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earwiggin : employment law update

VARIATION CLAUSES

Bateman and others v Asda Stores Ltd

It is not uncommon for employment contracts or staff handbooks to include a provision purporting to give the employer a right to vary the contract. Previous cases have suggested that this type of clause may only be relied upon by an employer to make reasonable or minor contractual changes. However, a recent decision by the Employment Appeal Tribunal suggests that it may be possible for employers to use these types of clauses to make more far-reaching contractual changes without obtaining the agreement of the employees affected.

Asda wanted to change the pay structure of about 18,000 of its employees. After a period of consultation, approximately half of the affected employees refused to agree to the proposed changes. Asda decided to implement the change anyway by invoking a clause in its handbook which stated that it "*reserved the right to review, revise, amend or replace the contents of the handbook, and introduce new policies from time to time reflecting the changing needs of the business...*"

About 700 employees brought claims and argued that the wording in the handbook only allowed Asda to make changes to non-contractual policies and that it therefore could not vary their pay arrangements without their consent. The tribunal and the EAT rejected their claims. It was held that the wording of the handbook was "clear and unambiguous" and therefore Asda was entitled to rely upon it to introduce the changes unilaterally.

At first glance, this is an encouraging decision for employers in that it suggests that there may be greater scope than previously thought to invoke variation clauses to make contractual changes. However, it is worth noting that Asda had taken steps to ensure that no employees suffered a reduction in pay as a result of the change in pay structure. The decision may well have been different if the changes had been more drastic. It is also important to remember that making unilateral contractual variations may amount to a breach of the implied term of trust and confidence. Therefore, employers would still be well advised to proceed with caution before relying on a variation clause to make significant contractual changes.

BONUSES - IMPLIED TERMS

Rutherford v Seymour Pierce Ltd

Many bonus schemes expressly provide that eligibility for a bonus is conditional on the employee still being employed and not under notice on the bonus payment date. But what if the bonus scheme does not include this type of provision? Can a former employee argue that they should still receive a bonus even though their employment has terminated? Or can the employer argue that there is an implied term to the effect that anyone who is no longer employed loses their entitlement to a bonus?

Mr Rutherford was employed by Seymour Pierce Limited as Head of Institutional Sales. His contract of employment simply provided that he was eligible to participate in the company's discretionary bonus scheme. Historically, the company paid out 50% of the bonus pool at the end of its third quarter with the balance being paid after the year-end accounts were signed off. Mr Rutherford was dismissed for poor performance after he had received the first bonus payment but before he received the balance that became payable at the end of the year. He brought a claim for breach of contract.

The company argued that, although his contract of employment did not expressly provide that he had to be still employed to qualify for his bonus payment, there was an implied term to that effect. However, this was rejected by the High Court. The Judge found that it was not necessary to imply such a term and that, in any event, the proposed term would be "manifestly unreasonable" because it would permit the company to avoid paying a bonus by dismissing the employee the day before the bonus payment date. Further, the Judge refused to imply such a term on the grounds that it was custom and practice amongst city institutions not to pay bonuses in these circumstances.

Although this case involved slightly unusual facts, it is a useful reminder that it is sensible to include clear contractual provisions setting out what happens to an employee's bonus entitlement when they leave. Simply stating that bonuses are discretionary may not be sufficient to allow the employer to refuse payments to employees who have left before the bonus payment date.

CONSTRUCTIVE DISMISSAL

Buckland v Bournemouth University High Education Corporation

Is it possible for an employer to avoid a constructive dismissal claim by rectifying a breach of contract before the employee decides whether to resign? A recent decision by the Court of Appeal suggests that it is not.

Professor Buckland was employed in the Archaeology Department of Bournemouth University. After some exam papers that he marked resulted in a high failure rate, his Head of Department decided that they should be remarked. This resulted in many of Professor Buckland's marks being overturned without his knowledge. Professor Buckland subsequently found out what had happened and brought a complaint against his Head of Department. Following an enquiry by the university, his complaint was upheld. Nevertheless, Professor Buckland was not happy because he felt that he had not been fully exonerated by the enquiry. He resigned and brought a claim for constructive dismissal.

Although the EAT dismissed his claim on the grounds that the university had rectified the breach of contract by upholding his complaint against his Head of Department, the Court of Appeal reversed this. It found that, once a breach of contract has been committed by an employer, it is not open to the employer to "cure" the breach before the employee has decided whether or not to treat themselves as constructively dismissed.

This is not a particularly helpful decision for employers in that it reduces the scope to avoid constructive dismissal claims by taking steps to deal with the problem before the employee resigns. One possible consequence is that it will give employers less reason to uphold grievances even where it is found that the employee has legitimate grounds for complaint.

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If you would like further information on anything reported above please contact [Marcus Rowland](#) (01242) 631224 or [Chris Hammond](#) (01242) 631282.

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