Changing an employment contract

An employment contract, like other contracts, can generally only be varied by agreement. If organisations wish to reserve an ability to make changes as business needs change, a clear contractual right to vary needs to be reserved in the contract. However, even if the clause provides a general right to vary, the extent of the right will be limited to changes of a minor and non-fundamental nature. For example, it is common for contracts to provide for minor variations of their terms or to provide that a Staff Handbook may be amended from time to time.

While there is case law to support an employer's ability to make reasonable variations, some 2015 cases demonstrate the high threshold that an employer will need to cross to avoid potential challenges.

An important case supporting an employer's right to make reasonable variations was *Bateman & Others v Asda Stores Ltd 2010 IRLR 370 EAT*. In this case, the relevant parts of the Staff Handbook, which were incorporated into employees' contracts, stated that the employer reserved the right to 'review, revise, amend or replace' the contents of the Handbook and introduce new policies. The Employment Appeal Tribunal (EAT) held that these words gave the employer the right to change contractual terms including pay rates.

The courts scrutinise variation clauses extremely closely and any unilateral change beyond the terms permitted by the variations clause will give rise to potential liability for breach of contract and unfair dismissal. Variation clauses therefore need to be drafted with great care.

In *Sparks v Department for Transport 2015 IRLR 641*, the employer wished to introduce a new absence management policy which triggered absence management procedures at an earlier stage of sickness absence. The Department for Transport sought to rely on a provision allowing it to make variations as long as they were not 'detrimental' to employees. The Court accepted that the triggering provision was incorporated into individual employment contracts from the Staff Handbook, but held that the new policy was detrimental because it could result in an employee facing disciplinary charges for absence sooner than previously. Accordingly the change did not fall within the scope of the contractual variation clause and required the express agreement of each member of staff.

In *Norman v National Audit Office 2015 IRLR 634*, the EAT also took a strict approach, holding that a clause stating that terms and conditions were 'subject to amendment' and that changes would be 'notified' to employees was not sufficient to allow the employer to unilaterally vary contractual leave and sick pay provisions. The EAT also held that a clause in the Staff Handbook could not confer the right to impose changes because the clause had not been incorporated into the relevant employment contracts.

Similarly in *Hart v St Mary's School (Colchester) Ltd EAT 0305/14*, the EAT held that a contractual clause that stated a part-time teacher's hours 'may be subject to variation depending on the requirements of the school timetable' was not sufficiently clear to allow unilateral variation. It held that the school had breached the teacher's contract in imposing a new pattern of work. This allowed her to resign on the basis of constructive dismissal.

These cases underline the need for careful drafting to ensure that provisions to enable variation are clear and unambiguous. However, this remains a high risk area and legal advice should always be sought before any unilateral variation is imposed.

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