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Focus on changing terms and conditions

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STANDING UP FOR YOU

Andrew James looks at how challenging changes to terms and conditions and negotiating current rights into collective agreements can be the most effective weapons for unions against government assaults on employment rights

Increasing the bargaining power of trade unions

AS MANY public and private sector union members face the threat of redundancy, others have the uncertainty of changes to terms and conditions, including cuts in pay and benefits.

For unions, it is vital that their members know such moves may be unlawful and how they can be challenged legally.

Contracts of employment

A contract of employment is a legally binding agreement which holds both employers and employees to its terms. Usually, neither side can alter the terms without the agreement of the other.

This should always be the starting point when representing an employee or group of employees negotiating a contract of employment and especially when opposing changes.

Over the course of an employment relationship, an employee's terms and conditions are likely to change by agreement with employees and their representatives. But when an employer tries to reduce financial benefits or restructure shift patterns (often with the claim that it is the only way to avoid redundancies) without the consent of employees and their representatives then they may be in breach of employment rights laws.

When an employer tries to reduce financial benefits or restructure shift patterns without the consent of employees and their representatives, they may be in breach of employment rights

Terms and individual contracts of employment can be changed in the following five ways:

- The employer and employee agree on the change.
- The employer imposes the change and the employee is deemed to have accepted it by carrying on working without protesting.
- The contract itself provides for changes.
- The contract is varied by collective agreement with a trade union which is binding on individual employees.
- Dismissal from the old contract with an offer by the employer of re-engagement on the new terms.

Changes to terms and conditions may not just be unlawful in themselves but can also contravene the Equality Act, the Working Time Regulations and National Minimum Wage Act. It is important to consider this when opposing any changes that erode the rights of members and when seeking remedy through a court or employment tribunal.

Statement of particulars

An employment contract will not necessarily be in writing, but an employer must provide an employee, after one month of the start of their employment, with a written statement of particulars of employment.

The statement should include details of the main terms and conditions including rate and frequency of pay, hours, holidays, sickness pay scheme, pension scheme, place of work and details of the disciplinary and grievance procedure.

Although such a statement is not a contract of employment, it is strong evidence that certain terms have been agreed between the parties especially when the employee has signed it.

Changes to terms and conditions

Only contractual terms require consent to be changed. Non-contractual benefits or provisions in policies can be modified or withdrawn at any time. So it is important to identify whether the change relates to a contractual or non-contractual term. This may also involve consideration of whether a term can be "implied" if it is not expressly made.

For example, something that has become custom and practice, such as an enhanced redundancy scheme not written into a collective agreement, cannot automatically be contractually implied.

Where a variation has been expressly agreed between the parties, it is enforceable and can only be changed by agreement in writing or orally. For example, an oral agreement that an employee would change from working day shifts to night shifts could not just be reversed by an employer.

Where an employee's terms and conditions change, the employer is obliged to issue the employee with a written statement of the change within one month of its taking place. However, the fact that a statement of change has been issued does not mean that the change is legally effective unless it has been lawfully implemented.

Implied agreement

This usually occurs where an employer has changed terms and conditions unilaterally by imposing them on the employee. If the employee remains in employment working without objection under the new terms, the employer may argue that the employee has ➲

➲ agreed to the changes. In these circumstances there will be no on-going breach of contract.

It is therefore vital that employees and their representatives make their objections clear, preferably in writing, if they are continuing to work under a contract where the employer has made a unilateral change and they do not agree to the change.

When an employer is determined to introduce a change to terms and conditions but cannot do so by agreement, they will either just impose the new term or terminate the relevant contracts

In cases where the employer simply delays in responding to a letter of protest or dealing with a grievance that has been lodged objecting to the change, employees should write to the employer on a regular basis confirming that they are continuing to work under protest as per their original letter. This protects the employee and undermines any argument by the employer that the employee has acquiesced to the breach. Ultimately, legal action might be necessary to force the issue.

Contractual right to vary

Contracts of employment may themselves allow an employer to make changes, as long as this is expressed in the contract.

Flexibility clauses such as mobility clauses are a common example of this. An employer who wishes to change the place where an employee works will usually be able to do so if the employee's contract contains a mobility clause, provided that the clause is exercised fairly.

Unilateral variation

When an employer is determined to introduce a change to terms and conditions but cannot do so by agreement, they will either just impose the new term or terminate the relevant contracts and offer new contracts of employment which include the change – the tactic of "fire and rehire".

Depending on the course of action taken by the employer, there are various legal options for workers, in addition to any collective action:

- Accept the breach by carrying on working under the revised terms.
- "Stand and Sue" – that is stay and work in accordance with the new terms, but make it clear that this is under protest, and bring an action for breach of contract in the High or County Court. If the breach of contract involves a shortfall in wages, claim in the tribunal under the protection of wages provisions of the Employment Rights Act.
- Resign and claim unfair constructive dismissal.
- If fire and hire tactics have been used, employees can claim unfair dismissal.
- Or they can just refuse to work under the new terms (likely to result in dismissal).

Unless the employer is making changes that will cause a financial loss to the employee, remedies are limited given the reluctance of courts to grant injunctions and declarations.

Employers making changes to terms and conditions will usually argue that a dismissal is for "some other substantial reason" (SOSR) for example if they are seeking to cut pay or other benefits.

Tactics

Case law on SOSR dismissals is not particularly helpful to employees, but there are tactics for unions to consider that are likely to get the best results for members.

In any negotiations on terms and conditions, the starting point should always be that the contract is sacrosanct and there is no statute or case that allows an employer to unilaterally vary it where there is no contractual right to do so.

If the employer is seeking to unilaterally impose wage cuts, the union should make it clear it will advise members to lodge a grievance and an unlawful deduction of wages/breach of contract claim. It could advise it intends to use a **Hogg -v- Dover College** argument.

This argument can also be used where changes the employer is trying to impose do not lead to financial loss. Depending on

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the circumstances, union members can lodge section 11 ERA 1996 claims, unfair dismissal claims or seek a High Court declaration for breach of contract. Although there are risks and a declaration does not compel an employer to revert back to the previous terms and conditions, these moves will at least put pressure on them.

The union can also assert that the changes would amount to a fundamental breach of contract and that employees are entitled to resign and claim constructive dismissal. This raises the stakes with employers, even if it's not a genuine possibility.

If the union feels it has no choice but to agree to eroded terms and conditions, it should attempt to avoid having them written into every contract of employment or have them limited for a defined period after which, subject to any further negotiations, they will revert back to the old terms.

If the changes are to the rate of pay, it will be important to attempt to ensure pension contributions will not be reduced. And it should negotiate with employers now to enshrine existing statutory rights into collective agreements.

Unions negotiated rights, such as paternity leave and flexible work, into agreements before those measures were enshrined in law. It didn't cost employers anything then, and it won't cost employers now to include currently automatic rights that the government is taking away, whatever ministers claim about burdens on business.

In the current climate, trade unions are increasingly becoming engaged with employers trying to erode terms and conditions. Whether a legal remedy is available will always depend on the facts of the case.

The law does not make court and tribunals the easiest arena in which to defend members' terms and conditions. Although a legal challenge can sometimes increase the bargaining power of trade unions, it is usually no substitute for industrial muscle.

Victoria Phillips examines the Tory attacks on the working time regulations and looks at the implications of recent judgments for the government's review

Attacks on working time

DAVID CAMERON, in his Europe speech in January this year, may have pledged to renegotiate parts of the UK's relations with Europe, but he was vague about the powers the UK should take back.

He did however refer to membership of the European Union as not requiring the working hours of British hospital doctors to be set by Brussels, leading to speculation that he's looking for a showdown over the Working Time Directive (WTD).

No adverse impact

The Tories hate the WTD. For them it represents the ultimate in EU red tape, a burden on business that prevents a flexible labour market operating unhindered by regulations that provide minimal levels of protection to working people.

But because UK companies widely use the directive's opt-out clause that allows individual workers to work longer than 48 hours a week, even the business lobby struggles to identify any adverse impact of the directive on the private sector.

People are increasingly prepared to sign anything a potential, or even current, employer puts in front of them just to get (or keep) a job

While it is unlawful to victimise or sack someone who refuses to sign an opt-out agreement, there is no legal prohibition on refusing to hire someone unless they sign. In these economic times, people are increasingly prepared to sign anything a potential, or even current, employer puts in front of them just to get (or keep) a job.

It may be difficult for employers' organisations to demonstrate that the WTD has significantly hindered economic growth. But, as with so many of the coalition's employment law reforms, the case for change is based entirely on myth and anecdote. And, where the WTD is concerned, providing succour to the EU-loathing Tory right.

Tightening the rules

The chorus of disapproval grows louder whenever a European or other court judgment tightens the rules of the WTD. Businesses have particularly hated some of the rulings on annual leave and sick leave. The Department for Business, Innovation and Skills (BIS) had to propose amendments to the Working Time Regulations (WTR) 1998 as part of its 2011 Modern Workplaces consultation in order to reflect a number of such judgments. BIS had not yet published a response to that part of the consultation as LELR went to press.

The proposed amendments include allowing workers who are ill during their annual leave to reschedule or carry over up to four weeks statutory annual leave to the following year. The consultation also looked at permitting employees to carry over 5.6 weeks annual leave due to maternity, paternity, parental or adoption leave and allowing them to either "buy out" 1.6 weeks of additional annual leave or to require the leave to be carried over in the event of an overriding business need.

Judgment in BA -v- Williams

There are several judgments that the government needs to take account of. Perhaps that is why it is taking BIS so long to respond. They include my long-running case of **British Airways -v- Williams**. In October 2012 the Supreme Court finally clarified the issue, ruling that pilots are entitled to be paid their normal remuneration during their four-week period of statutory annual leave.

The court said that holiday pay must include all elements of remuneration, such as flying pay supplements, and not just basic pay. Only sums that are intended exclusively to cover expenses can be excluded.

The case is important not only for workers in the civil aviation sector, whose rights to annual leave are set out in the Civil Aviation (Working Time) Regulations 2004, but also for the level of holiday pay of all workers whose entitlements to annual leave are set out in the regulations.

Holiday pay of pilots must include all elements of remuneration, such as flying pay supplements, and not just basic pay

It's inevitable that the rulings of the Court of Justice of the European Union (CJEU) and then the Supreme Court in Williams will lead to challenges to the level of payment for annual leave under the WTR. Payments are calculated in accordance with the statutory formula for a week's pay contained in the Employment Rights Act [ss 221-226].

If a worker's pay during the four-week period of statutory holiday does not correspond with their normal remuneration while working – for example, if commission payments, bonuses or other "intrinsically linked" allowances (such as

overtime and shift premiums) are excluded – Williams means that this is probably in breach of the WTD and so the wording and effect of the regulations must be construed to reflect this. Indeed, a number of tribunals have recently ruled to that effect.

Other rulings

Other rulings that BIS civil servants will be studying include the Thompsons case of **NHS Leeds -v- Larner**, in which the Court of Appeal decided that an employee who was absent for an entire leave year and did not make any requests to take annual leave during this time was entitled to holiday pay when their employment was terminated.

The Lords agreed with the claimants that unpaid working time holiday can be claimed as an unauthorised deduction from wages as well as under the WTR

In the Spanish case of **Anged -v- Fasga and others** the CJEU confirmed that a worker who is sick during holiday leave cannot be precluded from taking that period of leave at a later date, regardless of when the incapacity for work first arose.

And in another Spanish case, that of **Pereda -v- Madrid Movilidad SA**, it was held that the directive precludes national provisions or collective agreements that deny a worker who is sick during a scheduled period of annual leave the right to take the holiday at a later time, even if this is outside the holiday year.

The CJEU also held, in **Neidel -v- Stadt Frankfurt am Main** that Germany's legislation allowing for a carry-over period of nine months for untaken annual leave, meaning that public servants forfeited their holiday if it had not been taken within the nine-month period after the end of the leave year due to sickness absence, was unlawful.

It was the turn of France's interpretation of the directive in **Dominguez -v- Centre Informatique du Centre Ouest Atlantique** in which the CJEU said that it was contrary to the directive for national legislation to make entitlement to paid annual leave conditional on a worker having worked at least 10 days for the same employer in the leave year.

Another German CJEU case was **KHS AG -v- Schulte**, which confirmed that the directive does not require an unlimited accumulation of paid annual leave where an employee is on long-term sickness absence.

Judgment in Stringer -v- HMRC

Of course, one of the first UK CJEU cases in this long line of decisions on holiday and sick pay was my case of **Stringer and ors -v- HM Revenue and Customs**. It was held that the right to paid annual leave continues to be accrued during sick leave and that, where employment is then terminated, if the worker has been unable to take paid annual leave due to sickness absence they are entitled to payment in lieu.

When the case returned to the House of Lords to decide whether unpaid annual leave under the working time regulations and/or a payment on termination could also be pursued as unauthorised deductions of wages claims, the Lords agreed with the claimants that unpaid working time holiday can be claimed as an unauthorised deduction from wages, as well as under the WTR.

Unintended consequences for employers

Should Cameron succeed in wresting control of working time from Europe, or securing reform of the directive, there may be unintended consequences for employers. Removing protections afforded by the regulations could see an increase in claims for stress or personal injury, though the government's civil justice reforms and amendments to the Health and Safety at Work Act (which make pursuing claims more difficult) might shield them from that.

Any serious dilution of working time arrangements will also have a disproportionate impact on parents with childcare commitments, who are more typically women.

Where would that leave the coalition's pledge to make workplaces more family friendly?

Iain Birrell looks at some of the major changes to workers' rights introduced in the last couple of years which, he argues, amount to a serious assault on the ability of workers to take action

Taking tea at the Ritz

Although many of the rights enjoyed in the UK come from Europe, most are home grown and came about as a result of earlier struggles and injustices. They reflect, in large part, a tension between the employer's right to manage their business and the need to avoid exploitation of their workers.

As such, employment rights are inherently political. Indeed unfair dismissal was introduced directly as a means of stopping collective action by giving individual rights. It is this political angle that is driving the current changes and the government is pushing them through with as little scrutiny as possible on a wave of right wing propaganda.

Using the recession as justification

The recession has given the Conservative led government a great excuse to introduce extensive changes that undermine workers' rights. They justify everything by saying that it will either boost economic recovery or help to cut costs. A favourite refrain from government quarters is that "business tells us…" which has led to criticisms that they are making legislation on the back of anecdotes. But are they? Well, yes.

Complaints from business and sections of government that Britain is bogged down in "red tape" ignore data from the Organisation for Economic Co-operation and Development, which shows that UK workers are the third least protected in the western world.

Tales of an economic paralysis caused by excessive regulation leading to a reluctance to hire new staff have been shown to be nonsense by the government's own research. Scare stories of the number of employment tribunal claims spiralling, along with telephone number-like compensation, have all been scotched by official data from tribunals themselves.

Despite this, the reforms have gone ahead. Many are already law, with more yet to come.

Watering down rights

So many rights have been attacked there is not enough space to go into detail about all of them. The following are the ones most commonly relied on by workers and therefore the ones causing the most concern.

Unfair dismissal – employees who started work for their employer after 6 April 2012 need two years' continuous employment to bring an unfair dismissal claim (previously they only needed 12 months). According to the government's own figures about 3,700 to 4,700 people will lose out on this crucial right as a result.

By making it harder and harder to enforce fewer and fewer rights, the justice system is, like the Ritz, now only open to the moneyed few

Redundancy consultation – employers used to have to consult for 30 or 90 days (depending on the numbers affected) in redundancy situations involving 20 or more redundancies. The 90-day period was cut to 45 with effect from 6 April 2013.

Whistleblowing – the government decided that the law on whistleblowing had to be amended so that disclosures that could be characterised as being of a "personal" rather than "public" interest are no longer protected. Claimants also had to show from 25 June 2013 that they reasonably believed that the disclosure was in the public interest.

Pre-termination negotiations – this is a new concept dreamt up by the government following complaints from the employer lobby that it was unfair to have to either follow a fair procedure, or have evidence to back up an accusation that they wanted to level at an employee before sacking them. So from 29 July 2013, as long as they offer some sort of leaving package, they can tell an employee that they want to get rid of them in a meeting that is completely secret.

However, the employee cannot then use that information as evidence in an unfair dismissal complaint, unless they can show the employer was guilty of some form of impropriety such as bullying or perhaps some form of discrimination.

As there is no guidance about what the offer should contain, it is possible that a derisory offer (and some negative words about their work), would be enough to cause some employees to leave anyway. Because of the secrecy of the arrangements employees cannot claim constructive dismissal for resignations arising out of these meetings.

Discrimination by third parties – until recently, if a worker was discriminated against by someone at work who was not a fellow employee, but was nevertheless to some extent controlled or influenced by the employer, then they could sue the employer for failing to protect them. The classic example of this is a racist comic who rounds on a black member of staff at a function. The government is abolishing this right from 1 October 2013.

Preventing future discrimination – Employment tribunals currently have the power to ask (not tell – they have no powers of enforcement) an employer who has just lost a discrimination case to take certain steps to prevent future discrimination which might have arisen from a faulty HR system, or a lack of training for staff.

Although tribunals have only used this power in about half a dozen cases since it was introduced, the government branded it "an unnecessary burden on business" and will be abolishing it. This decision was made by the Government Equalities Office whose strapline is "putting equality at the heart of government".

TUPE and changes of contractors – in 2006 the government amended the Transfer of Undertakings (Protection of Employment) Regulations to cover transfers of staff where one contractor lost the contract, and another took over lock, stock and barrel. This was because of uncertainty about whether TUPE applied or not and was even welcomed by business as providing certainty and a level playing field. However, in its enthusiasm to strip away all the so called "gold-plating" in European sourced law, the government seems to want to remove this at some point in the near future and return everyone to the pre-2006 days of confusion.

Swapping shares for rights – in one of the most sinister moves of all, the government decided that it should be possible for people to sell their unfair dismissal and certain other rights in exchange for shares of between £2,000 and £50,000 in their employer's firm. Although derided by industry and unions alike, the chancellor George Osborne was determined to see it become law. The government clings to the self-delusional notion that this will be entirely voluntary and won't be imposed upon staff.

Payment is not in cash, but in the company's shares. The minimum value of £2,000 may be an illusory sum in companies which are not quoted on the stock market and whose shares are not therefore traded freely and openly.

As small companies frequently restrict when shares can be sold and whom they can be sold to, the chances of getting a proper valuation are slim. Although take-up is likely to be limited when it is introduced on 1 September 2013, the way the government is treating rights as commodities is extremely worrying.

Enforcing rights becomes harder

The second prong of the government's attack has been to make it more difficult to enforce workers' rights once they have been breached. This also has two aspects. The first of these is abolishing or limiting various watchdog bodies that look out for working people. These include the Agricultural Wages Board (abolished on 25 June) despite the valuable minimum wage protections it gave to vulnerable seasonal and agricultural workers.

The Equality and Human Rights Commission, whose mandate is to promote equality and run test cases, has had its budget slashed from £70m to £17m and had its powers and mandate significantly restricted.

Secondly, it is becoming harder and harder to enforce rights in employment tribunals. In discrimination cases the government has said that, in spring 2014, it will abolish the statutory questionnaires used to gather evidence and which can help to decide whether the claim should even be brought.

From 29 July 2013 bringing a claim has attracted fees of between £390 and £1,200. Appealing against a wrong decision to the EAT incurs further fees of £1,600. These usually (but not always) will be payable by the losing employer but CAB recently reported that half of all awards go unpaid. A wronged claimant may simply be throwing good money after bad. These are set to triple in the future, as the government wants to make employment tribunals self-financing through fees.

Unfair dismissal cases can now normally be heard by lawyers and not people with actual experience of industry; compensation for unfair dismissal will soon be limited to 12 months' losses even if the former employer caused far more in damages to the employee than that. The amount of costs a tribunal can award has doubled, as has a deposit that the claimant can be ordered to pay if the tribunal thinks their claim is weak.

Taking tea at the Ritz

A judge once said that justice was open to everyone in the same way as the Ritz Hotel. By making it harder and harder to enforce fewer and fewer rights, the justice system is, like the Ritz, now only open to the moneyed few.

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This publication is not intended as legal advice on particular cases.

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Contributors to this edition:
Iain Birrell, Andrew James, Victoria Phillips, Jennie Walsh

Editor: Alison Clarke
Design & production: www.rexclusive.co.uk
Front cover picture: Rex Anderson
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