BASIC PRINCIPLES OF CONTRACT LAW FOR EMPLOYERS

INTRODUCTION

A contract is a legally binding agreement between two or more people. Contract law calls these people 'parties'.

Once a contract has been created each party to the contract is legally obliged to carry out his or her part of the bargain and if they fail to do so they are said to be 'in breach of contract'.

A legally binding contract must have three main features:

- an agreement to do something;
- an intention to make a legally binding agreement; and
- an exchange of something which is of value.

Because the courts can enforce a contract, the law imposes some restrictions on the ability of some people, for example minors and people under a mental disability to enter into a contract.

Some contracts may meet all of the criteria for a valid and binding contract but conduct by one of the parties in the agreement process may have the effect of making the agreement invalid. These matters include misrepresentation, duress and undue influence.

Contracts can have express terms and implied terms and it is important when preparing an employment contract to be aware of any implied terms which will apply regardless of the terms of the contract. Terms of a contract which remove contractual terms which are implied by various statutes such as safety laws will not be enforceable.

AGREEMENT

Offer

The process of making a contract begins with an offer. Contract law describes an offer as an indication by a person that they are willing to enter into a contract (the offeror) with another person (the offeree) on certain terms. In employment law this will be the offer of a position by the future employer to the prospective employee.

An offer has legal significance as once it has been made the offeree, by accepting the offer can make a legally binding contract. Withdrawal of the offer once it has been accepted may not be possible without legal consequences such as compensation for any loss the person may have sustained as a result of accepting the offer and acting upon it.

It is important to distinguish an offer from what the law calls an 'invitation to treat'. An 'invitation to treat' occurs when a person indicates a desire to enter into discussions or negotiations as opposed to an actual offer to be bound by a contract. Goods for sale in a shop are an invitation to treat and when you present money for goods at the counter of a shop you are making an offer to buy the goods which the shopkeeper can accept or reject.

In employment law a job advertisement in the newspaper would be considered to be an invitation to treat as opposed to an offer. The offer would be made when applicants have been assessed and the employer formally offers the job to one of them. This can be either verbal or written but written offers are always preferable.

Acceptance

Agreement occurs when an offer is accepted and this acceptance has been communicated to the offeror. Once an offer has been accepted it becomes legally binding.

There may be formalities such as the signing of papers but informal acceptance is also possible. Using the example of goods for sale in a shop, agreement is made when the shopkeeper takes your money and allows you to take the goods.

In employment law acceptance would occur when the prospective employee accepts the verbal or written offer and this is communicated to the employer.

Counter offers

Acceptance may not be straightforward. Sometimes an offer may be met with what the law calls a 'counter offer'.

In employment law a counter offer might be a request by the prospective employee for extra pay or other employment related benefits. If the counter offer amounts to something different than what was initially offered the counter offer is regarded as a rejection of the initial offer and the initial offer is effectively cancelled.

The counter offer becomes the new offer and it is then up to the person who made the initial offer to decide if they wish to *accept* the counter offer.

This process can occur a number of times during negotiations and to avoid any misunderstandings it is important that accurate written records of offers and counter offers and responses be kept.

CONSIDERATION

Consideration is usually described as a form of benefit and detriment bargained for as part of the contract and passing between the parties which indicates that the parties intended the agreement to be legally binding as opposed to a one-sided arrangement where one person gets a benefit at the other's expense such as a gift.

A contract is not legally binding unless there has been some form of consideration.

Using the example of goods for sale in a shop the consideration is the money paid for the goods and the goods themselves.

In employment law the consideration would be the remuneration package paid to the employee and the employee's agreement to perform the job according to the job description.

INTENTION TO ENTER INTO A CONTRACT

For a contract to be legally enforceable the parties must have intended that the agreement would give rise to legally binding obligations.

Using the example of goods for sale in a shop, it is easy to see the element of intention. It is widely understood that when the money changes hands the goods are yours to use as you wish and the seller is entitled to keep your money.

CAPACITY TO ENTER INTO A CONTRACT

With certain exceptions, any person over 18 years of age (or company) can enter into a contract.

Minors

There are special rules which apply to people less than 18 years of age. Generally a minor can make a legally binding contract for goods or services which are usual or appropriate to their way of life such as food, clothing, services for institutional or educational benefit such as sports coaching etc.

Minors are able to enter into employment contracts, however, most states have education laws which make it unlawful to employ school age children at any time of the day or night if this prevents them going to school.

At this stage there are no laws restricting the right of farmers to employ their children.

Most states and territories have rates for juniors as does the Australian Fair Pay and Conditions Standard.

There are special rules about apprenticeships and traineeships.

People with a disability

People with a mental incapacity can enter into a contract but they can also apply to a court for the contract to be set aside and will usually succeed if the court is satisfied that they did not understand the true nature of the contract when it was made and the other party to the contract should have been aware of this fact.

Most awards contain special supported wage provisions which allow for reduced rates to be paid to people with a disability along with obligations on the employer to make necessary adjustments to the workplace. The Australian Fair Pay and Conditions Standard also provides special rates for the disabled.

People with reduced literacy are able to enter into contracts but it is important in such circumstances for the other party(ies) to be certain that the person understands the nature of the contract and its terms before signing as this may be a ground for the contract to be set aside.

In the context of employment law it is especially important to remember that it is the employer's responsibility to ensure that all employees understand the contents of all of the formal documents which must by law be provided to employees as part of enterprise bargaining (workplace agreements). If necessary these documents should be read out in their entirety to the employee.

EXPRESS TERMS AND IMPLIED TERMS

When a contract is written down and signed its terms will be clear to both parties provided they have read them. However, all contracts contain terms which are implied by the law. For instance using the example of goods for sale in a shop, there is an implied term in the contract of sale that the goods are fit for the purpose they are intended for and of a certain quality. Contract terms which are contrary to this have no effect.

In employment law there is for instance an implied term that employees will put the business of the employer before their own interests.

It is possible for verbal terms to form a part of a contract and for this reason it is important that when writing an employment contract you include all matters which were agreed to as part of the discussions leading up to the contract.

MISREPRESENTATION, DURESS AND UNDUE INFLUENCE

Misrepresentation in the context of contract law is the giving of false information by one party to the other before the contract is made which then induces them to enter into the contract. Contracts which are entered into as a result of a misrepresentation may be set aside.

It is important to distinguish the false information of fact from a statement of opinion or a promise.

Undue influence occurs in the context of contract law when a person uses a position of power or influence to say or do something which causes a person to enter into a contract when they would otherwise not do so.

Duress in the context of contract law is generally understood to be action or the threat of action by a person intended to coerce another person to become a party to the contract.

Both undue influence and duress can be grounds for setting aside a contract.

In employment law coercion and duress are also prohibited conduct under the WorkChoices law in the context of enterprise bargaining (workplace agreement making) and penalties can be imposed under the act.

FORMALITIES

Some contracts must by law be in writing before they will be enforceable, e.g. contracts for the sale of land, consumer credit contracts and formal workplace agreements. Other contracts will be enforceable even if they are verbal and there is no written record.

However, it is advisable that all contracts be in writing so that the parties can be clear about what has been agreed and in the event of a dispute it will be much easier to prove what was agreed.

This applies equally in the context of employment law. Misunderstandings and disputes about entitlements and conditions of employment can be reduced if a simple common law contract of employment is used which clearly details obligations and entitlements. In addition, all offers and counter offers which occur as part of the engagement process should be in writing.

There are templates for common law contracts of employment on The People in Dairy website at www.thepeopleindairy.org.au/engagement-reward/contracts-and-agreements.htm that can be used to create a draft document to take to your legal adviser

TERMINATION

Termination of contracts is a complex area of the law.

Termination of employment contracts has largely been dealt with by state and federal industrial laws for a number of years. The state and federal industrial relations tribunals have developed a comprehensive body of law in the areas of surrounding unfair dismissal and redundancy.

More details on termination of employment can be found on The People in Dairy website at www.thepeopleindairy.org.au/engagement-reward/termination.htm