Renegotiating Contracts of Employment
Akhlaq Choudhury

Introduction

1. There may be many reasons to seek to renegotiate contracts: cutting costs by reducing or removing elements of remuneration or by altering hours; eliminating provisions that have become anachronistic or are too expensive to apply; harmonisation of terms and conditions across the workforce; increasing efficiencies by requiring employees to work differently and so on. The list of potential reasons for wanting to change employees' contracts is endless. However, the means of doing so are very limited indeed and often fraught with difficulties. Given that changes will often affect groups of employees if not the entire workforce, getting it wrong could prove very costly indeed.

2. In this paper, I shall consider a few of the key means of changing terms and conditions by reference to recent developments in the case law.

Identifying the terms to be changed

3. Of course, not all the terms of the contract may be set out in the written contract of employment. A benefit provided to employees over many years may be a benefit to which the employees have become contractually entitled through custom and practice even though there is no reference to the benefit in the contract. The employer cannot simply remove such a benefit unilaterally without risking claims for breach of contract, constructive or unfair dismissal. Some benefits on the other hand may properly be considered to be entirely discretionary and in respect of which no contractual entitlement arises. However, even in such cases the employer will be obliged to act, in relation to the benefit, in a way that does not undermine trust and confidence. Simply removing such a benefit or ceasing to apply it in the manner that the employees have come to expect, could give rise to claims.

4. Then there are those terms that are incorporated into the contract from another source. This could be a staff handbook or collective agreement. Once again, such terms, if truly incorporated into the individual contract of employment, cannot simply be removed or changed unilaterally.

5. Thus, it is important to pause before any changes are introduced, and consider whether the change is trivial or non-contractual, such that the employee cannot complain about it, or whether the employer is in fact seeking to interfere with a

contractual entitlement. If it is the latter, then the employer will have to go about the implementing the change lawfully.

Means of introducing changes

6. Express mutual consent is the clearest and simplest way to effect change. In the absence of such consent the following means may be available:

    a. There may be a variation clause in the contract itself which entitles the employer to make changes;
    b. The employee consents to the change by his actions. In other words, there is acquiescence;
    c. There are changes to the collective agreement or other source of incorporated terms which vary the contract;
    d. If all else fails, there is the option of dismissing the employee and reengaging him or her on the revised terms.

Variation Clauses

7. Employers may expressly reserve to themselves the right to vary the contract of employment. However, the Court will generally take a strict approach to the interpretation of such variation clauses. The right to vary unilaterally will have to be in clear terms such that there is no doubt that the intention of the parties was to confer the right of variation. Even if it is found that the right exists, the scope of the right will usually be quite limited:

"The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort. In addition, the court is unlikely to favour an interpretation which does more than enable a party to vary contractual provisions with which that party is required to comply. If, therefore the provisions of the code which the council were seeking to amend in this case were of a contractual nature, then they could well be capable of unilateral variation as the counsel contends. In relation to the provisions as to appeals the position would be likely to be different. To apply a power of unilateral variation to the rights which an employee is given under this part of the code could produce an unreasonable result and the courts in construing a contract of employment will seek to avoid such a result." *Wandsworth London Borough Council v D'Silva* [1998] IRLR 193 at [31]

8. In *Bateman v Asda* [2010] IRLR 270, Asda wished to ensure that their entire store staff were employed on the same pay and work structure and this meant that those on the old regime had to transfer to a new regime. Some 9,330 employees agreed,

but some did not. So when the new regime was imposed on them, six test Claimants brought claims for unauthorised deductions from their wages. Asda contended that they were entitled to impose new conditions because the staff handbook 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 handbook also provided details of pay and other conditions of employment. The conditions in the staff handbook were incorporated in the employees' contracts of employment. The Tribunal held that these conditions permitted Asda to impose the new regime on its employees without obtaining their further consent. The Claimants appealed contending that Asda could not rely on the conditions in the staff handbook to justify imposing the new regime and they required the consent of all employees.

9. The employees' appeal was dismissed. It was held, applying *Wandsworth v D'Silva*, that the staff handbook did permit Asda to make the changes to the pay and work regimes without obtaining the further consent of the Claimants. It was further held that the particular wording in the staff handbook was wide enough to permit Asda to change matters set out in it and these included the pay and work structure with the result that Asda was entitled to impose the changes in the Claimants' pay and work provisions without the need to obtain the employees' express consent.

10. One of the difficulties for the employees was that no evidence had been adduced before the Tribunal to show that the employees did not intend or expect that their contracts could be amended in this way without their consent. It might be thought that it was obvious that none or hardly any of the employees would actually have given the matter any thought before agreeing to be bound but in the absence of evidence to that effect, the EAT found that there was nothing in the "relevant background" to the contract to show that the parties did not intend for the variation provisions to have the effect contended for by Asda.

11. *Bateman* emphasises that a contractual right to vary may be relied upon to introduce far-reaching changes in contracts across the whole workforce. No doubt in any such cases in the future, employees would be well-advised to adduce extensive evidence of the relevant background in order to establish that such wide variations were not countenanced when entering into the contract.

12. There may come a point whereby the proposed changes are so far-reaching that they amount to a fundamental change to the contract. In that case, the proper analysis may be that the old contract has in fact been terminated and replaced by a new contract on the changed terms. The question of whether or not a change to terms and conditions had the effect of replacing the old contract arose in *Potter v North Cumbria Acute Hospitals NHS Trust* [2009] IRLR 900.

13. It was held in *Potter* that the introduction of a new pay system in the NHS did not create new contracts of employment for its workers. The question to be considered was whether the parties' intention was to terminate the old contracts and replace them with new ones or to vary them, *Cumbria CC v Dow (No.2)* [2008] I.R.L.R. 109 and *Morris v Baron & Co* [1918] A.C. Fundamental as well as minor contractual changes could be effected by consensual variation. Parties could agree both the content and the mechanism for effecting change. The EAT held that on the facts, the existing contracts did permit the degree of unilateral change introduced by the employer.

Consent by acquiescence

14. The employer may decide to introduce changes to contracts in the hope or the expectation that they will be accepted but without waiting to obtain express consent. If the employee continues to work under the new terms, will he or she be taken to have consented to the change by his conduct?
15. The fundamental question to be asked in determining whether an employee had accepted a change to the contract by his conduct, is whether such conduct was only referable to his having accepted the new terms:

> "30 The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract continuing; it is not only

referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct.
31 So, where the employer purports unilaterally to change terms of the contract which do not immediately impinge on the employee at all — and changes in redundancy terms will be an example because they do not impinge until an employee is in fact made redundant — then the fact that the employee continues to work knowing that the employer is asserting that that is the term for compensation on redundancies, does not mean that the employee can be taken to have accepted that variation in the contract." Per Elias J (as he then was) in *Solectron Scotland v Roper* [2004] IRLR 4.

16. The "only referable" test was applied recently in the case of *Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2010] EWCA Civ 397. In *Khatri*, the appellant former employee (K) appealed against a decision refusing his application for summary judgment against the respondent bank. K was a derivatives trader and was entitled to a discretionary bonus. K signed a new contract which entitled him to a performance-related bonus, calculated according to a set formula. The contract stated that the bank "maintains the right to review or remove this formula-linked bonus arrangement at any time". Several months later K was told that he was at risk of redundancy. The bank offered him a suitable alternative position for a trial period of three months. It sent him a letter informing him that under his new terms and conditions he would be entitled to an annual discretionary bonus. The letter stated that K should sign to indicate his acceptance of the offer. K did not sign the letter. He continued to carry out the same work and received the same salary, but reported to a different person. Shortly before the end of the trial period, K indicated that he did not accept the new terms and wished to be paid his performance-related bonus. He was later dismissed on the grounds of redundancy but did not receive the performance-related bonus. The bank argued that under the old contract it was entitled to remove the performance-related bonus at any time and the bonus had been varied by K's subsequent acceptance by conduct of the new terms.

17. As to the question of acceptance of the variation by conduct, the Court of Appeal in Khatri applied the "only referable" test set out in *Solectron Scotland Ltd v Roper* and held that it was clear that it would be quite wrong to infer from all the circumstances that K had accepted changes to his contract, changes which were wholly to his disadvantage. In reality he had carried on doing the old job for the same pay. The only difference was in reporting to a different superior. That was a trivial difference and miles away from a clear unequivocal act from which one could infer that K accepted the new terms. It was particularly striking that K had not signed the offer letter and the bank had not required K to sign or even queried why he had not signed.

18. This case highlights the importance of obtaining written confirmation that an employee has consented to variations in his or her contract. It will rarely be sufficient that the employee has continued to work after the change of contract was

introduced, particularly where the change has no immediate effect to the employee's day to day working experience. Restrictive covenants, which would only apply after termination, are a good example of contractual provisions that would not have any immediate effect on an employee's day-to-day work experience and where it would be difficult to say that the continuation of work was only referable to the employee having accepted the new terms.

19. The other risk of the acquiescence route is that once the period for objection has passed, and the new terms take effect, some employees might assert that the changes have been imposed on them by way of a dismissal from the old contract and immediate re-employment under the new terms with the difficulty that the employer will not have followed a fair process: *Hogg v Dover College* [1990] ICR 39.

Changes to Collective Agreements

20. *Bateman v Asda* was an example of a case where contractual variations were introduced as a result of changes to the staff handbook. In *Malone v British Airways* [2010] IRLR 431, the employees sought to rely upon a provision in a collective agreement providing for minimum crew complements on various flights. When British Airways sought to reduce the cabin crew complements on some of those flights, employees claimed that the term as to cabin crew complements in the collective agreement was incorporated into their individual contracts of employment and that therefore the airline was in breach by not complying with those complements.

21. The High Court rejected the employees' claim. It was held that the parties at no stage expressed an intention that the terms of the collective agreement, in relation to crew complements, would be legally binding either between themselves, under the Trade Union and Labour Relations (Consolidation) Act 1992 s.179, or as incorporated in the respective employment contracts. There was no sufficient objective evidence of a mutual intention to give the terms of the collective agreement in relation to crew complements legal enforceability at the behest of any individual crew member. Further, the provisions were not apt for incorporation into the employees' contracts. The collective agreement t was a negotiated fleet collective agreement apt to cover planning for, and deployment of, 11,500 employees; it was not 11,500 individual contracts. Accordingly, there was no material incorporation into M's contract and hence no breach.

22. *Malone* is a reminder that if reliance is placed upon the provisions of a collective agreement, whether by the employer or the employees, a key question will always

be whether the particular provision relied upon is in fact apt for incorporation into individual contracts of employment.

Dismissing and reengaging employees on new terms.

23. The position is straightforward when there is one employee concerned and he or she agrees to a proposed change in the contract. What happens when the changes are applied across the workforce and most accept but some continue to resist? In those circumstances, the employer does have the option of dismissing those who refuse to agree to the variation. Whether or not such a dismissal is fair would depend on whether the dismissal was for "some other substantial reason" within s.98(1)(b) of ERA 1996; and, if so, whether the employer acted reasonably in treating it as a sufficient reason to dismiss.

24. It is well-established that where a substantial proportion of employees have accepted the change and there is a sound business reason for its introduction, the dismissal of those that do not accept may be fair: *St John of God (Care Services) Ltd v Brooks* [1992] ICR 715. See also *Willow Oak Developments Ltd v Silverwood* [2006] ICR 1552 in the context of a change to introduce restrictive covenants into the contract. Of course, in order to be fair, any such dismissal would also have to comply with procedural requirements.

25. Where very few or none of the workforce are willing to accept the changes, and the change is considered sufficiently important, the employer may have to consider the more drastic route of dismissing and re-engaging the entire affected workforce on the new terms. As well as basic procedural considerations, if 20 or more employees are affected, the employer will be required to follow collective consultation procedures under s.188 *Trade Union and Labour Relations (Consolidation) Act 1992*.

26. Changing terms and conditions in this way is not only administratively burdensome, but may have a detrimental effect on industrial relations. In order to avoid a mass of unfair dismissal complaints (even from those who accept the new terms: *Hogg v Dover College* [1990] 1 ICR 39), the securing of compromise agreements should be a key feature of any procedure involving dismissal and re-engagement.

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