



How to approach contractual variations.

Where an employer needs to achieve contractual variations, whether in the normal course of business or due to Coronavirus, there are three main elements of the process which must be given particular consideration if the employer is to achieve its aim. These are preparation, communication and the mechanics of making the variation.

Preparation :

The importance of preparation cannot be overstated. Employers will want to assess the reason for the variations – currently likely to be the threat to the business from Coronavirus – and establish what level of variation is required. Taking reductions in salary as an example, it would be prudent for finance and HR departments to work together to assess what level of savings the company must achieve and then model the most appropriate way to achieve that within the required timescales.

Employers should give considerable thought to the process that they will follow in order to give the best chance of agreeing variations quickly and with minimal negativity from employees. Consultation may be with employees directly or with a body which is recognised for the purposes of consultation on terms and conditions, such as a Trade Union or works council. We consider here how an employer without such a recognised body might consult.

Consultation will tend to involve an initial announcement of the proposal to the affected employees, with a deadline for employees to respond with any questions or concerns about the proposal. If there are no concerns raised an employer can often move quickly to put the variation in place. However, it is likely that most contractual variations will lead to some employee concerns. Where such concerns are raised, employers should engage with these issues, investigate them and respond to the affected employees.

It may be that concerns or suggestions cause an employer to reconsider their proposal. Employees can often bring forward useful suggestions and alternative approaches. Where this is the case, it is useful to give credit for this and show the business' willingness to engage.

It is also prudent to review employee contracts of employment (and, where appropriate, any collective agreements) in order to assess whether the contract provides a mechanism for variation. This will inform the process that will need to be undertaken and the relevant timescales.

Communication :

The importance of communication cannot be overstated. The ways in which employers communicated difficult decisions at the point of lockdown featured heavily on social media and did considerable damage to those companies who failed to communicate in a humane way with their workers. Those who engaged with their workers found a high degree of engagement and willingness to suffer short-term pain for long-term job security.

There is often a degree of cynicism from employees towards employers and vice-versa. When difficult decisions, such as pay cuts or redundancies, have to be made employees frequently question their employers' motives. However, there is no such issue in the present circumstances – employees are perfectly aware of the immense financial pressures on businesses due to Coronavirus and therefore employers' concerns are seen as authentic.

There is little to be lost and much to be gained from being transparent and open with employees about these pressures. Where employees can see the financial peril (and consequent risk to jobs) caused by Coronavirus, they are more likely to see potential short-term variations for what they are – an alternative to redundancies or business closure. There is a definite feeling that everyone is 'in it together' and this can be of use to employers in obtaining agreement to variations. On the whole, employees are aware that these are extraordinary times.

There is also evidence to suggest that employees are more amenable to potential variations where in the normal order of things they might be likely to respond with resignation and a claim of constructive unfair dismissal. The first step from an employee in making such a claim is to resign, and with the job market likely to be bloated by millions of unfortunate individuals, perhaps employees are less willing to resign in the first place.

That notwithstanding, clear and open dialogue with employees which takes a consultative approach is likely to give the best chance of succeeding in putting in place contractual variations with the least risk, negative feeling and wastage of time.

Mechanics of varying contracts :

Rules governing contracts tend to be found in contracts themselves. During the preparatory stage, employers should have reviewed contracts of employment and ancillary documents to find what rights had been reserved and any processes which had been agreed. These will set out the general mechanics of the process and should, generally, be followed.

Contracts of employment tend to contain either or both of two types of variation clause – specific or general. A specific variation clause states exactly how that clause might be varied in future. A classic example is an 'hours of work' clause. These tend to set out a working pattern, but will often also set out how this might be varied, perhaps as follows:

“Due to the nature of our business, your working hours will not necessarily coincide with the normal hours as outlined above. We reserve the right to vary your hours of work on a temporary or permanent basis as necessary to meet our business requirements. We may do so by amending your shift patterns and/or introducing new shift patterns, to include weekend and/or night working and/or reducing your hours of work as may be necessary for the proper performance of your duties.”

Such a clause reserves specific power for an employer to vary hours of work. Where this kind of clause exists, consultation is usually straightforward as the act of consultation itself is more of a gesture of goodwill and prudent for employee relations. If agreement were not reached through consultation, the employer may simply look to rely on the wording agreed in the contract of employment and enforce the change. Clearly such an approach would be more controversial in the case of a unilateral salary cut and employers would be unlikely to want to force this on employees unilaterally.

A general variation clause is seen in most contracts of employment and tends to read similar to this:

“We reserve the right to make reasonable changes to any of your terms and conditions of employment. You will be informed of any such changes in writing, the changes taking effect from the date of the notice. Significant changes to your contract of employment will be notified to you not less than one month in advance of the change becoming effective.”

These types of clause are rarely enforceable – they tend to be viewed as being insufficiently specific. While they are useful in regulating minor and uncontroversial variations, employers would be unwise to rely on such a general clause in order to reduce salary on one month’s notice. As such, in all circumstances the best mechanism for obtaining agreement to a variation of a contract of employment is to consult openly with affected employees. How to do so will depend on the number of affected employees, but the process set out below forms the basis to a consultation with multiple employees (and where there is not recognised body for consultation).

Following the completion of planning, the first stage of a consultation tends to be an announcement of the proposal. This is often done by group meeting, but given the rules on social distancing this could equally be achieved by video conference or by way of a well-drafted group email. Set out the reasons for the proposal, the impact of this, whether it is intended to be temporary or permanent and the consequences for the business of a failure to agree. Listen to any immediate queries or concerns – if these can be answered then do so; otherwise, undertake to consider the issues and respond in due course.

Set a deadline for queries, suggestions and concerns to be raised. Following this deadline, if none have been received email employees to confirm this and arrange individual meetings. If queries have been raised, respond to these (both to the individual and the group). If any suggestions are to be taken forward, revisit the plan accordingly. Individual meetings can then be arranged.

Where employees are happy to agree to the proposed variation(s), prepare a document which puts the change in place. Meet with the employee and have them sign the variation document – keep this in their HR file. Where employees are not happy to agree, go through their concerns with them and address each one. Often this allays concerns and an employee may be happy now to sign. If they are still not in agreement, schedule a further meeting.

In the meantime, it is often useful to write out to all employees (including those who have yet to agree), noting the support that the business has received from the vast majority of employees and how much this is appreciated. Meet again with the final employees and discuss any final concerns. Often, if employees will not agree to a variation, the last resort for an employer is to consider dismissal and re-engagement on the new terms. If you do need to consider this, contact your LexLeyton Employment Solicitor to discuss the particular circumstances and receive specific guidance.

