



Employment and Pensions

trowers & hamlin

Spring clean those contracts!

It was previously thought that an employer who expressly reserved the right to vary an employee's contract unilaterally would generally be unsuccessful in seeking to rely on such a right. However, following the recent Employment Appeal Tribunal (EAT) case of *Bateman and ors v Asda Stores Ltd* it seems that this will no longer be the case.

Whilst employers can draw heart from this decision, it is important to note that the inclusion of such a clause in an employee's contract can probably only be utilised in certain situations. Still, provided that the variation clause is a workable one, it is welcome news for Registered Providers who may already be enjoying the enhanced flexibility given by the demise of Schedule 1's restrictive regime.

Facts in Bateman

A small proportion of Asda's store staff were employed on a pay structure entitled "Standard Rate". Asda wanted to harmonise the terms and conditions relating to pay in order to bring them in line with their more recent pay structure entitled "Top Rate".

Asda tried to ensure that no employees suffered a reduction in pay as a result of the decision to amend their contracts to incorporate the more recent pay structure. It also underwent an extensive consultation process with the affected employees, with the result that over half of the employees transferred voluntarily to the new regime.

The employees' contracts incorporated the terms set out in the staff handbook and specifically stated that, "The Company reserves the right to review, revise, amend or replace the content of this handbook, and introduce new policies from time to time to reflect the changing needs of the business...".

A variety of claims were brought by some of the employees who refused to transfer voluntarily to the new pay scheme, including unauthorised deductions from wages, breach of contract and unfair dismissal claims. Of the eventual six test

claimants, five claimed declaratory relief (a declaration of their rights under their contracts), and one claimed that she had suffered loss as a result of the introduction of the new regime.

Both the tribunal and the EAT held that there was no reason to prevent an employer from reserving the right to amend any or all of the contract terms unilaterally. Accordingly, Asda was able to impose unilateral changes relying on the above-mentioned clause in its staff handbook.



Source: istockphoto

Limitations on power to impose unilateral changes

Although Asda was able to rely on its staff handbook to harmonise its pay structure the tribunal made it clear that the reservation of a contractual right to vary will be scrutinised carefully to ensure that it covers the actual changes made by the employer. In this case as the change or variation fell "within the contractual power to vary, it will be effective even if financial loss ensues".

The tribunal held, and the EAT agreed, that the clause in the staff handbook contained "a clear and unambiguous power to vary contractual terms". The power could only be exercised to reflect the changing needs of the business and, in the tribunal's opinion, Asda's desire to harmonise its pay structure fell within those needs.

The tribunal established that there was no reason why reserving a right to amend contractual terms unilaterally could not form an exception to the general rule that a variation of contract requires

Published by
Trowers & Hamlin LLP
Sceptre Court
40 Tower Hill
London
EC3N 4DX

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001

www.trowers.com

Trowers & Hamlin LLP is a limited liability partnership registered in England and Wales with registered number OC337852 whose registered office is at Sceptre Court, 40 Tower Hill, London, EC3N 4DX. Trowers & Hamlin LLP is regulated by the Solicitors Regulation Authority. The word "partner" is used to refer to a member of Trowers & Hamlin LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Trowers & Hamlin LLP's affiliated undertakings. A list of the members of Trowers & Hamlin LLP together with those non-members who are designated as partners is open to inspection at the registered office.

Trowers & Hamlin LLP has taken all reasonable precautions to ensure that information contained in this document is accurate but stresses that the content is not intended to be legally comprehensive. Trowers & Hamlin LLP recommends that no action be taken on matters covered in this document without taking full legal advice.

the consent of both parties. However, it then went on to concede that there may be exceptions to this approach.

Such exceptions will exist where "the employer had acted so unreasonably or so arbitrarily or capriciously as to amount to a breach of the implied [term] of trust and confidence". There may also be circumstances where a change to contractual conditions was introduced without notice or warning, or without consultation, leading to the argument that mutual trust and confidence had been infringed.

An implied term of trust and confidence exists in all contracts of employment and requires that the parties to the contract will not, without reasonable and proper cause, conduct themselves in a manner calculated, or likely, to destroy, or seriously damage, the relationship of confidence and trust which should exist between the employer and employee.

Will the extent of an employee's understanding make a difference?

It is interesting to note that an argument was raised in *Bateman* on appeal that the background of the affected employees should be taken into account in coming to a decision. The appellants' counsel stated that the tribunal should have taken into account the fact that most of the employees were not well-educated, or even literate or numerate and were subsisting on very low wages. As a result of this they could not be expected to appreciate that the effect of their contracts would be to leave Asda with the discretion to reduce their pay without the need to gain their consent.

The EAT was unable to entertain this argument as it had been accepted before the tribunal that the staff handbook should be construed on an objective basis. In addition no evidence had been presented to the tribunal that the employees had the claimed limitations and expectations and so there was no ground of appeal that the tribunal should have found that their background should have been taken into account. However, evidence that an employee is unable to understand the effect of a variation clause may, in future, be something that a tribunal could be asked to take into account.

Take a cautious approach

In view of the decision in *Bateman* variation clauses in contracts may be enforceable. However, such a clause

should be limited to the amendment of terms and conditions only where necessary, whilst making it clear that the Registered Provider's first step will always be to seek consent. Terms should only be imposed unilaterally as a last resort after proper consultation has taken place.

Provided that these guidelines are followed it is unlikely that a Registered Provider will be found to have acted unreasonably, arbitrarily or capriciously.

RIP Schedule 1...continued

Some Registered Providers are using the opportunity of Schedule 1's demise to look at amending their standard terms. They are interested in different remuneration structures, with fewer contractual payments; or making contracts more discretionary. If you are interested in a commercial look at your contracts please contact us.

April 2010

©Trowers & Hamlins LLP

For more information please contact:

Emma Burrows, Partner, London
t +44 (0)20 7423 8347 f +44 (0)20 7423 8001 e eburrows@trowers.com

Anna Scott, Professional Support Lawyer, London
t +44 (0)20 7423 8290 f +44 (0)20 7423 8001 e ascott@trowers.com

Trowers & Hamlins LLP is a limited liability partnership registered in England and Wales with registered number OC337852 whose registered office is at Sceptre Court, 40 Tower Hill, London, EC3N 4DX. Trowers & Hamlins LLP is regulated by the Solicitors Regulation Authority. The word "partner" is used to refer to a member of Trowers & Hamlins LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Trowers & Hamlins LLP's affiliated undertakings. A list of the members of Trowers & Hamlins LLP together with those non-members who are designated as partners is open to inspection at the registered office.

To be removed from our contacts database, please write your name here:

And return this page to Joanna Hodson, Trowers & Hamlins, Sceptre Court, 40 Tower Hill, London, EC3N 4DX or fax it to +44 (0)20 7423 8001

hrlaw@trowers.com

We provide a monthly email briefing on changes to employment law and HR practice. To obtain a free subscription please email us at hrlaw@trowers.com. Please quote ref.Hr0410.