Chapter 2

Regulating the employment relationship

Learning objectives
To understand:
● Different forms of employment status
● The definition of the contract of employment
● The sources of the contract
● How contracts of employment can be varied
● The significance of breach of contract
● The remedies available for breach of contract

Structure of the chapter
● Introduction: the character of the employment relationship and its legal regulation
● The context: the concepts of ‘work’ and ‘employment’; psychological contract; diversity of employment
● The legal framework: contracts for the regulation of work; employment status; the characteristics of the contract of employment; express and implied terms; references; whistleblowing; sources of the employment contract; the statement of initial employment particulars; terminating a contract of employment; subsistence of the contract; employment protection for ‘atypical’ workers

Introduction

The employment relationship

This is an exchange relationship: the exchange of work for payment. It is often known as the ‘work–wage’ bargain. The parties are an individual worker and an employing organisation. Because it is voluntarily entered into, it is different from other relationships under which work is performed – e.g. slavery, serfdom, conscription.

It is also characterised as a power relationship. The two parties – the employer and the employee – are often spoken of as if they are of equal status. However, the economic reality of employment shows that, in practice, there is, usually, no equality. In discussing
the employment contract, Wedderburn (1986) described the situation this way: ‘The individual employer is from the outset an aggregate of resources, already a collective power in social terms... In reality, save in exceptional circumstances, the individual worker brings no equality of bargaining power to the labour market and to this trans-action central to his life whereby the employer buys his labour.’

Means of regulating the employment relationship

The employment relationship is not a ‘free for all’. It is regulated. Four formal instruments may be used:

● the contract of employment between an employer and an employee;
● other contracts under which work is undertaken personally;
● statute law and statutory instruments together with case law;
● collective agreements with trade unions (or other workforce representatives).

All these ‘instruments’ produce sets of ‘rules’ which govern the employment relationship. The first three clearly have force of law and breaches can, as appropriate, be taken to employment tribunals and courts. The fourth set, in origin, is the result of a voluntary decision by an employer to negotiate directly with a trade union or, alternatively, to accept the provisions of a collective agreement negotiated elsewhere. Whilst collective agreements are, invariably, voluntary agreements and are presumed to be so (Trade Union and Labour Relations Consolidation Act 1992, s 179), they can and do have legal force in respect of terms and conditions of employment. The provisions of collective agreements, relating to pay, hours, holidays, etc. are, as appropriate, ‘incorporated’ in law into an individual’s contract of employment. So, in practice, all four formal instruments have legal force. (See also website chapter.)

In this chapter we will examine, in particular, the contract of employment with an individual; and other contracts under which work is undertaken personally. Throughout the textbook the various pieces of legislation will be considered; and, as appropriate, reference will be made to the ways in which collective agreements assist in the regulation of the employment relationship.

Context

In recent years, several developments have had an impact on the employment relationship and consequently on contractual issues. These are of fundamental significance because they force a reappraisal of various traditional models and practices. We will consider:

● concepts of work and employment;
● the psychological contract;
● the growing diversity of employment status.

Concepts of work and employment

In the period since 1945, ‘employment’ has been the predominant model through which work has been carried out. Essentially, it involves a long-term arrangement between an individual and an organisation with work provided on a continuing basis – day in day
out, week in week out, even year in and year out. Traditionally, in employment, a ‘job for life’ was presumed. Contractual benefits and entitlements were often service-related – based on seniority and continuous service. For individuals, a job, in these terms, was and remains a very valuable asset.

This model is essentially based on male employment patterns. This gender-based perspective is important in considering the issues raised in this chapter and elsewhere in the textbook. Linda Dickens (1992: 5) has commented:

A key to women’s disadvantage in the labour market . . . is that structures of employment, although apparently neutral, are in fact moulded around the life patterns and domestic obligations of men. Our systems of labour law and social security have similarly taken the male as the neutral standard of the worker to the disadvantage of women who, in not conforming to the male life and work pattern, fall outside various protections. The adoption of the male as the normal standard is revealed immediately we consider the label ‘atypical’ employee . . . the ‘typical’ employee is the male; the ‘atypical’ employee female.

This traditional model has been subject to considerable buffeting in the past 40 years as a result, principally, of three related factors: employers’ need for both greater flexibility in resource utilisation; their drive for greater efficiency and cost-effectiveness; and the challenges, in particular, of the law on sex discrimination. The changes initiated by employers from the early 1980s have been explored by academic writers in such theoretical models as ‘the flexible firm’ (Atkinson 1984), and the ‘shamrock organisation’ (Handy 1991).

Handy argues that we should reconsider our attitude to work as a wider activity and ‘stop talking and thinking about employees and employment’. His reason is that ‘if work were defined as activity, some of which is paid for, then everyone is a worker, for nearly all their natural life’. He proposes a portfolio of five categories of work – the balance of which will constantly alter as people grow older:

1. **Wage or salaried work**: Individuals are paid for the time given. This is the traditional employment model – whether a person’s contract is full time, part time or temporary.

2. **Fee work**: Money is paid for results delivered. Its incidence increases as jobs move outside organisations.

3. **Home-work (or ‘domestic work’) to prevent confusion with the concept of ‘homeworking’**: This includes all tasks taking place in the home – cooking, cleaning, caring for children and other relatives; and maintaining and improving the home. This area of work is particularly susceptible to the use of other providers – depending on a person’s economic circumstances.

4. **Gift work**: This is done for free outside the home for relatives, friends, neighbours, charities, local groups and as a public service. This unpaid work is particularly significant for the charitable organisations providing personal services for ill or disabled people.

5. **Study work**: This is education/training designed to improve skills and increase knowledge. In an employment culture emphasising training, development, continuous improvement and life-long learning, this work is of great value to individuals and organisations.
This ‘portfolio’ concept of work clearly challenges the social convention that paid employment is the only appropriate definition both of people’s contribution to society and of their status. So, if we were to adopt a different perspective, the domestic work, primarily undertaken by women would be recognised. The concept of ‘unemployment’ would be redefined. The notion of ‘retirement’, traditionally seen as disengagement from paid employment, would be reappraised. Furthermore, we might also acknowledge the financial contribution to society as a whole of uncosted and unpaid ‘domestic’ and ‘gift’ work.

**The psychological contract**

This concept, initially outlined by Schein (1988), has since been elaborated. Essentially, it is about the expectations and assumptions that parties bring to an employment relationship. These are likely to be moulded by previous employment experiences; by the process of socialisation in the family and the education system; by a person’s values; and by economic imperatives involving the need, for example, for income and an appropriate living standard.

One author (Mant 1995: 48), summarising the nature of this contract states that:

within that implicit contract are embedded three kinds of individual expectations and needs:

- The need for equity and justice – that employees will be treated fairly and honestly and that information and explanation about changes will always be provided.
- The desire for security and relative certainty – that employees can expect, in return for their loyalty, that they need not be fearful, uncertain or helpless (as they contemplate who might be the next to go).
- The need for fulfilment, satisfaction and progression – that employees can trust the value that the organisation places on their current contributions and prior successes and relationships.

The achievement of ‘deals’ under the psychological contract is highly problematic. For the employee, it depends on several factors. First, the extent to which the employer is serious about what is on offer; and through employment practices and the employment contract, aims to deliver on these ‘offers’. Secondly, the psychological contract can shift over time – possibly rapidly. Whether or not this is so, there is the question of feasibly reconciling the expectations of employee and employer. Mismatches can be sources of conflict, demotivation and disaffection. Thirdly, in terms of successful delivery of the psychological contract, much will probably depend on organisational size and the grades of staff concerned. So, larger organisations with developed human resource management policies may be more successful.

**The growing diversity of employment status**

The labour market has been characterised, historically, as comprising two broad categories of working people: ‘standard’ and ‘non-standard’ (or ‘atypical’ or ‘marginal’) workers. The first category comprises those who are, usually, employed on full-time, open-ended contracts and who may expect long, continuous service. This remains the largest group in the labour market (see Table 2.1). The second group consists of a wide diversity of employment status. As a group it has been growing in the past 20 years or so. These working people can be characterised as, for example, part-time, temporary,
freelance, agency, casual and zero hours workers and homeworkers (see Exhibit 2.1). The overwhelming majority of working people (nowadays estimated at around 85 per cent) are either ‘employees’ or ‘dependent workers’ and 13 per cent are clearly ‘independently self-employed’. However, as we shall see in the later discussion of case law, these labels may not always be used accurately.

### Table 2.1 Labour market structure

<table>
<thead>
<tr>
<th>Total in employment</th>
<th>Number of employees</th>
<th>Number of self-employed</th>
<th>Other groups (unpaid family work and training programmes)</th>
</tr>
</thead>
<tbody>
<tr>
<td>29.1 million</td>
<td>24.9 million</td>
<td>3.9 million</td>
<td>227,000</td>
</tr>
<tr>
<td>Full time</td>
<td>FT</td>
<td>PT</td>
<td>n/a</td>
</tr>
<tr>
<td>21.2 m</td>
<td>18.2 m</td>
<td>6.7 m</td>
<td>2.9 m 1.1 m</td>
</tr>
<tr>
<td>Male</td>
<td>M</td>
<td>F</td>
<td>M F</td>
</tr>
<tr>
<td>15.6 m</td>
<td>12.7 m</td>
<td>12.2 m</td>
<td>2.8 m 1.2 m 115,000 111,000</td>
</tr>
</tbody>
</table>


EXHIBIT 2.1

‘Standard’ and ‘atypical’ forms of employment

**Full-time workers.** This has long been regarded as the typical or ‘standard’ form of employment. Most work on open-ended contracts; although some may be on fixed-term contracts. This group represents around 75 per cent of the labour force (www.statistics.gov.uk).

**Part-time workers.** These are usually defined as those who work less than the scheduled full-time hours in a specific organisation: 27 per cent of those in employment work part time; 60 per cent of part-timers did not want full-time work (Labour Market Statistics, March 2011). In survey data, average working hours is 15 per week. Around 85 per cent of part-timers are female. By sector, two-thirds of part-time jobs are in ‘public administration, education and health’ and ‘distribution, hotels and restaurants’. Some part-time employment is structured on a job-share basis. Also, the incidence of ‘double jobbing’ is continuing to grow with 1.1 million workers having a second job (for, on average, nine hours per week) – about 60 per cent of these are women. Traditionally, many of the terms and conditions of employment under which part-time workers have worked have been inferior in comparison with full-time workers; although, in some organisations the pro rata principle was established (see Part-time Workers Regulations 2000 below).

**Temporary workers.** Temporary jobs can take a variety of forms. They can be for a defined time period (days, weeks or years); or for the completion of a specific task. They include many other forms of ‘atypical’ employment: seasonal work, casual work, zero-hours contracts, non-permanent jobs through a temporary employment agency (‘agency temps’). Temporary workers comprise 6 per cent of all employees. Just over half of temporary workers are female. By sector, 10 per cent of employees in the public sector are temporary (particularly in public administration, education and health care), compared with 6 per cent in the private sector. By occupation, the greatest concentrations are in professional occupations. The reasons most commonly cited by employers for recruiting temporary workers are:
providing cover for absent permanent staff (e.g. on maternity leave); to cope with seasonal workload fluctuations; to staff short-term projects; and to acquire people with specialist skills which are only needed on a short-term basis or which are only available on a non-permanent basis. Thirty-seven per cent of temporary employees could not find a permanent job (Labour Market Statistics, March 2011). (See the Fixed-term employees Regulations 2002 below.)

**Agency workers.** There are two categories of ‘agencies’ (Employment Agencies Act 1973):

- *employment agencies* introduce working people to be employed by or to establish a business relationship with the client themselves; and
- *employment businesses* supply their staff to a client to work on a temporary basis under the control of the hirer. They are usually paid by the agency.

Overall, the total numbers of agency workers is small. However, in certain sectors and occupations, their incidence is significant (i.e. clerical and secretarial work, personal and protective services, and plant and machine operatives). There is also a growth in ‘banks’ of professional agency workers (e.g. nurses, further education lecturers and supply schoolteachers). (See the Agency Workers Regulations 2010 below.)

**Zero-hours contract working.** This has been defined as an arrangement ‘where the worker was not guaranteed any work at all but in some way was required to be available as and when the employer needed that person’ (Cave 1997). The worker has the right to refuse work. This is not a new form of working. It has, however, grown in importance as a result of variable customer demand, changing technology and managerial strategies to be more cost effective. In 1998, the government reported some 200,000 such workers (DTI 1998). In Cave’s study, 22 per cent of employers used zero-hours contracts. It was also reported that women are more likely to be employed on such contracts, and that in 91 per cent of organisations, zero-hours contract workers did not have the same benefits as other employees.

**Self-employed workers.** There are 3.9 million self-employed persons – almost three-quarters of whom are male. This category has grown fitfully since the early 1980s – depending on economic circumstances. The term encompasses people in other ‘atypical working’ (e.g. temporary working, homeworking/teleworking).

**Homeworking.** Homeworking is a long-established feature of certain parts of manufacturing industry. It involves routine tasks carried out at home, invariably for low pay. National surveys of homeworking suggest that there are around 700,000 such workers (Social Trends 31). Over 70 per cent of homeworkers are women. They are more likely to have dependent children than women in the workforce generally. Overwhelmingly, these workers undertake clerical and secretarial work; and craft and related work. Teleworking is a ‘high tech’ variant of this traditional model.

**Teleworking.** This is a growing ‘high tech’ variant of homeworking – accounting for 8 per cent of the workforce. In 2010, around 3.7 million people worked mainly from home using both a telephone and a computer to carry out their work. An important difference from the traditional model of homeworking is that home is a base and homeworking as such may constitute only part of their working life – the other parts being on the employer’s premises or ‘on the road’. The majority of such workers are male (www.statistics.gov.uk).

The legal issues of employment status and the employment protection conferred upon these various categories of working people are outlined later in this chapter.

*Source: unless otherwise stated, data drawn from Labour Force Surveys (www.statistics.gov.uk).*
Interest in these more flexible forms of employment derives from employers’ need for greater operational flexibility and reducing unit labour costs (Atkinson 1984). However, their use is not new. These forms have a long history in the labour market where they have, traditionally, been regarded as marginal or ‘atypical’ forms of working. Despite this growth of more flexible working, it is important to note that ‘the shift away from permanent and full-time jobs to temporary, short-term or part-time work is exaggerated’ (Taylor 2002).

The legal framework

In this section, we will consider three broad sets of legal issues:

- employment status: ‘employees’, ‘workers’ and ‘independent contractors’ and the common law tests, mutuality of obligation, personal service, continuity of work;
- the characteristics of the contract of employment;
- employment protection for ‘atypical’ workers.

Employment status

In law, three broad terms are used to describe working people: employee, worker and independent contractor (i.e. self-employed). It has become increasingly important to appreciate the distinctions between these categories. This is because access to statutory rights and also determining the contractual arrangements under which a person works. Statute law draws a distinction but to a very limited extent. Much of the guidance is set out in case law as will be seen below. Indeed it is admitted by government that ‘the definitions of “employee” and “worker” in legislation are not sufficiently clear and “user-friendly”’ (DTI 2002: 7).

The starting point for considering the distinctions between these categories must be the principal employment statute, the Employment Rights Act 1996. This states:

> In this Act ‘worker’ (except in the phrases ‘shop worker’ and ‘betting worker’) means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
>
> (a) a contract of employment, or
> (b) any other contract whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.  

(ERA 1996, s 230(3))

This definition is, however, insufficient to distinguish effectively between the facts and circumstances of individual working people. Consequently, case law is necessary to determine whether a person is either an employee on a contract of employment, a worker on some other contract, or an independent contractor. In Table 2.2 an attempt is made to distinguish the different aspects of the employment status of each category. The terminology used in the table is then discussed below.
### Table 2.2 Determining employment status

<table>
<thead>
<tr>
<th><strong>Employee (i.e. a worker with a contract of employment)</strong></th>
<th><strong>Worker (who is not an employee)</strong></th>
<th><strong>Independent contractor (genuinely self-employed)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>People in this category are sometimes described as having an ‘employment relationship’</td>
<td>People in this category are sometimes described as having an ‘employment relationship’</td>
<td>Usually described as ‘in business on their own account’</td>
</tr>
<tr>
<td><strong>Common law tests:</strong> Multiple, control, integration, economic reality, Compliance with these is necessary</td>
<td><strong>Common law tests:</strong> The issue is likely to be: how many of these tests does the person comply with when the employment relationship is analysed?</td>
<td><strong>Common law tests:</strong> Usually, there is little or no evidence of compliance with these tests. However, there might be an issue about control. Economic independence.</td>
</tr>
<tr>
<td><strong>Mutuality of obligation:</strong> Extent that this exists in relation to both current and the future performance of work, Must be an ‘irreducible minimum’ of mutuality</td>
<td><strong>Mutuality of obligation:</strong> To what extent (if any) does this exist? If no mutuality, person cannot be an ‘employee’ and could be a ‘worker on a contract to work personally’ (ERA 1996)</td>
<td><strong>Mutuality of obligation:</strong> There will be no evidence of mutuality of obligation in respect of a particular employer. An independent contractor may ‘pick and choose’ the work undertaken</td>
</tr>
<tr>
<td><strong>Personal service:</strong> Is there evidence of this? Is ‘substitution’ permitted – if so, on what terms? Is substitution ‘unfettered’?</td>
<td><strong>Personal service:</strong> Is there evidence of this? Is ‘substitution’ permitted – if so, on what terms? Is it ‘unfettered’?</td>
<td><strong>Personal service:</strong> Personal service is not necessary and work may be subcontracted</td>
</tr>
<tr>
<td><strong>Duration of work:</strong> Is the work continuous or intermittent? If intermittent, is there a ‘global contract’ covering all work engagements?</td>
<td><strong>Duration of work:</strong> Is the work continuous or intermittent? If intermittent, is there a ‘global contract’ covering all work engagements?</td>
<td><strong>Duration of work:</strong> Generally, such work is for a fixed time period or until the completion of a task</td>
</tr>
<tr>
<td><strong>Contract:</strong> A ‘contract of employment’ will exist if the person satisfies the common law tests and evidence of mutuality of obligation</td>
<td><strong>Contract:</strong> A person thought to be a ‘worker’ (on some ‘other contract’ to work personally) may be an ‘employee’ if the common law tests and mutuality of obligation are satisfied. However, if they are only partially satisfied, then he or she may be such a worker</td>
<td><strong>Contract:</strong> No employment contract will exist. It will be a contract for services – a commercial contract. However, the self-employed contract may be a ‘sham’ and the person may, in fact, be an employee or a worker</td>
</tr>
<tr>
<td><strong>Remuneration:</strong> An employee will receive wages (of at least the national minimum wage) and is entitled to claim for non-payment and unauthorised deductions. Likely to be deduction of tax under PAYE and national insurance</td>
<td><strong>Remuneration:</strong> A ‘worker’ (who is not an employee) is likely to receive wages (of at least the national minimum wage) and is entitled to claim for non-payment and unauthorised deductions. May be deductions of tax under PAYE and national insurance</td>
<td><strong>Remuneration:</strong> Payment is likely to be a fee. Likely to make own arrangements for tax and National Insurance</td>
</tr>
</tbody>
</table>

In determining a person’s employment status against these tests and criteria, courts and tribunals look at the facts and circumstances of the individual case. They do not just accept the label that is given to a particular individual’s employment relationship by the employer. This may be inaccurate. Determining employment status involves a mixture of law and fact.
Common law tests

These tests have been developed by the judges over many decades. In particular, they help distinguish whether a person is an employee or self-employed – i.e. in business on his or her own account. They are as follows:

- **The control test.** This concerns the degree of control exercised by the employer. This long-standing test was at one time considered conclusive of ‘employee’ status. However, it is now regarded by the courts as one of the factors to be taken into account. The nature of control has, in practice, changed for various reasons. For example, as a result of human resource policies of ‘empowerment’, and the need to recruit skilled and professional staff who can exercise discretion and can work with some degree of autonomy. Courts and tribunals recognise that control may nowadays be more a question of the employer retaining ‘ultimate authority’ over the employee in relation to the performance of work. The Court of Appeal has indicated that the test considers ‘who lays down what is to be done, the way in which it is to be done, the means by which it is to be done and the time when it is done’ (Lane v Shire Roofing Co (Oxford) Ltd [1995] IRLR 493). In respect of the self-employed, it has been argued that, applying this test, they have greater autonomy and discretion in the way work is carried out. However, one writer suggests that ‘the right of control fails to distinguish employment from self-employment because its presence is entirely consistent with either type of contract’ (Brodie 1998: 140).

- **The integration test.** This involves considering the ways in which a person contributes to an organisation and is part of its structure: is the person ‘integrated’ into the organisation or ‘accessory’ to it? To what extent does the person contribute to service delivery or the production of goods? It focuses on the organisation of work and less on control or subordination. If integration is established, then a person is likely to be an ‘employee’.

- **The economic reality test.** This is closely associated with the integration test and covers the issue of who bears financial risks and, as appropriate, who provides the resources for work to be done (i.e. staff, tools and equipment). It should help provide a clearer answer to the question of whether the individual is ‘in business on their own account’ – i.e. self-employed. Buchell et al. (1999: 6), quoting Lord Justice Nolan in Hall v Lorimer [1994] IRLR 171, say that it ‘implies a test of economic dependence, in the sense that employee status is the result of “the extent to which the individual is dependent or independent of a particular paymaster for the financial exploitation of his talent”’. Genuine self-employed persons are likely to provide their own tools and be responsible for their own training and not be integrated into the structure and operation of the employer’s organisation. They may hire their own staff and/or make subcontracting arrangement to carry out work. However, in practice, it may not always be possible to identify the genuine self-employed. Some self-employed may have a relationship of economic dependence on an employer. Burchell et al. (1999: 12) comment that this category of ‘dependent self-employed’, ‘potentially included freelance workers, sole traders, homeworkers and casual workers of various kinds’.

- **Mutuality of obligation.** This is an essential test. Its use by the courts has grown in significance. It was initially laid down in O’Kelly v Trusthouse Forte [1983] IRLR 369, CA. In determining whether or not a person is an employee and whether or not a
contract of employment exists, courts and tribunals will examine the obligations that the person who is working owes to the employer and vice versa. The essential require-
ment is to establish whether, in an employment relationship, an employer has an
obligation to offer work to an individual and whether he or she has an obligation to
undertake the work offered. Normally, in a ‘standard’ employment relationship, an
employer expects to offer work on a regular basis. The employer, also, expects the
worker to undertake the work offered. If the worker refuses without good reason,
then, disciplinary action may result. However, there are circumstances where this
may not arise. For example, an NHS trust may phone a nurse (who is a member of a
nurse ‘bank’) and offer a night shift at a hospital. He or she may refuse (for any reason
– however trivial), but the employer will not take any disciplinary action and work
may well be offered for the following night. So there are no obligations on either side
to offer or perform work. However, there would, normally, be an obligation to under-
take any work that has been accepted.

It has been suggested (Deakin and Morris 1998: 164–8) that there may be a second
level of mutuality – mutual promises of future performance of the employment rela-
tionship. This provides the stability and continuity which is characteristic of the
employment relationship of the ‘standard’ worker. If this second level is missing,
then, there is probably no contract of employment.

One difficulty is that the contract may be silent on the issue of mutuality of obliga-
tion. The person working may have a long-established relationship with the employer;
and the person may have made assumptions that he or she is an employee because of
length of service, the degree of economic dependence on the employer for pay and
the extent of integration into the organisation – albeit intermittently. The landmark
(see Exhibit 2.2).

Genuine self-employed people are, in respect of mutuality of obligation, free to
‘pick and choose’ the work they do. Where they agree to do work, they need not
provide it personally. They may delegate it to another person to undertake it. So, no
mutuality exists which points to an employment contract.

● *The multiple test.* The Court of Appeal has stated that any decision on ‘employee’
status does not involve a mechanical checking off of factors. An overall view must be
taken of the facts and circumstances (including whether or not the individual makes
his or her own arrangements for tax and social security contributions). This overall
view would involve weighing the significance of particular factors; and considering,
if appropriate, the intentions of the parties and their behaviour. No factor is seen as
sufficient in itself. However, control, the payment of wages and mutuality of obliga-
tion are seen as essential (in *Hall (Inspector of Taxes) v Lorimer [1994] IRLR 171*).

**Personal service and substitution**

Most employers expect that both ‘employees’ and ‘workers’ will personally undertake
the work offered. The implication is that if there is no personal service then the person
may be self-employed. However, in case law, there have been specific rulings which
suggest that the issue is not clear-cut. The Court of Appeal ruled in *Express & Echo
Publications v Tanton [1999] ICR 693*, that an ‘irreducible minimum’ for there being a
contract of employment is personal service; and that a provision in a contract allowing
EXHIBIT 2.2

No mutuality of obligation

*Carmichael and Leese v National Power plc* [2000] IRLR 43, HL

Ms Leese (together with Ms Carmichael) had been employed since 1989 as a guide at a power station. She was obliged to supervise parties of visitors, explain various activities and answer questions. She also gave talks to schools. She was given training for the post. In her offer letter she was described as working on a ‘casual as required’ basis. The company did not have to provide work and she could refuse work. She had been unavailable for work on eight occasions.

She worked as a guide for up to 25 hours a week. She was paid, after deduction of tax and national insurance contributions at an employed person’s rate. But she was only employed when she worked. There was no sick pay and no pension provision. No notice to terminate the contract was indicated. She was provided with a uniform. She was accountable to the company for the quality of her work. The grievance and disciplinary procedures for regular staff did not apply. There was no written contract of employment nor any contractual information other than that in the offer letter.

The complaint to an employment tribunal was that the company had failed to provide a written statement of initial employment particulars (under ERA 1996, s 1). The company contended that the two women were not ‘employees’ in law.

The case went through various appeal stages and eventually reached the House of Lords. It ruled that the objective inference from the situation as described was that when work was available the applicants were free to undertake it or not as they chose. It saw the flexibility as suiting both parties. The arrangement was based on mutual convenience and good will and had worked well in practice over the years. But it took the view that, in the circumstances of the case, there was no ‘irreducible minimum of mutual obligation necessary to create’ a contract of employment.

the substitution of a ‘suitable person’ was ‘fatal’ to him acquiring status as an employee. This approach was also adopted by the EAT in *Staffordshire Sentinel Newspapers Ltd v Potter* [2004] IRLR 752. However, in *MacFarlane v Glasgow City Council* [2001] IRLR 7, EAT, it was held that a gym instructor whose contract provided that he could select a substitute from a list pre-approved by the gym, did not cease to be an employee because of that provision. A similar approach was adopted in *Byrne Brothers (Formwork) Ltd v Baird* [2002] IRLR 96, EAT, where the ability to provide a substitute was limited and had to be approved.

Commenting on this situation, Daniel Barnett (web bulletin, 5 May 2004, www.danielbarnett.co.uk) stated that ‘the position therefore appears to depend on the extent of the substitution clause. If the worker has an unfettered discretion to appoint a substitute, he cannot be an employee. If he has a heavily fettered discretion or requires the employer’s approval, the substitution clause will not prevent him accruing employee status.’

Continuity of service

This is particularly significant in three related respects:

- considering a person’s status as an employee;
- access to statutory rights which may be service-related;
qualifying for employment benefits under a contract of employment (e.g. enhanced holiday entitlements, sick pay, access to ‘flexible’ benefits).

**General statutory provisions**

The statutory provisions on continuous employment are defined in the Employment Rights Act 1996 (ss 210–19). Generally, continuity is in relation to one employer (the exceptions are considered below). Also, continuous employment can encompass a number of contracts of employment with that one employer.

To calculate continuous employment, the legal starting point is set out as follows:

Any week during the whole or part of which an employee’s relations with his employer are governed by a contract of employment counts in computing the employee’s period of employment.

(ERA 1996 s 212)

The importance of establishing the existence of a contract of employment is signalled by this provision. The number of hours a person works each week is not relevant. There is a statutory presumption in favour of continuous employment, unless the contrary is shown by the employer. Certain weeks count (under particular rules): where the employee is:

- ‘incapable of work in consequence of sickness or injury’ (ERA 1996, s 212(3)(a)); or
- ‘absent from work wholly or partly because of pregnancy or childbirth’ (ERA 1996, s 212(3)(d)).

In addition and significant for certain atypical workers, are weeks which may count:

- where the employee is ‘absent from work on account of a temporary cessation of work’ (s 212 (3)(b)); or
- ‘absent from work in circumstances such that by arrangement or custom, he is regarded as continuing in the employment of his employer from any purpose’ (s 212(3)(c)).

**Temporary cessation of work**

It has been ruled in various cases that ‘temporary cessation of work’ need not break continuity of employment. No time period is prescribed for the cessation. The cessation is a question of fact: did it or did it not take place? The cessation can be for any reason. The ‘work’ referred to is the paid work of the individual employee – not the general work of the employer’s business.

In handling cases involving the temporary cessation of work, two approaches have been used by the courts: the broad-brush approach; and the mathematical approach. Both remain available. In the former, the focus is on the whole employment history of the individual employee. This would obviously be done in retrospect and could take account of the expectations and intentions of the parties. The second approach considers the proportions of time spent at work and the times absent because of the temporary cessation (see Exhibit 2.3).

**Absent by arrangement or custom**

This provision can cover secondments, special leave of absence, working-time scheduling such as job-share or limited hours. This arrangement must be in place when the absence begins and should not be an afterthought.
A ‘temporary cessation of work’

*Ford v Warwickshire County Council [1983]* IRLR 126, HL

This case involved a succession of fixed-term contracts for a further education lecturer (long before the enactment of the Fixed-term Employees Regulations 2002). Ms Ford had a series of 11-month contracts (covering September–July inclusive) over a 9-year period. She was not required to work in August. The issue came before the courts because she wished to claim unfair dismissal and there was uncertainty about whether she had the necessary qualifying length of continuous service: was it 11 months or 9 years?

Using the mathematical approach to the advantage of the complainant, Diplock LJ ruled that the interval when there was no work should be ‘characterised as short relative to the combined duration of the two fixed-term contracts. Whether it can be so characterised is a question of fact and degree.’ Of course, it is possible that this approach might lead to pedantic arguments about what is meant by ‘short duration’. So, the broad-brush approach may have much to commend it.

**Note:** The approach in this case was used by the EAT in *Hussain v Acorn Independent College Ltd [2011]* IRLR 463, EAT in determining that a teacher had one year’s continuous service (covering a temporary contract, the summer holiday and a permanent contract) in order to make an unfair dismissal complaint.

**Service with more than one employer?**

As mentioned earlier, continuous employment is normally with one employer. However, there are circumstances in which the acquired service might be preserved if the employee’s employer changes in the following circumstances:

- A transfer of an undertaking (as specified in the Transfer of Undertakings (Protection of Employment) Regulations 2006).
- One corporate body replaced another as employer under *Act of Parliament*.
- The employer dies and the employee is then re-employed by the personal representatives or trustees of the deceased.
- A change in the partners, personal representatives or trustees who employ the individual.
- The individual is taken into the employment of an ‘associated employer’.

This final circumstance can create difficulties. Control is the central issue. For the purposes of the Employment Rights Act 1996,

> any two employers shall be treated as associated if – (a) one is a company of which the other (directly or indirectly) has control, or (b) both are companies of which a third person (directly or indirectly) has control. (s 213)

Finding ‘control’ can be difficult. There are technical ways of establishing it through majority shareholding. Some cases have explored the channels of influence exerted on corporate policy. The presence of these can be particularly important for employment relations issues. Although there is no authoritative guidance on this issue, there is statutory authority for courts and tribunals to inquire into organisational decision-making structures.
Contracts

As indicated above, there are three broad types of contract that might exist to regulate a working relationship:

- a contract of employment (sometimes referred to as a contract of service);
- some other contract under which an individual agrees to work personally; and
- a contract for services with an independent contractor (i.e. a self-employed person).

An issue that has been considered by the courts is whether the contract that is in force accurately reflects the true position of the employment relationship and in particular the correct employment status of the person undertaking work. Complaints have been made to employment tribunals and courts about whether a contract is a ‘sham’ (see Exhibit 2.4).

Volunteers

The employment status of volunteers is an issue that has come before the courts more frequently. The key issues are the nature of the agreement under which a volunteer works, whether there are any mutual obligations and the issue of payments. The following cases outline some of these issues.

South East Sheffield Citizens Advice Bureau v Grayson [2004] IRLR 353, EAT: The EAT held that for a volunteer to be an ‘employee’ it was necessary to identify an arrangement under which, in exchange for ‘valuable consideration’ (this generally, means payment),

EXHIBIT 2.4

'Sham' contracts

Protectacoat Firthglow Ltd v Szilagyi [2009] IRLR 365: A firm of builders argued that a written ‘partnership agreement’ showed that Mr Szilagyi was a partner and not an employee so he could not claim unfair dismissal. The Court of Appeal said that rather than consider whether a written agreement was a sham, tribunals should simply look at what the true legal relationship was between the parties. A court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the start of the contract but, if appropriate, as time goes by.

Autoclenz v Belcher and others [2009] EWCA Civ 1046: The employer claimed that the car valets were self-employed sub-contractors and that this was stated in their contracts. The Court of Appeal ruled that the clauses in the contracts which expressly provided for ‘substitution’ and the ability to refuse work were a ‘sham’. There was, in practice, an obligation to work. Furthermore, it found that the control test and the requirement for personal performance were satisfied. It ruled that the car valets were ‘employees’ and they were able to claim in relation to paid annual leave and the national minimum wage. (The Employment Appeal Tribunal had found them to be ‘workers on some other contract to work personally’.) In July 2011, the Supreme Court upheld the Court of Appeal decision on the issue of ‘sham’ contracts, it stated that where a party asserts that a written term of contract does not reflect the reality of the agreement, then tribunals/courts may look beyond the contractual terms to find the true nature of the agreement. A court or tribunal may disregard contractual provisions that do not reflect the reality of the contracts. Autoclenz v Belcher and others [2009] UKSC 41
the volunteer was contractually obliged to provide services or work personally for the employer. In this case, the ‘volunteer agreement’ aimed to ‘clarify the reasonable expectations of both the volunteer and the Bureau’. The implication was that there was no intention for the agreement to be legally binding. There was no obligation for the CAB to provide work, nor for the volunteer to undertake it. The only obligations on the CAB were to reimburse expenses and to indemnify the volunteer against negligence claims if the volunteer worked for the CAB.

X v Mid Sussex Citizens Advice Bureau [2011] EWCA Civ 28: This involved a claim under the former Disability Discrimination Act 1995. X argued that the CAB’s decision asking her to stop attending as a volunteer was connected with her disability. The court ruled that she was a volunteer and did not have a paid ‘occupation’. The volunteer agreement was ‘binding in honour only’ and was not a contract of employment. She was not under a legal obligation to attend work.

Breakell v Shropshire Army Cadet Force UKEAT/0372/10: This also concerned a claim for disability discrimination by a paid volunteer adult instructor with Shropshire Army Cadet Force. The EAT ruled that there was no obligation for the ACF to provide work, nor any for him to accept the work offered, and he was only paid for the work he undertook. There was no mutuality of obligation in this arrangement. It found that he was a volunteer, not an employee or a worker under the former Disability Discrimination Act 1995 (s 68(1)).

FRISHCO SUPERMARKET CASE STUDY

Scenario 2.1

What is Jason’s employment status?

In January 2010 Frishco’s Head Office introduced a casual work scheme for additional store staff. They recruited a ‘bank’ of general assistants who would be available to meet emergencies in stores and, in particular, help out during peak times of customer demand (e.g. prior to Christmas and Easter; and on Friday, Saturday and Sunday). ‘Bank staff’ would also be available to cover in holiday periods. Jason, who has been in the ‘bank’ since it started, has only been an average performer and, in fact, he has not been called into work very often. In April 2012, after he was found by his team leader not to be stacking shelves quickly enough or putting goods in the correct places, he was told by Winona, an assistant manager, that he was being removed from the ‘bank’ and that he need not expect any more work. He says that he will ‘see them at the tribunal’. The ‘terms of engagement’ for ‘bank staff’ state: ‘Frischco will offer you work from time to time depending on the company’s operational requirements. Staff are expected to undertake the work offered unless they have a good reason not to. They will be paid at the National Minimum Wage.’

Question

Does Jason have grounds, in law, for claiming unfair dismissal at an employment tribunal? Give reasons for your view.

Visit www.mylawchamber.co.uk/willey to access sample HR documents to support this case study.
Chapter 2 Regulating the employment relationship

The characteristics of the contract of employment

A flawed instrument

Our focus in this section is on the predominant form of contract – the contract of employment. It is the starting point for so many issues: workplace grievances; disciplinary action and dismissal; and complaints to employment tribunals. However, although it is so fundamentally important, it is still a flawed instrument.

First, as mentioned above, it regulates an asymmetrical employment relationship which is characterised by a power imbalance under which an employee can be vulnerable to employer action. Secondly, many aspects of the contract can reinforce employer power. It provides a means of direction and control of the employee and, consequently, has been described as ‘a command under the guise of an agreement’ (Kahn-Freund 1983: 18). Thirdly, when it is formulated and agreed, a legal fiction is adopted that the contract is ‘freely arrived at’. Technically, this is so. No employee is forced to enter a contract of employment. However, in reality, few job applicants or employees have influence over the terms of their contract. Force of economic circumstances means that most people ‘take it or leave it’.

Fourthly, there are still echoes of the old ‘master and servant’ relationship in the way that the contract of employment is perceived. This submissive relationship which governed employment law during the nineteenth century has gradually been replaced by the, theoretically, more egalitarian contractual relationship. However, occasionally, judges in their rulings reflect this old-fashioned perspective based on status. Finally, the contract of employment has limitations as far as the adoption of universal minimum standards is concerned. Statute law is often seen as necessary to ensure universal fair treatment. For example, the former Equal Pay Act 1970 (s 1) (now the Equality Act 2010, s 66) deemed that ‘an equality clause’ be included in contracts of employment if one is not provided for ‘directly or by reference to a collective agreement or otherwise’. This means that no term of a contract of employment can be discriminatory on grounds of sex. It will be void if it is. The need for anti-discrimination law has been commented on by academic lawyers. ‘The common law with its emphasis on freedom of contract, sees nothing inherently wrong with discrimination . . . as long as no pre-existing contract or property right is infringed’ (Deakin and Morris 1998: 543). So, through statute law, Parliament is eroding ‘contractual autonomy’.

Defining the contract of employment

It is a promise or an agreement made by an employer and an individual employee following an employer’s offer of work. It is freely arrived at by the parties that make it. No one compels them to agree. It is legally enforceable in the courts and is intended to be so. It is usually of indefinite duration. It involves ‘consideration’ – i.e. something of value – usually pay, with which the employer obtains the promise of the employee to be ready, willing and able to undertake the agreed work. It may be in writing, verbally agreed or part verbal and part in writing. It need not be signed.
Key elements in this definition are examined in more detail below:

- **Offer.** This is an offer to the individual employee of work to be provided by the employer. It may be conditional on, for example, the receipt of acceptable references; medical and/or Criminal Records Bureau checks; and work permits being provided. (See also the guidance from the Information Commissioner: Employment Practices Data Protection Code (2005) Part 1.) An employer can withdraw an offer before the prospective employee has accepted it. There can, however, be difficulties of timing. When does the job applicant know of the withdrawal? Has he or she given notice to terminate existing employment?

- **Agreement.** It is an agreement between an employer and an employee that the employee will be ready, willing and able to undertake work offered. If this offer was conditional, then the contract is binding once the conditions have been fulfilled. If the offer has been accepted (but the prospective employee has not yet started work) and the employer withdraws the offer, then there can be a breach of contract. Usually, this can be dealt with by a payment in lieu of notice. If the prospective employee changes his or her mind about the job, it is unlikely that an employer would sue for breach of contract because it would be difficult for the employer to quantify the loss (see ‘Express terms’ below).

- **‘Consideration’.** This legal term describes something of value with which the contract is ‘sealed’. Usually, it is the pay given by the employer for the employee to be ‘ready, willing and able’ to undertake the work required.

- **Parties to the contract.** The term employer is, generally, fairly clear – although there can be occasional difficulties defining who the employer is in large conglomerate organisations where there may be associated companies. Also, as far as certain agency workers are concerned, defining their employer can pose some problems. The term employee is even more problematic as we have discussed above.

- **Legally enforceable.** The agreement is legally enforceable in the courts and at tribunals and is intended by the parties to be so. As a consequence, claims in the tribunals and courts can be made concerning allegations of breach of contract.

- **Freely arrived at.** Importantly, the agreement is freely arrived at – i.e. no one compels an employee to agree to enter a contract of employment on particular terms. Only exceptionally is an employee able to influence the terms.

- **Verbal and/or in writing.** Such contracts may be verbal or in writing or part verbal or part in writing. The reality, for most employees, is that they will not receive a legally drafted contractual document. They are more likely to receive a statement of initial employment particulars (as required under s 1, Employment Rights Act 1996) (see Exhibit 2.5). This outlines the employer’s statement of the essential terms and conditions of employment. In addition to this, there will be other terms of the contract (see ‘Sources of contractual terms’ below) – some of which may be in writing. This statement of employment particulars is important to employees in respect of the balance of information in the employment relationship. However, Which? Legal Service (2010), in a survey of 4,075 people, found that 26 per cent only skim-read their contracts; and 6 per cent did not read them at all. The survey also recorded that 12 per cent (2 million people) had no contractual information at all (www.whichlegalservice.co.uk).

- **Duration.** A contract of employment can be for any period of time. So, it may be for a fixed term; or may be open-ended (sometimes said to be ‘permanent’). The latter is the most common. Effectively, the contract exists until such time as one of the parties brings it to an end – either by the employee’s resignation or dismissal by the employer.
## Contractual information (required under Employment Rights Act 1996, s 1)

Information to be given to an employee within eight weeks of starting employment. If there is no information under any headings this should be stated. Even if the person leaves before the eight weeks, they are entitled to receive the information.

- Names of the employer and the employee.*
- Date employment began.*
- Date when continuous employment began (may include previous employment with that employer, or the consequences of a business transfer, or of transfers between companies within a group).*
- Scale or rate of remuneration; or method of calculating remuneration.*
- Intervals at which remuneration is paid (weekly, monthly or some other interval).*
- Hours of work and normal working hours.*
- Holiday entitlement, public holidays and holiday pay. (The particulars given being sufficient to enable the employee’s entitlement including any entitlement to accrued holiday pay on the termination of employment to be precisely calculated.)*
- Job title or brief job description.*
- Place or places of work where the employee is required or permitted to work.*
- Terms relating to sickness, injury and sick pay.†
- Pensions and pension schemes.†
- Notice periods to terminate the contract – by both the employer and the employee.
- If employment is temporary, how long it is to last; or termination date of the fixed-term contract.
- Any collective agreement affecting terms and conditions of employment (including, where the employer is not a party to the agreement, the names of the employers and the unions by whom they were made).
- Where the employee is required to work outside the United Kingdom for more than a month:
  - the period for which he or she is to work outside the UK;
  - the currency in which he or she will be paid;
  - any additional remuneration payable; and any benefits to be provided whilst outside the UK;
  - any terms and conditions relating to return to the UK.
- A note (which can refer to a reasonably accessible document) specifying:
  - any disciplinary rules applicable to the employee;
  - disciplinary procedure relating to the employee;
  - an indication of a person ‘to whom the employee can apply if dissatisfied with any disciplinary decision relating to him’ (s 3(1)(b)(i)) including dismissal;
  - an indication of a person ‘to whom the employee can apply for the purpose of seeking redress for any grievance relating to his employment and the manner in which any such application should be made’ (s 3(1)(b)(ii));
  - appeal steps should also be indicated.

* This information shall be ‘included in a single document’ (s 2(4)).
† For these particulars, the employee may be referred to some other reasonably accessible document (s 2(3)).
Contractual terms: express and implied

Express terms

These usually originate from management decisions and collective agreements. They set out explicitly certain terms under which an employee is to work. For example, in addition to pay and working time arrangements, an employer may want an employee to accept a mobility clause; or a restrictive covenant; or some commitment to confidentiality. Other examples, concerned with the specific circumstances of the employer’s business, can include the circumstances in which an employer can physically search an employee and his or her property; dress codes; and testing for substance abuse.

Garden leave in the absence of an express term was considered by the High Court (SG&R Valuation Service Co LLC v Boudrais and Others [2008] IRLR 770). In the circumstances of the case, it was ruled that the employer was entitled to place the complainants on garden leave because of their misconduct. The EAT (in Christie v Johnson Carmichael EAT/0064/09) ruled that the employer had the right to put a chartered accountant on garden leave in the absence of an express contractual term. In this case, he had resigned as a result of a dispute about his contract of employment. These cases demonstrate the clear advantage of having an appropriate express term in contracts.

A slightly unusual example of where an express term can be valuable to an employer is a ‘no show’ clause. Normally, if a job applicant changes his or her mind, having accepted an offer of employment, it is unusual for an employer to take any action. However, the High Court ruled in a case involving a City of London investment firm where there was a ‘no show’ clause in the contract. It found that the employer was entitled to recover £293,000 from the employee (Tullett Prebon Group Ltd v El-Hajjali [2008] EWHC 1924).

Implied terms

These, generally, derive from common law (the historic decisions of judges) or from specific statute law. Terms might be implied by judges for one of several reasons:

- for ‘business efficacy’ (i.e. where a term is necessary to make a contract work);
- where, on the facts, such a term is so obvious (even though it is not provided as an express term);
- on the basis of custom and practice (see below);
- to give effect to a statutory requirement;
- to meet changing circumstances.

Both express and implied terms will be explored in more detail in the discussion below.

Activity 2.1

Your contract of employment

Find out all the detailed terms of your own contract of employment. What are the sources? Which terms are in writing and which are verbal? Answer these questions as you read the following section.
Sources of contractual terms

There are several sources of a contract of employment:

- management decisions on terms and conditions of employment;
- collective agreements between an employer and recognised trade unions;
- workplace rules;
- custom and practice;
- statute law;
- implied terms under common law.

Management decisions on terms and conditions of employment

An employer’s ability to determine the terms and conditions under which a person works has, traditionally, been quite wide. However, two constraints affect these decisions:

- the requirements of employment and discrimination law;
- any collective agreements with recognised trade unions.

So, for example, an employer may determine the pay to be offered to an individual. However, it is necessary to ensure that such a pay is compliant with law on equal pay and, also, set at or above the rates of the national minimum wage. Furthermore, if there is a collective agreement in place, then the pay should be appropriate in relation to an agreed grading structure. However, it is important to remember that the constraints on employers are, in some respects, not always as strict as they appear at first sight. Even under law, they have areas of discretion. So, for example, employers can ask staff to agree to opt-out from the 48-hour maximum working week; certain terms, which may be regarded as indirectly discriminatory under discrimination law, can be ‘objectively justified’; and requests by parents and carers to work flexibly can be refused for specified ‘business reasons’.

Collective agreements between an employer and recognised trade unions

Collective agreements can be important in determining and influencing an individual employee’s terms and conditions of employment. An employer who, for example, has agreed to negotiate the terms and conditions of employment for particular grades of staff will apply the relevant provisions of the collective agreement to staff in that grade – irrespective of whether they are union members or not.

In law, the terms of the collective agreement relevant to an individual employee will then be ‘incorporated’ into that person’s contract of employment. So, their pay, working time, holidays, shift pay, overtime rates, sick pay, etc. will derive from the collective agreement.

There are four important aspects that need to be borne in mind in relation to collective agreements and contracts of employment:

- Which contractual terms are appropriate for ‘incorporation’? Those that have been tested in the courts are not the essential issues relating to pay, but those that are
procedural or ‘aspirational’ in terms of good employment practice. For example, the Court of Appeal ruled on the status of a ‘no compulsory redundancy’ agreement (Kaur v MG Rover Group Ltd [2005] IRLR 40). It stated that the job security provision of the agreement which included the words, ‘There will be no compulsory redundancy’, when construed in the context of the agreement as a whole was no more than ‘a statement of collective aspiration’ and was not appropriate for incorporation into individual contracts. The Court has also ruled on a collective agreement between British Airways plc and the trade union (Malone and others v British Airways plc [2011] IRLR 32, CA). BA had unilaterally reduced crew complements on its aircraft below the agreed levels. The Court stated that the provision in the agreement was ‘apt for incorporation’ in that it related to working conditions (i.e. cabin crew complements). However, it stated that there would be ‘disastrous consequences’ for the business if this provision was individually enforceable. It ruled that the provision was intended by the employer as an undertaking towards its cabin crew employees collectively and not to be incorporated into individual contracts of employment. It was ‘binding in honour’ only.

- The role of the union when contractual changes are made. (This is considered in Chapter 3 under the issue of contract variation.)

- What happens when a collective agreement is rescinded by the employer? In brief, the relevant terms of a collective agreement can ‘live on’ in the individual employee’s contract of employment. In the 1980s, British Gas unilaterally terminated an incentive bonus scheme which had been voluntarily agreed with a union. The company was entitled to give notice to terminate this collective agreement – which it did. However, the terms of the agreement had been incorporated into individual contracts. Lord Justice Kerr, in the Court of Appeal, said: ‘the terms (of a collective agreement) are in this case incorporated into the individual contracts of employment and it is only if and when those terms are varied collectively by agreement that the individual contract of employment will also be varied. If the collective agreement is not varied by agreement but by some unilateral abrogation or withdrawal or unilateral variation to which the other side does not agree, then, it seems to me that the individual contract of employment remains unaffected’ (Robertson and Jackson v British Gas Corporation [1983] IRLR 202).

- The effect on a collective agreement of a business transfer. (This is considered in Chapter 3 in the discussion on the Transfer of Undertakings (Protection of Employment) Regulations 2006).

Workplace rules

The law on these is so varied that it is impossible to provide anything but broad guidelines. The rules are likely to be in an employee’s contract if the employee signs them or if they are posted on notices in the workplace. But, even if they are signed, the rules may not become contractual but merely be lawful and reasonable instructions on how a job is to be carried out. The differences between a contractual rule and a lawful instruction can be described as follows:

- Rules can only be changed with the employee’s consent. By ‘working to rule’ an employee is merely carrying out the contract.
• Instructions can be changed by the employer without consultation or agreement. By disobeying instructions which are lawful and reasonable an employee is breaking the contract.

▶ Custom and practice

In any workplace there are ways of working and, in some cases, terms and conditions which are not written down and have evolved over a period of time. A critical issue can be whether or not these customary ways have become contractual. To be binding, the courts have determined that custom and practice must meet three conditions:

• It must be widely known and almost universally observed by the relevant employees.
• It must be reasonable.
• It must be so certain that the individual employee can know exactly the effect that the custom has on him or her.

The implication of ‘customary’ terms into contracts of employment can be difficult. In Cook and Others v Diageo [2005] EATS/007/04, the issue of whether an employer’s policy on local holidays had achieved the status of a contractual term was considered. The EAT, drawing on the approach in previous case law (Solectron Scotland Ltd v Roper [2004] IRLR 4, EAT) ruled that a custom or established practice regularly applied may become the source of an implied contractual term only when ‘the courts are able to infer . . . that the parties must be taken to have accepted that the practice has crystallised into contractual rights’.

▶ Statute law

This affects the terms of contracts of employment in a number of particular ways:

• Statutory imposition. The direct intervention by legislation into contracts of employment. The principal example was the former Equal Pay Act 1970 which deemed that an equality clause should exist in all such contracts. This is now in Equality Act 2010, s 66.
• General obligations. These are designed to influence the way employers behave in the employment relationship. They cover, for example, the provisions of equality and of health and safety legislation.
• Minimum conditions. These must be met by employers (e.g. in respect of notice to terminate employment; paid annual leave; and maternity and paternity leave). An employer may provide enhancements under the individual’s contract – i.e. terms and conditions better than the statutory minimum.

▶ Implied terms under common law

The discussion above has focused to a large extent on terms and conditions that are either formally in writing or, if not, at least generally recognised by the parties concerned. These implied terms are one source which many employees may not fully appreciate. Yet their importance is considerable. They are drawn from case law over many decades where the courts have implied into contracts of employment terms which make them work effectively and clarify the rights and duties of the parties. In some instances, as we shall see below, these implied terms have been modified by provisions of statute
General duties on employers

To pay wages

Failure to pay wages that are agreed and due to the employee is regarded as a fundamental breach of the contract of employment. An employee may resign and claim constructive dismissal if a grievance does not resolve the issue. Also, under statute law (Employment Rights Act 1996, ss 13–27), the employee (irrespective of length of service) may complain to an employment tribunal about the non-payment.

Not to make unauthorised deductions

An employer may only make deductions if there is legal authority to do so under:

- Act of Parliament: for example, the authorised deduction of income tax, National Insurance contributions and, as appropriate, deduction through Attachment of Earnings Orders ordered by the courts.

- Contract of employment: this might provide for deductions to be made in certain specific circumstances. Examples include fines for disciplinary offences; deductions for cash deficiencies and stock shortages permitted, under the Employment Rights Act 1996, in the special circumstances of retail employment (see Chapter 9).

- Individual agreement: an employee can give agreement for the deduction of, for example, union subscriptions; or to reimburse the employer for overpayment of wages.

To take reasonable care of the employee

This wide-ranging duty encompasses not just physical care of the employee but also exposure to psychiatric harm in employment. The issues under this heading are explored in Chapter 12 on health, safety and welfare. It is also important to note that this implied duty on employers covers the provision of references for ex-employees (see Exhibit 2.6).

Not to breach mutual trust and confidence

This duty concerns the co-operation between the employer and the employee. Arising, over the years, from unfair dismissal cases, it has frequently been stated that an employer should not destroy the ‘mutual trust and confidence’ on which co-operation is built. This duty has been stated in this way: an employer will not, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84, EAT). Examples of breaches of mutual trust and confidence include:

- where an application for transfer had not been dealt with fairly;
- where there was failure to investigate a genuine safety grievance;
EXHIBIT 2.6

References

There is no general duty on an employer to provide a reference for an employee applying for another job. However, it can be expressly stated in a person’s contract that a reference will be provided. Where they are provided, they should comply with guidance under case law.

A duty of care is owed to the ex-employee to provide a reference that is true, accurate and fair (Bartholomew v London Borough of Hackney [1999] IRLR 246, CA). It must not give an unfair or misleading impression when considered in its totality. As a general rule, a reference does not have to provide a full and comprehensive report on all the facts relating to the person in question.

Difficulties may arise in one particular set of circumstances: when an employee resigns under threat of disciplinary action or before that action is complete. Again, case law has asserted that the principle of telling the truth is important. If the ex-employer omits any mention of the disciplinary proceedings, it could be a breach of duty owed to the recipient of the reference. It could make the referee liable for negligent mis-statement. On the other hand, a referee should not make comments about an employee on matters which have not been properly investigated. In terms of natural justice, a proper investigation involves giving the employee a chance to state his or her case. In Cox v Sun Alliance [2001] IRLR 448, the Court of Appeal found that the referee was negligent in relying on unexplored allegations of dishonest conduct attributed to the ex-employee and the communication of these views to Mr Cox’s new employer. (However, see Jackson v Liverpool City Council [2011] EWCA Civ 068)

The burden of proof is on the referee to show that the contents were true. The referee’s defence might be that he or she ‘honestly believed that the contents were true’.

It is also important to note that all strands of equality law extend to the ‘post employment’ situation (see Chapters 5 and 6). The Equality Act 2010 (s 108) covers ‘relationships that have ended’. It prohibits as unlawful any discrimination or harassment which ‘arises out of and is closely connected to a relationship which used to exist between them’ (i.e. between an employer and an employee). Clearly, the provision of references is one of the possible issues which could be discriminatory.

Because references inevitably involve the disclosure of personal data, the Information Commissioner provides relevant guidance on the drafting of references. This covers not just requests by ex-employees but also references given in relation to legal proceedings and financial references. Furthermore, there is guidance on the detail which can be disclosed to the ex-employee requesting the reference (see Employment Practices Data Protection Code 2005, section 2.9) www.ico.gov.uk.

- where there was a false accusation of theft on the basis of flimsy evidence;
- where the right to suspend an employee was exercised unreasonably;
- where a mobility clause was not operated reasonably (see Exhibit 2.7).

The EAT has held (Morrow v Safeway Stores plc [2002] IRLR 9 EAT) that breach of mutual trust and confidence will ‘inevitably’ be a repudiatory breach of the contract of employment and can result in the employee’s resignation and a claim for constructive dismissal (subject to the qualifying length of service). The Court of Appeal (in Buckland v Bournemouth University [2010] Higher Education Corp EWCA Civ 121) ruled that the test for a constructive dismissal claim in such circumstances is whether there has been a fundamental breach of contract and not whether the employer behaved ‘unreasonably’. Furthermore, the employer cannot ‘cure’ or remedy the breach by attempting to correct its own wrongdoing.
General duties on employees

- To co-operate with their employer

Under case law, this has been construed to mean helping to promote the employer’s business interests by working according to the terms of the contract. However, in working to contract, employees must not wilfully disrupt the employer’s business.

- To obey lawful and reasonable instructions

Any instruction to an employee must be both lawful and reasonable. Lawfulness means that an instruction must not, for example, breach equality law; or require an employee to exceed working time restrictions which are applicable to that individual. Reasonableness will be judged in the circumstances. However, factors which might be taken into account would be whether the particular employer is able (in terms of knowledge and skill) to obey the instruction and whether the instruction is consistent with the ‘status’ of the work he or she is employed to do. (See the discussion on contract variation in Chapter 3 and in particular the case of Cresswell and Others v Board of Inland Revenue [1984] IRLR 190, HC.)

- To be trustworthy

This duty is complementary to the employer’s duty of mutual trust and confidence. The implied duty of fidelity generally ends when the contract ends. Breaches of trust by an employee are invariably regarded as serious and are likely to lead to dismissal and, in
certain circumstances, criminal proceedings. Depending on the employer’s business interests, this implied term might be elaborated into express terms setting out clear specific duties on employees as seen in some of the five aspects following:

- **A general duty to be honest.** Acts of deception, theft, embezzlement, forgery, etc. are breaches of trust and can lead to instant dismissal. They may also result in criminal proceedings brought by the Crown Prosecution Service in the Crown Court or in magistrates’ courts.

- **An obligation not to wilfully neglect a contractual duty.** The Court of Appeal found that the failure of two company directors to report evidence of serious fraud was a ‘wilful neglect of duty’ and so a fundamental breach of their contracts of employment. The employer was entitled to dismiss them (*Dunn and Another v AAH Ltd* [2010] IRLR 709).

- **Obligation not to compete with the employer.** This obligation can be included in a restrictive covenant (as an express term in a contract of employment). Such a term restricts the work undertaken by a former employee in three possible ways:
  - **non-competition:** limiting the ex-employee from taking work with a competitor organisation;
  - **non-solicitation:** prohibiting the making of contact with clients and customers of the ex-employer;
  - **non-dealing:** not engaging in business activities with such clients and customers. The employer must show that it has a legitimate business interest to protect. The ‘reasonableness’ of restrictive covenants is an issue that can be determined by the courts. For example, the High Court ruled that the prohibition by an estate agency on a former employee from working in a specified area for two years was unreasonable and unenforceable. No other firm of estate agents in the area imposed a non-competition covenant for longer than six months. There was no evidence to suggest that the employer’s business was so different to justify a longer period (*Barry Allsuch and Co v Harris* [2001] Industrial Relations Law Bulletin 680, HC) (see also Exhibit 2.8).

- **Obligation not to disclose confidential information.** This can bind both current and, if it exists as an express term, ex-employees. Such express obligations are likely to co-exist with restrictive covenants. Breach of the duty of confidentiality is likely to be regarded as gross misconduct resulting in instant dismissal. However, there may be special circumstances in which an employee might believe that unauthorised disclosure is in the public interest (see Whistleblowing below).

- **Obligation not to benefit from work undertaken for the employer.** This relates to work covered by legislation on patents, intellectual property right and copyright. Subject to this limitation, an employer cannot prevent a former employee from using the general knowledge and skill that has been acquired in the course of employment.

**Duty to take reasonable care**

This duty requires that employees should take care of themselves and their fellow-workers and co-operate with the employer and other agencies in complying with health and safety requirements. It is supplemented by the provisions of the Health and Safety at Work etc. Act 1974 (s 7) and its associated regulations (see also Chapter 12).
Enforcing a restrictive covenant

*Standard Life Health Care Ltd v Gorman [2010] IRLR 233, CA*

Mr Gorman resigned from Standard Life without notice to go and work for a competitor. This was a breach of the implied term of fidelity under his contract. The company sought to hold him to the full three month period of his notice. The High Court granted an injunction preventing him from working for any private health insurance business other than Standard Life. It also upheld the company's right to suspend him and not provide him with work. The Court of Appeal ruled that, where the employee had seriously breached his or her contract, the employer could require the employee to continue the contract. In the circumstances, the employer was not obliged to provide him with work. In this case, the consequences for Mr Gorman were significant because he was paid on a commission only basis.

**Probationary periods and contracts**

Employers, usually, have a probationary period for new employees (and sometimes for promoted employees). As far as new employees are concerned, there is no legal requirement covering the length of this. It may, depending on the nature of the post, be reasonable to have a period of any time up to 12 months.

The critical problem for employers is how they deal with the termination of employment of an individual who ‘fails’ his or her probationary period. The following are factors that need to be taken into account:

- Does the contract of employment offered at the start of employment indicate that it is conditional on satisfactory completion of the probationary period and may be terminated at the end of this period?

- A probationary period for a specific time period does not guarantee employment to that date. The contract might be terminated earlier with due notice from the employer (*Dalgleish v Kew House Farm Ltd [1982] IRLR 251, CA; Fosca Services (UK) Ltd v Birkett [1996] IRLR 325, EAT*).

- Is the employee given notice to terminate at the end of the probationary period? It is uncertain, in law, whether notice needs to be given. So, best practice suggests that it is given or, alternatively, that pay in lieu of notice is provided.

- Any termination of the contract of employment is, from the start of employment, potentially affected by equality law (Equality Act 2010, s 39(2)(c)). This can result in employment tribunal claims, irrespective of length of service, alleging unfair treatment. An employer, therefore, needs to be clear on the reasons for dismissal after a probationary period. Whether or not the employee qualifies for making an unfair dismissal claim, it is advisable that these reasons should relate to those for fair dismissal among which are ‘capability’ and ‘conduct’ (Employment Rights Act 1996, s 98).
Is the employee entitled to use a contractual disciplinary and dismissal procedure? If so, failure to allow a probationer to do so could be a breach of contract and might lead to a wrongful dismissal claim, which can be made irrespective of length of service.

Has the employee, during the course of the probationary period, been given appropriate support and advice relating to capability and conduct?

An employee whose probationary period is longer than 12 months will accrue employment rights.

As far as promoted employees who are on a probationary period in a new post are concerned, equality law and unfair dismissal legislation would need to be considered. In addition, if unsuitability is demonstrated in the new post, then the employer would need to consider the steps to be taken under the contract. For example, would a return to a lower position be consistent with the original offer of promotion or would there be a breach of mutual trust and confidence?

Whistleblowing

There may be circumstances when an employee believes it is ‘in the public interest’ to disclose information and, potentially, breach the duty of confidentiality (see Exhibits 2.9 and 2.10).

Legislation was enacted in 1998 on public interest disclosures. This is now in Employment Rights Act 1996, Part IVA. It is designed to protect workers who make certain disclosures from both detrimental treatment and unfair dismissal by their employer. The legislation defines ‘qualifying disclosures’ and ‘protected disclosures’.

Qualifying disclosure

This is a disclosure of information which a worker reasonably believes tends to show some malpractice – whether this is currently happening, has happened or is likely to happen in the future. Specifically, the legislation refers to:

- a criminal offence;
- the breach of a legal obligation;
- a miscarriage of justice;
- a danger to the health and safety of any individual;
- damage to the environment;
- deliberate covering up of information tending to show any of the above matters.

It does not matter that after investigation the worker’s belief is found to be mistaken. However, the worker must show that, at the time of the disclosure, it was reasonable to hold the particular belief; that the information and allegation was substantially true; and that the worker acted in good faith and did not act for personal gain. (Disclosures in breach of the Official Secrets Act 1989 are excluded.) The EAT has ruled, however, that the worker must produce ‘facts’. An allegation alone (in this case in a solicitor’s letter) was not sufficient (Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, EAT). This is, arguably, a restrictive interpretation of the legislation.
A whistleblower: dismissal

**ALM Medical Services Ltd v Bladon [2002] IRLR 807, CA**

**Complainant.** Bryan Bladon had 20 years’ experience as a nurse. In June 1999 he joined ALM at one of its private nursing homes. From mid-August to September 1999, when the matron was on sick leave, he temporarily ‘acted up’.

**His concerns.** On 19 August he phoned Mr Sinclair, PA to the Managing Director, Dr Matta. He was concerned about some matters relating to the management of the home and the welfare and care of patients. These included poor drug records, staffing levels, patient neglect and a wound to a resident. He was asked to put his concerns in writing which he did by fax. (This was a ‘protected disclosure’.) Sinclair said he would deal with the issue on his return from holiday. By 31 August, Bladon saw further deterioration in patient care. He decided to take further action and phoned the Social Services Inspectorate (SSI) (although this was not a ‘prescribed person’).

**The inspection.** On 1 September, an inspection was carried out by the SSI and an inspector from the health authority’s nursing home inspectorate. On 8 September, the inspectors wrote to Dr Matta saying that four of the six concerns raised by Bladon were ‘substantiated in whole or in part’. These should be investigated and addressed by the company.

**Disciplinary action.** On 9 September, Bladon was summoned to a disciplinary hearing without prior warning about what was to be discussed. He was given a written warning on 10 September by Matta. It was claimed in the letter that Bladon’s own alleged lack of professional care was partly responsible for problems; and that they were motivated by poor relations he had with colleagues. He was denied any internal right of appeal.

**Dismissal.** On 16 September Bladon was summarily dismissed. It was said that in carrying out his professional duties, he fell below the standards expected of him.

**ET complaint.** Bladon complained that he had been subject to a detriment (the written disciplinary warning), and unfairly dismissed because he had made ‘protected disclosures’.

**Tribunal’s consideration.** It was appropriate for Bladon to raise his concerns with Sinclair. Bladon had a ‘reasonable belief’ that the information disclosed was covered by the ‘qualifying disclosure’ provisions. The disclosure was made in good faith because of his concern about his professional responsibilities and, in particular, about patient welfare. His disclosure to the inspectorate was reasonable since this was the appropriate body. It was reasonable for Bladon to raise the issue with the inspectors and not await Sinclair’s return. Furthermore, in the absence of a whistleblowing policy and of any indication that the company would investigate his concerns, it was reasonable for him to go to the inspectorate. The tribunal accepted the employer (in particular, Dr Matta) had ‘acted in a demeaning, insensitive, unprofessional, unreasonable and arrogant way’ that left Bladon feeling ‘belittled, professionally slurred, isolated and unable to respond in an effective way’. The employer had ‘manufactured’ or ‘fabricated’ a disciplinary situation; failed to follow its own procedures; and made no attempt to investigate Bladon’s concerns. The ET only permitted evidence from the Managing Director and not from three other ALM witnesses.

**Tribunal’s decision.** It ruled that Bladon was subject to a detriment (both the written warning and the refusal of a right of appeal); and that he was dismissed unfairly.

**Financial award.** Bladon was awarded £5,500 compensation for net losses to the date of the hearing; £7,500 for future losses; and £10,000 aggravated damages (taking account also of injury to feelings) for the detrimental treatment. Total compensation: £23,000.

**Court of Appeal.** This ruled that ALM was entitled to call evidence, particularly on the issue of ‘protected disclosures’. This evidence was also relevant to the reasonable belief and good faith of Mr Bladon. It allowed the company’s appeal and remitted the case for a tribunal rehearing.
EXHIBIT 2.10

Whistleblowers: detrimental treatment

_Fecitt and Others v NHS Manchester [2011] IRLR 111, EAT_

**Facts.** Three registered nurses, Ms Fecitt (a clinical co-ordinator), Ms Woodcock and Ms Hughes (a ‘bank’ nurse) were employed by NHS Manchester at the Wythenshaw Walk-in Health Centre. In March 2008 they raised concerns about a general nurse, Mr Swift, who had exaggerated his qualifications. The employer accepted these concerns as a ‘protected disclosure’. When Swift apologised, the employer decided that no further action would be taken. This did not satisfy the three women, who decided to pursue the matter. The result was a deterioration in staff relations. The three nurses raised grievances about their treatment by other staff; Swift complained of bullying and harassment; and Ms Fecitt made a formal complaint under the employer’s whistleblowing policy.

**Detriments.** Ms Fecitt was removed from her managerial responsibilities. She and Ms Woodcock were redeployed away from the Walk-in Centre. Ms Hughes, a ‘bank’ nurse, was not given further work.

**EAT ruling.** It overturned the employment tribunal’s decision on the grounds that it had taken the wrong approach to ‘causation’. The EAT found in favour of the claimants and remitted their cases back to an employment tribunal for further consideration.

**‘Causation’ and liability.** The EAT ruled that where a worker has made a ‘protected disclosure’ and has subsequently suffered detrimental treatment, it is for the employer to prove that its actions (or failure to act) was ‘in no sense whatever’ on the ground of the protected disclosure. The employer was vicariously liable for the treatment by their work colleagues of the three complainants. This ruling means that the approach adopted in whistleblowing cases is consistent with that in discrimination cases. The approach to the burden of proof in _Igen Ltd v Wong [2005] IRLR 258, CA_ is applicable (see Chapter 5). So, the employer has the burden of proving, on the balance of probabilities, that the relevant act or failure to act was _not_ done on the ground that the worker made a protected disclosure.

**Protected disclosure**

A qualifying disclosure will be a protected disclosure where it is made either directly to the employer or through internal procedures authorised by the employer; and also if it is made to a legal adviser in the course of obtaining legal advice. Furthermore, disclosure to a person prescribed by the Secretary of State may be ‘protected’. ‘Prescribed persons’ include, as appropriate, the Health and Safety Executive, the Audit Commission for England and Wales, HM Revenue and Customs, the Serious Fraud Office, the Financial Services Agency.

The issue of the extent of a ‘protected disclosure’ was considered in _Hibbins v Hesters Way Neighbourhood Project [2009] IRLR 198, EAT_. In this case the issue was whether or not a disclosure that does not reveal any ‘wrongdoing’ or ‘failure’ by an employer (or a person for whom the employer is responsible) was ‘protected’ under the Employment Rights Act 1996. The EAT ruled that a teacher’s disclosure to the police and also to her manager that a student (i.e. a third party) was a suspect in a rape case was a ‘protected disclosure’.
Detrimental treatment and dismissal

Protection from suffering detriments (in respect of a wide range of statutory rights) is covered by the Employment Rights Act 1996, Part V. Case law originally interpreted the law as covering detriments during employment. However, the Court of Appeal (Woodward v Abbey National plc [2006] EWCA Civ 822) has ruled, in a whistleblowing case, that an employer was liable for a detriment imposed after the termination of the employment contract. Following an earlier House of Lords ruling (Rhys-Harper v Relaxion Group plc and other appeals [2003] IRLR 484), Lord Justice Ward stated that ‘limiting such protection against victimisation to acts committed during the existence of the employment contract and excluding acts connected with the wider “employment relationship” but committed after termination of the contract was absurd, irrational and arbitrary’. The decision in this case has much wider significance. The rights not to suffer a detriment (in ERA 1996, Part V) cover, among others, health and safety, maternity, paternity, parental and adoption leave, working time and flexible working and employee representatives. The principle established in the Woodward case affects all categories. An employer will be liable for post-employment retaliation – for example, refusal to provide a reference. (Similar protection is provided under equality law.)

If a worker resigns because of detrimental treatment by the employer and then claims constructive dismissal, the cut-off date for calculating compensation is the date of his or her dismissal and not the date at which the employer’s conduct first amounted to a repudiation of the contract (Melia v Magna Kansei Ltd [2006] IRLR 117).

In El-Megrisi v Azad University (IR) in Oxford [2009] UKEAT 0448/08, the EAT ruled on the principal reason for dismissal relating to whistleblowing. The complainant raised concerns with her employer about the immigration status of staff and students and also other alleged irregularities. She was dismissed shortly afterwards. She claimed ‘ordinary’ unfair dismissal and also a detriment and dismissal for making a ‘protected disclosure’ contrary to Employment Rights Act.

On the question of the dismissal, the EAT ruled that the employment tribunal had wrongly focused only on her most recent disclosure when it held that, because of previous difficulties with her employer, this disclosure was not the principal reason for her dismissal. The EAT stated that the tribunal had failed to take into account that the history of difficulties had consisted of other protected disclosures. These were the principal reason for her dismissal.

Employment tribunal applications

The public interest disclosure legislation covers a wide group of ‘workers’. Complaints alleging unfair dismissal or detrimental treatment may be made to an employment tribunal irrespective of length of service. The tribunal will consider:

- the identity of the person to whom the disclosure was made (e.g. an appropriate professional body);
- the seriousness of the relevant failure;
- whether the relevant failure is continuing or is likely to occur again;
● whether the disclosure breaches the employer’s duty of confidentiality to others (e.g. clients);
● what action has been taken (or might reasonably be expected to have been taken) if a disclosure was made previously to the employer or a prescribed person;
● whether the worker complied with any internal procedures approved by the employer if a disclosure was made previously to the employer.

The Department for Business, Innovation and Skills ([www.bis.gov.uk/employment](http://www.bis.gov.uk/employment)) has confirmed that, for claims received after 6 April 2010, employment tribunals can pass to a prescribed regulator allegations (made in a claim) that the claimant has suffered a detriment or has been dismissed. It will be effected by a complainant ticking the appropriate box on the ET1 claim form to indicate consent. The aim of the process is to encourage claimants who may not have considered passing information to the relevant regulator to consider doing so.

In *BP plc v Elstone and Another* [2010] IRLR 558, EAT the Employment Appeal Tribunal, adopting a purposive approach in its interpretation of the legislation, ruled that a worker was entitled to bring a complaint under the whistleblowing provisions of the Employment Rights Act 1996 in respect of a detriment that he allegedly suffered in his current employment because of a protected disclosure that he had made while in previous employment. Mr Elstone, while employed by Petrotechnics, had made protected disclosures to two senior BP employees because of concerns about health and safety issues. (Petrotechnics evaluated safety processes for BP.) Petrotechnics dismissed him for breach of confidentiality which was seen as gross misconduct. Subsequently, he was to be employed as a consultant by BP. However, after Petrotechnics informed BP that he had disclosed confidential information, BP chose not to engage him. He claimed, at employment tribunal, that he had suffered a detriment from BP.

## Breach of contract

A contract of employment can be breached either by the employer or by the employee.

- **By employee.** If the employee breaches his or her contract, the employer will usually initiate disciplinary action (see Chapter 8). Depending on whether the breach is regarded as either minor or persistent minor misconduct or as gross misconduct, the employer will either dismiss the employee or impose a disciplinary penalty short of dismissal (usually, some form of warning).

- **By employer.** Breach of contract by an employer may be relatively minor or fundamental. A minor breach is likely to result in some form of grievance which may be resolved through the relevant grievance procedure. A fundamental breach is much more serious and can have a number of important consequences for the both the employee and the employer (see the following section).

### What is a fundamental or repudiatory breach of contract?

It is behaviour by an employer which is so serious that effectively ‘tears up’ the contract. Lord Denning, in the Court of Appeal, said ‘if the employer is guilty of conduct which
is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance . . . [T]he conduct must . . . be sufficiently serious to entitle him to leave at once' (Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27). Examples can include not paying wages that are due, providing hazardous working conditions, failing to tackle harassment or other discriminatory treatment. It is likely that such conduct would be a breach of the implied mutual trust and confidence and also, possibly, a breach of the contractual duty to take reasonable care of the employee.

Usually, it is expected that an employee will initially raise a grievance (see the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009). However, the employee must not stay too long after the unacceptable conduct by the employer because he or she might be thought by the tribunal or court to have waived the right to terminate. Of course, in some cases the behaviour may be so unacceptable that the employee might resign immediately without using the grievance procedure.

When an employee terminates the contract of employment in these circumstances, this forced resignation is regarded, in law, as equivalent to a ‘dismissal’. The Employment Rights Act (s 95(1)(c)) states that an employee is dismissed by his or her employer if ‘the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct’. In everyday speech (but not in law) this is known as ‘constructive dismissal’.

Termination of a contract of employment

This issue is considered in detail in Chapter 8. Here, it is sufficient to outline briefly those circumstances in which a contract might end.

- **Notice to terminate.** Notice can be given by either the employer or the employee in accordance with the terms of the contract. The notice given by the employer should comply with the statutory minimum periods of notice (ERA 1996, s 86). If the contract is silent about notice, then the employee should be guided by the statutory minima.

- **Summary dismissal.** This refers to the instant termination of the contract. It can arise where there is gross misconduct by an employee (e.g. violence or theft) and there has been appropriate investigation and a disciplinary hearing.

- **Wrongful dismissal.** This is where the contract is terminated in breach of the contractual terms (e.g. in breach of the implied term of mutual trust and confidence, or where insufficient notice is given to terminate the contract). The restrictions on making unfair dismissal claims do not apply.

- **Constructive dismissal.** This arises in circumstances where an employee resigns because of what is perceived to be a repudiatory breach of the contract of employment by the employer (see above).

- **End of a fixed-term contract.** This refers to those contracts that have either a specific termination date or which end on the completion of a particular task.
Frustration of contract. This is a complex area. Much will depend on the specific circumstances. It involves termination of the contract as a result of some unforeseen event which makes it difficult for the contract to be carried out. Frustration would cover death, long-term ill-health or imprisonment (particularly if the sentence is lengthy).

Subsistence of a contract

It is important to remember that there are certain circumstances when a contract of employment can subsist (i.e. it remains in existence but no work is carried out under it). An example of such circumstances arises in respect of maternity and paternity leave (see Chapter 11). There may be other circumstances where a person is absent from work by agreement with the employer. In all these circumstances, the contract remains in existence and, even if there is no remuneration paid, certain specified terms – express and or implied – are enforceable (e.g. confidentiality, restrictive covenants, mutual trust and confidence).

Employment protection for ‘atypical’ workers

In Exhibit 2.1 above, various categories of ‘atypical’ workers were identified. In this section, we will consider the employment protection afforded to these categories. Some will have to establish ‘employee’ status before they can claim employment rights; whilst other rights are extended to the wide category of ‘workers’ (see Exhibit 2.11). A significant driver of employment protection for ‘atypical’ workers has been the European Union as can be seen from the outline and discussion below.

Part-time workers

There have been three broad developments in law which have begun to improve protection and rights for part-time workers:

- Access to statutory rights. The European Court of Justice ruled in 1994, in respect of statutory employment rights, that it was indirect sex discrimination for Britain to have differential qualifying rights for access for full-timers and for part-timers to unfair dismissal compensation and redundancy pay.
- Requirement to work full time. The requirement to work full time may be indirect sex discrimination which has to be objectively justified. Claims have been made by women returning from maternity leave to vary the scheduling and the number of working hours.
- Comparable treatment with full-time workers. The European Union adopted a directive in 1997 implementing a social partners’ Framework Agreement on Part-time Work. This deals with the contractual rights of part-timers. It concerns any part-timers who have a contract of employment or are in an employment relationship. Part-timers are workers whose normal hours of work, averaged over a period of up to a year, are less than the normal hours of comparable full-timers.
EXHIBIT 2.11

Access to certain key statutory rights

‘Employee’ status (i.e. workers who have contracts of employment)

- **Contractual information**: must be provided within eight weeks of employment starting (ERA 1996, s 1).
- **Minimum contractual notice**: (ERA 1996, s 86).
- **Protection against unfair dismissal**:
  - qualified by length of service (ERA 1996, ss 94, 108, 109);
  - restricted right when dismissal relates to industrial action (TULRCA 1992, ss 237–9).
- **Written reasons for dismissal**:
  - one year’s continuous service (ERA 1996, s 92);
  - no qualifying service if employee pregnant or on maternity leave.
- **Maternity leave**: an unqualified right (ERA ss 71–8).
- **Shop and betting shop workers: protection in relation to Sunday working**: irrespective of age or length of service (ERA ss 36–43, 45).
- **Right to parental leave**: qualified by length of service.
- **Right to request flexible working** (ERA 1996, ss 80F–80I):
  - qualified by length of service;
  - qualifying conditions re child or dependant.
- **Protection for fixed-term employees against discrimination** (Fixed-term Employees Regulations 2002):
  - irrespective of age or length of service.
- **Transfers of undertakings: dismissal/substantial detrimental change to contracts** (TUPE 2006, reg 4):
  - qualified by length of service.

‘Workers’ (i.e. those with contracts of employment and those on some ‘other contract’ to work personally)

- **Protection against discriminatory treatment because of a protected characteristic**:
  - protected characteristics (Equality Act 2010, s 4);
  - in relation to ‘employment’: employees and applicants (EA 2010, s 39);
  - contract workers (EA 2010, s 41);
  - post employment (EA 2010, s 108).
- **Right to equal pay**: this covers ‘the ordinary basic minimum wage or salary and any other consideration whether in cash or in kind which the worker receives directly or indirectly in respect of his employment from his employer’ (Article 141, Treaty of Rome). (EA 2010, Chapter 9)
- **Protection from deduction from wages**: available irrespective of length of service (ERA 1996).
- **Working Time Regulations 1998**:
  - maximum working week; paid annual leave; rest entitlements and health requirements;
  - irrespective of length of service and hours worked.
- **Statutory national minimum wage**: minima for workers of 16 years and above (NMWA 1998).
- **‘Whistleblowing’ rights**: protects from detrimental treatment/dismissal for making protected disclosure (ERA 1996).
Chapter 2 Regulating the employment relationship

- **Protection for part-time workers**: against discrimination (Part-time Workers Regulations 2000).
- **Protection for agency workers**: the right to equal treatment is available to agency workers after 12 weeks’ employment (Agency Workers Regulations 2010).
- **Protection against ‘blacklisting’ for participation in trade union activities**: (Employment Relations Act 1999 (Blacklists) Regulations 2010).
- **Statutory right to be accompanied**: applicable in grievances and disciplinary action (Employment Relations Act 1999, 10); explicitly covers agency workers and homeworkers.

The directive outlines certain general principles to be transposed into national law:

- Part-timers may not be treated less favourably than full-timers.
- Member states should in consultation with the social partners work to remove obstacles to part-time work.
- Employers, as far as possible, should make opportunities for part-time work at all levels; and should give consideration to requests from workers for changes from part-time to full-time work and vice versa.
- Refusal to transfer from full-time to part-time work (or vice versa) is not in itself a valid reason for dismissal.

The directive has been partially transposed into UK law through the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (which were amended in 2002) (see Exhibit 2.12).

**Fixed-term contract workers**

There are three legal issues involving these workers:

- **Continuity of service.** This is a basic and, in many cases, a vitally important issue for those workers on successive fixed-term contracts. It may be possible to ‘stitch together’ such contracts to establish continuity of service. In this context, it is also important to consider the significance of temporary cessations of work and the significance of breaks between contracts (see earlier discussion and also *Ford v Warwickshire County Council* [1983] IRLR 126, HL).
- **Statutory employment rights.** These accrue to fixed-term contract workers depending on whether they can, under the legal tests discussed earlier, be defined as an ‘employee’ or as a ‘worker’ on some other contract to work personally.
- **Comparable treatment with permanent workers.** The European Union adopted the Fixed-term Workers Directive 1999 implementing a social partners’ framework agreement. This is to be transposed into the law of member states. The purposes of the framework agreement were stated as follows:
  - to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;
EXHIBIT 2.12

Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

Who is a part-time worker? This is defined by exemption – as a person who is not a full-time worker in a particular workplace. Also, the regulations cover ‘workers’ and not just ‘employees’.

Who is the comparator? The part-time worker and the full-time worker comparator are to be employed at the same time, by the same employer, at the same establishment, under the same type of contract, and be engaged in the same or broadly similar work (taking into account, as appropriate, whether they have a similar level of qualification, skills and experience) (reg 2(4)). A comparison can be made with either a full-time worker on a permanent contract; or one on a fixed-term contract. If there is no comparator at the same establishment, a person who works at a different establishment of that employer can be chosen. It is not possible to have a hypothetical comparator.

The principle of equal treatment. In respect of the terms of the contract, a part-timer has the right not to be treated by the employer less favourably than a full-time worker is treated. This right applies only if the less favourable treatment ‘is on the ground that the worker is a part-time worker’ and that the discriminatory treatment is ‘not justified on objective grounds’. To test whether there has been less favourable treatment, the pro rata principle shall apply unless it is ‘inappropriate’ (reg 5(3)). The EAT has ruled that the less favourable treatment need not be solely on the ground of part-time status. But this status should be the effective and predominant cause of the treatment (Carl v University of Sheffield [2009] IRLR 616).

The regulations also prohibit a part-timer being subject to any ‘detriment by any act, or deliberate failure to act, of the employer’ (e.g. denial of promotion opportunities) (reg 5(1)).

Objective justification. Discriminatory treatment can only be justified if it can be shown that the less favourable treatment is necessary to achieve a legitimate objective (e.g. a genuine business objective) and is an appropriate way of achieving that objective.

Rate of pay. A part-time worker must not receive a lower basic rate of pay than a comparable full-time worker. This protection also covers special rates of pay (e.g. bonuses, shift allowances and unsocial hours and weekend payments).

Overtime. Under current case law, part-timers do not have an automatic right to overtime payments when they work beyond their normal hours. However, once a part-timer exceeds the normal hours of a full-timer, the part-timer has a legal right to the applicable overtime payments (Stadt Lengerich v Helmig [1995] IRLR 216, ECJ).

Contractual sick and maternity pay. There must be no less favourable treatment in calculating rates of pay; the qualifying length of service for the pay; and the length of time for which the payment is received. The benefits must be provided pro rata unless the differential treatment is objectively justified.

Other contractual benefits. A part-timer must not be treated less favourably in terms of benefits such as health insurance, company cars, subsidised mortgages and staff discounts.

Conditions of access. There should be no discrimination over access to an occupational health scheme, a profit-sharing scheme or a share option scheme unless it is objectively justified.
**Leave entitlements.** Part-timers are entitled to statutory leave entitlements. Where an employer provides enhanced arrangements under contractual terms, then, part-timers should have the same entitlements as full-timers – on a *pro rata* basis.

**Access to training.** Part-time workers should not be excluded from training. Training provision should be at convenient times for the majority of staff including part-timers.

**Redundancy.** Selection criteria and different treatment of part-timers must be justified objectively.

**Conversion to part-time status.** This is not a right. The employer must consider requests. A full-time worker who converts by reducing working hours is entitled to be treated no less favourably than he or she was treated in terms and conditions of employment; or being subject to a detriment (reg 3).

**Statement of reasons for treatment.** A worker who believes he or she has been discriminated against may ask the employer in writing for ‘a written statement giving particulars of the reasons for the treatment’ (reg 6). If there is a case for objective justification, this should be stated. This statement is admissible at employment tribunal. A tribunal may draw ‘any inference that it considers just and equitable, including an inference that the employer has infringed the right in question’ if the employer has ‘deliberately and without written excuse’ not provided such a statement; or considers the statement ‘evasive or equivocal’ (reg 6(3)).

**Unfair dismissal and victimisation.** Dismissal or selection for redundancy is automatically unfair if the reason or principal reason concerns the exercise of rights under the regulations. A worker may complain to an employment tribunal; and also in relation to victimisation.

**Employment tribunal application.** A worker may complain within three months of either the date of the alleged discriminatory action; or the last in a series of discriminatory actions. It is for the employer to identify the ground for the less favourable treatment or detriment (reg 8(6)).

**Liability.** Reflecting the provisions of other discrimination law, an employer is vicariously liable for the behaviour of managers, supervisors and other workers ‘in the course of employment’ whether or not the behaviour was with the employer’s knowledge and approval (reg 11(1)). An employer’s defence is that it ‘took such steps as were reasonably practicable’ to prevent the discrimination (reg 11(3)).

**Remedies.** If an employment tribunal finds a complaint to be well-founded, it is required, as it considers ‘just and equitable’ (reg 8):

- to make a declaration of the rights of the complainant and the employer;
- to order the employer to pay compensation to the worker. A two-year limitation on remedies in relation to an occupational pension was ruled by the House of Lords to be incompatible with European law and was removed in 2002 (Preston v Wolverhampton Healthcare Trust (No. 2) [2001] ICR 217);
- to recommend that, within a specified period, the employer takes action, which appears to the tribunal to be reasonable in the circumstances of the case, to deal with the discrimination. Failure to comply with the recommendation may result in increased compensation.

- to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

The directive has been partially transposed into UK law through the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (see Exhibit 2.13).
Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002

**Who is covered?** The regulations apply to ‘employees’ (whose status will have to be determined under the common law tests). The directive, however, applies to ‘workers’.

**The principle of equal treatment.** A fixed-term employee should not be treated less favourably, in respect of terms and conditions, than a ‘permanent’ employee on the grounds of being fixed-term (reg 3). Also, the regulations prohibit the fixed-term employee, because they are fixed-term, being subject to any ‘detriment by any act or deliberate failure to act of the employer’ (reg 3(1)(b)).

**Objective justification.** Less favourable treatment may be objectively justified. Justification depends on the circumstances of the case. The regulations provide that discrimination in relation to a particular contractual term will be justified where the fixed-term employee’s overall package of terms and conditions is not less favourable than the comparable permanent employee’s (reg 4) (see [Manchester College v Cocliff](#) UKEAT/0035/10 for guidance on the approach to be taken).

**Which contracts are covered?** A fixed-term contract means a contract of employment which is one of the following (reg 1(2)):

- one which is made for a specific term which is fixed in advance (e.g. three months, a year); or
- one which ends automatically on the completion of a particular task or upon the occurrence or non-occurrence of any specific event. Examples include those contracts covering maternity leave breaks; peak demands for a service or production; or tasks covering defined projects like setting up a database.

**Who is the comparator?** This is a ‘permanent’ employee – i.e. someone on an open-ended contract of employment (reg 2). He or she should be employed by the same employer at the same establishment doing the same or broadly similar work. Where relevant the comparator should have similar skills and qualifications to the fixed-term employee. Where there is no comparator in the same establishment, then a comparison can be made with a similar permanent employee working for the same employer in a different establishment.

**Successive fixed-term contracts.** The use of successive fixed-term contracts is limited to four years, unless further fixed-term contracts can be justified on objective grounds. It is possible for employers and employees to increase or decrease this period through a collective agreement or, in non-union organisations, through a workforce agreement (reg 8 and sch 1).

There is no limit on the duration of the first fixed-term contract. However, if this contract is of four years or more and is renewed, it will be treated from then as ‘permanent’ unless the use of a fixed-term contract is objectively justified.

Furthermore, if a fixed-term contract is renewed after the four-year period, it will be treated as a contract for an indefinite period unless the use of a fixed-term contract is objectively justified. A fixed-term employee has the right to ask the employer for a written statement confirming that their contract is permanent or setting out objective reasons for the use of a fixed-term contract beyond the four-year period. The employer must provide this statement within 21 days (reg 8).

**Written statement of reasons.** A fixed-term employee has a right to ask their employer for a written statement setting out the reasons for the discriminatory treatment that they believe has occurred. The employer must provide this within 21 days of the request (reg 5). The statement is admissible in
employment tribunal proceedings. A tribunal may draw ‘any inference that it considers just and equitable, including an inference that the employer has infringed the right in question’ (reg 5(3)) if the employer has ‘deliberately and without written excuse’ not provided such a statement or considers that ‘the written statement is evasive or equivocal’.

Redundancy waiver. If included in a fixed-term contract agreed, extended or renewed after 1 October 2002 it will be invalid.

Protection against unfair dismissal and victimisation. Dismissal or selection for redundancy is automatically unfair if the reason or principal reason concerns the exercise of rights under the regulations. An employee may complain to an employment tribunal irrespective of age or length of service. Similar protection is provided against victimisation (reg 6).

Termination of a fixed-term contract. From 1 October 2002, the end of a ‘task’ contract that expires when a specific task has been completed or a specific event does or does not happen will be a dismissal in law. Likewise, the non-renewal of a fixed-term contract concluded for a specific period of time will be a dismissal. Employees of one year or more have the right to a written statement of reasons for dismissal and the right not to be unfairly dismissed. If the contract lasts for two years or more and it is not renewed because of redundancy, the employee has the right to statutory redundancy pay.

Application to employment tribunal. A worker may complain to an employment tribunal about less favourable treatment or victimisation (reg 7). The complaint should be made within three months of either the date of the action or of the last in a series of discriminatory actions. Where an employee complains, it is for the employer to identify the ground for the less favourable treatment or detriment (reg 7(6)).

Liability. An employer is vicariously liable for the behaviour of managers, supervisors and other workers ‘in the course of employment’ whether or not the employer knew or approved the behaviour (reg 12(1)). The defence is that he or she ‘took such steps as were reasonably practicable’ to prevent discrimination (reg 12(3)).

Remedies. If an employment tribunal finds a complaint to be well-founded, it is required, as it considers ‘just and equitable’ (reg 7):

● to make a declaration of the rights of the complainant and the employer;
● to order the employer to pay compensation to the worker which the tribunal considers to be just and equitable;
● to recommend that, within a specified period, the employer takes action to deal with the discrimination against the complainant which appears to the tribunal to be reasonable in the circumstances of the case. Failure to comply with the recommendation may result in increased compensation.

Statutory sick pay. Employees on contract of less than three months are entitled to statutory sick pay from October 2008.

Casual and zero-hours contract workers

The role of casual workers is of growing importance in particular sectors (e.g. as nurses, supply teachers or in hotels and catering). Clearly, they have an employment relationship. The question is, what kind of relationship? What is the employment status? Is it one that confers statutory rights?
There is no specific statutory framework governing the position of casual workers. However, as noted below, casual workers may be able to claim under the Working Time Regulations 1998 and the National Minimum Wage Act 1998. Furthermore, they are protected under the Equality Act 2010 (see Chapter 5) and under the Health and Safety at Work Act 1974 (see Chapter 12).

Case law and casual workers

Various legal issues have arisen in case law over the past 20 years or so:

- Whether there is explicit ‘mutuality of obligation’?
- Whether the person can be defined, under common law tests as an ‘employee’ in law?
- Whether there is a ‘global contract’ covering all assignments of work?
- Whether they have sufficient continuous service as an ‘employee’ to claim unfair dismissal?
- What counts as ‘working time’?
- Whether they are eligible for the national minimum wage?

‘Regular casuals’ in catering

The case of O’Kelly v Trust House Forte plc [1983] IRLR 369, CA concerned waiters whose names were on a list to be called first for banqueting functions. They worked only for THF and did so virtually every week for varying hours (from three to 57). They were paid weekly, deductions were made for tax and National Insurance and they also received holiday pay. They worked under the control of the head waiter and were provided with uniforms. However, they did not have to agree to work if they did not wish to. Likewise the company was not required to provide work. Refusal could, however, result in removal from the list. The Court of Appeal ruled that there was no mutuality of obligation and so they were not ‘employees’.

‘Bank’ nurses

It was ruled by the Court of Appeal in Clark v Oxfordshire Health Authority [1998] IRLR 125, CA that no contract of employment existed, even if there was a ‘global contract’ in existence, if there was no mutuality of obligation ‘subsisting over the entire duration of the relevant period’.

Long-serving tour guides

In the landmark ruling in Carmichael and Leese v National Power plc [2000] IRLR 43, HL the House of Lords determined that there needed to be an ‘irreducible minimum’ of mutuality of obligation for a person to be an employee (see Exhibit 2.2 above).

Relevant legislation and casual workers

Working Time Regulations 1998

The paramount importance of ‘mutuality of obligation’ deprives many long-serving working people of statutory employment rights (viz. on unfair dismissal, redundancy pay, parental rights, the provision of contractual information). However, such workers
may have some rights and entitlements in respect of the Working Time Regulations 1998. These provide an entitlement to a maximum working week and to paid annual leave (on, if appropriate, a *pro rata* basis). Furthermore, case law from the European Court of Justice has defined ‘working time’ for working people who are ‘on call’ (*SIMAP v Consellaria de Sanidad y Consumo de la Generalidad Valenciana [2000]* IRLR 845; *Landeshauptstadt Kiel v Jaeger [2003]* IRLR 804) (see Chapter 10).

**National Minimum Wage Act 1998**

This legislation can also provide entitlements for certain casual and zero hours contract workers. Such workers should not be paid less than the national minimum wage. Furthermore, an associated issue tested in the courts was what constituted the eligible ‘working time’ of a nightwatchman who was allowed, during his shift, to sleep on duty. The EAT ruled that where a worker was required to be on the employer’s premises to carry out his duties over a specific number of hours, then, all the hours were eligible for the national minimum wage (*Wright v Scottbridge Construction [2001]* IRLR 589) (see Chapter 9). In addition to a claim relating to the national minimum wage, a casual worker is entitled to claim for non-payment of wages under the Employment Rights Act 1996.

**Homeworking**

The status of homeworkers can be problematic. Each case has to be considered on its own facts and circumstances to determine whether or not there is compliance with the common law tests and, therefore, ‘employee’ status. The issues that can arise in cases are:

- the fact that the work is undertaken in premises not under the control of the employing organisation;
- the provision, probably by the employer, of equipment and materials to be used;
- whether there is mutuality of obligation;
- whether the work is continuous or intermittent;
- whether there is a global contract in existence governing the employment relationship.

Two notable cases have arisen in this area:

- *Airfix Footwear v Cope [1978]* IRLR 396, EAT. This concerned Mrs Cope who worked at home making shoe heels. The company provided her with tools and issued instructions and, over a seven-year period, she generally worked a five-day week. There was close supervision of her work. She was paid on a piecework basis without deductions for tax and national insurance. She was held by the EAT to be an employee.
- *Nethermere (St Neots) Ltd v Gardiner & Taverna [1984]* IRLR 240, CA. In this, homeworkers worked for a company for three years for between five and seven hours a day sewing children’s clothes. In some weeks, there was no work, and Ms Taverna usually took off 12 weeks each year. Subject to a minimum set by the company, the workers could specify the amount of work they wanted to be supplied with. The Court of Appeal found that contracts of employment existed. It stated that well-founded expectations of continuing homework consisting of the regular giving
Employment protection for ‘atypical’ workers

and taking of work for periods of a year or more could crystallise into an enforceable contract of employment spanning weeks in which no work was done and preserving continuity. So, the length of the relationship and the regularity of dealings between the homeworker and the employer were sufficient to establish an ‘irreducible minimum of obligation’.

Agency workers

There are a number of uncertainties about the position of agency workers in employment law. Their degree of employment protection is not always clearly established. This situation is complicated by the existence of a triangular relationship between the agency, the worker and the ‘end user’ or client organisation. The legal issues that have arisen in the past ten years or so have concerned case law in Britain, the European Union Temporary Agency Work Directive 2008, the previous Labour government’s policy initiatives for ‘vulnerable’ workers and in political concerns about the behaviour of gangmasters in their treatment of migrant agency workers. The key legal issues are:

- the employment relationship of an agency worker;
- determining the status of an agency worker;
- the employment obligations to the worker;
- the employment relationship with the ‘end user’;
- the EU principles of equal treatment for agency workers;
- the specific employment protection for migrant agency workers.

The employment relationship of an agency worker

Agencies must comply with the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003. There are two categories of organisation: the employment agency and the employment business. (Although, it is fair to say that the term agency is used to encompass all organisations which provide staff.) The ‘agency’ provides introductions to a hiring organisation for whom the worker will work on either an open-ended or fixed-term contract. In such a case the hirer will be the employer. The ‘employment business’, however, will place staff on a temporary basis with a client. The contractual relationship is with the employment business (or ‘temp agency’ as these are commonly known).

Determining the status of an agency worker

This issue is left to the courts to consider on the facts of each individual case using the common law tests. In *McMeechan v Secretary of State for Employment* [1997] IRLR 353, the Court of Appeal considered whether, following the insolvency of the agency, the worker was entitled to a payment from the National Insurance Fund as an ‘employee’. The Court of Appeal weighed the various facts in the case which point to or away from an employment relationship. Among the evidence was a document signed by McMeechan which stated that he would provide his services as a ‘self-employed worker and not under a contract of service’. However, there was also evidence that the agency had power of dismissal for misconduct and the right to end assignments. It had the right to make deductions from an hourly rate of pay for poor performance or bad time-keeping.
His pay was subject to deduction of tax and National Insurance contributions. Also, the agency provided a grievance procedure and he owed a duty of fidelity and confidentiality. The Court found that there was an employment relationship with the agency but only for the purposes of the specific engagement.

**The employment obligations to the worker**

Where a worker has an employment relationship with the agency, it must provide a written statement of employment particulars and an indication of whether the person is employed on a contract of employment or a contract for services (i.e. as an independent contractor). Subject to whatever qualifications exist in law, agency workers are eligible for the national minimum wage, entitlements under the Working Time Regulations and statutory sick pay. Apart from in the entertainment and modelling sectors, the agency worker should not be charged by the agency for finding work. Whilst the employment contract might be with the agency, the ‘end user’ has a number of legal obligations to the worker – particularly under equality law and health and safety legislation.

**The employment relationship with the ‘end user’**

There have been instances of some agency workers being placed with a client organisation and, for various reasons, remaining with that ‘end user’ for a prolonged period of time. As a consequence, the courts have dealt with a number of cases to consider how the nature of the contractual relationship has evolved over time between the agency worker and the ‘end user’.

Initially, in the triangular relationship, the contractual relationships are likely to be as follows:

- **Agency worker and agency** – a contract of employment (i.e. the worker is an ‘employee’), or a contract for services (i.e. the worker is self-employed).
- **Agency and client organisation or ‘end user’** – a commercial contract to provide staff as specified.
- **Agency worker and client organisation or ‘end user’** – whilst there are legal obligations governing the conduct of both and the performance of the worker, there is no contract of employment between these two parties. The agency is the employer.

In recent years, several complaints to employment tribunals by agency workers who had worked for long periods of time with ‘end users’ resulted in rulings by the Court of Appeal to determine the issue of employment status and contractual obligation in these triangular relationships (*Dacas v Brook Street Bureau (UK) Ltd* [2004] IRLR 358, CA; *Cable & Wireless plc v Muscat* [2006] IRLR 354, CA; *James v London Borough of Greenwich* [2008] IRLR 302, CA). In the first of these cases, the possibility of an implied contract of employment evolving over time with the ‘end user’ was raised. Eventually, the Court of Appeal elaborated the issue of an ‘implied contract of employment’. In *James v London Borough of Greenwich* [2008] IRLR 302 it was stated that the implication of a contract should only be done on the grounds of ‘necessity’.

The key issues arising from the *James* case are:

- **‘Necessity’ and ‘business reality’**. Where there is no express contract between an agency worker and the ‘end user’, the first question for the purposes of determining employment
Employment protection for ‘atypical’ workers

status is whether or not it is necessary, according to established common law principles, to imply a contract between these parties to give the situation business reality.

- *The implication of a contract with the ‘end user’*. On the facts, the relationship between the agency worker and the end user was fully explained by express contracts between the agency and the worker and between the agency and the ‘end user’; and the arrangements were not a sham. In these circumstances, it was not necessary to imply a third contract between the worker and the ‘end user’. ‘The mere passage of time did not justify the implication of a contract between the worker and the end user as a matter of necessity’.

- *The contractual situation*. As there was no express or implied contract between the worker and the ‘end user’, it followed she could not be an employee of the ‘end user’.

The view of many commentators is that the emphasis on ‘necessity’ in the *James* case will now make it more difficult for agency workers on long-term placements to establish an employment relationship with the ‘end user’. It is only likely to arise where the entire relationship with an agency is a sham (see Exhibit 2.14).

**EXHIBIT 2.14**

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**Necessity**

*Tilson v Alstom Transport [2011] IRLR 169, CA*

**Facts.** Mr Tilson worked for Alstom from August 2004. He was eventually promoted to a management role. His employment arose from a complex network of three contracts for the supply of labour. He brought an unfair dismissal claim against Alstom following his dismissal on 7 November 2006. It had to be determined whether he was an ‘employee’ of Alstom. In his position as manager, the employment tribunal heard, he managed Alstom employees; could recruit permanent staff; was authorised to discipline and dismiss permanent employees; signed time sheets for permanent staff; had to apply to his line manager for annual leave; and had negotiated contracts on behalf of Alstom. It was reported that he had rejected, more than once, Alstom’s offer of permanent employment because he was receiving significantly higher pay under the agency arrangements.

**Judgments.** The employment tribunal found that a contract of employment should be implied with Alstom. The EAT overturned this decision. The Court of Appeal upheld the EAT decision and elaborated on the issue of ‘necessity’.

**Necessity.** The Court of Appeal referred to the principle that a contract of employment can only be implied if it is ‘necessary’ to do so. In an earlier case, the Court had stated that the correct question to ask is whether it is necessary or not to imply a contract ‘to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist’ (*The Aramis [1989] 1 Lloyd’s Rep 213, 224*). The Court in the *Tilson* case noted that where the parties would or might have acted exactly as they did in the absence of a contract, then this would be fatal to the implication of a contract. It stated further that the mere fact that there was a significant degree of integration of Mr Tilson into Alstom was not inconsistent with an agency relationship in which there was no contract between him and Alstom. Furthermore, there was no common intention that there should be a contract nor any decision of contractual terms. So, this reinforced the view that no contract could be implied.
EU principles of equal treatment for agency workers

The Temporary Agency Work Directive 2008 is a companion piece of legislation to the directives governing part-time workers and fixed-term contract workers (see above). Among the key provisions of the directive are the following:

- **The purpose of the directive is:**
  - ‘to ensure the protection of temporary workers and to improve the quality of temporary work by ensuring that the principle of non-discrimination is applied to temporary workers and recognising temporary agencies as employers’;
  - ‘to establish a suitable framework for the use of temporary work to contribute to creating jobs and the smooth functioning of the labour market’ (Article 2).

- **The principle of non-discrimination.** ‘The basic working and employment conditions of temporary workers shall be, for the duration of their posting at a user undertaking, at least those that would apply if they had been recruited directly by that enterprise to occupy the same job’ (Article 5).

- **Access to permanent quality employment.** ‘Temporary workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find employment’ (Article 6).

The Agency Workers’ Regulations 2010, implementing the directive, came into force on 1 October 2011. This legislation is on the basis of a ‘social partners’ agreement reached in May 2008 between the Confederation of British Industry and the Trades Union Congress (see www.bis.gov.uk/employment) (see Exhibit 2.15).

EXHIBIT 2.15

Agency Workers’ Regulations 2010: some key provisions

**Scope.** Department for Business, Innovation and Skills Guidance (April 2011) states that an agency worker is someone with a contract with the temporary work agency (TWA). This is an employment contract or an agreement to provide services personally. But he or she ‘works temporarily for and under the direction and supervision of a hirer’. The unique, tripartite relationship between agency worker, agency and hirer is a key feature of these regulations and those who are covered by them. The key elements required for an agency worker are:

- there is a contract (an employment contract or an agreement to provide services personally) between the worker and a TWA;
- that worker is temporarily supplied to a hirer by the TWA; and
- when working on assignment the worker is subject to the supervision and direction of that hirer; and
- the individual in question is not in a business on their own account.

The Guidance also states that those working for ‘in-house temporary staffing banks’ are ‘likely to be outside the scope’ of the regulations. Issues of scope are, of course, very likely to be tested at employment tribunal.

**Qualifying period.** Agency workers to be provided with a right to equal treatment after 12 calendar weeks in a given job (regardless of whether this is a full-time or part-time job). A new qualifying period will begin only if a new assignment with the same employer is ‘substantially different’ or if there is ‘a break of more than six weeks’ between assignments in the same role.
**Anti-avoidance provisions.** Agency workers will have grounds for an employment tribunal claim if a structure of assignments develops – the most likely explanation for which is an intention to deprive them of equal treatment rights. For example, rotation between a series of 11-week assignments in ‘substantially different’ roles with a hirer.

**Information.** A TWA cannot supply an agency worker to a hirer without certain information. Also, agency workers are entitled to information relating to their equal treatment entitlements (see Guidance).

**Equal treatment.** There are two sets of entitlements:

**Day 1 rights for all agency workers:** The regulations give agency workers:

- the same access to certain facilities provided by the hirer such as the staff canteen, transport facilities, car parking and child-care facilities; and
- the same information on job vacancies as comparable permanent workers and employees within the hirer’s organisation.

**After 12 weeks in the same job:**

These additional new equal treatment entitlements relate to ‘relevant terms and conditions’, namely pay and other basic working conditions, and will only come into effect after an agency worker completes a 12-week qualifying period with the same hirer, in the same role.

**Pay.** This includes:

- **basic pay,** based on the annual salary an agency worker would have received if recruited directly (usually converted into hourly or daily rate, taking into account any pay increments);
- **overtime payments,** subject to requirements regarding the number of qualifying hours;
- **shift/unsocial hours allowances, risk payments for hazardous duties;**
- **payment for annual leave** (above the statutory minimum of 5.6 weeks, at a full-time equivalent rate), which can be added to the hourly or daily rate;
- **bonuses or commission payments,** directly attributable to the amount or quality of the work done by the individual, including where sales or production targets achieved and payments related to quality of personal performance;
- additional discretionary, non-contractual payments that are paid with such regularity that they have become custom and practice but which do not fit the excluded types of bonus described below;
- **vouchers or stamps,** which have monetary value and are not ‘salary sacrifice schemes’ – e.g. luncheon vouchers, child-care vouchers.

Pay **excludes,** among other matters, occupational sick pay and occupational pensions.

**Liability.** ‘The agency will be responsible for any breach of a right in relation to equal treatment for which they are responsible but will have a defence if they have taken “reasonable steps” to obtain the necessary information from the hirer and acted “reasonably” in determining the agency worker’s basic working and employment conditions. In such cases the hirer will be liable.’

**Remedies.** At employment tribunal, these will be compensation for the agency worker’s loss – subject to a minimum award provision and the possibility of an additional award when the ‘anti-avoidance provision’ is breached.
Chapter 2  Regulating the employment relationship

FRISCHCO SUPERMARKET CASE STUDY

Scenario 2.2

What rights does Tracey have under the Agency Workers’ Regulations?

Tracey works as a part-time assistant to Debbie, the Administrative Assistant. She was placed through an employment agency, Instant-Resourcing, 15 weeks ago. There is another part-time assistant, Indira, who works different hours and, in fact, the two part-timers normally never meet. However, on one occasion, Tracey was asked to work extra hours to help out with a workload peak. She agreed to do this. Her hours overlapped with those of Indira who was also working some overtime. At a lunch break they chatted about working at the company. Indira commented that she welcomed the overtime because she needed the extra cash. Tracey learned that Indira was being paid time and a quarter for each hour of overtime (i.e. £8.00 ph) whereas she was being paid at flat rate (£6.00 ph). Tracey had heard about some regulations relating to the equal treatment of agency workers and was looking for some advice on whether or not she might have a claim and so raise a grievance with the agency and with Frischco.

Question

What advice would you, as an HR practitioner, give Tracey about her employment rights?

The specific employment protection for migrant agency workers

Many, but certainly not all, legal migrant workers are likely to be covered by British employment legislation. However, at the margins of the labour market there are certain vulnerable groups. One such group are those who work for gangmasters in, for example, agriculture, horticulture, dairy farming, gathering shellfish and related fish processing and packaging. The Gangmasters (Licensing) Act 2004 was enacted to deal with what were described in Parliament as ‘unscrupulous rogue gangmasters who are exploiting and intimidating workers, often breaching human rights and engaging in a range of criminal activities such as illegal deductions from wages, failure to pay the minimum wage or sickness pay, tax fraud, human trafficking, smuggling and the supply of drugs’ (7 January 2004).

Labour providers in these sectors require a licence and details are available on a public register maintained by the Gangmasters Licensing Authority. The legislation creates two new criminal offences: supplying labour without a licence and using an unlicensed labour provider. Offenders can face up to 10 years in prison. Workers provided by the labour provider (agency) have various employment rights and also protection under discrimination and health and safety legislation (see www.gla.gov.uk).
‘Atypical’ workers in your organisation

Check whether or not your organisation employs people who may be defined as ‘atypical’ workers. Which of the categories outlined above are used? Undertake an audit of a particular small group. It may be helpful to select from the following questions:

- What is the gender and ethnic profile of the staff you have selected?
- What description (from the categories of ‘atypical’ workers discussed above) would you use for these people?
- Using the common law tests, is the description of their employment status by the employer accurate?
- Is there evidence of mutuality of obligation?
- Is there evidence of a global contract?
- Are any of them provided by an employment agency?
- If so, have any problems arisen from the triangular relationship with the agency? How have they been resolved?
- How do their terms and conditions compare with employees on open-ended contracts of employment?
- Is there any evidence of breaches of discrimination law?
- Would you be recommending any reforms to your employer? What would these be?

Complaints relating to employment contracts

Complaints relating to contracts are likely to fall into one of the following categories:

- **Grievances that certain contractual terms and/or statutory rights have not been complied with.** If the grievance is not satisfactorily dealt with through the internal grievance procedure, most of these issues can be raised as complaints at an employment tribunal (subject, of course, to the complainant’s employment status and length of service with the employer). The remedies will be those outlined under the appropriate legislation (see the other chapters in this textbook). It is possible for certain contractual grievances to be raised in the High Court where they do not relate to specific employment rights or discrimination law but rather to specific terms of the contract. Examples can be found in respect of claims concerning restrictive covenants or allegations about unlawful contract variation (Burdett-Coutts and Others v Hertfordshire County Council [1984] IRLR 91, HC; Cresswell and Others v Board of Inland Revenue [1984] IRLR 190, HC).

- **Unfair dismissal claims** (including those relating to redundancy) which can be made at an employment tribunal – depending on qualifying service (see Chapter 8).

- **Wrongful dismissal claims** which concern the termination of the contract which breaches the terms of that contract including the providing of insufficient notice (see Chapter 8).
Conclusion

The regulation of the employment relationship continues to be subjected to two parallel developments in law. First, statute law is progressively determining a framework of minimum rights which mould the terms of the contract of employment. Other ‘contracts to carry out work personally’ are also being influenced by statutory requirements. Although these are more limited in scope, they do cover two of the essential bases of an employment relationship: pay (through the national minimum wage and equal pay legislation); and working time regulation. The general political thrust of British and European employment law acknowledges that those in the ‘flexible labour market’ are entitled to minimum rights and that the general restriction of access to statutory rights to full-time permanent employees has ceased to be defensible. Consequently, legislation is gradually recognising the circumstances of part-time workers, some of those on temporary contracts, in agency work and in homeworking arrangements. Where there are gaps in employment protection, case law is taking some tentative steps towards improvement. However, a principal obstacle is the combined effect of restricting so many employment rights to those with ‘employee’ status; and the impact of ‘mutuality of obligation’ in excluding so many ‘atypical’ workers – particularly, casual workers – from employment protection.

References


**Useful websites**

Gangmasters Licensing Authority [www.gla.gov.uk](http://www.gla.gov.uk)

Information Commissioner’s Office [www.ico.gov.uk](http://www.ico.gov.uk)

UK Statistics Authority [www.statistics.gov.uk](http://www.statistics.gov.uk)

Visit [www.mylawchamber.co.uk/willey](http://www.mylawchamber.co.uk/willey) to access study support resources including realistic HR documentation to accompany the case studies in the book, an online chapter on collective labour law, interactive multiple choice questions, annotated weblinks, a glossary, glossary flashcards, key case flashcards, a legal newsfeed and legal updates.