VARIATION OF CONTRACT

1.0 INTRODUCTION

During the course of an employment relationship the employer may wish to change the terms and conditions of employees e.g. in relation to hours, place of work, operation of sick pay scheme, rates of pay. Similarly, the employee/union may seek changes e.g. in relation to working hours because of domestic arrangements.

In considering the law in relation to variation of contract, it is important to note the influence of a range of legislation including the anti-discrimination law particularly in relation to flexible working arrangements, indirect discrimination and the need to make reasonable adjustments under the disability discrimination legislation; the Working Time Regulations; and the TUPE Regulations. This paper does not address these particular issues but rather is concerned with the general legal principles relating to variation of contract.

Historically industrial relations in the UK operated on the basis of 'freedom of contact' whereby the substance of contracts of employment had not been subject to statutory intervention. In recent years, largely due to EU membership, this has changed considerably and many rights are now guaranteed to employees including rights relating to minimum wage, notice payments, working time and holidays, equal pay, protection from discrimination etc. However these should be viewed as a basic floor of rights to be improved upon by negotiation, including collective agreements, and many areas including company sickness pay and the right to a pension are not subject to any statutory intervention.

All employees have a contract of employment which consists of the agreement between employer and employee about working arrangements including pay, hours, holidays, workplace, provision for sick pay etc. Ideally, this should be a written document/s and should be as detailed as possible, although there is no legal requirement on an employer to provide a written contract. There is however a legal requirement for an employer to provide to an employee a written statement of particulars of employment (see below).

Both parties are bound by the contract of employment and generally neither party can vary the contract without the agreement of the other. Thus, variation of contract is best achieved through negotiation and agreement. In this respect it is generally seen as being in the interests of both employers and employees that changes to terms and conditions are negotiated through agreed collective bargaining processes so that the employer is dealing with a representative body at a local or national level and does not have to seek the agreement of employees on an individual basis.

2.0 CONTRACT OF EMPLOYMENT - GENERAL

There are 4 types of terms in an employment contract:

Express Terms - terms specifically agreed either orally or in writing;

Implied Terms - terms which the parties are taken to have agreed – includes terms so obvious they do not need to be specifically included (e.g. duty to provided a safe working environment, duty of mutual trust and confidence); terms required to give the contract 'business efficacy' (e.g. a driver will hold a valid driving license);

Incorporated Terms – terms incorporated from other sources including collective agreements or works rules;

Statutory Terms – terms implied or imposed by statute e.g. right to minimum wage.

INCORPORATED TERMS

Incorporation of terms may be ***express*** i.e. the individual contract expressly states that certain terms are regulated by, for example, a collective agreement.

Incorporation may also be ***implied*** in the same way as other terms may be implied e.g. where there is a clear and well-established custom that terms of collective agreements are incorporated into individual contracts.

When terms of a collective agreement are incorporated into individual contracts they are legally enforceable as between the employer and the employee – ***Robertson -v- British Gas Corporation*** 1983 ICR 351 CA - notwithstanding the fact that collective agreements are normally not enforceable as between the parties negotiating the agreements (i.e. usually the employer/s and the relevant trade union/s). The terms to be incorporated must be 'apt for incorporation' i.e. relate to individual terms and conditions. (see ***Keeley -v- Fosroc International Ltd*** 2006 IRLR 961 CA; ***Sparks & Others -v- Department of Transport***, High Court (QBD) 2015 EWHC 181).

The agreement can be taken to be incorporated into all of the relevant employees contracts – it is not necessary for the individual to have consented or to even be a member of the union/s making the agreement.

In relation to the implied incorporation of collective terms on the basis of custom and practice, in ***Henry & Others -v- London Transport Services Ltd.*** [2002] IRLR 472 the Court of Appeal set out the following principles – clear evidence is required to establish a custom and practice, and the burden is that of balance of probabilities; and, if a custom and practice is established that changes are incorporated into individual contracts through collective bargaining, it can be expected to cover all terms (unless there is evidence that the custom and practice is otherwise).

This issue was addressed in the NI Tribunal decision ***of Desmond Clerkin & Others –v- Warrenpoint Harbour Authority*** (Case Ref Nos. 3286/01 – 3290/01). In that case it was found that the practice of terms and conditions being varied through collective agreements could be taken as an implied term of the employee's contracts as the practice was 'reasonable, certain and notorious'. The Tribunal also found that the fact that individual employees did not accept the new terms did not matter as they were bound by the collective agreement.

3.0 WRITTEN STATEMENT OF TERMS AND CONDITIONS

An employer must provide an employee within 2 months of their commencement of employment with a written statement of particulars of employment under **Article 33 of The Employment Rights (NI) Order 1996** (the 1996 Order).

The statement should include details of the main terms and conditions including:

- names of employer and employee;
- date employment began (and whether any previous employment counts as continuous employment);
- rate and frequency of pay;
- hours;
- holidays;
- any sickness pay scheme;
- any pension scheme;
- notice;
- job title or brief description of duties;
- place of work and any mobility clause;
- reference to any incorporated collective agreements;
- details re any requirement to work outside UK for more than 1 month;
- details of disciplinary and grievance procedure.

Such a statement is not a contract of employment although it is often referred to as such. It is however strong evidence that certain terms have been agreed between the parties especially when it has been signed by the employee.

Lovett -v- Wigan Metropolitan Council CA (2001) EWCA Civ 12, CA Unfavourable term in written statement re salary progression which contradicted term in letter of appointment held not to be contractual term despite the fact that employee had signed written statement acknowledging receipt of written statement. CA held that terms in letter of appointment were contract terms and written statement was not intended to be a contractual document.

Article 27 of The Employment (NI) Order 2000 provides that if it is found in (most) successful Tribunal proceedings that, at the date of the start of the proceedings, the employer had failed to give a written statement or notification of a change under Article 36 of the 1996 Order, the Tribunal is to award an extra 2 or 4 weeks pay unless there are exceptional circumstances making it unjust or inequitable to do so.

3.1 Notification of Changes

Article 36 of the 1996 Order requires that notification of any changes in terms and conditions must be notified to the employee by way of a personal written statement detailing the changes within one month of the change taking effect, except where the statement included an appropriate cross-reference to another document e.g. a collective agreement.

However the mere fact of such notification does not mean that a legal variation has occurred. Similarly the failure to do so does not mean that a legal variation has not occurred.

It should be noted here that where the contractual position is uncertain it may be possible to bring a claim to the Tribunal under **Article 43 of the 1996 Order** where the term is one of those which must be provided in a Article 33 statement. In any such claim the Tribunal does not have the power to decide what a term should be but only to state what has been agreed on the basis of the evidence available. A Tribunal cannot interpret contractual terms if a disputed term is not clear – ***Southern Cross Healthcare Co Ltd -v- Perkins & Others*** 2011 ICR 285 CA.

4.0 PERMISSIBLE UNILATERAL VARIATION?

An employer who seeks to force through a proposed variation of contract without the agreement of the employee will potentially be acting in breach of contract. In this situation both the employer and employee have a range of options which will be considered below.

Firstly, in considering whether any proposed change amounts to a potential breach of contract two initial issues need to be considered:

1 Is the term to be varied a term of the contract?

2 If so, does the employer have the right to unilaterally vary the term?

4.1 Is the term to be varied a term of the contract – 'Non Contractual Terms'

In certain circumstances some terms may be considered as merely discretionary and 'non-contractual' terms. In considering whether or not a term is a contractual term the issue is whether or not there was an intention to be legally bound.

Thus, for example, the unilateral removal of certain allowances may be considered not to be in breach of contract if the allowance was clearly discretionary or non-contractual e.g. a specific statement in a contract that entitlement to a benefit is non-contractual will generally serve to exclude any contractual entitlement.

However, in the absence of any such certainty, the courts will generally be reluctant to accept that terms are non-contractual and the burden of establishing that there was no intention to be bound falls on the party making such an assertion.

In ***Wandsworth London Borough Council -v- D'Silva*** (1998) IRLR 193 CA the employer altered a code of practice in relation to sickness. The CA found that the code was not part of the contract but was simply meant to lay down good practice for managers. The language of the provisions in question was found not to provide *"…an appropriate foundation on which to base contractual rights.."*

Intention to Create Legal Relations

Two contrasting cases concerning enhanced redundancy payments demonstrate the importance of the intention to create legal relations:

In ***Albion Automotive -v- Walker & Others*** [2002] All ER (D) 170 (Jun) the Court of Appeal upheld a Tribunal's finding that an established custom of enhanced redundancy payments was sufficient to establish an intention by the employer to be contractually bound to such payments

In ***Campbell -v- Union Carbide Ltd.*** [2002] All ER (D) 143 (Sep) in relation to a severance payment in non-redundancy cases, the EAT upheld a Tribunal's finding that, despite custom and practice, there was no such intention to be legally bound where the employer had expressly stated in the relevant collective agreement that enhanced redundancy scheme was legally enforceable and elsewhere in the same collective agreement the severance scheme in non-redundancy cases was stated to be discretionary.

Intention to Create Legal Relations??
The Court of Appeal has held that an employee could not rely upon a promise made at a Xmas party that he would receive a future pay increase. In order for there to be an enforceable contractual term there must be certainty as to the contractual commitment entered into, or facts from which certainty can be established – otherwise a promise amounts to no more than a statement of intention. In this case what was said at the party was too vague and uncertain to be taken to amount to a contractual promise.
Judge -v- Crown Leisure Ltd [2005] IRLR 823

4.2 Does the employer have the right to unilaterally vary a contractual term?

Terms of a contract may be lawfully changed where such change is specifically authorised by a contract term.

If the variation clause is fairly precise and restricted (and its operation is not seen as oppressive – see below) then it may well be valid and enforceable. Thus, unilateral variation may be permitted where it is clearly and expressly provided for in a relevant collective agreement e.g. ***Airlie & Others -v- City of Edinburgh District Council*** 1996 IRLR 516, EAT (where the terms of a bonus scheme provided for consultation with the workforce before any changes but also made provision for the employer to make such changes – it was found that the necessary consultation had taken place and the EAT upheld the employer's power to vary)

In the ***D'Silva*** case (see above) the employer had argued in the alternative that even if the rules in relation to sickness were contractual, other provisions in the contract reserved to the employer a right of unilateral variation. Although it was not necessary in that case to do so Lord Wolff MR did address the point as to whether a unilateral variation clause will always work stating *obiter*:

> *'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.'*

However, he went on to draw a possible distinction in a case where the claimed power was to vary substantive rights under the contract stating:

> ***'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'.***

Attempts at unilateral variation have been rejected by the courts where the language of the term purporting to give the power has not been specifically precise (e.g. in ***Lee & Others -v- GEC Plessey Telecommunications*** 1993 IRLR 383 QBD where the employer sought to rely on a power to issue 'general instructions and notices').

In ***Bateman & Others v ASDA Stores Ltd [2010] IRLR 370*** the EAT considered a clause in a Staff Handbook which said 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 and to comply with new legislation…*"

Referring to ***Wandsworth v D'Silva***, the EAT concluded in ***Bateman*** that the ET had been right to find that this clause gave the employer the right to unilaterally change parts of the Staff Handbook containing contractual provisions including pay, sick pay and hours of work, as well as non-contractual policies, on the basis that the above clause was clear and unambiguous. (Although the Employment Appeal Tribunal did point out that any such right needed to be exercised in a way that does not breach the implied term of trust and confidence – see below). This case would seem to suggest that clauses within a contract or handbook which seek to give the employer a power to make unilateral changes, may well now be easier for employers to enforce, even where that they appear to give the employer a very wide discretion.

However, such terms still need to be <u>contractua</u>l, by way of agreement or lawful incorporation, and cannot just be unilaterally inserted into a pre-existing contract or contractual handbook etc. Any such clause also needs to have clear and unambiguous wording.

Thus, in the 2012 NI Tribunal case of ***Jamieson & Others v AIB Group (UK) PLC t/a First Trust Bank*** (1815/10 & Others) , the Tribunal found that a clause in an internal intranet document which provided information to staff about the employer's policies and procedures which was exactly the same as the *ASDA* clause above did <u>not</u> give the employer a right to unilaterally vary the terms of bank officials in relation to pay progression. There were various reasons for this, including that the clause had never been agreed with the relevant union in a context where terms and conditions were governed by collective bargaining and that the clause was ambiguous.

Notification Clause as Variation Clause?

Another issue which arose in the ***Jamieson*** case (above) was whether a clause on a Written Statement to the effect that *"The Bank will give you notice of any change of these terms within one month of the change*" amounted to a power of unilateral variation.

The Claimants contended that this clause was solely to give effect to the statutory duty (under Article 36 of the 1996 Order) on the employer to notify the employee of any change in their main terms and condition.

In finding that this clause did not amount to a power of unilateral variation, the Tribunal found, *inter alia*, that this clause "*..on its ordinary meaning and read in a reasonable fashion is about a notification of change and not the right to unilaterally vary the contract.."* . (The fact that the Written Statement also referred to terms and conditions being governed by collective bargaining was also an important factor in this decision).

More recently, in the case of ***Norman and Douglas -v- National Audit Office*** UKEAT/0276/14/BA, the EAT overturned an ET decision that a clause in a contract which stated that terms and conditions were '*..subject to amendment*' and that changes would be notified to employees amounted to a power of unilateral variation. The EAT affirmed Lord Woolf's obiter in ***D'Silva*** (see page 8 above) about the need for such terms to be clear as now well accepted and found that the clause in question came '*nowhere near being clear and unambiguous'* .

(Similarly, in the case of ***Hart -v- St Mary's School (Colchester) Ltd***, (IDS Brief 1017, March 2015) the EAT found that that a clause that stated that a part-time teacher's hours '*may be subject to variation depending on the requirements of the school timetable'* did not amount to a power of unilateral variation.)

Implied Terms can Override Express Terms?

The broader issue raised by Lord Wolff's comment (below) in the ***D'Silva*** case is whether a harsh and unreasonable result produced by a clear and unequivocal right of unilateral variation would be upheld.

'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'.

Lawyers are taught that implied terms cannot override express terms: *"A term will not be implied if it would be inconsistent with the express wording of the contract"* (*Chitty on Contracts*). Arguably on any realistic analysis of employment law this is just what happens.

Case law strongly supports the proposition that the courts limit the operation of unequivocal rights of unilateral variation (or other express terms) by invoking the implied term of trust and respect (or trust and confidence) so that a unilateral variation term could not be used in such a way as to breach the trust and respect term and destroy the basis of the contract. This can now be taken as well established .

In ***United Bank Ltd. -v- Akhtar*** (1989) IRLR 507 EAT, a claim for constructive dismissal was upheld, despite a mobility clause, where an employee refused to move from Leeds to Birmingham in 6 days time and was refused any postponement on the basis of his personal circumstances.

The EAT reached this decision by (a) implying a term of reasonable notice and, more fundamentally, (b) finding that reliance on the strict words of the clause was a fundamental breach of the term of trust and respect.

In the words of Knox J's judgement:

"We take it as inherent that there may well be conduct which is either calculated or likely to destroy or seriously damage the relationship of trust and respect between employer and employee which a literal interpretation of the written words of the contract might appear to justify, and it is in this sense that we consider that ***in the field of employment law it is proper to imply an overriding obligation (of trust and respect) which is independent of, and in addition to, the literal interpretation of the actions which one permitted to the employer under the terms of the contract"***

Knox J's reference to the 'overriding' obligation of trust and respect is the prime example of the view that, contrary to the general principle in contract law that express terms take precedence over implied terms, in the field of employment law, express terms can be subject to implied terms.

It would now seem clear that a Court or Tribunal may be persuaded to intervene where the employer is exercising a discretionary right to impose change in a situation where the implications for the employee are particularly oppressive.

Not a test of reasonableness

However, the ***Akhtar*** decision should not be taken to mean that express terms are subject to a test of 'reasonableness'. In the subsequent case of ***White -v- Reflecting Road Studs Ltd*** [1990] IRLR 191, the EAT upheld the employer's decision to transfer an employee to lower paid work pursuant to an express clause permitting such flexibility holding that only 'capricious' behaviour by the employer would transgress its implied duties.

More recently, in ***Clark -v- Nomura International PLC*** 2000 IRLR 766, QBD, a case concerning discretionary bonuses, the High Court determined that an employer's discretion to award a bonus was fettered by the requirement that it should not be exercised 'irrationally or perversely' and rejected 'reasonableness' as an appropriate test. The High Court's test of irrationality or perversity was subsequently approved by the CA in ***Mallone -v- BPB Industries plc*** 2002 ICR 1045 CA.

In the area of express contractual discretion to withhold certain payments or bonuses, cases such as ***Commerzbank AG -v- Keen*** [2007] IRLR 132 CA, have established that an express contractual provision providing for a non-contractual discretionary bonuses to be paid at the absolute discretion of the employer must be read subject to the employer's duty not to exercise such discretion in an irrational or perverse manner – although the CA said that the onus on the employee of establishing perversity was ' a very heavy one'.

".....in the case of bonuses in particular, the courts will inevitably construe any provision which describes a bonus as being 'discretionary' and 'non-contractual' as simply meaning that the employee has no ***right*** *to such a payment but this does not mean that the employer does not have to undertake a legitimate exercise of its discretion in good faith to see if such a bonus payment should be made or not"* **(Harvey Division B1 para 33.01)**

Flexibility Clauses

The issue of an implied term qualifying the operation of an express flexibility clause may not arise at all if the flexibility clause is held not to cover the purported variation. Thus flexibility clauses will be narrowly interpreted in accordance with the *contra preferentem* rule that any ambiguity will be resolved against the party who seeks to rely upon it to avoid obligations under the contract.

In ***National Semiconductor (UK) Ltd -v- Church & Others*** EAT 252/97 (IDS Brief 599) the Applicants were required to work 25 hours exclusively at weekends. They had in their contracts a term which enabled the employer to require them to move to other shifts. The employers sought to rely on this clause in changing the employees hours so that they worked 42 hours per week throughout the week. The EAT held that the clause only allowed the employer to rearrange the hours worked not to increase them. The Applicants resignation amounted to constructive dismissal.

In ***BPCC Purcell Ltd -v- Webb EAT 129/90*** an employee was transferred between departments under a flexibility clause losing £80 per week. While rejecting that there was an implied term which meant that the express term must be exercised reasonably, EAT found that the term must not be used in such a way as to destroy mutual trust and confidence. £80 loss out of wage of £305 was taken to amount to be a breach of the implied duty of trust and confidence and the employee had been constructively dismissed

In ***Hussman Manufacturing Ltd -v- Weir [1988] 2 IRLR 288*** an employee was moved from shift with loss of £17 per week. EAT found no breach of contract and, in relation to the extent to which the implied duty of trust and confidence could limit management discretion under an express term, said that the consequences to an employee had to be 'much more fundamental than a mere drop in earnings, save in the most exceptional cases'.

Implied Duty of Trust and Confidence can support variation?

There is also an argument that implied terms can be relied upon by the employer to override or qualify express terms.

In ***Fish and anor -v- Dresdner Klienworth & Others*** 2009 EWHC 2246 (QB), a case concerned with bonuses of E12.6 million among 5 bankers, the Bank argued, *inter alia*, that the implied term of trust and confidence required the employees to act in the Bank's best interests and, given the Bank's perilous financial position, to forgo these payments completely.

The Bank's argument that the implied term should prevail over the express term was rejected on the basis that the duty of trust and confidence could not be used to cut down the whole benefit of a contract freely entered into. "*There is no principle that provides that if subsequent events make the bargain one which the employer would not have made had he forseen these events, he may require the fiduciary employee to release him*" – Jack J

Similarly in the NI Tribunal case of ***Jamieson & Others v AIB Group (UK) PLC t/a First Trust Bank*** (1815/10 & Others), the Bank contended that there was an implied term that contractual payments (incremental salary increases) could be withheld on foot of exceptional trading conditions. The Tribunal rejected the proposal that any such implied term existed.

There is no legal authority for the existence of any such implied unilateral variation term and indeed it is impossible to see how any such implied term, which by its very nature would be unwritten, could have the degree of clarity and required of any unilateral variation term.

Limits on the use of the Implied Term of Trust and Confidence to qualify express terms?

In ***Johnston -v- Unisys Ltd 2001*** ICR 480 HL, the House of Lords held that the implied duty of trust and confidence could not be used to qualify the employer's express contractual right to dismiss an employee without cause upon notice (other than in a case of constructive dismissal by way of an Unfair Dismissal claim – ***Eastwood -v- Magnox*** 2004 HL). Part of the reason was that Parliament had already developed the statutory law of Unfair Dismissal and the judicial development of an action based on common law

could be seen as subverting the delicate statutory balance between the rights of the employer and the employee in relation to dismissal.

In ***Reda and anor -v- Flag Ltd*** 2002 IRLR 747 PC, a view very much in accordance with contractual orthodoxy was taken by the Privy Council holding that an unrestricted power to dismiss could not be circumscribed by an implied duty of trust and confidence stating that although this implied term was well recognised "…. *In common with other implied terms it must yield to the express provisions of the contract..".*

Can the implied term of trust and confidence be excluded?

This is a subject of considerable debate. The Law Commission's 2005 proposal to invalidate unfair and unreasonable terms in contracts of employment has not been enacted and the Unfair Contract Terms Act 1977 is unlikely to be of any assistance in this matter as its application to employment contracts is very much in doubt (see, for example, ***Commerzbank AG*** -v- ***Keen*** [2007] IRLR 132 CA).

Contractual orthodoxy would suggest that a clear express term could exclude the trust and confidence term - although it is difficult to imagine any employer seeking to insert a clause in a contract giving an express power to act perversely or capriciously. On the other hand, an employer might seek to insert an express clause excluding any additional implied terms .

The counter argument is that a contact of employment is fundamentally different from a commercial contract and the personal 'relational' element is the *sine qua non* of such a contract. Lord Steyn addressed this issue in ***Johnson -v- Unisys*** but stopped short of suggesting that the term could never be excluded.

It has been suggested by the President of the EAT, Mr Justice Langstaff (in a September 2014 paper for the Industrial Law Society) that an answer may be found indirectly in the case of ***Autoclenz -v- Belcher [2011]*** **ICR 1157 SC** concerning employment status wherein it was found that the contractual documents did not reflect the true agreement between the parties. It was found that no-one seriously expected the contract to be performed as per the purported contract. Similarly a Tribunal could find that any purported exclusion of the implied term was simply not part of the actual agreement seen in a proper 'relational' context.

5.0 VARIATION NOT AUTHORISED BY CONTRACT

Where a variation is not authorised by contract it may still be implemented without breach of contract in 4 ways:

- express agreement between the parties;
- implied agreement through conduct of employee/s;
- union collective agreement which is binding on employee;
- termination of the existing contract and re-employment under new contract with different terms.

5.1 Express agreement

Agreement must be voluntary - if it can be shown that employee under duress then they cannot be said to have agreed to the change.

It should be noted that stating that if an employee does not sign that their contract will be terminated does not amount to duress - ***Hepworth Heating Ltd. -v- Akers & Others*** 846/02. In that case the EAT held that a Tribunal had erred in finding that a group of employees had not validly agreed to variation when they added the words 'under duress' after their signature. Since there had been no duress in the legal sense, the variation was binding on the employees.

Even if there is duress, the agreement is voidable rather than void. Thus, if the employee by his subsequent actions after the duress has ceased can be taken to have accepted the new contract he may be bound by it on the basis that he has affirmed the agreement.

5.2 Implied agreement

This will usually arise where the employer purports to unilaterally vary the contract by imposing new terms and conditions and the employee is seen to accept this by their behaviour or ‘acquiescence’.

The courts are generally reluctant to find that the employees have consented to variation of contract in the absence of express agreement. This is particularly so in the case of changes which do not have immediate effect (e.g. mobility clause; sickness pay).

In ***Jones -v- Associated Tunnelling Co Ltd*** 1982 IRLR 477 the EAT took the view that implying an agreement to a variation of contract is a course "… *which should be adopted with great caution* ...". They went on to state that "… *If the variation relates to a matter which has immediate practical application (e.g. the rate of pay) and the employee continues to work without objection after effect has been given to the variation (e.g. his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed But where ... the variation has no immediate practical effect the position is not the same*.".

In ***Apuru -v- Iceland Frozen Foods plc*** 1996 IRLR 119 new terms and conditions containing a mobility clause were sent to employees. The employee failed to sign and return the document but carried on working for more than 12 months after the document was issued. EAT held that the Tribunal had erred in holding that the employee had affirmed the new contract by working under it for more than 12 months without objection. The Tribunal had failed to recognise the need for caution before finding that an employee has agreed a variation by continuing to work where the variation has no immediate practical effect.

Another issue which can arise is when an employee agrees to a variation of contract 'under protest'. Under what circumstances can they later be taken to have affirmed the new contract by continuing to work? It would seem that if an employee initially protests but then works under the new terms for a long period without further protest they will be taken to have affirmed the new contract – see cases overleaf.

WHAT CONSTITUTES ACQUIESCENCE?

Arthur H Wilton Ltd v Peebles & Ors EAT 835/93:
The employees objected to their employers not paying the industry-wide annual pay rise which was negotiated between various trade unions and the relevant trade association. The rise had always been paid in the past and the tribunal and EAT found that it was a term of the employees' contracts that it would be applied to them. The employers argued that the employees had agreed to a change in their terms and conditions by continuing to work and that while the employees had protested about the change they had "not objected, complained or protested as systematically and vociferously as they might have done". EAT rejected this argument, stating that it was not necessary for an employee to "embark on systematic or vociferous complaints in order to prevent an agreement from being foisted on him unilaterally by his employer". As long as the employee has made it clear that he or she is not agreeing to the reduction in wages, he or she cannot, by continuing to work, be bound by an agreement to accept a reduction.

Henry & Others –v- London General Transport Services [2002] IRLR 472:
The Court of Appeal found that "it would be extremely difficult to conclude other than that the employees had accepted the revised terms" where the employees had initially presented two petitions against the terms, they then worked under those terms for a period of two years before instituting proceedings for unlawful deductions.

GAP Personnel Franchises Ltd -v- Robinson UKEAT/0342/07
The EAT found that an employee had acquiesced in an otherwise illegal variation of his contract in relation to mileage expenses as he had continued to submit claims at the new lower rate for 5 months without protest

Acquiescence can only apply where the employer has purported to vary the contract. If there is a dispute about the <u>meaning of a contractual term that has not been changed</u> (e.g. a bonus term in a collective agreement), whether or not the employee it can be argued to have accepted the employer's interpretation of the term for years is irrelevant. The issue is one of 'construction of contract' and the legal issue is what the words actually mean – the views of the parties as to what they mean are largely irrelevant.

Variation by Custom and Practice

In ***Selectron Scotland Ltd -v- Roper & others*** 2004 IRLR 4, the EAT (applying the principle from ***Devonald -v- Rosser and Sons*** 1906 2KB 728 that a term can only become established through custom and practice where it is 'reasonable, notorious and certain') stated that it is doubtful whether a custom can ever vary existing contractual rights, but even if it can, it would need a very long established practice before it could be inferred that a party had, by implication accepted the rights conferred by custom at the expense of more favourable rights.

In ***International Packaging Corporation (UK) Ltd v Balfour & Others*** 2004 IRLR 1, the Scottish EAT held that employer was not entitled to reduce employees' hours of work without their consent on the basis that they had previously consented to short-time work.

5.3 Collective Agreements

While collective agreements are not normally enforceable as between the employer and the trade union, when they are incorporated into the individual employee's contract, they become legally enforceable as between the employer and employee (***Robertson -v- British Gas Corporation*** 1983 ICR 351 CA). Once a term becomes incorporated into the individual contract it remains incorporated even if the collective agreement is terminated (unless of course it is clearly replaced by a different term).

As long as the collective agreement is incorporated into individual employees' contracts, individual employees need not be a union member or even be aware of the collective agreement to be bound by the agreement.

Once a collective agreement is incorporated into a contract the employer is bound as well as the employee. In ***Edinburgh Council -v- Brown*** 1999 IRLR 208 the employers refused to upgrade the employee in accordance with a re-grading system that had been agreed by a joint consultative committee with the unions in 1987, arguing that it was only a policy with no binding effect and could be varied at any time without the agreement of the unions and had been so varied in 1992. EAT held that the variation was not incorporated into the employee's contract because there had been no agreement to vary either collectively or by the employee.

While the incorporation of a collective agreement is normally by way of express incorporation through a reference in the contract of employment, collective agreements can also be incorporated into a contract by implied incorporation – see note on ***Henry & Others -v- London Transport Services Ltd.*** [2002] IRLR 473at page 3 above**.**

In the recent case of ***Sparks & Others -v- Department of Transport***, High Court (QBD), 2015 EWHC 181, a government department was prevented from imposing a new absence management policy on staff pursuant to a power in a staff handbook (which was taken as having been incorporated into individual contracts of employment) which authorised contractual changes provided they were not 'detrimental' to employees. The proposed changes were found to be detrimental and thus outside of the scope of the variation clause and could not be implemented without consent.

Appropriateness of Terms

In order for a term or condition to be incorporated into a collective agreement it must be an appropriate term for incorporation i.e. it must relate to an individual rather than a collective issue.

This most typically arises in relation to redundancy issues. Thus, while it may be that a clause quantifying individual entitlements to enhanced redundancy payments could be incorporated (if the facts show the intent to be bound), larger questions as to the handling of the redundancy may fall into the purely collective category.

In ***Griffiths -v- Buckinghamshire County Council*** ICR 265 QBD it was decided that a term relating to notice of impending redundancies contained in a collective agreement was inappropriate for incorporation into individual contracts.

Redundancy selection procedures, however, may be capable of incorporation into individual contracts in limited circumstances. In ***Young -v- Canadian Northern Railway Co*** 1931 AC 83 PC, the Privy Council declined to incorporate a clause setting out agreed seniority provisions for use in a redundancy; whereas in ***Anderson -v- Pringle of Scotland Ltd*** [1988] IRLR 64 the Court of Session (in proceedings for an interlocutory injunction) found a *prima facie* case that a collective agreement providing for LIFO (Last in, First Out) had become part of the individual contract. Ultimately

the issue will not just be whether a particular agreement or clause has been applied in the past but whether the facts as a whole show an intent to do so as a matter of contractual obligation.

In the case of ***Kaur –v- MG Rover Group Ltd*** 2005 IRLR 40 the CA, in overturning a decision of the High Court, ruled that a provision in a collective agreement stating that "there will be no compulsory redundancy" was not incorporated into the Applicant's individual contract of employment. These words were found to be aspirational rather than a binding contractual term.

A collective agreement may permit unilateral variation by the employer. In ***Airlie & Others -v- City of Edinburgh District Council*** 1996 IRLR 516 a bonus scheme was incorporated into the contract of employment as was a code of practice in relation to the bonus scheme. The code of practice included a review procedure whereby the scheme could be reviewed by agreement. Following a failure to agree, the employer unilaterally amended the scheme. This was held to be lawful as there was also a term which allowed the employer to terminate the scheme and it was found that the individual contracts thereby made provision for unilateral variation.

5.4 Termination of Contract

Where an employer wishes to change terms and conditions of an employee/s and is unable to do so by agreement, the employer may choose to terminate the relevant contract and offer new contracts which include the variation. This is commonly known as 'Fire & Rehire'.

In practice this is highly undesirable means of achieving variation of contract and rarely happens as it inevitably leads to conflict, is very damaging to industrial relations, and can lead to industrial action.

Where the employee is actually dismissed for refusing to accept a new contract, a dismissal may or may not be an Unfair Dismissal depending on the circumstances. If the employer can show a good business reason for the changes this will likely mean that the employer can establish that the dismissal was for 'some other substantial reason' and thus potentially fair. However, the question as to whether the employer behaved reasonably still remains to be considered – if the employers properly consulted with the

employees and unions seeking agreement of employees, considered their views, considered alternative jobs etc, they are more likely to have been considered to have behaved reasonably. If however the employer has simply sought to force through the proposed changes with little or no consultation it is more likely to be considered unfair. Also, in considering the issue of reasonableness, the Tribunal will consider whether the disadvantages to the employees outweighed the advantages to the employer or *vice versa*.

The EAT case of ***Scott & Co -v- Richardson*** UKEAT 0074/04 highlights the low threshold which an employer must meet to establish 'some other substantial reason' for dismissal. In that case the employer unilaterally introduced a shift pattern so that employees lost overtime payments. The Claimant was dismissed for refusing to accept the variation. EAT said that test is whether employer reasonably believed that change had advantages and that it was not necessary for the employer to prove such advantages. Provided that the reason was not 'whimsical, unworthy or trivial' then the employer will establish 'some other substantial reason'.

In ***Garside and Laycock Ltd. -v- Brooks & Others*** 2011 IRLR 735 EAT, the EAT held that a Tribunal had wrongly concentrated on the reasonableness of the employee's decision to reject a pay cut rather than rather than whether the employer acted reasonably in dismissing him for refusing it.

6.0 UNILATERAL VARIATION OF CONTRACT – OPTIONS FOR THE EMPLOYEE

Where an employer does not have power to unilaterally vary contract terms and is unable to get agreement for changes to terms and conditions and imposes the new term/s or dismisses the employee for refusing to accept the change, what options does the employee have in these situations?

An employee may respond to the breach of contact in the following ways:

- claim Unfair Dismissal if dismissed for refusing to accept contract changes/new contract;

- 'stand and sue' - stay and work 'under protest' and bring claim for unlawful deductions or breach of contract;

- in the case of a fundamental breach, resign and claim constructive dismissal;

- where the change amounts to the termination of the old contract and the introduction of a new contract, continue to work under the new contract and claim Unfair Dismissal in relation to the old one;

- refuse to work the new terms e.g. if the new terms involve different duties or hours.

6.1 Claim Unfair Dismissal if Dismissed for Refusing new Contact

Whether or not any such claim succeeds will depend on whether the employer can establish a good business reason for the change of contract terms and acted reasonably by way of negotiation, consultation etc. – see section 5.4 above.

6.2 Stand and Sue

The employee works on under protest and brings a breach of contract action for loss arising from the employer's breach.

The leading case is the HL decision in ***Rigby -v- Ferodo*** 1988 ICR 29 w here the employer cut the wages and a number of staff continued to work but expressly did not accept the wage cut. The HL stressed that as long as there is a continuing contract, not terminated by either side, the employer will remain liable for any shortfall in contractual wages.

An employee who has suffered a reduction in wages (including bonuses, commission, holiday pay etc – see definition of 'wages' – **Article 49 of The Employment Rights (NI) Order 1996**) may alternatively bring a claim for unlawful deductions to the Tribunal under **Article 55 of the 1996 Order** as long as the employee can establish that there was a contractual entitlement to such wages.

However, where an employee wishes to stand and sue, it is vital that they make it clear that the variation is not being accepted or, as set out at 5.2 above, an employee may be taken to have agreed the variation by their behaviour – by 'acquiescence'.

In a situation where the employee signs or otherwise accept the new contract 'under protest', it is also necessary that the employee adheres to the terms of the new contract (e.g. re working hours) under protest – failure to do so can render the employee liable to be fairly dismissed for failing to obey a reasonable order as they have agreed to work the new contract - ***Robinson -v- Tescom*** UKEAT/0567/07

<u>Use of Injunction to challenge unilateral variation?</u>

Damages for breach of contract or an unlawful deductions claim will only cover direct financial loss. Some changes including a change in working hours or duties may involve no loss. In such a case the only potential remedy from the courts (in the absence of a constructive dismissal or **'*Hogg -v- Dover College*'** Unfair Dismissal claim – see below) would be to seek a declaration or an injunction. These remedies are discretionary and the courts are most reluctant to interfere with the performance of employment contracts.

6.3 Claim Constructive Dismissal

Where employer seeks to impose a variation of contract and an employee leaves claiming constructive dismissal, there may be a constructive dismissal which may or may not be unfair depending on the employer's behaviour.

In accordance with the leading Court of Appeal decision of ***Western Excavating (ECC) Ltd -v- Sharp*** 1978 ICR 221 in relation to constructive dismissal, the employee will have to be able to establish that:

- there was a fundamental breach on the part of the employer;
- the employee resigned because of the breach; and
- the employee did not affirm the contract by delaying too long before resigning.

The breach relied upon can be an anticipatory breach as well as an actual breach – thus a letter advising of a forthcoming reduction in wages can give rise to an entitlement to resign and claim Unfair Dismissal in the same way as an actual reduction. However, vague or conditional proposals for changes to terms and conditions would not be considered as an anticipatory breach.

It should be noted that a constructive dismissal will not necessarily be unfair. Any such dismissal will likely not be found to be unfair if the employer can show a genuine business need ('some other substantial reason') and that they acted reasonably in seeking agreement of employees, consultation etc. (***Savioa -v- Chiltern Herb Farm Ltd.*** 1982 IRLR 166, CA). If however the employer has simply sought to force through the proposed changes with little or no consultation, it is more likely to be considered unfair.

6.4 Remain in employment and claim Unfair Dismissal

Where the employer has either expressly or otherwise terminated one contract of employment and replaced it with another with substantially different terms and conditions, the employee may claim Unfair Dismissal even though the employee is still employed by the same employer - ***Hogg -v- Dover College*** [1990] ICR 39 EAT***; Alcan Extrusions -v- Yates*** [1996] IRLR 327 EAT.

It should however be noted that in both of the above cases employer did not expressly dismiss the employee but the change in contract terms was so fundamental as to amount to termination of the contract e.g. in ***Hogg*** he had effectively been demoted from a Head of Department in a college to a lesser post with a considerable drop in salary.

As discussed at 5.4 above, if the employer can establish a fair reason for the changes and engages in meaningful consultation before seeking to impose new contracts and otherwise acts reasonably, any such Unfair Dismissal claim may then be unsuccessful as the employer may be found not to have acted unreasonably.

6.5 Refuse to Change

If the employee simply refuses to go along with the changes e.g. by refusing to carry out the changed duties, the ball is back in the employer's court.

If the employer dismisses they may face Unfair Dismissal proceedings or wrongful dismissal proceedings.

Protective Awards and Variation of Contract

The right to statutory consultation (under Article 216 of the Employment Rights (NI) Order 1996 - where an employer proposes to make more than 20 employees redundant - can apply in circumstances where an employer proposes to impose new contracts on a group of employees as the definition of redundancy for the purposes of consultation (Article 223 of the 1996 Order) includes '… dismissal for a reason not related to the individual concerned ...' - ***GMB -v- Man Truck & Bus UK Ltd. [2000] IRLR 636 EAT***. Such failure to consult can lead to a Protective Award of up to 90 days pay for each individual.

John O'Neill
Thompsons NI
June 2015