

Employment E-Bulletin

March 2010

GLAISYERS
SOLICITORS LLP
www.glaisyers.com

Right to unilaterally vary contracts of employment



Introduction

In *Bateman and others –v- Asda Stores Limited* the Employment Appeal Tribunal (EAT) has confirmed that employers may have the right to unilaterally vary employees' contracts of employment (including hours of work and rates of pay) without obtaining the express consent of employees where there is a broadly drafted contractual right to change terms and conditions of employment contained in a staff handbook provided the changes are properly implemented and the employer does not act in a way which breaches its duty of trust and confidence.

Facts of the case

Prior to August 2007, a proportion of Asda store staff were working under an old pay structure. Asda wished to amend the contracts of those employees so that their pay structure was in line with the rest of the store staff. Asda therefore embarked upon an extensive consultation process with the affected employees which resulted in just over half transferring voluntarily to the new regime. The remaining staff however, were transferred involuntarily under a provision in Asda's staff handbook which enabled it to "review, revise, amend or replace" the contents of the handbook and introduce new policies to reflect the "changing needs of the business". The handbook specified that some sections, including those relating to pay and the right to change terms, formed part of the employees' contracts of employment.

700 claims were subsequently brought by employees of Asda in the Employment Tribunal claiming unauthorised deductions from wages, breach of contract and in some cases, unfair dismissal. Six test cases were considered by the Tribunal.

Decision of the Employment Tribunal

The employees argued that:

- 1) The power to vary was limited to non-contractual policies.
- 2) Any proposed variation to pay still required consent.

3) The fact Asda consulted with staff rather than imposing the change from the outset, suggested Asda also believed the handbook wording did not allow them to unilaterally change contractual terms.

The Employment Tribunal found that, whilst contractual changes ordinarily require the consent of both parties, employers can reserve the right to vary terms in a contract of employment without consent by reserving the ability to change a particular aspect of the contract unilaterally. Such a provision would however, be scrutinised carefully to ensure it enables the employer to make the particular change unilaterally. As a result, if the change falls within the contractual power to vary, it will be effective even if financial loss ensues.

The Tribunal noted that there may be exceptions to this approach where, for example, an employer has acted unreasonably, arbitrarily or capriciously or has introduced a change without notice or consultation and in so doing has breached the implied mutual duty of trust and confidence. The Tribunal confirmed however, that no such arguments arose in this case as Asda had given several months warning to affected staff before transferring them and the handbook contained a clear unambiguous power to vary contractual terms to reflect the changing needs of the business. In view of this, the Tribunal rejected the employees' claims.

Decision of the EAT

The employees appealed to the EAT and argued that the Tribunal:-

- 1) Failed to take account of the background of the affected employees: The Claimants argued that as most of the employees were "not well educated or even literate" they could not have intended or expected that the effect of their contracts would be that Asda could reduce pay, hours or holiday without consent or notice.
- 2) Did not appreciate Asda's duty to maintain trust and confidence by explaining to the employees what the clause meant: If Asda really intended that the words in the staff handbook were to have the effect claimed then, under its duty to maintain trust and confidence, it should have explained to its employees what they really meant.

3) Incorrectly construed the handbook as entitling Asda to impose the new regime without consent:

The Claimants argued that the wording in the handbook entitling Asda to “review, revise, amend or replace” did not apply to the terms and conditions of employment but rather the contents of the handbook itself.

The EAT rejected all of the above arguments. It found that the handbook should be construed objectively and that the power in the handbook was clear and unambiguous and allowed Asda to amend the handbook and introduce new policies unilaterally. As regards the potential breach of trust and confidence, the claimants had conceded at the tribunal hearing that this was not an issue and therefore they were unable to appeal the issue.

Comment

The decision is helpful to those employers who wish to make changes to their working practices which reflect the changing needs of their business particularly in the current economic climate. The case makes it clear that, provided the wording of the variation clause is clear and the employer acts in line with the implied duty to maintain trust and confidence, these terms can be varied unilaterally (ie, without consent) even if this results in financial loss to the employee. Furthermore, whilst Asda did decide to consult with its staff, it was under no obligation to do so and could have imposed the change without consultation. The EAT did go on to say however, that if Asda had failed to consult it would probably have been difficult to make the changes without damaging the relationship of trust and confidence between Asda and its affected employees. It is also important to bear in mind that Asda took steps to ensure no employee suffered a financial loss as a result of the change. Had Asda been seeking to introduce a more radical change, the decision may have been different.



Russell Brown
Partner
rwb@glaisyers.com
dd: 0161 833 5667



Sarah Young
Solicitor
sey@glaisyers.com
dd: 0161 833 5689

If you would like to receive more information regarding the contents of this newsletter or information on any other employment law related matters then please contact Russell Brown at Glaisyers Solicitors LLP, One St James's Square, Manchester M2 6DN. Tel: 0161 832 4666; Fax: 0161 832 1981; Email: rwb@glaisyers.com

How we can help your business

We are a medium sized city centre firm with a high degree of expertise in our chosen fields. We therefore provide a level of service which is comparable to that offered by many a national and international law firm, whilst retaining a personal interest in our clients and their businesses.

We believe passionately in training and developing all the members of our team to ensure that our clients continue to obtain the highest quality of advice and support.

Our range of services

- Commercial/Corporate
- Family
- Property Development
- Public Law
- Commercial Disputes
- Employment
- Landlord and Tenant
- Corporate Finance
- Personal Injury
- Road Traffic Accidents
- Residential Property
- Housing
- Publicly Funded Work
- Intellectual Property
- Divorce/Child Care
- Mergers & Acquisitions
- Probate/Estate Planning
- Costs Law
- Debt Recovery
- Immigration

Glaisyers Solicitors LLP
One St James's Square
Manchester
M2 6DN

DX: 14364 Manchester

email: manchester@glaisyers.com

Telephone: 0161 832 4666

Fax: 0161 832 1981

www.glaisyers.com

If you do not wish to receive further information from Glaisyers Solicitors LLP about events or legal developments which we believe may be of interest to you, please either send an email to manchester@glaisyers.com or contact Tracey Fallon by telephone on 0161 832 4666 or by post at Glaisyers Solicitors LLP, 1 St James's Square, Manchester M2 6DN. The material contained in this article is provided for general purposes only and does not constitute legal or other professional advice. Appropriate legal advice should be sought for specific circumstances and before action is taken.

GLAISYERS

S O L I C I T O R S L L P

www.glaisyers.com