

Varying Terms and Conditions Of Employment

Introduction



Somewhat unsurprisingly, along with advising employers in respect of redundancy, the issue of varying an employee's terms and conditions of employment is becoming an increasingly topical subject matter for employment lawyers. In the current economic climate, employers are striving to reduce employee related costs, usually as part of an overall cost reduction exercise, in order to ensure that their businesses remain as competitive as possible and giving them a better chance of survival. As part of these cost reduction exercises, MH+C's employment law and benefits department is frequently asked by employer clients to advise on whether they can make changes to their employees' terms and conditions in an effort to save costs and how these changes can be effected.

The issue of re-negotiating a contract of employment is essentially a matter of basic contract law. The first principles of contract law prohibit any unilateral alteration of a contract, whether it is a contract of employment or otherwise. Accordingly, in order to alter or vary the terms of a contract, there must be agreement on both sides. While a work practice may be changed by an employer unilaterally, a contractual term may not be altered without an employee's agreement.

The change that most employers are looking to effect is a reduction in employees' salaries. This is not surprising given that this is the most significant employee related cost for businesses. Salary would, however, constitute a term of employment rather than a work practice and as such, it cannot be varied unilaterally. While some contracts of employment contain a clause which expressly reserves the employer's right to make amendments to an employee's contractual terms and conditions of employment, a variation clause must be exercised reasonably at all times. Such a clause does not give an employer an absolute discretion to unilaterally reduce employees' salaries and cannot be exercised in an oppressive manner. Ordinarily, it would not be considered reasonable to unilaterally reduce an employee's salary which is a fundamental term of the employee's contract of employment (arguably the most fundamental term from the employee's perspective).

Therefore, even if there is a variation clause contained in employees' contracts of employment, it would be considered a high risk strategy to unilaterally reduce employees' remuneration on the basis of such a clause without any consultation with employees and agreement of employees. While employees' agreement may be express or implied, tacit or by acquiescence, if the variation relates to a reduction in salary which is a fundamental contractual term, it would obviously be recommended that employees' agreement to such reduction should be express and in writing.

Employers should however be careful about the representations made in return for securing employees' agreement to salary reductions. The High Court has, in the past, enforced an employer's promise not to introduce redundancies if employees agreed to a re-deployment.

Legal Risks

Where variations to an employee's terms and conditions of employment are forced through without any consultation or without the employee's agreement, employees have a number of potential legal avenues available to them. An employee could argue that his/her position has become untenable by reason of the unilateral change to his/her contractual terms and as such,

the employee had no alternative but to consider himself/herself constructively dismissed. Constructive dismissal claims in Ireland are brought to either a Rights Commissioner or the Employment Appeals Tribunal (EAT) under the Unfair Dismissals Acts 1977-2007. Alternatively, an employee could take a claim for breach of contract to the civil courts and as part of such claim, could seek injunctive relief to prevent the unilateral variation by his/her employer. A disgruntled employee could also take a claim to a Rights Commissioner under the Payment of Wages Act 1991 claiming that there has been an unlawful deduction made to his/her remuneration. Further, an employee could bring a trade dispute under the Industrial Relations Acts 1946-2004. A non-legal risk that is also worth mentioning is the affect on employee morale and industrial relations within an organisation if changes are forced through without employee consultation and agreement.

Conclusion

In the past number of years it has proved very difficult to get employees to accept changes to their terms and conditions of employment which are to the employees' detriment. However, it is our experience that in more recent times, by reason of prevailing economic circumstances, employees are much more receptive to changes to their terms and conditions of employment if these changes increase their job security and mean that other more unpleasant cost saving measures such as redundancy can be put off or avoided for the time being.

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