



VARYING THE TERMS OF AN EMPLOYMENT CONTRACT

Set out below are some of the main points employers should consider when looking to make changes to an employee's terms of employment. When contemplating a variation, each case will need to be considered on its own facts. **This information sheet does not constitute legal advice. Should you be unsure as to your rights or obligations you should seek expert advice at the earliest opportunity.**

Is the change authorised by the Contract of Employment?

In some circumstances the contract may in fact allow for the employer to make the necessary change, in which case a formal variation of contract is not required. e.g. mobility clauses regarding the employee's location of work. However, even if the change is authorised by the contract, the employer still owes the implied term of trust and confidence to the employee, they should therefore ensure they continue to act reasonably and provide the employee with reasonable notice of the changes that will impact them.

You must also be sure to check any contractual requirements particularly with regard any notice periods that must be given or any provisions that relate to varying the terms and ensure these are complied with.

Changes not authorised by the Contract of Employment

If the change is not authorised under the contract, a variation of the contract is required.

Consideration

To satisfactorily vary a contract there must be some consideration provided to the employee. This may easily be addressed if the employee is receiving some new benefit under the varied terms, in which case the benefit will be the consideration. If the varied terms have an immediate practical effect such as change of working hours or pay the consideration could be the employee's continued employment. However, if the change will not have effect

immediately e.g. change of a notice period you will need to assess carefully what, if any, consideration is being given.

How to implement the variation

There are a number of options which you can consider when seeking to implement a variation:

Gain the employee's consent (either express or implied)

Unsurprisingly this is the most satisfactory outcome. Express consent can be obtained either in writing or verbally. Whilst a verbal agreement is sufficient to vary the terms, you should always seek to obtain signed confirmation from the employee that the varied terms are accepted.

Implied consent can be obtained by the employee continuing to work within the terms of the varied contract without raising objection to the new terms. In these cases the employee's silence can be deemed acceptance of the varied terms.

The longer an employee delays in raising an objection the more likely it is the terms will be deemed accepted. Employers must however still be careful as if the varied term does not have an immediate practical effect e.g. a varied notice period, it could be argued that their silence and continued work does not demonstrate agreement to the varied term.

Unilaterally impose the variation on employees

Whilst you could simply impose the varied terms upon the employees with no consent from them, this route opens up potential claims by employees for breach of contract or constructive dismissal. This is therefore not an advisable approach.

Seek to terminate the current contracts and offer re-engagement on new terms.

If you are unable to gain the employee's consent and it is unworkable for the contracts to go unchanged you may have to consider dismissing the employee. In doing so you must be sure to comply with the relevant contractual and statutory notice requirements to avoid a claim for wrongful dismissal. You must also ensure that your actions are reasonable and the dismissal is for one of the permitted "fair reasons".

In such circumstances this will usually be a dismissal for "some other substantial reason", under this heading a sound business reason may be deemed sufficient to defeat a claim for unfair dismissal, although sometimes "redundancy" is also pleaded.

If following this route you should you consult with the employee, provide them with written notice of potential termination and follow a fair and reasonable procedure regarding the dismissal itself.

Consultation

When varying terms under whichever method, it is good practice to consult with the employee. Through consultation you may be able to obtain their express consent to the variation. If not, you can lay down the groundwork for later dismissals. When considering the fairness of a dismissal in such circumstances Courts will take account of (among other things) any warnings or notice given to the employee; your motive in seeking the changes; and whether the changes were clearly explained to the employee and thoroughly reviewed. It may be that during consultation the employee would consent if the changes were implemented incrementally, which may then be something you wish to consider.

Collective Agreements

Where a variation of terms has been negotiated by a trade union or other employee representative body this may be sufficient to amend each individual employment contract. This is provided that the representative has acted as the employee's agent in negotiating the change or where the collective agreement reflecting the amendment has been expressly or impliedly incorporated into the individuals contract. e.g. where the individual contract terms include an express provision giving effect to the results of collective bargaining or such a term is implied through custom or practice.

In circumstances where there is a trade union or employee representative body there will be further consultation considerations with which the employer should comply e.g. triggering a duty for collective consultation if considering dismissing for redundancy 20 or more employees at one establishment within a period of 90 days or less. You should seek advice if unsure of your obligations.

The variation of contracts is something that must be seriously considered by employers and any correspondence or consultation on it should be well documented. If you are uncertain as to how to proceed you should seek specialist advice at the earliest opportunity.

Please note that there are additional provisions in place that affect the variation of contract terms where there has been a transfer of undertaking. These are outside the scope of this factsheet.

For more information on varying terms of contracts, or any other legal matter for your business please visit www.crane-staples.co.uk Alternatively contact Michael Scutt or Nicola Shepherd on 01707 329333.