

Continuous Employment: Why it's good for you

By Craig Rothwell

I'll be honest up front: prepare yourself to read a boring but important article relating to employment law with a hint of mystery. Boring because it describes a technical legal term named 'continuous employment'. Important as the more you have got of it as an employee, the stronger your position at work. Mysterious as like a will'o the wisp continuous employment can be lost almost in an instant with wallet-breaking consequences.

The importance of continuous employment is obvious. If you have continuous employment of 1 year with an employer, you are entitled in law to a paid vacation, paid sick leave, paid ante-natal leave, paid maternity leave, and a severance allowance if you are made redundant. With continuous employment of less than a year, you are guaranteed none of these things and have to rely upon your employer's generosity.

Moreover, as your continuous employment increases in length, the potential severance allowance payable to you by your employer increases steadily. Under the Employment Act 2000, it is 2 weeks wages for each completed year of continuous employment up to the first 10 years and 3 weeks wages for each completed year thereafter. This is subject to an overall maximum of 26 weeks wages. As length of continuous employment with a company is one of the key factors used in deciding who is most at risk of redundancy or lay-off, the more you have the less likely you are to be made redundant or laid-off at any time.

That's its importance. What exactly though is 'continuous employment'?

Continuous employment sounds an awful concept, but rest easy that it does not mean that you have to work continuously to have it. You can have continuous employment with an employer and still go home for dinner each night and have weekends off without your continuous employment being broken.

Basically, your continuous employment is the period beginning with your first day of work and ending with your last day. This is so long as you don't have a non-contractual gap away from work in between these dates. By non-contractual I mean periods away from work other than the leave permitted by most employment contracts such as vacation, maternity leave or sick leave. Sounds a fairly simple concept, but it often raises a good deal of questions in practice, some of which I highlight below.

First, yes, continuous employment will include any probationary period. So don't as a new employee be taken in by an employer's old trick of issuing a new contract once a probationary period is passed and having the continuous employment start at that later time.

Second, the start date should be treated as the date on which the contract of employment actually begins and not when you actually begin to perform the contractual duties. For example, if the contract states the employment as beginning on the first day of the month, say 1 September, but as this was a Saturday the first day at work is actually 3 September, it is 1 September which should normally be taken as the start date.

Third, suspension for disciplinary reasons with or without pay will not bring the period of continuous employment to an abrupt end. Similarly, if during an industrial dispute, your employer prevents you from coming to work as part of a 'lock-out' tactic, this also does not end your continuous employment with them.

Rather harshly, however, if your sick leave goes beyond a period of 4 weeks, the Act provides that the continuous employment is no longer deemed to continue. Four weeks is a very short guideline in comparison to other countries such as the UK where the equivalent amount allowed is 26 weeks.

It is only if the inability to work is due to an occupational disease or accident resulting from your actual employment (i.e. your ill health is your employer's fault) that this 4 week limit on sick leave does not apply. The only other way around this is for your employer to agree that your continuous employment will continue during a long-term absence due to ill-health. This is normally done and ensures that long servers suffering long-term ill-health are not unfairly penalised by losing their increased employment rights accumulated over their years of service.

If you are a casual, temporary or seasonal worker, you will not usually be able to build up periods of continuous employment with one employer and so will not benefit from the increased rights available to those with continuous employment of 1 year or more. However, the Employment Act does provide an exception to this. If you work short term contracts with gaps between the contracts of less than 30 days with the same employer, the law allows these contracts to be strung together in calculating continuous employment.

This does not help seasonal workers who work 8 - 10 consecutive months of the year, but it does assist the employee placed a series of short fixed term contracts by their employer. Now if an employer is determined that their employees should not gain the rights given to those with one year's continuous employment, they need to consider whether they can do without the skills of that employee for at least a month each year to sidestep this provision.

Finally, continuous employment is not broken by the sale or transfer of a business. If you carry on working for a new employer after a sale or transfer, then your service with the previous employer has to be taken into account. However, if prior to the sale or transfer your employment was terminated and severance payment was accepted by you, you can't have your proverbial cake and eat it: if the new employer chooses to employ you, the start is taken as an entirely fresh one free from any previous employment service or record.

And that's 'continuous employment'. Maybe still boring and important but hopefully not so mysterious now.

This article contains information of a general nature and should not be relied upon as a substitute for professional legal advice given with respect to a particular factual situation.

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