How to change the terms of existing employment contracts

Employers may wish to change employees’ terms and conditions of employment for a number of reasons. For example, it might be necessary to reduce pay or levels of benefits to cut costs, or to change employees’ duties to reflect the fact that the employer’s business has moved on. However, varying employment contracts can be problematic, particularly in the face of opposition from employees.

This XpertHR “how to” guide explores how employers can achieve their goal of changing employees’ terms and conditions of employment while minimising legal risk.

The guide covers:

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How to change the terms of existing employment contracts

Introduction
Employers may wish to change employees’ terms and conditions of employment for a number of reasons. For example, it might be necessary to reduce pay or levels of benefits to cut costs, or to change employees’ duties to reflect the fact that the employer’s business has moved on.

No matter how valid or important the reasons for the change might be, varying employment contracts can be problematic, particularly in the face of opposition from employees. Where the change is clearly beneficial to the employees, the variation of contract is unlikely to result in any challenge from them, but the employer should still understand the legal implications of varying contracts. This guide explores how employers can achieve their goal while minimising legal risk.

The reasons for the change
The employer should give careful thought to the reasons for the change. When varying contractual provisions, it is important that the employer satisfy itself that it has a genuine business reason for doing so. Being able to demonstrate to staff why the change is necessary can help achieve “buy-in” from employees and their agreement to the change. Further, if the employer decides to dismiss and re-engage employees to achieve the variation (see Dismissal and re-engagement), if challenged by an employee, it will have to rely on the “some other substantial reason” defence to show that the dismissal was fair. To do this, it will need to show that it had a genuine business reason for imposing the change, and that it acted reasonably in dismissing the employee.

Timing considerations
The timing of the process could be one of the employer’s most crucial considerations, depending on how urgently the change needs to be implemented. How long it will take to achieve the variation of the employees’ contracts will depend on the nature of the changes proposed and how cooperative the employees are. Employers should not expect to be able to complete the process within a short timescale, except in relation to the most straightforward and uncontroversial of changes. Even then, some form of genuine consultation and communication should take place.

A period of formal collective consultation will be required if 20 or more employees do not agree to the change and the employer decides that it is necessary to take the option of dismissing and re-engaging them to achieve a variation of their contractual terms (see Collective consultation). The employer should factor this into its timetable. Beginning collective consultation at an early stage in the process, while attempting to obtain the employees’ agreement to the change, can save time if dismissal and re-engagement becomes necessary.

The risk of discrimination
Employers should consider the potential “knock-on” effects of contractual changes, such as risks arising under discrimination or equal pay legislation. For example, changing working hours or shift patterns could constitute indirect sex discrimination if it makes it more difficult for employees with childcare responsibilities to attend work, as this is likely to affect a greater number of female employees. The employer should consider alternative, non-discriminatory, options if it identifies a risk of indirect discrimination and should go ahead with the variation only if it is satisfied that it can be justified.

TUPE considerations
Employers should check the history of the employees’ employment. If employees have
transferred to the employer under TUPE, their terms and conditions will be protected to some extent. Broadly speaking, the terms and conditions of transferring employees can be changed only where the transfer is not the reason for the change or where the change is for an economic, technical or organisational reason that involves changes in the workforce (i.e., changes in the number or functions of employees or the location of the workforce). There is no particular point beyond which the connection to the transfer will be "broken" although the further away from the transfer that the changes are made, the stronger the argument that the transfer is not the reason for the change may become. Employees may also become less likely to take the point and bring a claim.

The TUPE Regulations are amended from 31 January 2014 to allow employers to make a variation to employees' terms and conditions that would otherwise be void under TUPE, where there is a contractual clause that authorises the variation, e.g., a mobility clause. The amendment applies in relation to transfers that take place on or after 31 January 2014 and where the purported variation is agreed, or starts to have effect, on or after that date. The employer must still follow the required procedure to achieve the variation. However, there is a question over whether or not this provision complies with the Acquired Rights Directive (2001/23/EC), which the TUPE Regulations are intended to implement. A variation that is allowed by the contract but which is nevertheless made because of the transfer could be open to challenge, ultimately at the European Court of Justice.

Can the employer make the change unilaterally?

Varying employees' terms and conditions unilaterally can be extremely risky. Other than in cases involving changes that are clearly non-contractual or where a flexibility clause applies (see Operating a contractual clause that authorises the change), employers should think very carefully before taking such a step. Even in these two cases, the employer will need to consult on the changes with the affected employees, to reduce the risk of a constructive unfair dismissal claim.

Essentially, the risk in this approach lies in its uncertainty. If the employer attempts to vary the employment contract unilaterally, the employees can do one of three things: "stand and sue" (i.e., remain in employment and bring a claim against the employer); resign and claim constructive unfair dismissal; or waive the breach of contract.

"Stand and sue"

There are two claims that employees may be able to bring if they stand and sue. The first, and most common, is for breach of contract, where the employees seek to recover damages from the employer, while continuing to work under protest. This will be an option only where the employee has a monetary claim.

The employee needs to point to a clear breach of contract (i.e., the imposition of new terms), but does not need to demonstrate that the breach is a fundamental one. The business reasons why the employer has made the change to the contract, and the fact that it may have acted reasonably, do not come into the equation and are no defence to a breach of contract claim. Those arguments are relevant only in defending an unfair dismissal claim.

The second claim that employees may be able to bring when standing and suing is an unfair dismissal claim, provided that they can show that the variation of the contract constitutes a fundamental breach. Many employers find this surprising, as, of course, the individual concerned will continue to be employed. However, the effect of a fundamental breach will be to terminate the old contract. This means that a dismissal will have taken place, notwithstanding the fact that the employee has continued to work for the employer under a new contract.

Leave and sue for constructive unfair dismissal

If the unilateral variation is sufficiently fundamental, the employee will be entitled to resign and claim that he or she has been constructively unfairly dismissed.
Waive the breach of contract

If employees do not take action promptly after having been made aware of the unilateral variation, they may be taken to have waived the breach of contract. The employer should notify employees of any variation to their contract in good time. There is no set time period after which the breach is deemed to have been waived. If employees waive the breach, they will be deemed to have accepted the new contractual terms.

Operating a contractual clause that authorises the change

Some contracts of employment have express clauses that allow the employer to make specific changes to certain terms and conditions. These commonly provide for changes to the employee's place of work, job content and hours of work. For example, a contract may provide that, in addition to the duties contained within the specific job description, the employee will be required to carry out other duties within his or her capabilities as the needs of the business require. Alternatively, a contract may provide the employer with a general power to vary any of its terms.

Even where there is a clause that appears to give the employer the power to change the contract, the employer should approach it with caution because such clauses tend to be interpreted restrictively by the courts and implied terms in the contract may limit the effect of the clause. The employer should:

- check that the flexibility clause covers the specific change that is proposed;
- consult on the change with affected employees; and
- ensure that it acts reasonably when operating the clause.

As part of the consultation exercise, the employer should attempt to obtain employees' express consent to the variation (see Obtaining express agreement to the change) as this will remove the risk of claims that the clause does not allow the change or that the employer has acted unreasonably.

General flexibility clauses that appear to allow the employer to change anything at any time are unlikely to be effective except for minor changes, or for changes where there is no practical effect for the employee, for example changing a benefits provider where the benefit provided remains the same.

Flexibility clauses that relate to a specific provision of the contract are more likely to be successful, provided that the wording of the clause is clear. However, even then, the employer must ensure that the change that it is making is covered by the clause. For example, in National Semiconductor (UK) Ltd v Church & Ors EAT/252/97, a number of employees were employed to work 25 hours exclusively at weekends. Their contracts contained provisions stating: “although you are employed in the shift/position quoted, production requirements may change from time to time and it is a condition of employment that you should be able, with due notice, to change to other shift/positions”. The employer sought to rely on this clause when it changed the employees' working hours so that they worked 42 hours a week, throughout the week. The Employment Appeal Tribunal (EAT) held that this was a breach of contract. The flexibility clause allowed the employer only to re-arrange the hours that the employees worked, not increase the number.

Even with a clear flexibility clause that allows the change, the employer will need to consider the limiting effects of implied terms. The leading case on this point is United Bank v Akhtar [1989] IRLR 507 EAT, which also provides a degree of practical guidance for employers. In this case, the employer sought to rely on a mobility clause in Mr Akhtar's contract, which allowed it to instruct him to transfer from the company headquarters in Leeds to a branch in Birmingham. The employer gave just six days' notice of the transfer and decided not to exercise the discretion in the contract to provide Mr Akhtar with relocation expenses. Although the EAT emphasised the fact that express terms in the contract should be limited by implied terms only where it is necessary, and not simply reasonable, it decided that the employer had breached three implied terms that were necessary. The implied terms were that the employer:

- should have given reasonable notice of the transfer;
- would not exercise its discretion not to provide relocation expenses so as to make
performance of the employee's obligations impossible; and
would not generally act in such a way as to undermine the implied duty of mutual trust and
confidence.

It is important to note that, as the wording of the relevant clause was clear and unambiguous,
the employer would have been able to rely on it, had it acted differently. The employer fell
down because the way that it exercised its power under the clause was so unreasonable as to
undermine the implied duty of mutual trust and confidence.

Carrying out a genuine consultation exercise will help the employer to demonstrate that it
has acted reasonably in operating the variation clause. In Bateman and others v Asda Stores
Ltd [2010] IRLR 370 EAT, the employer was successful in arguing that it was entitled to change
its employees' pay arrangements, relying on a contractual clause that stated: “The company
reserves the right to review, revise, amend or replace the content of [the staff] handbook, and
introduce new policies from time to time.” The EAT held that the employer had not acted in
a way that breached its implied contractual duty not to destroy the relationship of trust and
confidence with its employees. It was important that the employer had engaged in extensive
consultation with the employees before imposing the variation.

Obtaining express agreement to the change

Obtaining express agreement to the change, either individually or through collective
consultation, is normally the safest option open to employers, although, unless the change
is clearly beneficial to the employees, it may not be the most straightforward. While the
employees' verbal consent to the change will be sufficient, the employer should obtain
consent in writing wherever possible, to avoid uncertainty and potential disputes. This can be
quite a task, particularly in large organisations, but with good communication on the reasons
for the change, employees will often respond positively when asked for their consent in
writing.

If employees do not respond to the employer's request for their consent to a variation,
whether or not it can take their silence as consent will depend on the nature of the change.
If the change has an immediate effect, for example changes to pay, it will be difficult for
employees to show that they have not accepted the change if they do not object within a
relatively short period of time. This will, however, always depend on the facts of the case.
If the change has no immediate impact, for example the imposition of a mobility clause or
restrictive covenants, it will be much harder for the employer to establish the employees’
agreement through silence.

Communication and individual consultation

Communication with employees is key to obtaining their consent to the variation. In some
circumstances, a statutory requirement to consult collectively will apply (see Collective
consultation). Regardless of whether or not collective consultation is required, the employer
should carry out some form of communication exercise with the affected employees to try to
obtain their agreement to the change.

The employer should inform the employees of the reasons for the change and the proposed
date for implementation in good time. It should also set out the possible effects of the change
and seek employees' feedback. As with any consultation exercise, the employer should
consider ways of reducing or avoiding any negative effects of the change.

Employers may have to try a combination of highlighting the negative consequences of
not making the change and offering incentives to persuade staff to agree, particularly
if the changes are detrimental. An incentive does not need to be a financial advantage;
it could be any measure that is beneficial to the employees, for example a revised shift
pattern. If the contract variations are necessary for financial reasons and the alternative
may be redundancies, the employer should explain this to the employees and seek to reach
agreement on the changes to avoid or reduce the need to make employees redundant.

The employer should inform the affected employees that, if it cannot reach agreement with
them on the changes, it may need to go through a formal dismissal and re-engagement
process.
The employer should consider whether or not it is appropriate to offer any assistance to employees to help them adjust to the change, for example by phasing changes in gradually or by offering temporary assistance with travel costs to employees whose place of work has changed.

As well as a communication exercise with the affected employees as a whole, the employer should consider holding individual consultation meetings with employees. Individual meetings are an opportunity for the employer to discuss with the employee any reasons for objecting to the change and explore whether or not there is anything that can be done on an individual level to obtain his or her agreement. For example, if the proposed variation is an increase to the employee's working hours, he or she may agree to it on the condition that he or she can work from home on certain days.

Collective bargaining
If the employer recognises a trade union, it should attempt to negotiate the contractual change under the terms of the collective bargaining agreement. Provided that the relevant agreement is incorporated into the employees' contracts this can be a useful way of obtaining agreement to changes without needing to go out to the whole workforce. This is because employees will be bound by terms negotiated under a properly incorporated collective bargaining agreement, regardless of whether or not they are members of the recognised union. The employer should consult with the recognised union under the agreement, setting out the reasons for the change and the potential consequences of not making it.

Implementing the variation
To implement the variation, with the consent of the employees or by exercising power under a flexibility clause in their contracts, the employer should send each employee a letter setting out the changes to his or her terms and conditions and when they will take effect. The letter should request that the employee confirm that he or she acknowledges and understands the change by signing a copy of the letter and returning it to the employer.

If changes are made to any of the employment particulars that must be included in the employees' written statement of terms and conditions (under s.1 of the Employment Rights Act 1996), the employer must confirm the changes in writing to the employees within one month of the changes becoming effective. Failure to do this can lead to the employer being liable for either two or four weeks' pay (subject to the statutory cap on a week's pay), provided that the employee also brings a substantive claim (eg unfair or wrongful dismissal) before the tribunal.

Dismissal and re-engagement
If employees refuse to consent to a variation and there is no clear flexibility clause in their contracts, an employer that wishes to go ahead with the variation has the option of dismissing and re-engaging the employees. To do this, the employer issues the employees with a new contract of employment, which they must sign to indicate acceptance of the new terms, and at the same time gives them notice of termination of their old contract of employment. This should happen only after a proper process of consultation has taken place. Each employee has the choice of staying with the employer on the new terms, after the expiry of the old contract, or leaving on its expiry. In either case the employee can bring an unfair dismissal claim, if he or she has the required service. The prospect of dismissal and re-engagement is often effective, as many employees will accept the variation rather than leave employment.

To defend an unfair dismissal claim, the employer would have to rely on "some other substantial reason", which is a potentially fair reason for dismissal under the Employment Rights Act 1996. In determining whether or not the dismissal was fair, the tribunal would examine, first, the reasons for the changes and, second, whether or not the employer adopted a fair procedure in implementing those changes. The employer must be able to show that it
has a genuine business reason for making the variation to employees’ contracts. This means that it must be able to point to some practical advantage, but there is no need to prove a financial gain.

**Collective consultation**

Employers should be aware that it may be necessary to consult collectively with employees in relation to a variation of contract. This is because the definition of redundancy under s.195 of the Trade Union and Labour Relations (Consolidation) Act 1992 is “dismissal for a reason not related to the individual concerned”. Where an employer is proposing to dismiss staff to introduce changes to employment terms, this will qualify as a redundancy dismissal for the purpose of collective consultation. It is not, however, a redundancy for the purpose of qualifying for a statutory redundancy payment, since that definition is much narrower.

There will still be a dismissal for these purposes if employees are immediately re-hired under a new contract, as it is the ending of the particular contract that counts, rather than the employment of the individual employee.

The collective consultation obligation applies if the employer is proposing to dismiss 20 or more employees over any 90-day period. The duty to inform the Secretary of State of the proposed redundancies also applies in these circumstances. The consultation with appropriate employee representatives must begin “in good time” and at least 30 days before the first termination, or 45 days if 100 or more staff are being dismissed (where the proposal to make redundancies was made prior to 6 April 2013, the minimum consultation period is 90 days if 100 or more staff are being dismissed). Where the employer recognises an independent trade union in respect of the affected employees, the appropriate representatives will be trade union representatives. Where there is no recognised union, it may be necessary for the employer to hold elections for employee representatives (see [How to arrange the election of employee representatives for collective redundancy consultation purposes](#)). The penalty for a failure to consult collectively is a protective award of up to 90 days’ pay for each affected employee.

The collective consultation process can run alongside the process of individual consultation with affected employees in an attempt to obtain their consent to the change. If the employer begins formal collective consultation only when it is clear that 20 or more employees will not agree to the variation, it will extend the time before it can issue notices of dismissal to those employees and therefore the time that it takes to achieve the variation.

**Individual consultation on dismissal**

An employer that is proposing to dismiss and re-engage employees must ensure that it follows a fair procedure in carrying out any dismissals. Although the matter does not concern discipline, compliance with the principles of the “Acas code of practice on disciplinary and grievance procedures” will assist the employer in ensuring procedural fairness. Therefore, the employer should hold individual meetings with each objecting employee and offer him or her the same safeguards during the process as he or she would receive under the employer’s disciplinary policy, for example the right to be accompanied, the opportunity to state his or her case at the meeting and the right to appeal the decision.

**Implementing dismissal and re-engagement**

If the employer decides to go ahead with dismissal and re-engagement of employees who do not agree to the variation, it must give them the appropriate period of notice: either the notice required under their contracts or the statutory minimum notice if this is longer. This can cause difficulties for employers as not all employees will have the same notice periods and the desire will normally be to implement the change on the same date for everyone. To deal with this issue, employers can consider making payments in lieu of notice (see [How to make a payment in lieu of notice](#)), although this carries a cost because, in effect, it means paying the employees twice for the same period.

The employer should send each employee his or her written notice of termination, enclosing the offer of re-engagement on the revised terms. The new contract of employment should begin immediately after the expiry of the notice period.
More guidance from XpertHR

How to:

- How to protect against claims of constructive dismissal
- How to avoid falling foul of the law on harmonising contractual terms and conditions following a TUPE transfer

FAQs:

- If a contract of employment contains a flexibility clause, does the employer have to consult with the employee before it implements a variation to his or her terms and conditions?
- Is there any way to change the terms of an employee’s contract if there is no provision for the change in the contract?
- Is it possible to change the terms of a contract by dismissing an employee then re-engaging him or her under different terms?
- Can an employer harmonise the contracts of TUPE transferred employees with those of its existing workforce where the changes will be beneficial to them?

Policies and documents:

- Procedure on varying terms and conditions
- Contract clause providing a ‘blanket’ power to vary the contract
- Letter to an employee in an exercise of a contractual power to vary terms

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