

Varying a contract of employment

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Every year Acas helps employers and employees from thousands of workplaces. That means we keep right up-to-date with today's employment relations issues – such as discipline and grievance handling, preventing discrimination and communicating effectively in workplaces. Make the most of our practical experience for your organisation – find out what we can do for you.

We inform

We answer your questions, give you the facts you need and talk through your options. You can then make informed decisions. Contact us to keep on top of what employment rights legislation means in practice – before it gets on top of you. Call our helpline 0300 123 1100 for free confidential advice (open 8am-6pm, Monday to Friday) or visit our website www.acas.org.uk.

We advise and guide

We give you practical know-how on setting up and keeping good relations in your organisation. Download one of our helpful publications from our website or call our Customer Services Team on 0300 123 1150 and ask to be put you in touch with your local Acas adviser.

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From a two-hour session on the key points of new legislation or employing people to courses specially designed for people in your organisation, we offer training to suit you. Go to www.acas.org.uk/training to find out more.

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We offer hands-on practical help and support to tackle issues in your business with you. This might be through one of our well-known problem-solving services. Or a programme we have worked out together to put your business firmly on track for effective employment relations. You will meet your Acas adviser and discuss exactly what is needed before giving any go-ahead. Go to www.acas.org.uk/businesssolutions for more details.

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Changes occur in working relationships for all kinds of reasons

but problems can be avoided or resolved through proper discussion between employer and employee. Any agreed changes in the contract should be recorded in writing.

This leaflet is intended to give general guidance about the main legal considerations which may arise when employers or employees wish to change (or amend) the terms of a contract of employment between them. It is not an authoritative statement of the law; determining the law is a matter for the tribunals and the courts. Although every effort has been made to ensure that the information contained in the leaflet is accurate, the varying of contractual terms is a complex legal matter and it is advisable to seek independent legal advice.

Employers should be cautious if they are intending to vary a contract of employment when there has been a change of employer as a result of a business transfer or service provision change. This could be a recent transfer, or it could have been at any point in the past. There are special protections and rules regarding the contractual terms and conditions employees have when they transfer. For more information, see the Acas Guide Handling TUPE Transfers.

<http://www.acas.org.uk/tupe>

What is a contract of employment?

A contract is an agreement between two parties and is enforceable by law. A contract of employment is a contract of service and comes into being when an employee agrees to work for an employer in return for pay.

What are contract terms?

The terms of the contract are the rights and obligations which bind the employer and employee to the contract.

The terms of a contract can be:

- express (those which are explicitly agreed between the employer and employee, either in writing or orally)
- implied (those which have not been spelled out but which would be taken by the people involved to form part of the contract) or
- statutory.

Express terms may be established by referring to various sources, particularly the written statement of terms and conditions (to which most employees are entitled under the Employment Rights Act 1996), the letter of appointment and written or oral statements made by the employer and accepted by the employee. Express terms may also be incorporated into individual contracts by reference to other documents, such as collective agreements made with the recognised trade union and company handbooks.

Implied terms are often:

- too obvious to mention or because the people involved assumed they would be incorporated at the time the contract was entered into (eg: that the employee will not steal from the employer or that the employer will provide a safe working environment)
- necessary to make the contract workable (eg: that an employee employed as a driver will hold a valid current driving licence)
- the custom and practice of the business or industry, ie: where a particular custom or practice has been adopted over a period of time.

Statutory terms are those implied or imposed by an Act of Parliament or Statutory Instrument, eg: the entitlement to be paid the national minimum wage or given a minimum period of notice. Agreements to contract out of statutory terms are normally void under the law¹.

1 Some of the measures in the Working Time Regulations 1998 may be adapted through agreements between workers and employers. For further information, go to www.acas.org.uk/workingtimeregulations or try www.gov.uk

Why would employers or employees want to vary a contract?

- An employer may wish to vary the terms of the contract because of changed economic circumstances or due to a reorganisation of the business. Possible areas of change could include pay rates, hours or days worked, duties, supervisory relationships or place of work.
- An employee may seek to vary the contract to bring about improvements in pay or working conditions, for instance by requesting additional holidays, or to change the conditions so that they suit him or her better, eg: by requesting a change from full-time to part-time working because of domestic responsibilities.

How can contracts be varied?

- An existing contract of employment can be varied only with the agreement of both parties. Changes may be agreed on an individual basis or through a collective agreement (ie: agreement between employer and employee or their representatives (trade unions or workforce representatives)).
- An employer who is proposing to change an employee's contract of employment should fully consult with that employee or his or her representative(s) and explain and discuss the reasons for the change.
- Employees are far more likely to accept changes if they can understand the reasons behind them and have an opportunity to express their views. Involving employees makes good business sense, as it drives up levels of employee engagement and motivation.
- Variations to the contract can be agreed verbally or in writing. It is preferable for any agreed changes to be recorded in writing.
- Where a variation to the contract has been agreed and the changes concern particulars which must be included in the written statement of terms and conditions, the employer should give written notification of the change to the employee, within a month of the change taking effect.

In what circumstances can an existing contract authorise changes in the employee's working conditions?

- A contract may contain express terms which allow an employer to make changes to employees' terms and conditions. The flexibility clauses may be quite specific or they may include a general power to allow the employer to change the contract terms.

WARNING

As case law suggests that tribunals and the courts often place a fairly narrow interpretation on flexibility clauses an employer should seek legal advice if they intend to rely upon the flexibility clause in their employees' contracts to vary the terms and conditions.

How can an individual contract be varied by a collective agreement?

- A contract of employment is in law an agreement between an employer and an individual employee. Any variations to the contract need that individual's agreement. However, an employer and employee can agree, either expressly through a clause or reference in the employee's contract, or through an implied term, that relevant changes in terms and conditions can be negotiated by a trade union(s) on the employee's behalf. This may be the case whether or not the employee is a member of the recognised trade union(s).

Varying a contract: employers' questions

What's the first thing I should do?

Consult with your employees (or their representatives) about any proposed changes to their contract with the aim of seeking the employee's agreement. It is best practice for you to seek written consent to the changes from the employee (an e-mail response from your employee would normally be acceptable). You must also provide a written statement detailing the changes to their written statement of terms and conditions within one month of the change taking effect.

It is best to renegotiate an existing contract through consultation and discussion with your employees. The aim of this is to reach a compromise.

Is it worth offering incentives?

It may be. Some employers offer incentives to encourage their employees to agree to the change(s). You might offer to “buy out” a term in the contract to allow them to introduce a different contractual term. Incentives do not have to be financially costly to a company, for example, a company wishing to alter shift patterns may be able to offer extra paid or unpaid leave in exchange. For more information contact the Acas Helpline on 0300 123 1100 (open Monday to Friday 8am-8pm and Saturday 9am-1pm) or take legal advice.

Can I impose a contract unilaterally?

If you impose a new contract unilaterally you will be in breach of contract and your employees may well:

- make legal claims against the company for constructive dismissal if the breach is fundamental and significant
- claim damages for breach of contract at a civil court
- claim at an employment tribunal for unlawful deduction from wages if the change affects their pay.

Imposing a change is also likely to affect the employees’ level of engagement, morale and performance and you should seek legal advice or speak to the Acas Helpline on 0300 123 1100 for further information.

Good practice tips:

- ✓ keep talking and consult with employees – this will help maintain levels of productivity and engagement
- ✓ follow your internal policies – employees should raise formal grievances with their employers if they are not happy with a variation in their contract
- ✓ consider the options – reaching a compromise is the best way of preserving good employment relations at work
- ✓ call Acas Helpline on 0300 123 1100, and seek legal advice where appropriate.

What if I can’t reach agreement with my employees?

If you cannot reach agreement with your employees you can serve notice to terminate the existing contract and offer the employee re-engagement on the new terms. This should be considered only after full and thorough consultation with employees and their representatives and treated as a last resort.

By doing this you will be dismissing the employee and it is important that you follow a fair dismissal process and offer the employee the right of appeal against their dismissal. Your employee may make a claim to an Employment Tribunal for unfair dismissal. It would be for the Employment Tribunal to decide whether or not the dismissal was fair or unfair.

Proper notice of the termination of the contract will be as specified (or implied) in the employee's contract, or the minimum statutory notice period, whichever is the longer. Whilst you would not be breaching your employees' contract by doing this your employees could claim unfair dismissal if they have the qualifying length of service to do that.

NOTE: If you decide to dismiss and offer re-engagement on the new terms to 20 or more employees then there is a legal obligation for you to collectively consult with any recognised trade unions or workforce representatives. The penalty for failing to collectively consult could be a Protective Award for all affected employees up to a maximum of 90 days pay.

If you are (or expect to be) affected by such issues, see Appendix 1 on important changes to making a tribunal claim.

Varying a contract: employees' questions

What if I just agree to the changes?

In this situation you would start to work under the new terms and conditions agreed between yourself and your employer. Your employer would usually put the changes in writing to you and may ask you to sign a document to confirm that you have agreed to the change.

NOTE: if you do not agree to the change but do not inform your employer AND you work under the new terms and conditions, this could be perceived that you have accepted the changes. If at a later date you decided to make a claim to an Employment Tribunal, the Tribunal will take into account what you have done to resolve the matter with your employer.

Can I complain to my employer?

Yes. If you are unhappy with the changes your first step would be to discuss this informally with your employer. If this does not resolve the matter then you may wish to raise a formal grievance, using the company grievance procedures, or the Acas Code of Practice, if the company does not have grievance procedures in place. The benefit of doing this is that you may be able to resolve the matter quickly and may help you to re-negotiate the changes.

What if I leave?

If you leave you could claim constructive dismissal at an employment tribunal if you consider that the changes to your contract are significant and fundamental and providing you have the qualifying length of service to do this. Refer to Appendix 1 which outlines important changes to making Employment tribunal claims.

NOTE: Before ending your employment you may want to speak to the Acas Helpline on 0300 123 1100 (open Monday to Friday 8am-8pm and Saturday 9am-1pm) for further information on this. Alternatively you may wish to seek a legal opinion.

Can I stay and work under protest?

If you work under protest you can either:

- Work under the new terms and make it clear to your employer that you do not agree to the change AND take legal action at a civil court to sue your employer for breach of contract. The court will consider whether the company are in breach of contract and may award you damages that you have suffered as a result of the breach of contract. This is costly and you should take legal advice,

OR

- Bring a claim for unlawful deduction from wages if the change results in a reduction in your wages. Again you must inform your employer that you do not agree to the changes or that you are agreeing under protest.

In either case it is important to first raise a grievance with your employer

to try to resolve this issue without court action. Call the Acas Helpline on 0300 123 1100 (open Monday to Friday 8am-8pm and Saturday 9am-1pm) to discuss your options in more detail or alternatively take legal advice.

Good practice tips:

- ✓ keep talking to your employer – this is by far the best way to reach agreement. Court action takes time, it may incur costs and you could end up without a job
- ✓ follow your internal policies – a formal grievance should be raised with your employer if you are not happy with a variation in your contract
- ✓ consider the options – reaching a compromise is the best way of preserving good employment relations at work
- ✓ call Acas Helpline on 0300 123 1100 (open Monday to Friday 8am-8pm and Saturday 9am-1pm) and seek legal advice where appropriate

Can I claim unfair dismissal if I stay at work?

In some exceptional circumstances where your employer has unilaterally imposed significant and fundamental changes to your contract upon you it may be possible to claim at an employment tribunal that you have been expressly dismissed from your existing contract even though you continue to work under the new contract. In this situation you must make it clear to your employer that you do not agree to the changes and seek to resolve the situation first with your employer.

This is a very complex situation and it is important that you seek legal advice before making a claim to an employment tribunal before taking action at the tribunal. If you are (or expect to be) affected by such issues, see Appendix 1 on important changes to making a tribunal claim.

Important Note

Collective Consultation

If an employer decides to terminate the contracts and offer re-engagement on different terms for 20 or more employees they are legally required to consult collectively with any recognised trade union or workforce representatives. The penalty at Employment Tribunal for not complying with this legal requirement is a Protective Award. Call the Acas Helpline for further advice on 0300 123 1100 (open Monday to Friday 8am-8pm and Saturday 9am-1pm).

Where can I find out more?

The Acas Code of Practice on disciplinary and grievance procedures sets out principles for handling disputes in the workplace. These include:

- informing the employee of the problem
- holding a meeting to discuss the problem
- allowing the employee to be accompanied
- deciding on appropriate action
- providing employees with an opportunity to appeal.

Employment Tribunals are legally required to take the Code into account when considering relevant cases. Tribunals will also be able to adjust any compensatory awards made in these cases by up to 25 per cent for unreasonable failure to comply with any provision of the Code. Discipline and grievances at work: the Acas guide: to order, to view and order, go to www.acas.org.uk/publications

Appendix 1: Important changes to making Employment Tribunal claims

Previously, an employee could go straight to the tribunal service, but this will change. From 6 April 2014, if an employee is considering making an Employment Tribunal claim against their employer, they should notify Acas that they intend to submit a claim.

Details of how and where to do this are given below.

Acas will, in most circumstances, offer to assist in settling differences between employee and employer. Employers intending to make a counter-claim against an employee must follow a similar procedure.

The process for agreeing settlement is called Early Conciliation. It is handled by experienced Acas conciliators and support officers and is:

- free of charge
- impartial and non-judgmental
- confidential
- independent of the Employment Tribunal service
- offered in addition to existing conciliation services.

Early Conciliation focuses on resolving matters on terms that employee and employer agree.

Early Conciliation may not resolve matters in every claim. When this is the case Acas will issue a certificate that is now required for a claim to be submitted to an Employment Tribunal.



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Remember, when a claim is lodged with a tribunal, Acas will continue to offer conciliation to both sides until the tribunal makes a judgment and, if the claim is successful, a remedy decision (usually financial compensation) has been made.

To find out more about Early Conciliation, go to www.acas.org.uk/earlyconciliation

Acas Training

Our training is carried out by experienced Acas staff who work with businesses every day. They will show you the value to your business of following best practice in employment matters and how to avoid the common pitfalls. We also run special training sessions on new legislation.

Look at the Acas website for up-to-date information about all our training or if you want to book a place online, just go to www.acas.org.uk/training or call the Acas customer services team on 0300 123 1150.

Training sessions are specially designed for smaller companies and our current programme includes:

- Managing discipline and grievances at work
- Managing absence at work
- Employment law update
- HR management for beginners
- Having difficult conversations
- Contracts of employment: how to get it right
- New employment legislation
- Redundancy and restructuring.

We also have free online learning to help you – just go to www.acas.org.uk and click on e-learning to look at the topics covered.

Acas Publications

*Book time with your
Employment specialist*

Whether you need to know how to write a contract of employment, how much holiday you are entitled to or about the latest employment legislation, our range of publications give practical information and advice for both employers and employees on employment matters.

View and order online at www.acas.org.uk/publications

You can also sign up for Acas' free e-newsletter. It will keep you informed about the latest developments in employment legislation as well as best practice advice on a range of employment-related topics.

If you would like to join our mailing list, subscribe online at www.acas.org.uk/subscribe

Information in this booklet has been revised up to the date of the last reprint – see date below. For more up-to-date information go to the Acas website www.acas.org.uk.

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

Acas aims to improve organisations and working life through better employment relations. We provide up-to-date information, independent advice, high quality training and we work with employers and employees to solve problems and improve performance.

We are an independent, publicly-funded organisation and many of our services are free.

March 2014

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