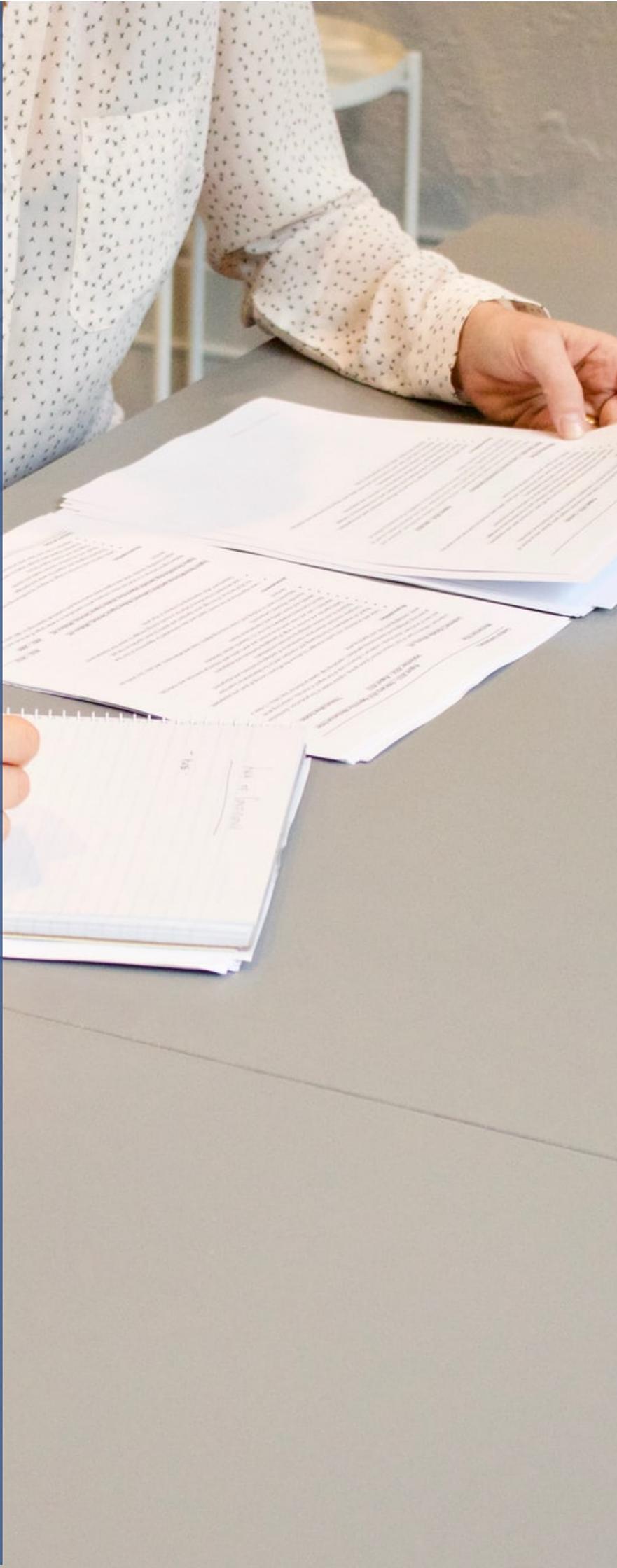


Changing Terms and Conditions of Employment

Guidance for independent
schools



Introduction

The coronavirus (COVID-19) crisis is placing an unprecedented strain on UK employers. As the government puts in place the first steps towards lifting the lockdown conditions, you will need to start thinking about how you will return to work and in what form. To do that, you may well be asking your employees to work in a different way in the future, so how will you manage that situation? Some of the things you may want to consider are:

- What will your structure for this new normal look like?
- Will you need employees to start and finish work at different times?
- Will you need to reorganise your workforce, perhaps redeploying employees into different roles or departments?
- Will you need to cut/vary hours and/or pay as a result of changing student numbers?

The foundation of the employment relationship is the Contract of Employment, which contains the terms and conditions on which the employee is engaged to work. A Contract of Employment can be written or verbal or a mixture of both. It often contains implied terms too, and for most independent schools, these will normally include the established implied terms such as treating employees with mutual trust and confidence. In its entirety, it will govern the relationship between you and your employee on a host of issues, including those highlighted above. Changing that contract can sometimes be tricky and the purpose of this note is to set out the steps required to bring about any amendments.

Step 1: Check the current contracts

A contract can only be changed in line with its existing terms or by agreement, so the best place to start is with what the contract currently says. Is what you are trying to achieve already permitted under the contract? If so, then that does make things a whole lot easier in the long run.

Whether or not it is permitted will rather depend on the nature of the change. For example, as independent schools are often dependent on changing student numbers, there may well be express clauses allowing you to reduce hours and pay in the event of timetable reductions. However, unless you have a carefully-worded express clause which the employee has signed enabling you to make such changes, you will normally not be able to reduce pay without agreement. With things like start and finish times, job duties and sometimes even hours of work (if someone works different hours each week), you will have a degree of flexibility.

For example, it is not unusual for a contract to say:

We reserve the right to vary your hours of work, on a temporary or permanent basis, as necessary to meet our organisational requirements.

In theory, that should give you a fair degree of latitude to change the contract but, as ever, it is rarely that straightforward. Any specific flexibility clauses will be given a restrictive interpretation by the courts and may be limited by an implied term (for example, an obligation to exercise the flexibility clause reasonably).

By way of an example, if you are looking to change your employees' start and finish times by an hour or so, perhaps to avoid the risks associated with rush hour on public transport, then this sort of in-built flexibility may work. However, if the change is more fundamental, then that probably is not a reasonable exercise of your discretion. In addition, please keep an eye out for potential discriminatory consequences when changing start and finish times; for example, anything impacting childcare arrangements may be indirectly discriminatory on the grounds of sex.

Step 2: Talk to your employees

The easiest way to bring about a contractual change is by negotiation and agreement. It is also the option that is best for maintaining cordial employee relations with your workforce. You should always check in the first instance who you should be negotiating with. It is unusual for an independent school to have a recognised trade union, but if your employees are represented by a recognised trade union for the purpose of collective bargaining, you should speak with them. Whilst collective agreements are not legally binding unless they are in writing and stated to be so (although do check individual Contracts of Employment to see if such an agreement is incorporated into the same), it is important to try and engage with the unions when looking at varying terms; indeed, if there is a recognised union, there may be an obligation to consult with them, e.g. in a collective consultation process. This helps from an employee engagement perspective and it is a good idea to discuss why you need to look at making these changes so that you can get the union's support. Also, they may well have some useful suggestions for you to consider.

For minor changes, if employees are willing to agree to a change, it can be brought about immediately; the timing is simply something else to be agreed between the parties.

Negotiation with Trade Unions

You will prepare your case and discuss the options with the union in the hope that your proposal is accepted by them. The difficulty will come if the union will not agree to put your offer to the workforce. In certain circumstances, employers will be able to break impasses in collective negotiations by making direct offers to the workforce, on the understanding that it is only intended to resolve the current impasse rather than end collective bargaining. However, this is a complex area and advice should be sought.

If employers do not wish to go 'over the heads' of the union, the options in Step 4 below are still open to force through the change.

Negotiation with your employees

If there is no recognised union, which is likely to be the case in the independent sector, you will be talking with the employees directly and it is them with whom you must negotiate. Under the current restrictions, you will need to think around the practicalities and logistics of this. In the first instance, decide whether this will be announced verbally or in writing. We would recommend some kind of group meeting or conference call (by telephone, Skype, Zoom, Microsoft Teams, etc. if a socially-distanced meeting isn't pragmatic) at which you can explain in person what the changes are and why they are necessary. This can be followed up by letter/email, again setting out the changes and asking the employees to confirm agreement. Individual meetings can then be arranged with any employees who have expressed concerns or reservations so that they can be addressed. No formal invite letter or representation is required as these are still 'informal' meetings.

If a meeting is impractical, you could simply write to your employees explaining why the changes are necessary and asking for agreement. That is your choice, and will no doubt depend on the logistics of your workforce.

Throughout this stage of talking/negotiating with your employees, you will need to sell the 'benefits' of the change – or potential serious consequences of not agreeing to it. In more normal times, it is fairly common practice to try and trade things off – "if you agree to X, we will give you Y". Given the stringent economic times now, and bearing in mind the pressure independent schools are already under with the increase in contributions to the Teachers' Pension Scheme and the loss of income for some parents, it is unlikely that this is an option. Instead, you will have to stress the serious implications for not bringing about the changes. That will vary from school to school but it's not hard to envisage a situation where redundancies will be necessary if changes cannot be brought about.

Whilst being a good communicator is important, don't forget to refer to the contract if that helps. If you have inbuilt flexibility which clearly covers the proposed change, and that can be exercised in a way that does not breach trust and confidence to bring in the change, then say so. You can explain that you are trying to be accommodating about this, but at the end of the day your existing contract allows this change so it's going to happen anyway.

Step 3: Recording the agreement

It is important that any contractual changes are recorded in writing as evidence in any future dispute.

To download a template letter that can be used to confirm the new terms and conditions, see the ['Changing terms and conditions of employment' section](#) of our Back to Business Hub (accessed via our main Coronavirus Advice Hub).

The employee accepts by returning a signed copy of the agreement or by using the words on the letter to reply by email.

Step 4 (if required): Forcing the change

If the change cannot be enabled under the terms of the contract and cannot be agreed, then you have two options to force the change through:

Unilateral variation

In the first instance, you could just unilaterally vary the contract, i.e. tell employees that from X date, the change is happening whether they like it or not. This is generally not recommended as it will likely result in a breach of contract, allowing the employee to claim. If the change has economic consequences, then someone can work under protest, stay employed and then claim for the difference between old salary and new reduced salary. Moreover, it is likely to lead to disengagement, or at the very least a vote of no confidence and/or a collective grievance being raised, even if the school doesn't recognise any trade unions. It may also bring adverse publicity to the school.

If unilateral variation is going to be used, it works best for changes that do not have direct economic consequences, for example a change in start time without a reduction in hours/pay. Whilst that might still be a breach of contract, the employee's options are more limited and probably restricted to resigning in response to the breach and claiming constructive dismissal (although it will be prudent to also consider whether there are any indirect discrimination consequences of any proposed change). It is unlikely that many employees will be inclined to resign in the current climate but that is a danger.

Dismissal and re-engagement

The usual better option here is to dismiss the employees on notice and re-engage them on the new, changed terms. It is still risky given it involves a dismissal and opens the door to unfair dismissal claims, but if you've attempted to bring the change about via negotiation first and have a solid business case for the change, you may well be able to defend an unfair dismissal claim.

The real problem here is time. Employees must be dismissed on notice, which could be as much as 12 weeks depending on length of service or contractual terms. Many independent school contracts also require notice to be given before a certain date, such as the start of the new term. As a further hurdle, if the changes involve proposals to dismiss 20 or more employees in a 90-day period, the collective consultation requirements will be triggered, making the process even longer.

If collective consultation is required, then please refer to our collective consultation note for further details in that regard.

In terms of a process for the dismissal and re-engagement:

1. Invite the employee to a meeting

Please use the **'Formal meeting invite'** from the **'Changing terms and conditions of employment'** section of our Back to Business Hub and set out:

- a) What the changes are;
- b) Why they are necessary/the consequences of not agreeing; and
- c) The steps you have taken to bring about the changes by agreement.

You should invite the employee to a meeting, which can be held by electronic means if necessary. Attach any relevant documentation to the invite letter and give at least 48 hours' notice of the meeting.

2. Hold the meeting with the employee

Discuss again the reasons for making the change and the steps taken so far. Make sure to take notes of the meeting. Give the employee one last chance to agree to the changes. If they do not, then you can inform them that, unfortunately, you have no option but to serve notice to terminate their employment. The notice you are required to give will be set out in their contract. Remember, for most schools, teaching staff will usually be on a term's notice and sometimes notice must be given either before or on the first day of term to expire at the end of term, which means that all meetings and consultation must have been started in good time and before the new term. This can mean that if you miss the deadline, you are unable to effect the change until the end of the following term.

3. Confirm the decision in writing

Use the **'Dismissal and re-engagement letter'** from the **'Changing terms and conditions of employment'** section of our Back to Business Hub to confirm your decision.

4. At the end of the notice period, offer to re-engage the employee on the new terms

You can give them a contract confirming the new conditions of employment. It will be up to them to decide whether to accept it or not.

Due to the potential legal and industrial relations risks involved, we strongly advise you to seek legal advice before starting any process to make any changes to terms and conditions. Please speak to your Employment Law Adviser or, if you are not yet an Ellis Whittam client, call 0345 226 8393 to enquire about our support for schools.