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# Varying contractual terms and policies in the time of Covid-19 and a post- Covid-19 world

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## **Agenda:**

- Part 1: Which terms and policies to vary?
- Part 2: How to vary?
- Part 3: The consequences of getting it wrong.
- Part 4: Thoughts for the future?

# Which terms and policies might need to be varied?

- Contractual and non-contractual benefits
- Varying terms as to remuneration:
  - Coronavirus Job Retention Scheme (CJRS) and furlough leave
  - ***Re Carluccio's (in administration)*** [2020] EWHC 886 (Ch)
  - ***Abrahall v Nottingham City Council*** [2018] ICR 1425
- Varying hours of work:
  - 'Phase Two' of the CJRS: anticipated changes in July

## Part 2: How to vary contractual terms and policies: Collective Consultation

- TULR(C)A 1992, s. 188
- Other sources of obligations:
  - Information and Consultation of Employees Regulations 2004/3426
  - Health and safety regulations, e.g. Health and Safety (Consultation with Employees) Regulations 1996/1513

# Collective redundancy situations (1)

- TULR(C)A 1992, s. 188:

*“(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.*

*“(1A) The consultation shall begin in good time and in any event—(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 45 days, and (b) otherwise, at least 30 days, before the first of the dismissals takes effect.”*

## Collective redundancy situations (2)

- The extended definition of ‘redundancy’:
  - Dismissal and reengagement
  - ***GMB v MAN Truck & Bus UK Ltd*** [2000] ICR 1101
- The ‘special circumstances’ defence: s. 188(7):

*“If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances.”*
- ***Clarks of Hove Ltd v Bakers Union*** [1978] 1 WLR 1207

# Individual consultation and varying collectively agreed terms

- Collective consultation is no substitute for individual consultation: *Mugford v Midland Bank* [1997] IRLR 208.
- How does an employer vary collectively agreed terms?
  - The perils of s.145B TULR(C) A 1992
  - *Kostal UK Ltd v Dunkley* [2019] EWCA Civ 1009

## S.154B TULR(C)A 1992:

- “(1) A worker who is a member of an independent trade union which is recognised, or seeking to be recognised, by his employer has the right not to have an offer made to him by his employer if –*
- (a) acceptance of the offer, together with other workers’ acceptance of offers which the employer also makes to them, would have the prohibited result, and*
  - (b) the employer’s sole or main purpose in making the offers is to achieve that result.*
- (2) The prohibited result is that the workers’ terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated on behalf of the union.”*

# The routes to contractual variation:

- Interpreting existing terms:
  - Express terms
  - Specific flexibility clauses
  - Implied terms:
    - ***Reda v Flag Ltd*** [2002] IRLR 747; ***United Bank v Akthar*** [1999] IRLR 507
  - General flexibility clauses
    - ***Wandsworth London Borough Council v D'Silva*** [1998] IRLR 193

# Unauthorised changes: the options?

- Express agreement
  - *Sheet Metal Components Ltd v Plumridge* [1974] ICR 373  
and cf *Hepworth Heating Ltd v Akers* EAT 846/02
- Implied Agreement
  - *Abrahall v Nottingham City Council* [2008] ICR 1425
- Unilateral imposition

## Working under protest

- Sufficient for an employee to make clear that the change is not agreed: ***Arthur H Wilton Ltd v Peebles*** (EAT/835/93).
- Courts will allow reasonable period of time to decide: ***Shields Furniture Ltd v Goff*** [1973] ICR 187.
- Employees can reject the change following a trial period: ***Turvey v CW Cheyney & Son Ltd*** [1979] IRLR 105.
- The employee must work to the new terms and cannot cherry-pick.
- Breach of contract/unlawful deduction from wages

# Out with the old and in with the new: LITTLETON Dismissal and reengagement

- S.188 TULR(C)A 1992
- Notice pay
- Unfair dismissal
  - SOSR/redundancy
  - What loss?

# A week is a long time during a pandemic...

- Trust and confidence.
  - An analogy with PHI?
    - *Aspden v Webbs Poultry and Meat Group (Holdings) Ltd* [1996] IRLR 521
    - *Brompton v AOC International Ltd* [1997] IRLR 641
    - *Villela v MFI Furniture Centres Ltd* [1999] IRLR 468
    - *Briscoe v Lubrizol* [2002] IRLR 607
    - *Marlow v East Thames Housing Group Ltd* [2002] IRLR 798
- The developing landscape and further changes



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