



Employment Guide: Varying Terms and Conditions of Employment

Note: This publication is intended to provide general guidance only. It does not constitute legal advice and should not be relied upon as doing so.

Advisory Officers, at the Employment Relations Service, can offer confidential and free advice on all aspects of employment law and employment relations.

Overview

What is a Contract of Employment?

A contract of employment is an agreement between employer and employee which governs the working relationship. It comes into being when an employee agrees to work for an employer in return for pay and is enforceable by law.

The varying of contractual terms can be a complex legal matter and it may be advisable to seek independent legal advice.

The terms of the contract are the rights and obligations which bind the parties to the contract. These terms may be express or implied:

Express Terms

Express terms are those which are explicitly agreed between the parties, either in writing or orally. Examples of some of the express terms include pay, hours of work, holidays, pensions, sick pay. Express terms can be found in a number of places including the written statement of terms and conditions (please see the publication 'Contracts of Employment'), the letter of appointment, written or oral statements made by the employer and accepted by the employee and in company handbooks.

Express terms may also be incorporated into individual contracts by virtue of the terms of a collective agreement between an employer and a trade union where there is an express or implied term in the employee's contract which permits this.

Implied Terms

Implied terms are those which have not been explicitly agreed but can be considered to form part of the contract to make it workable. Examples are the employer's duty to provide a safe working environment and the employee's duty to exercise reasonable care and skill in the performance of his/her duties. The contract, and relationship between employer and employee, is also one regarded as based on the implied term of mutual trust and confidence. Terms can also be implied by the custom and practice of the business or industry, for example where a well-known custom or practice has been adopted over a period of time.

Why would employers or employees want to vary a contract?

Over time businesses need to evolve; they will need to remain competitive in their market and react to changing economic circumstances. This will impact on employees and may mean that some element of change to their contractual terms is inevitable. This may be necessary, or considered vital, for the growth and survival of a business. Possible areas of change to the contract could include pay, bonuses, pensions, hours or days worked, duties, or place of work.

An employee may also seek to vary the terms of the contract to improve their pay and conditions or by making a request to change conditions which are more suited to the employee, for instance a change from full time to part time employment or vice versa. Any such request should be considered carefully and reasonably by an employer balancing the request made by the employee against the business needs of the organisation.

How can contracts be varied?

- A contract of employment is a legally binding agreement and any changes must be agreed by both parties. However, changes can be agreed on an individual basis or through a collective agreement (see below).
- Working conditions or practices may be changed by the employer if the change is expressly authorised by a term in the employment contract. For example an employer may expressly reserve the right to alter the employee's duties through a flexibility clause, or place of work through a mobility clause. However, this can be a complex area and employers may wish to take legal advice before relying on such clauses for other than minor changes.
- A contract can be varied by collective agreement. 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 negotiated by a trade union are incorporated into an individual employee's contract. This may be the case whether or not the employee is a member of the relevant trade union.

- An employer who is proposing to change an employee's contract (or a number of employees' contracts) should consult fully with the employee(s) and / or his or her representatives. Consultation should involve a constructive, full and open two way discussion during which the employer can explain the reasons for the change and also consider the views and suggestions of the employee(s).
- Changes to contracts can be agreed verbally or in writing but, to prevent any misunderstanding, it is preferable for **any changes to be recorded in writing**. Where a change to the contract has been agreed and the changes concern clauses that must (by law) be included in the written statement of terms and conditions, the employer should notify the employee in writing of the change, within four weeks of the change taking effect.

What happens when an employer varies a contract without the agreement of the employee and what could an employee do in these circumstances?

- If an employer imposes changes in contractual terms without the agreement of the employee, **there will be a breach of contract**. In these circumstances the employee can respond by:
 - **He / she can accept the breach by simply carrying on and continuing to work under the amended contract.** Where an employee continues to work under revised terms without objection, then in due course, he or she may be regarded as having agreed to the changes.
 - If there is a fundamental breach going to the heart of the contract, the employee may treat the breach as bringing the contract to an end. He or she, subject to a qualifying period of employment of one year, could make a complaint of constructive unfair dismissal to the Employment and Discrimination Tribunal. A fundamental breach might include a substantial pay cut or a major change in working hours.
 - In coming to a decision, the Tribunal will take into account whether the employer acted reasonably in all the circumstances of the case. If a complaint of constructive unfair dismissal is upheld, the Tribunal may award up to six months' pay. Please refer to the advice contained in the publication 'The Requirements of the Employment Protection (Guernsey) Law, 1998' for further information.
 - The employee could also consider taking a claim for breach of contract to the Civil Courts and apply for damages to recover direct financial loss resulting from the breach, for example in respect of a cut in pay.
 - **The employee could refuse to agree to a change in the terms.** This would only be possible in those circumstances whereby the employee is able to refuse to accept the change, for example, where working hours are changed. If the employee decides to dismiss the employee as a result and the employee subsequently makes

a complaint of unfair dismissal the employer would need to demonstrate that he acted reasonably in the circumstances.

- **The employee may continue to work within the varied contract ‘under protest’**, making it clear that he or she does not accept the terms and is treating the change as a breach of contract. In these circumstances the employee could seek damages from the employer through the Civil Courts for a breach of contract and / or a declaration that the employer must abide by the original terms. This is known as **‘standing and suing’** on the contract.
- If the change can be said to amount to a termination of the existing contract and the imposition of a new contract the employee could work under the new contract and claim to have been unfairly dismissed from the old contract. The employee could make a claim to the Employment and Discrimination Tribunal, subject to having been continuously employed for one year or more. The Tribunal, in the first instance, would have to decide whether the new terms were so substantially different as to be an entirely new contract and not a variation of the old one.

Is there an alternative method of making contractual changes if agreement on a variation cannot be reached?

- If an employee refuses to agree to a change the employer may decide to terminate the old contract with due notice and offer the employee new terms and conditions. There will be no breach of contract in these circumstances. If the employee accepts the new contract, continuity of employment is preserved.
- However, the termination from the old job will be a dismissal under the law and could result in an unfair dismissal claim, even if the employee accepts the new job. The Tribunal would then consider whether the employer acted reasonably in the circumstances and whether a fair procedure, including meaningful consultation took place.
- The employer or employee(s) could also unilaterally notify a dispute to the Industrial Disputes Officer, under the Industrial Disputes and Conditions of Employment (Guernsey) Law, 1993. This allows the matter to be dealt with under the law through advice, conciliation, voluntary arbitration or an Industrial Tribunal for a legally binding settlement. Advice on this process is available from the Employment Relations Service.

Other Publications

Publications can be downloaded from the website on a wide range of employment relations matters including local employment legislation and best practice guidance on other employment related matters.

Contact Information

For further advice

- Check www.gov.gg/employmentrelations
- Email employmentrelations@gov.gg
- Contact the **Employment Relations Service**, Edward T Wheadon House, Le Truchot, St Peter Port, GY1 3WH
- Telephone number: **01481 220026**