A summary of the law on:

Changing Terms and Conditions

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Whether they know it or not, all employees work under a contract of employment. Ideally this should be a written document and should give as many details as possible of the terms and conditions that apply. In unionised workplaces contract terms are usually found in collective agreements (e.g. 'Agenda for Change' in the Health Service).

This information sheet looks at whether, and in what circumstances, an employer can vary the contract, and answers some commonly asked questions.

Is there a legal right to a contract?

Although there is no legal requirement on employers to provide a written contract, they do have to provide a written statement of particulars of employment.

This should outline the main terms and conditions including:

- the names of the employer and employee
- the date employment began
- the job title and duties of the job
- the place of work
- the rate and frequency of pay, hours, holidays, sickness pay and pension scheme/s,
- notice details
- reference to any incorporated collective agreements
- details of any disciplinary and grievance procedures.

Both parties are bound by the contract and generally neither can vary it without the agreement of the other person.

Frequently Asked Questions

Can the employer change the contract unilaterally?

If an employer tries to impose a variation of contract, they will potentially be in breach of contract. To decide whether there is a breach of contract, two initial questions have to be considered:

- Is the term being varied a term of the contract?
- If so, does the employer have the right to unilaterally vary it?

What is a non-contractual term?

A non-contractual term is one that does not legally bind the two parties to the contract. In deciding whether or not a term is contractual, the issue is whether or not the written contract and any other evidence show an intention to be legally bound.

For instance, certain allowances which are clearly at the discretion of the employer would be deemed non-contractual. As a result, if the employer unilaterally removes them, this would not be in breach of contract. To cover themselves, some employers incorporate a specific statement in the contract stating that entitlement to the benefit is non-contractual.

However, in the absence of certainty, Tribunals and courts are reluctant to rule that a term is non-contractual.

In **Albion Automotive -v- Walker & Others 2002**, the Court of Appeal upheld a tribunal's finding that an established custom of enhanced redundancy payments was sufficient to indicate an intention by the employer to be contractually bound to such payments.

Can the employer have a contractual right to unilaterally vary the contract?

A term of a contract may be changed where such change is specifically authorised by a contract term. However the courts will not always uphold such a power.

In the case of **Wandsworth London Borough Council -v- D'Silva 1998**, the court said that employers need to use clear language in a contract to be able to unilaterally vary. This case and subsequent cases have established that even where there is a power to unilaterally vary a contract the courts may not uphold such a term if it is used in a manner which is oppressive or capricious.

In **United Bank Ltd. -v- Akhtar 1989**, the court upheld a claim of constructive dismissal despite the existence of an express mobility clause in Mr Akhtar's contract. This was because he was being asked to move city in six days with no consideration for his personal circumstances.

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What about changes that are not authorised by the contract?

Where a variation is not authorised by contract, it may still be brought about without breach of contract in the following ways:

- express agreement between the parties
- implied agreement through the conduct of employee
- union agreement which is binding on the employee
- termination of the existing contract and re-employment under a new contract

What is meant by express agreement?

It just means that there was a clear agreement between the employer and employee. To be valid any such agreement must be voluntary. If the employee can show that he or she was put under 'duress', then they cannot be said to have agreed voluntarily. However, it is not duress if an employer threatens to dismiss the employee if they do not sign.

What is meant by implied agreement?

This will usually arise if the employer purports to unilaterally vary the contract by imposing new terms and conditions and the employee is seen to accept this by their behaviour e.g. by working under the new terms for a long period without protest.

However, the courts are generally reluctant to find that employees have consented to a variation of contract in the absence of an express agreement. This is particularly so in the case of changes which do not have immediate effect (e.g. changes to a sick pay scheme).

What about collective agreements?

As long as a collective agreement is 'incorporated' into individual contracts, employees will be bound by any change negotiated as a result of it. Employees need not be a union member or even be aware of the collective agreement to be bound by it.

Incorporated Terms

Incorporation of terms may be express i.e. the individual contract expressly states that terms are governed by a collective agreement.

Incorporation may also be implied where there is a well-established custom that terms of collective agreements are incorporated into individual contracts.

Even though collective agreements are not legally enforceable, when the terms of a collective agreement are incorporated into individual contracts, they are legally enforceable by individual employees.

Can the employer terminate the contract and impose a new contract?

If an employer wants to change a term and cannot get agreement for it, they will sometimes terminate the existing contract and offer a new one which includes the variation.

If the employee is dismissed for refusing to accept the new contract, this will not always be an unfair dismissal. It will depend on all the circumstances.

For instance, if the employer can show 'a good business reason' for the changes, they are likely to be able to establish that the dismissal was for 'some other substantial reason' and was therefore potentially fair.

However, a Tribunal will also have to consider whether the employer behaved reasonably in bringing in the new contract – for instance by consulting with the employees and unions - then the dismissal is more likely to be considered fair than if the employer seeks to just impose the change without any consultation.

What can the employee do?

If the employer imposes a new term in an unlawful manner, what can the employee do?

An employee may respond in the following ways:

- stay and work 'under protest' and bring a claim for unlawful deductions or breach of contract
- in the case of a fundamental breach of contract, resign and claim constructive dismissal
- if the employer has introduced a new contract which is fundamentally different from the previous contract, the employee can continue to work under the new contract and claim unfair dismissal in relation to the old one (**Hogg -v- Dover College 1990**)
- refuse to work the new terms if, for instance, they involve different duties or hours – this may result in dismissal which may or may not be unfair depending on all of the circumstances.

In considering variation of contract it should be noted that a range of legislation may be relevant including in relation to flexible working arrangements; indirect discrimination; reasonable adjustments under the disability discrimination legislation; the Working Time Regulations; and, in the case of a business transfer, the TUPE Regulations. This information sheet does not address these issues but rather is concerned with the general principles relating to variation of contract. This information sheet should not be taken as a comprehensive statement of the law in this area. You are advised to take advice from your union representative before taking any action based on this information.

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