



Employment **Law**
Exchange

The ELE guide to the basics of contract law

And maybe why it is so hard to grasp

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A long time ago when.....

For the skilled self- employed



Labourers Subject to Legislation



THEN

Industrial revolution

Moves to mass employment/
Fordism/HRM



Contract law ALSO evolving in 19th C

- Had been mainly concerned with land and property
- Now applying to the workplace and seen as a progressive move to negotiated relationships rather than ones defined by 'status'/ legislation
- The rise of the implied terms, devised by judges to make sense of it

THEN THE BASICS EMERGED BUT UNEASILY

- Employment contracts tend to be long term and 'relational' rather than 'transactional' i.e. purchasing on a one off basis, e.g. a ticket, a holiday, a meal. The legal rules sit more easily with the latter, as employment contracts evolve / change over time.
- A contract is, in theory, the end of a negotiation and so long as the key elements of a contract are there it will be legally binding. There is no need for writing but the lack of evidence will make enforcing a contract difficult.

THE REQUIREMENTS

- An offer (say, of work)
 - An acceptance which must be in line with the offer
 - An intention to create a legal (as opposed to a merely social) agreement
 - Consideration-pay/reward
 - Express and implied terms
- BUT THERE ARE MANY PROBLAMATIC ASPECTS



THEY INCLUDE.....

- No need for fairness
- Ignorance, even say blindness, illiteracy is no 'defence'. The contract overrides anything said etc.
- Inflexibility-a contract is complied with or not-in which case it will be broken. The only question is what was the contract about and was it broken?
- You cannot justify a breach-the contract is broken or not
- The contract is between two parties-third parties, e.g. agencies struggle to work with contract law and collective agreements can be problematic.
- Notions of fairness and reasonableness generally missing.

ANY MOVES TO BRING THE CONTRACT MORE INTO LINE WITH MODERN WORKPLACES HAVE BEEN LIMITED

- One example has been the rise of the implied term of 'trust and confidence' into all employment contracts.
- Mainly, the evolution has been through the grafting on of statutory duties onto the contract model.
- Some areas still neglected, e.g. zero-hours/casual working and problems of accessing rights dependent on a period of time through 'continuity of employment' as the common law defining feature of a contract of employment.
- In a way, the topics that work easily are those directly derived from the 19th C, such as restraint of trade, confidentiality.

SO-WHERE ARE WE?

- We have seen a recent decline in statutory protective rights. Especially in terms of the so-called flexible workforce. Can contract law fill the gap?
- Contract law is highly specific, narrow and inflexible. Where there are legal issues, e.g. trying to imply a contract of employment e.g. between a temp and a client, the law falls back on commercial case-law which is not always appropriate
- Varying contracts has always been problematic as in theory there has to be the employee agreement but in reality the termination, plus offering a new contract has been a useful technique.