



MWR Solicitors
A legal guide

EMPLOYMENT LAW:

Variation of employment contracts
Calculating holiday entitlement



INTRODUCTION

A contract of employment is a legally binding document which means that the parties to it have to abide by its terms or face possible legal action. However, from a practical point of view, it is likely that changes may be needed to the contract over the course of employment.

WHAT ARE THE WAYS THAT AN EMPLOYER CAN CHANGE / VARY A CONTRACT OF EMPLOYMENT?

There are a number of ways that an employer can change / vary your employment contract legally:

- a) By obtaining your consent to vary / change the contract of employment. This can be done either orally or in writing, although it is better in writing;
- b) By imposing changes / variations to your employment contract with your implied consent. An example of this would be if your employer brought in new terms and conditions, and you did not raise any objection to them after they had been brought in and you continued to work in accordance with the new terms and conditions.
- c) By relying on an existing clause in an employment contract that gives the employer the contractual right to vary/change the contract. These clauses are more commonly referred to as "variation clauses" or "flexibility clauses". For a variation clause to be enforceable, it must be clear, specific and unambiguous.

WHAT HAPPENS IF YOUR EMPLOYER TRIES TO FORCE A FUNDAMENTAL CHANGE / VARIATION OF CONTRACT WITHOUT CONSENT ("UNILATERAL VARIATION")?

If there is a strong business need for a fundamental change / variation to your contractual terms, your 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).

If however there does not seem to be a strong business need for the change / variation, you may have the basis to bring a claim through the employment tribunal or county court for unfair dismissal/ breach of contract.

FAIR PROCEDURE

If your employer has a need to change / vary terms, it will need to ensure that the changes are made properly, in order to avoid claims for breach of contract / unfair dismissal.

The employer should satisfy itself that it has a business need to make these changes which is sufficient to fall within 'some other substantial reason' being one of the limited numbers of fair reasons for dismissal under the Employment Rights Act 1996.

To avoid claims of unfair dismissal not only must your employer have a fair reason to dismiss, it must also follow an appropriate procedure. A suggestion would be as follows:

a) Your employer should give advance notice to you of its intention to make the change / variation. They should make it clear that no decision will be made until account has been taken of your views.

b) The employer should meet with you / your representatives to discuss the situation and pay attention to any alternatives suggested. If these are not viable, the employer should make it clear that the change needs to occur and that if you are unable to consent, you will be given notice to terminate / vary the contract.

c) If you do not give consent, then notice to terminate may be given to you, together with an offer of re-employment on new terms. Whilst a dismissal will occur, such a procedure may make it a fair dismissal.

YOUR OPTIONS AS AN EMPLOYEE

So what can an employee do if an employer seeks to unilaterally impose a change / variation to terms and conditions of employment? There are a number of options available which are set out below:-

1. Accept the changes / variations.

This is where you agree to accept any proposed changes / variations to the employment contract. The changes will then take effect and there will be no basis for legal action.

2. Implied consent to the changes / variations.

This is where you fail to make clear your objection to any proposed changes / variations to your employment contract and / or you remain silent about the changes.

In these situations, 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.

If an employee does not make their objection to any changes known and they comply with the new terms and conditions, they are likely to be deemed to have accepted the changes, even if they accept them "under duress" (Hepworth Heating Ltd v Ackers [2003] UK EAT 13_02_2101)

3. Do not accept the changes / variations but continue to work under protest

This is where you inform your employer that you do not accept the proposed changes / variations to the employment contract but you will continue to work "under protest" of the changes being proposed. In other words, the employee makes their objection to the proposed changes to the employment contract in a clear and unambiguous way

If an employee takes this option, they may be able to sue their employer for breach of contract whilst still working for them.

4. Refuse the changes / variations and resign

If the changes to the employment contract are sufficiently serious, you could consider resigning and treating yourself as being constructively dismissed. You could consider a claim for breach of contract or constructive dismissal. You should however be aware that this is not a step to be taken lightly and specific legal advice should be sought before resignation.

5. Refuse the changes / variations and negotiate further

This option is self explanatory. However, negotiation is obviously a two sided process and it should be remembered that employers may not wish to negotiate.

In all instances, the internal grievance procedure should be exhausted before a claim to the employment tribunal or county court is considered and legal advice should be sought in this regard at the earliest opportunity.

Please note that the information provided in this booklet provides only a general, basic overview on the variation of contracts of employment. This booklet does not address more unique situations such as circumstances involving discrimination.

CALCULATING HOLIDAY ENTITLEMENT

Under English law, full time employees are entitled to a minimum of 5.6 weeks holiday entitlement per year, including bank holidays.

If an employer fails to provide an employee with the minimum holiday entitlement they will be in breach of the Working Time Regulations.

If an employee works 5 days a week, they will typically be entitled to a statutory minimum of 28 days holiday per year, including bank holidays.

If an employee works under a shift system, for example 4 on, 4 off, the easiest way to calculate holiday entitlement is by using the following simple calculation:-

$$\text{Number of basic hours per week} \times 5.6 = \text{Annual holiday entitlement (in hours)}$$

If you work under a shift system and you want to convert your hours of holiday entitlement into shifts, the following further calculation should be carried out:-

Annual holiday entitlement in hours

Length of basic shift

Example

Employee works a shift system of 4 on, 4 off: Their basic hours of work are 40 hours per week: Their basic length of shift (not including overtime) is 10 hours.

40 hours x 5.6 = 224 hours per year

Then convert hours to number of shifts

$$\frac{224 \text{ hours per year}}{10 \text{ hours}} = 22.4 \text{ shifts per year}$$

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