The *Wilson* Case, The *Alcan* Case and Contracts of Employment: When is a Variation not a Variation?

Mary Siddall

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Prior to this year, the legal conditions for bringing about a variation in a contract of employment appeared to be quite clear; in fact, to have a logical neatness about them which can be somewhat lacking in other, murkier areas of employment law.

The rules went like this. A contract of employment is a contract like any other. In accordance with common law principles, one party to the contract cannot impose changes without the consent of the other. Therefore, an employer who wishes to bring about a variation in the terms of employment of an employee is required, either to obtain that employee's consent, or to terminate the existing contract of employment with the correct period of notice, whilst offering the new terms, to commence immediately after the notice expires. (In effect, therefore, the only means of introducing new terms **in the absence** of agreement was, effectively, to dismiss the employee and start all over again with the new contract).[1]

If an employer sought to impose a unilateral variation, again, the options for the employee were clear(ish). The employee could continue to work to the new terms, but under protest, and could bring a claim for breach of contract to the county court, or a claim for breach of the Wages Act 1986 to the industrial tribunal. Alternatively, he or she could treat the imposed change as a repudiatory breach of contract, resign and claim constructive dismissal.

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[1] See Rigby v Ferodo [1987] IRLR 516

Sadly in my experience, employers (usually the party seeking to bring about a change) were rarely impressed with the "logical neatness" of these principles. I have often encountered great difficulty in persuading a client that it is not possible for him or her to cut pay, or alter working hours, or change a person's holiday entitlement simply by serving notice to that effect. Once that point had been grasped, the client would express horror at the notion that, in order to make the change, the employee may have to be dismissed first. The lengthy letter of advice which followed, setting out what could happen if (a) the change was imposed unilaterally or (b) notice of termination was given, sent many a determined employer running for cover.

Two recent cases have increased the employers' dilemma, while dramatically strengthening the rights of employees in such a situation.

In *Wilson and others v St Helens Borough Council*[2] the Employment Appeal Tribunal states that the established principles set out above will not apply if the reason for the purported variation in terms is the transfer of an undertaking.

The *Wilson* case involved a school controlled by Lancashire County Council. The County Council gave notice that it would withdraw its support from the School on grounds of cost. St Helens Borough Council agreed to assume control from the date of the County Council's withdrawal. Thus, 76 of the 169 staff at the school were offered posts by the Borough Council, but on different terms. These staff were made redundant by the County Council on one day, and started work for the Borough Council, under the new terms, the next.

Some months later, the Union acting for some of the staff wrote to the Borough Council asking that the previous terms of employment be restored. When this was refused, applications were made to the industrial tribunal. The claims were dismissed, and the employees went to the EAT.

The argument of the employees was that their old terms of employment with the County Council were absolutely protected following the assumption of control by the Borough Council, by virtue of Regulation 5(1) of the Transfer of Undertakings (Protection of Employment) Regulations 1981, and by Article 3(1) of the European Directive 77/187

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[2] [1996] IRLR 320

(the source of the UK regulations). Both provide that, where there has been a transfer of an undertaking, all rights and obligations arising out of any contract of employment in existence at the date of transfer are transferred to the party taking over responsibility for the operation of the undertaking.

Regulation 12 of the 1981 Regulations makes it clear that it is not possible to contract out of the effect of Regulation 5.

The staff relied upon Regulation 12 and the European Court of Justice case of *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [3] as authority for the proposition that the rights conferred upon employees by the Directive cannot be waived. Therefore, they argued, it was not possible for them either to consent to the new terms or to affirm them (by working under them) and the purported variation was ineffective.

The Employment Appeal Tribunal agreed. A variation in a contract of employment, the Tribunal found, will be ineffective, even if made by consent, **if the reason for the variation is a transfer of the undertaking in which the employee works.**

The decision has caused great consternation among employers, and delight amongst trade unions. It has been widespread practice for incoming employers who acquire employees under the 1981 regulations to agree alterations to their contracts of employment. Sometimes this will be to harmonise the previous terms with those of their existing employees. In other cases, a change in the terms of employment will be the whole reason for the transfer in the first place: for instance, a business may try to contract out part of its operation to reduce employment costs. Some of the employees may be offered jobs by the contractor, but on a lower wage. It is now open for an employee to accept the job offer, but then to claim that his or her previous terms of employment apply and that the new employer must pay the difference in wages.

The decision also makes it clear that an employer who sheds jobs following a transfer will be able to rely upon the defence that the reason for the dismissals was an "economic, technical or organisational reason entailing changes in the workforce" (Regulation 8(2) of the 1981 Regulations); whereas the employer who tries to save jobs by persuading

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[3] [1988] IRLR 315

the transferring employees to accept a lower rate of pay or less advantageous conditions cannot.

Further guidance on this issue may be obtained from the Court of Appeal, to where the *Wilson* case is now headed; although frankly, now that the association has been made, it is difficult to see how the principle set out in *Daddy's Dance Hall* can be avoided.

A differently constituted EAT has had cause to look at this whole issue again in the case of *Meade and Baxendale v British NuclearFuels.* [4] Again, this was a claim by a person who had been dismissed by the transferor and re-employed on less beneficial terms, which he consented to. Two years later, he sought a declaration from the industrial tribunal (under what is now section 11 of the Employment Rights Act 1996) as to the terms and conditions of his employment. Like the applicants in *Wilson*, he argued that any variation in these terms was ineffective because of Regulation 5(1) of the TUPE regulations.

This time, the EAT held that a dismissal for a reason connected with a transfer, although automatically unfair, was not a nullity. Therefore the employment with the transferor had been effectively brought to an end and the transferee was free to re-employ on any basis he chose. **Wilson** was distinguished on the basis that the EAT had not considered the effect of the dismissals and redundancy payments upon their finding that the variations were ineffective (even though it appears that the facts in *Wilson* were very similar, ie all the teachers had been dismissed before accepting new contracts). Nevertheless, the EAT went on to hold that, in the absence of a dismissal, the principle set out in *Wilson* would hold good.

The *Meade* case therefore adds further uncertainty to an already volatile area of the law. Employers can derive little comfort from it in view of its similarity to the *Wilson* case. The Court of Appeal must now decide which of the two decisions it prefers in cases where there is a pre-transfer dismissal, as well as deciding the vital question of whether or not the EAT's interpretation of the *Daddy's Dance Hall* case is correct.

In the meantime, many commercial clients are pulling out of deals, especially in contracting-out situations where the impact of *Wilson* could be catastrophic for one of the businesses concerned.

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[4] EAT, 24 July 1996, unreported at time of writing

The *Alcan* case[5] did not involve a transfer situation, but like *Wilson* it provides employees with a valuable additional option, this time in cases of attempts to vary the contract of employment unilaterally.

In *Alcan*, the employers wished to introduce a new shift system. They consulted with their employees over the proposed changes, but when agreement was not forthcoming, the changes were imposed by a letter sent to each one of them. The employees all responded in standard terms, indicating that they would work the new system under protest, but that they considered that they had been unfairly dismissed. All 61 employees later brought claims for unfair dismissal to the industrial tribunal.

The tribunal's decision in favour of the applicants was upheld by the Employment Appeal Tribunal. The EAT, relying on the case of *Hogg v Dover College*,[6] agreed that the unlawful imposition of a variation to the terms of employment need not always be characterised as a potential repudiatory breach, giving the employee the option whether to remain or whether to resign and claim constructive dismissal. If substantial changes are introduced without consent, this can amount to an effective withdrawal of the original contract, ie a dismissal, entitling the employees to claim unfair dismissal even if they continue to work for the employer.[7]

Alcan, therefore, is a stark reminder to employers that they may be heavily penalised if they try to impose changes in contractual terms upon employees. The decision allows employees to " have their cake and eat it", ie to keep their jobs but at the same time to bring a claim for unfair dismissal.[8] Take the position of an employee whose contract has been

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5 [1996] IRLR 327

6 [1990] ICR 39

7 The traditional view has always been that a repudiatory breach by the employer is effective to end the contract of employment with immediate effect. Some doubt has been cast upon this by the line of case-law of which *Gunton v Richmond LBC* [1980] IRLR 165 and *Boyo v Lambeth London Borough Council* [1995] IRLR 50 are prime examples. Gunton raised the possibility that the employee was able to elect whether or not to treat his or her employment as ended in face of a repudiatory breach by the employer. However, the point has never really been settled. The case of Alcan seems to offer an interesting variation on this theme, offering the employee the chance both to treat himself or herself as dismissed, but to remain in employment under the new terms.

8 An employer who has terminated a contract of employment in order to introduce new terms and conditions may be able to show that the ensuing dismissal was fair for a "substantial reason". However, it will not be enough for the employer to assert that there were good economic and business reasons for

changed, without necessarily suffering a financial loss. Previously, he or she may have considered a breach of contract claim, but decided that this would not be worthwhile, because damages would be low or difficult to quantify. If the change in working arrangements is substantial, the employee will be able to claim unfair dismissal and recover, at least, the basic award, even if there is no other loss. Likewise, an employee who has suffered a severe cut in wages will not be confined to claiming the difference between the old wage and the new: by claiming unfair dismissal, he or she may claim a basic award or redundancy payment, pay in lieu of notice plus the continuing loss of earnings.

For employers, the choice will be difficult. It is even clearer now that a unilateral variation of employment is unlawful. If the changes are imposed, that may lead to unfair dismissal claims. Yet the only legal way of altering the employment contract, in the absence of consent, is by dismissing the employee. That again may lead to the tribunal, and the employer will only succeed in resisting claims if it can be demonstrated that the dismissals were for a "fair" reason, for example, a compelling economic or organisational reason why the changes must be brought in. The employer may well feel that he is caught between the "devil and the deep blue sea".

Conclusion

No matter what the law might say about both parties to a contract having equal rights, in reality the notion of an employee "consenting" to a change in a contract of employment is often a myth. Where the choice is effectively "sign this agreement or lose your job" it is clear that employer and employee do not have equal bargaining power. Nowadays, it is a brave or rich employee who will face unemployment in order to enforce his or her rights. This is a factor often relied upon by employers when seeking to introduce changes in the workplace.

Both *Alcan* and *Wilson* go some way towards tilting the balance towards the employee. If the case of *Wilson* is upheld by the Court of

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making the changes - some evidence of the need to vary terms must be demonstrated. See *Banerjee v City and East London Health Authority* [1979] 2IRLR 147 and *Chubb Fire Security Ltd v Harper* [1983] IRLR 311.

Appeal, employers will find great obstacles to contracting out operations in order to save labour costs. The case of *Alcan* means that employees may not have to risk their livelihood in order to obtain a remedy against their employer for imposing a drastic change in employment terms.

It seems right that an employee's contractual rights should be entrenched as far as possible. It is also arguable that the practice of offering employees (who might otherwise have been made redundant following the transfer of the business where they work) detrimental terms runs contrary to the whole purpose of Directive 77/187, which is designed to preserve their rights on a transfer.

The other side of the coin is worth looking at. There are occasions where changes to outmoded terms of employment may be justified. There are also situations (and our employment department here has been involved in advising on several) where, if a business is not sold or contracted out, **all** the employees will lose their jobs.

Will the law provide a workable situation to the perpetual problem of balancing the rights of the employee against the economic needs of the employer? That remains to be seen.

Mary Siddall
Paris Smith and Randall