

# Advice leaflet - Varying a contract of employment

Changes occur in working relationships for all kinds of reasons but problems can be avoided or resolved through discussion, with agreed changes being recorded in writing.

This leaflet is intended to give general guidance about the main legal considerations which may arise when employers or employees wish to change (or amend) the terms of a contract of employment between them. It is not an authoritative statement of the law; determining the law is a matter for the tribunals and the courts. Although every effort has been made to ensure that the information contained in the leaflet is accurate, the varying of contractual terms is a complex legal matter and it is advisable to seek independent legal advice.

## What is a contract of employment?

A contract is an agreement between two parties enforceable by law. A contract of employment is a contract of service and comes into being when an employee agrees to work for an employer in return for pay.

## What are contract terms?

- The terms of the contract are the rights and obligations which bind the parties to the contract.
- The terms of a contract can be express (those which are explicitly agreed between the parties, either in writing or orally) or implied (those which have not been spelled out but which would be taken by the parties to form part of the contract).
- Terms are implied, for instance, because they are:
  - too obvious to mention or because the parties assumed they would be incorporated at the time the contract was entered into (eg: that the employee will not steal from the employer or that the employer will provide a safe working environment)
  - necessary to make the contract workable (eg: that an employee employed as a driver will hold a valid current driving licence)
  - the custom and practice of the business or industry, ie: where a custom or practice has been adopted over a period of time.
- Express terms may be established by referring to various sources, particularly the written statement of terms and conditions (to which most employees are entitled under the Employment Rights Act 1996), the letter of appointment and written or oral statements made by the employer and accepted by the employee. Express terms may also be incorporated into individual contracts by reference to other documents, such as collective agreements and company handbooks.

- Statutory terms are those implied or imposed by an Act of Parliament or Statutory Instrument, eg: the imposition of an equality clause into an employee's contract and the entitlement to be paid the national minimum wage or given a minimum period of notice. Agreements to contract out of statutory terms are normally void under the law.(1)

### **Why would employers or employees want to vary a contract?**

- An employer may wish to vary the terms of the contract because of changed economic circumstances or due to a reorganisation of the business. Possible areas of change could include pay rates, hours or days worked, duties, supervisory relationships or place of work.
- An employee may seek to vary the contract to bring about improvements in pay or working conditions, for instance by requesting additional holidays, or to change the conditions so that they suit him or her better, eg: by requesting a change from full-time to part-time working because of domestic responsibilities.

### **How can contracts be varied?**

- An existing contract of employment can be varied only with the agreement of both parties. Changes may be agreed on an individual basis or through a collective agreement (ie: agreement between employer and employee or their representatives).
- An employer who is proposing to change an employee's contract of employment should fully consult with that employee or his or her representative(s) and explain and discuss any reasons for change.
- Variations of contract can be agreed verbally or in writing. It is preferable for any agreed changes to be recorded in writing.
- Where a variation in the contract has been agreed and the changes concern particulars which must be included in the written statement of terms and conditions, the employer should give written notification of the change to the employee, within a month of the change taking effect.

### **In what circumstances can an existing contract authorise changes in the employee's working conditions?**

- A contract may contain express terms which allow an employer to make changes in working conditions. Through flexibility clauses, for example, an employer may expressly reserve the right to alter the employee's duties. The contract may therefore be drafted to permit reasonable changes to be made within the terms of the existing agreement.
- Sometimes tribunals and courts may consider that the contract contains implied terms which may authorise or prevent alterations of working conditions. For instance, it would be usual for an employee to be expected to work within reasonable daily travelling distance of his or her home.

### **How can an individual contract be varied by a collective agreement?**

- A contract of employment is in law an agreement between an employer and an individual employee. Any variations in the contract need that individual's agreement.
- However, an employer and employee can agree, either expressly through a clause or reference in the employee's contract, or through an implied term, that relevant changes in terms and conditions negotiated by a trade union(s) are incorporated into individual employees' contracts. This may be the case whether or not the employee is a member of the relevant trade union(s).

### **What happens when an employer varies a contract without the agreement of the employee?**

- If an employer imposes changes in contractual terms without the agreement of the employee, there will be a breach of contract.

### **What could an employee do in these circumstances?**

- The employee can accept the breach and continue to work under the amended contract. Where an employee continues to work under revised terms without objection, then in due course he or she may be regarded as having agreed to the changes.
- Where an imposed change involves a significant change to the contract, eg: a reduction in pay or alteration of working hours, an employer may well be acting in fundamental breach of contract. Where there is a fundamental breach, the employee may treat the breach as bringing the contract to an end and leave the job. In such circumstances and subject to having the necessary qualifying service, the employee will have the opportunity to make a claim of constructive dismissal before an employment tribunal. In coming to a decision the tribunal will take into account whether the employer acted reasonably in all the circumstances of the case.
- Alternatively, the employee may continue to work within the varied contract but under protest, making it clear that he or she does not accept the terms and is treating the change as a breach of contract and dismissal from the original contract. In these circumstances the employee will retain the right to seek damages from the employer for a breach of contract and/or a declaration from the courts that the employer must abide by the original terms. Subject to having the necessary qualifying service, the employee may also have the opportunity to make a claim for unfair dismissal before a tribunal. The tribunal, in the first instance, will have to decide whether the new terms are so substantially different as to be an entirely new contract and not a variation of the old one.
- Whether or not the breach is a fundamental one, the employee may sue for damages for breach of contract in the civil courts; or if the employment has terminated, the claim can be made to an employment tribunal, which can award damages limited to a maximum of £25,000.

## **Is there an alternative method of making contractual changes if agreement on a variation cannot be reached?**

- Yes. If, after negotiation, agreement on a variation of contract has proved to be impossible, an employer can – having followed the statutory dispute resolution procedures, where they apply, and observed any relevant procedural agreements - terminate the original contract, with proper notice, and offer a new contract to the employee, including the revised terms. There will be no breach of contract as a result of taking such action. If the employee accepts the new contract, continuity is preserved.
- Proper notice will be as specified (or implied) in the employee's contract, or the minimum statutory notice period, whichever is the longer.
- Under the law the termination will be regarded as a dismissal and it will be open to all eligible employees to claim unfair dismissal before an employment tribunal – whether they refuse to accept the new contract and leave, or are dismissed under the old contract and re-engaged.

From 1 October 2004, a new 3 step procedure for resolving disputes in the work place came into force. Employment tribunals can increase or reduce the compensation by between 10-50% if employers or employees have not fully complied with the statutory procedures. The employer must:

Step 1) Write to the employee to explain the reasons why dismissal is being considered, the time and place for a meeting to discuss the issues, and the fact that the employee has the right to be accompanied,

Step 2) Hold a face to face meeting to discuss the problem. After the meeting the employer must inform the employee of the decision, and of their right to an appeal

Step 3) Hold an appeal meeting, if required.

There are some situations – involving groups of employees – where the statutory procedures do not have to be used (for more details see the Department of Trade and Industry website at [www.dti.gov.uk/employment/index.html](http://www.dti.gov.uk/employment/index.html)).

### **Notes**

(1) Some of the measures in the Working Time Regulations 1998 may be adapted through agreements between workers and employers. For further information, see the free Department of Trade and Industry (DTI) publication *A Guide to Working Time Regulations* which can be obtained by telephoning the DTI on **0845 6000 925** or visit the DTI website for information on [The Working Time Regulations](#).

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