Chapter 7: The variation, suspension, and future of the personal employment contract
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1. Consider the circumstances in which a change of working practices will amount to (1) a variation of contractual terms, (2) a termination of the employment contract with re-engagement on a new contract, (3) a redundancy, and (4) neither of (1)–(3).

Author's answer: The correct response to this question is that it is all a matter of fact and degree. For example, if the change of working practices is such that the express or implied content of a contract of employment is materially altered in any way, this will amount to (1) a variation. The modification will have to be significant in order to qualify as a variation of the express or implied content of the employment contract, since if the employer merely issues a lawful and reasonable instruction to the employee which is a change from established practice, this will not necessarily be sufficiently material to constitute a variation, and the employee will nevertheless be bound to follow that instruction in terms of his/her implied duty to follow reasonable and lawful orders and instructions. A variation will not necessarily constitute (3) a redundancy, and it is unlikely to be (2) a termination of the contract, coupled with a re-engagement on a new contract. The situation in (2) will arise where the employer actively terminates the employment contract, or its behaviour is so bad that the employee is entitled to treat the employer's conduct as constituting a repudiatory breach of the employment contract, whereby he/she has been constructively dismissed. In this way, it is essential that an actual termination or constructive termination has occurred before (2) can arise. But, a termination is not enough of itself. Instead, the employer must subsequently re-engage the employee on a new contract of employment, or be treated as having done so. Turning to the situation where a change of working practice might amount to a (3) redundancy, this question is dependent on the satisfaction of the definition of redundancy in section 139(1) of the Employment Rights Act 1996, as interpreted and applied by the House of Lords in *Murray v Foyle Meats Ltd.* [2000] 1 AC 51. First, it is a requirement that the employee has been dismissed, i.e. there has been an actual or constructive termination of his/her employment contract. Secondly, it must be demonstrable that the dismissal was wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind generally, or at a particular place, had ceased or diminished, or were expected to cease or diminish. As such, it is incumbent on the party seeking to establish a redundancy to show that the change of working practice constitutes a constructive termination of the employee's employment contract, and that such termination was caused by a reduction or cessation in the employer's need for work to be carried out. For obvious reasons, the change in working practice would have to be substantial to meet the test of redundancy in this case.

2. Now list the responses available to the employee faced by an employer imposing contractual variations. Which of the five options do you prefer and why?

Author's answer: The first (1) option is for the employee to expressly agree to the proposed variation. This formally alters the contractual terms. The second possibility (2) is that the employee accepts the employer's repudiatory breach of the employment contract, terminates the contract by resigning and then claims damages for a constructive wrongful dismissal or statutory compensation for a constructive unfair dismissal under Part X of the Employment Rights Act 1996 ("ERA"). As for the third option (3), the employee may do nothing and continue to work on the basis of the new varied terms without eliciting any formal protest. In this third case, the key question is whether the employee has

implicitly consented to the variation by continuing to work in this way. The next and fourth option (4) is where the employee responds to the employer's unilateral repudiatory breach of the contract of employment by affirming the contract and works on the basis of the new terms explicitly under protest. In such a case, the employee may bring a claim in court for damages for contractual breach or present a complaint of unauthorised deduction from wages under Part II of the ERA. The fifth option (5) involves the employee refusing to work under the modified terms and instead continuing to work under the old terms. As for the question as to which option is best, this comes down to what the employee is seeking to achieve, e.g. is the employee prepared to walk away from his/her job. If not, does he/she wish to stand in employment and sue the employer. Moreover, the employee would have to decide whether he/she would prefer to continue to work on the basis of the new or old terms.

3. Describe the general attitude of the judiciary to variations to contractual terms initiated by management. How would you explain this phenomenon in light of the fact that an unaccepted variation is a breach of contract?

Author's answer: The judiciary tend to be favourably disposed to managerially imposed variations of contractual terms, whether the contract of employment contains a unilateral variation clause empowering the employer to do so, or not, as the case may be. This is somewhat paradoxical in light of the common law rule that a unilateral variation of the employment contract that is not accepted by the employee may amount to a repudiatory breach of contract if it is so serious that it goes to the root of the employment contract, or evinces an intention on the part of the employer to no longer be bound by the employment contract. The attitude of the judiciary here can be partially ascribed to the incomplete nature of the employment contract, i.e. the fact that it is impossible to foresee all of the potential eventualities and provide for them in advance. Owing to this feature of the employment contract, the judiciary tend to afford the employer considerable leeway in instigating contractual variations. However, of more significance is the influence of the common law reserve power of the employer to terminate the contract of employment on providing reasonable notice to the employee, and then to reengage the same employee on a fresh contract of employment. The fact that the common law empowers the employer to terminate and re-engage is perceived to be at odds with a strict judicial policy that might treat unilateral managerial variations as constituting unlawful unilateral variations of contractual terms. After all, if a court rules that a proposed variation would result in a repudiatory breach of contract, there is nothing to stop the employer from terminating the contract and then re-hiring the employee on the basis of a new employment contract that contains the proposed varied contractual terms. By continuing to work in accordance with the fresh employment contract, the employee would subsequently be taken to have assented to its terms (including the varied terms). The end result is that the adoption of common law rules reflecting a strict or prohibitive policy towards unilaterally proposed managerial variations would not have the power to preclude the employer from doing what it wants anyway, which only goes to underscore the extent to which the common law rules on the termination of the employment contract shape the common law rules governing the contract's variation.