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BE AWARE

The monthly employment law newsletter from DLA Piper UK LLP



EVERYTHING MATTERS

THE EXPERT VIEW



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This month, Jane Cotton, a Legal Director in our Manchester office, gives her expert view on how to carry out a contract variation.

A contract of employment is a legally binding agreement and, once made, both parties are bound by its terms – neither can alter the contract without the agreement of the other. However, during the course of an employment relationship there may be a business need for change. In this month's article, Jane Cotton gives the expert view on how to carry out an effective contract variation, in light of the recent Employment Appeal Tribunal decision in *Bateman v Asda Stores Limited*, which appears to give employers more flexibility to make contractual changes.

How can employment contracts be varied?

Attempting to impose changes to the contract with or without advance warning is a unilateral variation. This would be a clear breach of contract, carrying significant risks.

Some terms will not be part of the contract, for example, benefits that are stated to be non-contractual and "policies" which merely provide guidance on how the contract will be carried out. However, a term may be contractual even if it is stated not to be and claims can still arise from alteration of non-contractual aspects of the relationship (for example, discrimination claims).

Contractual terms can be validly changed in three ways: (i) the employer and employee agree to the change – **variation by mutual consent**; (ii) individual contracts may be varied by the terms in a union agreement – **variation through the terms of a collective agreement**; (iii) the terms of the existing contract may allow for changes to be made by the employer – **variation by contractual authority**.

When one party wants to change the terms and conditions of employment the simplest method, both from a practical and legal point of view, is to get the other party to agree to the change. Clear evidence of voluntary mutual agreement will be needed to establish that terms have been varied.

Incorporation of a collective agreement negotiated with a union into the employment contract is the normal way in which a change agreed by a union on behalf of an employee becomes legally effective. If a contract of employment expressly incorporates such agreements "made from time-to-time" then the making of a new agreement will vary the contract.

Are contractual variation provisions enforceable?

It is common for contracts of employment to include express terms giving the employer the power to make changes. If the proposed variation will affect existing terms of the contract, the employer may not need to amend the contract if:

- the existing terms are sufficiently broad to accommodate the employer's proposals.

- there is a specific right for the employer to vary the contract in this way.
- the contract gives the employer a general power to vary its terms.

Specific flexibility clauses will be given a restrictive interpretation by the courts and may be limited by the terms implied into the contract (for example, the obligation to act reasonably). Where contractual authority to change terms is provided for in the contract the employer must act within the terms of the variation clause so as not to breach the contract, ie the variation in question must be clearly allowed for by the terms of the contractual clause. An express term in a contract giving the employer the right to vary contractual terms can be limited by implying into the contract a term which affects the exercise of that right, eg a mobility clause exercised at short notice involving a change of working locations at some distance may be viewed as a breach of the implied term of trust and confidence. The variation must be allowed for by the flexibility clause, eg a term stating: "although you are employed in the shift/position quoted, you may be required to change to other shift/positions" would only allow hours to be re-arranged, not increased or decreased.

It had previously been thought that general flexibility clauses can only be used to make reasonable or minor administrative amendments that are not detrimental to the employee. The general position remains that employers cannot give themselves carte blanche to make any changes to the contract simply by inserting a global contractual term to that effect. At best this type of clause will only give the right to make to changes of a minor and non-fundamental character. However, in the recent case *Bateman and others v Asda Stores Ltd*, the EAT upheld a tribunal decision that Asda was entitled to rely upon a general statement in its employee handbook reserving the right to vary contractual terms in order to introduce new pay terms, without the need to obtain employees' express consent. The decision is useful for employers wishing to make changes to working practices to reflect the changing needs of their business, but it is significant that the employees had not argued that Asda's unilateral variation of contract was a breach of the implied term of mutual trust and confidence at tribunal level and so were unable to do so before the EAT. It is also significant that in fact no employee had been demonstrated to have suffered any financial loss as a result of the changes. The decision may have very limited practical impact, although employers may wish to review contracts to insert more wide-ranging powers to make amendments to contracts.

What if there is no contractual right to make the change and employees do not agree?

If the employer's proposals involve altering the existing contract and there is no contractual right to make such a change, in the absence of the agreement of the employees the employer could:

- Unilaterally impose the change and use the employee's conduct to establish implied agreement to the new terms.
- Terminate the existing contract and offer continued employment on the new terms.

Unilaterally imposing the change and relying on the employee's implied agreement is more likely to be effective if there is an immediate practical effect on the employee (for example, a pay cut) and they continue to work without objecting. However, employers should not assume that silence is sufficient to indicate implied agreement – especially if there is no immediate impact on the employee (such as a change to a contractual redundancy payment, which will only have effect if and when the employee is made redundant, which may be some years later).

The imposition of the change by the employer will be a breach of contract. The employee can:

- Comply with the new terms but work "under protest" and claim for breach of contract or (if their wages have been reduced) unlawful deductions from wages. This is known as "standing and suing".
- If the change is sufficiently fundamental, resign and bring a claim for constructive dismissal.
- refuse to work under the new terms.

An employer faced with an employee who refuses to agree to a change may choose to terminate the old contract with full contractual notice and offer the employee new terms and conditions. There will be no breach of contract in these circumstances, but the termination will be a dismissal which can give rise to an unfair dismissal claim, even if the employee has accepted the new contract. The employer would then have to show that a sound business reason for the change and that the employer had acted reasonably in all the circumstances.

CASE OF THE MONTH

Muschett v HM Prison Service

Facts

Mr. Muschett signed a contract with the Brook Street agency on 15 January 2007. From 22 January 2007 until 10 May 2007 he was supplied to HM Prison Service ("HMPS") to work as a cleaner at Feltham Young Offenders Unit. When HMPS terminated his assignment Mr. Muschett brought employment tribunal claims for unfair dismissal, wrongful dismissal, and sex, racial and religious discrimination against both Brook Street and HMPS.

Decision

The tribunal dismissed Mr. Muschett's claims against HMPS at a pre-hearing review on the basis that he was neither an employee of HMPS as defined in s.230 Employment Rights Act 1996 ("ERA"), nor in the 'employment' of HMPS in the wider sense under the Sex Discrimination Act 1975 ("SDA") or Race Relations Act 1976 ("RRA"), nor was he a 'contract worker' under the relevant discrimination legislation. Mr. Muschett appealed to the EAT and subsequently to the Court of Appeal.

Under s.230 ERA, an employee is defined as someone working under a contract of employment, which means a contract of service or apprenticeship. Under s.78(1) RRA (and other discrimination legislation) 'employment' means employment under a contract of service or a contract personally to execute any work or labour. Under s.7 RRA (and similar provisions in other discrimination legislation) a 'contract worker' is someone who works for a principal but who is employed not by the principal but by another person, who supplies them under a contract made with the principal.

The tribunal found that Mr. Muschett had no written contract with HMPS, he worked in accordance with a contract for services for temporary workers between him and Brook Street, he had undergone a CRB check and induction process before

working for HMPS and was supplied with a copy of the staff handbook, he was under HMPS's control when carrying out his work and was required to carry it out personally, but he was paid by Brook Street and he had no contractual obligation to provide services personally to HMPS. The tribunal judge held that there was no mutuality of obligation between HMPS and Mr. Muschett and therefore no contract of employment. In the absence of mutuality of obligation, the tribunal judge also held there was no contract personally to do any work. Mr. Muschett was not a 'contract worker' as he had no contract of employment with Brook Street. Accordingly, all his claims failed.

The Court of Appeal held that there was no basis on which to question the tribunal's finding that Mr. Muschett was not an employee of HMPS. The Court of Appeal also held that there was no implied contract for services between Mr. Muschett and HMPS. There was nothing in the evidence that necessitated the implication of such an agreement, and, following *James v Greenwich BC*, only necessity will do.

Implications

In many cases, agency workers will be able to bring discrimination claims on the basis that they have a contract of employment with the employment agency and consequently fall under the 'contract worker' provisions. However, there is no doubt that this case does significantly reduce the ability of agency workers to bring discrimination claims. It would potentially be open to employers to insist that agencies only supply workers who are not employed by the agency, in order to avoid the risk of discrimination claims. In addition, this case further reinforces the position following *James v Greenwich BC* that where there is a valid tripartite contractual relationship between agency, worker and end-user, the courts will rarely imply a contract (whether of service or to provide services personally) between the worker and end-user.

NEWS IN BRIEF

Default retirement age will be decided this summer



It has been reported that the Government will make a decision on the default retirement age in the summer. At an Employers Forum on Age conference, Employment Relations Minister, Lord Young, stated that the decision would be made alongside the publication of Government evidence gathered as part of its review on the issue. This will be followed by a consultation on any proposed change, which would then come into force in 2011.

Government publishes response to "fit note" consultation



On 29 January 2010, the Government published its response to the consultation on the draft regulations which will introduce the new statement of fitness to work (often referred to as "fit notes") on 6 April 2010. Only GPs will be able to issue fit notes and they will only be able to certify that an employee "may be fit for work", rather than "fit for work" to make it clear that employers still need to carry out a risk assessment on the employee's return. The fit note will list the common types of changes employers can introduce to assist a return to work: "a phased return to work", "amended duties", "altered hours" and "workplace adaptations". The Government believes this will encourage further discussions between doctor and patient and between employee and employer on the potential options that could facilitate a return to work.

EIRO publishes study on the use of ADR in employment disputes



The European Industrial Relations Observatory (EIRO) has published a comparative study on the use of alternative disputes resolution (ADR) for workplace disputes. The research shows that there has been a rise in the use of ADR throughout Europe, and that it is most successful when used in relation to ambiguous and complex matters. According to EIRO, ADR is now viewed by many as a faster and more cost-effective approach than traditional court proceedings.

HR MATTERS

This month Emma Phillips, an Associate in our Birmingham office, considers how employers should deal with employees who misuse social networking sites.



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An employee has posted disparaging comments about the company and his line manager on his Facebook profile. In addition, he has posted a video on his profile which shows him and his colleagues playfighting in the staff room but does not identify the company. I consider that his online conduct has brought the company into disrepute and amounts to gross misconduct. Can I dismiss him?

To date, there has been a lack of reported cases indicating how tribunals will approach instances of online misconduct. However, given the exponential growth in the popularity of social networking sites and the increasing awareness of employers of their employees' online activities, it is reasonable to predict that this will soon change.

A recent unreported case, *Taylor v Somerfield*, suggests the need for employer caution in this area. The case concerned a claim for unfair dismissal where an employee had posted a video on YouTube of himself and his colleagues playfighting with plastic bags in the company warehouse. He was subsequently dismissed for bringing the company into disrepute.

The employment tribunal found the employee to have been unfairly dismissed on the basis that there was no evidence that he had brought the company into disrepute. The respondent company could only be identified from the video by a viewer who was familiar with the colour pattern of the employees' retail uniforms. It was therefore unlikely that the video could damage the reputation of the company in the eyes of a reasonable viewer. Moreover, there had been no enquiry as to how many hits the video had received, an issue which the tribunal considered key to the question of whether the company had suffered damage. In fact, the video had been removed after three days, during which time it had received eight hits, three of which were from the employee's managers.

It follows that the video posted by your employee fooling around in the staff room may not justify dismissal on reputational grounds. However, the comments posted on his

Facebook profile could support disciplinary action. The disparaging comments make explicit reference to the company and to the employee's line manager, so are more likely to be capable of bringing the company into disrepute. However, further investigation into whether his conduct did, in fact, cause, or have the potential to cause, actual damage to the company's reputation may be required prior to concluding that dismissal is the appropriate sanction in this case.

Furthermore, you should consider whether other grounds could be invoked, such as:

- potential health and safety breaches evident from the online video;
- whether the employee's conduct creates vicarious liability for the employer under the Protection from Harassment Act 1997 or for discrimination (for example, where the employee has made disparaging comments about his line manager connected to race, gender, age or other prohibited grounds); and
- breach of confidentiality arising from posting confidential information online.

Practically, therefore, employers should ensure that they implement clear policies which confirm the potential implications in respect of online conduct which may impact on their business. Going forward, tribunals and courts will face the unenviable task of balancing employer concerns against an employee's rights to privacy and freedom of expression. Until clarification is provided by the employment tribunal and appellate courts, employers are advised to tread cautiously when disciplining for online misconduct adhering to internal policies which should be re-circulated from time to time, while employees should exercise restraint in terms of what they say and do online if related to their employment.



HR IN CONTEXT

in association with HR Benchmarker



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The CIPD Report (February 2010) 'Next Generation HR', has identified the following as key emerging issues for HR to engage with :

- Building "organisation equity" through the development of future-proof cultures, future-fit leaders and acting to project understanding of the organisation activity and direction ("guardians and commentators").
- The development of a next stage evolution for HR having progressed from a service focus through a process emphasis to be an insight-driven function that informs the organisation at a business level about challenges, opportunities and solutions.
- The development of a new generation of HR leaders ("partners and provocateurs") who are able to partner with other senior leaders and engage with their organisation to encourage new ways of doing business or new areas of strategic focus.

The centrepiece of the concept of next generation HR is that the function and its senior practitioners have the "organisation insight" to deliver business practice that is ahead of current thinking – they will be able to synthesise the information clues around them to develop organisational ideas, strategies and innovative ways of doing business. For HR specialists contextual people management information is sourced at two levels:

- Information on workforce features, trends, preferences, behaviours and performance.
- Information on the impact and effectiveness of HR structure, strategy, and processes.

More than ever before HR specialists need to understand the core purpose of their organisation and how the HR function will add future value in relation to market issues, resource utilisation, achieving competitive advantage and challenging the overall business environment. As the CIPD report notes, in some organisations this is already underway in that:-

".....some HR functions are delivering unique organisation insight, helping organisations to find new ways of meeting current and future challenges. In these functions there is a new relationship to data-gathering and analysis – generating true insight"

To learn more about how HR Benchmarker surveys and analysis enable managers to identify emerging trends, current issues and comparative operational practice on a wide range of workforce metrics and HR indicators, visit www.hrbenchmarker.com or contact Bill Taylor.

ON THE HORIZON

Employment Legislation Tracker

2010

Statutory payments and limits

On 1 February 2010 the maximum compensatory award for unfair dismissal fell from £66,200 to £65,300. On 6 April 2010, the rates of statutory maternity pay, statutory paternity pay, and statutory adoption pay will increase from £123.06 to £124.88 per week. Statutory sick pay will remain at £79.15 per week.

Employee study and training regulations

The Apprenticeships, Skills, Children and Learning Act 2009, which received Royal Assent on 12 November 2009, introduced a new right for employees to request time off to undertake study or training. In order to implement this, the [Employee Study and Training \(Eligibility, Complaints and Remedies\) Regulations 2010](#) and the [Employee Study and Training \(Procedural Requirements\) Regulations 2010](#) were laid before Parliament on 1 February 2010. These regulations set out the detail of how a request should be made and the procedure to be followed by the employer upon receipt of a request. The regulations will come into force on 6 April 2010 and will apply to employees who work for an organisation employing 250 or more employees. It is expected that the regulations will be extended to all employees in April 2011.

Additional paternity leave

The Work and Families Act 2006 inserted a power in the Employment Rights Act 1996 to make regulations entitling eligible employees to additional paternity leave. In September 2009, the Government consulted on [draft regulations](#). In January 2010, the Government issued its [response](#) to this consultation. The regulations will come into force on 6 April 2010 and will apply to employees expecting a baby, or matched for adoption, on or after 3 April 2011.

Safeguarding Vulnerable Groups Act 2006

Since 12 October 2009, the [Independent Safeguarding Authority \(ISA\)](#), established under the [Safeguarding Vulnerable Groups Act 2006](#), has operated a centralised vetting and barring scheme for those working with children and vulnerable adults. The Act also introduced barring from 'regulated activities' – people included on the new barred lists are barred from a much wider range of jobs and activities than before. There is also a new duty to share information. From 26 July 2010 all new entrants to roles working with vulnerable groups and those switching jobs within these sectors will be able to register with the ISA and be checked by them. The legal requirement for employees to register with the vetting and barring scheme and for employers to check their status will come into force in November 2010.

2011

Temporary Agency Workers' Directive

[Directive 2008/104 EC](#) on Temporary Agency Work was published in the Official Journal of the European Union on 5 December 2008. Member States have until 5 December 2011 to implement its provisions in the UK. The most important of these is that agency workers must have the right to equal basic working and employment conditions with comparable permanent employees. The Directive does, however, enable the UK to provide that an agency worker must be in a job for at least 12 weeks before they receive this protection. This accords with the agreement reached between the Government, the CBI and the TUC in May 2008. The Government launched a [consultation](#) process to determine how to implement the Temporary Agency Workers' Directive in the UK. This closed on 31 July 2009 and the Government's [response](#), together with [draft regulations](#) for consultation, was published on 15 October 2009. Consultation on the draft regulations closed on 11 December 2009 and the Government's [response](#) was published on 21 January 2010. The draft Regulations were laid before Parliament on 21 January 2010 and are expected to come into force on 1 October 2011.

2010

Equality Bill

The [Equality Bill](#) was published on 27 April 2009 and has now completed the Committee Stage at the House of Lords. The Report stage is scheduled for 2 March 2010. The Bill aims to harmonise and strengthen the law on discrimination. It brings together over 100 pieces of separate discrimination measures into one place and, in most cases, provides a single approach. It also extends the circumstances in which a person is protected against discrimination, harassment and victimisation. The Bill is expected to receive Royal Assent in Spring 2010 and come into force in Autumn 2010. The EHRC is currently consulting on [draft codes of practice](#) and [guidance](#) drawn up for the Equality Bill, which will explain the new legislation so it can be applied consistently by lower courts and tribunals.

The Employment Relations Act 1999 (Blacklists) Regulations 2010.

The blacklisting of trade unionists involves the systematic compilation of information on individual trade unionists and their use by employers and recruiters to discriminate against those individuals because of their trade union membership or because of their involvement in trade union activity. Early in 2010, draft Regulations to prohibit the blacklisting of trade unionists were laid in Parliament for approval. The Regulations make it unlawful to compile, supply, sell or use a "prohibited list" (i.e. a blacklist).

2011

European Works Council Directive

[Directive 2009/38/EC](#) on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), was published in the Official Journal of the European Union on 16 May 2009. Member States have until 5 June 2011 to give effect to the Directive. The Directive will, among other things clarify the concepts of "information" and "consultation", define what matters are to be considered as "transnational", establish a right to paid time off for training for EWC members, recognise the role of trade unions in the establishment of EWCs and insist upon "effective, dissuasive and proportionate" sanctions for those employers who fail to comply with the Directive's requirements. On 19 November 2009 the Government launched a [consultation](#) on the implementation of the Recast Directive in the UK, with draft Regulations. The consultation closed on 12 February 2010 and the Government's response is awaited.

AT A GLANCE

| | Now | Future |
|-------------------------------------|---------|-------------------------|
| Unfair dismissal basic award | £11,400 | |
| Unfair dismissal compensatory award | £65,300 | |
| Maximum statutory redundancy pay | £11,400 | |
| Cap on a week's pay | £380 | |
| Rate of SMP, SPP, SAP | £123.06 | £124.88 from April 2010 |
| Rate of SSP | £79.15 | |
| National minimum wage | | |
| 22 and over | £5.80 | |
| 18 – 21 | £4.83 | |
| 16 – 17 | £3.57 | |



In February 2010, 73% of our subscribers answering our "Your Say" question said that they did not anticipate receiving many requests for time off to attend training from April 2010 when eligible employees working in a business which employs 250 or more employees will have the right to request it.

YOUR SAY

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