



ALTERNATIVES TO REDUNDANCIES

1. Introduction

In the current economic climate and with the forecast for economic recovery looking promising, employers are becoming increasingly open to the idea of using alternative strategies to avoid making their staff redundant. These strategies should help them in the long run as once the economy picks up, employers will not need to look for appropriate staff again.

Some alternatives to redundancies include:

- Pay freezes
- Contractual variations;
- Retraining and recruitment freezes;
- Reducing agency staff,
- Bans on overtime;
- Flexible working;
- Secondments;
- Sabbaticals and many more.

Before deciding on any of these options, each one should be considered carefully especially with regard to the current law. A cost-benefit analysis should be carried out, staff and/or unions should be consulted and clear positive communication should be made.

Variations to contracts of employment

A contract of employment can only be altered with the agreement of all parties. If employers decide to change the terms of the employment contract unilaterally, they will open themselves up to claims for breach of contract or unlawful deduction from wages, for wrongful or constructive unfair dismissal and possible discrimination claims.

It is therefore advisable to seek the employees' express and written agreement to any variation of the terms of the employment contract and this can be done by consulting with all staff who are affected by the variation. Alternatively, the employer can impose a change to the terms and hope that the employees continue to work within the varied terms of the contract thereby accepting to the change by conduct.

If they do not wish to accept the terms by such an implied agreement, employees should make it clear that they are working under protest and do not accept the new terms.

In such a case, an employer can terminate the existing contract and offer continued employment under the new terms. As noted above, this could give rise to claims for wrongful or unfair dismissal and care should be taken in terminating the existing

contract. Contractual notice (or payment in lieu of notice) should be given to avoid wrongful dismissal claims. A potentially fair reason for dismissal should be established, and employers will need to show that they have acted reasonably in dismissing the employee for failing to agree to the change. Furthermore, the new ACAS Code of Practice should be followed to protect employers from unfair dismissal claims.

Changes to a contract will only amount to a variation where they affect the contract of employment, i.e. where they confer contractual rights on employees (in comparison to just good practices), and where the contract does not itself authorise the change to be made.

Changes authorised by the contract

Where the proposed change affects the employment contract, employers should check whether the terms of the contract authorise changes to be made.

Thus, where the term in question can be interpreted broadly enough to accommodate the change, any change will not be seen as a variation to the contract of employment. However, importance will be placed upon the parties' intention at the time of creating the contract, and any ambiguities in the relevant term will be construed against the party seeking to rely on the term.

Where the contract contains an express right to make a change (flexibility clause), courts and tribunals will be reluctant to enforce any such changes where an employer changes the terms of the contract unilaterally without proper consultation.

Where the contract conveys general power to vary the terms of the contract (so-called specific flexibility clause which typically arise in the areas of mobility clauses, job content and hours of work), employers will be restricted from making unilateral changes. This is particularly the case where implied terms of an employment contract curtail the operation of an express flexibility clause. Thus where a change in shift pattern would materially reduce or increase the hours of work, the change in hours and pay needs to be expressly and clearly expressed in any flexibility clause. Hence as noted above, consultation with the employees will be important.

Lay-off and short-time working

Lay-off during a particular week refers to employees who do not receive pay for a particular week as an employer does not provide them with work they were employed to do.

Short-time working refers to a reduction in the work provided to employees and their pay is less than half a week's pay.

Both practices may be used as an alternative to redundancy but they must be permitted under the contract of employment, either impliedly and based on custom and practice or expressly. It is important to note that any contractual right to lay-off may only be a right to lay-off for a reasonable period of time.

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