

The High Court in *IBM (UK) Holdings Ltd v Dalgleish* has ruled that IBM breached the implied duty of trust and confidence that exists between employers and employees by the manner in which it conducted a consultation process about proposed changes to its UK pension plans.

Like many other businesses over the last decade, IBM wanted to make savings to its pension costs by making changes to its UK Defined Benefit pension plans. Scheme members were unhappy about the changes and argued that IBM had breached the implied duty of good faith that employers owe to members of a pension scheme when exercising its functions, but also that it had breached the implied duty of trust and confidence that exists between employers and employees by the manner in which it went about making the changes. IBM sought declarations from the High Court that its actions were lawful.

The High Court ruled against IBM. Whilst the bulk of the judgment (which runs to a staggering 325 pages!) dealt with pension issues, the High Court also ruled that IBM had breached the implied duty of trust and confidence when consulting about the proposed changes to its UK pensions plans. A remedies hearing is due to follow, although we understand that IBM has already indicated an intention to appeal.

Although only a High Court decision, this case contains some valuable lessons for other employers planning to make changes to terms and conditions of employment. Five key issues for employers to consider are:

**1. Never do (or say) anything during the consultation process that could undermine the relationship of trust and confidence that exists between employers and employees.**

In this case, the High Court was highly critical of the manner in which IBM carried out the consultation process, in particular that IBM had not given members a clear explanation of why it was really making the changes (it had told them that the changes were necessary in order to ensure long-term sustainability, but the Court found that the real reason was because it needed to meet its global earnings per share targets) and that it had deliberately misled them about when it was proposing to make the changes in order to preserve its negotiating position. Leaving aside any potential statutory remedy, the High Court said that IBM's actions meant that employees had a potential damages claim for breach of the implied term of trust and confidence.

**2. Be careful what you say.** Do not make statements which you know to be untrue, especially if the aim of making such statements is to induce the recipients to behave in a particular way.

Equally, be open and transparent during the consultation process and do not give misleading reasons for any proposed changes or try to hide behind other reasons. When consulting with employees, employers should ensure that any information provided as part of the process is genuine and it should always be given in good faith.

**3. Be careful how you say it.** IBM had informed employees that if they did not agree to the proposed pension changes they would not be eligible to receive "any salary increases". The High Court took this to mean that employees would never be entitled to any future salary increases and said that this also amounted to a breach of the implied duty of trust and confidence.

**4. Ensure that you comply with your own Codes of Conduct or Business Rules or run the risk of being criticised.** In this case, the Judge said that the members of the scheme were entitled to expect that the consultation would be carried out in accordance with IBM's own Business Conduct Guidelines and Core Values which placed importance on such values as "honesty", "ethical behaviour" and talked about the need for "trust and personal responsibility in all relationships". The High Court was prepared to take into account these statements when considering whether there had been a breach of the implied duty of trust and confidence.

**5. Do not think that you will be allowed to hide behind the actions of any parent company.** Unfortunately the Courts are likely to give short shrift to any argument that an employer was "just following orders". Whilst the subsidiary company may well end up "following orders", it needs to be seen to have genuinely considered employees' views during the consultation process. In this instance, the High Court was not prepared to let IBM in the UK off the hook simply because it had been carrying out the wishes of its US parent company.

Making changes to terms and conditions is never without risk, especially when you are talking about reducing key contractual benefits such as pensions, but employers can minimise the risk of any claims by carrying out a consultation process that is genuine, constructive and meaningful.

### Contact

**Caroline Noblet**  
Partner  
T +44 20 7655 1473  
E caroline.noblet@squiresanders.com