

Can changing an employee's duties amount to a constructive unfair dismissal?



Lord Sugar was in the firing line last month as the East London Employment Tribunal pored over the evidence in relation to a constructive unfair dismissal claim brought against him Stella English, a winner of *The Apprentice*. English complained that the £100,000-a-year role she was given after winning the show as that of an “overpaid lackey”. Here, **Gillian Mair**, a senior solicitor in the employment team of Brodies LLP considers the implications for employers when changing an employee's contractual terms.

The Stella English claim raises a number of interesting questions, including whether and to what extent an employer can change an employee's duties without it amounting to a fundamental breach of contract, entitling an employee to resign and claim constructive unfair dismissal.

Generally the starting point for an Employment Tribunal in these circumstances would be to consider the employee's contract and any description of their duties and to consider the duties undertaken by an employee in practice.

Flexibility clauses contained within an employee's contract of employment, seeking to give an employer a general right to change an employee's duties, should be exercised with caution. It should not be assumed that these clauses give an employer free rein to make any changes they wish.

The degree to which an employee's duties may be deemed to fall outwith the terms of their contract of employment ultimately will depend on the facts of each case. If an employer makes material changes to an employee's duties, whether by asking them to undertake additional duties or removing duties from their remit, it is open to an Employment Tribunal to find that such a change amounts to a fundamental breach of contract.

For example, the Employment Appeal Tribunal (EAT) found that the removal of a football manager's ability to select players for his team amounted to a fundamental breach of contract. It noted that the removal of such duties would have had significant consequential effects on the employee's role. The EAT also commented that the test of whether or not a change in duties amounts to a fundamental breach of contract is an objective one and the fact that an “autocratic style of management” was an industry norm in the football world was no defence.

In another case, the EAT found that replacing the duties of an architect with more managerial duties amounted to a fundamental breach of contract, as the employee effectively would have lost some of the skills associated with carrying out hands-on architectural work.

Cases like these highlight the need for employers to be mindful of the possible consequences of changing an



employee's contractual terms.

Generally, once an employer has fundamentally breached the contract of employment, this cannot be cured by any subsequent action on their part. While an employer's actions cannot cure a breach of the contract, they can, however, repair the employment relationship if it has been damaged but has not yet resulted in the employee's resignation. An on-going situation that is allowed to fester is more likely to cause a breakdown than a one-off act.

In a relatively recent case, the EAT found that an employee had been suspended unreasonably by his manager and that the manager's actions seriously damaged the relationship. In spite of this, the Tribunal found that the employer's subsequent action of recalling the suspension recovered the relationship and, therefore, that the manager's actions were not serious enough to justify the employee resigning.

While this case is helpful for employers, it is important to remember that if their actions are deemed to be serious enough to amount to a fundamental breach of contract, an offer of amends cannot rescue them. In these circumstances, an employer may, however, depending on the time that has elapsed between the alleged breach of contract and the date of resignation, be able to argue that an employee has affirmed any breach by delaying too long in resigning in response to the breach. **Hr**