INTRODUCTION TO EMPLOYMENT LAW

THE CONTRACT OF EMPLOYMENT

CHANGING TERMS AND CONDITIONS

GEMMA PARKER, LINKLATERS, 2017

UPDATED BY SIMON RICE-BIRCHALL, EMMA HUMPHREYS, RACHEL SNIPE OF EVERSHEDS SUTHERLAND (INTERNATIONAL) LLP,
NOVMEBER 2023

Introduction to Employment Law
The Contract of Employment
Changing Terms and Conditions

1 Introduction

The terms of employment contracts rarely remain static over time. Employers often need or want to make changes as a result of changing business interests, and the changing needs of employees. Common changes that are sought relate to:

- Job title and description;
- Job location/place of work;
- Salary and benefits packages;
- Sick pay entitlements.

The starting point is that, as with any other contract, the employer is not entitled to unilaterally vary the terms of the employment contract. However, a variation to contractual terms is not always necessary in order to bring about a change to working arrangements.

Some changes will be administrative in nature and therefore will not affect the substance of the contract; for example, changes to a health or life assurance provider where the terms of the cover remain the same, and these changes are usually straightforward to make without legal consequences. The same is often true for changes which are purely for the employee's benefit; for example, annual pay increases.

Where the proposed change does not fall within one of these categories, the employer will need to consider whether the change proposed requires a variation to a contractual term and, if so, what the terms of the contract provide in relation to changes.

The terms of an employment contract are drawn from a number of sources and it is as important to consider the implied terms of the contract as the express terms as these carry equal weight and may restrict the employer's freedom to implement a change. For example, an employer who wishes to change the notice period in an employee's contract will be restricted by the implied requirement that the notice period be reasonable and the minimum statutory notice requirements that are imposed under the Employment Rights Act.

An employer who wishes to make changes to discretionary enhanced sick pay will first need to consider whether any term in relation to the making of such payments has been implied into the employment contract by way of custom and practice (for example, where enhanced sick pay has always been paid for a minimum period and employees have an expectation of this). Similarly, an employer who wishes to withdraw a contractual entitlement to a bonus scheme will need to consider whether this would be in breach of the implied term of trust and confidence (this will depend on the reasons for the withdrawal, the impact on employees and what alternatives are proposed).

Consideration of the sources of employment contract terms is set out in the separate paper, 'The Employment Contract, General Principles'. It is important to remember that both express and implied terms need to be taken into account in order to determine how a contractual variation can be implemented.

When a change to working arrangements is proposed, the employer should consider the following:

- Whether the change required is a change to a contractual term;
- Whether there are specific or general express terms that permit the change to be made;
- The impact of implied terms on the power to vary;
- The options for implementing change if the express terms do not permit variation;
- Any legislative restrictions on implementing a variation.

These issues are considered in turn below.

2 Is a contractual change required?

Not all changes to working arrangements will require a change to contractual terms of employment. Employers frequently apply rules and policies to employees which are not referred to in the employment contract. Changes to such rules and policies may be relatively easy to make but it is important to be aware that even rules or policies that are expressly stated to be non-contractual may still, in practice, have been incorporated into the contract.

In the case of (***Keeley v Fosroc International, 2006***), for example, redundancy provisions were set out in the employee handbook which also contained lots of detail about procedures applying to employees and statements of aspiration which did not have contractual effect. The employee's contract of employment made express reference to the employee handbook and the Court of Appeal found that the enhanced redundancy entitlement was enforceable by employees as a contractual term even though other policies in the handbook were clearly non-contractual.

Even where the proposed change does not require a variation of contractual terms, the employer may still be restricted in its freedom to make changes by implied terms or legislative requirements. In particular, the employer must not act in such a way as to destroy the relationship of trust and confidence between the employer and employee.

3 Do the express terms of the contract allow for flexibility or permit the change to be made?

The express terms of the contract are usually the easiest terms to identify as these have been specifically agreed by the parties, either in writing or orally.

The express terms of the contract may have been drafted or agreed to give the employer flexibility to determine the precise term that will apply to the employee (for example, a clause that provides that the employee shall perform such duties as the employer determines, provided these are commensurate with their status). Alternatively, the express terms might provide for the employer to make specific changes in the future. A clause permitting the employer to change the employee's place of work (a mobility clause) is a good example of a specific flexibility clause.

It is important that the express terms in the contract are not simply taken at face value as there are limitations on the extent to which employers are entitled to make changes to the employment contract even where the express terms permit changes. Tribunals and Courts have not been keen to allow employers to draft employment contracts in such a way as to allow the employer to take advantage of the likely unequal bargaining positions of the two parties and make unilateral changes to the contract and they will determine any ambiguity in the interpretation of a term in favour of the party seeking to rely on it.

3.1 Specific flexibility clauses

Employers commonly try to build some flexibility into contractual clauses so that changes to working arrangements are within scope of the terms of the contract and, technically, it is not therefore necessary to vary the actual contractual terms or for the employer to consider the options in section 4 below. Location clauses and those that set out working patterns are good examples of clauses that often include flexibility. The more specific the flexibility provisions in a clause, the easier it will be for the employer to rely on the clause to make a change.

The employer will first need to consider whether the proposed change falls within the scope of the flexibility provided for in the contract term. If it does, the employer should then consider whether its actions will breach any implied terms of the contract which restrict the operation of the clause. For example, the employer should not act in a way which would breach the employer's implied obligation to maintain trust and confidence in the relationship between employer and employee. This does not mean that the change the employer wishes to impose has to be a reasonable one, but the unreasonable operation of the clause to impose the change is likely to be in breach of the employer's implied obligations. In the leading case of ***United Bank v Akhtar, 1989***, the employee's contract included a mobility clause and the employer sought to relocate him to a different city. The employee was given very little notice of the relocation and the employer did not exercise its discretion to offer him any contribution towards relocation expenses. As a result, the employer was found to be in breach of its implied obligations to give the employee reasonable notice of the relocation, to act in a manner which does not destroy trust and confidence between the employer and employee and to operate the clause in such a way so as to not make performance of the contract impossible (which was the effect of the failure to pay relocation expenses).

3.1.1 Operating mobility clauses to avoid redundancy costs

The flexibility of a mobility clause can be of particular benefit to employers who might otherwise be faced with a redundancy situation. Where an employer has reduced or no requirements for employees to carry out a certain type of work at a particular site, employees carrying out that work will potentially be redundant. If the employer has similar work available at another site and a transfer to this site is within the scope of mobility clauses in the affected employees' contracts of employment, the employer could choose to operate those mobility clauses and require the employees to transfer to the other site. This would avoid the cost and disruption of a redundancy situation (but, depending on the location of the site, may not be attractive to employees).

If the employer does decide to go down this route, it must be made clear to employees from the start, as retrospective reliance on relocation clauses as a defence to claims made on redundancy will not be accepted by the Employment Tribunal (***Curling v Securicor Limited, 1992***).

3.2 General flexibility clauses

General flexibility clauses which provide the employer with a general right to vary the terms of the contract of employment are of limited use, but it is still worth including one in the contract of employment. In (***Bateman and Others v Asda Stores Ltd, 2009***), Asda was found to be entitled to rely on a general right, which was set out in the employee handbook, to vary contract terms without the express agreement of employees. However, this decision should be treated cautiously, especially where the proposed change is to the detriment of a significant number of employees. This is because it was relevant that Asda consulted extensively with employees; only one of the six employees in the test case was able to show that they had suffered a detriment and the employees did not plead breach of the implied term of trust and confidence so it was not considered by the Tribunal. General flexibility clauses will usually only be enforceable in respect of reasonable or minor changes to the contract terms and provided there is no breach of the implied term of trust and confidence.

4 What if the express terms do not permit variation?

If it is not possible for the employer to vary the contract by relying on the express terms, there are three alternative options:

- Seek express agreement of employees;
- Trade union agreement;
- Unilaterally impose the change;
- Terminate employment and offer to re-engage employees on amended terms.

4.1 Express agreement of employees

This is the simplest way for an employer to change contractual terms but it is often difficult to secure the agreement of employees. An agreed change will be valid whether or not it is confirmed in writing but written evidence will be helpful to both parties if the change is ever disputed and is particularly important for the employer where a change is to the employee's detriment. In order for a contractual change to be valid, the employee's consent must, in accordance with general contractual principles, be free from duress. In order to obtain the express agreement of employees, an employer might want or need to offer employees some incentive to accept a contractual variation. For example, an employer might propose a variation to employees' enhanced sick pay entitlement which is to the employee's detriment, with the incentive that employees who agree to the change will be entitled to an additional day's paid holiday. It is also common for employers to try to link changes to contractual terms to the award of annual pay increases (where these are not a contractual entitlement).

As in relation to any contractual changes, consideration for the employee agreeing to the change is required. In the above example, the benefit of paid holiday would also be consideration for the employee agreeing to the detrimental change to sick pay. Where there is no specific benefit to the employee, the fact of the employee continuing to work and the employer continuing to provide work should be adequate consideration for the change.

However, this may not be adequate consideration where the employee agrees to the change in advance of it being implemented. In such cases, specific

consideration should be allocated in return for the employee's acceptance of the change or the lack of consideration can be addressed by entering into the variation by deed. However, where the variation is made to restrictive covenants, real financial consideration must be given and neither a deed, nor nominal consideration, will be sufficient.

If an employee refuses to accept a request to vary the employment contract, the employer can either accept this decision, or take one of the alternative steps, unilaterally imposing the change or terminating employment and offering to re-engage the employee on amended terms.

4.2 Trade union agreement

A contract of employment is an individual contract made between the employer and the employee. Therefore, in most cases, the fact that a change may have been agreed by the trade union will have no effect on the contract itself. However there are two circumstances where it is the trade union and not the individual employee who has the power to accept variations to the contract by the employer:

- where the union is acting as an agent for the employee;
- where there is an express or implied term in the employee's contract incorporating agreements made between the employer and the trade union.

4.2.1 Union acting as agent

The law of agency is very complicated and as this occurs only rarely, is beyond the scope of this course. Basically it requires a positive action on the part of the employee who appoints the union as their agent. Note that agency cannot be inferred from the employee's membership of the union alone.

4.2.2 Agreement incorporated

If a contract of employment incorporates agreements made between the employer and the relevant trade union, then any changes agreed with the trade union will vary the terms of the individual's contract of employment. It is irrelevant whether or not the employee is a member of the trade union. The incorporation of a collective agreement does not alter the fact that the contract itself is made between the employer and the employee. The employee has merely agreed, by entering into the contract, to be bound by the terms agreed between the employer and the union.

Note where there is a recognised trade union and contract variations are sought there is, in principle, a risk of claims under s145B of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) which prohibits employers from inducing their workers to bypass collective bargaining in certain circumstances. In ***Kostal UK Ltd v Dunkley [2021] UKSC 47***, in a majority decision, the Supreme Court decided that a direct offer to workers, in relation to a matter which falls

within the scope of a collective bargaining agreement, cannot be made lawfully unless the employer has first followed, and exhausted, the agreed collective bargaining procedure.

4.3 Unilaterally imposing the change

An employer who imposes a change to an express or implied term of the contract will be in breach of contract. In these circumstances, the employee may:

- Continue working and accept the change, either expressly or by implication;
- Refuse to accept the change and continue working under protest;
- Resign in response to the imposition of the change and claim constructive dismissal.

4.3.1 Accepting the change

An employee who continues to work after a unilateral change of contract has been imposed may either expressly accept the change (this should be recorded in writing), in which case the position is the same as under section 4.1 above, or continue to work but neither expressly accept or refuse the change. In such circumstances, the employee's agreement to the change may be implied from their conduct. The Courts may be more willing to conclude that the employee's acceptance is implied where the effect of the contractual change is immediate (for example, a reduction in salary), than where its impact will not be felt for some time (for example, a variation of restrictive covenants that will apply on the termination of employment). This was the case, for example, in ***Aparau v Iceland Frozen Foods plc, 1996***, where the employer's argument that an employee had accepted a change to her contract incorporating a mobility clause was not accepted because the mobility clause had no effect during the period in which she had worked without objection. However, note that in ***Abrahall v Nottingham City Council*** **[2018] EWCA Civ 796**, the Court of Appeal held that council employees had not impliedly accepted a two-year pay freeze, despite a lack of protest for approximately two years. The court rejected the proposition that continuing to work following a contractual pay cut will always be treated as acceptance, instead finding that the question of what inferences can be drawn will depend on the particular circumstances of the case.

4.3.2 Refusing the change and continuing to work under protest

An employee may continue to work in response to a unilateral imposition of a change of contract and, by making clear that they are doing so under protest, they will retain their right to bring a claim for breach of contract. So, if the employer works under protest in response to a change which reduces their salary, they will suffer ongoing losses in respect of which they are entitled to claim compensation for breach of contract from their employer. As only direct financial loss arising from the breach can be claimed, this will usually only be of benefit to the employee where the change is detrimental in respect of pay and benefits. If the changes will result in significant losses for the employee, the financial risk to the employer of an individual refusing to accept a unilateral imposition of a change could be substantial. Where the employer has imposed a variation to a fundamental term of the contract (such as a reduction in salary), the employee will be entitled to resign and claim compensation for constructive dismissal but, if they choose not to do so, they will still retain their claim to damages for breach of contract. The Employment Tribunal only has jurisdiction to hear breach of contract

claims that are outstanding on termination of employment so, whilst they are continuing to work, the employee will need to bring any claim for breach of contract in the civil courts. If the variation relates to a change in pay, the employee may also be able to claim compensation for an unlawful deduction from wages. This claim will often be more attractive to the employee because the Employment Tribunal will have jurisdiction to hear it.

Another potential remedy is a claim for declaratory relief, effectively seeking a court declaration that the original contractual terms continue in force. This was the case in ***Department for Transport v Sparks (2016)*** where the DfT sought to introduce a new standard "trigger point" across its various agencies in relation to the number of absences required before an official absence management process was initialised The seven claimants obtained a declaration in the High Court that certain clauses in the employer's staff handbook had contractual effect. The Court of Appeal confirmed that the attendance management provisions were contractual and that they could therefore only be amended in accordance with the contract terms or by consensus.

Where, as is often the case if a contract review has been undertaken the employer seeks to impose a number of contractual variations, the employee cannot choose to accept some but not others (other than where TUPE applies: see section 5.1 below). In ***North Lanarkshire Council v Cowan (2007)***, employees did not consent to changes to their contract which involved a reduction in working hours, an increased hourly rate of pay and no pay for part of their lunch breaks. The employees later claimed that they had accepted the first two changes but that the employer was in breach of contract for not paying them for their full lunch break. The EAT found that the employees had not accepted the whole package of new terms and, as such, their contracts had not been varied to provide for the higher rate of hourly pay or reduction to working hours.

4.3.3 Resigning and claiming constructive dismissal

If the imposed variation is in breach of a fundamental term of the employment contract amounting to a repudiatory breach, the employee will be entitled to resign and claim compensation for constructive dismissal. A breach of the implied term of trust and confidence can amount to a fundamental breach of contract even if the actual term being breach is not a fundamental term of the contract, if the employee can show that the employer's imposition of the change is the "last straw" in a series of actions in relation to the employee which amount to a breach of the term of trust and confidence. If the employee resigns without giving notice (as is often the case in order to avoid affirming the contract by continuing to work), the employee will be entitled to claim damages for breach of contract in respect of their notice period (constructive wrongful dismissal). Irrespective of notice, the employee will also be entitled to claim damages for constructive unfair dismissal. It is usually much harder for an employer to defend this sort of claim than a claim for ordinary unfair dismissal where the employer has dismissed the employee for refusing to accept a contractual change rather than imposing the change upon the employee. As considered below, in the latter circumstances, the Employment Tribunal will consider the reasonableness of the employer's reasons for the change and the reasonableness of the employee's motives for refusing to agree to the change.

4.4 Terminate employment and offer to re-engage the employee on amended terms

If employees have not agreed to a proposed change and the employer is unwilling to take the risk of breach of contract/constructive dismissal claims by unilaterally

imposing a change, this option will be the only way in which the employer can be sure that the change will be effective. Although potential claims from employees for unfair dismissal will crystallise on termination of employment, the employer will be able to defend these if it can show that its motives for the change were reasonable. However, the employer may have unrelated reasons (for example, maintaining stability in the workforce and keeping valued employees) explaining why it does not want to risk dismissing employees in case they do not take up the offer of re-engagement.

Provided the employer dismisses employees in accordance with their notice entitlement, they should not have a claim for wrongful dismissal. In order to defend a claim for unfair dismissal, the employer will need to show both that it had a fair reason for the dismissal (under s98(1) of Employment Rights Act 1996) and that it followed a fair process before dismissing the employee. The most common fair reason relied upon by employers seeking to vary terms and conditions is "some other substantial reason" (SOSR). The employer's reasons for making the change will be relevant to establishing this defence, although it is not necessary for the employer to establish that the change is essential for the commercial survival of the undertaking. Consideration of the employee's reasons for refusing to accept the change will also be relevant. However, in the case of ***Garside and Laycock Ltd v Booth, 2011***, the EAT held that the main issue is whether the employer has acted reasonably in dismissing the employee, and a Tribunal should not put too much focus on the reasonableness of the employee's reasons for rejecting the change.

Tribunals will generally take account of the following when considering the reasonableness of an employer's decision to dismiss an employee for refusing to agree a contractual variation:

- The extent of consultation with employees over the change, including how the changes have been explained to the employees and how long they have been given to consider them;
- The likely impact of the changes on employees;
- The employer's reasons for making changes;
- The employees' reasons for rejecting the changes;
- Whether the employer has considered any alternatives to the changes, particularly in response to consultation with the employees about them;
- Whether a majority of employees has accepted or rejected the changes and whether a recognised trade union has recommended or objected to the changes.

Sometimes, rather than relying on SOSR, an employer may fairly dismiss an employee for misconduct, on the grounds that the employee has unreasonably rejected the change, or redundancy, for example, where changes to job description are necessary because a redundancy situation has arisen, and the employee's failure to accept the alternative role means that he is fairly redundant.

When defending a claim for unfair dismissal arising from the employer's dismissal of an employee for refusing to accept a contractual variation, as well as pleading the fairness of the dismissal, if necessary, the employer should also raise that the employee acted unreasonably in failing to mitigate their loss by not accepting the offer of employment on amended terms. However, although it is possible for an employer's dismissal to be unfair, but for the employee to have acted unreasonably in refusing to accept the offer of re-engagement, in practice,

Tribunals find it difficult to reach a decision which would involve the employee being penalised for refusing to accept a change where the employer's action against the employee for this refusal has been found to be unfair.

Note, that the so-called practice of "fire and rehire" has faced growing criticism, particularly as a result of a number of high-profile disputes which arose during the pandemic. Although it has been discussed in a number of Parliamentary debates and the Government has described it as "unacceptable as a negotiating tactic", in October 2021 it blocked a Private Member's Bill which aimed to curb the practice. However, ACAS guidance published in November 2021, relating to how and when dismissal and re-engagement should be used, made it clear that fire and rehire should be a last resort. The government published a Statutory Code of Practice on Dismissal and Re-engagement (fire and rehire) in January 2023. The Code sets out a step-by-step process that employers should follow to explore alternatives to dismissal and to engage in meaningful consultation with Trade Unions, employee representatives or directly with affected employees, to find an agreed position. There is no current planned implementation date for this new code.

4.4.1 Collective consultation under s188 TULR (C)A 1992

An employer's obligations to collectively consult with employees will be triggered under section 188 of the Trade Union & Labour Relations (Consolidation) Act 1992 where an employer proposes to dismiss as redundant 20 or more employees within a period of 90 days or less. The definition of redundancy under this Act is wider than under the Employment Rights Act 1996 and is defined as a dismissal which is "for a reason not related to the individuals concerned". The dismissal of employees for a refusal to accept a contractual change falls within scope and, where such dismissals are proposed, the employer should enter into collective consultation with employees and notify the Secretary of State that it is doing so. If this does not happen, the employer may face claims for protective awards, and/or criminal liability in respect of any failure to notify the Secretary of State.

Although the number of employees actually dismissed for refusing to accept a contractual change may ultimately be low, the employer will not know at the outset of the process whether this will be the case; so, if the number of dismissals the employer could make if all the employees refuse to accept a change is more than 20, the consultation obligations will be triggered and should be observed. If the employer is anticipating the agreement of employees or unilateral imposition of the change, care should be taken that the collective consultation obligations have not been triggered, if dismissals of employees who refuse the change might eventually be made. Where an employer does not view dismissals as an option at the outset, it should help to avoid legal challenges later if this is clearly documented, in case this position changes as events unfold, triggering the consultation obligations.

5 Statutory considerations

As well as considering the express and implied terms of the contract, the employer also needs to consider whether there are any restrictions imposed by statute on the employer's ability to change the terms and conditions of the employment contract. The following should be taken into account:

- Collective redundancy obligations (considered above)
- Whether TUPE applies and its effect
- Obligations under the Information and Consultation of Employees Regulations

- Pension consultation obligations
- Discrimination and Working Time legislation
- Section 4 Statement.

5.1 The effect of TUPE

5.1.1 Where the transfer is the reason for the variation

Under regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), variations to a contract of employment transferred under TUPE will be void if the sole or principal reason for the variation is the transfer. There are a number of exceptions, however.

First, a variation is permissible where the sole or principal for the variation is an economic, technical or organisational (ETO) reason entailing changes in the workforce **and** the employer and employee agree the variation. It is important to note that the 2014 amendments to TUPE provide that a change of location falls within the meaning of 'entailing changes in the workforce' so that a contractual change of location can be an ETO reason. This is helpful because transferees often look to relocate an acquired workforce following a transfer, perhaps to the same location as existing employees of the transferee.

5.1.2 Changes permitted by the contract

In a further change from the pre-2014 position, TUPE expressly provides that employers can make changes to the contractual terms of transferred employees if the contract permits such changes to be made, even if the reason for such changes is the transfer. It would seem that variations are most likely to be permitted by a contract in relation to mobility clauses, and job titles/descriptions, but any changes would still be subject to the usual legal restrictions including the effect of the implied term of trust and confidence.

Note that some academics expressed concerns that any changes which are made by reason of the transfer and not for an ETO reason will be void, irrespective of whether they are permitted by the contract, in accordance with the CJEU's interpretation in of the Acquired Rights Directive (from which TUPE derives) in ***Foreningen af Arbejdsledere I Danmark v Daddy's Dance Hall, 1981***, and that this provision is therefore incompatible with the requirements of the directive. However, the contrary argument is that the provision merely allows the transferee to rely on an existing contractual right to vary, rather than allowing it to make a change in transferring employees' terms. It remains to be seen how tribunals will resolve this issue.

5.1.3 Changes to terms derived from collective agreements

Transferees are able to make changes to contractual terms derived from a collective agreement, provided that at least a year has passed since the transfer and such changes are no less favourable, when taken together, than the employee's previous terms. The 'no less favourable' requirement is likely to be a point of contention given it is subject in nature.

Where a mixture of potentially void variations have been made, for example, some to the advantage of employees and some to the employees' detriment, the legal position is different to that in a non-TUPE situation and employees are entitled to challenge the validity of some changes whilst retaining the benefit of others. Where are all changes are entirely positive to the employees (which is

often a subjective assessment), they will not be void, even if made by reason of the transfer.

5.1.4 Material detriment to employee

Separately to the issue of validity of variations to contractual terms, regulation 4(9) of TUPE provides that an employee who is facing a substantial change in working conditions to the employee's material detriment in connection with a transfer may treat themselves as dismissed.

5.1.5 Summary of when transferee may be able to make changes

In summary, a transferee employer may be able to make valid changes to the terms of transferred employees in the following situations:

- Where the reason for the change is unconnected with the transfer.
- Where the sole or principal reason for the change is the transfer but an ETO reason applies and the employer and employee agree the change.
- Where the contract of employment permits the change to be made.
- By leaving as long a period as possible between the transfer and making the changes. A change can be found to be in connection with a transfer indefinitely but the longer the period, the harder it is likely to be to establish a connection.
- Depending on the circumstances, by varying terms and conditions of existing employees as well as transferring employees rather than singling out those who have transferred.

5.1.6 The obligation to inform and consult

Where TUPE-related changes to terms and conditions are envisaged, the obligation to inform and consult under TUPE kicks in. In brief, the transferor and transferee have an obligation to inform and consult with recognised trade unions or elected employee representatives in relation to any "affected employees". There are no prescribed time limits, but TUPE provides that certain prescribed information must be given "long enough before the relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees". This has been taken to mean "in good time". In addition, where an employer of an affected employee "envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, [it] shall consult the appropriate representatives of that employee with a view to seeking agreement to the intended measures". Failure to comply with the information and consultation obligations can result in a tribunal claim for a protective award of up to 13 weeks' gross pay per affected employee.

5.2 Obligations under the Information and Consultation of Employees Regulations

Collective bargaining agreements entered into between the employer and the union may require the agreement of trade unions to any changes to contractual terms.

Consideration should be given to whether the Information and Consultation of Employees Regulations 2004 (ICE) apply and, if so, whether an information and consultation agreement obliging the employer to consult on various matters has been put in place. If an agreement is in place, the employer will be obliged to

consult representatives about proposed substantial "changes in contractual relations", which would include changes that affect retirement and disciplinary and grievance procedures. Changes to pay or monetary benefits are not covered by the ICE Regulations.

5.3 Pension consultation obligations

Where the employer is proposing to make a change to an occupational pension scheme which is a "listed" change, the Occupational and Personal Pension Scheme (Consultation by Employers and Miscellaneous Amendments) Regulations 2006 may apply to impose obligations on the employer to consult with employee representatives about the change for a minimum period of 60 days. Listed changes include changes to pension age, rules of admittance to the scheme, prevention of future of accruals of benefits under the scheme, changes to the liability of the employer to make contributions, and the introduction of employee contributions.

5.4 Discrimination and working time

Care should be taken that any contractual changes do not have a direct or indirect discriminatory effect. For example, a requirement that employees relocate in accordance with the terms of a mobility clause may be indirectly discriminatory towards female employees if an increased journey time means that they can no longer accommodate childcare commitments. In such a case of potential indirect discrimination, the employer will need to consider whether its actions can be objectively justified as being a proportionate means of achieving a legitimate aim, which will involve consideration of the disadvantage to employees and whether this can be mitigated (in the example given, this might be possible by altering employees' working hours).

Changes to working hours or holidays must be in accordance with the requirements of the Working Time Regulations 1998 which impose minimum rest periods.

5.5 Section 4 statement

Section 4 of ERA 1996 requires employers to give employees and workers a written statement of any changes to employment terms not later than one month after the change is effective. This is an administrative requirement and compliance with the legislation or a failure to comply with it will not impact on whether the employer has effectively varied the contract.

6 Summary of questions for an employer to consider where a change to working arrangements is proposed

At the outset:

- What is the change proposed and which working arrangements will it affect?
- What are the reasons for making the change and what impact will it have on employees?
- Will the change require any variation to contractual terms?
- Is the change within scope of changes permitted by the express terms of the employment contract?

- Is there a recognised Trade Union and have collective bargaining agreements been entered into?
- Are there any implied terms that will impact on the implementation of the change and what is the effect of these?

If the change is not within scope of the express contractual terms:

- Is the change something employees are likely to resist and can we offer any incentives to encourage acceptance?
- Have employees been fully consulted about the change and have any comments in response been taken into account?
- Is it possible that 20 or more dismissals may be made in response to refusals to accept changes? If so, notify BEIS and begin collective consultation.
- Will the reasons for dismissal of employees for refusing to accept a change be sufficient to constitute a SOSR fair reason for dismissal? Is misconduct or redundancy relevant?

Gemma Parker, Linklaters
November 2017

Updated by Simon Rice-Birchall, Emma Humphreys, Rachel Snipe
Eversheds Sutherland (International) LLP, November 2023