
Commercial contracts: is it fine not to sign?

Imagine this: you have a client. As their contract comes to an end you discuss extending it. The contract expires. You've almost agreed terms for continuing the service, but neither party has signed the contract. They're a good client, so you continue providing the service anyway.

Then suddenly, 2 months after the expiry of the first contract, a dispute arises and your client ends the relationship. They pay you a small amount for the 2 months' work, but you think you're entitled to much more under the contract.

Was there a contract?

There's no absolute rule that contracts have to be written, let alone signed. Moreover, in the modern age, signing doesn't necessarily have to take the traditional form – you could use an electronic signature system.

However, a recent case with similarities to the above scenario shows that sometimes a lack of signature suggests lack of intent to be bound by the contract. Meaning the courts won't enforce it.

The claim was brought against a sportswear manufacturer by a company that held the rights to exploit the commercial activities of Marouane Fellaini, the Belgium and Manchester United footballer. The facts of the case were not completely summarised in the judgment, but Fellaini wore boots made by the manufacturer and the parties were in negotiations about the extension of the contract. At some point, the manufacturer decided to end the relationship. It appears Fellaini had initially complained about the construction of the boots. In any event, the company sued the manufacturer for not making payments. Because the parties hadn't yet agreed a contract extension, at the relevant time there was no signed contract in force.

The High Court said that in the commercial context, especially with big businesses supported by legal teams, a signature is often expected. Without those signatures the courts may decide there is no evidence to suggest that the parties intended to be bound by the contract. For that reason the court dismissed the claim and the manufacturer didn't have to make the claimed payments.

What this means for you

You should always make your intentions clear.

If you and the other party don't sign a finalised contract it's hard to know whether or not the court would enforce it. This example involved two big companies that had legal advice – this influenced the court's decision. That doesn't mean, however, that a small business isn't expected to sign contracts – especially if the evidence shows you've got a track record of signing. You also don't know whether you'll be in the position of wanting the court to enforce the contract or wanting to avoid its consequences.

So it's best to make it clear when a contract is finalised by signing it, and to be careful about acting on contracts that aren't signed.

How we can help

We have numerous contracts covering all sorts of matters that you can use to clarify your business agreements. For example, we have an **Agency agreement, Consultancy agreement** and a **Partnership agreement.**

Commercial contracts: a clause is in there, but is it fair?

You're negotiating a contract with a business client. One of your directors suggests the following terms:

- Excluding liability for any negligence. So for example if you build a wall that's unintentionally not thick enough and the building collapses, you can't be sued for the damage.
- Stating that the client has not relied on anything you've said or done in forming the contract – perhaps because of something you previously told the client that was incorrect but key in their decision to instruct you. This is known as a 'non-reliance' clause.

Moreover, this director is against bringing these terms to the client's attention in the hope that they don't notice them.

Is this advisable? Would the clauses be effective in court?

In brief, this depends on whether a court would decide that the clauses are fair. The Court of Appeal (CA) considered this topic twice recently: 'Case 1' focused on a clause similar to the first one above, excluding liability for negligence; 'Case 2' focused on a clause like the second, a non-reliance clause. The first clause was found to be fair and enforceable; the second was unfair and so wasn't enforced.

Whether the clauses are enforced depends on the context, but there are a few principles to remember if you're considering such clauses.

- You should bring onerous clauses to the other party's attention. Particularly onerous clauses won't be incorporated into the contract unless you do. In Case 1, the clause excluding liability was highlighted in the introductory paragraph to their conditions.
- The court will consider whether the clause is reasonable. With exclusion clauses, a primary issue is whether the clause can be seen as genuine allocation of risk – it's not all that unusual to limit liability for negligence, and in Case 1 the business offered insurance to offset the risk. This also demonstrated that the business didn't consider themselves to be acting underhandedly.
- In Case 1 the parties' bargaining power was similar – had one of the parties been a global company with a billion-dollar turnover and the other an SME or a sole-trader, it might have been decided differently.
- Non-reliance clauses have been ruled as reasonable in several recent cases, but not in Case 2. This was for several reasons, but one difference stands out: there was no 'carve-out', i.e. nothing expressly stating that the other party could rely on statements made by their solicitor in response to enquiries. In the conveyancing world, where pre-contract enquiries are vital, this was particularly important.
- Note also that a non-reliance clause might protect you against making some incorrect statements but not others. In particular, if you deliberately say or do something that you know is (or might well be) false, this makes it fraudulent and the non-reliance clause wouldn't help. Also, if you say something that makes the other party think there isn't a relevant non-reliance clause, the non-reliance clause would probably be considered unreasonable.

What this means for you

Exclusion and non-reliance clauses are common in commercial contracts and there is no reason to avoid them. However, there is always a risk that a court will not enforce the clause, especially if it's particularly broad in scope or there is unequal bargaining power.

Note, also, that you're more limited when it comes to exclusions from consumer contracts.

How we can help

We have numerous contracts that make use of exclusion clauses. For example, our **Short and Medium-term leases for commercial premises** both include clauses saying that the parties haven't relied on representations except (carving out) those given in response to written enquiries. Our **Agreement for the supply of goods (non-retail)** includes clauses limiting liability and non-reliance clauses with no carve-out.

Sleeping is not working says Court of Appeal

Most of your business is conducted during normal office hours, but a certain service that you provide requires workers being 'on-call' at night. They're allowed to sleep, as long as their phones ring loudly enough to wake them. Must workers be paid the minimum wage whilst sleeping?

The most obvious example of this is with care workers, who are needed at night and must be prepared to work, but often won't actually be needed at that time, and the sector is dangerously short of money so there are many workers working at the minimum wage. The matter isn't limited to the care-sector, however: case-law has also involved a night-watchman at the premises of a construction company and a worker responsible for security for business premises. Or, maybe you employ people to take calls at night, and so need them on-call in case the phone rings, but people rarely call at night so the worker can get a decent night's rest.

The legislation on this is not clearly drafted and case-law from the Employment Appeal Tribunal displays tension between different interpretations of the law. Sometimes, workers who were expected to sleep for their shift were considered to be working and therefore entitled to minimum wage; other workers in that situation were considered only to be available for work.

A recent Court of Appeal judgment has reviewed the case-law and simplified the answer: if a worker must be available for work at a time when they're *expected* to sleep, they need only be paid the minimum wage for those times when they are actually working.

Unfortunately, the answer won't always be as simple. There will be cases when workers are expected to work but allowed to doze in quiet periods; that would be considered working and therefore they'd be entitled to minimum wage. But it won't always be clear where to draw the line between those cases and the case when they're sleeping and not working but available for work.

It is also understood that Unison is preparing to appeal this to the Supreme Court, so this might not be the final word on the matter.

What this means for you

You must pay your workers the statutory minimum wage. For workers of 25 or over who are not apprentices, that's £7.83/hour (which increases each April). But if the worker is expected to sleep when they're available for work, you can negotiate a reasonable payment that might be less than the minimum wage.