

wilson browne SOLICITORS

Guide To Changing Terms And Conditions

Over the course of the employment relationship it is likely that the contractual terms will change, a good example of this will be if an employee receives a pay rise or in instances of promotion. These changes are usually accepted, as there is a clear benefit for the employee in doing so.

The process may not be so simple when changes are needed that may not be as favourable to the employee if they are not permitted by the employees' existing contracts. It is important to bear in mind that if, as an employer, you wish to amend the terms of an employment contract a full procedure must be followed.

This procedure can be implemented through following the steps outlined in this factsheet.

Preparatory Steps

The extent of the preparation required will, of course, depend on the extent of the proposed changes and the number of employees/other individuals potentially affected by those changes.

Assess:

- the nature of the workforce, ie their status and length of service and, hence, the extent of the risk of claims for unfair dismissal
- the contracts in place for the individuals potentially affected by the changes:
 - identify contractual and non-contractual terms
 - beware contractual terms in handbooks/other documents etc
- the proposed changes:
 - do they affect contractual terms at all?
 - if they do not, is any change to contracts actually required?
 - if the changes do affect contractual terms, do the relevant contracts have an adequate flexibility clause covering the proposed change that could be invoked?

The results of the assessment outlined above will dictate the extent of the process that is required and the steps outlined below may need modification accordingly.

Step 1: Formulate A Business Case

Formulate a business case for the proposed changes which can, if necessary, later be disclosed in evidence.

The business case will typically cover matters such as:

- details of the background to and reasons for the proposed changes to terms and conditions of employment, eg:
 - changed economic circumstances resulting in a need to reorganise the business
- a general harmonisation exercise to ensure that contracts are legally compliant, appropriate for the size and structure of the business and/or provide proper protection for the employer's business interests
- details of the change(s) required to terms and conditions of employment and the business reasons for considering them appropriate to address the needs identified above
- an analysis of the available methods by which the changes may be effected and consideration of the advantages/disadvantages of each for the business and for the affected employees
- details of the number and type of employees affected by the proposed changes
- an assessment of the impact of the proposed changes for the affected employees (eg some employees may be affected by only some of the proposed changes)
- an assessment of how, if at all, this impact may be minimised while still meeting the business need (eg by introducing the changes in stages over time, rather than all at once)
- based on the number of employees affected, an assessment of the consultation procedure that will be required and how it will be conducted

Step 2: Decide Nature Of The Consultation

Collective consultation

If the change:

- will affect 20 or more employees, or
- 20 or more employees are likely to refuse to agree to the change voluntarily

It will be necessary to commence collective consultation. It may be necessary to elect employee representatives if they are not already in place. The Secretary of State must be notified. Detailed legal advice should be sought on this potential trap for the unwary.

If it is the case fewer than 20 employees will be affected by the changes in terms, consultations can take place on an individual basis and there is no requirement for the employees to be accompanied.

Pensions

If the proposed changes affect pensions, consultation with active and prospective scheme members and their representatives may be required.

Step 3: Provide Initial Information To All Affected Employees

Information is often initially provided to employees by way of one or a number of group presentations, followed up with information in writing (see Step 4).

This should take place as early as possible, to ensure that employees receive adequate warning of the proposed changes.

Step 4: Provide Information In Writing

The information provided to employees at the initial presentation should be confirmed in writing. This might be a simple letter or an information 'pack'. Either format should include the proposed revised contract or written variation, an explanation of the proposed changes, an outline of the consultation process and the implications for the business and the employee if the changes are not agreed. It may include other information, such as 'frequently-asked questions' (FAQs) about the changes, particularly if the proposed changes are extensive and/or complicated.

Step 5: Start Consultation Process

Commence collective consultation, if required.

Address any other requirements to consult, eg in relation to pension changes.

Alternatively, if no collective consultation is required, once affected employees have had time to digest the information provided at the initial meeting/presentation (24 hours is probably the shortest period that would be considered adequate but this will depend on the scope of the proposed changes), hold individual consultation meetings with them.

There is no need for employees to be accompanied at these individual meetings at this stage.

Step 6: Consider Representations

Review the representations received during the consultation process. Consider whether, in light of these, any modification(s) should be made to the proposed changes to address concerns raised by employees.

Step 7: Further Consultation Meetings And Warning

Hold a further consultation meeting with representatives and/or each of the affected employees. Again, depending on the scope of the exercise, this may be preceded by another group presentation.

Warn the employees that, if agreement to the proposed contract changes (as modified from the employer's original proposals as agreed by the employer in light of the consultation) cannot be reached, you will have to consider serving proper notice to terminate the existing contracts, followed immediately by an offer to re-engage the employees on the new terms.

Emphasise at this stage that such a course of action would be a last resort and that the preferable outcome would be that the changes are agreed voluntarily.

Step 8: Consider Any Further Representations And Review Consultation Process

Consider any further representations made at Step 7. Review:

- the likelihood of securing agreement to the changes from the affected employees/their representatives, in light of their attitude during the consultations to date, and
- whether, as a result, any further consultation meetings are necessary

Review or refine the proposed dismissal process as required.

Step 9: Communicate Deadline For Agreement To New Terms To Affected Employees

Write to each affected employee:

- repeating the business reasons for the proposed change(s)
- setting a deadline for obtaining written agreement from the employee to the proposed new terms and conditions
- stating that, if agreement is not reached at that stage, the employer will consider terminating the relevant employee's employment due to their having refused to agree to the change
- emphasising that any such termination would be on notice (ie so that there will be no breach of the existing contract)
- stating that the employer will also offer immediate re-engagement on the new terms
- setting a meeting date and time (which can be just after the deadline for voluntary agreement), which the employee is required to attend if voluntary agreement to the change is not reached by the deadline
- explaining that, if such a meeting is necessary, the employee will have the right to be accompanied at it if he wishes

The employee representatives (if any) should be given a copy of the proforma letter and relevant individual details for each affected employee.

Step 10: Review Responses And Deal With Administrative Issues (1)

During the period from Step 9 until the deadline, keep an accurate record to monitor which employees:

- (1) agree the new terms
- (2) state that they will not agree the new terms
- (3) fail to respond

In respect of those employees in category (1) above, check that new contracts have been properly executed and ensure that the employee receives a copy that has also been signed on behalf of the employer. The new contractual terms should be implemented according to the new contracts.

In respect of employees in categories (2) and (3) above, consider sending another letter to each of them to remind them that they are required to attend the individual meeting, as set out in the letter sent at Step 9.

Step 11: Individual Consultation Meetings With Dissenters (if required)

Hold individual consultation meetings with each of the employees who do not agree the new terms voluntarily.

The employee should be offered the right to be accompanied at this meeting.

At the meeting:

- review the process to date
- offer the employee the opportunity to make further representations on the issue
- reiterate that if voluntary agreement to the new terms is not reached, the employer will have no option but to terminate the existing contract and offer re-engagement on the new terms

Step 12: Give Dissenters Written Notice Of Termination Of Employment

Ensure that any collective consultation has been concluded.

Write to each affected employee who has not voluntarily agreed to the proposed changes:

- reviewing the process to date

- giving due notice of termination under the employee's existing contract (note that it is unlikely that all relevant employees will have the same notice period)
- stating the new terms and conditions will take effect on expiry of this notice period.
Note that:
 - where between 20 and 99 employees are affected by the proposed change(s), dismissals cannot take effect until 30 days after the start of the consultation
 - where 100 or more employees are affected by the proposed change(s), dismissals cannot take effect until 45 days after the start of the consultation
- enclosing the new contract of employment and offering employment, from the date the notice expires, on the new terms
- requesting written agreement to the new terms before the date on which they are intended to come into effect
- offering the employee the right to appeal against the decision to end the original contract

Step 13: Review Responses And Deal With Administrative Issues (2)

During the period from Step 12, keep an accurate record to monitor which employees:

- (1) agree the new terms
- (2) state that they will not agree the new terms
- (3) fail to respond

In respect of those employees in category (1) above, check that new contracts have been properly executed and ensure that each employee receives a copy that has also been signed on behalf of the employer. The new contractual terms should be implemented according to the new contracts.

Your response in respect of employees in categories (2) and (3) above will depend on the particular circumstances. For example, if the employee indicates that he will be working under the new terms but under protest, you will need to decide whether that is acceptable, or whether you will wish to treat that protest as a repudiatory breach of contract by the employee, which you may then accept, bringing the contract to an end. You may suggest treating the protest as an appeal against the decision to end the employee's original contract, and deal with the matter under the appeal process.

Step 14: Hold Appeal Meetings (if required)

Hold an appeal meeting with any employee who invokes the right of appeal. The usual formalities in relation to an appeal should be observed.

Step 15: confirm outcome of appeal meetings (if required)

Write to the relevant employee(s) to confirm the outcome of any appeal meeting, stating that the decision is final.