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# Employment contracts

**by Practical Law Employment**

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A note setting out some general principles of contract law in the context of employment contracts.

This note considers the essential elements of contract law in the context of employment contracts. It addresses the differences between employment contracts and general commercial contracts and when certain formalities should be observed. It also sets out the correct approach to the construction of employment contracts and provides an overview of the remedies available.

For further information on the law in this area, see IDS Employment Law Handbooks, Volume 3 (Contracts of Employment), Chapter 1 (Formation of Contract), Chapter 3 (Contractual Terms), Chapter 5 (Incorporated Terms), Chapter 7 (Void Terms and Illegality), Chapter 13 (Termination By Operation of Law), Volume 10 (Trade Unions) and Volume 13 (Wages), Chapter 1 (Employment Contracts and Wages).

See also Chitty on Contracts 32nd edition, Volume 1 (General Principles), Chapter 13 (Express Terms), Chapter 14 (Implied Terms), Chapter 22 (Discharge by Agreement), Chapter 23 (Discharge by Frustration), Chapter 24 (Discharge by Breach) and Volume 2 (Specific Contracts), Chapter 40 (Employment).

For information on the requirements for formation of a contract in Scotland, see Practice note, Contracts: formation (Scotland).

## Differences between employment contracts and ordinary commercial contracts

The terms of a contract are the rights and obligations that bind the parties to the contract. They can be express, implied or incorporated from other sources. The basic principles of contract law are that there must be:

- An intention to create legal relations.
- Offer and acceptance.
- Consideration between the parties.
- Certainty.

In addition, a party must have the capacity to enter into a contract. In the context of employment contracts, the most important restrictions apply to minors. For more information, see IDS Employment Law Handbooks, Volume 3 (Contracts of Employment), Chapter 1 (Formation of contract), Capacity to contract.

The general principles above apply to the employment contract in the same way that they apply to any other type of contract (see Practice note, Contracts: formation). However, there are some important differences between employment contracts and other commercial contracts, largely due to their personal nature.

For more information on illegal contracts, see IDS Employment Law Handbooks, Volume 3 - Contracts of Employment, Chapter 1 - Formation of contract, Illegal contracts. In the employment context, questions of illegality most often arise in respect of contracts that are not illegal at the outset but which become illegal because of the way in which they are subsequently performed.

### Court will not usually order specific performance

The court will not generally order specific performance of an employment contract, when it comes to a party seeking a remedy for breach of contract. In *Chappell and others v Times Newspapers Ltd and others [1975] 1 WLR 482*, the general rule against specific performance was explained as follows:

> "The general rule is that an injunction will not be granted to restrain an employer from terminating a contract of employment. Instead, the employee can sue the employer for damages for breach of contract. The basic reason for refusing an injunction is that the relationship between employer and employee is one of confidence, and the courts ought not to seek to prolong the relationship by an injunction or a decree of specific performance when that confidence no longer exists. If the employer does not want to employ the employee, or the employee does not

> want to work for the employer, you cannot by order of the court satisfactorily make them do what one of them does not want to do."

One early (and exceptional) case in which the court was prepared to order specific performance, to restrain the employer from treating the contract as at an end, was *Hill v CA Parsons and Co Ltd [1972] Ch 305*. Notably, trust and confidence still existed between the parties and the employer had only issued a notice to dismiss under pressure from a union. For other examples of the court ordering specific performance, usually in the context of restraining the employer from breaching the terms of a contractual disciplinary policy in the NHS, see Specific performance cases).

Section 236 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) confirms that an employee shall not be compelled to perform work or to attend any workplace for the doing of any work.

The principle behind the rule against specific performance was affirmed in *Geys v Societe Generale [2012] UKSC 63* (see Legal update, Geys: employee must accept employer's repudiation for contract to be terminated (SC)) and also by the High Court in *Ashworth and others v The Royal National Theatre [2014] EWHC 1176 (QB)* (see Legal update, Musicians not entitled to specific performance of their contracts). However, the Supreme Court in *Geys* did not appear to factor in the statutory provision contained in section 236 of TULRCA as being another reason why the employee should not actually be compelled to work (see Practice note, Termination following a repudiatory breach: impact of Geys: Does this decision have implications for when an employee resigns without due notice, in breach of contract?).

For further information, see Declaration and injunction.

## Repudiatory breach does not automatically terminate employment contracts

When one party is in repudiatory breach of contract, the other party has a choice whether to accept that breach as bringing the contract to an end or to insist on performance of the contract and sue for damages (known as the elective theory). There has long been controversy about whether the rule is different in the case of employment contracts. Some case law suggested that a breach automatically brought the employment contract to an end (the automatic theory). In *Geys*, the Supreme Court decided in favour of the elective theory, rejecting the notion that a special exception should be made for employment contracts. The majority held that the employment contract should be kept firmly within the common law in this regard:

> "We should keep the contract of employment firmly within the harbour which the common law has solidly constructed for the entire fleet of contracts in order to protect the innocent party, as far as practicable, from the consequences of the other's breach." (*Paragraph 97.*)

**Approach to remedies remains exceptional**

The *Geys* judgment highlights the difficulty of regarding the employment contract as something that can easily be assimilated into general contract law. The strict contractual approach to repudiation cannot be fully followed through when it comes to remedies. In a normal commercial situation, the wronged party has a real choice about whether it accepts the breach as bringing the contract to an end. However, in the employment context, employees will not be in a position to insist on the continuation of the relationship if they are excluded from the workplace. Consequently, their only option, when not accepting the repudiation as bringing the contract to an end, will be to sue for damages (as if they have accepted the breach). Anomalously, their loss will be limited to their notice period and they will be under a duty to mitigate their loss, as if they have accepted the breach of contract. For further information, see Practice note, Termination following a repudiatory breach: impact of Geys: Employee's remedy if he does not accept the repudiatory breach as bringing contract to an end.

Commenting on the fact that the employment contract will never conform to "ordinary" commercial contracts, Lord Sumption said:

> "In an age of large corporate enterprises many of whose employees perform routine jobs, the personal character which was once typical of employment relationships has lost much of its former importance."

He also pointed out that the existence of statutory protection, in terms of unfair dismissal law, has made the development of a more stringent standard of employment protection at common law unnecessary, citing *Johnson v Unisys Ltd [2003] 1 AC 518* (see Practice note, Constructive dismissal: The relationship between a contractual claim and an unfair dismissal claim).

**Is there a tension between common law rights and statutory rights?**

Lord Sumption asserted in *Geys* that statutory rights are capable of co-existing with common law rights, without the two affecting each other. However, one unfortunate issue highlighted, but not resolved, by *Geys* is that the date of dismissal for common law purposes may be different from the date of dismissal for unfair dismissal purposes (the effective date of termination (EDT)) (see Practice note, Termination following a repudiatory

breach: impact of Geys: Does Geys affect the EDT in unfair dismissal case?). This demonstrates a tension between the parallel systems.

In *Gisda Cyf v Barratt [2010] UKSC 41*, the Supreme Court considered whether the concept of constructive knowledge had any place when determining the EDT. Was it appropriate to apply "ordinary contractual principles"? It concluded that the concept of constructive knowledge had no place:

> "The need to segregate intellectually common law principles relating to contract law, even in the field of employment, from statutory conferred rights is fundamental." (*Paragraph 39*.)

It emphasised the need to interpret section 97 of the Employment Rights Act 1996 in its statutory setting:

> "It is part of a charter protecting employees' rights. An interpretation that promotes those rights, as opposed to one which is consonant with traditional contract law principles, is to be preferred." (*Paragraph 37*.)

## Parties do not have equal bargaining power

An important observation was made in *Autoclenz Ltd v Belcher and others [2011] IRLR 820* that, while employment is a matter of contract, it is not the same as an arm's length commercial contract.

An employer will usually be in a position to dictate the terms of the contract. Courts and tribunals will be astute to the fact that the written terms may not reflect the actual legal obligations between the parties.

In *Autoclenz*, a car valeter was held to be an employee, despite the contract describing him as self-employed and containing a substitution clause and a written term suggesting that there was no mutuality of obligation. The Supreme Court indicated that:

> "the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part." (*Paragraph 35*.)

For further information, see Legal update, Employment status: tribunals can set aside express terms that do not reflect the actual legal relationship (SC).

## Employees are not consumers (Unfair Contract Terms Act 1977)

The Unfair Contract Terms Act 1977 (UCTA) imposes two principal restrictions:

- A person cannot restrict liability for death or personal injury resulting from negligence. In respect of other loss or damage, a person cannot exclude or restrict their liability for negligence unless it is reasonable to do so (section 2, *UCTA*).
- A business operating on standard written terms cannot exclude liability for breach of contract unless it is reasonable to do so (section 3, *UCTA*).

Employers (although not employees) are bound by section 2 of UCTA (paragraph 4, Schedule 1, *UCTA*).

Historically, employees have successfully argued that employment contracts were regulated by section 3 of UCTA and that any exclusion of liability had to be reasonable. Section 3 used to provide that, not only did it apply as between contracting parties where one of them dealt on the other's written standard terms of business, but also when one of them dealt "as a consumer". However, pursuant to the Consumer Rights Act 2015 (CRA 2015), UCTA no longer refers to consumers and section 3 only regulates the use of exclusion clauses in business-to-business contracts (see Practice note, Excluding or limiting liability for negligence: Consumer Rights Act 2015 (post 1 October 2015)). This has cast some doubt on whether section 3 of UCTA has any further application to contracts of employment.

Contracts of employment are expressly excluded from the scope of the CRA 2015 (section 48, CRA 2015), so this does not give any protection to employees.

Prior to the introduction of the CRA 2015, in the leading case of *Commerzbank AG v Keen [2006] EWCA Civ 1536* (about a discretionary bonus scheme), the Court of Appeal held that the argument that UCTA could apply to contracts of employment had no real prospect of success (see Legal update, Discretionary Bonuses: Unfair Contract Terms Act 1977). This was because the employee was not dealing with his employer "as a consumer", nor on its written standard terms of business. The Court of Appeal held that it would be stretching the ordinary meaning of "consumer" and "standard terms of business" to regard section 3 of UCTA as having any place in relation to a bonus scheme, and noted the artificiality of reading section 3 as extending to bonus schemes (see paragraphs 102 and 104). However, whether or not the employee is dealing as a consumer is no longer relevant as these words have been removed from UCTA.

Following the changes to UCTA, the precise application of section 3 in the employment field remains uncertain. For further information, see Practice note, Bonuses: Unfair contract terms. For a discussion of whether an employee can ever be a consumer, and the possible impact of the changes to UCTA on *Commerzbank*,

see Practice note: overview, Consumer Rights Act 2015: Overview of share schemes issues: Traders and consumers: Can an employee be a consumer in relation to their employer?.

For information on UCTA and the CRA 2015 in Scotland (which differs from the position in England and Wales), see Practice note: Overview, Contract law for employment practitioners (Scotland): overview: Unfair contract terms in employment.

At a European level, contracts relating to employment are excluded from the scope of the Unfair Contract Terms Directive (93/13/EEC) (UCTD). However, where an employer deals with an employee as a seller or supplier of services, the UCTD could apply. In *Pouvin v EDF (C-590/17) EU:C:2019:232)*, the ECJ ruled that, in granting a loan to one of its employees to buy a house, EDF was acting as a seller or supplier for these purposes and the loan was in scope for the UCTD (see Legal update, Employer's loan to employee in scope for Unfair Contract Terms Directive (ECJ)).

While employees are not regarded as consumers for the purposes of UCTA, they are regarded as consumers for the purposes of the Consumer Credit Act 1974. Accordingly, employers making loans to employees will fall within the ambit of this legislation (see Practice note, Employee share schemes: loans to employees and directors: consumer credit issues: Employee loans: why is consumer credit regulation relevant? and Do employee loans and credit arrangements fall within the consumer credit regime?).

### Employment contracts cannot be assigned at common law

A contract for personal service cannot be assigned from one employer to another without the employee's consent because of its personal nature (*Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014*). This principle was affirmed in *Co-operative Group (CWS) Ltd v Stansell Ltd [2006] EWCA Civ 538*.

It is possible that an employment contract could be assigned or novated if all parties consent. However, as a general contractual matter, novation will extinguish the original contract and replace it with a fresh contract. Consequently, novation of an employment contract is likely to result in the dismissal of the employee. Consideration for the new contract will also be required.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (*SI 2006/246*) (TUPE) are a statutory exception to this rule. TUPE provides for an automatic, statutory novation of the contracts of employment of a transferring employee (that is, the automatic transfer by law of their employment contract from one employer to another). No consent is required from the employee, but the *Nokes* principle is honoured by virtue of the fact that the employee may exercise their right to opt out of the transfer (see Practice note, TUPE (4): the automatic transfer principle).

### Employee obligations cannot be enforced by a third party

The doctrine of privity of contract, that only the parties to a contract may enforce it, was modified by the Contracts (Rights of Third Parties) Act 1999. This provides that a third party may enforce the terms of a contract in certain situations. Notably, an employee's obligations under an employment contract are excluded from its ambit. However, an employer's obligations are not excluded and may be enforced by third parties unless expressly excluded (see Practice note, Contracts: privity and third party rights and obligations: Which contracts does the Third Party Rights Act affect?). *Cavanagh v Secretary of State for Work and Pensions [2016] EWHC 1136 (QB)* is an example of the employer's obligations to an employee being enforceable by a third party under the Contracts (Rights of Third Parties) Act 1999 (in this instance, a trade union being able to insist that the employer make deductions from an employee's salary in relation to trade union subscriptions).

## General contractual principles

### Intention to create legal relations

For there to be a binding contract, there must be an intention to create legal relations. The objective conduct of the parties must be considered when determining intention, not their subjective states of mind (see Practice note, Contracts: formation: Intention to create legal relations). In the employment context, the most obvious example of when there is no intention to create legal relations is the case of a genuine volunteer (see Practice note, Volunteering and internships: employment law issues).

The case of *Attrill and others v Dresdner Kleinwort Ltd and Commerzbank AG [2011] IRLR 613* considered the need for consideration that may arise during employment. The employer sought to argue that its announcement about a bonus pool at a town hall meeting (and broadcast live on the intranet) had not been intended to create a legally binding obligation. The High Court and Court of Appeal rejected this argument and found that the announcement had contractual effect. It was significant that the announcement had been made by the chief executive and had been approved by the board.

The High Court noted that:

- Whether there is an intention to create legally binding relations must be considered objectively (*RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC 14*).
- The surrounding circumstances made it clear that there was an intention to create legally binding relations, particularly as the bonus was designed to retain staff.

The Court of Appeal noted that, **in the employment context, where a term is being introduced into an existing relationship, there will be a very strong presumption that it is intended to be legally binding**. For further information, see Legal updates, Court of Appeal upholds bankers' claims to bonuses from guaranteed minimum retention pool and Bankers' claims to bonuses from guaranteed minimum bonus pool upheld (High Court).

The burden of proof is on the party seeking to show that there was no intention to create legal relations (Edwards v Skyways Ltd [1964] 1 WLR 349). For further information on general contractual principles surrounding the intention to create legal relations, see Practice note, Contracts: formation: Intention to create legal relations.

For an example of a case in which the employment tribunal found that there was no intention to create a legally binding promise, merely words of comfort in relation to a pay rise in due course, see *Judge v Crown Leisure Ltd UKEAT 0443/04/2809* and Legal update, Promises made at social functions.

## Offer and acceptance

For full consideration of the issues surrounding making an offer of employment, see Practice note, Recruitment: Making an offer of employment. For an offer to result in a binding contract, it must be made by a person with authority to make a binding contract on behalf of the employer (*Puntis v Governing Body of Isambard Brunel Junior School EAT/1001/95*). For the general commercial principles applicable, see Practice note, Contracts: formation: Offer and Practice note, Contracts: formation: Acceptance.

### Conditional offers

Offers of employment are frequently made conditional, for example on receiving satisfactory references or a satisfactory medical report. "Satisfactory" is to be construed subjectively, rather than objectively, meaning relevant checks must be satisfactory to the employer (*Wishart v National Association of Citizens Advice Bureaux [1990] IRLR 393*). For further information on conditional offers, see Practice note, Recruitment: Making an offer subject to conditions.

### Time-limited offers

An offer letter may stipulate a time limit for acceptance after which, if nothing is heard, the offer will lapse. If no time limit is specified, an offer will generally be taken to lapse after a reasonable period of time unless it is clear that the offer is open-ended. What amounts to a reasonable period of time will depend on the particular circumstances. Consequently, an employer may wish to stipulate a specific time limit in the offer letter. Alternatively, the employer could expressly withdraw the offer when it considers the offer to be closed in order to avoid any repercussions.

### Acceptance

An employee may accept an offer in a number of ways, for example over the telephone, by post or by email. If an offer is accepted by post, acceptance will be valid when posted (*Henthorn v Fraser [1892] 2 Ch 27*). It is not clear when an acceptance by email is effective; it may be when it is read or when it is received by the employer's internet service provider.

### Acceptance of term within existing relationship

It may not be necessary for the employee to accept a proposed new term conferring a benefit. In *Attrill* the employer unsuccessfully argued that an employee had to accept an offer of a bonus for it to be contractually binding. The Court of Appeal found that the employer had unilaterally varied the employment contract, which it was entitled to do under the terms of the employee handbook, so no acceptance was required from the employee. In the alternative, acceptance was a formal and unnecessary exercise in circumstances where a benefit was being conferred on the employee.

By contrast, where the employer seeks to introduce a detrimental change, there will be a need for acceptance (either express or implied). See Practice note, Changing terms of employment: What happens if an employee doesn't sign a new contract given during employment?.

### Withdrawal of offer after acceptance

A binding contract comes into existence once an unconditional offer of employment has been accepted. If the employer seeks to withdraw the offer, the employee may have a claim for breach of contract, but damages are likely to be limited (see Practice note, Recruitment: Withdrawing an offer). It will be rare for an employer to want to sue an employee for breach of contract where they accept the offer but do not start work. Technically, there will be a breach of contract but the employer is likely to find it hard to show what, if any, loss it has suffered as a result.

### Offer withdrawn or employment terminated due to false information by employee

Employees may make false statements on their CV or in pre-employment questionnaires which results in

the employer withdrawing the job offer or terminating employment. It may be possible for an employer to sue an employee for damages suffered as a result of fraudulent or negligent misrepresentation, but this is rare in practice. An employer brought such a claim in *Cheltenham Borough Council v Laird [2009] EWHC 1253 (QB); [2009] IRLR 621*, although this was not made out on the facts (see Legal update, Answers to pre-employment medical questionnaire were not misrepresentations). For further guidance in this area, see Practice note, Recruitment: Discovering an employee has lied during the recruitment process.

## Consideration

The employment contract, like other contracts, will not be binding unless there is consideration. In the employment context, the consideration from the employer is usually payment of a salary and the consideration from the employee is usually the provision of labour. The need for remuneration in order for there to be a contract of employment was stated powerfully in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*: "There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind." (*Page 515*.) For the basic rules on consideration, see Practice note, Contracts: formation: Consideration.

In *Secretary of State For Business, Innovation and Skills v Knight UKEAT 0073/13/0905*, a managing director and sole shareholder, who had entered into a contract of employment with the company, was held to be an employee despite the fact that she had not received pay for two years (see Legal update, Receiving pay was not a prerequisite for employment status (EAT)). She had forgone pay for this period because the company was in financial difficulties. The EAT commented that, as was noted in *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld [2009] ICR 1183,* "if [an employee] was contractually entitled to [a salary], the fact that he did not take it could not retrospectively diminish his right." (*Paragraph 51*.) The EAT commented that: "Money is not the only consideration which may move from an employer under a contract of employment ..." and, somewhat controversially, gave the example of provision of equipment or the duty to take care of an employee's health and safety as alternative forms of consideration (*paragraph 23*).

In *Stack v Ajar-Tec Ltd [2015] EWCA Civ 46* the Court of Appeal reached a similar decision on the employment status of a director and shareholder who had performed part-time work for a company without pay for around three years without a formal employment contract in place; although the employer was not insolvent in that case (see Legal update, Unpaid shareholder and director was an employee).

The comments made about consideration in *Knight* are in stark contrast to the position taken by the EAT in *Prior v Millwall Lionesses Football Club UKEAT 341/99/2802* (a case about volunteers), that "there is no category that we have seen anywhere referred to or contemplated of gratuitous or unpaid employees." (*Paragraph 18*.)

## Certainty

For a contractual promise to be enforceable, it must be sufficiently certain. For an example of a case in which the intention to promote someone within two years was not sufficiently certain to be binding, see *O'Laoire v Jackel International Ltd (No 2) [1991] ICR 718*.

An "agreement to agree" will not be contractually binding, even if the parties intended to enter into legal relations. For example, in *Barbudev v Eurocom Cable Management Bulgaria Eood and others [2012] EWCA Civ 548*, a side-letter provided that the employee would receive a 10% share in the business on terms to be agreed. The Court of Appeal held that this was merely an agreement to agree, which was not enforceable (see Legal update, Court of Appeal confirms Barbudev side letter was non-binding agreement to agree).

In *Attrill*, the court was prepared to regard an announcement to 400 employees that a bonus pool was available as sufficiently certain to be enforceable by each individual employee. It did not matter that no employee could say what the value of their share was at the time of the announcement; the employer had made clear that the bonus pool would be distributed "in the usual way" and there was a past mechanism for determining what this meant.

For further information on the need for certainty, see Practice note, Contracts: formation: Certainty of terms.

# Formalities

There are no particular formalities that have to be observed for entering into an employment contract. A contract may be express or implied, oral or in writing. There is no legal requirement for an employee to have a written contract of employment. However, section 1 of the Employment Rights Act 1996 (ERA 1996) requires an employee to be given a statement of certain specified employment particulars. For those whose employment commenced before 6 April 2020, the section 1 statement was required to be provided within the first two months of employment. For those commencing employment on or after 6 April 2020, the majority of particulars must be given on or before the date employment commences. See Practice note, Section 1 statements for more information.

## Section 1 statements and employment contracts

A section 1 statement is not necessarily a contract of employment in itself. It may simply be a statement of what has already been agreed orally or in writing. If there is no separate written contract, the section 1 statement will be persuasive evidence as to the terms of the contract of employment between the parties. If, however, there is a separate written contract, the section 1 statement cannot override a term recorded in that contract. The contract itself always takes precedence (*Robertson v British Gas Corporation [1983] ICR 351*).

If an employment contract is in writing, it usually only requires simple signatures (see Practice note, Execution of deeds and documents: Distinction between deeds and simple contracts). In the employment context, this will usually mean that there is one signature for the employee and one for and on behalf of the employer, without the requirement for either to be witnessed.

## When a contract should be signed as a deed

Sometimes it will be necessary for the employment contract to be signed as a deed, rather than as a simple contract. For the formalities of executing a document as a deed, see Practice note, Execution of deeds and documents: Execution of deeds: formalities for a deed. The most common reason for signing the employment contract as a deed is because it contains a power of attorney (to be effective, a power of attorney must be signed as a deed). Power of attorney clauses will be necessary:

- If there are intellectual property rights that the company wants to protect (see Standard document, Intellectual property clause for employment contract (long form)).
- To procure the transfer of shares or resignation of offices after termination (see Standard clause, Director clauses (private, listed and AIM companies)).

The contract should also be signed as a deed where there may not be any consideration. In the employment context, the absence of specific consideration for a change introduced once employment has commenced will rarely be an issue, since consideration can readily be found in the employee's continued employment. However, there may be issues if the change will not take effect immediately (see Practice note, Changing terms of employment: Consideration) or the employer is simply promising to perform an existing contract (*WRN Ltd v Ayris [2008[ IRLR 889 QBD*). Consequently, restrictive covenants introduced during the employment relationship should have specific consideration assigned to them, either expressed as a lump sum or expressed as being linked to a pay rise. As most employers are cautious about restrictive covenants, they may decide to execute such a variation as a deed.

## Unsigned contracts

An employment contract need not be in writing, and may be express or implied; so there is no strict requirement for a contract to be signed (see Formalities above). However, it is clearly in the employer's interests to obtain a signed agreement, otherwise it may be difficult to establish what the terms are and there may be disputes. It may be inferred that an employee has accepted the terms offered by the employer by their conduct (in effect by turning up for work), even if the contract has not been signed and returned by the employee. For a case in which an employee was deemed to have accepted the terms, despite having expressed his dissatisfaction with some of them, see *Collymore v Capita Business Services Ltd UKEAT 162/98/1506*.

However, a court or tribunal may not always be prepared to infer consent to particular terms from the employee's performance of the contract. This is particularly true where an existing employee is offered new terms and their consent to a particular term cannot be inferred from the employee continuing to perform the contract, for example because the relevant term does not have immediate practical impact. An example of this is a restrictive covenant. If the new contract contains restrictive covenants, an employer will usually find it difficult to establish that these were particular terms of the contract that had been agreed between the parties, without the employee's signed agreement. The test is whether "the employee's conduct, by continuing to work, [is] **only referable** to his having accepted the new terms imposed by the employer", or whether it is "consistent with the old contract continuing" (Elias J in *Solectron Scotland Ltd v Roper & Ors [2003] UKEAT/0305/03*). For an unusual example of a case in which the court found that there had been implied acceptance of new restrictive covenants, despite the lack of a signed agreement, see Legal update, Employee bound by restrictive covenants in unsigned contract provided after promotion (HC). For more on this point, see Practice note, Changing terms of employment: What happens if an employee doesn't sign a new contract given during employment?.

## Different types of employment contract

There are many different types of employee, requiring different levels of protection within the employment contract. For example, see Standard documents:

- Director's service agreement.
- Employment contract for a senior employee.

- Employment contract for a junior employee.
- Employment contract for a salaried partner.

However, employers should not assume that such distinctions are watertight and should decide which clauses may have to be tailored, omitted or added, according to the particular situation. Care is needed, for example, when it comes to the distinction between "senior" and "junior" employees. Restrictive covenants may be necessary in respect of someone who occupies a position of influence with clients, even if they are not managerial or highly paid (for example, see *East England Schools CIC (t/a 4myschools) v Palmer and another [2013] EWHC 4138 (QB)*; Legal update, Recruitment consultancy could protect customer connection despite recruitment information being on social media (High Court)). An intellectual property assignment clause may be desirable for a junior employee in a creative role. For these optional additional clauses, see Standard clauses, Intellectual property clause for employment contract (short form) and Intellectual property clause for employment contract (long form).

The above types of contract may be adapted to reflect the fact that the employee may be fixed-term, part-time or a casual employee. For example, see Standard documents:

- Fixed-term employee clauses.
- Part-time employee clauses.
- Casual employee contract.

For other resources that may be helpful for those advising employers and employees on entering into employment contracts, see:

- Practice note, Acting for an employee entering into an employment contract.
- Standard document, Advice to employer on the employment contract for a junior employee.
- Standard document, Advice to employer on the employment contract for a senior employee.
- Standard document, Advice to employer on the director's service agreement.