Employment and pensions

Changing terms and conditions of employment: a practical approach

Recently we’ve seen more and more employers exploring how to change terms and conditions. Changing contracts to keep up to date with changing economic circumstances is a fact of modern life. It can be more straightforward than many employers think but there are a few pitfalls for the unwary.

A golden rule to start with

Contracts of employment have some special rules which apply to them but usual contract principles apply too. This means that, generally, one party cannot vary the terms of the contract without the other’s consent; but that does not mean that significant employment changes are not possible, even if there is workforce opposition.

If variations of contract can be agreed it is, of course, preferable for any agreed changes to be recorded in writing and employers should not forget to issue new written statements of employment particulars as required by the Employment Right Act, if necessary.

When is a change not a variation?

Perhaps not surprisingly, the courts and tribunals will not readily accept that it is reasonable for an employer to rely on a contractual right to change terms and that employees have granted their employer a completely unfettered right to make any changes it wishes to the fundamental terms of their contracts. Nevertheless, it may be possible for an employer to make changes without getting each employee to consent to the change.

Employers wishing to use such a right must ensure that the discretion is carefully exercised so it is absolutely clear what changes can be made. The right must also be exercised precisely in accordance with the clause. For example, if the right to make changes is subject to trade union consultation, that consultation must be completed. In addition, a right to make changes to a contract without specific consent, must always be exercised reasonably, for example with appropriate warning and notice. However, provided the contract wording is clear and unambiguous it is possible an employer can make changes without the employer actually varying the contract itself at all.

When is a variation not a change?

Employers must take particular care if a variation is made following a TUPE transfer. If there is no economic, technical or organisational reason entitling a change in the workforce, even a consensual variation will not be effective if the transfer is the sole or principal reason for the variation. Employers seeking to vary contracts close to transfer, where the reasons for the changes may be challenged, need to take particular care. Even if an employee has accepted a one-off payment to agree the variation, if it is transfer related it will not be effective so employers need to approach this situation with extra care.

Obtaining agreement

As so often with employment law, the key to successful contract variation, whether individual or collective, is full consultation. Employers should start consultation as early as practicable and be prepared to explain and discuss any reasons for change. It is likely that as a result of this consultation many staff will agree to the change. The more the better – a recent case found that a majority acceptance signified the reasonableness of the proposed variation.
Where change is difficult some employers offer financial incentives. One issue that is not well known but raised increasingly by unions is that an attempt to "buy out" collective terms to replace these with individual terms can fall foul of legislation protecting trade union consultation rights under the Trade Union and Labour Relations (Consolidation) Act 1992. Even making an offer to buy out such terms may be unlawful, so a variation strategy which includes any element which may appears to be an inducement needs to be considered cautiously.

What happens when agreement is not possible?

If contractual variation cannot be achieved on a voluntary basis, the only option may be to impose new terms or expressly dismiss and re-engage on new terms. Whenever employees may be able to show they have been placed on new contract by the actions of their employer collective consultation obligations have to be considered.

If more than 20 employees are affected and may in law have been dismissed and re-engaged, the employer will have to follow collective redundancy consultation procedures, even when no reduction of the workforce is planned. This means the timescale allowed must take account of the collective consultation period (30 days or, currently, 90 days if more than 100 employees are affected) so this is a strategy which requires plenty of time. Employers must also remember to file an HR1 with the Department of Business, Innovation and Skills.

An employer may choose simply to impose a new contract and wait to see if employees object. Technically, this involves the employer breaching the original contract. If that change is fundamental, for example imposing a reduction in pay, employees may treat the breach like a notice to dismiss and regard themselves as being constructively dismissed claiming breach of contract and, if they have sufficient service, unfair dismissal. Claims for failure to follow collective obligations, may also be made if the collective consultation regime is not complied with. Given that this may result in protective awards of up to 90 days gross pay per employee this can be an expensive risk.

If change is imposed without a dismissal, an employee may continue to work, perhaps expressly, under protest. After a time acceptance of the new terms may be implied but definitive guidance on when that time will be is hard to give. It is a route which many employers avoid because it lacks certainty.

The second option is dismissal and re-engagement. While this can appear draconian and aggressive, impacting on staff morale and industrial relations, it does have legal certainty. We always advise employers to accompany such a step with a clear communication strategy. The business reasons for such a step must always be explained and the importance of consultation cannot be overstated. Handled correctly this approach can be successful and this route offers certainty, as claims by disgruntled employees must be brought within a set period after dismissal, an important consideration for business certainty. Even if employees accept new contracts they can still claim unfair dismissal so this is not a step to be taken lightly but it is a well trodden route that can have a significant impact on business survival and growth.

If you would like to discuss how Trowers & Hamlins LLP can help you achieve successful contract variation please contact Emma Burrows.

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For more information please contact:
Emma Burrows, Partner, London
t +44 (0)20 7423 8347 e eburrows@trowers.com
Rebecca McGuirk, Partner, Birmingham
t +44 (0)121 214 8821 e rmcguirk@trowers.com
Helen Cookson, Senior Associate, Manchester
t +44 (0)161 838 2081 e hcookson@trowers.com

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