

# Changing terms of employment



## Why is it important to know the law when changing an employee's terms?

An employee's terms will usually alter in any number of ways during their employment (for example, their pay may increase). Most changes will be uncontroversial, but sometimes a business will want to do something that the employee is less willing to accept. In these cases, the business must understand how to make the change legally binding while minimising any possible disruption.

## Will the proposed changes affect the contract?

The business should first decide if its plans involve amending the contract itself. This involves identifying the existing terms of the contract, which may be:

**Express:** terms explicitly agreed between the parties (either orally or in writing).

**Implied:** terms may be implied for a number of reasons, for example through custom and practice.

**Incorporated:** terms may be incorporated into the contract by law.

Some terms will not be part of the contract. For example:

- Benefits that are stated to be non-contractual;
- "Policies" which merely provide guidance on how the contract will be carried out.

## Is there a contractual right to vary the term?

If the proposed change will affect existing terms, the business will not need to amend the contract if:

- the existing terms are sufficiently broad to accommodate the business's proposals;

- there is a specific right for the business to vary the contract in this way;
- the contract gives the business a general power to vary its terms.

However:

- Any ambiguity in the terms of the contract will be construed against the business;
- Any specific flexibility clauses will be given a restrictive interpretation by the courts and may be limited by an implied term (for example, an obligation to exercise the clause reasonably).
- General flexibility clauses should only be used to make reasonable or minor administrative amendments that are not detrimental to the employee.

## Implementing a binding change in terms

If a business' proposals involve altering the existing contract and there is no contractual right to make such a change, the business can consider the following options. In most cases, it will be good practice to carry out a consultation process before changing any terms of employment.

### 1. Express agreement

The employee may agree to the business' proposals orally or in writing (although an oral agreement is clearly more vulnerable to challenge at a later date) and we would recommend any consent is confirmed in writing.

For the contractual amendment to be binding, the employee must receive some form of benefit in return. In many cases, the employee's continued employment will be sufficient, but there may be problems when the change does not have an immediate effect (for example, when the employee's rights on termination are altered and so consideration can also be given to getting it signed as a deed).

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## 2. Unilaterally imposing the change and relying on the employee's implied agreement

This strategy is more likely to be effective if there is an immediate practical effect on the employee (for example, a pay cut) and they continue to work without objecting. However, this approach carries risk and a business should not assume that silence is sufficient to indicate implied agreement, especially if there is no immediate impact on the employee. If the business imposes the change it will be a breach of contract. In response to the breach, the employee can:

- Comply with the new terms but work “under protest” and claim for breach of contract or (if their wages have been reduced) unlawful deductions from wages. Where the change imposed is substantial, the business may be deemed to have dismissed the employee, and therefore the employee may also bring a claim for unfair dismissal;
- Resign and bring a claim for constructive dismissal, if the change is sufficiently fundamental to entitle the employee to take such action;
- Refuse to work under the new terms (for example, where there is a change in duties or hours).

## 3. Dismissing and offering re-engagement on new terms

This approach avoids some risks involved in unilaterally imposing the change on the employee. However, as a result, the employee may be able to claim either:

- Wrongful dismissal, unless the business gives the appropriate period of notice (or makes a payment in lieu of notice);
- Unfair dismissal, unless the business can establish a potentially fair reason for dismissal and show that it acted reasonably in deciding to dismiss the employee for failure to agree to the change.

A refusal to agree to a change in contracts will usually amount to “some other substantial reason” for dismissal, provided there is a sound business reason for the change. Where this is done on a large scale the collective redundancy regime can also be triggered.

### We're here to help...

This note gives a general overview of some key considerations. Care should be taken in changing employees' terms and conditions as additional considerations can arise, for example where a union is recognised or where the change affects a large number of employees.

If you would like any further information about our specialist employment law and HR services, please contact a member of the team.

## KEY CONTACT



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Kevin is experienced in all aspects of employment law, both claimant and respondent, from drafting contracts and procedures, through to providing representation before tribunals in cases involving multiple claimants, and advising on dismissal and re-engagement procedures in relation to contract variations for 500 plus employees. He has worked across the public and private sectors, for high street practices, local authorities and RSLs. This diverse range of experience has given him a very good understanding of the different pressures and considerations that apply when providing advice to individuals, businesses and public bodies. Kevin is admired for his pragmatic approach to most problems, and for finding solutions which minimise both cost and risk to clients.

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