

BRIEF UPDATE

FROM THE EMPLOYMENT LAW DIVISION



VARYING CONTRACTS OF EMPLOYMENT— *BATEMAN & OTHERS v ASDA STORES LTD*

In the current economic climate employers may consider taking measures, including reducing pay or bonuses, as an alternative to making redundancies. Alternative measures, such as these, involve a variation to the contract of employment and employees may refuse to agree to the proposals, especially where they have an adverse effect on them.

A contract of employment may only be amended in accordance with its terms or with the express agreement of both parties. Where the employee's express agreement cannot be obtained and the employer cannot rely on an existing term of the contract in making the change, an employer is left with the option of terminating the employee's contract of employment and offering re-employment under the new terms. This of course constitutes a dismissal and therefore carries with it the risk of an unfair dismissal claim.

The right to rely on variation clauses was previously thought to be very limited indeed. The general view was that no significant changes

could be made whilst relying on a general variation clause. However, the recent case of *Bateman & Others v Asda Stores Ltd* suggests that the power to make changes in reliance on such a clause is wider than previously thought. This case may therefore be helpful to employers wishing to impose detrimental unilateral changes including reducing salary or bonus payments.

In this Brief Update we will examine the *Bateman* case and look at why some caution should be exercised when relying on it.

The Facts of the Case

Asda sought to introduce a new pay structure for its hourly paid employees. This was introduced for all new employees and existing employees were able to transfer to the new structure voluntarily. Most existing employees transferred voluntarily and Asda then sought to transfer the remaining employees onto the structure. Asda entered into a lengthy, but ultimately unsuccessful, period of consultation with the remaining employees and the change was eventually imposed without their agreement.

In enforcing this change Asda relied on a clause within their staff handbook which stated that Asda “reserved the right to review, revise, amend or replace the contents of this handbook and introduce new policies from time to time reflecting the changing needs of the business...”. The conditions in the staff handbook were incorporated into the employees' contracts of employment.

The EAT found that Asda where entitled to rely on the variation clause to reserve the right to vary contractual terms without obtaining further consent, even where an employee suffers financial loss as a result.

The Decision in Summary

This case is authority for the proposition that, where an employer has a variation clause in their contract of employment or employee handbook (which is of contractual effect), changes can be made without further agreement, provided that: -

- The clause is clear and unambiguous
- The employer complies with the terms of the clause (including any limitations it may place on them to make changes)
- The employer does not act arbitrarily or capriciously in making the change
- The employer does not breach the mutual term of trust and confidence in the way in which it imposes the change.

A Note of Caution

Employers should note that, in this case, the employees conceded that there was no issue in relation to a breach of trust and confidence and therefore this argument was not considered by either the Tribunal or the EAT. Although the trust and confidence argument was not before it, the EAT commented that, whilst Asda were entitled to impose this change without consultation, had they not entered into consultation it would perhaps have been difficult to make the changes without damaging trust and confidence.

The majority of the employees affected by the change in this case were not claiming to suffer any financial loss earnings and the EAT expressly accepted that Asda had taken steps to ensure that no employee suffered a reduction in pay due to the change.

The EAT relied on an earlier judgement of the Court of Appeal in confirming that whilst an employer may reserve a contractual right to unilaterally vary the contract of employment, clear language must be used and if the unilateral change could produce an unreasonable result, the courts in construing the contract would “seek to avoid such a result”.

It is also worthy of note that the variation clause upon which Asda sought to rely contained limitations on the nature of the changes possible, namely that they must relate to “*the changing needs of the business or comply with new law*” and Asda were able to show a genuine business need for the change.

Drafting Variation Clauses

Employers wishing to draft a new variation clause are advised to include similar limitations on the nature of changes that can be made, as described above.

Employers should also ensure that clauses of this nature which are

contained within an employee handbook are expressly states to be of contractual effect.

Relying on an Existing Variation Clause

Employers wishing to rely on an existing variation clause should remember that this case does not give carte blanche to make changes. Employers must be careful not to act arbitrarily or capriciously in making changes and they must be careful not to breach trust and confidence. To that end, employers must be able to show that they have a genuine business reason for making the change and should still enter into a period of consultation about the change they propose.

If you would like to discuss or require assistance with any of the above issues please contact a member of the employment law team:-

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