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Changing terms and conditions of employment

Inside

Whether it is updating an individual contract or implementing a large-scale change of shift patterns or working location, varying an employment contract means changing the "deal" between employer and employee.

This Inbrief looks at how an employer can secure a binding change to terms and conditions of employment, and what options are available when agreement cannot be reached. We consider what is meant by "fire and rehire" and explain the legal and commercial risks of this approach.

What are the terms and conditions of employment?

The rights, responsibilities and duties of both employer and employee are known as the terms and conditions of the employment contract (referred to as the "terms" in the rest of this Inbrief). Before embarking on a process of change, the first question to ask is whether the proposals affect a term of the contract. If so, the employer will need to implement a binding change to the affected term(s).

A contract of employment is not necessarily one set of written terms in a single document. Many contracts consist of a patchwork of terms from different sources. These can include the following.

- Express terms – as agreed between the employer and employee, which can be either verbal or written.
- Implied terms – extra terms that have not been expressly agreed but are implied by law, statute, in fact to fill a gap, or by custom and practice. The most common implied terms are the mutual duty of trust and confidence, and key basic employment rights such as minimum wage and statutory holiday.
- Terms incorporated from other documents – such as an offer letter, employer policies and procedures, or a collective agreement.

Some provisions which affect the employment relationship may be non-contractual, which means they can be changed more easily. Many typical employer policies or procedures may be contained in a staff handbook or similar, which makes clear that they are not contractual, do not create rights or obligations, and can be amended at any time.

If the wording is not clear, however, there is a risk that the policies and procedures will form part of the contract.

For more information on contractual terms please see our Inbrief on contracts of employment.

Is agreement needed?

Although a change to terms will often require agreement, the wording of the employment contract may be flexible enough to allow the employer to make changes as needed.

Broad wording

If the relevant contractual term is drafted broadly, what the employer wishes to achieve could potentially be accommodated within the existing term. For example, an employee's duties may be described as those set out in their job description, but the contract might also say that this includes other duties that the employee might reasonably be asked to do. This would give some scope for duties to be altered within the existing wording.

Flexibility clauses

Alternatively, the contract may include wording that expressly allows the employer to make a change to the terms. This may relate to a specific clause (such as place of work) or to the contract more generally.

Such wording can be useful, but it does not mean that the employer can simply change the contract as they wish.

Firstly, these clauses must be drafted very clearly. Any uncertainty in the wording would be interpreted in the employee's favour.

It is unlikely, for example, that an employer would be able to rely on a general flexibility clause to make any changes which may be to the employee's detriment.

Secondly, the ability to use a flexibility clause is subject to the implied duty of trust and confidence. In practice, this means that the flexibility clause must be exercised reasonably. This might mean consulting about the change and/or providing adequate advance notice. In some cases, it can mean the change cannot be made at all. Failure to use flexibility clauses reasonably can lead to claims of breach of contract or constructive unfair dismissal.

As flexible as the contractual wording may appear at first glance, the more detrimental the proposed change is to the employee, the more difficult it will be to rely on a flexibility clause to achieve it. In reality, it is unlikely that changes to the fundamental terms of the deal between employer and employee - such as terms relating to hours or pay – can be accommodated through to a flexibility clause.

Varying the contract by agreement

The best way to vary the contract is to secure employees' express agreement to a change. Agreement must be given voluntarily and free from duress. Handling this process carefully will make agreement more likely and reduce the legal risks. The Advisory. Conciliation and Arbitration Service (Acas) has produced useful guidance on making changes to employment contracts.

Communication and consultation

Communicating clearly with employees, including providing sufficient information to enable them to understand what is being proposed, is essential. Employers should ensure that as early as possible they explain:

- what the proposed changes are
- who might be affected
- why the changes may be needed
- the timeframe
- any other options that have been considered and why they may not be appropriate

After providing this information, there should be a consultation process with the affected employees before reaching agreement. Employers should ask for feedback, answer questions and respond to concerns. They should also listen to objections and consider any alternative proposals.

Employees are likely to want to understand what will happen if they do not agree. If the alternative is structural change that may result in redundancies, employers should be open about this. Care should be taken, however, to ensure that no actual decisions have been made about potential dismissals as this may trigger the obligation to collectively consult (explained further below).

How the change is communicated and discussed will depend on whether this is a proposal affecting only a small number of people or is something that affects the wider workforce. In some cases, a suitable forum might be staff briefings. In others, a private meeting with a line manager would be the first step. The Acas guidance suggests that although the changes might first be explained verbally, the proposal should also be put in writing.

Another relevant factor is whether the workforce is unionised or has a standing body of employee representatives. If so, it is likely that these representatives will need to be involved in this process, and possibly the union must be collectively bargained with if this is required under its collective agreement.

Practical tips on securing agreement

There are various steps an employer can take to encourage employees to consent to the proposed change, or to make this a more attractive prospect.

For example:

- offering an additional benefit as incentive
- genuinely listening to and responding to concerns about the proposals
- thinking about the timing – a potentially detrimental change may be more acceptable if it is tied in with other more positive changes

It is also essential that an employee receives something of value as part of any change, or else they may not be bound in future by their agreement (unless they agree by signing a deed)

Documenting the change

It is important to record all contractual changes in writing. This should be done for every affected employee individually, to show that they have agreed.

What is appropriate will depend on the nature of the change. In some cases, a letter of variation, countersigned by the employee, will be adequate. However, where there is any change to the key particulars of employment covered by section 1 of the Employment Rights Act 1996, the employer must provide the worker with a written statement of the change within a month. For more information on section 1 statements please see our Inbrief on contracts of employment.

Changes after a TUPE transfer

Employers must exercise particular caution if the affected employees have recently transferred under TUPE. This is because if the reason for the change is the transfer itself, the contractual change will be void – even if the employees have agreed to it. This includes where variations are made with the intention of harmonising terms between the old and new employees.

Changes in this situation will be void unless the contract permits that particular change, or there is an "economic, technical or organisational" reason for the agreed change.

For more information on the limits on making changes after a TUPE transfer please see our Inbrief on TUPE.

Unilaterally imposing change

If employees do not agree to the proposed change after consultation (and prior collective bargaining with their union, if applicable), one option is simply to announce that the change will be implemented from a set date.

This is a risky strategy from a legal perspective. Imposing the change as a fait accompli will amount to a breach of contract by the employer. It also runs the risk that employees may:

- continue to work in accordance with the changed terms, but under protest — reserving the right to sue for breach of contract and/or bring a claim for unlawful deduction from wages
- resign and claim constructive dismissal
- refuse point-blank to accept the new terms
- bring claims if they are union members and collective bargaining
- to change the term had, in fact, not been properly exhausted

In the third scenario the employer would have little option but to dismiss, potentially giving rise to tribunal claims for unfair dismissal from employees who have at least the two years' service.

The best outcome for employers adopting this type of approach is that employees would simply acquiesce in the new working arrangements and go along with them. After a period of time, the legal position would be that such employees had impliedly agreed to the variation by their conduct.

Dismissal and re-engagement

A more structured approach to imposing contractual changes is to carry out a process of dismissal and re-engagement. Often referred to as "fire and rehire", this involves terminating employees' existing contracts on notice and offering to immediately re-engage them on the new terms.

This approach has been the focus of significant public scrutiny in recent years due to a number of high-profile examples. Nevertheless, it is a lawful option if it is handled correctly. It is a better option than just imposing the changes because the old employment contracts will be lawfully terminated with notice. It can also be a fair dismissal if the employer has good reasons for the change and follows a fair procedure.

The Acas guidance on making contractual changes says that fire and rehire should be a "last resort". It emphasises the importance of exploring other alternatives first and undertaking genuine and meaningful consultation. Whilst this guidance does not have formal legal status, a process carried out in accordance with this guidance would be more likely to result in a fair dismissal.

The process for "fire and rehire"

Before dismissal and re-engagement there needs to be a thorough process of consultation, to see if agreement can be reached first. This is central to the Acas guidance, with "reasonableness" being the key to mitigating both legal and employee relations risks. Clear and relevant information about the proposed changes should be provided to all affected employees, workers and representatives, including those absent from the workplace, to enable them to reach an informed view.

If there is a recognised trade union and the proposed changes are covered by a collective agreement, information must be provided to the union representatives. Similarly, if there is a standing body of employee representatives, they should be involved in the process.

If agreement cannot be reached for some or all employees, an employer can then follow a dismissal process in order to impose the change. The employer would need to explain the business necessity of the change and that re-engagement will be offered on the revised terms. If employees still do not agree to the change, they would be dismissed on notice. To minimise the risk of claims, it may be advisable to offer a right of appeal.

The Acas guidance emphasises that this route should only be used after the employer has made all reasonable attempts to reach agreement through a full and thorough consultation.

Collective consultation

Although not a classic redundancy situation, a proposal to dismiss and re-engage in the context of changes to terms counts as "redundancy" for collective consultation purposes.

Accordingly, if it is proposed that 20 or more employees will be dismissed within a 90-day period, the employer must consult with the recognised trade union if there is one, or elected employee representatives otherwise. This applies even though the employees are immediately being offered re-engagement.

Determining the point at which an employer is "proposing" this number of dismissals can be a difficult question. The consultation must begin "in good time" once the proposal has been formulated, and at the point when other alternatives are possible. There is, however, a tension between an employer ensuring that it does not pressurise employees into agreeing the contractual change under the threat of dismissal, and ensuring that consultation is started in good time if dismissal and re-engagement is a potential outcome. For this reason, specific legal advice is likely to be needed in this scenario.

For more information on collective consultation requirements please see our Inbrief on collective redundancies.

Legal risks

Provided the employee is given the correct notice under their contract, they would not have a claim for **breach of contract**.

If the employee has more than two years' service, they are able to bring a claim in the Employment Tribunal for **unfair dismissal**.

To show that the dismissal was fair, the employer will need to show that it had a fair reason for dismissal, and that it acted reasonably in dismissing the employee in those circumstances. The fair reason for dismissal is likely to be "some other substantial reason", based on the employer having a sound and pressing business need to introduce the changes.

The employer would also have to show that a fair process had been followed. This would largely turn on whether there was adequate and genuine consultation about the proposed changes before dismissal.

Even if the dismissal is unfair, compensation may be limited because the employee was immediately offered re-engagement on the new terms. The employer can argue that offer of re-engagement would be an opportunity for the employee to limit their loss. The key question will be whether the employee's refusal to accept re-engagement was unreasonable. If it was not, the potential earnings from re-engagement would not be taken into account by the Tribunal. This question will be fact specific and the significance of the change will be a key factor.

It is also important to consider whether imposing the changes in this way would involve **discrimination**. For example, would the change have a particularly detrimental impact on working parents, or would there be a risk of disability discrimination if the change affected an employee's management of their health condition?

Where there is a recognised union, imposing a change by dismissal and re-engagement might risk **industrial action**. For example, as flagged in the Acas guidance, this may result in a strike, a refusal to take part in certain activities, or a "work to rule" (where employees do no more than what they are contractual required to do). In addition, the union might support individual employees who had been dismissed in bringing tribunal or other legal claims.

The use of "fire and rehire" is controversial and so also involves **reputational risk**. A clear message from the Acas guidance is that dismissal and re-engagement should not be used as a threat, or as a means of unreasonably pressurising employees to enter less favourable terms.

Future developments

The current government does not intend to prohibit the use of dismissal and re-engagement, but it has published a statutory Code of Practice on "fire and rehire" which is due to come into force in summer 2024. This emphasises best practice and, like the Acas guidance, says the process should only be used as a last resort.

In April 2024 the Supreme Court is due to consider whether an injunction should have been granted which prevented Tesco from "firing and rehiring" employees in order to remove their contractual entitlement to enhanced pay. This is a high-profile example of the use of dismissal and re-engagement to change terms, and the Court of Appeal had overturned the injunction originally granted by the High Court.

The Labour Party has pledged to outlaw fire and rehire in its Employment Rights green paper.

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