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CHANGING TERMS AND CONDITIONS OF EMPLOYMENT

It is not unusual for employers to want to change their employees' terms and conditions of employment to bring them into line with changes in the law or developments in the sector, just or to make them more user friendly. More recently many employers have considered doing so to save costs in the current economic downturn. For example, by changing shift patterns to reduce the need for overtime, removing benefits that can no longer be afforded, or even reducing rates of pay. It must be remembered that a contract of employment is like any other contract, and generally cannot be varied unilaterally. Also, each employment contract is a unique agreement between the employer and the individual employee. The fact that more than 99% of the staff have agreed to a variation will not make it binding on the one individual who has not. However, there are ways and means by which employers can achieve the desired objective.

Is it a variation at all?

Contracts of employment sometimes do not actually say what everyone thinks they do. Careful inspection often reveals that the employer has greater discretion than he thought to, for example, change shift patterns, pay or withhold bonuses or other benefits, etc. If discretion is exercised regularly and consistently over a lengthy period, it can give rise to a contractual entitlement, but it is always worth checking what latitude you already have before embarking on a potentially controversial exercise.

If it is, is it permitted?

Many contracts contain a provision allowing the employer to vary its terms, sometimes on giving a period of notice. Such clauses can allow you to implement relatively minor changes, which may be sufficient for your purposes, but using them to impose major changes runs the risk of a constructive dismissal claim.

If not, can you gain the staff's agreement?

Ideally, all changes should be by mutual consent, and this may be easier to get now that modifications to terms and conditions can potentially save jobs. If there is a collective bargaining arrangement, it may be possible for consent to be obtained that way, but otherwise it will be a matter of getting each employee to "sign up" to the changes individually.

How do you consult?

The usual starting point would be to explain to the staff why the changes are necessary, explain the business case. Staff would then be given a draft of the new terms and conditions and invited to comment on them within a given timeframe. A revised draft, taking into account any changes as a result of those comments should then be circulated, perhaps with an explanation of why some suggestions were not feasible. It is possible then to ask for further comments, then circulate a further revised draft. You can do so as often as you like, but sooner or later you will have to invite those who agree to the changes to sign the final version and return it to you.

Imposing the new terms and conditions If any employees do not agree, you could try to "talk them round", but you would want to avoid doing separate deals with them when most staff have accepted the new terms.
If all else fails, you might contemplate telling them that with effect from a date in the future they will be deemed to be working under the new terms and conditions. Effectively, this would amount to a breach of contract by you, but if the employee failed to take any action he could be said to have waived the breach and accepted the variation by conduct.

Such action could be an application to the court for an injunction requiring you to honour the old terms and conditions, an application to the employment tribunal for a declaration that they still apply or a claim for an unauthorised deduction from wages if the variation results in a reduction in his pay. The most serious disadvantage to you, however, is uncertainty.

Whether an employee has waived a breach of contract will always depend on the facts; lapse of time is not of itself determinative. It may, therefore, be that which terms and conditions apply remains in limbo indefinitely, particularly if the employee works on after lodging a formal protest and/or the purported change to the terms and conditions does not have any immediate effect.

In order to avoid this the better course is usually to formally terminate the employee's old contract and offer them their job back on the new terms and conditions at the expiry of their notice period.

Termination and re-engagement

The termination would be on notice. The employee would work it and if he accepted the new terms and conditions before it expired then there would be a transition to the new terms and conditions when it did.
However, even if he did so this would still be a dismissal, and if he had more than 24 months continuous service he could make a claim for unfair dismissal and seek reinstatement on his old terms. To defend such a claim you would have to demonstrate that there was a good business case for the change and that you followed a fair process before moving to dismiss.

This is where evidence that you went through a proper consultation exercise is will be vital, and that the majority of staff agreed to the changes will be very helpful, therefore always keep dates and notes of meetings and outcomes. If you are forced to go through the termination/ re-engagement process with 20 or more staff this will, technically, amount to a redundancy exercise and will trigger collective consultation obligations under the Information & Consultation Regulations. However, if the business case for the changes is communicated effectively and the consultation exercise is handled sensitively then, in practice, the vast majority of staff usually consent to reasonable changes, and that the prospect of dismissal and re-engagement on the new terms is usually enough to bring the remainder into line. Businesses are reminded to seek employment law advice before taking any action.

Altering terms and conditions under TUPE - what's changed?

As before, if the sole or principal reason that changes to an employee's terms and conditions is the transfer, then they will be void. Changes 'connected to the transfer' were previously void too - but this provision has now been removed.
There are still circumstances in which changes are valid: for example, if there is an 'economic, technical or organisational (ETO) reason entailing changes in the workforce', and employer and employee have agreed the change.
Sometimes the terms of the contract allow employers to make a change irrespective of the transfer. This could include a change brought about by an order from a new client.
Under the new rules, a change of workplace location may now also be considered a fair ETO reason. Before, it was deemed to be automatically unfair.
Employers should consult and seek agreement about any changes, or explain in writing why points raised cannot be carried forward. Legal advice is recommended.

Due to increasing demand for our services and expansion of the team supporting our clients we have outgrown our old offices and moved to larger premises. We remain passionately committed to supporting employers in managing their business and strive to make a positive difference in all we do.

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