Labour&European
law review
Autumn 2018 | issue 142

Focus on Terms and Conditions of Employment

www.thompsonstradeunion.law
www.thompsons.law

Neil Todd explores the various mechanisms employers can seek to utilise to make adverse changes to hard-won terms and conditions of employment

Making changes to terms and conditions

EMPLOYERS ARE allowed to make unilateral changes to a contract if it expressly states that they can.

A contractual right to vary?

A common example is a mobility clause allowing the employer to change their employee's place of work. It is important to note, however, that these terms have tended to be construed restrictively by courts and tribunals.

For instance, in **United Bank Limited -v- Akhtar**, a clerical worker who lived and worked in Leeds was asked to relocate to Birmingham with just six days' notice. The Employment Appeal Tribunal (EAT) held that the express mobility clause was subject to the following three implied terms:

- the duty of mutual trust and confidence
- a duty to give reasonable notice of the intended move, and
- a duty not to exercise an express term in a manner which made it impossible to comply with the contract.

It concluded in this case that the employer had breached all three terms in the way they had exercised their power under the express mobility clause.

Another common example is a flexibility clause giving the employer the power to alter an employee's shift patterns. Courts and tribunals are, however, generally reluctant to allow these clauses to be used to reduce or increase the number of hours an employee works if the clause does not expressly permit this.

One unhelpful decision is **Bateman and ors -v- Asda Stores Ltd** where the employer was allowed to rely on a clause in the staff handbook to introduce a new pay regime without the consent of employees which stated: "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."

The EAT held that, although the provision was wide-ranging in its effect, it was unambiguous and the changes introduced fell within the terms of the power to unilaterally vary the contract. The claimants did not, however, argue that the tribunal should have considered the unequal bargaining power of the two parties to the contract. There is case law which states that this is a relevant consideration.

More recent decisions indicate that the judgment in **Bateman** is particular to its facts and that the terms of a variation clause must be scrutinised carefully by the courts. For instance, in **The Department for Transport -v- Sparks and anor** (weekly LELR 472) the variation clause stated that: "Your contract of employment cannot be changed detrimentally without your agreement." The Court of Appeal held that, as the staff had not been consulted and the changes were detrimental, they were not effective.

In **Norman and ors -v- National Audit Office** (weekly LELR 416) the EAT held that a clause in the appointment letter, which provided that terms and conditions were "subject to amendment" and that any changes would be "notified" to staff, did not amount to a contractual right to vary. In particular, the EAT held that the words "subject to amendment" were not sufficiently clear and unambiguous and so could not be incorporated.

A further consideration when dealing with changes to terms and conditions is whether the change relates to a contractual or non-contractual term. If the term is non-contractual the employer will not be bound by it.

In **Wandsworth London Borough Council -v- D'Silva** the Court of Appeal held that the provisions of an employer's code of practice on staff sickness was not a term of the contract of employment and so could be unilaterally altered. The Court held the terms were designed to be flexible and informal in a way that was inconsistent with the creation of contractual rights.

When trying to decide whether a clause is a contractual term the starting point is the wording of the provision in question. If it is clear, it may well stand on its own; if it is concerned with an employee's remuneration package, it is more likely to be held to be a term of the contract as it is clearly an important part of the overall bargain.

A variation by agreement?

Employers can also vary the contract of employment if the employee agrees to the change, either expressly (in writing or orally) or impliedly.

Implied agreement usually occurs where, in the first instance, the 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 they have impliedly agreed to the changes. In these circumstances the court will deem that there has been no breach of contract. Jo Seery deals with the implications of this approach in more detail in her article on page 5.

"Employers can also vary the contract of employment if the employee agrees to the change, either expressly (in writing or orally) or impliedly"

However, courts tend to be reluctant to find that employees have consented to a change in their contract where there is no express agreement. In the recent case of **Abrahall and ors -v- Nottingham City Council** (weekly LELR 578), the Court of Appeal made clear that acceptance of a variation of contract should only be inferred from conduct. Where the variation is disadvantageous to the employee, acceptance is less likely to be inferred if the conduct is ambiguous.

➲ Nevertheless, employees should always submit a letter of protest to any change to their terms and conditions of employment which they do not wish to accept. They should do this by expressly identifying the terms that have been changed, stating that while they will continue to work under them, they do not accept them and wish to raise a grievance about them.

This is, generally speaking, a safer option than refusing to work under the new terms (having previously agreed to do so under protest) which may lead to an employee being subjected to disciplinary proceedings for insubordination, as in **Robinson -v- Tescom Corporation** (weekly LELR 62).

What if there is duress?

If it can be shown that the employee was put under duress to accept the changes, then they cannot be said to have agreed as it must be voluntary.

Duress is however very hard to prove in the employment context. In the case of **Hepworth Heating Ltd -v- Akers and ors** the EAT held that an employer's threat to terminate a contract of employment with notice did not amount to duress.

Collective agreements?

if there is a recognised trade union in the workplace, changes to terms and conditions most commonly occur through the process of collective bargaining, as Iain Birrell explains in his article on page 9.

Collective agreements are not normally enforceable between the parties negotiating them (the employer and one or more unions), unless they expressly state that they are, which is extremely rare. However, in the event that they are incorporated into individual contracts they become legally enforceable as between employer and employee.

Collective agreements can also be incorporated into the contracts of all employees. In other words, it is not necessary for them to be a member of the trade union taking part in the negotiations. Whether a particular term has been incorporated is a matter of law. The normal way is by express reference in a contract of employment.

However, in some circumstances a tribunal or court may find that terms have been implied from a collective agreement into a contract usually by custom and practice.

Even when a collective agreement has been incorporated into an individual contract, it does not always follow that it applies to all of the terms. In **Kaur -v- MG Rover Group Limited**, for instance, it was held that a specific provision in a collective agreement, stating that "employees will not be made compulsorily redundant", was not expressly incorporated into an individual's contract, even though there was an express term in it stipulating that their employment was subject to collective agreements.

The commitment that there would be no compulsory redundancies was held not to be apt for incorporation as the words were expressing an "aspiration" rather than a contractual term.

In **Malone and ors -v- British Airways plc**, the Court of Appeal held that collectively agreed provisions stipulating minimum staffing levels on BA flights were not incorporated into individual contracts because of the "disastrous consequences" that would ensue, such as the possibility of staff grounding flights. The court concluded that, as that could not have been the intention of the parties, the provision did not have contractual effect.

To avoid such adverse findings, trade unions should agree an express term in each and every collective agreement stating that both parties understand that each and every term of the collective agreement is incorporated into each and every relevant employee's contract of employment and both parties understand each and every term to be enforceable by the individual employee.

> *"Even when a collective agreement has been incorporated into an individual contract, it does not always follow that it applies to all of the terms"*

Jo Seery considers what remedies are available to an employee when the employer seeks to impose changes to their contract to which they have not agreed

Seeking remedies to changes

EMPLOYERS FREQUENTLY seek to reduce staffing costs by making changes to terms and conditions.

In the first instance, the union (if it is recognised) will try to negotiate with the employer, but if no agreement can be reached the employer may seek to impose the changes to individual contracts in one of two ways: by issuing notices of variation to all employees; or by dismissing and then re-engaging them on new contracts.

What are the options in the event of a breach?

If an employer imposes a change of contract without the employee's agreement this constitutes a breach of contract. In that event the employee should, as Neil Todd explains in his article on page 2, submit a letter of protest making clear they object to the change and lodge a grievance. This is important because it makes clear they have not accepted the change, even though they are staying in their job, thereby protecting their right to bring a legal claim sometime in the future.

If the employee remains in employment, they can only lodge a claim for breach of contract in the county court or High Court. For instance, in **Rigby -v- Ferodo Ltd** the employees successfully brought a claim after the employer cut their wages. The court accepted that by working under protest they had not accepted the changes imposed on them and they were entitled to sue for the loss of wages. If there is no loss arising from the breach, the court can make a declaration that there was a breach and that the unchanged contract applies.

If the change results in a loss of pay, employees can lodge a claim for unlawful deduction from wages in the employment tribunal instead of the county court. However, in order to succeed they have to show that the lost wages were "properly payable". In **Bent and ors -v- Central Manchester University Hospitals NHS Foundation Trust**, for instance, the terms of the contract provided for automatic pay progression. An employment tribunal held that, by deferring the pay progression of workers who had reached a certain level of sickness absence, the Trust had unilaterally varied the contract and upheld the claim for unlawful deduction. ➲

> *"If the change results in a loss of pay, employees can lodge a claim for unlawful deduction from wages in the employment tribunal"*

Remedies to changes

➲ If the employer refuses to accept the letter of protest, there is little the employee can do except possibly to resign and claim constructive dismissal, which is risky and generally not a course of action to be recommended. The only other alternative is to do nothing, but this provides very little protection.

What about claiming constructive dismissal?

If the employer commits a repudiatory breach (they no longer agree to be bound by the terms of the contract) the employee can accept the employer's breach by resigning with or without notice under section 95(1) (c) Employment Rights Act 1996 (ERA) and claim that they have been unfairly constructively dismissed.

Case law has established (**Western Excavating Limited -v- Sharpe**) that in order to succeed in a claim for constructive dismissal claimants have to show that:

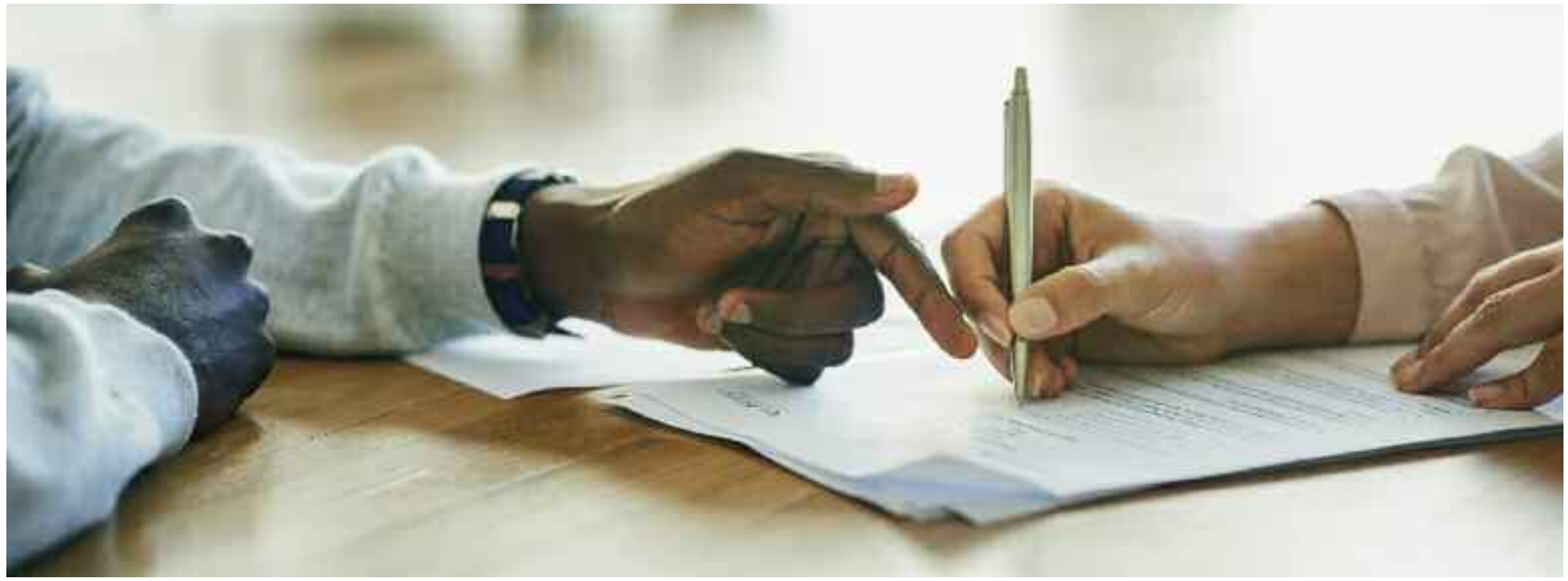
- there was a fundamental breach of contract by the employer
- the employer's breach caused the employee to resign
- the employee did not affirm the contract by delaying too long before resigning.

The burden is on the employee to show that there has been a fundamental breach, such as a deliberate refusal to pay agreed wages (**Cantor Fitzgerald International -v- Callaghan & ors**); or a change to the workplace without notice where there was no mobility clause in the contract (**Aparau -v- Iceland Frozen Foods plc**).

"Although there is no legal obligation on an employee to stipulate why they resigned, it is a good idea to do so, citing breach of contract"

The reason for resigning must be breach of contract and no other reason. Although there is no legal obligation on an employee to stipulate why they resigned, it is a good idea to do so, citing breach of contract.

If the employee waits too long after the breach before resigning, they may be deemed to have accepted the employer's breach, thereby affirming the new terms and losing the right to claim constructive dismissal.



Having said that, tribunals accept that resigning from employment is a very serious matter, so if the employee delays the tribunal will consider the circumstances and reason for the delay.

In the case of **Bournemouth University Higher Education Corporation -v- Buckland** the tribunal found that the employee had not affirmed the contract while off sick at the time of the breach for a period of six weeks. However, this does not mean that an employee who is off on long-term sick leave will always succeed in a claim for constructive dismissal. This is because a tribunal is likely to find that there is a point at which the employee could have objected and resigned with notice.

What about claiming unfair dismissal?

If the change is fundamental it may be possible to argue that the imposition of a new contract amounts to the dismissal of the employee from the old contract for which they can bring a claim for unfair dismissal. That will be the case even if the employee remains in employment on a different contract.

In **Hogg -v- Dover College**, for instance, a teacher was demoted from his position as head of department with a consequent reduction in both hours and salary (of 50 per cent). The Employment Appeal Tribunal (EAT) considered that, as these were wholly different terms, he had been dismissed from his original post.

The fact that he had accepted the offer of a new part-time job, which meant the employment relationship continued with the same employer, did not mean that the old contract had not been terminated. However, the EAT also stressed that for there to be a dismissal the new terms being offered must be radically different. An employee is unlikely to succeed in an unfair dismissal claim where the changes are more minor in nature.

When can employers succeed in claiming SOSR?

If the employee does not agree to the change, the more likely course of action is for the employer to issue the employee with notice of dismissal and re-engagement on the new terms. In that case the employer is likely to be able to rely on some other substantial reason (SOSR) or redundancy as the reason for dismissal.

To establish SOSR, the employer only has to show that they had a sound business reason for the dismissal. This is a low hurdle for the employer to overcome. In **Kerry Food Ltd -v- Lynch**, the EAT considered that the fact the employer was able to show that a change in the rota was advantageous for the employer was enough to establish SOSR.

"It is important to note that the employer only has to show that they reasonably believed that the change had advantages"

It is important to note that the employer only has to show that they reasonably believed that the change had advantages. They do not have to prove the changes were necessary. So long as the changes were not introduced for some "whimsical, unworthy or trivial reason" the employer is likely to be able to establish SOSR for the dismissal.

Having established the reason was SOSR the employer then has to show that they acted fairly when dismissing for that reason. In **Garside and Laycock -v- Booth** ➲

➲ (weekly LELR 235), the EAT overturned a finding of unfair dismissal because the tribunal had concentrated on the reasonableness of the employee's decision to reject a pay cut.

It also drew attention to the employer's duty to consider the "equity" of a dismissal when considering reasonableness and suggested that where there had been a pay cut this might include consideration of how the pay cut had been negotiated and whether management, as well as the wider workforce, was subject to it.

Tribunals also have to consider what happened between the offer being made and the dismissal, when balancing the reasonableness of the dismissal against the reasonableness of the employee in refusing to accept the change.

This can include:

- whether the employer warned and properly consulted the employees and/or recognised union about the change (see the section on collective consultation below)
- whether a majority of the employees to whom the change applied accepted the changes
- whether the union recommended or objected to the change
- whether the employer considered alternatives
- whether the changes applied to all workers.

"In some cases, a change to terms and conditions may also give rise to a redundancy situation"

What about claiming redundancy?

In some cases, a change to terms and conditions may also give rise to a redundancy situation.

In broad terms, a redundancy in this situation applies where the requirement for employees to do work of a particular kind has either ceased or diminished or is expected to cease or diminish. Consequently, if some employees are dismissed and not replaced because they have refused to accept the new terms and conditions, a redundancy situation arises.

The question then is whether the employer acted reasonably when dismissing for redundancy. However, the tribunal may find that the new contract is suitable alternative employment, and that the employee unreasonably refused it.

What is the obligation to collectively consult?

It is also important for employers to comply with the obligation to collectively consult under section 188 of the Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992.

The definition of redundancy in relation to this duty encompasses a situation where an employer is seeking to dismiss and re-engage employees. Consequently, the employer must consult the appropriate representatives of the employees (which will be the union if it is recognised) who may be affected by the proposed dismissals or who may be affected by measures taken in connection with those dismissals.

Consultation must be carried out within 30 days before the first of the dismissals where it is proposed to make 20 or more employees redundant at one establishment and 90 days or more where it is proposed to dismiss 100 or more employees at any one establishment.

Consultation must include ways of:

- avoiding the dismissals
- reducing the number of employees to be dismissed, and
- mitigating the consequences of the dismissals.

It must also be "with a view to reaching agreement with the appropriate representatives." In other words, it must be meaningful and genuine.

Conclusion

As can be seen, the legal remedies are not an easy fit to situations where the employer seeks to impose changes to contracts. The best approach is, therefore, a collective one.

Iain Birrell looks at the issue of collectively bargained terms and conditions, weighing up in the process why they are something of a legal curiosity and also why they are so important

Collectively bargained terms and conditions

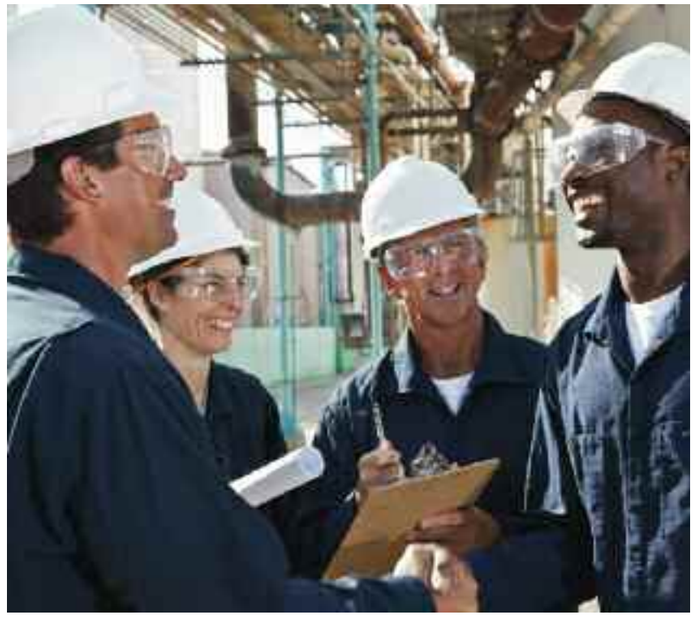
THE TERM collective bargaining refers to a situation where workplace negotiations are conducted by or with the representatives of groups of workers, rather than the individual workers themselves. The agreement which emerges is known as a "collective agreement".

Although it cannot usually be legally enforced unless it explicitly states that was the intention of the parties under section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). millions of UK workers can legally enforce their terms in the courts and employment tribunals, as I explain later.

What are collective agreements?

A collective agreement does not need to be in any special format. The major ones take booklet form, but they can be made in correspondence or conversations, or sometimes even policy documents. Very occasionally they can come from custom and practice. It is useful to have them in writing to avoid any doubt about what actually was agreed, but it is not necessary.

Sometimes they have colourful names, such as the Green Book (local authority workers); the Burgundy Book (school teachers); and the Blue Book (the engineering construction industry). Sometimes they are known as "Whitley Conditions" named after John Henry Whitley who was the chair of the investigatory committee in the early 20th century who recommended formal collective bargaining as a means of remedying industrial unrest.



What is in collective agreements?

Generally, collective agreements cover key aspects of working life such as: pay rates; hiring and firing arrangements; physical ➲

➲ conditions; allocation of work; disciplinary and grievance procedures; facilities for trade unions; and collective bargaining machinery.

So important are they that, if an employee is covered by one, then the employer must tell them in writing within two months of starting work.

Collective agreements can be local or national depending on who they are intended to cover. National agreements are usually negotiated by a National Joint Industrial Council, comprising representatives from both staff and management side and which operate for years.

A local collective agreement may cover a single hospital and the people working there, whereas a national agreement may cover every hospital in the country. There may be several collective agreements operating at the same place and time. For instance, firefighters are subject to the Grey Book, whereas their managers work under the Gold Book.

How do they become legally binding?

The way in which collective agreements become legally binding is, counter-intuitively, through individual contracts.

An individual contract can absorb (or "incorporate" in legal jargon) collectively agreed terms if it clearly says that it will, and in doing so it automatically makes them as enforceable as the rest of the terms in that contract.

Having said that, however, it depends on the wording of the contract, as became apparent in the case of **Ackinclose and ors -v- Gateshead Metropolitan Borough Council** (see below).

Problems can also arise if the new terms conflict with terms already in place. There is no rule of thumb about which terms take priority. In each case it is simply a question of looking at the facts and trying to work out what the parties intended to achieve.

"Uncertainty can therefore be a feature of collective agreements since not every term can be absorbed into an individual's contract of employment"

Sometimes the deciding factor can seem minor or accidental such as in the case of **Gascol Conversions Ltd -v- Mercer**. In this case, Mr Mercer's contract required him to work a 54-hour week. The union then agreed a national agreement for 40 hours which expressly said that, in the event of conflicting terms, the national agreement prevailed. A local agreement then varied the national agreement back to 54 hours. Despite that Mr Mercer was sent a revision to his contract saying that 40 hours was right. He signed it but continued to work 54 hours. When he was later made redundant, the court held that the last agreement (which stipulated a 40-hour week) was the one that applied.

Which terms are legally binding?

Uncertainty can therefore be a feature of collective agreements since not every term can be absorbed into an individual's contract of employment. For instance, terms like pay and conditions clearly fit, whereas collective policy issues or issues that are aspirational, or agreements about the employer's relationship with the union, are not suitable.

The most common area for disagreement concerns workplace policies and whether any part of them are contractual. It is up to the courts to decide, bearing in mind that they have the power to ignore wording which appears to hide the reality, such as a term that states "this is not a contractual provision" when it clearly is.

A key feature of incorporated collective terms is that they can be agreed or changed as a result of negotiations in which the employee concerned has no involvement, but is bound by them whether they agree with them or not, and even whether or not they are a member of the trade union that negotiated them, according to the decision in **Gray Dunn and Co Ltd -v- Edwards**.

Even if, individually, they lose out to the benefit of the greater collective good, they cannot lodge a complaint against the union which agreed it, following the decision in **Iwanuszezak -v- GMB**.

What happens when they come to an end?

Another key feature of incorporated collective terms is that they survive the "death" of the original collective agreement, as happened in the case of **Robertson -v- British Gas Corporation**. Collective agreements are sometimes terminated, either because they were for a fixed period, or because they no longer suit the needs of the signatories.

These terms survive because they morph into an individual term. Sometimes that works in favour of the employee, other times it doesn't. For instance, when the White Book was replaced by the (superior) Green Book it gave rise to a dispute in **Ackinclose -v- Gateshead MBC** about whether the contracts changed too.

Mrs Ackinclose and her colleagues wanted the better terms and argued that they had automatically updated and replaced the old ones. The Employment Appeal Tribunal (EAT) disagreed, saying that their contract was so specific in the way it referred to the White Book that it could not be given the wider interpretation that Mrs Ackinclose wanted and so she was stuck with the old terms.

Under regulation 5 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), a new employer can be stuck with a collective agreement as a legacy from the old one, with the result that some employees have different terms and conditions compared to others. The question that arises in that instance is whether individual contracts can be updated by new collective agreements, despite those employers not being part of the collective bargaining process.

Known as the "dynamic approach", this was a thorny issue until the case of **Alemo-Herron and ors -v- Parkwood Leisure Ltd** (weekly LELR 333), when it was decided that a TUPE transfer breaks that link and stops that automatic updating process (known thereafter as the "static approach"). That applied to existing EU law but this has shifted slightly again so that the Court of Justice of the European Union has accepted that in some circumstances collective agreements can have that "dynamic" effect following a transfer, provided that the employer's interests are sufficiently safeguarded.

Can employers "buy out" terms?

Employers who feel they have been lumbered with individually incorporated collective terms may want to change them by "buying-out" the terms with an inducement. However, under section 145B of TULRCA, it is unlawful to do this if that is the sole or main purpose of the inducement.

If the employer makes the offer to the whole workforce, it can prove to be an expensive mistake as compensation is fixed at just over £4,000 per offer per employee, as the employer found out to their cost in **Kostal UK Ltd -v- Dunkley and ors** (weekly LELR 559).

This is a strangely underused provision despite the fact that it can be lucrative for employees. Not only can they reject the offer, they can keep their existing terms and conditions and sue for both the compensation and the value of the sweetener they rejected under section 146(2D) TULRCA.

Conclusion

There are good reasons why this all matters. The first is that a huge number of people have their pay and terms and conditions set by collective bargaining – 15.2 per cent of private sector staff and 57.6 per cent of those in the public sector in 2017. That adds up to 4.1 million and 3.1 million people respectively.

The second is that collectively bargained wages are generally higher: in the public sector, for every £10,000 that a non-member earns, a union member on average earns around £1,690 more. In the private sector it is around £580 more. Finally, on average union members take home higher pay; have better sickness and pension benefits; have more holiday; have more flexible working hours; and are more likely to be in permanent and full-time jobs.

All of which goes to show the power of the collective bargaining process.

Contributors to this edition: Iain Birrell, Jo Seery, Neil Todd
Editor: Alison Clarke
Design & production: www.rexclusive.co.uk