

## Employment

February 2010

### Time to consider a general variation clause?

Most employers reserve some flexibility to make changes within the contract itself, without having to obtain the employee's consent. Mobility clauses or flexibility clauses are common examples of these types of clauses. But beyond these common types, variation type clauses were only considered suitable for non contractual type variations, and certainly not for something as critical as pay.

The issue in *Bateman and Ors v Asda Stores Limited* was whether the employers could rely on a general variation clause (in their staff handbook) to unilaterally change pay and holidays. Surprisingly the EAT said yes, but outlined a number of conditions which an employer should follow before an employer will be able to rely on such a clause.

The message for employers is clear - if you don't already have a general variation clause in your contracts - then get one! Although it will not give you unfettered power to unilaterally vary contracts, it will greatly assist your ability to implement a lawful variation.

#### Facts

Asda commenced an extensive consultation process to bring all their employees under the same pay structure. The majority of employees consented and voluntarily agreed to adopt the new pay structure. However, a minority refused to give consent and Asda transferred them to the new pay scheme regardless, citing the relevant paragraph in the staff handbook which stated:

*"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 and to comply with new legislation."*

About 700 employees brought claims at the Employment Tribunal and a test case was brought by 6 of the claimants. The Employment Tribunal found that although, as a general rule, a variation of contract

requires the consent of both parties, employers can reserve the right to unilaterally amend a contract of employment. They noted that there may be times when it would breach the mutual term of trust and confidence and examples of this would be where the employer actions were "unreasonable, arbitrary or capricious" but there was no evidence of Asda acting in this manner. The claimants appealed.

The EAT held that the Tribunal had been right to conclude that the clause in the handbook did allow Asda to make changes to the employees contracts unilaterally but that if there was a breach of mutual trust and confidence, then the employee would be within its rights to resign and claim constructive dismissal. Again the EAT found no evidence that Asda had breached any mutual terms and held that the clause was not limited to non-contractual policies.

#### So what does this mean for employers?

The EAT did apply some limitations to their decision. In order to rely upon such a clause an employer

- must not invoke the clause in a way which damages mutual trust and confidence between the parties
- must not act arbitrarily or capriciously
- should ensure that the clause is "clear and unambiguous"

We would therefore recommend that an employer who does wish to include such a clause, should still follow normal principles in relation to variation of terms, ie an employer should consult and inform their staff surrounding the proposed changes and give them reasonable notice of this change. To do otherwise may breach the mutual trust and confidence point referred to above.

Since this case does depart from established case law built up over many years, we would imagine that this case will be appealed and it may be that the Court of Appeal takes a different view. One point that was raised by

the employees Counsel during the appeal concerned the construction of the clause and whether the parties ever intended such a clause to have this wide power. In their skeleton argument he argued:

*“not one of the 150,000 employees who entered a contract on the basis of it, could conceivably have intended or expected its effect would be to leave to the unilateral discretion of the respondent the right to reduce the pay increase or change the hours of work and cut holidays without the need for consent and without the need for notice.”*

But because this point was not addressed in evidence before the tribunal the EAT were not able to make any findings on this issue.

## News

### Government Publishes Guidance on Pereda and Stringer

The Department for Business, Innovation and Skills (BIS) has published its Guidance on the Stringer and Pereda cases, which focus on how sick leave and paid annual leave under the Working Time Directive interact. The Guidance notes that a worker who has missed out on statutory annual leave due to sickness, may be able to carry-over the missed leave to the next leave year. However, the Guidance falls short of saying that it must happen. Interestingly, they are saying that the ruling applies to the full UK entitlement of 28 days, rather than the European level of 20 days. BIS are considering revising the Working Time Regulations and will be consulting on possible amendments to them in response to the ECJ ruling.

For more information on this issue, particularly the carry over of holidays please read our case update on *Shah v First Yorkshire Ltd* below.

The Guidance is available at <http://www.berr.gov.uk/whatwedo/employment/working-time-regs/case-law/index.html>

### Government Publishes Guidance for Employers on the Right to Request Time Off for Training

BIS has also published specific guidance notes for employers and employees on the new right available to employees to request time off for training. Employees in organisations with 250 or more employees will have this right from 6 April 2010; the right will be available to all employees from 6 April 2011. The amount of time allowed off is at the discretion of the employer. To request time off an employee must have more than 26

weeks' service. The training must be for the purpose of improving their effectiveness at work and the performance of their employer's business, although it need not lead to a formal qualification. Generally, an employee may only make one application to an employer in any 12 month period and that application must be in writing. The procedure to be followed by an employer on receipt of an employee's application is very similar to the existing flexible working application procedure.

The guidance for employers, [Consider time for training](#) is on the *Business Link* website.

### Default retirement age to be decided this summer

Employment relations minister Lord Young, speaking at an Employers Forum on Age conference in early February, stated that the Government will make a decision on the default retirement age in the summer. At the same time, the Government will also publish evidence gathered as part of its review on the issue. This will be followed by a period of consultation on the proposed change, which will come into force sometime in 2011.

### Fit Notes – the Government's response

The Government recently published its response to the consultation on the draft regulations which will introduce the new “fit notes” for use by GPs from 6 April 2010. GPs will now be able to certify that an employee “may be fit for work taking account of the following advice”, in addition to the traditional statement that they are “not fit for work”. Specific guidance for individuals, employers and healthcare professionals will be available shortly. The thinking behind the new fit note is that it will encourage people who have been off ill back to work sooner.

However, despite Government enthusiasm, there is some growing disquiet that the reality of fit notes may not meet their stated aims. For example, Carol Black has said that it will take some time before we see changes. Recent research suggests that there has been a low level of GP training on sick notes in general, leading to concerns about the future for fit notes.

### Pre-employment health screening

The Government have included within the Equality Bill a clause making it easier for disabled job applicants to succeed with direct discrimination claims where their applications fail after they have been asked pre-employment health questions. Basically, the government are trying to encourage employers not to ask questions relating to

the health of disabled applicants. This late amendment was announced in December and has been welcomed by the disability lobby. It will apply not only to questions at interview but also to pre-employment questionnaires.

In January the clause was further amended by the House of Lords to give the EHRC power to take enforcement action, and also tighten up the way that the clause is drafted. The amendments will still be debated in the House of Commons. If such a question is asked, the burden of proof in showing that no discrimination has taken place will shift to the employer.

The situations where it is possible to discuss disability without shifting the burden of proof include:

- To enquire whether reasonable adjustments need to be made in connection with an interview or post;
- To monitor diversity;
- Taking positive action in respect of disabled persons
- Establishing whether there is a genuine occupational requirement which relates to the disability (e.g. physical strength for a fireman);

### Final version of Agency Workers Regulations published

The Agency Workers Regulations 2010 have now been published. The regulations, implementing the Temporary Agency Workers Directive, will come into force on 1 October 2011. Draft Regulations were published in October 2009 and were the topic of a previous [Bulletin](#).

Key changes to the draft regulations since October 2009 include:

- Revising the definition of "pay" for the purposes of the equal treatment provisions to include bonuses that are directly related to individual performance and vouchers or stamps with a monetary value, such as luncheon vouchers. Occupational pensions and sick pay remain excluded from the concept of pay.
- Introducing a specific anti-avoidance provision giving a worker the right to be treated as if they were entitled to equal treatment if a pattern of assignments develops, either within the hirer or between that hirer and

connected businesses. The tribunal can make an additional award of up to £5,000 in the event of a breach of this provision.

- The problem of the amounts between the parties being too small to be worth litigating over has been addressed by giving tribunals discretion to make a minimum award of two weeks' pay for equal treatment claims and pay between assignments.
- The list of "collective facilities and amenities" to which agency workers should have access has been changed so that it is no longer exhaustive. Also, the provision that less favourable treatment can be justified on objective grounds if an agency worker's contract, taken as a whole, is at least as favourable as that of a comparator has been removed.
- Clarifying that pregnancy, childbirth or maternity, for a protected period of up to 26 weeks after a woman has had her child, are occasions when periods of absence continue to count towards the 12-week qualifying period.
- Explaining that the weeks when a workplace is in effect closed (as is the case for agency teachers during the summer vacation) or in the event of industrial action or a lock-out will not count towards the qualifying period.

### EHRC publish guidance on private sector gender pay gap reporting

The Bill includes a general power that private sector employers with over 250 employee should publish their **gender pay gap** data annually. In January following a period of consultation, the EHRC published their [Guidance](#) on how private sector employers should go about this process. Rejecting a single figure approach, they have decided to use a "menu of options" which give employers a choice on how they want to report their pay gap. The choices include:

- the difference between the median hourly earnings of men and women
- the difference between the average basic pay and total average earnings of men and women by grade and job type
- the difference between men's and women's average starting salaries.

Employers with more than 500 employees will be encouraged to report on more than 2 indicators and provide a narrative or explanation. Going forward the EHRC would like to see these larger organisations move to 3 indicators, again with a narrative.

Given the voluntary nature of these proposals, the EHRC are trying to promote compliance by offering a limited degree of immunity from investigation for firms that participate.

The government are not saying that employers need to conduct a full equal pay audit - which is a wider concept looking at comparative roles and concepts like work of equal value.

## Cases

### [First UK Tribunal case says lost annual leave due to sickness should be carried over](#)

In *Shah v First West Yorkshire Limited* 1809311/2009, the Employment Tribunal had to determine whether the decisions in the European Court of Justice of *Pereda* and *Stringer* would apply to UK domestic law.

Critically the Employment Tribunal held that holidays could be carried over to the next leave year despite the fact that the Working Time Regulations prevent this. If this case is upheld on appeal it will set a precedent which other Tribunals will be bound to follow.

Mr Shah had been scheduled to take four weeks annual leave between February and March 2009. He broke his ankle in January 2009 and was off on sick leave until April of that year. When he requested the four weeks leave to be rescheduled due to his period of sickness absence, the employer responded more than six weeks later refusing the request, explaining that it had been lost since their holiday leave year ended on 31 March 2009. Mr Shah lodged a claim with the Tribunal that under the Regulations he was entitled to receive his accrued untaken annual leave.

Although it was widely expected that Tribunals would follow the *Pereda* point that pre-booked holidays which cannot be taken due to sickness absence should be taken at a later date, it is the carry over point that is of interest in this case. The Tribunal found that the Working Time Regulations, in particular Regulation 13(9) should be read consistently with European law, and that Mr Shah was entitled to take his annual leave in the next leave year and that the employer had refused to permit him to exercise his rights under the Regulations. Employers had been hoping that

a Tribunal would reject such a claim on the grounds of conflict with the WTR.

This is an important case for employers to be aware of. Although this decision is not binding on other Employment Tribunals it does give an indication of their analysis applying to cases going forward. Additionally, the Department for Business Innovation and Skills (BIS) have confirmed that in light of the ruling in the ECJ cases, they will be consulting on possible amendments to the Working Time Regulations.

### [Workers can be prevented from carrying over holidays](#)

In *Lyons v Mitie Security Ltd*, the Employment Appeal Tribunal confirmed that as long as employers are reasonable in their operation of notice requirements, then employers can prevent holidays being carried over at the end of a leave year. But before employers think this case resolves all the difficult issues arising from *Stringer*, the case did not deal with rules which prevent carry over because the employee was unable to take the leave due to ill health. So whilst this is helpful for employers it does not tackle the more difficult issue discussed in the *Shah* case above of whether carry over should be permitted in cases where an employee has been unable to take the leave due to ill health.

In this case Mr Lyons, a security guard resigned claiming constructive dismissal after his employers denied him 9 days leave. He made the request for the 9 days leave towards the end of his leave year but he did not follow the company procedure which involved 4 weeks notice. The central issue on appeal was whether the right to four weeks' paid leave under the Working Time Regulations (WTR) 1998 was inalienable, even if an employee failed to comply with contractual notice requirements or those set out in Regulation 13 of the WTR which govern leave requests.

The EAT noted that the absence of case law suggests that employees have not been denied their reasonable requests for holiday entitlement, even towards the end of a leave year.

They were satisfied that the right to statutory leave is not absolute, as employees do have to follow notice provisions under the Working Time Regulations. Employers are also free to set their own notice provisions, even if these are more onerous than the WTR. Mr Lyons was unsuccessful in his claims for constructive dismissal and unpaid holiday pay.

This case does assist employers who prevent employees from carrying over leave, provided they do not operate their holiday policy in an unreasonable, arbitrary or capricious way.

### Disability Discrimination Act 1995 – Can you aggregate two related impairments?

In *Patel v Oldham Metropolitan Borough Council* the issue on appeal was whether two different impairments can be aggregated for the purpose of the long term requirement in the Disability Discrimination Act. An impairment is said to have a long-term effect if it has lasted at least 12 months, or the period for which it lasts is likely to be at least 12 months; or it is likely to last for the rest of the life of the person affected. In this case the claimant had a period of absence relating to an inflammation of the spinal cord. She later suffered a further injury ( which related to the original condition) and the issue was whether the 2 conditions could be aggregated to comply with the 12 month requirement. Although the Tribunal dismissed the claim, the EAT allowed the appeal confirming that the Tribunal had made a mistake in failing to consider whether the secondary pain had developed from the primary impairment and remitted it back to Tribunal.

This means that in some situations employers may need to look at whether 2 separate but related conditions or impairments should be aggregated to consider whether the employee is suffering from a disability.

### Duty to conduct risk assessment for a pregnant worker

Most employers are now familiar with the fact that a failure to carry out a risk assessment for a pregnant woman can amount to sex discrimination. In this case the claimant argued that there was a general obligation on employers to carry out a risk assessment if an employee notifies them that they are pregnant. However in *O'Neill v Buckinghamshire County Council* the EAT held that there was no general requirement to conduct a risk assessment, but rather three

conditions must be met to establish whether an employer has a duty to conduct a risk assessment for a pregnant worker:

1. the employee notifies the employer in writing that she is pregnant;
2. the work is of a kind which could involve a risk of harm or danger to the health and safety of the expectant mother or her baby;
3. the risk arises from either processes, working conditions or physical, chemical or biological agents in the workplace.

In this case, the employee was unsuccessful in arguing that a disciplinary procedure should have been dropped once it was known that she was pregnant, and this should have been included in the risk assessment. The EAT did confirm that where the duty is triggered a failure to carry out the risk assessment will still result in an automatic claim for sex discrimination. The sensible course of action therefore suggests that employers should still conduct a risk assessment when there is any hint that conditions 2 or 3 above are met.

This Bulletin is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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If you would like any further information on this Bulletin, or any other Employment issues, please call the person at D&W with whom you normally liaise, or one of the following specialists:

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