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Employment Law Issues in Leading Change

Ronnie Neville, Partner
Employment and Benefits Department
Mason Hayes+Curran

South Bank House,
Barrow Street,
DUBLIN 4.

1. Variation of Contract

1.1 CONTRACTS OF EMPLOYMENT

The relationship between the employer and employee is regulated by the terms and conditions of the contract of employment. The terms and conditions may be express or implied and often arise out of negotiations between the parties prior to employment. Alternatively, they may be derived from a collective agreement negotiated by the employee's trade union. Furthermore, common law, statutes and the Irish Constitution insert both express and implied terms into a contract of employment. These will be touched on below, as where it is established that a relevant provision is a term or condition of the employment contract, the basic tenet of contract law provides that such provision cannot therefore be amended or varied without the agreement of the parties. A variation to the contract cannot be effected unilaterally, by either party, and generally can only be achieved by agreement, whether express or implied, tacit or by acquiescence.

1.2 CONTRACTUAL PROVISIONS OR MERELY WORK PRACTICES

Whilst an employer may be constrained in his ability to alter an employee's terms and conditions of employment, work practices can generally be altered, suspended or even discontinued at the discretion of the employer. Work practices might include times for breaks, or ways of performing the particular job function. In the UK decision of *Cresswell v Board of Inland Revenue*,[1] the plaintiff employees performed an administrative function relating to the PAYE tax scheme. The scheme was computerised and the plaintiffs refused to operate the new scheme, but agreed to continue to operate the previous manual scheme. The defendant employer refused to pay the employees' until they operated the new work practice and the plaintiffs claimed that requiring them to operate the new system amounted to a breach of contract. The court held that whilst the content of the job in question may have altered considerably, this was not sufficient to fall outside the original description of the job function.

1 [1984] 2 All ER 713

Accordingly, this was not a breach of contract and the employer was entitled to refuse to pay the employees in the circumstances.

In the Irish decision of *Rafferty Ward and the National Bus and Rail Union v Bus Eireann and Irish Bus*[2], the court expressly referred to the *"difference in law between conditions of service and work practices"*. The court had to consider whether the defendants could change rostering arrangements, abolish certain duties and replace them with other duties. The plaintiffs claimed these amounted to unilateral variations of contract.

The defendants argued that due to serious financial difficulties, they had to achieve cost savings and that the proposed changes were not contractual but changes in work practices, which could be imposed entirely at the discretion of the employer and in the best interests of the business. The court agreed the drivers' principal function remained unaltered and in particular referred to the fact that the alterations did not affect their rate of pay, hours of work, length of holidays, sick leave or pension rights. Accordingly, the court found these were changes to work practices, which the employer was entitled to make.

1.3 CHANGING EMPLOYEES' TERMS AND CONDITIONS

In the current economic climate, most businesses are focussing on cost cutting measures and clearly, wages and salaries are a major cost for many employers. Much public debate has taken place recently regarding pay cuts, particularly given the ongoing negotiations between the social partners, but as pay is one of the principal terms of employment, varying pay should therefore require consent. Curiously, this is a relatively uncharted area of employment law, given that economic crises in recent decades tended to be accompanied by significant price inflation, taking pay cuts off the agenda. But with the real possibility of price deflation this year, and also given lower interest rates, many economists argue that nominal pay can be cut while maintaining living standards.

It is difficult to point to reliable evidence of the extent of pay cuts taking place in the workforce or the level of such cuts, as much of our information is anecdotal, however, we certainly believe that such cuts are widespread.

Employment lawyers have different views on the legality of unilateral pay cuts in the private sector. Most argue that pay cuts cannot be imposed unilaterally in the context of the employment contract relationship, even where the contract contains a variation clause. A standard variation clause might provide that the employer reserves the right to make changes to the employee's terms of employment entirely at his discretion. However, any such variation would have to be reasonable, which is a term implied into the contract (discussed below). Clearly, where there is a variation clause in the

2 [1997] 2 IR 424

contract, the employer's authority to vary his employee's employment terms will be considerably stronger than if there was no such clause in the contract, as he has contractual authority to do so, but it is debatable (and in our view doubtful) whether an employer could rely on this general clause to unilaterally vary pay. Subscribers to this view believe an employee whose pay has been reduced without consent could bring a claim under the Payment of Wages Act 1991 or a case for constructive dismissal, arguing that the employment contract has been breached[3].

However, some practitioners argue that it should be possible to vary an employee's terms and conditions unilaterally, provided reasonable notice is given, together with an explanation of the reasons for the change. This does not mean that an employer who is profitable can unilaterally reduce workers' wages to make more profit. But if an employer is sustaining losses, a Rights Commissioner or Employment Appeals Tribunal ("EAT") may be unlikely to look favourably on an employee who takes a claim under the Payment of Wages Act for a deduction in his wages, provided the reduction in pay is not disproportionate to the fall in the Company's revenue and/or profits.

Whilst we can see the obvious logic of this view, this office would not agree that employers can safely reduce an employee's pay without first securing that employee's consent.

Whilst a general variation clause may not suffice to entitle an employer to unilaterally vary an employee's terms and conditions of employment, if there is written evidence, in the employment contract or elsewhere, that a specific benefit being provided to the employee is on the express understanding that the employer reserves the right, at his sole discretion, to amend such policy, or indeed discontinue providing such benefit, the employer here has preserved the contractual right to do so unilaterally and would be in a strong position to defend any claim brought by the employee. Careful and considered drafting of employment contract can therefore offer greater flexibility to an employer. Examples of benefits that are regularly limited in this way would include a bonus scheme, company car, or stock option scheme, for example.

1.4 PROCEDURES FOR REDUCING SALARY/BENEFITS

Employers should consult with employees with a view to obtaining their express consent to any proposed variation to their terms. If an employee continues working without protest under terms which have been unilaterally changed by the employer, the employee may be deemed to have given implied consent, but it is clearly preferable to seek to reach agreement with employees to avoid the risk of a variety of claims or industrial unrest.

[3] Such potential claims are discussed further in Section 3.

It may be easier to secure employees' agreement to the reduction or removal of "fringe" benefits, rather than proposing reductions to basic pay. Such benefits may include the provision of daily newspapers to staff, or lunch or travel subsidies, for example. Also, unless the employee has a contractual entitlement to a fixed bonus, it may be possible to reduce the level of such bonus, or not pay a bonus at all. Generally, contracts provide that a bonus "may" be payable and might also provide bonuses are payable based on the performance of the business, as opposed to personal performance. If there is nothing in writing, can the employer point to the level of bonuses being paid in previous years being of a variable nature, depending on the performance of the business?

In terms of process, the main objective is secure consent and the consultation process should be open and transparent to enhance the prospect of employees engaging positively. The rationale for the changes should be explored, being one of economic necessity and depending on the employer's size, profile and/or nature of business, as much information regarding sales, turnover and profit as possible should be provided. In practice, recent attempts by private sector employers to seek pay cuts have usually been accompanied by significant compensatory incentives – or threats of job losses. For example, Independent Newspapers have offered free shares and Aer Lingus offered a lump sum. However, there is anecdotal evidence of private sector non-union firms offering workers a choice of pay cuts now and job losses (or even potentially business shutdown) a few months down the road – with pay cuts invariably chosen by the workers involved.

From an optical perspective, if management shows it is leading the way in effecting cost saving measures and has taken a pay cut at senior level, this may demonstrate good faith and persuade other employees to follow suit. Another suggestion would be to introduce pay cuts only for those above a certain pay grade, or alternatively, a sliding percentage scale, depending on salary.

It would be advisable to enter consultation early and to provide advance notice of the change. Some employers may choose not to expressly seek consent or to consult to such a level, but to simply make the changes. Notice should still be given and the changes documented. It should be noted that the Terms of Employment (Information) Acts 1994–2001 requires employers to give employees written notice of any variation within ***1 month*** of implementation, but we would recommend notice be given in advance.

If the employer can do so, he should indicate whether the changes are temporary or permanent. If the employer does make commitments to employees during this consultation process, these may be legally enforceable against the employer in the future, depending on the facts. In *O'Rourke v Talbot (Ireland) Ltd*[4], the employer gave a

4 [1984] ILRM 587

"guarantee" to employees that if they accepted redeployment due to financial difficulties being experienced, it would not introduce compulsory redundancies. The high court held the employees were able to rely on this guarantee.

One important consideration for workers in a company facing financial difficulty, is that if an employee agrees to a pay cut, the company subsequently makes that employee redundant, the eventual statutory redundancy will be based on the lower wage paid to the employee prior to the dismissal, rather than the higher wages paid for most of their employment. Of course, this would only be a factor if their higher pay would have been above the statutory ceiling of €600 per week. It is, however, a worrying prospect for employees and something which might result in them being reluctant to accept a pay reduction if redundancies remain likely. Some employers have attempted to provide some comfort to such employees by guaranteeing that should redundancies follow within a specified period of time (perhaps 6 months), that the salary will be calculated on the basis of the original amount. This too is not airtight, as the redundancy legislation expressly provides that statutory redundancy should be calculated on the basis of salary at the date of termination.

2. Terms of an Employment Contract

2.1 EXPRESS TERMS

Generally, both parties are free to agree on any contractual terms they wish subject to statutory limitations. Express terms are those which have been spelled out clearly, whether in writing or pursuant to an oral agreement.

The **Terms of Employment (Information) Acts 1994-2001** provide that all employees must be provided with a written statement of their terms and conditions of employment. For new employees, this should be done within two months of the commencement of their employment. The written statement must be signed by or on behalf of the employer and must be retained for one year after the employee's employment has ceased. Such statements must include: -

- the full names of the employer and the employee;
- the address of the employer in the State or, where appropriate, the address of the principal place of the relevant business of the employer in the State or the registered office (within the meaning of the Companies Act, 1963);
- the place of work or, where there is no fixed or main place of work, a statement specifying that the employee is required or permitted to work at various places;
- the title of the job or nature of the work for which the employee is employed;
- the date of commencement of the employee's contract of employment;
- in the case of a temporary contract of employment, the expected duration thereof or, if the contract of employment is for a fixed term, the date on which the contract expires;
- the rate or method of calculation of the employee's remuneration;
- the length of the intervals between the times at which remuneration is paid; whether a week, a month or any other interval;
- any terms or conditions relating to hours of work (including overtime);
- any terms or conditions relating to paid leave (other than paid sick leave);
- any terms or conditions relating to incapacity for work due to sickness or injury and paid sick leave, and pensions and pension schemes;

- the period of notice which the employee is required to give and entitled to receive (whether by statute or under the terms of the employee's contract of employment);

- a reference to any collective agreements which directly affect the terms and conditions of the employee's employment including, where the employer is not a party to such agreements, particulars of the bodies or institutions by whom they were made;

- details of the times and duration of rest periods and breaks including daily rest periods, weekly rest periods and rest and intervals at work; and

- details of the company's pay reference period.

Examples of additional clauses which are common in employment contracts and which may be relevant in the context of employers seeking to vary employment terms would include:

– probationary periods:

– grievance and disciplinary procedures

– bullying and harassment procedures;

– lay-off/short time;

– company car;

– pension;

– share options;

– retirement age;

2.2 IMPLIED TERMS BY COMMON LAW

Certain terms will be implied by law to give effect to a contract of employment. I mentioned above there is an implied term that any unilateral changes which an employer seeks to make by relying on a variation clause must be measured against a test of reasonableness. There is an implied term that the employer must act reasonably in his dealings with an employee and a separate duty to act fairly.

2.3 TERMS IMPLIED BY STATUTE

Terms and conditions of employment can be implied into contracts by statute. These terms generally set out the minimum rights provided for under various pieces of employment legislation, although the contract may provide for greater protection.

(1) Notice

The Minimum Notice and Terms of Employment Acts 1973 – 2001 imply a graduated scale of notice periods according to length of service into all contracts of employment. The notice periods are as follows:-

13 weeks to 2 years' service	1 week's notice
2 years to 5 years' service	2 weeks' notice
5 years to 10 years' service	4 weeks' notice
10 years to 15 years' service	6 weeks' notice
more than 15 years' service	8 weeks' notice

These are the *minimum* periods of notice to which employees are entitled under statute. However, at common law, an employee must be given notice which is reasonable in the circumstances. Each case must be looked at on its merits and consideration must be given to status, responsibility etc. In the case of *Tierney v Irish Meat Packers*[5], an employee with nine years' service as the group Credit Controller was awarded six months' notice by the High Court.

(2) Equality

The Employment Equality Acts 1998 - 2007 essentially provide that employees must not be discriminated against on grounds of gender, age, race, religion, marital status, family status, disability, sexual orientation and/or membership of the Traveller community in relation to access to employment, terms and conditions of employment and training and promotion.

(3) Dismissal

The Unfair Dismissals Acts 1977 - 2007 ("the UD Acts") imply the right not to be unfairly dismissed into every employment relationship. The UD Acts provide, in a nutshell, that all dismissals are unfair unless they are on grounds of conduct, competence, capability, redundancy or some other substantial reason. In order to make a dismissal "fair", employers must adapt and follow their own dismissal procedure, commonly referred to as the Disciplinary Procedure.

(4) Redundancy

The Redundancy Payments Acts 1967 - 2007 provide for the right to statutory redundancy payments, subject to certain conditions, in the event that employment is terminated in a situation of redundancy.

(5) Working Time

[5] (1989) ILT 5

The Organisation of Working Time Act 1997 governs the terms and conditions of employment relating to working time, annual leave and public holidays. The legislation implies terms relating to rest breaks, maximum weekly working time, night working, annual leave and public holidays into all contracts of employment.

(6) Protective Leave

The Maternity Protection Acts 1994 – 2004, the Adoptive Leave Acts 1995-2005, the Parental Leave Acts 1998 – 2006 and the Carer's Leave Act 2001 all imply terms and conditions in relation to protective leave into all contracts of employment.

(7) Payment of Wages

The Payment of Wages Act 1991 provides that every employee has the right to a readily negotiable mode of wage payment (e.g. cheque, credit transfer etc). The Act also governs an employer's right to make deductions from an employee's wages or salary by providing that an employer must have (a) prior written contractual authority to make the deduction; and (b) that the employer must give a week's notice of any such deduction to the employee.

(8) A-typical Workers

A-typical workers include fixed-term and part-time employees. They are protected by the Protection of Employment (Part-Time Work) Act 2007 (which recognises the principle of non-discrimination between comparable full-time and part-time workers and provides for the payment of benefits to a part-time worker on a pro-rata basis as compared to the comparable full-time worker) and the Protection of Employees (Fixed-Term Work) Act 2003 (which also prohibits less favourable treatment of a fixed term worker as compared to a permanent worker in relation to conditions of employment).

(9) Health and Safety

The Safety, Health and Welfare at Work Act 2005 implies rights and obligations on both employers and employees into all contracts of employment.

2.4 TERMS IMPLIED BY CUSTOM AND PRACTICE

For a term to be implied by custom and practice it must be "*...so notorious, well known and acquiesced in that in the absence of agreement in writing it is to be taken as one of the terms of the contract between the parties...*".[6]

[6] O'Reilly v Irish Press (1937) I.L.T.R. 194

In practical terms, the rights usually implied into a contract of employment because of custom and practice include rights to sick pay, the right of an employer to suspend an employee and the rights of employees in relation to ex-gratia termination payments, particularly in situations of redundancy.

For a term to become part of the contract it must reflect a clear, recurring, uninterrupted practice that has been the norm for a number of years. The Court has set out the test that applies before a term may be implied as follows:

(i) the term must be reasonable and equitable;
(ii) it must be necessary to give business efficacy to the contract;
(iii) it must be so obvious that it goes without saying;
(iv) it must be capable of clear expression;
(v) it must not contradict any express term of the contract.[7]

An example of a term implied by custom and practice is the right to sick pay. Notwithstanding that there is no general right to be paid while absent from work, an entitlement to sick pay may be implied from the custom and practice of the employment.

In *Charlton v HH The Aga Khan's Studs Societe Civile*[8] the Court considered whether or not an employee should have implied into her contract of employment an entitlement to sick pay in circumstances where the long-standing employees of the Defendant were paid their salary in full when absent through illness. This matter was heard in the context of the employee seeking injunctive relief and the Court held that the Plaintiff had established a fair issue to be tried that there was an implied sick pay term in her contract of employment and ordered that her salary be paid pending resolution of the matter.

[7] BP Refinery (Westernport) Pty Ltd v Shire Hastings (1978) 52 A.J.L.R. 43

[8] [1999] ELR 136

3. Breach of Contract – Types of possible Claims

3.1 CONSTRUCTIVE DISMISSAL

An employee who resigns will be deemed to have been constructively dismissed in one of two circumstances:

– as a result of a breach of contract of the employer, eg failure to pay wages or a reduction in wages;

– the conduct of the employer was so unreasonable that the employee could not have been expected to continue to work, eg using abusive language, a complete change in job specification, taking away responsibilities and duties from an employee. [9]

Under the Unfair Dismissals Acts 1977-2007, constructive dismissal is defined as the termination of employment by the employee in circumstances where due to the employer's conduct, it would be reasonable for the employee to terminate the contract without notice. Both component parts (i.e. breach of contract justifying summary terminations; and conduct) are included in the citation quoted from the above case.

A claim for unfair dismissal is generally brought to the EAT where there is an automatic presumption that the dismissal is unfair, with the result that the burden of proof first rests with the employer to show there are substantial grounds justifying the dismissal. However, in a constructive dismissal claim, this burden is reversed and the employee must first establish to the EAT that the breach and/or conduct justified the employee's resignation.

It has been suggested that if express consent cannot be obtained to vary employment terms, despite consultation, employers may consider serving notice to terminate the existing contract while offering to re-engage the employee on a new contract incorporating the new terms. This will constitute a 'dismissal' for the purposes of the unfair dismissal legislation, but the employer may be able to satisfy the tribunal that the dismissal was fair if there were genuine business reasons for the change constituting *'some other substantial reason'* and that it acted reasonably in all the circumstances. This would be a high risk strategy however.

In constructive dismissal cases, a third party will examine the conduct of both parties and there is a duty on an employee to act reasonably and to seek to resolve the matter

[9] Byrne v RHM Foods (Ireland) Limited UD 69/1979.

internally, before resorting to terminating the contract and claiming constructive dismissal. Therefore, if there is a grievance procedure in operation, an employee is expected to utilise this prior to resigning. Obviously, the employee will have to be aware of the existence of such a procedure.

In a recent UK Employment Appeals Tribunal case[10], a manager whose job description had changed to increase his travel requirements claimed that his contract had been breached. Whilst this was an unfair dismissal claim rather than a constructive dismissal claim, as he was dismissed for not working the extended geographical area of responsibility, his dismissal was upheld by the UK's EAT because he had not complied with management instructions to work the new area under protest while the issue was being processed.

If an employee is successful in his constructive dismissal claim, the employee will be entitled to receive the same remedies as those available to employees who have been unfairly dismissed by their employer.

Reduction in Pay

Whether a change in an employee's terms and conditions will satisfy the test for constructive dismissal is a question of fact. It will depend on the circumstances of each particular case. In *Industrial Rubber Products v Gillon*[11], it was held that a unilateral reduction in pay, even for good reason and to a relatively small extent, may be a material breach of a fundamental element in the contract of employment. A refusal to pay overtime payments for overtime hours worked was held to be a breach going to the root of the contract of employment entitling the employee to claim constructive dismissal in *Stokes v Hampstead Wine Company Limited*[12].

Lack of Pay Rise

In *Riddell v Mid-West Metals Limited* [13], an employee received a lesser bonus than he had been led to believe he would receive and he was required to cover his own motoring expenses, which he had not previously been required to do. The EAT noted, however, the remuneration was reviewable under the terms of the contract and given the fact that the claimant did not seek to engage in negotiations on the issue causing his concern, took the position that he could not accept the proposal and terminated his employment. His claim failed.

[10] Robinson v Tescom Corporation [2008] UKEAT/0567/07
[11] [1977] IRLR 389
[12] [1979] IRLR 298
[13] M962 UD 687/80

Change in job function/location/working hours

Changes in job function may give rise to an entitlement to claim constructive dismissal. If, however, an employer for good commercial reason directs an employee to transfer to other suitable work on a purely temporary basis at no diminution in salary and it is made clear that it is only a temporary arrangement, the employee may not be entitled to claim constructive dismissal.

An imposed change of location, where the employee is not contractually obliged to work at the new location, may give rise to a constructive dismissal claim.[14]

Where an employer has the contractual right to alter hours of work and shift systems, doing so will not constitute a breach of contract and will not give rise to a constructive dismissal claim.[15]

3.2 WRONGFUL DISMISSAL

It may also be open to an employee whose terms and/or work conditions have been unilaterally varied to make a claim before the civil courts for wrongful dismissal. This is essentially an action for breach of contract and is brought before the civil courts at common law. It is an alternative remedy to the statutory remedy of unfair dismissal.

At common law, the onus of proof in a wrongful dismissal action rests with the employee rather than the employer (unlike unfair dismissal claims, where the onus rests on the employer). Increasingly, the civil courts are refusing to compensate plaintiffs in wrongful dismissal claims over and above an amount equal to an employee's contractual or reasonable notice period. The logic behind this is that under common law, an employer can terminate the employment contract for good reason, bad reason, or no reason, on the giving of adequate notice and accordingly, the court will award damages limited to the amount commensurate with notice. The courts have also expressly pointed to the remedies available to dismissed employees under unfair dismissal legislation. Generally, an employee cannot recover damages for the manner in which wrongful dismissal takes place or for injured feelings.

As such, unless the employee is in a very senior position and has a very long notice period, and also given the costs involved of bringing a civil claim, the statutory unfair dismissal route is a more popular option for employees.

As part of a wrongful dismissal action, an employee may also seek an injunction seeking

[14] Bass Leisure Limited v Thomas [1994] IRLR 104

[15] Dal v A S Orr [1980] IRLR 413

an order preventing his employer from changing the terms of his employment. Injunctions involve significant risk, particularly given the considerable financial costs involved. As a strategy therefore, they are frequently (but not exclusively) sought by senior executives. The High Court has shown a willingness to grant this relief where it can be shown that damages are an inadequate remedy, despite the traditional jurisprudence against the specific performance of employment contracts. In order to secure an injunction, the traditional three tiered test applied by the courts include:- (i) that there is a "serious" question to the tried; (ii) that damages are an inappropriate remedy; and (iii) that the balance of convenience favours the granting of an injunction. The Irish courts have in recent years suggested that in the context of an employment injunction, the plaintiff must establish a "strong" case, with the result that it was more difficult to secure an injunction. If the application is unsuccessful, the employee will be liable for the employer's legal costs in addition to his own legal costs, unlike the position in respect of statutory claims (such as unfair dismissal claims), where each side bears their own legal costs regardless of the outcome.

3.3 CLAIMS UNDER THE PAYMENT OF WAGES ACT, 1991

An employee who believes that there has been an "unlawful" deduction in his wages can make a complaint to a Rights Commissioner under the Payment of Wages Act, 1991.

Any deduction permitted by statute or contract is lawful and does not therefore contravene this Act.

Where a deduction is not permitted by statute or contract, the employer must first secure prior consent in writing to such deduction in order to comply with the Payment of Wages Act. Also, the legislation provides that the employee must be notified in writing at least one week before the deduction has been made.

If the claim is successful, the claimant may be awarded compensation amounting up to the net amount of wages that would have been paid to the employee in respect of the week immediately preceding the date of the deduction, if the deduction had not been made or, if the amount of the deduction is greater than that, twice that amount. Whilst this might suggest that the employer's maximum exposure is two weeks' wages, the EAT, which hears appeals of decisions from the Rights Commissioner, does not appear to have addressed this limit in the past and indeed, the EAT has not limited itself to such an amount in making awards for deductions in breach of the legislation.

For instance, in *Sullivan v Department of Education*[16], the EAT awarded Ms. Sullivan the difference in pay grade attributable to her higher qualifications for a period which ran from 1st September 1991 through to 1st July 1994. It would certainly appear there

16 [1998 ELR 217]

should be grounds to either appeal any such award in excess of the clear statutory provision to the High Court on a point of law, or alternatively, to bring a judicial review action, but it would obviously be preferable to avoid any such claim in the first instance, by securing consent if at all possible.

4. Trade Unions and Collective Agreements

4.1 TRADE UNIONS

In unionised employments, it may be possible to agree a variation of employment terms with a trade union acting on behalf of specific employees or employee generally, rather than reaching express agreement between employer and employee. Where appropriate, employers will normally copy any collective agreements to new employees, making it clear that these agreements form part of the employees' terms and conditions of employment. Generally, employees will accept terms or conditions negotiated on their behalf by the trade union and even in the event of a vote being taken on a proposed change, it is more likely that those who voted against changes will accept the decision reached by the majority and to work under the changed terms and conditions. If the employee does not expressly object to a change and indeed, if the employee acquiesces to changes and continues to work under such new terms (particularly if there are associated benefits introduced to secure agreement to variation), the employee may be denied, or "estopped", from denying the validity of the variation.

However, problems can arise where the employee expressly objects at the outset to such changes and makes it clear that they do not wish or intend to be bound by such changes. A trade union cannot bind those members on its behalf and this was made clear in the decision on *Goulding Chemicals Limited v Bolger*[17], where the Supreme Court confirmed the traditional common law view that variation to a contract requires the consent of the contracting parties which related to the plant closure and the amount of redundancy pay which the employees would receive. Here, Mr. Bolger made it quite clear that he and the other objecting employees never intended to be bound by a change, notwithstanding that the majority of their colleagues voted for a change. The Supreme Court held that each employee's individual contact required consent of that individual employee, whether such consent was express, implied or by acquiescence.

However, in *Gray Dunn & Company Limited v Edwards*[18], it was held that where the employers negotiated a detailed collective agreement with a recognised union, the employer is entitled to assume that all unionised employees know of and are bound by

17 [1977] IR 211
18 [1980] IRLR 23

its provisions, where the employees did not make it expressly known that they would not agree to such terms, or would not agree to be bound.

4.2 COLLECTIVE AGREEMENTS

Strictly speaking, the notion of the provisions of collective agreements being implied into contracts of employment breaches the age old concept of privity of contract. However, in circumstances where (a) the trade union acts as an agent on behalf of an employee; or (b) the employer agrees to be bound by the collective agreement; or (c) statute confers the force of law on a collective agreement, this doctrine can be circumvented.

It is only in very limited circumstances that a trade union can act as agent for an employee. Usually this only arises where the union has specific authority to negotiate a particular issue on behalf of an employee or if an employee could be estopped from denying that the trade union was acting on his/her behalf.

It is more common for there to be a specific term in an employee's contract of employment incorporating the provisions of a collective agreement. This usually occurs in the manufacturing and other labour intensive industries. In addition, it is not uncommon for contracts of employment to refer to the national tripartite agreements for the time being in force – currently Towards 2016.

Where an agreement has been reached between employer and trade union, and where it is clear there is an intention to enter a legally binding contract which related to business relations, if a party seeks to deny the enforceability of such agreement, the onus of proof lies on that party and in the *Goulding* decision, the Court stated that this is a heavy burden to overcome. Accordingly, the legality of collective agreements has been confirmed, although in that case, the provisions of the agreement could not apply to those employees who expressly repudiated and opposed such agreement. Kenny J stated that *"membership of a corporate body or of an association does not have the consequence that every agreement made by that corporate body or association binds every member of it. None of the defendants are parties to the agreement and if they consistently opposed it no question of their being bound by acquiescence can arise"*.