Out with the old, in with the new: how to change employees’ terms and conditions.

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Unilateral variation

1. As a matter of general principle, terms and conditions of employment, once agreed, cannot be unilaterally varied by one party to the contract. A variation must be consensual in order to be binding on the parties. This can give rise to obvious practical difficulties: an employer who needs to achieve cost savings and seeks to do so by reducing contractual benefits cannot do so without the consent of individual employees (or, where terms are collectively agreed and incorporated into individual contracts of employment, the relevant union(s)). The only alternative is to terminate and offer to re-engage, which is time consuming, administratively clumsy and risks claims of unfair dismissal and (where 20 or more employees are affected) claims under s. 189 of TULR(C)A 1992 for a protective award (see GMB v Man Truck & Bus UK Ltd [2000] IRLR 636, EAT).

2. There has therefore been an increasing tendency for terms and conditions of employment to include a provision reserving to the employer a right to change terms of employment at its discretion. This was first acknowledged in Wandsworth London Borough Council v D'Silva [1998] IRLR 193 in which Lord Woolf MR giving the judgment of the Court of Appeal said at paragraph 31:

‘The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort.’

3. Note that it will rarely, if ever, be possible to imply a term reserving to one party a power to vary. In Securities and Facilities Division v Hayes [2001] IRLR 81 CA,
the Claimants' contracts of employment provided for payment of a subsistence allowance if an employee was absent from home overnight. The employers sought agreement from the unions for a reduction of the rate of allowance. When no agreement was reached, the employers unilaterally reduced the allowance. There was no express term permitting unilateral variation. The employers argued there was an implied contractual term permitting unilateral variation. In holding that the employers were in breach of contract, Peter Gibson LJ stated:

‘44. It is a strong thing to imply a term into a contract of employment when that term allows the unilateral variation of the contract. That is all the more so when there are established means for reaching consensual variations to the contract through the Whitley Council procedures ...

...  
46. ... Had the parties intended a provision allowing the unilateral variation of the rate of the allowances, in my judgment the contractual terms would have had to provide unambiguously for that.’

4. That a unilateral power to vary must be expressed in clear and precise terms is not controversial. The words of Lord Woolf in D’Silva and Peter Gibson LJ in Hayes reflect the general common law, see Lombard Tricity Finance v Paton [1989] 1 All ER 918 (CA) per Staughton LJ at 923b:

‘in general ... it is unusual for a contract to provide that its terms may be varied unilaterally by one party in his absolute discretion to the detriment of the other: in general one would require clear words to achieve that result.’

5. Therefore where an express variation clause is restricted to one particular aspect of the contract and is expressed in unambiguous terms, it is very likely to be upheld. A more general power to vary any of the terms of the contract was
always thought to be more problematic, at least until the decision of the EAT in Bateman v Asda Stores Ltd [2010] IRLR 370. Asda wished to ensure that employees working in its stores were all employed on the same pay and work structure. To achieve this the terms and conditions of some employees had to be amended. Asda conducted an extensive consultation process. It sought to ensure that no employees suffered a reduction in pay as a result of the decision to amend their contracts. Around 9,300 employees agreed to the changes but about 8,700 did not. Asda therefore imposed the changes on the latter group unilaterally. It relied on provisions in its staff handbook which, so far as material, stated:

‘Your Contract

[A] The letter you received offering you your job (and any subsequent contract change letters), together with the following sections in this Handbook, form your main terms and conditions of employment:
- Changes to the Colleague Handbook
...

[B] They also constitute your statement of employment particulars which you are entitled to under the Employment Rights Act 1996. The Handbook also contains lots of information about Asda policies which do not form part of your terms and conditions of employment.

Changes to the Colleague Handbook

[C] 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 ...’
6. The Employment Tribunal held that the relevant provisions of the Handbook had been incorporated into the Claimants' employment contracts\(^1\) and permitted the employer to impose the changes without the consent of the Claimants. This was upheld by the EAT (Silber J presiding). The EAT held that the words 'reserves the right to review, revise, amend or replace' clearly showed that Asda was entitled to unilaterally change the Handbook; and this was not limited to the non-contractual policies because the power extended to 'the content of this Handbook' which included both the contractual and non-contractual parts.

7. The Bateman decision has not been met with universal approbation, see for example 'Reserving the Right to Change Terms and Conditions: How Far Can the Employer Go?' by Frederic Reynold QC and John Hendy QC (2012) ILJ 41(1) 79 – 92 (albeit John Hendy was on the losing side in Bateman).

8. The power to vary unilaterally was considered in three notable cases in 2015. In Norman v National Audit Office [2015] IRLR 634 the Claimants received a letter of appointment which provided:

> 'The following paragraphs summarise the main current terms and conditions of your employment in the NAO. Detailed particulars of conditions of service are to be found in the relevant sections of the HR Manual ... They are subject to

\(^1\) It is well established that an employer's handbook can be incorporated into an employee's contract of employment. In the words of Potter LJ at paragraphs 14 and 28 of Briscoe v Lubrizol Limited [2002] EWCA Civ 508: ‘... It is of course frequently the case that details of an employee's contract and the benefit to which he is entitled by virtue of his employment are largely to be found in a handbook of the kind supplied to the claimant.... Again, it is frequently the case that, in the employment context, the language of a handbook, while couched in terms of information and explanation, will be construed as giving rise to binding legal obligations as between employer and employee ...’ Note however that the outcome of these cases can turn on the question of whether provisions in the handbook have in fact been incorporated into individual contracts of employment. In Haigh v Department for Work & Pensions [2004] EWHC 3015 (QB) for example the Court held that a performance appraisal system, even though linked to pay, formed part of the administrative or regulatory element of the employer - employee relationship and fell to be regarded as policy not contract. See most recently Dept of Transport v Sparks [2016] EWCA Civ 360, 14 April 2016.
amendment; any significant changes affecting staff in general will be notified by 
... Policy Circulars ... while changes affecting your particular terms and conditions 
will be notified separately to you.’

9. In 2012 the NAO carried out a review of contractual benefits and decided to reduce certain leave and sick pay entitlements. It carried out extensive consultations and negotiations with the PCSU but no agreement was reached. The NAO therefore decided to impose the changes, relying on the above provision in the letter of appointment.

10. The Claimants brought proceedings for breach of contract, on the basis that they had not consented to the changes. They sought a declaration that their original terms applied. An Employment Judge, sitting alone, cited D'Silva and Bateman in accepting that in order to construe wording in a contract as giving rise to a power to unilaterally vary, it would have to be “very clear in its meaning”. The EJ went on to hold that the words ‘they are subject to amendment’ in the appointment letters were clear and indicated that NAO did have a power of unilateral variation.

11. However the EAT allowed the Claimants’ appeal holding that the provision in the appointment letters came “nowhere near being clear and unambiguous” – the language did not clearly reserve to the employer the right to amend unilaterally. It did no more than simply point out that the clauses can be amended and that, if they were, and the changes were significant and of general effect, they would have been notified by broadcast methods such as circulars or orders and, if they were in an individual context and of less significance, by specific notification or information. The EAT said:

‘Where an individual employee discusses a matter with the employer or where, on a collective basis, the trade union discusses a matter with the employer, it
might be quite usual for any change that had been agreed as a result of that process to be publicised, broadcast and disseminated by the employer. But that tells us nothing as to whether the employer has the right to vary without the consent of the individual employee or of the trade union as a result of negotiation.’

12. See to similar effect Hart v St Mary’s School (Colchester) Ltd (UKEAT/0305/14) [2015] All ER (D) 266 (Jan). The Claimant was employed as a part-time learning support teacher working three days a week, Tuesday to Thursday. Her contract of employment contained the following clause:

‘In the case of the Teacher on a part-time contract the fractional part will be notified separately and may be subject to variation depending upon the requirements of the School Timetable.’

13. The Respondent required the Claimant to change from a three-day week to working the same number of hours but over five days. The Claimant did not accept this and when the change was imposed she resigned and claimed constructive unfair dismissal. An Employment Judge rejected the claim holding that the clause gave the employer a unilateral right to vary the hours worked as required by the school timetable. However the EAT (Judge Hand QC presiding) allowed the Claimant’s appeal, stating:

‘What then does the second part of cl.1.4, “may be subject to variation depending upon the requirements of the School Timetable”, mean? In my judgment this is permissive and it does not tell the reader in what circumstances the variation may take effect. “May be subject to variation depending upon the requirements of the School Timetable” might incline one to think that the variation is more likely to take place at the behest of the school. But I do not regard the wording as making that entirely and completely unilateral. The variation could be at the
request of the part-time teacher. Both variations would have to be subject to the requirements of the school timetable. The school may refuse a teacher’s request for a variation and vice versa. Even though the requirements of the school timetable might suggest to the employer that there should be a variation, in my judgment it does not amount to a power to vary unilaterally ... I do not regard the words in para 1.4 as being sufficiently clear when looked at in the context and when one can quite clearly see a prospect of the teacher applying to vary, as well as the school applying to vary, as amounting to a unilateral power of variation in the employer. These are matters that were never considered by Employment Judge Amin. She took the view that this was all very clear and straightforward. In my judgment, in doing so, she fell into error.’

14. So to be effective a term containing a power to vary must make it clear who has the right to exercise that power and in what circumstances.

15. In Sparks v Department for Transport [2015] IRLR 641 the Claimants were all, effectively, employed by the Department for Transport (they worked for a number of different agencies all of which fell under the DoT). Their various staff handbooks contained broadly similar terms and conditions in respect of sickness absence: informal, followed by formal, procedures were triggered by sickness absence for a specific number of working days or a number of occasions over a 12-month period. The Department wanted to change its Attendance Management policy. After unsuccessful negotiations, it informed the Claimants’ trade unions that it would unilaterally impose its new policy. The relevant provisions in the staff handbook read as follows:

‘... all of the provisions of the ... Handbook which apply to you and are apt for incorporation should be incorporated into your contract of employment.

...
Your contract of employment cannot be changed detrimentally without your agreement. Consequently, the Department will not change any of your terms and conditions of contract without your consent or that of a recognised Trade Union ... Any proposals affecting staff will be the subject of consultation through the Whitley system, with a view to reaching agreement, with the recognised Trade Unions.’

16. The Claimants applied for a declaration that the new policy would not apply contending that the employer did not have the right to unilaterally vary the Attendance Management provisions of the Staff Handbook. Given the authorities cited above one would have thought the answer to this was fairly straightforward – the wording set out in the preceding paragraph does not ‘clearly and unambiguously’ give the employer that right does it? Rather surprisingly Globe J. thought otherwise:

‘Paragraph 1.3.1 contains three sentences. The interpretation of whether the defendant reserved to itself the positive right unilaterally to amend the contracts of its employees is complicated by its drafting in negative rather than positive terms. Further, literally and separately, the first and second sentences conflict with each other. The first sentence is qualified by the word 'detrimentally', whereas the second sentence provides an unqualified right to the employee not have any change of the contract without consent. Nonetheless, in my judgment, the meaning that para. 1.3.1 as a whole would have conveyed to a reasonable person is that any proposals affecting a change in an employee's terms and conditions should first of all have been the subject of consultation through the Whitley Council system with a view to reaching agreement. In the absence of agreement, unilateral changes could then have been made ...’

17. But with a sting in tail:
...but only if they were not detrimental to the employee.’

18. Why, or in what circumstances, employees might complain about non-detrimental changes is not considered. Where a variation is beneficial to an employee, the courts are more ready to infer acceptance from the fact that the employee has continued to discharge his/her contractual obligations without requiring more, see for example Hershaw v Sheffield City Council [2014] ICR 1120. See also Attrill v Dresdner Kleinwort Ltd [2013] EWCA Civ 394, [2013] ICR D30.

19. What test is to be applied in deciding whether changes are detrimental? Is it a purely objective test or is there scope for more of a hybrid test such as that found under the Equality Act 2010 in cases like Shamoon v RUC [2003] IRLR 285? In Sparks, Globe J. referred to Shamoon and also noted the subjective evidence of some employees:

20. ‘... there is some evidence that employees are fearful of being caught by the low triggers of the [new attendance management] policy and are acting in what may be a dangerous way. In an email dated 27 March 2013, reference was made to two examples. In one example, a DSA employee continued to work despite having being struck on the head by a defective door handle and being knocked unconscious for a short while. In the other example, a DVLA employee made a decision to come to work with his nine-month-old child when his wife was ill and he could not contact either set of grandparents to assist with child-care responsibilities.’

21. He concluded that the changes to the attendance management policy were detrimental and could not be unilaterally varied.
22. On 14 April the Court of Appeal dismissed the employer’s appeal, see *Dept of Transport v Sparks* [2016] EWCA Civ 360 although the only point argued was whether the relevant terms of the handbook were apt for incorporation.

**Unilateral variation v Acquiescence and acceptance**

23. Even if the employer does not have a power to unilaterally vary the terms of the contract, a purported unilateral variation may still be effective. If the employee continues to work under the terms of the contract as varied the variation takes effect as if made consensually. In *Wess v Science Museum Group* (UKEAT/0120/14/DM) (6 October 2014, unreported) the Claimant was employed as a Senior Curator. She was initially employed on Civil Service terms and conditions, until the time of a restructuring exercise in 2003 when she was offered a new, lower grade position as Curator of Science. The Claimant was sent an entirely new contract, which contained a reduced notice entitlement the effect of which was to reduce her notice period entitlement from six months to 12 weeks. The new contract ended with the following statement:

‘I confirm my agreement that the above terms and conditions constitute my permanent contract of employment … I also accept the terms and conditions as described in the job description that accompanies this statement and in the relevant policies and sections of the staff handbook referred to in this statement.’

24. The Claimant did not sign the new contract but nor did she say that she objected to the different terms in it. Some nine years later the Claimant was made redundant on three months notice. She claimed that this amounted to a breach of contract as she was entitled to six months notice. The ET rejected this holding that she had in fact accepted a variation of that term by continuing to work after its introduction and without protest. This was upheld by the EAT.
25. Note, however, that in general Tribunals should treat with caution an argument that the employee has impliedly accepted a unilaterally imposed new term, at least where the effect of that new term is not immediate, see Jones v Associated Tunnelling Co Ltd [1981] IRLR 477 EAT in which the EAT pointed out, having regard to the imbalance of bargaining power in the employment relationship, it may well be asking too much of an employee to object to an erroneous statement of terms and conditions which has no immediate practical impact.

26. If the employee makes it clear that he is continuing to work ‘under protest’ or ‘reserving his rights’ the employer's attempt to impose the new terms will amount to a continuing breach of contract, see Rigby v Ferodo Ltd [1988] ICR 29 in which the House of Lords held that the employer's attempt to impose a 5 percent reduction in wages was a breach of the Claimant's contract and in continuing to work but under protest he had not affirmed the variation. He was therefore entitled to recover the difference between his contractual entitlement and the amount paid to him by his employer either as damages for breach of contract or in debt.

27. For a good summary of the distinction see the judgment of Elias P in Solectron Scotland Ltd v Roper [2004] IRLR 4 EAT:

‘30. The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights. But
sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract containing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct.

31. So, where the employer purports unilaterally to change terms of the contract which do not immediately impinge on the employee at all — and changes in redundancy terms will be an example because they do not impinge until an employee is in fact made redundant — then the fact that the employee continues to work knowing that the employer is asserting that that is the term for compensation on redundancies, does not mean that the employee can be taken to have accepted that variation in the contract.’

28. Note that the option of working ‘under protest’ will not be available if it is impossible for the employee to carry on working without conforming to the new terms for example where the employer has introduced new working hours. In that situation, the employee will be regarded as acquiescing in the variation if he does not resign within a reasonable period of time, see WE Cox Toner (International) Ltd v Crook [1981] ICR 823. Also ‘protest’ has a shelf-life, see Henry v London General Transport Services Ltd [2002] IRLR 472, CA.

Constraints on the exercise of a power to vary unilaterally

29. At common law it is now well settled that where a contract confers on a party an apparently unfettered discretion to act in a certain way, that discretion:

‘must [not only] be exercised honestly and in good faith, but having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably’

30. The Court of Appeal has expressly declined to imply a test of reasonableness in the exercise of a contractual discretion, preferring instead a test of irrationality. In Socimer International Bank Ltd v Standard Bank London Ltd [2008] 1 Lloyd's Rep 558 (in the context of an express contractual discretion in a seller of securities to value assets on default of payment by the buyer), Rix LJ observed that:

‘... a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. ... pursuant to the Wednesbury rationality test, the decision remains that of the decision maker, whereas on entirely objective criteria of reasonableness the decision maker becomes the court itself.’

31. Cases such as Clark v Nomura International plc [2000] IRLR 766, Horkulak v Cantor Fitzgerald International [2005] ICR 402 and Commerzbank AG v Keen [2007] ICR 623 are obvious examples of the Courts’ imposition of the restraints of rationality, good faith and lack of capriciousness or arbitrariness to limit discretion in the employment context. Those are all bonus cases. In Birmingham CC v Wetherill [2007] IRLR 781, the Court of Appeal applied the same constraints
to unilateral variation of a car user allowance scheme, per Chadwick LJ at para. 34:

‘I have explained that an employee who purchased a Band 3 car in reliance on the practice in force before April 1993 acquired contractual rights to car user allowance at Band 3 rates — at least for so long as he owned and used that car. Those rights were capable of being varied by the Council, acting unilaterally. But the power to vary was subject to the restriction that it could not be exercised for an improper purpose, capriciously or arbitrarily, or in a way in which no reasonable employer, acting reasonably, would exercise it.’

32. The matter was, arguably, put beyond doubt by the decision of the Supreme Court in Braganza v BP Shipping Ltd [2015] ICR 449 (the case of the ship engineer who disappeared overnight and was declared to be lost overboard, presumed drowned) in which Lady Hale said at para. 18:

‘Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties’ bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.’

Then at para. 30, after citing case law including Nash and Abu Dhabi:
'It is clear ... that unless the court can imply a term that the outcome be objectively reasonable—for example, a reasonable price or a reasonable term—the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose.'

33. However the question remains whether this is quite the same as the test applied in determining whether the employer has acted in breach of the implied term of trust and confidence? In Braganza Lady Hale certainly noted that:

‘The particular context of this case is an employment contract, which, as Lord Hodge JSC explains, is of a different character from an ordinary commercial contract. Any decision-making function entrusted to the employer has to be exercised in accordance with the implied obligation of trust and confidence.’

34. However the test for whether there has been a breach of the implied term is expressed rather differently. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347, Browne-Wilkinson, then President, said (at paragraphs 17, 18 and 22):

‘In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee ... To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the tribunal’s function is to look at the employer’s conduct as a whole and determine whether it

2 A reference to the speech of Lord Hodge at para. 61
is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it…”

35. In Malik v Bank of Credit and Commerce International SA [1997] IRLR 462. Lord Nicholls (at paragraphs 8, 13 and 14) said:

‘... The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances.’

36. In Bateman the EAT had an opportunity to discuss this issue. The Claimants argued before the EAT that if Asda really intended that the words in the Handbook give them a right to vary unilaterally it should, pursuant to its duty to maintain trust and confidence, have brought that home to employees. However the EAT rejected the argument, but only because the point had been conceded before the ET:

‘... the Claimants had expressly conceded that there was no issue in relation to the trust and confidence duty ... the Employment Tribunal explained in paragraph 82 of its Reasons that “there is no contention that [Asda] acted capriciously, or arbitrarily, or in any way which breached mutual trust and confidence, in imposing [the new regime] in August 2007 “.’

37. In any event the conflation of the irrationality test with breach of the implied term is clearly unhelpful. In our view unless and until expressly decided otherwise, the implied term ought not to be relied on by Claimants seeking to challenge the exercise of a unilateral power to vary. The appropriate test is that set out above.
When is it fair to dismiss (and re-engage)?

The reason for dismissal

38. Dismissal because of a refusal to accept new terms and conditions is not related to the individual concerned and thus amounts to redundancy for the purposes of Part IV, Chapter II of TULRCA. However, unless the employer’s requirement for employees to carry out work of a particular kind, or to carry out work of a particular kind in the place where the employee is employed, has diminished, it is unlikely to amount to redundancy for the purposes of Part X of the Employment Rights Act 1996 (unfair dismissal).

39. Therefore the employer will have to establish that the decision to dismiss employees in order to effect a variation of terms and conditions amounts to ‘some other substantial reason’ for the purposes of s. 98(1)(b). This usually present little difficulty. The employer must of course genuinely believe that it is necessary to dismiss in order to effect a variation and dismiss for that reason. Then as long as the need for a variation is not whimsical or arbitrary but is based a sound business reason, the employer will have established a potentially fair reason for dismissal.

40. The most commonly cited case for this proposition is Hollister v NFU [1979] ICR 542, CA per Lord Denning MR but see more recently Genower v Ealing, Hammersmith & Hounslow Area Heath Authority [1980] IRLR 297 per Slynn J (as he then was) said at paragraph 18:

‘It is perfectly plain on the decision of the Court of Appeal in Hollister which is followed by this Tribunal in Bowater Containers Ltd v McCormack [1980] IRLR 50 that a re-organisation or re-structuring of a business may well be a reason which falls within section [98(1)]. Indeed, it may be that, if, to quote from the Court of Appeal Judgment, “a sound good business reason is shown,” this may constitute “a substantial reason” within the meaning of the section, even if the alternative
to taking the course they propose is not that the business may come to a standstill, but is merely that there would be some serious effect upon the business.’

**Introducing / varying restrictive covenants**

41. At one time it was thought that a refusal by an employee to agree to a restrictive covenant which the court later held to be unreasonably wide could not amount to a potentially fair reason for dismissal, see *Forshaw v Archcraft Ltd* [2000] ICR 70 but this decision was disapproved in *Willow Oak Developments Ltd v Silverwood* [2006] ICR 1552. The real question in deciding whether there has been some other substantial reason to justify dismissal is whether the employer has a genuine belief that it has a real business need to introduce restrictive covenants. If the employer satisfies the Court that this is so, the Court will not then review the enforceability of the covenant and the dismissal of any employee who refuses to accept the covenant is potentially fair. In other words the breadth of the covenant is not relevant to the question whether the employer’s reason for dismissal is a potentially fair one as falling with the ‘some other substantial reason’ category³.

42. Note that consensual variation of terms and conditions of employment to add or vary restrictive covenants must be supported by consideration. An interesting question that sometimes arises is, what is an appropriate level of consideration? Nominal consideration or relying on the continuing working relationship is risky. In *Re-Use Collections Ltd v Sendall* [2015] IRLR 226 Mr Sendall originally had no written contract of employment. In October 2012 he was given and signed, albeit reluctantly, a written contract which included for the first time provisions in relation to confidential information and post-termination restrictions. He received a pay rise at the same time.

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³ See Employee Competition 3rd edition, 2016, ed. Paul Goulding QC at para. 6.34.
43. In subsequent litigation Re-use argued that Mr Sendall’s agreement to the restrictive covenants had been supported by consideration because they had been introduced as part of a contractual package under which benefits had been conferred, including the pay rise. Mr Sendall countered that the pay rise had not had anything to do with the restrictive covenants. Reuse’s alternative argument was that consideration could have been found by its continued employment of Mr Sendall after the move to the new contract.

44. The High Court, whilst finding against Mr Sendall on other grounds, held that the restrictive covenants were not enforceable for lack of consideration, despite the pay rise. The Court held that the majority of the package of benefits conferred under the new contract of employment had already been enjoyed by Mr Sendall. Re-use had failed to produce any satisfactory evidence that the salary increase had been specific to Mr Sendall. It had not been made clear to him that the increase had been conditional upon his accepting the new contract, or even that in some more general sense it had been linked with its introduction. Further, it could not have been said that Re-use had provided consideration merely by continuing to employ him, particularly without having sought to have linked its continued willingness to employ him with his willingness to sign the contract of employment.

Reasonableness

45. Whether the employer has acted reasonably or unreasonably in dismissing and offering to re-engage is to be determined in accordance with the test set out in s. 98(4) of the ERA.

46. In Garside and Laycock Ltd v Booth [2011] IRLR 735 an Employment Tribunal, apparently applying a paragraph from the decision of the EAT in Catamaran Cruisers Ltd v Williams [1994] IRLR 386, directed itself that an employer would only act reasonably if its financial situation was ‘so desperate that the only way
of saving the business is to propose stringent reductions in pay and conditions’ and that it was not imposing the changes for arbitrary reasons. Allowing an appeal against that decision the EAT pointed out that the Tribunal had ‘selected from Catamaran not the principle that was adopted on appeal but the very principle that was rejected.’

47. The Tribunal had also assessed the reasonableness of the employer’s decision to dismiss by asking whether the Claimant’s insistence on his original terms and conditions was reasonable. That, pointed out the EAT, was a reversal of the statutory question that ought to be asked. Section 98(4) is to be answered by asking whether, in the circumstances ‘the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee.’

48. The EAT continued:

‘14. The focus of the Tribunal’s attention is thus required to be on the reasoning and reasonableness of the employer and not upon what it is reasonable or unreasonable for the Claimant to do. It may well be, and we would generally hope and expect, that the decision of an employer, in order to be reasonable, will take account of whether the employee himself affected by the decision regards it as reasonable or unreasonable; but that is very different from saying that the decision depends upon what the employee thinks is reasonable or unreasonable.’

49. See to similar effect Chubb Fire Security Ltd v Harper [1983] IRLR 311 in which the ET said:

‘If it was reasonable for [the employee] to decline these terms then obviously it would have been unreasonable for the employers to dismiss him for such refusal.’
50. Balcombe J said that was a wrong approach:

‘We must respectfully disagree with that conclusion. It may be perfectly reasonable for an employee to decline to work extra overtime having regard for his family commitments, yet from the employer’s point of view having regard to his business commitments, it may be perfectly reasonable to require an employee to work overtime. [ … ] We agree with the comment [ … ] in ‘Harvey on Industrial Relations in Employment Law’ [ … ] ‘it does not follow that if one party is acting reasonably the other is acting unreasonably’.

51. Chubb was applied in St. John of God (Care Services) Ltd. v Brooks [1992] ICR 715 the employers, a company which operated a hospital, were obliged to carry out a reorganisation following substantial cuts in funding from the National Health Service. They offered the staff new contracts of employment with less favourable terms including reduced pay and holiday entitlement and the abolition of overtime rates for weekend and bank holiday work. The claimant employees refused to accept the new terms and were dismissed. On their complaints of unfair dismissal an employment tribunal found that the reorganisation was ‘some other substantial reason’ justifying dismissal within the meaning of section 57(1)(b) of the Employment Protection (Consolidation) Act 19781, now s. 98(1) of the ERA and then went on to consider the question of reasonableness:

‘(a) Management have a right to reorganise a business in a manner which they consider advantageous but

(i) it is for management to show that the reorganisation has discernible advantages and

(ii) more importantly, the interests of the employees cannot be ignored while evaluating whether the employer has acted reasonably under section 57(3).
(b) Occasionally an employee may act reasonably in refusing to accept new terms and yet the employer may equally be acting reasonably in dismissing the employee.

(c) Thus it does not follow that if one party is acting reasonably the other is acting unreasonably. The sole question is not whether the advantages to the employer outweigh the disadvantages to the employee.

(d) The crucial question is whether the terms offered were those which a reasonable employer could offer.’

52. It held that no reasonable employer should have expected the claimants to accept the new contracts and the dismissals were therefore unfair.

53. On the employer’s appeal to the EAT, the area of dispute was effectively limited to the question whether or not sub-paragraph (d), quoted above, was a correct statement of the law. The EAT, by a majority, held that it was not. If the only thing that is looked at is the offer, this necessarily excludes from consideration everything that happens between the time when the offer was made and the dismissal. For example, thought the EAT, the number of employees accepting / rejecting the offer is a relevant consideration.