



# *Varying a Contract of Employment*

*Advisory Guide 2*



## *ADDENDUM ON QUALIFYING SERVICE IN RESPECT OF DISMISSALS*

Variation of contract issues arise within a wider employment law context than general breach of contract/unfair dismissal law.

Legal developments indicate that where an employee claims that a statutory right has been denied (eg where an employer reduces wages) and as a consequence is dismissed from the original contract then he/she can rely on the unfair dismissal protection afforded those 'dismissed for asserting a statutory right'. This unfair dismissal protection has no attached qualifying service period.

It should be noted that this dismissal protection covers dismissal from a contract of employment as well as termination of employment.

Further, imposition of certain contractual changes upon an employee or particular groups of employees may give rise to potential claims, in some cases, under discrimination laws. These also have no attached qualifying service period in respect of Industrial or Fair Employment Tribunal applications.

**Variation of contract is thus a highly complex area of employment law. The Agency's enquiry point service may be contacted for further advice on 028 9032 1442.**

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Labour Relations Agency

*Varying a Contract of Employment*

## 1. INTRODUCTION

- 1.1 This Guide 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. The Guide is not an authoritative statement of the law; determining the law is a matter for the tribunals and the courts. Every effort has been made to ensure that the information contained in the Guide is accurate, but it should be emphasised that the varying of contractual terms is a complex legal matter. It is therefore advisable to seek independent legal advice when seeking to vary a contract of employment.

## 2. WHAT IS A CONTRACT OF EMPLOYMENT?

- 2.1 A contract is a promise, or a set of promises, that the law will enforce. In the context of an employment relationship the employee usually

promises to perform certain tasks for the employer, who in turn, promises to pay the employee a wage<sup>1</sup>. The contract comes into effect when the employer offers the contract and the employee accepts. It should be noted that it is not necessary for a contract of employment to be in writing but it is preferable to have the contract in writing.

## 3. WHAT ARE CONTRACT TERMS?

- 3.1 The terms of the contract are the rights and obligations which bind the parties to the contract.
- 3.2 The terms of a contract can be express (those terms which are explicitly agreed between the parties, either in writing

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<sup>1</sup>Many employment rights are granted only to those termed 'employees' or 'workers' in the relevant legislation and not to the genuinely self-employed. Guidance on who is an employee or a worker for the purposes of particular legislation is provided in the literature published by the appropriate Government Department. The Labour Relations Agency is able to advise on such matters.



or orally) or implied (those terms which have not been spelled out but which would be taken by the parties to form part of the contract).

3.3 Terms are implied, for instance, because they are:

- too obvious to mention or because the parties assumed they would be part of the contract 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 custom or practice has been adopted over a period of time.

3.4 Express terms may be established by referring to various sources, such as (a) the written statement of particulars of employment (to which employees are entitled under the law), (b) the letter of appointment or (c) written or oral statements made by the employer and accepted by the employee.

3.5 Express terms may also be introduced into individual contracts by what is known as incorporation. An incorporated term is one which becomes part of the contract after agreement to it has been reached in another forum. The most common example of an incorporated term is a term which has its origins in a collective agreement between an employer and a trade union. A collective agreement between an employer and a union is not usually a legal contract and is generally an agreement in honour which cannot be enforced in the courts. However the terms

of the collective agreement may be “incorporated” into the individual contract of employment. In such circumstances the terms become enforceable in law.

- 3.6 Statutory terms are those implied or imposed by an Act of Parliament or Statutory Instrument, eg the imposition of an equality clause into an employee’s contract or the entitlement to be paid a minimum rate of pay. Agreements to contract out of statutory terms are normally void under the law.

#### 4. **WRITTEN STATEMENT OF PARTICULARS OF EMPLOYMENT**

- 4.1 While there is no legal obligation on the part of the employer to put all the terms of the contract in writing the law provides employees with the right to receive a written statement

of particulars of employment<sup>2</sup>. This written statement is not a contract of employment, although it is often referred to as such. It is simply evidence as to certain terms of the contract that have been agreed between the parties. For further information on this statutory requirement see the Agency’s Information Note 2 on Employment Particulars and Itemised Pay Statement.

#### 5. **WHY WOULD EMPLOYERS OR EMPLOYEES WANT TO VARY A CONTRACT?**

- 5.1 An employer may wish to vary the terms of a 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.

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<sup>2</sup> Article 33 of the *Employment Rights (Northern Ireland) Order 1996*



5.2 An employee may seek to vary the contract to bring about improvements in pay or changes to working arrangements, for instance by requesting additional holidays or by requesting a change from full-time to part-time working because of domestic responsibilities.

## 6. *HOW CAN CONTRACTS BE VARIED?*

6.1 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 an agreement between an employer or employer's association and a trade union(s)).

6.2 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 change.

6.3 Variations of contract can be agreed verbally or in writing. It is preferable for any agreed changes to be recorded in writing.

6.4 Where a variation in the contract has been agreed and the changes concern an item which must be included in the written statement of particulars of employment, the employer should give written notification of the change to the employee, within a month of the change taking effect.

## 7. *HOW CAN AN INDIVIDUAL CONTRACTS BE VARIED BY A COLLECTIVE AGREEMENT?*

7.1 A contract of employment is in law an agreement between an employer and an individual employee. Any



variations in the contract need that individual's agreement.

- 7.2 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 negotiated by a trade union(s) are incorporated into individual employees' contracts. This may be the case whether or not the employee is a member of the relevant trade union(s).

## 8. *IN WHAT CIRCUMSTANCES CAN AN EXISTING CONTRACT AUTHORISE CHANGES TO THE TERMS OF THE CONTRACT?*

- 8.1 A contract may contain express terms which allow an employer to make changes to the contract. Through mobility or

flexibility clauses, for example, an employer may expressly reserve the right to require an employee to work at a different location, or to alter the employee's duties. The contract may therefore be drafted to permit foreseeable changes to be made within the terms of the existing contract, eg where there is a potential need to transfer an employee to a different workplace. Employers should note that any change in a contractual term may be challenged as discriminatory or unreasonable and must be objectively justified.

- 8.2 Sometimes tribunals and courts may consider that the contract contains implied terms which may authorise or prevent alterations of working conditions. For instance, it would be usual for an employee to be expected to work within reasonable daily travelling distance of his or her home.



## 9. *WHAT HAPPENS WHEN AN EMPLOYER VARIES A CONTRACT WITHOUT THE AGREEMENT OF THE EMPLOYEE?*

9.1 If an employer imposes changes in contractual terms without the agreement of the employee, there will be a breach of contract.

## 10. *WHAT COULD AN EMPLOYEE DO IN THESE CIRCUMSTANCES?*

10.1 The employee can accept the breach and continue 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.

10.2 Where an imposed change involves a significant change to the contract, eg a reduction in pay or

alteration of working hours, an employer may well be acting in fundamental breach of contract. Where there is a fundamental breach, the employee may treat the breach as bringing the contract to an end. In such circumstances and subject to having the necessary qualifying service, the employee may make a claim of constructive dismissal to an industrial tribunal. In coming to a decision the tribunal will take into account whether the employer acted reasonably in all the circumstances of the case.

10.3 Alternatively, the employee may continue to work within the varied contract but under protest and making it clear that he or she does not accept the terms. In these circumstances the employee will retain the right to seek damages from the employer for a breach of contract

and/or a declaration from the courts that the employer must abide by the original terms.

- 10.4 Whether or not the breach is a fundamental one, the employee may sue for damages for breach of contract in the civil courts; or if the employment has terminated, the claim can be made to an industrial tribunal, which can award damages up to a maximum figure.

**11. IS THERE AN ALTERNATIVE METHOD OF MAKING CONTRACTUAL CHANGES IF AGREEMENT ON A VARIATION CANNOT BE REACHED?**

- 11.1 Yes. If, after consultation, agreement on a variation of contract has proved to be impossible, an employer can - having observed any relevant procedural

agreements and consultation requirements - terminate the original contract, with proper notice, and offer a new contract to the employee, including the revised terms. Normally this will not constitute a breach of contract and if the employee accepts the new contract, continuity of employment is preserved.

- 11.2 Proper notice will be as specified (or implied) in the employee's contract, or will be the minimum statutory notice period, whichever is the longer.
- 11.3 The termination of the original contract will be a dismissal under the law and it will be open to employees to claim unfair dismissal before an industrial tribunal subject to having the necessary qualifying service. This will be the case whether they leave employment by refusing to accept the new contract or are dismissed



under the old contract and re-engaged under the new contract. The tribunal must then decide whether the dismissal was fair or unfair in all the circumstances.

## **THE LABOUR RELATIONS AGENCY**

The Labour Relations Agency was set up in 1976. The Agency's statutory remit is now to be found in the Industrial Relations (Northern Ireland) Order 1992, as amended by the Trade Union and Labour Relations (Northern Ireland) Order 1995.

The Agency is directed by a Board which is comprised of individuals who have knowledge and experience of employment relations. The Chairman and Board members are appointed by the Department of DHFETE.

Details of the current membership of the Board are available on request from the Board Secretary by writing or telephoning as detailed on the back cover.

## **WHAT WE DO**

We promote the development of good employment policy in areas such as,

- terms and conditions of employment
- disciplinary rules and procedures
- grievance handling
- attendance management

and good employment practices which contribute to organisational success, and improve the quality of working life for employees.

We provide a wide range of conciliation and arbitration services and an advice service on employment matters.



## **PUBLICATIONS AND INFORMATION**

As well as conciliation, arbitration and advisory services we can provide a wide range of information.

Our staff will be pleased to make information available in large print or on audio tape for people with impaired sight. Additional assistance for those with special needs (for example, hearing or learning disabilities) can be arranged by the Agency on request.

A list of our publications with information on how to obtain copies is available on request. (Contact details are given on the back cover.)



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