



# variation of employment contracts

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## INTRODUCTION

Many employers hold the mistaken belief that provided they give reasonable notice to employees, they may change existing terms and conditions of employment. However, the starting point is that any change to an employment contract imposed unilaterally by an employer without the employee's agreement is a **breach of contract**.

## GENERAL PRINCIPLES

If the breach is sufficiently serious, it will entitle the employee to resign and claim at an employment tribunal for unfair dismissal. If the change is very significant, it may even be possible for the employees to argue that there has been a removal of their old contracts amounting to dismissal, whilst carrying on working under the new terms.

A written clause in the employment contract allowing such changes to be made **may** be effective. There are essentially four possibilities:

- No contractual power to vary – the only possibility here is an implied right to make changes if the term is not of sufficient importance.
- A generally worded power to vary terms – such a clause has limited use. Case law shows that a contractual provision to vary does not entitle the employers to make unilateral changes of a fundamental nature.
- A specific power to vary – eg a requirement to work whatever pattern of hours the employer determines or to work at any office or site of the company.
- An express and specific right to vary. However, if the changes proposed are serious and fundamental, the changes may be outside the scope of the express right.

If employees are dismissed for refusing to accept changes in contractual terms which are financially detrimental, the case of *Mennell v Newall & Wright (Transport Contractors) Ltd* [1996] IRLR 384 is authority for their right to claim automatic unfair dismissal on the basis of asserting a statutory right, namely the right under the Employment Rights Act 1996 not to have unauthorised deductions made from pay.

A dismissal (or constructive dismissal) without prior consultation and negotiation with employees and their representatives, is unlikely to be regarded as a fair dismissal.

## **CHANGING CONTRACTUAL TERMS**

If there is a strong business need for a change to contractual terms, the employer may give notice of dismissal and offer re-employment on the new terms. Such dismissals may be potentially fair, provided the employer has adopted a fair and reasonable procedure (see below).

An appropriate clause in the contract may give scope for a change to certain terms.

## **FAIR PROCEDURE**

If an employer has a need to change terms, it will need to be wary of potential contract claims and claims for unfair dismissal.

To avoid these, the employee's consent to the change should be sought. The employer should satisfy itself that it has a business need to make these changes sufficient to fall within 'some other substantial reason' being one of the limited number of fair reasons for dismissal under the Employment Rights Act 1996.

To avoid claims of unfair dismissal not only must an employer have a fair reason to dismiss, it must also follow an appropriate procedure:

- The employer should therefore give advance notice to the employee of its intention to make the change, making it clear that no decision will be made until account has been taken of the employee's views.
- The employer should meet with the employee to discuss the situation and pay attention to any alternatives suggested by the employee. If these are not viable, the employer should make it clear to the employee that the change needs to occur and that if he is unable to consent, then the employer will be given notice to terminate his contract.
- If consent is not given, then notice to terminate can be given to the employee together with an offer of re-employment on new terms. Whilst a dismissal will occur, such a procedure may make it a fair dismissal.

## **THE EMPLOYEE'S REMEDIES**

- If an employer seeks to impose unilaterally a change to benefits, the employee can either resign and treat himself as constructively dismissed (assuming the change is sufficiently serious).
- S/he can then consider claims for breach of contract and unfair dismissal.

- Alternatively the employee can carry on working under protest and sue for breach of contract, without treating the breach as one which terminates the contract.

In all instances, the internal grievance procedure should be exhausted before a claim to the employment tribunal or court is considered.

### **IS SILENCE IMPLIED CONSENT?**

- Where an employer does impose a change unilaterally there is some doubt as to whether or not if an employee fails to object to that change he is deemed to have accepted it.
- Jones v Associated Tunnelling [1981] IRLR 477 restated the principle that silence could not imply consent.
- In Aparau v Iceland Frozen Foods [1996] IRLR 119, the court recognised the inequality of bargaining position between employer and employee and held that silence was not necessarily consent. In that case the court held that it was only when the change took effect that the employee could be said to have consented by not objecting.

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