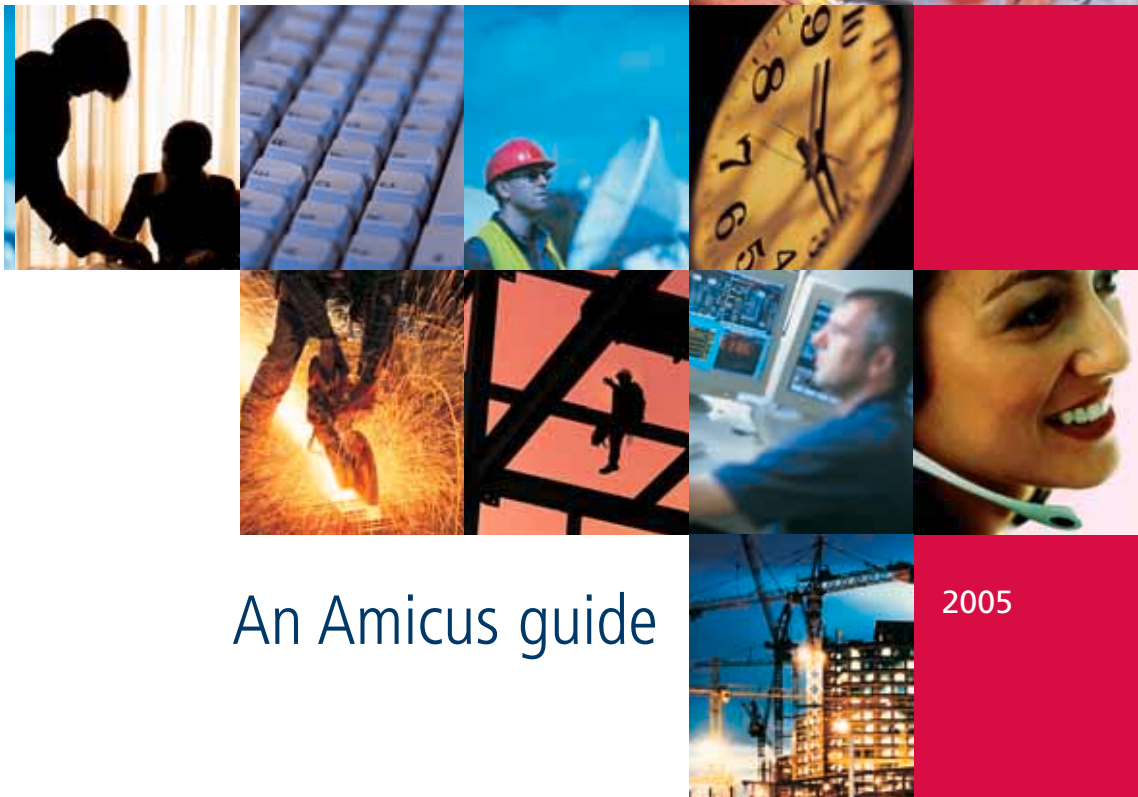




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# Employment status and related rights



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## **Amicus guide to employment status and related rights**

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## ■ INTRODUCTION

Entitlement to employment rights in the UK is determined by 2 factors:

- (1) an individual's employment status; and
- (2) their length of service (qualifying period) with the employer.

In the past most workers were employed on simple open-ended (ie: permanent) contracts. There are now a whole host of different working arrangements including fixed-term, short-term, temporary and casual basis. In addition, employers may choose to use agency workers or self-employed staff. Whatever the case, workers need to be clear about the basis on which they are employed, as this will determine their entitlement to employment rights. This guide gives 'at a glance' information on the following topics:

- Employment Status
- The difference between being employed and self-employed
- Length of Service (Qualifying Periods)
- Principle Statutory Employment Rights
- Special Categories of Employment Relationships
  - fixed-term/temporary employees
  - agency workers
  - part-time workers

## ■ Employment status

The difference between being employed and self-employed is crucial in determining an individual's entitlement to employment rights. There are 3 main categories of employment status in the UK: 'employee,' 'worker,' and 'self-employed.'

### ■ 'Employee'

An employee is an individual who works for an employer under a contract of employment, which is known as 'a contract of service'. To constitute a contract of employment, there must be 'mutuality of obligations' between the employer and the employee (ie: the employer is obliged to offer and pay the employee for work, and the employee is obliged to turn up and undertake the work personally). Employees are entitled to all statutory employment rights and are protected by a whole range of legal provisions, in areas such as payment of wages, dismissal, redundancy and maternity.

### ■ 'Worker'

Workers are a hybrid category, somewhere in between an 'employee' and 'self-employed'. A worker is an individual who works for an employer, not under a contract of employment, but under 'a contract for services' (like those who are 'self-employed'). The key distinction between a 'worker' and the 'self-employed' is whether the worker has to provide his or her services personally (in which case they will usually be a 'worker'), or whether they are entitled to substitute someone else to do their work for them (in which case they

will usually be 'self-employed'). Workers qualify for some, but not all, statutory employment rights.

### ■ 'Self Employed'

Self-employed workers, on the other hand, are not entitled to most statutory employment rights. The only rights they enjoy are their benefits under their contract and, in some limited circumstances, the right not to have unauthorised deductions made from their pay, and not to be discriminated against on grounds of sex, race, nationality, disability, religion or belief, or sexual orientation. A self-employed person provides the employer with his or her services, but remains independent (ie: they are genuinely in business of their own account). The agreement between the two parties in this situation is a 'contract for services'. It is always worth querying whether an individual is in fact self-employed. For example, even if the contract allows for a substitute to do the work if, in reality, it is the employer who decides who the substitute can be, the individual may in fact be a 'worker' and will therefore qualify for some employment rights.

The issue of an individual's employment status can be complex. You should never assume that a member does not have employment rights due to their employment status, and should always contact your Full-Time Officer for advice.

## ■ The Difference between being Employed and Self-Employed

Whether someone is an employee or self-employed may, ultimately, be a matter for the courts to decide. In such circumstances, courts and tribunals apply a series of tests in order to decide whether an individual is employed or self-employed, which are summarised in the table overleaf:

## ■ Agency workers

These are arguably a further category. They may be classed as self-employed or employees of the agency who 'supplies' them with work depending on their circumstances and changing case law. See page 19 for further details.

<b>Test</b>	<b>Employed</b>	<b>Self-employed</b>
Degree of Control	The worker is told what to do, how and when to do it.	The worker is taken on to do a particular job and decides how it should be done.
Integration	The worker forms part of the organisation.	The worker is in business on his or her own account – he or she can work for other people and employ others.
Obligations	The organisation is obliged to provide work, and the worker is obliged to do it.	There is no obligation on either side.
Payment	The worker receives pay or salary with PAYE deductions, a payslip, etc.	The worker issues an invoice when job is finished and receives a fee with no deductions. The worker also has the ability to make a profit or loss.
Benefits	The worker has right to paid holiday and sick leave.	The organisation has no involvement when worker is unavailable for work.
Ownership of equipment	The equipment and materials are provided by the organisation.	The workers own premises, tools and materials.

## ■ LENGTH OF SERVICE (QUALIFYING PERIODS)

The second factor which determines an individual's eligibility to claim employment rights is their length of continuous service with their employer. For example, an employee must usually have one year's continuous service with the employer to be able to claim unfair dismissal, or two years' continuous employment to be entitled to redundancy pay. Most temporary or atypical working arrangements will qualify the individual as 'employees' or 'workers' but, due to the short-term nature of their working arrangements, they never accrue sufficient length of service to qualify for certain employment rights. Not all statutory employment rights, however, have qualifying periods, and certain rights can be claimed from day-one of the employment.

The rules on calculating continuous service are complicated, and continuity can arise in various and unexpected ways (ie: short breaks in employment can be sometimes be discounted, so that continuous service is not broken). Where notice has not been worked or paid in lieu (or where there is no contractual right to pay in lieu), the statutory notice period can be added to time worked to establish the length of continuous employment for rights including unfair dismissal.

Advice should always be sought from your workplace representative or regional office.

## ■ PRINCIPAL STATUTORY EMPLOYMENT RIGHTS

So far as employment protection legislation is concerned, rights are not dependent on the employee being on a 'permanent' contract. The law does not make a distinction between permanent and temporary employees as such, and an individual's rights will depend on their employment status and length of service regardless of whether they work on a permanent or temporary basis.

Each employment right has different rules on the type of employment status and length of service required to qualify for that right. The key statutory employment rights are explained overleaf.

## ■ RIGHTS THAT ONLY APPLY TO 'EMPLOYEES'

### ■ Unfair dismissal rights

An 'employee' will not normally qualify to pursue a complaint of unfair dismissal unless they have been continuously employed for at least one year and are under 'normal retiring age' at the effective date of termination of his or her contract of employment.

### ■ Dismissal on a Protected Ground

It is automatically unfair to dismiss an employee on certain protected grounds. Moreover, there is no qualifying period for dismissal on a protected ground, so an employee can claim unfair dismissal no matter how short their length of service. The main protected grounds are sex, race, nationality, disability, sexual orientation, religion/belief or trade union membership. Nor may 'employees' be lawfully dismissed for having asserted their statutory employment rights; for having made a 'protected disclosure'; for taking action to avoid imminent danger to their health and safety at work; for exercising their legitimate functions as employee or workforce representatives, pension scheme trustees, safety representatives, and the like; for refusing to work on Sundays (this is limited to potential shop workers and betting workers); for being pregnant (or for having taken advantage of their rights to maternity leave and pay); for refusing to work more than an average 48-hour week; and so on.

## ■ Notice

The right to receive statutory minimum notice applies to employees who have worked for one month. The contract may, of course, provide for contractual notice periods, which are more generous than the statutory minimum.

## ■ Time off Work

*The following rights do not require a minimum period of qualifying service (although other conditions apply):*

- (a) *time off for trade union duties and training*
- (b) *time off for trade union activities*
- (c) *time off for public duties.*
- (d) *time off for ante-natal care*
- (e) *time off for study or training (young persons)*
- (f) *time off to attend to public duties*
- (g) *time off: employee or workforce representatives*
- (h) *time off: pension scheme trustees*
- (i) *time off: safety representatives and representatives of employee safety.*

## ■ Statutory Sick pay

Eligibility for statutory sick pay does not depend on the number of hours per week an individual works. However, it is only available to those whose earnings are no less than the lower

earnings limit for National Insurance contribution purposes. This requirement has the inevitable effect of excluding some part-time employees. It will also not apply to anyone employed for a specified period of 3 months or less.

<b>Other Rights</b>	<b>Qualifying Period</b>
Itemised pay statement .....	none
Written particulars of employment .....	1 month
Redundancy Pay .....	2 years
Time off for ante natal care .....	none
Statutory Maternity pay and leave .....	26 weeks
Statutory Paternity pay and leave .....	26 weeks
Statutory unpaid Parental Leave .....	1 year
Statutory unpaid Dependant's Leave .....	none
Right to request Flexible Working .....	26 weeks

## ■ RIGHTS APPLYING TO BOTH 'EMPLOYEES' AND 'WORKERS'

This will cover most types of working relationship, except for the genuinely self-employed.

Therefore, full-time, part-time, casual, temporary, or seasonal would normally qualify for these rights. The following rights have no qualifying period:

- Working Time Rights – Under the Working Time Regulations 1998 (as amended) every worker in the UK has the legal right to a minimum of four weeks' paid annual holidays (contractual rights may provide for more generous entitlement). The Regulations also give rights to breaks and a limit on the maximum number of hours that can be worked in a week);
- National Minimum Wage rights;
- Protection against unlawful pay deductions;
- Equal Pay;
- Health & Safety protection;
- The right to join a Trade Union;
- The right to be accompanied at a disciplinary and grievance meetings;
- Protection from discrimination on grounds of sex, race, nationality, religion or belief, disability, sexual orientation and transsexual;

- Protection from detriment on certain protected grounds: making a protected disclosure, part-time status, or asserting any of the above rights.

Note: although only 'employees,' and not 'workers,' can claim unfair dismissal, if a 'worker' is dismissed for asserting any of the above rights, they may still be able to action the dismissal at an Employment Tribunal as a detriment.

## ■ SPECIAL CATEGORIES OF EMPLOYMENT RELATIONSHIPS

As we have seen, an individual's entitlement to employment rights depends both on their employment status and their length of continuous service with the employer.

However, the law has conferred special protection for certain categories of working relationships. Those are fixed-term (or temporary) employees, agency workers, and part-time workers.

## ■ FIXED-TERM OR TEMPORARY EMPLOYEES

Where a temporary employee is taken on directly with the employer (as opposed to through an agency), they may be covered by The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

The Regulations apply only to 'employees' who:

- work under a fixed-term contract – this is a contract which specifies not only when it will start, but also when it will end.  
(ie: for one month, one year etc.);

or

- are employed to undertake or complete a specified task, or a contract which is due to expire on the occurrence or non-occurrence of a specific event. Therefore, there does not necessarily need to be a specific 'fixed-term' for an employee to be protected by the Regulations.

The Regulations also give fixed-term employees (also known as temporary employees) the right not to be less favourably treated than permanent employees. If there are differences, the employer has to show that the overall employment package is no less favourable (unless the employer can show that the difference in treatment can be objectively justified).

Fixed-term employees can compare their treatment with that of permanent staff employed by the same employer, so long as they are doing the

same or similar work and are working at the same establishment (location). If there is no comparable permanent employee at that establishment, a comparison can be made with the pay and benefits package of comparable permanent employees of the same employer at other establishments/locations.

If a fixed term employee believes that they are receiving less favourable treatment, they have the right to ask the employer for a written statement explaining the difference in treatment, which can be used as evidence at an Employment Tribunal.

Fixed-Term employees enjoy the same statutory employment rights as permanent employees (providing they have sufficient length of service to qualify). In particular:

- the right to paid holidays, pro-rata to the length of their contract;
- the same rights in relation to all contractual terms, including pay and pensions as permanent employees;
- protection from dismissal on protected grounds ie: due to maternity or pregnancy under discrimination law, sex, race etc.
- redundancy pay (if their contract ends by reason of redundancy) provided they have worked for the employer for 2 or more years;
- protection from dismissal for asserting any of their legal rights to equal treatment or other statutory rights.

In cases where they work on more than one fixed-term contract, their service is added together. A fixed-term employee who has completed four years' continuous service, under one or more successive fixed-term contracts, will automatically be considered a permanent employee unless further fixed-term status can be objectively justified by the employer.

Termination – When a fixed-term contract comes to an end and the employer decides not to renew it, then the law regards the employee as having been dismissed. This means that, provided the employee has the necessary qualifying service, he or she may be able to claim unfair dismissal, or a redundancy payment, depending on the reason for the dismissal.

## ■ AGENCY WORKERS

A worker supplied through an agency will not normally be considered an employee of the organisation in which he or she is working, even though the organisation effectively controls what the worker does. In the majority of circumstances, they will be considered as an employee of the agency and are therefore able to claim employment rights from the agency.

The European Commission is currently considering introducing legislation to give agency workers the right to be no less favourably treated than other employees at the organisation in which he or she is working. However, it will be some time before this right comes into force in the UK.

Legal provisions that apply specifically to agency workers are:

- No fees – an employment agency cannot charge you a fee simply for finding you work or putting you on their books;
- Getting your wages – an agency cannot withhold your pay simply because they haven't received their payment from the company or organisation where you worked;
- A written statement of terms and conditions – when you sign on with an agency you should be given a written statement of terms and conditions before you start any work;

- Workers seeking employment through an agency have the right not to be discriminated against in the offer of terms of employment (this includes on grounds of their sex, race, trade activities etc);
- In cases of discrimination, it is usually possible to claim both against the agency and the principle employer (whether latter discriminated).

## ■ PART-TIME WORKERS

Part-time workers (regardless of the number of part-time hours they work) must not be treated less favourably than full-time workers engaged in the same or broadly similar work.

A 'Comparable full-time worker' can be summarised as a worker who:

- is engaged under the same type of contract as the part-time worker and carries out the same or broadly similar work (ie: a part-time casual worker can compare with a full-time casual worker, but not with a full-time permanent worker as they are on a different type of contract); and
- works at the same establishment as the part-time worker. Where there is no full-time worker at the same establishment to compare with, a comparison can be made with a full-time worker who works for the same employer but at a different establishment/location.

It is worth highlighting that the Regulations apply not only to 'employees' (persons employed under contracts of employment or service) but also to 'workers'. This means that the regulations apply not only to employees but also to freelancers, home-workers, casual or seasonal workers, and agency workers (such as 'temps') who undertake to do any type of work for an employer, whatever the nature of the contractual relationship. The regulations do not, however, apply to people who are genuinely self-employed.

## Less favourable treatment

A part-time worker will be presumed to be treated less favourably than a comparable full-time worker if the treatment in question cannot be justified on objective grounds.

The right to no less favourable treatment than a full-time worker includes the right to pay and other contractual benefits. Unless justifiable on wholly objective grounds, it would be unlawful to treat a part-time worker less favourably in relation to the list below, although the calculation of benefits payable to part-time worker may legitimately be assessed on a pro-rata basis:

- occupational sick pay or maternity pay (in excess of the minimum statutory requirements);
- the length of service needed to qualify for such payments;
- the length of time over which occupational sick pay or contractual maternity pay is paid;
- an occupational pension scheme;
- Equal Pay;
- Training, promotion, etc – Part-time workers must not be excluded from opportunities for training, promotion or transfer simply because they work part-time, although an employer is not required to restructure training programmes to accommodate part-time workers;

- Overtime – a part-time worker has the right to have an equal opportunity to work overtime, although it is not contrary to equal treatment to pay enhanced rates for overtime only once the part-time worker has completed full-time hours;
- Redundancy rights – part-time workers have the same redundancy rights as full-time workers. However, part-time workers are not entitled to have taken into account previous full-time service with the employer when their redundancy pay is calculated;
- Workers returning to work part-time after absence – a former full-time worker returning to work part-time with the same employer, after an absence lasting no longer than 12 months, is entitled to return either to the same job or to a job at the same level as that former job (whether under the same or a different contract), and must not be treated less favourably (under the pro-rata principle) than he or she would have been but for that absence – unless the less favourable treatment can be justified on wholly objective grounds. This rule applies whether or not the worker's absence was occasioned by a dismissal, redundancy, maternity leave, a lengthy sickness absence, a career break etc.

- Holidays – a part-time worker is entitled to the same amount of holiday (pro-rata to the hours worked) than a full-time worker. For example: a part-time worker working two days a week, who takes a week's holiday, is entitled to two days' holiday pay in respect of that week. If a part-time worker's contractual working hours vary from week to week, a week's holiday pay will be calculated by averaging the previous 12-week period.

**Further information on what to do if you believe that you are receiving (or have received) less favourable treatment than a comparable full-time worker is available from your local regional office.**