



Business NEWSLETTER

SUMMER 2010

ISSUE 57

Changing Terms of Employment

Difficult times demand difficult decisions. Faced with a downturn in work, how should businesses reduce staff costs? Redundancies are one option, but these may mean losing valued employees. Changing terms of employment, perhaps paying less for fewer hours' work, is another. Often employees will agree to such a change, to preserve their jobs in the longer term. If they don't, is it possible to impose change?

Following extensive consultation, ASDA introduced a new national pay and work structure for their store staff. About half of their employees consented to the change, but the others did not, and a few made Employment Tribunal claims for the pay that they had thereby lost. ASDA successfully defended these claims by pointing to their long standing staff handbook. This set out pay, hours and other terms, and gave them power to 'revise, amend or replace the contents of this handbook [...] to reflect the changing needs of the business'. As ASDA had not acted capriciously or arbitrarily in introducing the new structure, and had consulted staff before doing so, they could lawfully exercise this power, and had not breached their duty of trust and confidence to employees in doing so.

Other employers have not always been so successful. Mr Khatri worked for a Dutch bank in London as a trader. In March 2008 he agreed a new employment contract which awarded him a performance related bonus each year, but also reserved the bank's 'right to review or remove this [...] bonus at any time'. Four months later, having first been warned of possible redundancy, he was redeployed and informed that he would lose the bonus. Mr Khatri told the bank that he did not accept such loss. Having ultimately been made redundant in January 2009, he claimed a bonus for the year 2008 of more than a million Euros. The bank resisted his claim, relying on the words of reservation in his employment contract, but were unsuccessful. These words might have given them the right to change the bonus in later years, but the language of the relevant provisions in the employment contract made it clear that Mr Khatri could not be deprived of his bonus for 2008 mid-year, especially after having already worked seven months to earn it.

Equality at Work

One of the last measures of the Labour Government was to pass a new Equality Act, some of which comes into force in October. While much of the Act consolidates existing law - prohibiting discrimination, harassment and victimization by reason of various 'protected characteristics' such as age, disability, pregnancy, race and nationality, religion and belief, sex and sexual orientation - new rules prohibit:

- Discrimination by association where, for instance, an employer treats an employee unfavourably because he is the father of a disabled child.
- Discrimination by perception where, for instance, an employer treats an employee unfavourably because he wrongly believes him to be gay.
- Discrimination arising from disability where, for instance, an employer treats a disabled employee unfavourably and such treatment is not a proportionate means of achieving a legitimate aim.
- Pre-recruitment health questionnaires, except in limited circumstances.
- Pay secrecy clauses in employment contracts which seek to prevent employees discussing what they earn.

Henry

Giving vacuum cleaners a human face can be a litigious business. Numatic manufactured a range for both commercial and domestic markets, of which the best known was 'Henry'. This had a black domed 'bowler hat' lid, above a red cylinder shaped like a human head and painted with a smiley face. When Qualtex informed Numatic that it was proposing to manufacture a vacuum cleaner with a similarly humanoid character and appearance, Numatic obtained an order to prevent it from doing so on the ground that this would be passing off. Numatic owned the goodwill and reputation in Henry, and, although Qualtex's model would have a different name and colour and no smiley face, it could easily be mistaken for Henry.

Letters of Intent

While two parties are negotiating the terms of a contract, those terms normally remain 'subject to contract' and are not binding on either of them until the contract is actually signed. Nevertheless, it is not unusual for them to behave as if the contract had already been signed, and for one to begin supplying goods and/or services to the other on the basis of a letter of intent. The consequences can be dire.

A distribution company, Whittle Movers, tendered to a cinema warehousing company, Hollywood Express, for a five year contract. In order to win the tender, Whittle cut its prices in return for the security of a long term flow of work. After fifteen months, no contract ever having been signed, Hollywood gave six months' notice to terminate the relationship. Whittle argued that a contract had been agreed by virtue of the conduct of the parties in working together, but this argument failed. Hollywood's argument that there had been an interim agreement, terminable by notice, was also rejected. The parties had never agreed to dispense with a signed contract, and had never agreed all the key terms. In the total absence of a contract, Whittle's only remedy was to seek restitution for any unjust enrichment that Hollywood had enjoyed as a result of Whittle's artificially low prices.

Similar issues arose in a later dispute between RTS and Molkerei over whether there was a contract for the supply and installation of automated packaging, this time with a quite different result. By their conduct and correspondence the parties had shown that they had agreed all the key terms set out in draft documents, and had waived the need for a signed contract. The court, nevertheless, stressed that it could not have imposed on the parties an agreement they had not reached, and warned of the perils of beginning work without first signing up.

Environmental Regulation

The Environmental Agency and Natural England have been given new regulatory powers akin to those enjoyed by planning authorities. They can:

- Issue compliance notices requiring the cessation of an activity which is, or threatens to be, an environmental offence.
- Issue restoration notices requiring the rectification of any harm caused by an environmental offence.
- Issue stop notices prohibiting an activity that causes, or threatens, harm to the environment, or could constitute an environmental offence

Furthermore, they can also impose fixed, up to £300, and variable, up to £25,000, monetary penalties for environmental offences without having to prosecute the offender.

Look After Yourself

Quite rightly, employers are responsible for the health and safety of their staff while at work, and are prosecuted if they fail to protect them. Nevertheless, employees must behave reasonably, and have regard for their own well being and that of colleagues. If they suffer injury because of their own carelessness, in a way that was not foreseeable, then their employers will be acquitted.

E was a well respected and experienced welder who was working on the Hungerford Jubilee Bridge. In seeking to dismantle a working platform high above the river Thames, he disregarded explicit instructions from his employer and also worked without a harness. Consequently, he was crushed to death. In doing so he 'went on a frolic of his own' for which his employer could not be held responsible.

AH was employed as a mechanic in the workshop of Keltruck. His son JH, who was also employed by the company, was backing a cab into the workshop to hook up to a trailer. Neither JH, nor a third employee, noticed AH standing in front of the trailer, and AH ignored the bleeping of the cab. In consequence, he was crushed. Keltruck had prepared a suitable risk assessment for the workshop and had drawn the risks to the attention of their staff. Having done so, they were entitled to rely on the 'reasonable common sense and experience of mature employees' to avoid accidents such as this and were not culpable.

Directors' Liability in Tort

Generally, directors are protected by their company's limited liability status from incurring personal liability. Some long established exceptions to this rule include circumstances in which they give personal guarantees to banks or landlords, or allow their company to trade on when it has no prospect of avoiding liquidation, or are at fault when their company falls foul of environmental or health and safety laws.

In addition, directors can expose themselves to liability in tort, for instance by:

- negotiating to sell goods which they know infringe someone else's patent; or
- making fraudulent (as distinct from merely negligent) misrepresentations which enable their company to sell a subsidiary or trade in foreign exchange; or
- procuring breach of a property contract entered into by a fellow director.

In each case they must personally compensate their victim for any loss suffered.

This Newsletter is intended for the use of Clients of Gross & Co. It provides a summary of recent developments in business law but not specific advice on individual cases. We would, of course, be pleased to provide more detailed advice on these or any other business related matters.

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