

Changing Employment Terms

A Brief Guide

Expert knowledge means success

Contents

1. Introduction
1. Does the employment contract need amendment?
3. How to change the contract
4. Further Information

Note: This publication has not been updated since it was last published. Some of the hyperlinks may have changed and may need updating. In addition, some of the information in this publication may be out of date.

Introduction

It's generally easy to change employment terms that are beneficial to employees such as an increase in pay or provision of a car allowance, but what if you want to change terms that are less acceptable to an employee, for example a pay cut?

Firstly, you need to determine whether the change affects the employment contract, and if so, how to make a legally binding change.

Business Link¹, at www.businesslink.gov.uk/bdotg/action/layer?topicId=1074003264 provide a useful checklist.

You should make sure you:

- Familiarise yourself thoroughly with the details of any existing contracts before considering what alterations you want to make;
- Consult your staff about any changes you wish to introduce and include their trade union or other elected representatives. Simply imposing changes could mean a claim by employees for damages in a civil court, employment tribunal, or a constructive dismissal claim before an employment tribunal;
- Discuss any changes with your staff in a thorough and detailed way, fully explaining the reasons for any planned alteration and take into consideration the impact of the proposed changes in individual circumstances;
- Try, if agreement cannot be reached with an employee on changes, to negotiate a new contract;
- Put as much in writing as possible.

Does the employment contract need amendment?

A contract is a legally binding agreement between you and your employee, which is formed when the employee agrees to work for you for pay.

A change of terms will not require a change to the contract of employment where the change is simply a change in practice or where:

- the existing contract allows the employer to change its terms;
- the existing contractual terms are flexible enough to allow the proposed change without change (for example, a clause which requires an employee to carry out a range of duties);
- the employer has a specific right to change the contract in this way.

However, the above options are not without problems and should only be used to make minor and reasonable changes to the terms that are beneficial to the employee. Specific flexibility clauses may be limited by implied terms (such as the obligation on the employer to act reasonably) and will be given a restrictive interpretation by a tribunal. Note that where flexibility clauses are open to interpretation, this interpretation will favour the employee.

If it is determined that the contract does need amending, then this can only be done with the employee's agreement or within the scope of the existing terms which must be scrutinised.

The "contract" is made up of both oral and written agreements and may include:

- Express terms which are terms explicitly agreed between the employer and employee;
- Implied terms which may include:
 - terms that are too obvious to mention (e.g. that the employee will not steal from the employer);
 - those necessary to make the contract workable (e.g. that a person employed as a driver must have a current driving licence) - though it is often better to write down such terms in any case; and
 - those that are the custom and practice of the business or industry;
- Terms incorporated into individual contracts by reference to other documents, such as company handbooks or collective agreements with trade unions;
- Terms imposed by law (e.g. the right not to be discriminated against on grounds of race or sex).



Changing employment terms on the transfer of an undertaking

Legal advice should be sought where an employer proposes to change the terms of a contract as part of a transfer of an undertaking.

If it can be shown that the sole or principal reason for the change the transfer itself or a reason connected with a transfer which is not an economic, technical or organisational reason entailing changes in the workforce then the change will be void.

Non-contractual benefits and "policies" do not form part of the contractual terms. Altering non-contractual terms can also lead to discrimination claims and claims of breach of the implied duty of mutual trust and confidence. Note that just stating that a term is non-contractual does not make it so. If in doubt, seek legal advice.

How to change the contract

Where the change in terms does require the existing contract to be changed and the existing contract does not allow for this, the employer may consider the following options. Note that the employer must also provide the employee with a written statement of any changes to terms.

Express agreement

The employer can seek express agreement for the change in terms from the employee (or where appropriate through a binding collective agreement with a trade union or other collective body). Legally, the employee may agree to the employer's proposals orally although it is safer to get written agreement. The employee must receive a consideration in return for the change in terms for the contractual amendment to be considered binding. In some cases, where the change has immediate effect, the employee's continued employment can qualify as the consideration.

Implied agreement

Where the change has an immediate impact on the employee, the employer could consider introducing the change and hoping that the employee does not object so that their implied agreement to the new terms can be established. However, even if an employee continues to work without objection that does not guarantee implied agreement - particularly if the impact of the change of terms is delayed.

Such an imposed change of terms is a breach of contract and the employee may respond by:

- refusing to work under the new terms;
- resigning and bringing a constructive dismissal claim against the employer; or
- "standing and suing", where the employee works "under protest" and brings a breach of contract claim or in the case of a pay cut a claim for unlawful deductions from wages.

Termination and re-engagement

An employer may choose to terminate the existing contract and offer continued employment under the new, varied terms. In this case, the employer must comply with the statutory dismissal and disciplinary procedures for the dismissal not to be automatically unfair.

Again, this strategy is not without risk and the employee may respond by:

- bringing a claim for unfair dismissal, unless the employer can establish a potentially fair reason for dismissal and show that it acted reasonably in dismissing the employee for failure to agree to the change.
- Bringing a claim for wrongful dismissal unless the employer gives the appropriate period of notice (or makes a payment in lieu of notice).

Note that where the employer terminates the contracts of all employees "of a description or in a category to which the employee belongs" and then re-engages the employees then the statutory dismissal and disciplinary procedures may not apply. However, if the proposed change singles out a particular group of employees (for example older employees), then this could give rise to a claim of indirect discrimination.

In addition, where the collective consultation obligations apply then the statutory dismissal and disciplinary procedures may not apply. Where this approach is used to terminate the contracts of multiple employees the dismissals may be considered as redundancies for certain purposes. If 20 or more employees are affected the employer must notify the Secretary of State and comply with the statutory collective consultation obligations.

The employer will be required to inform and consult its employees in the following circumstances:

- where the employer proposes to change the terms by terminating the contracts of 20 or more employees;
- where there is a recognised trade union and the proposed change of terms may be subject to collective bargaining with trade union representatives.
- where The Information and Consultation of Employees Regulations 2004 apply and there is an information and consultation agreement in place. The employer may have to inform and consult employees on "changes in contractual relations" unless the

Employment Act 2008 abolishes statutory dismissal and grievance procedures

The 2004 statutory dismissal and grievance procedures have not proved popular with employers and are viewed as being complex and time consuming.

The Employment Act 2008 received Royal Assent on 13 November 2008 and became operational as from 6 April 2009. The Act repealed the then current dispute resolution procedures amongst other measures.

The Act made changes to the law relating to dispute resolution in the workplace. In particular, it:

- repealed the existing statutory dispute resolution procedures and related provisions about procedural unfairness in dismissal cases;
- conferred on employment tribunals discretionary powers to amend awards if parties have failed to comply with a relevant statutory code;
- made changes to the law relating to conciliation by Acas;
- amended tribunals' powers by which they may reach a determination without a hearing; and
- allowed tribunals to award compensation for financial loss in certain types of monetary claim.

The Act is available online at:
<http://www.legislation.gov.uk/ukpga/2008/24/contents>

changes are to pay or other monetary benefits.

- where the change to terms affect the pension scheme. The employer may have to consult under an information and consultation agreement (where one is in place) or comply with consultation obligations laid down in the Pensions Act 2004.

Further Information

For a more detailed guide to employment contracts see our publication:

[312 – Contracts of Employment](#)

This guide is for general interest - it is always essential to take advice on specific issues.

We believe that the facts are correct as at the date of publication, but there may be certain errors and omissions for which we cannot be responsible.

Acknowledgement

¹ © Some material in this publication has been sourced from Business Link and other government websites and Crown copyright therein is duly acknowledged.

Important Notice

© Copyright 2019, Martin Pollins,
All Rights Reserved

This publication is published by **Bizezia Limited**. It is protected by copyright law and reproduction in whole or in part without the publisher's written permission is strictly prohibited. The publisher may be contacted at info@bizezia.com

Some images in this publication are taken from Creative Commons – such images may be subject to copyright. **Creative Commons** is a non-profit organisation that enables the sharing and use of creativity and knowledge through free legal tools.

Articles and information contained herein are published without responsibility by us, the publisher or any contributing author for any loss howsoever occurring as a consequence of any action which you take, or action which you choose not to take, as a result of this publication or any view expressed herein. Whilst it is believed that the information contained in this publication is correct at the time of publication, it is not a substitute for obtaining specific professional advice and no representation or warranty, expressed or implied, is made as to its accuracy or completeness.

The information is relevant within the United Kingdom. These disclaimers and exclusions are governed by and construed in accordance with English Law.

Publication issued or updated on:
31 March 2012

Ref: 673

