

GUIDANCE NOTE

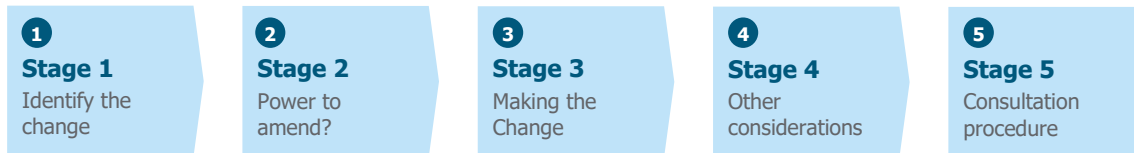
Changing Terms and Conditions of Employment

October 2020

www.bcplaw.com

BRYAN
CAVE
LEIGHTON
PAISNER **BCLP**

HOW TO CHANGE TERMS AND CONDITIONS OF EMPLOYMENT



THE FIVE STAGE APPROACH

1 STAGE 1 - Identify the change you would like to make

Consider whether the change is to a contractual term of the contract. Contractual terms can be express, implied or incorporated from other sources.

- **Express** terms are those that have been agreed explicitly between the parties, either orally or in writing.
- **Implied** terms are terms that have not been specifically set out or stated by the parties at the time of entering into the contract. For example, terms may be implied into a contract because they are too obvious to mention or because the parties assumed they would be incorporated at the time the contract was entered into.
- **Incorporated** terms are those which are incorporated into the contract by virtue of a statutory provision or through the terms of a collective agreement.

Some changes to the way in which employees work, or to a non-contractual policy, would not amount to formal changes to terms and conditions of employment. Employers have much more scope to modify non-contractual provisions.

2 STAGE 2 – Is the change covered by an express power to amend?

If the proposed change is to a term of the contract, you should check if the terms of the contract authorise the change.

- The contracts of the relevant employees may contain an express power to make certain amendments to terms and conditions without the agreement of the employees. This may be an express right to make changes in the area of the relationship covered by the proposed change (that is, a specific flexibility clause), or the contract of employment may give a general power to vary the terms of the contract (that is, a general flexibility clause).

- If there is a specific flexibility clause, consider whether it can be interpreted widely enough to cover the proposed change. Remember that if there is any ambiguity, the relevant term will typically be resolved against you if you are trying to rely on it. It is very unlikely that you would be able to rely on a general flexibility clause to change an employee's key contractual rights or benefits, such as pay.
- If the terms you would like to change are covered by a collective agreement which applies to some or all of the employees who would be affected by the change, it is likely that there will be a procedure in the relevant collective agreement that will need to be followed to effect the change.

3

STAGE 3 – Making the change

If the change is not authorised by the contract itself or if it is deemed too risky to rely on the authorisation under the contract, there are three ways in which you can vary the contract of employment.

Seek agreement

Seek agreement to the change from the employees, through collective bargaining if required, or (if not) with representatives or on an individual basis. If agreement is reached, ensure that the employees give written consent to the change. From a legal perspective, this is the least risky option.

Unilaterally impose the change

If employees do not agree to the change or you do not want to seek their express agreement, you could try to impose the change unilaterally, and then rely on the employees' implied agreement (that is, they accept the new terms by their continued employment).

This carries the following risks:

- employees may say that they are continuing to work "under protest", in which case they will be deemed not to have agreed the proposed changes. They may also bring a claim for breach of contract or unlawful deductions from wages if the breach of contract involves a shortfall in wages (known as "standing and suing").
- even if employees do not state that they are continuing to work under protest:
 - this does not unequivocally mean that they have impliedly accepted the change – each situation is fact specific.
 - if the impact of the change does not affect them until a later date (for example, a mobility clause), it will be difficult to show that they had impliedly consented by their continued employment.
- if the breach of contract is a fundamental breach going to the root of the contract, the employees can resign and bring claims for constructive dismissal.

Terminate and re-engage on new terms

If all else fails, you could consider terminating the affected employees' employment, and offering re-employment on the revised terms.

- The employees could reject the re-employment proposals and bring claims for unfair dismissal (but will only be able to bring a claim for breach of contract if you do not serve appropriate notice). You could then potentially find yourself without key employees.
- To defend such unfair dismissal claims, you would have to establish a potentially fair reason for dismissal (which would be "some other substantial reason") and show that you acted reasonably in dismissing the employee for failing to agree to the change in terms of employment. You would need to be able to demonstrate that you held a reasonable and genuine consultation process with the affected employees.

- If 20 or more employees at one establishment are affected by the change, this may trigger a collective redundancy situation. To minimise the risk of a claim for a protective award for failure to inform and consult, consider whether a collective redundancy consultation process should be carried out.
- At the start of the process of varying employment contracts, you will not know for certain whether the employees will agree to the proposed new terms. If the employees do not agree, you may end up dismissing and re-engaging those employees. In light of the liabilities arising for failing to properly comply with collective consultation requirements, if the proposed change is likely to mean that the employees' agreement will be difficult to obtain and that notices of termination may need to be issued to at least 20 employees at one establishment within a 90 day period, you may wish to consider commencing collective consultation and notifying the government about collective redundancies at the outset of the process.

4

STAGE 4 – Other considerations

Pensions

- If you offer an occupational pension scheme or a personal pension scheme to which you contribute, and you wish to make certain changes to the pension arrangements, you will need to consult with your employees for at least 60 days under a specific procedure laid down by pensions legislation.
- At the end of this period, you must consider the responses before you decide whether to implement the change. If there are no responses then the consultation process is complete.

TUPE

- If you are considering changing terms of employment in connection with a transfer of an undertaking, you will be subject to the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). Under TUPE, changes are generally void if the sole or principal reason is the transfer and it can be very difficult to harmonise terms without falling foul of this provision.

ICE Regulations

- Where the standard information and consultation provisions under the Information and Consultation of Employees Regulations 2004 (the "ICE Regulations") apply, you may also be obliged to inform and consult ICE representatives about proposed "substantial changes in contractual relations".

5

STAGE 5 – Consultation procedure if the proposed change is not authorised by the contract

The following procedure could be used where no other formal consultation procedures apply in respect of the affected employees or the proposed changes.

If other formal consultation procedures apply in respect of the affected employees or the proposed changes, those should be followed.

If changes are being made to pensions, take legal advice on the procedure which may need to be followed.

Presentation to the affected employees

Present the proposed changes to the affected employees as early as possible to give adequate warning. You should also attempt to answer (in the form of FAQs issued as part of the consultation process) concerns which you anticipate the affected employees may have with the proposed changes.

EXPLAIN:

- the reasons behind the change and the implementation timelines. Try to highlight any positive aspects for the employees, and explain what might happen to the business if the change is not brought in. For example, could it possibly mean redundancies?
- that the employees should consider the proposed changes and that a consultation process will follow to discuss questions and concerns.

Consultation

- Commence collective consultation and/or hold individual consultation meetings with the employees concerned (as appropriate).
- Receive any feedback on the proposed changes, note any objections and the reasons for the objections, and discuss employees' concerns with them with a view to reaching agreement.

Consider

- Consider if the proposed changes can be varied.
- Consider if employees' concerns are valid and can be accommodated.

Further consultation

- Hold a further consultation meeting. You should respond to any feedback given at the initial consultation or individual meetings and note any further responses.
- If no agreement is forthcoming, consider further consultation or whether as a last resort you should introduce the possibility of dismissal and re-employment (described above) into the consultation process.

Set a Deadline

- Write to the affected employees and set a deadline for obtaining written agreement to the new terms.
- Explain that if agreement is not obtained by that date you will consider terminating their employment for refusal to agree to the change and offer re-engagement on the new terms. Alternatively, you may decide to unilaterally impose the change (as described above) at this stage.
- The communication should contain a date and time for the employees to attend a meeting if no voluntary agreement has been reached by the deadline. It should also outline the reasons for the proposed change again, and make clear that any termination of their existing employment contract will be on the appropriate notice.

Individual meetings

- If express agreement has not been obtained at this stage, hold a meeting to discuss the refusal and the proposed termination, noting clearly that this is the employee's final chance to make representations about the proposal.
- Whilst the employees may not technically have a right to be accompanied at this meeting, it is good practice to allow employees to bring a companion.

Written notice of termination

- Ensure you have concluded the collective consultation process if one has been undertaken.

- Serve notice due under the contract of employment and explain that the new terms will take effect on expiry of the notice period. If you have conducted a collective redundancy consultation process and you are dismissing between:
 - 20-99 employees, you cannot dismiss them until 30 days after the start of the consultation;
 - 100 or more employees, the dismissals cannot take place until 45 days after the start of consultation.
- Enclose the offer of employment with the new/revised terms and request written agreement that they accept the new terms before the date that they become effective.
- Offer the employee a right of appeal against the decision to terminate the original contract.

Hold an appeal meeting

- If the employee appeals, hold an appeal meeting (which should be conducted by a more senior member of staff).
- It is good practice to allow the employee to bring a companion to this meeting.

Outcome of appeal

- Write to the employee with the outcome of the appeal and confirm that this is the final decision.

Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

London

Governor's House, 5 Laurence Pountney Hill
London EC4R 0BR England

Rebecca Harding-Hill

Tel: +44 (0) 20 3400 4104

rebecca.harding-hill@bclplaw.com

Bryan Cave Leighton Paisner LLP

This document provides a general summary only. It is not intended to be comprehensive nor should it be used in place of legal advice or other advice. Specific legal advice should always be sought in relation to the particular facts of a given situation. For specific advice, please get in touch with your usual BCLP contact.