



DEAN WILSON
SOLICITORS

Changing Terms and Condition of Employment

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1. Does an employer have the right to change an employee's and conditions of employment?

When considering whether the contract of employment needs to be changed, an employer should first consider whether the change they want to implement is in fact a contractual term, or whether it is for example a policy or practice instead.

However, even where a policy is stated to be non contractual or a practice is not written down anywhere, this may not be the final answer. A policy can become incorporated into a contract of employment (which does not have to be in writing) in various ways including through custom and practice.

Working on the basis that a change of contract is required the first step should be to look at the written contract, if there is one. Many contracts will contain an express contractual right giving the employer the right to make changes and to merely notify the employees of those changes. If such a clause is not contained within the contract, and in some cases even where it is (see more details below) it may be necessary to obtain the consent of all affected employees before that change comes into effect.


2. Could an express power to make changes to the contract of employment be used to change contracted hours of work?

Even where there is an express contractual power to change terms of the contract, employers should bear in mind that the courts and employment tribunals construe these clauses, known as general variation clauses, very narrowly. The more that a change may have a detrimental impact on an employee the more likely it is that an employer will be advised to obtain express consent to those changes rather than rely on a general variation clause.

3. How would an employer go about getting consent to proposed changes?

If there is no express power to make changes or the changes are considered to be too significant to rely on such a clause an employer is likely to start a process of consultation with all employees who will be affected by the proposed change, with a view to reaching agreement with them about the change.

How the consultation process works will depend on how many employees are involved, the nature and size of the employer's organisation and the nature of the change which is



proposed. However, generally it would start by a group presentation being made to all potentially affected employees, explaining the proposed changes and the reasons for making them.

In addition to the group presentation it may be sensible for the employer to meet with the affected employees individually so that they can feedback on how the proposed changes may impact on them personally, and put forward any objections or alternative solutions for consideration.

Once the individual consultation meetings have been completed the employer is likely to have secured consent from some of the affected employees but there may be a number who are not willing to agree. At that stage the employer should consider what the objections which have been raised are and whether there are any accommodations which could be made in order to secure agreement.

4. What happens if the affected employees will not agree to the change which the employer wants to make?

If the end of the road of consultation has been reached without the employer and employee being able to reach an agreement as to the change, the employer may decide that the change is sufficiently important to the business that it should be imposed without consent. If the change is sufficiently significant employees who have not agreed to the change may resign and seek to bring a constructive unfair dismissal claim in the employment tribunal. Alternatively the employee may continue to work albeit under protest and bring an unlawful deduction from wages claim to recover the difference in remuneration that they received after the change was imposed as compared to before the change came into effect.

It is as a result of these potential claims which could be pursued that employers who are contemplating making a change to contractual terms, particularly where this may have an adverse impact on employees earnings, to seek consent where at all possible and to undertake any consultation seriously, being willing to compromise where possible in order to achieve agreement. Ultimately the employer imposing a contractual change may need to demonstrate both the business need for that change to occur and that they have acted reasonably in seeking to implement it.

5. Are there any other options other than imposing the change without consent?

If it has not proved possible to achieve consent to a proposed change to the terms and conditions of employment it is possible for an employer to serve notice to terminate the current contract of employment and to offer immediate re engagement on the new terms and conditions. If the employee then agrees the change can come into effect and the employee would preserve their continuity of employment. If there is still no agreement then the employment relationship would come to an end when the notice period expires.

At that point the employee may well seek to pursue a claim in an employment tribunal for unfair dismissal. In order to defend that claim the employer would need to demonstrate a clear business need to make the change sought, that it had followed a fair procedure in consulting with the employee prior to notice to terminate being served and that it had then acted reasonably in treating the lack of consent to the change of terms and conditions of employment as a reason justifying dismissal and the offer of re engagement.

Where there is a possibility of giving notice to terminate employment to 20 or more employees within a 90 day period in order to offer re engagement on new terms and conditions there may be an obligation to comply with collective consultation requirements.

Changing terms and conditions of employment is a tricky area which should be planned carefully in advance. The Dean Wilson team are happy to assist with designing and implementing an appropriate process to be followed which seeks to achieve the desired change whilst keeping risks to a minimum.



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