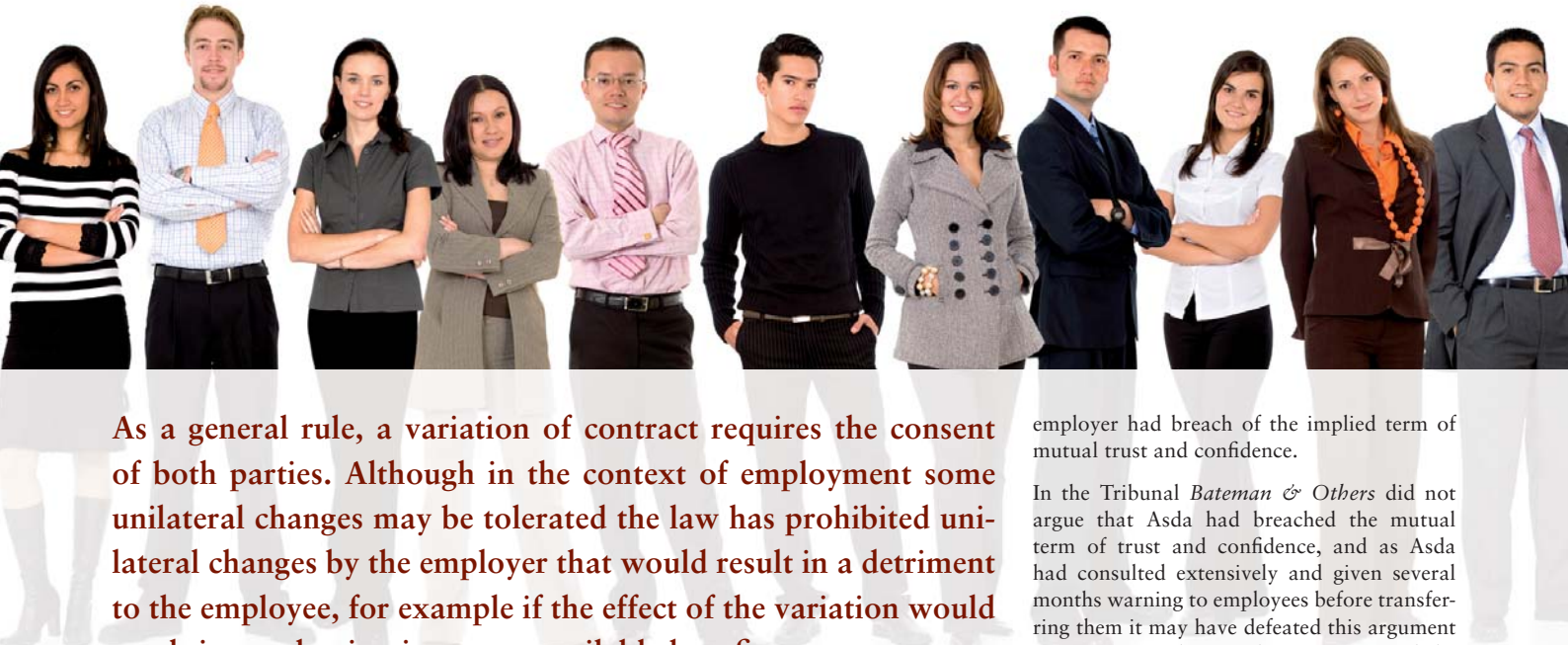


Dictating The Terms? *Varying Employees Contracts*



As a general rule, a variation of contract requires the consent of both parties. Although in the context of employment some unilateral changes may be tolerated the law has prohibited unilateral changes by the employer that would result in a detriment to the employee, for example if the effect of the variation would result in a reduction in pay or available benefits.

Contracts of employment often contain variation clauses with a view to reserving the employer's right to vary terms and conditions without their employees' consent. Such variation clauses will be closely scrutinised and any ambiguity will be construed in the employee's favour. There is also the added risk that the employee would in response to any change allege breach of contract by the employer and claim constructive dismissal e.g. for breach of the implied term of mutual trust and confidence.

The Employment Appeal Tribunal (EAT) case of *Bateman & Ors v Asda Stores Ltd* provides some comfort and useful authority to employers that it should now be possible to vary contractual terms without agreement, subject to the satisfaction of certain conditions even where the employee may suffer a detriment.

Asda had sought to harmonise the terms and conditions of employment for all staff by implementing a new unified pay structure. For some this resulted in a reduction in pay. After extensive consultation, most of Asda's staff voluntarily moved on to the new pay regime, the remaining staff were transferred involuntarily under a provision in the Staff Handbook that allowed Asda to 'review, revise, amend or replace' the contents of the handbook (only some sections of which were

contractual) and to introduce new policies to 'reflect the changing needs of the business'.

Bateman and around 700 others claimed that they had suffered unauthorised deductions from wages in breach of S.13 of the Employment Rights Act 1996 as a result of being involuntarily transferred to the new pay regime. They did not contend breach of the implied term of trust and confidence by Asda.

In the Employment Tribunal the claims were rejected and the Tribunal held the employer's unilateral variation to the contract terms to be valid. They accepted that Asda's desire to have only one pay structure fell within 'the changing needs of the business' and found that the provisions of Asda's handbook were sufficiently clear and unambiguous to entitle it to vary contractual terms and to introduce new policies without employee consent.

On appeal EAT agreed with the Tribunal's findings and upheld the decision.

The case does note some exceptions where it remains unlikely that an employer's unilateral change would be permissible, in particular where the variation is *unreasonable, arbitrary or capricious*, or where the employer has failed to give notice of, or consult on, the change. In such circumstances it is also likely that the employee could claim that the

employer had breach of the implied term of mutual trust and confidence.

In the Tribunal *Bateman & Others* did not argue that Asda had breached the mutual term of trust and confidence, and as Asda had consulted extensively and given several months warning to employees before transferring them it may have defeated this argument in any event. The EAT however, rejected the Claimants' arguments raised in relation to breach of the mutual term of trust and confidence on appeal specifically because they had not previously raised this as an issue.

Although many employers may welcome this decision they should still proceed with caution before making unilateral changes, particularly if as a result the employees suffer a detriment.

Firstly, check the variation clause to ensure that it provides the right to make the change, and that it is clearly drafted so as to avoid the 'contra proferentum' rule by which any ambiguity in the term will be interpreted in the employee's favour. Thereafter the manner in which the employer seeks to introduce and operate the variation clause must be reasonable and not arbitrary. Employers should still go through a process of notice of, and consultation upon any proposed changes. Care should be taken to avoid claims of breach of the duty of trust and confidence. The decision in the *Asda* case should at least assist employers in their negotiations with employees during the consultation process and it gives effect to some shift in the bargaining power.

If you require any further information please contact Nicola W Hughes on 0117 926 4121 or by email nwuh@meadeking.co.uk

Controlling Costs

the latest attempt



In November 2008 Lord Justice Jackson was appointed to conduct a detailed review into the costs of civil litigation and to make recommendations to promote access to justice at proportionate cost. One year and over 500 pages later, he delivered his final report. Here is a brief summary of his recommendations.

Conditional fee agreements (CFAs)

Whilst widely believed to promote access to justice, “no win, no fee” agreements (and other types of CFA) were found to be a major contributor to disproportionate costs in England and Wales because of (a) the success fee that lawyers can claim on top of their basic costs and (b) the after-the-event insurance premium that is commonly taken out to protect the claimant from the risk of having to pay adverse costs. Currently, both of these can be recovered from the unsuccessful opponent so that a claimant (for example in a professional negligence claim) can significantly improve his prospects of an advantageous settlement by entering into a no win no fee agreement and arranging adverse costs insurance (making the likely costs to be borne by the defendant that much greater). The review recommends that this should stop. It will still be open to clients to enter into a CFA with their lawyers but any success fee will instead be borne by the client, not the opponent. Although this proposed change may promote access to justice, in practice it may well also promote the cost of it.

Reversing the burden of costs

The principle that the loser pays the winner’s costs has been a fundamental one for centuries, but the review proposes to reverse the burden of costs (known as qualified one way costs shifting) in certain categories of litigation so that the claimant will not be required to pay the defendant’s costs if the claim is not successful; but the defendant will be required to pay the claimant’s costs if it is. The point of this is that a wronged party with a meritorious claim for damages should not be deterred from bringing a claim by the risk of facing an adverse costs order.

Other funding issues

The review encourages the use of legal expenses insurance (commonly included with household and contents insurance and motor insurance) and proposes the use of contingency fee agreements, whereby the lawyer is only paid if his client’s claim is successful and then he is paid out of the settlement sum or damages awarded (usually as a percentage of that amount). These types of agreement are not currently permitted in “contentious” business but their

introduction should increase access to justice. Unfortunately the inability of the successful party to recover any more than a conventional amount means that it will have to absorb any difference in costs itself.

Self-evidently, it must be acknowledged that such changes will not happen over night. There are a number of vested and entrenched interests at work which frequently conflict with each other. For example, one bone of contention for defendants concerns adverse costs insurance. Despite being liable for the premium if the claim is successful, the defendant may defend the case through to trial, succeed and then find that the insurer avoids liability on the basis that the claimant misled it when submitting a proposal. The Jackson review is designed to avoid such abuses of the system but it remains to be seen whether and when its proposed changes will be put into effect. Until then, it is business as usual...

For further information please contact Adam Chivers on 0117 926 4121 or email ajc@meadeking.co.uk or Adam Dymock on 0117 923 4034 or by email ard@meadeking.co.uk

Meade King Insolvency Alert

Good news for Landlords: rent as an administration expense

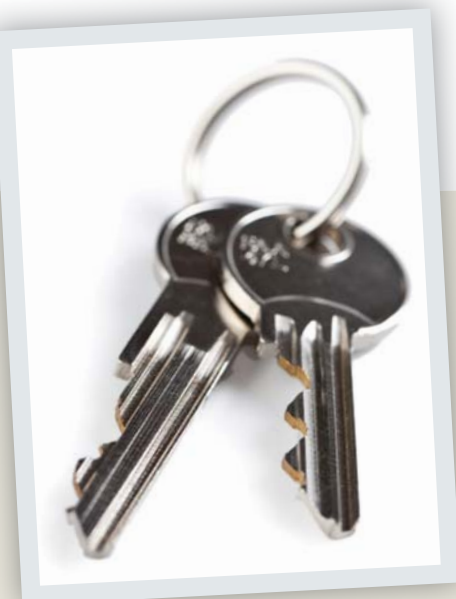
The High Court has held in the case of *Goldacre (Offices) Limited v Nortel Networks UK Limited (in administration)* [2009] EWHC 3389 (Ch) that rent of business premises constitutes an expense of the administration of a company and is payable in priority under Rule 2.67 of the Insolvency Rules 1986.

It was held in *Goldacre* that if an administrator causes a company to use leasehold property for the benefit of creditors, then the administrator must automatically pay such rent as falls due under the lease as an expense of the administration. It was further held that there is no element of discretion, that payment

must be made whether or not the landlord is seeking payment and that the entire rent must be paid even if the company only occupies part of leasehold premises.

The decision in *Goldacre* will strengthen the position of landlords of premises occupied by tenants that go into administration, and further extends the expenses payable by an administrator.

The decision in *Goldacre* follows the earlier decision in the case of *Trident Fashions* that business rates comprise administration expenses.



For further information please contact Keith Mahoney on 0117 926 4121 or by email kwm@meadeking.co.uk

ASBESTOS

Asbestos is a very familiar substance in the construction trade. It has been used extensively in a wide range of products incorporated into buildings built or refurbished before 2000. When asbestos is damaged the tiny fibres of which it is composed can be inhaled, where they become trapped in the lung, potentially leading to cancer (mesothelioma) and asbestosis.

Asbestos can be found in insulation board, ceiling tiles, partition walls, door panels, fire surrounds, lagging on pipework, boilers, insulating jackets around ducts, roof sheeting, wall cladding, flues, gutters, water tanks etc. Add in textured coatings (artex) and bituminous fabrics (roofing felt) and the potential for releasing asbestos fibre in the course of renovation, demolition or even ordinary maintenance becomes clear. To avoid risk to employees and others, and to protect against criminal prosecution, employers must have a good understanding of the law on the management of asbestos.

The legislative framework is set out in the Control of Asbestos Regulations 2006. The regulations replace the Control of Asbestos at Work Regulations 2002. The main current requirements may be summarised as follows:

The Duty to Manage Asbestos

The regulations create a duty to manage asbestos in **non-domestic** premises. The dutyholder is any person (which can include a company as opposed to an individual) responsible to any extent for the maintenance or repair of non-domestic premises. This therefore includes a tenant of commercial premises as well as the owner.

The duty extends to the communal areas, and it is perfectly possible for more than one person to be a dutyholder in respect of the same space. Where this is the case, both dutyholders should comply with the regulations.

Assessing the Risk

The regulations require the dutyholder to make “a suitable and sufficient assessment” to find out whether asbestos is or may be present in the premises.

The assessment should include an inspection of the building, and take into account information from the building plans, the age of the premises and any other relevant information which is available. The assessment must

be recorded and must be reviewed if there is a significant change in the premises.

Action if Asbestos is Present

If the assessment reveals that asbestos is, or may be present in the building, the dutyholder must ensure that:

- a determination of the risk from the asbestos is made;
- a written plan identifying the whereabouts of the asbestos is prepared; and
- management measures for control of the asbestos are specified in the written plan.

It is not a requirement of the regulations that all of the asbestos must be removed immediately. Given the prevalence of asbestos in our built environment this is not feasible. The determination of risk is a specialist task, as is the decision on how the asbestos should be managed. This may be by labelling and monitoring, encapsulating etc.

The plan must include measures to ensure that anyone likely to come across the material or disturb it is made aware of the asbestos. In practice, the consultant inspecting the premises for asbestos will prepare a register supported by photographs and plans identifying in respect of each suspected asbestos site the type of asbestos and the management measures proposed. The dutyholder can then ensure that all employees, contractors and emergency services' visitors are given a copy of the register before any part of the premises is disturbed.

Reviewing the Management Plan

As usual with health and safety measures, there is a duty to review and revise the plan at regular intervals, and to **keep a record** of the steps taken from time to time in pursuance of the management plan. Again, this can most conveniently be done by noting the asbestos register so that it is kept up to date and is a complete record.



Duty to Check for the Presence of Asbestos

Employers should not start any work in demolition, maintenance or any other trade which involves tampering with the structure of any premises (and here the regulations include domestic as well as non-domestic premises) unless they have made a suitable and sufficient assessment as to whether asbestos is contained in the premises.

The occupant of non-domestic premises should volunteer a copy of the asbestos management plan for the assistance of any contractor instructed to work on the premises, but the contractor will not be complying with the regulations himself if he depends on this and fails to make his own assessment – starting with an enquiry as to whether an asbestos survey has been carried out and a management plan prepared. Where there is asbestos, it will nearly always be the case that if asbestos material is to be disturbed or removed the work will have to be done by a licensed contractor.

Working with Asbestos

The regulations identify the standards which must be observed by licensed contractors to ensure the health and well being of their employees and of subsequent occupants of the premises. Upon conclusion of the work, specific standards must be met for cleaning and a certificate issued confirming that the site is fit for re-occupation.

Employers/dutyholders who fail to comply with the legislation risk prosecution in the Criminal Court. Recently, Fife Council was fined £10,000 for failing to maintain its asbestos management plan. Worse may be the uncomfortable awareness that the employer and his employees together with other users of the premises may suffer painful illness and perhaps early death years down the line as a result of failure to observe the regulations.

For further information, please contact Judith Kelly on 0117 926 4121 or by email jbk@meadeking.co.uk.

Charity Of The Year 2009



Managing Partner, James Hawkins and members of the Meade King charity committee are pictured presenting Chris Banting, South West regional fundraiser for CLIC Sargent, with a cheque for £2,837.70 at the conclusion of the Meade King charity year. In all, the firm raised £3,129.83 for CLIC Sargent over the course of the year.

Charity Committee Chair Judith Kelly said: “We are delighted to contribute to such a worthwhile cause, and we are grateful to the clients and friends who bought raffle tickets, ate cake and sponsored our sporting efforts. Simon East made a magnificent solo contribution by raising sponsorship to run the Bristol half marathon, and the stand-out event was the Dragon Boat racing in September 2009. Sponsoring a charity has been a marvellous and positive experience for us as a firm; the benefits go both ways”.

Data Protection Act – monetary penalty notices



The Data Protection Act has been with us for many years but with effect from 6 April the Information Commissioner's Office (ICO) will be empowered to issue Monetary Penalty Notices (MPNs) of up to £500,000 where appropriate. The ICO is expected to use the introduction of these new powers initially for high profile cases on the basis that we have all had long enough to familiarise ourselves

with the principles of data protection. The ICO will consider serving a MPN if there has been a serious contravention of the data protection principles and that the breach is likely to cause serious damage or distress and was either deliberate or the offender had been reckless and had not taken reasonable steps to prevent it. A data controller will be judged by the standards of what a reasonably

prudent controller would do so ignorance is not a defence.

MPNs are most likely to be issued for breaches of the legislation such as losing laptops or memory sticks which have not been encrypted or insecure networks leading to personal data loss particularly where no effort has been made to notify the individuals whose data has been mislaid.

Many organisations still assume that the rules do not apply to them and seek to rely on the exemptions in the Data Protection Act. These, however, are very limited and given the introduction of the new and far more punitive penalty regime it would be sensible for all data handlers or processors (those who hold or collect data) to review their notification and/or to review their systems to ensure that they do fall within the exemption. Even if you have registered under the Data Protection Act a review of your policies for the protection of personal data in your possession is now more important.

http://www.ico.gov.uk/upload/documents/library/data_protection/forms/notification_exemptions_-_self-assessment_guide.pdf

If you would like further information please do not hesitate to contact James Hawkins. He can be contacted on 0117 926 4121 or jnh@meadeking.co.uk