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Chartergates Fact Sheet

SUBJECT: MAKING CHANGES TO AN EMPLOYMENT CONTRACT

An employment contract, like most contracts, can only generally be changed or varied with the agreement of the parties to the contract. After all, what would be the point of having a contract in the first place if this were not the case? Many such agreed variations to employee contracts occur regularly in the normal course of business. For Example, when an employee receives a pay rise this will involve a variation to their contract. Such variations which are in the employee's favour obviously do not tend to cause any problem.

However, problems can arise for employers when it is necessary to make changes that adversely affect an employee, such as a reduction in pay or hours, or changes to job role or location. In such situation's employees may well be unwilling to agree the change and it is therefore very important for employers to know how they can make such changes lawfully and therefore avoid any legal challenges (or at least be in a strong position to defend a challenge). If it proves impossible to get the employee's 'express' agreement, either by individual agreement or by a collectively negotiated agreement, an employer will have to consider alternative options.

The first thing to consider is the contract itself and whether it contains any clauses which permit the required change without the agreement of the employee. This may be the case where:

- ✓ The contract contains terms which are sufficiently broad to accommodate an employer's proposals
- ✓ There is a specific right to vary the contract in the way required
- ✓ The contract gives an employer a general power to vary the contract terms

However, caution must be exercised in the use of such clauses and employer should bear in mind that:

- ✓ Any ambiguity in the wording of the clause will likely be construed against the drafting party
- ✓ Specific flexibility clauses are given a restrictive interpretation by the courts and their application may also be limited by implied terms, such as to exercise the clause reasonably
- ✓ General flexibility clauses may only be able to be used to make reasonable or relatively minor adjustments

If there are no such flexibility clauses in the contract an alternative is to seek the agreement of the employee to the proposed change other than by their express agreement. This can be achieved by:

- ✓ Imposing the change and using the employee's subsequent conduct to establish an implied agreement to the change
- ✓ Terminating the existing contract and offering the employee a new contract on the changed terms

However, imposing the change or terminating the existing contract may give rise to potential headaches for employers. For example, if an employer unilaterally imposes the change this will amount to a breach of contract and the employee may:

- ✓ Comply with the changes but work 'under protest' and bring a claim for breach of contract

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- ✓ Bring a claim for unlawful deduction from wages where the change involves a reduction in pay
- ✓ Refuse to work under the proposed change
- ✓ Resign and bring a claim for constructive dismissal

The term constrictive dismissal describes a situation where an employee resigns without notice by reason of the employer's conduct. The conduct in questions must be so serious as to amount to a fundamental or 'repudiatory' breach of contract. The employee is therefore entitled to regard the contract as having come to an end and the resignation will count as a dismissal under the terms of the Employment Rights Act 1996 (ERA). Reductions in contracted pay or hours are examples of changes that are likely to be regarded as repudiatory breaches.

There are four elements that an employee needs to show to establish that they have been constructively dismissed:

- ✓ That there has been a breach of contract by the employer
- ✓ That the breach is sufficiently important to justify the employee resigning
- ✓ That the employee left in response to the breach
- ✓ That the employee did not take too long in resigning after the breach

However, even if an employee can satisfy the above criteria, such that there has been a constructive dismissal, there is a further test in order to determine whether or not the dismissal was fair. Where an employer cannot show that there was a fair reason for the dismissal, it will obviously be unfair. If the employer can show a fair reason, then the issue becomes whether or not the employer acted reasonably in treating that reason as sufficient to justify the dismissal. If the employer has acted reasonably (as defined by the relevant legislation and case law) then even where there has been a constructive dismissal it will not amount to an unfair dismissal.

Terminating the existing contract and offering re-engagement on new terms avoids the risks associated with unilaterally imposing the change but using this option may give rise to claims for:

- ✓ Wrongful dismissal, where an employer does not give the required notice or make a payment in lieu of notice
- ✓ Unfair dismissal, unless the employer can establish a potentially fair reason for the dismissal and show that they acted reasonably in dismissing the employee for refusing to accept the proposed change.

However, it is well established that a refusal to agree to a reasonable change in an employment contract can amount to 'some other substantial reason' for dismissal, one of the potentially fair reasons for dismissal under the provisions of Section 98 of the ERA. In order to avoid or defend any of the potential claims listed above, an employer will need to be able to show that there was a sound business reason for the proposed change and that they acted reasonably in making the change. Acting reasonably in this context means following a fair process involving the provision of sufficient information, appropriate consultation, allowing appeal hearing etc.

It is important to note that if an employer follows the 'terminate and re-engage' route that this may be construed as a redundancy situation in certain circumstances. Where more than 20 employees are concerned it is essential that employers follow the collective redundancy obligations under the Trade Union and Labour Relations (Consolidation) Act 1992. This includes the obligation to notify the Secretary of State for the Department of Business, Innovation and Science. Failure to comply with this obligation is a criminal offence.

Where changes to employment contracts are proposed in the context of the transfer of a business, or 'service provision change', employers should also be aware of the potential application of the Transfer of Undertakings Protection of Employment) Regulations 2006 (TUPE). TUPE severely restricts the right to make changes to an employee's terms and conditions unless an employer can show that it was for an 'economic, technical or organisational' reason.

As the above shows, making lawful changes to employee contracts is possible but needs to be handled with care. Chartergates can provide all the necessary advice and guidance in order for employers to confidently make the changes to employment contracts that are required to meet the needs of their businesses.