## LEARNING OBJECTIVES

After reading this chapter, students will be able to:

- Explain when a contract between an employer and an “infant” or a person with a mental impairment is legally enforceable.
- Explain when the intention to create a legally enforceable contract exists.
- Define offer, acceptance, and mutual consideration, and explain their significance in employment contracts.

## CHAPTER OUTLINE

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## I. Introduction

The successful outcome of the job recruitment process discussed in Chapter 6 is an employment contract between an employer and an employee. Therefore, we have reached the point in the book when we must turn our attention to the rules of contract law. In this chapter, we consider three distinct issues relating to the requirements of a valid employment contract.

The first is the capacity to contract. Who can enter into an employment contract? The basic answer is anyone who is recognized within the common law regime as having the legal capacity to contract. That includes most adults and some children, as we will see. Some people lack the mental capacity to fully understand what they are agreeing to, which is inconsistent with freedom of contract insofar as parties must be able to rationally assess the contract’s benefits and risks. The common law has developed tests to ensure that parties meet the legal capacity to contract. The second is the necessity for parties to have the intention to enter into a legally enforceable contract. Finally, the basic elements of a contract—whether employment or otherwise—must be met. A contract is an agreement formed between two (or more) parties that contains three elements:

1. an offer,
2. an acceptance, and
3. mutual consideration.

If any of these elements is missing, a court will not recognize or enforce the agreement the parties appeared to have reached. A lot of employees, but especially employers, have learned this lesson the hard way. Let’s consider each of these requirements in more detail.

## II. Capacity to Enter into a Contract

Do you think that a child should be able to enter into an employment contract? It is easy to see why we might be concerned about this possibility. Children may not understand what it means to enter into a contract or what they are actually agreeing to. The same can be said for people
who have a mental impairment. Since a contract is supposed to be the end result of a voluntary exchange based on a meeting of informed minds, the possibility of a contract with a child or a person who is mentally impaired is problematic from a contract law perspective. Yet, the courts have not ruled all such contracts to be unenforceable.

In the case of children under the age of 18 (called **infants** or **minors** in legal terminology), the courts begin with the assumption that the contract is void. However, exceptions have been recognized in which employment contracts with infants are enforceable. The most important exception relates to contracts that, overall, are for the benefit of the infant.1 If it is, then it is enforceable. Few modern cases involving infant employment contracts exist, but a (relatively) recent application of this rule was applied in a case involving John Tonelli, who won four Stanley Cups with the New York Islanders hockey team in the 1980s (see Box 7.1).

**BOX 7.1 » CASE LAW HIGHLIGHT**

**The Enforceability of an Employment Contract Involving a Minor**

*Toronto Marlboro Major Junior “A” Hockey Club et al. v. Tonelli et al.*

(1979), 23 OR (2d) 193 (CA)

**Key Facts:** At age 17, John Tonelli entered into a contract with the Toronto Marlboro junior hockey team. It required him to play only for the Marlboros for three years, and then pay the team 20 percent of his hockey earnings for his first three years of professional hockey. In exchange, the Marlboros provided Tonelli with a nominal wage, paid for his room and board and school tuition, and gave him coaching, exposure, and a chance to make the pros. When Tonelli turned 18, he informed the Marlboros that he was repudiating (cancelling) the contract, and he signed with the Houston Aeros, a professional hockey team. Tonelli argued that the contract with the Marlboros was invalid because he was a minor when he signed the agreement.

**Issue:** Was the contract “for the benefit” of the 17-year-old Tonelli and therefore legally enforceable?

**Decision:** No. The contract was unenforceable. The court explained the legal test for contracts with people under the age of 18:

> This contract, signed by Tonelli when he was an infant, falls into the category of a contract of service. It can be enforced against him only if it was for his benefit at the time it was made. The onus is on the Marlboros to establish that it was for his benefit. Whether it was or was not for the infant’s benefit is a question of fact. … In making its decision, the Court must construe the contract as a whole and strike a balance between its beneficial and onerous features. The contract is not to be invalidated simply because it places some burdens upon an infant. These principles of law are well established and no authority need be cited to support them.

The court ruled that, although Tonelli received some benefits from the contract, overall the contract was onerous for him and highly beneficial to the Marlboros. The court noted that “where, as here, the bargaining position of the parties is manifestly unequal and one party is able to dictate terms to another, courts are increasingly vigilant to protect the weaker party and reluctant to enforce the contract against him.”

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**infant:** A person under the age of 18; also referred to as a **minor** in legal writing.
We noted in Chapter 1 that some of the vilest and most disturbing snapshots in the story of the Canadian law of work involve abuse and mistreatment of child workers in late 19th-century factories. By requiring employers to establish that a contract with a minor is for the minor’s benefit, the courts retain the ability to police child exploitation at work. However, governments have not left this protective role to judges.

Contracts involving employees with a mental impairment are treated as **voidable contracts**. This means that they are not automatically void. However, if a court finds that the mentally impaired party was unaware of what was being agreed to, or that the contract is very unfair, it may void the contract.3

### III. Intention to Create a Legally Enforceable Contract

Let’s assume now that we have two parties that have the legal capacity to enter into an employment contract. The next issue is whether they actually intend to create a legally enforceable contract. Judges do not want people dragging each other to court over every little promise made in everyday interactions. In the beautiful language of Lord Stowell in an 1811 decision: “[Contracts] must not be the sport of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever.”4

In assessing whether there was an intention to create a legal contract, judges ask whether “a reasonable person” would assume that the intention existed, considering all of the facts. This is known as an **objective test**. It asks, What would a reasonable person of normal intelligence think, if told about the circumstances? An objective test contrasts with a **subjective test**, which asks, What was this person actually thinking at the time? Through the application of an objective test, a judge can find that an intention existed to create a legally enforceable contract even if one of the parties claims in court that he or she did not actually have that intention.

The requirement to create legal relations is usually assumed in the typical employment relationship involving an employer who offers a job to an employee, but not always. For example, consider a situation familiar to many students: the unpaid internship. Often companies offer to permit a person to shadow an employee or do a variety of tasks as a way to gain experience and connections, but without an offer to “employ” or pay wages. Has an employment contract been created in such a situation? See Box 7.2.

Unpaid internships are controversial. There is concern that some businesses are exploiting young workers to obtain free labour. The *Sarmiento* case suggests that the common law regime may not be very helpful to unpaid interns who want to argue that they are really “employees” and subject to an employment contract and the common law rules that govern those contracts. Therefore, these workers have tended to look to the regulatory standards regime, especially employment standards legislation, for assistance. In Chapter 2 we considered an expanded definition of “employee” in the Ontario *Employment Standards Act* that captures most unpaid internships.5

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**voidable contract**: A contract that may be declared void at the option of one of the parties due to a deficiency. An example is an employment contract involving an employee who is considered mentally impaired.

**objective test**: A legal test used in interpretation of contracts and statutes that asks, What would a reasonable person of normal intelligence think, if told about the circumstances? Contrast with **subjective test**.

**subjective test**: A legal test used in interpretation of contracts and statutes that asks, What was this person actually thinking at the time? Contrast with **objective test**.
The Intention to Create a Binding Employment Contract

**Sarmiento v. Wilding & Rampage Entertainment**

**2008 BCPC 232**

**Key Facts:** Sarmiento agreed to perform various tasks without pay for Rampage, a small film production company. After she stopped working for the company, she filed a lawsuit claiming that she had been “hired” as an employee and was owed $25,000 for the work she performed for the company.

**Issue:** Did the parties enter into a legally enforceable contract requiring the payment of wages to the worker for work performed?

**Decision:** No. The court accepted the company’s argument that Sarmiento had agreed to be an “unpaid intern” and that no mutual intention to create legal relations had existed:

The evidence does not show Sarmiento was “hired” to work for Rampage generally or that after a period of training, she took on the mantle of paid employee. Nothing in the evidence showed that the relationship between the parties changed or that there was any consideration indicative of the parties entering into an employment contract part way through the time Sarmiento was affiliated with Rampage. Although Sarmiento did “script work” for Rampage, the work she did was to benefit her in terms of training for her (through feedback provided) and did not confer a benefit upon Rampage.

Quite apart from whether Sarmiento was an employee or intern, I find the evidence does not support holding that [Sarmiento] and Rampage had a common intention to enter into an employment contract. With the funding structure and limited financing behind Rampage, I am unable to conclude [the company] was looking to hire staff or that [it] employed Sarmiento in the capacity she wanted the Court to believe.*

* See also *Evard v. University of B.C. (Alma Mater Society)* (1995), 14 CCEL (2d) 124 (BCSC) (a student university newspaper editor was not entitled to compensation because there was no intention to create a legally enforceable contract).

**IV. Elements of a Contract: Offer, Acceptance, and Mutual Consideration**

Finally, even if two parties have the capacity to contract and reach an agreement with the intention to create a contract, they may still fail to create a valid, legally enforceable contract. Common law judges determined very long ago—long before employment contracts existed—that for any agreement to become a legally binding contract, an offer must be made by one party and must be accepted by another party, and mutual consideration must exist between the parties. These requirements apply to employment contracts in Canada today.

**A. Offer and Acceptance**

In the case of an employment contract, the first two requirements of offer and acceptance are usually satisfied without much controversy. In the usual course, an employer will offer to employ a worker, and the worker will accept that offer. The acceptance must be unequivocal such that both parties understand that they are entering into a binding contract. Consider a typical “offer letter” that an employer might send to a prospective employee, as depicted in Box 7.3.

Since the offer letter in Box 7.3 expressly and clearly indicates that the employee’s signature constitutes acceptance of both the offer letter and the attached contract of employment, there should be little dispute about what was offered and whether the employee accepted it.6

However, sometimes it is less clear what the employer offered or whether the employee accepted the offer. In many cases, no written contract or offer setting out what the contract’s terms will be is used. In such cases, the evidence that an offer was made by one party and accepted by another must be gleaned from the conduct of the parties or from oral testimony or other documentary evidence put before a judge that describes what the parties discussed. In Box 7.5, we consider a case in which a judge was asked to decide whether a verbal offer of employment was made and accepted during a telephone conversation.
**B. Mutual Consideration**

“Consideration” means something of value or a benefit. Therefore, when we say that an employment contract must contain mutual consideration, we mean that it must provide *something of value to both the employer and the employee that they otherwise would not receive*. The consideration need not be equal to both parties. In fact, the courts have said that they will “not enter into an inquiry as to the adequacy of consideration,” and “anything of value, however small the value, is sufficient consideration to support a contract at law.”

Given such a low threshold, you might think the requirement for mutual consideration rarely creates a problem in employment contracts. And that is true, at least at the point of the formation of the contract. It is easy to see how consideration would normally flow both ways in a typical employment relationship. The employee receives money (a wage) and perhaps some
other benefits, such as health or dental insurance or pension contributions. In exchange, the employer receives the employee’s labour power and promise to comply with legally permissible directions issued by the employer.

However, the requirement of mutual consideration applies to contract amendments as well. In this context, problems occasionally arise. For a mid-contract amendment to be enforceable, both employee and employer must receive something new of value that they were not otherwise already entitled to under the existing (prior) contract. Consider the decision in the famous 1809 contract case of Stilk v. Myrick, discussed in Box 7.4.

**BOX 7.4 » CASE LAW HIGHLIGHT**

The Origins of Mutual Consideration in Employment Contracts

**Stilk v. Myrick**  
(1809), 170 ER 1168

**Key Facts:** Stilk agreed to work as a seaman on a dangerous sea voyage for 5 British pounds per month. Two other seamen deserted the ship, creating more work for Stilk on the return voyage. The captain (Myrick) offered to pay Stilk more for the return voyage for the additional work that would be required. However, when the voyage was done, Myrick refused to pay Stilk the additional amounts he had promised. Stilk sued to recover that money.

**Issue:** Was the captain’s promise to pay Stilk more than agreed to in the original contract enforceable?

**Decision:** No. In the original contract for 5 pounds per month, the seamen had already agreed to perform “all that they could under all the emergencies of the voyage,” and were bound “to exert themselves to the utmost to bring the ship in safety to her destined port.” Sometimes things happen on a voyage that create more work for the crew, and the original contract contemplated that. Therefore, Myrick received nothing new in exchange for his promise to pay Stilk more than the original 5 pounds. As a result, because he received no “new consideration,” Myrick’s promise to pay Stilk more than 5 pounds per month was not an enforceable agreement.

*Stilk v. Myrick* took place two centuries ago, but can you see how the rule applied in that case is still relevant to modern-day employment situations? At its core, *Stilk v. Myrick* is an employment case in which the parties agreed to amend the contract terms in the middle of the contract. However, the amendment was unenforceable because “new consideration” did not flow to both parties.

A typical situation today involves an employer that wants to amend the terms of the employment contract, such as by changing the compensation amount or the amount of notice required to terminate the contract. The Stilk decision tells us that an amendment to an employment contract is only enforceable if (1) both parties agree to the change, and (2) both parties receive new consideration—some new benefit not required by the original contract.

*Rejdak v. Fight Network Inc.*, discussed in Box 7.5, provides a useful demonstration of how the requirements of offer, acceptance, and mutual consideration come into play in the employment setting. Let’s consider it in two parts, separating out the issues of offer and acceptance, and mutual consideration.

*Rejdak v. Fight Network Inc.* offers two important lessons about the common law rules of contract. First, a verbal offer by an employer to employ a job applicant can create an enforceable employment contract if the worker accepts the offer. A written contract is not necessary.8 Second, if an employee commences work before having signed a written employment contract, then a written contract introduced afterward constitutes a proposed amendment to the original verbal contract. That amendment is only legally enforceable if both the employer and the employee agree to the amendment and both receive a new benefit (new consideration) that they were not otherwise entitled to under the verbal contract. We will look in more detail at how the common law regime governs mid-term contract amendments in Chapter 10.
**BOX 7.5 » CASE LAW HIGHLIGHT**

**Offer, Acceptance, and Mutual Consideration**

*Rejdak v. Fight Network Inc.*

(2008), 67 CCEL (3d) 309 (Ont. SC)

**Key Facts:** Rejdak argued that a verbal offer of employment was made by The Fight Network (TFN) in a Friday night telephone conversation. The terms of that contract included the salary amount, job title, start date, and a requirement that the employer provide him with “reasonable notice” in the event his contract is terminated. Based on that belief, Rejdak quit his existing job and began work at TFN the following Monday. During that first day, TFN gave Rejdak a new written employment contract and asked him to sign it. Rejdak took the written contract home and returned it signed the following day. The written offer allowed the employer to terminate Rejdak’s employment with no notice while he was on “probation.” Rejdak’s contract was terminated during the probation period without notice. Rejdak claimed that he was entitled to a longer period of “reasonable notice” as agreed verbally in the Friday phone call and that the written “probation” clause was unenforceable.

**Issue One (Offer and Acceptance):** Did the parties enter into a verbal employment contract during the Friday night telephone conversation?

**Decision:** Yes. A verbal offer was made during the phone call, which was accepted by Rejdak. The judge wrote:

I conclude that on [Friday] August 5, [the employer] offered and Mr. Rejdak accepted a job on the following terms: his title was editor and creative director; his annual salary was $50,000; and he was to start on Monday, August 8, 2005. There was no indication on August 5 that his employment was subject to a probationary period. Mr. Rejdak began work at TFN prior to signing the employment agreement. I conclude that there was an oral employment contract entered into by the parties on Friday evening.

**Issue Two (Mutual Consideration):** Did the parties lawfully amend the oral contract when they signed the written contract?

**Decision:** No. According to the judge, the employee received no new consideration in exchange for granting the employer the benefit of a new probationary period:

Mr. Rejdak’s position is that the written employment agreement is of no force or effect because there was no fresh consideration. …TFN submits that the employment agreement signed on August 9, [2005], provided two benefits to Mr. Rejdak which constitute new consideration. The first added benefit was paid vacation. The agreement provided that Mr. Rejdak would be entitled to two weeks’ vacation. If he did not take all of his vacation in a particular year, he could carry up to one week vacation into the next year. The second benefit under the contract was a health benefit plan: Mr. Rejdak was entitled to participate in TFN’s employee benefit plan or a private plan, if no employee plan existed. …

I do not accept that either benefit constitutes additional consideration. The paid vacation merely reflects the two-week statutory minimum [already required by the Employment Standards Act]. Mr. Rejdak would reasonably have expected to receive the health benefit plan since it was a standard benefit provided to all TFN employees.

The court found that the original oral contract required that the employer provide Rejdak with “reasonable notice,” which the court ruled was four months. Rejdak was entitled to damages based on lost wages for a period of four months.

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**V. Chapter Summary**

In this chapter, we explored three requirements of all employment contracts: (1) the parties must have the legal capacity to contract; (2) the parties must have the intention to create a legally enforceable contract; and (3) the contract (including any proposed amendment to an employment contract) must comprise an offer, an acceptance of that offer, and mutual consideration. The absence of any of these requirements can prevent a court from enforcing an agreement between an employer and employee.
QUESTIONS AND ISSUES FOR DISCUSSION

1. Should an employment contract between an employer and an “infant” or a worker who is mentally impaired always be unenforceable? Explain.

2. What is the difference between an “objective test” and a “subjective test”? How does this distinction matter when the courts assess if there was an intention to create a legally enforceable employment contract?

3. Explain the significance of offer, acceptance, and mutual consideration in employment law.

4. Must an employment contract be in writing to be enforceable?

5. Jon’s employer asked him to sign a revised employment contract that was identical to the original contract, except that it gave the employer the right to terminate the contract by providing less notice than was required in the original contract. Jon signs the revised contract. Is the revised employment contract legally enforceable?

UPDATES

Go to www.emond.ca/lawofwork for links to news, author’s blog posts, content updates, and other information related to the chapters in this text.

NOTES AND REFERENCES

1. The roots of the exceptions are deep and begin with the concept that an “infant” contract for “necessaries” is enforceable. In Doyle v. White City Stadium Ltd., [1935] 1 KB 110, the court described the rule as follows (at 131): "An infant may bind himself to pay for his necessary meat, drink, apparel, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards," and to that has been added in the course of years contracts of service that are to an infant’s benefit. Contracts for apprenticeships and employment contracts have been found to fall within a branch of the rule, provided that the contracts are generally "for the benefit" of the employee. Not all employment contracts meet this standard, as demonstrated in the case of Toronto Marlboro Major Junior "A" Hockey Club et al. v. Tonelli et al. (1979), 23 OR (2d) 193 (CA) discussed in Box 7.1. See also De Francesco v. Barnum, [1890] 45 Ch D 430; and Butterfield v. Sibbitt and Nipissing Electric Supply Company Ltd. (1950), OR 504 (SC).


6. An offer to enter into an employment contract can be made conditional on a future event occurring; this is known as a “condition precedent” in contract law. In that case, the acceptance of the offer does not become valid until the condition precedent has been satisfied. For example, an offer of employment may be made conditional on approval by a board of directors: Bowen v. Canadian Tire Corp. (1991), 35 CCEL 113 (Ont. Gen. Div.).

8. However, a statute may require some types of contracts to be in writing. For example, some fixed-term contracts of more than one year must be in writing by virtue of Statute of Frauds legislation in effect in some Canadian provinces (e.g., Ontario Statute of Frauds, RSO 1990, c. S.19), or by virtue of the original 17th-century British Statute of Frauds that applies under “received law.” See Campbell v. Business Fleets Limited, [1954] OR 87 (CA); Smith v. Mills, [1913] 6 Sask. LR 181; and Lavallee v. Siksika Nation, 2011 ABQB 49. The scope of the Statute of Frauds has been read down by Canadian courts, which have ruled that a fixed contract of more than one year is not governed by the Statute if it “could be performed in less than one year.” The implied right to terminate a contract with “reasonable notice” makes most contracts potentially terminable within a year.