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Variation of Employment Contracts: Consent and COVID-19

by **Ciara O'Kennedy**

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One year on the impact of COVID-19 on the employment landscape is hugely significant and has brought about significant changes to the way we work, many of which are here to stay.

Many employers have been forced to implement radical overhauls of their business operations in order to remain viable with such changes likely to require adjustments to terms and conditions of employment for employees. In many industries, remote working is now the norm and a blended work environment between home and office, when the restrictions lift, is likely to be the future.

Businesses have also been forced to consider stark options such as pay cuts, reductions in working hours and lay-offs. To avoid or minimise job losses and to keep their businesses afloat, employers may wish to alter the existing terms and conditions of their employees.

Any variation of a core term of an employee's contract needs the employee's consent to avoid the risk of legal challenge.

But is the COVID-19 pandemic an exceptional circumstance justifying variations to an employment contract without employee consent to ensure survival of a business? The simple answer is no.

This article considers whether there are any circumstances in which variations may be permissible without consent, the risks associated with implementing changes in the absence of consent, and the possible defences available to employers who are left with no alternative but to implement changes unilaterally.

Changes to Terms and Conditions

Permanent or temporary variations to terms and conditions can occur:

1. With the employee's consent.
2. Without the employee's consent, but in reliance upon a contractual provision allowing for variation of the contract, such as a variation or mobility clause.
3. Without either the employee's consent or a variation clause.

Variations with Employee Consent

The provisions of an employment contract most affected by the impact of COVID-19 relate to remuneration, working hours and location of work. Remuneration and working hours are fundamental terms of any employment contract (as is work location but to a lesser degree). It is a general principle of contract law that the terms of a contract cannot be altered without the agreement of both parties, meaning that unilateral alterations of these provisions by an employer would generally amount to a breach of contract.

Employers must also consider the statutory protections afforded to employees. Reducing an employee's pay unilaterally and without consent may also expose employers to claims under the Payment of Wages Act 1991 before the Workplace Relations Commission, or employees may resign and claim constructive dismissal.

To implement a valid reduction in pay or working hours, without the risk of legal challenge, employee consent or agreement should be sought. In practical terms this should involve communicating with employees regarding the financial impact of COVID-19 on the business, outlining the rationale behind the proposed changes and consulting with the employees well in advance of the proposed changes to obtain the necessary agreement to reduce pay or working hours.

Once consent or agreement has been obtained, employers should record the fact of the agreed variation to the terms and conditions in writing. This can be done by way of a side letter or addendum to the contract which must be provided to the employee no later than one month after the change takes effect.

A prudent employee may wish to specify that his/her agreement to the variation is for a specified period of time with a view to being reviewed and pre-COVID-19 terms being reinstated when possible. In such circumstances employers should consider including a review date when the change(s) can be reconsidered. An employee who continues to work under altered terms and conditions of employment, without expressly accepting or objecting to the changes, has arguably acquiesced to the changes and is likely to find it difficult to subsequently challenge. An employee who accepts changes under protest is keeping open the possibility of a legal challenge.

Variations Through Reliance on Terms of Contract: Flexibility and Variation Clauses

Many employment contracts include a flexibility or variation clause that purports to allow employers to vary the terms and conditions of employment without any input from an employee. While the existence of such a clause in an employment contract may be of some comfort if changes are proposed, it should not be relied upon in isolation to impose changes without consultation. The Irish Courts, while accepting, that in certain circumstances alterations to terms and conditions are necessary for commercial efficacy, have consistently held that such clauses must be exercised reasonably. It is generally accepted that such clauses are intended to permit minor non-material changes, which do not relate to core terms, such as updates to reflect changes in law or statute or a change in a work practice. Imposing pay cuts, even of a temporary nature, without consultation or consent, by reliance on such clauses is unlikely to be viewed by a Court as reasonable.

Variations: Mobility Clauses

With remote working, or some form of hybrid arrangement between home and workplace set to continue, many employers have already taken steps to reduce the capacity of their physical workplace. Reliance on a mobility clause post lockdown to relocate employees to work from home permanently, or, to introduce a hybrid working arrangement where employees are opposed to such changes is not without risk of legal challenge.

Case law illustrate that mobility and variation clauses must be exercised reasonably. In *O'Byrne v Dunnes Stores,* Irish Supreme Court found that Dunnes Stores had breached the employee's contract of employment when it sought to rely on a general mobility clause to move an employee from Tallaght to Blanchardstown without any advance notice or consultation.

In order to successfully rely on a mobility clause to introduce significant changes to a work location, employers should provide employees with as much notice as possible of the proposed change, provide detail on the commercial rationale for the proposed changes and afford the employees an opportunity to make representations in respect of the changes before introducing such measures.

Can Employees Who Refuse to Accept Alterations to Terms and Conditions be Lawfully Dismissed?

Section 6.1 of the Unfair Dismissals Act 1977-2015 (the Acts) provides that dismissals are deemed to be unfair for the purpose of the Acts unless "having regard to all the circumstances, there are substantial grounds justifying the dismissal". Can a dismissal for refusal to accept material changes to terms and conditions, which an employer claims are essential to the survival of a business, qualify as "substantial grounds" so as to make the dismissal lawful?

The UK Employment Appeals Tribunal has accepted the proposition that a dismissal following a refusal to accept revised terms and conditions is capable of constituting "substantial grounds" if challenged. To successfully rely on this provision, employers should act reasonably in the manner in which they introduce such variations. Decisions from the UK Tribunal have helpfully identified various important factors, set out below, which Irish employers should consider prior to taking any action to terminate employees who refuse to accept necessary material changes to their terms and conditions:

1. The UK Tribunals have placed considerable emphasis on consulting and engaging with those employees' who object to the changes and in particular to carefully consider their reason for objecting. Failure to do so will likely make it more difficult to successfully rely on this ground if challenged.
2. The nature, commercial rationale and full effect of the proposed changes should be sufficiently and clearly explained to employees. Given the importance of fair procedures in the Irish context, it is likely that the procedural fairness adhered to by an employer in seeking to introduce changes to fundamental terms of the contract will be critical.
3. The UK Tribunals have placed considerable weight on the extent of the consultation process engaged in with the affected employees. The importance of consultation has been repeatedly emphasised in the UK decisions as has the extent to which employers have considered the impact on employees of the changes and any alternatives to the changes proposed.
4. Consideration should be given to the extent to which the burden of the proposed changes is being shared between management and employees below management level. Ideally any changes should be across the board and not targeted at lower paid employees or middle management while senior management remain unaffected. Targeting specific groups of employees can also lead to potential discrimination claims and should be avoided.

Engage and Consult

To avoid potential claims and employee unrest, employers who propose to implement variations to employee terms and conditions, on a permanent or temporary basis, should consider putting in place arrangements to engage and consult with them in advance. Where agreement cannot be reached, evidence of reasonableness, consultation and negotiation by the employer will be critical in successfully defending any legal challenges that may ensue.

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