

Varying employment contracts: how to navigate the risks

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Throughout an employee's employment, their terms will often alter: their role may change or their pay may increase. Most changes are uncontroversial. However, at times you may wish to implement a change, which an employee is less willing to accept. It is essential you know how to make any change legally binding and how to minimise disruption.

The pitfalls

An employment contract can only be amended in accordance with its terms or by mutual consent. You cannot change an employment contract unilaterally, and simply changing the employment contract without consent could result in either breach of contract and/or a repudiatory breach.

Damaged relations and bad publicity are also potential outcomes and, if a loss of pay occurs, the employee may bring an 'unlawful deduction from wages' claim.

Not all changes require an employment contract to be amended. Some changes may occur in practice as opposed to the physical amendment of the contract. In other cases, the contract will already allow for the proposed change.

Contractual right to vary?

If the proposed change affects the existing terms of the contract, you will not need to amend the contract if:

- the existing terms are sufficiently broad to accommodate your proposals;

- there is a specific right for you to vary the contract in this way; or
- the contract gives you a general power to vary its terms.

THE RISKS: any ambiguity in the terms of the contract will be construed against you. Any specific flexibility clauses will be given a restrictive interpretation by the courts and may be limited by an implied term, for example, an obligation to exercise the clause reasonably.

THE REALITY: by and large, general flexibility clauses can only be used to make reasonable or minor administrative amendments, which are not detrimental to an employee.

THE ALTERNATIVES: If your proposals involve altering the existing contract, but you have no contractual right to do so, you could:

1. get express agreement to the new terms (either from the employee or through a binding collective agreement);
2. terminate the existing contract and offer continued employment on the new terms; or
3. unilaterally impose the change and use the employee's conduct to establish their implied agreement to the new terms.

The risks of unilaterally imposing a change

If you impose a contractual change without the employee's express or implied consent, **you will be in breach of contract**, and the original terms of the contract will remain in place. The employee can respond to the breach in one of the following ways:

1. work under the new terms in protest whilst bringing a claim for breach of contract or unlawful wage deductions (known as 'standing and suing');
2. in respect of a fundamental breach (i.e. that it goes to the root of the contract), employees can resign and bring a claim for constructive dismissal;
3. where possible, i.e. when there has been a change in duties or working hours, employees can refuse to work under the new terms; or
4. do none of the above and accept the change.

If you provide a new contract to an employee, and they do not sign and return it, the question arises as to whether the employee is bound by the new contract. The burden will be on you to show an "unequivocal act implying acceptance". The test of whether the employee has impliedly accepted, is an objective one and depends on the employee's conduct, rather than his intentions.

C for consideration

Any agreement that varies the terms of an existing contract must be:

1. supported by consideration (see below); and/or
2. executed as a deed.

Consideration is where the variation can either benefit or prejudice a party. For instance, if you are varying an employment contract, consideration could constitute a pay rise, bonus payment, promotion or continuous employment (except in the case of economic duress or fraud). Performance of an existing duty may provide consideration if it offers a practical commercial benefit, such as saving time or inconvenience.

The issue of consideration becomes more problematic when the proposed change will not take effect until sometime in the future. Changes of this type often relate to termination, for example, notice periods and restrictive covenants. In these cases, it may be more difficult to rely on the concept of continued employment as consideration for the change.

ADOPT A CAUTIOUS APPROACH: allot some form of consideration to any change, for example, expressly tying the change into an annual pay rise.

IN PRACTICE: many employers document their permitted variations by deed, or by referring to the payment of a small sum (a 'peppercorn') by way of consideration. These methods attempt to alleviate the risk of disputes over whether valid consideration was, or had to be, given for the variation.

Practical considerations

In reality you are undertaking a selling exercise and should always look for ways to 'sell' the proposed change to your employees, even if it is to their detriment. You should bear in mind the following points when communicating a proposed change:

Is the change necessary? Often, the answer will be a resounding yes, due to the financial position of the company. If the alternative to the suggestion is a more formal restructuring (resulting in job losses), you should make your employees aware of this. That way, they are more likely to view the change as the lesser of two evils.

Can staff be offered any incentive to help them accept the change? Offering an additional benefit in return for a detrimental change is often an effective way of securing agreement. This does not have to be financial. You should consider other innovative benefits to induce staff to agree to the proposed change.

Does all of the change have to be implemented at once? It is possible to make some changes over time or put in place transitional arrangements. This may make the ultimate change easier, particularly as employees often find the timing of a change more disconcerting than the change itself.

The timing of a proposed change. You should consider linking the introduction of a change to something beneficial, which will happen to employees at a certain time. For example, it may be easier to introduce a change to a contractual commission structure at the same time as annual salary reviews. The salary increase could be presented as a trade-off for a less favourable change in the commission structure.

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