Harper James Solicitors video transcript: Changing Terms & Conditions of Employment

I’m Sean Walsh and I’m an employment solicitor for Harper James Solicitors.

I do get called quite a few times about changing terms and conditions of employment and I’m not really talking about the inevitable changes that you will find in every Employment Contract with regards to annual pay or it might be promotion, but these are changes really that come about from a reorganisation of the employees and actually can also come about from the harmonisation of terms and conditions, so you may have some employees that have come across as a result say, for example, of a TUPE transfer and have different terms and conditions than your existing employees. At some point in the future, you may want to harmonise those terms and conditions and that’s really what I’m talking about today.

An Employment Contract has normal contractual principles and therefore can only be changed in accordance with its terms or by agreement and not all changes involve change to the contract itself as well, so sometimes you can have where the contract authorises change, where there’s a specific, for example, flexibility clause and one with a change of location, you may have a specific mobility clause. With those flexibility clauses though you’ve just got to be careful as the employer with regards to the implied terms in every Employment Contract, especially the implied term of trust and confidence. So what I’m talking about there is having reasonable notice, making sure when you’re exercising the discretion with regards to the flexibility clause it’s not done in a manner whereby it makes it impossible for the employee to carry out the contract and not done in a way that damages the trust and confidence that each employee is entitled to have from their employer.

Options for change that aren’t authorised by contract are three in number. The first, you would seek express agreement through consultancy with the employee. The second option, you could unilaterally impose the terms and conditions, the new ones, and then wait for implied agreement from the employee. The third option would be actually to terminate the Employment Contract of the employees and re-employ them on the new terms. The first option is the simplest and the most straightforward. If the change is minor, even, you could even do it by a formal letter and see what feedback you get and then, with those that have an issue, you can then carry out the consultation on that basis. The second option of unilaterally imposing it is the most risky. It’s a breach of contract and, without express or implied agreement from the employee, their old terms remain and is then implied by their actions, but you could find that the employee works under protest and, if it’s a fundamental change, you could find that the employee resigns and has potentially a constructive dismissal claim. The third option of terminating employment and re-employing on new terms is really where the employees refuse to agree and it’s likely to be the best option under this circumstance. If it’s done with contractual notice there is no wrongful dismissal for the notice payment but it’s still a dismissal in law and therefore there is the possibility of an unfair dismissal claim even where that employee continues on their new terms.

An employer has a potentially fair reason with this dismissal of some other substantial reason but it’s always likely to be unfair if there is no procedure. So you need to have that procedure in place and

the sort of factors that are relevant to fairness are if you have a sound business reason, if with regards to your motives for introducing the change, doing an impact assessment as to how it impacts on the employees and carrying out reasonable and genuine consultation and also another factor here is where the majority of employees accept the change, it’s likely to be reasonable and fair. Some practical tips for you with regards to introducing the changes include: you don’t have to introduce all the changes at the same time and maybe consider changing over a period of time, possibly incentivise any changes that you introduce and also the timing of that change. So if there’s a promotion or there’s an annual review, that’s sometimes a good time to introduce changes to terms and conditions.