

Employment law

Changing contractual terms

Throughout a term of employment, the applicable terms and conditions are sometimes amended and altered to keep up with changing circumstances. Some changes to minor clauses may go unchallenged; other changes take place by mutual consent. No doubt you have never had an employee object to their remuneration clause changing when they get a pay rise or other improvement in the terms and conditions.

Difficulties only usually arise when you want to introduce a variation to a fundamental term of the contract and the employee does NOT consent. The law is that contracts can only be changed by agreement, unilateral changes will be a breach. This not only means that they will not take effect, but they can expose you to claims of breach of contract and constructive dismissal.

Not all amendments and redrafting involve a change in the existing terms of the contract. It will be important for you to consider each contract on an individual basis. The following are examples of changes that would not normally be a breach of contract.

- Employees are expected to adapt to new methods and techniques of doing their work. The sort of situation this covers would be where you are changing from manual to computerised record keeping and as a consequence the duties are changed.
- If there are express flexibility clauses in the contract, or the contract itself is so widely drafted that it covers the proposed changes. However, you are still expected to implement such changes in a reasonable manner and failure to do so could result in a constructive dismissal situation.
- Where there are collective agreements incorporated into employees' contracts of employment, negotiated changes in those agreements normally take effect on the employees' contracts without their individual consent.

So your first action is to look at the individuals' present duties, their contracts of employment and then the proposed changes; you may find that for some employees there is no contractual change.

But what do you do when you have to make a change that is not covered by any of the above?

The strategy

Change by agreement

You should always try and obtain agreement to the change. There are no strict legal guidelines as to how to do this; the key to successful management of change is a proper sensitivity to the situation and careful persuasion.

If you can reach agreement put it clearly in writing as soon as possible, inform the employee of the date the change will be implemented. You may consider issuing a new contract for signature.

In all cases where you are making a change it is helpful if you can give something in return, eg a bonus payment, additional seniority or salary, enhanced holiday rights, etc. You are more likely to get agreement if you do! In addition, in pure contractual terms, this amounts to consideration and will be additional evidence which would count in your favour if a court or tribunal had to decide on this issue.

It is inadvisable to impose the change as a *fait accompli* and then infer agreement from the employee's conduct in failing to object to the change.

Imposed change

If you are unable to agree the change you will first have to consider if the needs of your business to make the change are so important that they justify imposing the change regardless of the harm.

If so, there are two possible basic approaches, both of which entail legal risks and potential damage to general employee relations:

1. make a unilateral change to the existing contract by simply announcing the change and implementing it forthwith or with notice
2. terminate the existing employment contract with proper notice (whilst complying with the statutory dismissal procedures), and offer re-engagement on a new contract which reflects the amended terms

If you take the first approach, the employee may accept the change despite their initial protest. However, they may continue to protest, insist on the terms of the original contract and either bring a claim for breach of contract or resign and claim constructive dismissal. Alternatively they could work under the new terms, but "under protest" which means they reserve their right to claim breach of contract or, in limited cases, unfair dismissal. You are unlikely to have a defence to these claims and the tribunal may not only award compensation for the loss they have suffered as a result of the change or dismissal but also make an award that they are reinstated to their job on their original terms.

If you take approach two, the employee is being dismissed and can therefore still claim unfair dismissal. However, if there is a reasonable consultation process you are more likely to be able to defend a claim on this basis than under approach one and more likely to minimise any compensatory payments. Importantly, however, the change will not be revoked and the employee will have to bring any action within three months of the dismissal.

Risk

The risk is that an employee refuses to accept the change and brings a claim to the employment tribunal for breach of contract or unfair dismissal (whether constructive or actual dismissal). The ground for your dismissal of the employee under the second approach will be 'some other substantial reason' necessitated by business reasons (although in some cases it could be deemed 'redundancy' which may raise collective consultation issues). The Tribunal accepts that there may be situations in which the interests of the employer and the employee are irreconcilable. However, your reasonableness will be judged within the context of the need to make the changes and the manner in which you deal with implementing them. Genuine consultation coupled with some attempt at "buying out" old terms would be seen more favourably, especially if those who do not accept the changes are in the minority

The above advice is only for the purposes of planning general strategy. If you are proposing contractual changes, you will need specialist legal advice.

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