

# e-post

Updating you on employment issues

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Welcome to the March issue of *e-Post*.

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## Handbook authorised unilateral change in contract terms

The Employment Appeal Tribunal (EAT) has confirmed that Asda was entitled to rely on a paragraph in its staff handbook in order to impose significant changes to terms and conditions for over 8,000 staff. The handbook reserved the employer's right to review, revise, amend or replace its contents, as well as to replace policies. The EAT endorsed the employment tribunal's decision that this provision allowed Asda to introduce a new pay and work structure unilaterally - in other words without the consent of the employees involved. At first sight this decision provides significant encouragement for employers seeking to rely on similar wording to impose changes to contractual terms. But on closer examination it may prove to be an exceptional case.

Asda wished to move around 10 per cent of its 150,000 workforce onto modernised terms and conditions under which the remainder of its staff were already engaged. Of the minority employed under the old-style terms, more than half agreed to change, leaving about 8,700 who refused to transfer to the new terms after the consultation process had ended. 700 claims ensued, but only one of six test claimants was able to show that she had suffered an overall loss as a result of the new regime. That meant that many arguments that claimants typically deploy when an employer attempts to push through such changes unilaterally were not available. For example a powerful case can often be made that imposing changes which significantly disadvantage employees amounts to a breach of the implied duty to uphold mutual trust and confidence, even if the staff handbook purports to give the employer the right to do this.



**Click below for the full decision**  
**[\(Bateman v Asda Stores\)](#)**.

## No way back after fundamental breach

The Court of Appeal has ruled that once there has been a fundamental breach of contract, all the cards are in the hands of the wronged party. If the employer is in breach, the employee is not obliged to accept any offer of amends and retains the right to treat the contract as terminated. In this case the University had re-marked the papers of some of Professor Buckland's students behind his back, which the employment tribunal accepted was a fundamental breach of contract. However the University then set up an enquiry which was critical of the people involved and exonerated the Professor. But, as the Court of Appeal put it, his own petulance kept the wound festering, and he resigned.

The Court of Appeal overturned the Employment Appeal Tribunal's decision that the enquiry had cured the breach of contract, and that the employee had lost the opportunity to bring proceedings for constructive unfair dismissal. It admitted that its ruling could cause injustice, but said that to allow the possibility of curing a fundamental breach would bring uncertainty into employment law. However this decision should not necessarily stop employers trying to make amends. Many employees will want to keep their jobs if things are put right, and will also be aware that even if they are entitled to bring a claim, compensation will be reduced if an employment tribunal decides they have acted unreasonably.



Click below for the full decision ([\*\*Buckland v Bournemouth University\*\*](#)).

## The trust and confidence duty really is mutual

If Professor Buckland's case could be considered unhelpful for employers, they will derive some comfort from another recent case on constructive dismissal, this time from a Scottish division of the Employment Appeal Tribunal (EAT). This case establishes that if an employee has already committed a breach of the implied duty of mutual trust and confidence, he cannot rely on an employer's breach of the same duty to bring the contract of employment to an end. This applies even if the employer is unaware of the employee's misconduct at the time of its own breach.

In this case the employee had been suspended because he was suspected of wrongly disclosing confidential information about a disciplinary enquiry into one of his superiors. Following his suspension - which he claimed was a breach of the implied duty of trust and confidence - a whole catalogue of complaints emerged about his own conduct, including sexual harassment and drunkenness while on duty. The EAT thought these were sufficiently serious to mean he had long been in breach of the same duty himself. Part of the EAT's reasoning is based on Scottish common law, which is not necessarily the same south of the border, but there has been at least one English case which supports the conclusion it reached.



Click below for the full decision ([\*\*Aberdeen City Council v McNeill\*\*](#)).

## No contract, no rights

Last month's ruling of the Court of Appeal in an agency worker case is a reminder of the general principle that without some kind of contractual relationship an individual has no rights either under employment protection or discrimination legislation. In this case Mr Muschett was unable to overcome the factual decision of the employment tribunal that he had no contract of any kind either with the agency who recruited him, or with the organisation to which his labour was supplied.

Despite the headlines, this case does not mean that agency workers have no protection against discrimination. Although they will normally not have employment status, provided they have a contract "personally to execute any work or labour" with the agency, they will be protected from discrimination by the contract worker provisions. These impose liability on the end-user if it discriminates against a worker supplied under a contract between it and the agency. Agency workers' rights under discrimination law will be bolstered from October next year when they will also be entitled to the same basic terms and conditions as their permanent counterparts after a 12-week waiting period.



Click below for the full decision ([Muschett v H M Prison Service](#)).

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