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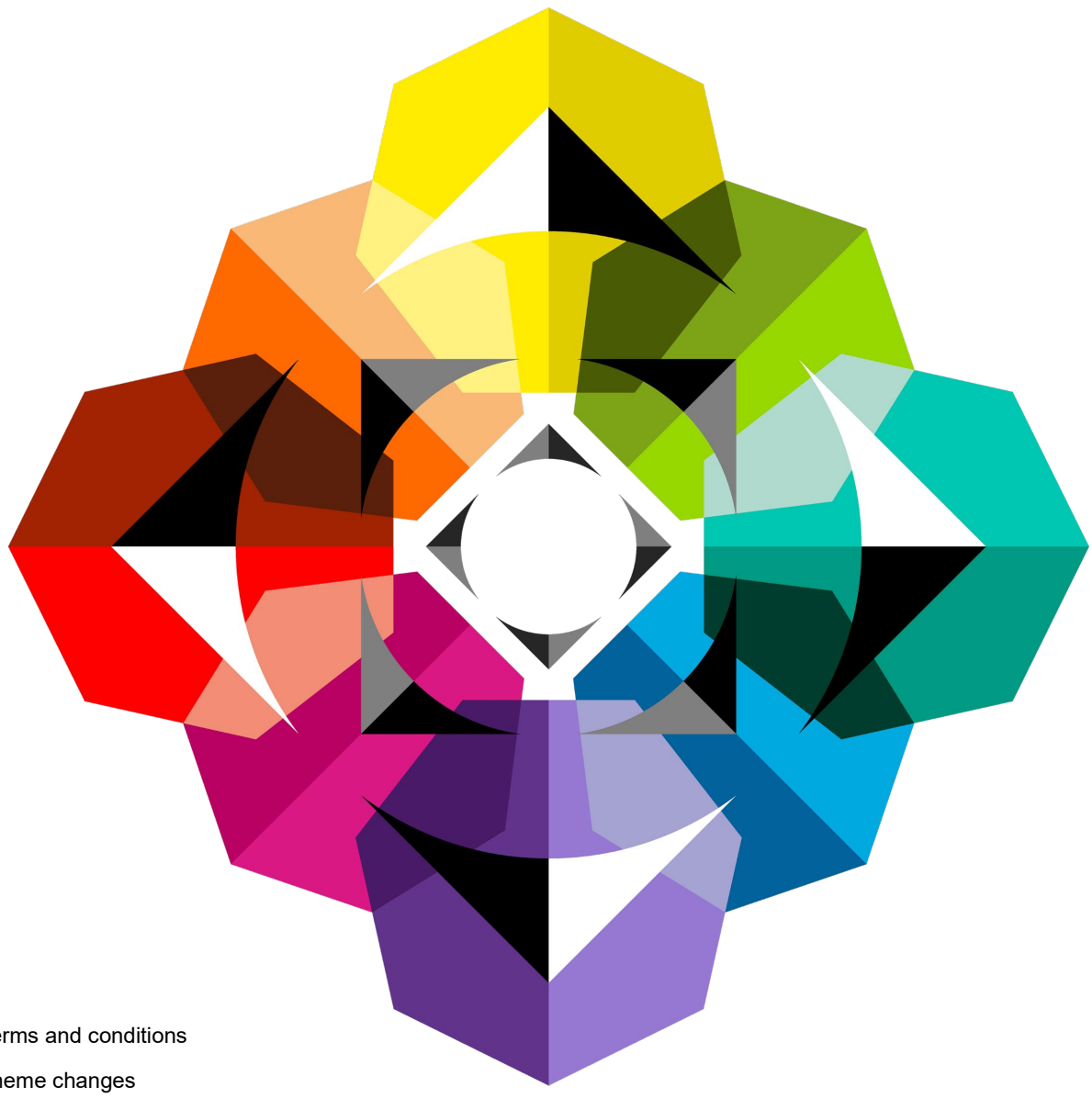
Reducing business costs – alternatives to redundancy



Inside

When businesses run into financial difficulties and need to reduce costs, the knee-jerk reaction is often to consider the scope for job cuts. But redundancies are not a cheap option and, if mistakes are made in the way redundancies are handled, further costs may be incurred on account of tribunal claims. Other drawbacks include the loss of valuable skills and experience and the negative impact on the morale of the staff that are retained.

Employers should therefore think creatively and look at other alternatives that may better suit the needs of their business. This Inbrief summarises some of the options and examines how to avoid falling foul of the legal procedures and obligations that might come into play.

Changing terms and conditions

Perhaps the most obvious way to reduce business costs without resorting to dismissals is to adjust employees' contractual entitlements — for example, an across-the-board pay cut.

The legal starting point is that employees' pay, benefits and working hours will most likely be express terms of the contract of employment. Even where terms of this nature are not expressly set out in writing, they may be implied into the contract by "custom and practice". In addition, terms may sometimes be incorporated into individual contracts from sources such as company policies or work rules.

Any significant change to working arrangements is therefore likely to require the variation of employees' contracts of employment. Depending on the circumstances, even a pay freeze, for example, or a restriction of overtime working might entail changes to contractual terms and conditions.

Changing terms and conditions is fraught with legal dangers and employers should proceed carefully and generally take legal advice before embarking on such a course. In outline, these are the main options:

- changes allowed by the contract
- variation by mutual agreement
- unilateral imposition of new terms
- terminating employees' contracts and re-engaging them on new terms

Changes permitted by contract

The best scenario for the employer is that the change it is proposing is authorised by the contract of employment. This can arise in different ways. The contractual term in question may, for example, be drafted sufficiently broadly to accommodate the change.

Alternatively, the contract may include a "flexibility clause" – an express right for the employer to implement changes. This could either be a specific clause covering the proposed change or a general power for the employer to vary the terms of the contract.

The presence of a flexibility clause does not necessarily mean the employer can proceed with impunity. Clauses of this type are interpreted restrictively by courts and tribunals and any ambiguity will be resolved against the employer.

In addition, the way in which a flexibility clause can be operated may be restricted by general implied terms of the employment contract - in particular, the implied duty of mutual trust and confidence. This may, for example, require the employer to give staff reasonable notice of any changes.

In organisations that are unionised, changes to terms and conditions are usually negotiated with the relevant trade union. This is another situation in which the changes are likely to be permitted by individual employment contracts, because there is normally a clause catering for collectively agreed changes to be automatically incorporated into the contract. Nonetheless, the union will generally obtain employees' agreement before accepting the employer's proposed changes.

Variation by agreement

Where the employer has no right to impose unilateral changes, clearly the best route is to obtain employees' consent. Faced with the option of agreeing detrimental changes or potentially being made redundant, many employees are likely to be amenable albeit reluctantly.

Full and effective communication and consultation, so that employees fully understand the business needs behind difficult decisions, is a crucial factor in securing agreement. This can be done via staff briefings and meetings but it is best also to offer individual consultation on a one-to-one basis.

It is essential to obtain employees' individual written agreement to changes, in order to avoid future disputes.

Unilaterally imposing changes

What should an employer do in respect of employees who, following consultation, still refuse to agree to the change required? One option is simply to announce that the change will be implemented from a set date.

This is a risky strategy from a legal perspective. Imposing the change as a fait accompli will amount to a breach of contract by the employer. This runs the risk that employees may:

- continue to work in accordance with the changed terms, but under protest — reserving the right to sue for breach of contract and/or bring a claim for unlawful deduction from wages
- resign and claim constructive dismissal
- refuse point-blank to accept the new terms

In the third scenario the employer would have little option but to dismiss, potentially giving rise to tribunal claims for unfair dismissal from employees who have at least the two years' service.

The best outcome for employers adopting this type of approach is that employees would simply acquiesce in the new working arrangements and go along with them. After a period of time, the legal position would be that such employees had impliedly agreed to the variation by their conduct.

Dismissal and re-engagement

Generally speaking, a better way to proceed where employees' agreement to contractual changes is not forthcoming is to terminate their existing employment contracts - giving the required statutory or contractual notice - and offer to re-engage them on new contracts containing the revised terms.

This may seem like a "nuclear option", but it at least avoids the risk of employees suing for breach of contract. Because the employment contract is lawfully terminated with notice, the employer is not in breach.

This approach is often called "fire and rehire" and has come in for some criticism recently – but it is a lawful step as an alternative to attempting to unilaterally impose changes. Acas has produced guidance on fire and rehire practices which emphasises the importance of employers first exploring other all options (such as obtaining agreement instead) and consulting their employees in a genuine and meaningful way.

Employees with at least two years' service will, of course, be entitled to claim unfair dismissal. However, the employer can defend such claims by showing it had a "substantial reason" for dismissal - namely, its pressing business need to introduce the changes in question. The employer would argue that it adopted a fair procedure by consulting fully over its proposals and acted reasonably in the circumstances.

Importantly, the employer's legal duty to consult collectively may be triggered in these circumstances. A proposal to dismiss and rehire in the context of changes to terms and conditions counts as 'redundancy' for collective consultation purposes. Accordingly, if 20 or more employees will be dismissed within a 90-day period, the employer must consult with the recognised trade union if there is one, or elected employee representatives otherwise. (See our Inbrief on collective redundancies.)

Pension scheme changes

Another option for employers that may appear attractive is to change its pension arrangements.

Employers should bear in mind that most changes will require them to consult with employee representatives, under special consultation requirements applying to pension schemes (although some smaller schemes are exempted). The process is broadly similar to the collective redundancy consultation process, but the obligation to consult is not restricted to changes affecting a particular number of employees. The consultation period must last at least 60 days.

Lay-off and short-time working

Employers looking for alternatives to declaring redundancies may consider laying staff off temporarily or reducing their working week. A lay-off is generally understood to mean an employer providing employees with no work - nor pay - for a week or more. Short-time working occurs when an employee works only part of a week and receives proportionately reduced pay.

If the employer has no contractual authority to impose a lay-off or short-time working, the considerations in relation to changing terms and conditions described above will apply. In particular, unless employees' express and informed consent is obtained, the employer will potentially face claims for unlawful deduction from wages, breach of contract and constructive dismissal.

There is specific legislation governing temporary lay-offs and short-time working, but it is complex and little-used in practice. It provides a right for employees who have been laid off or kept on short time for four or more consecutive weeks or six weeks in any 13-week period to claim a redundancy payment in certain circumstances. The scheme only applies where the contract of employment allows for lay-off/short-time working without pay.

Finally, there is a very modest statutory wage protection scheme for employees who are laid off without pay. They can claim a 'guarantee payment' for days on which they would normally be required to work, but the maximum is only £29.00 per day and entitlement is limited to five days in any three-month period.

Reducing use of contract workers

Dispensing with the services of casual workers, agency staff and self-employed consultants may be a relatively low-risk way to reduce employment costs without making 'permanent' staff redundant. The employment status of such individuals should, however, be carefully assessed in case they legally qualify as 'employees' with statutory rights such as statutory redundancy pay and unfair dismissal.

Employers should also be careful when terminating part-time or fixed-term staff. They are protected from less favourable treatment in comparison to (respectively) full-time and permanent colleagues, unless it can be objectively justified by the employer.

Discretionary benefits

Employment contracts often describe bonuses and other benefits as being non-contractual or 'discretionary', implying that the employer is entitled to withhold or reduce them. Such contractual provisions do not, however, give the employer *carte blanche* or mean they are immune from legal challenge.

For example, an employer should be in a position to demonstrate that it has not exercised a contractual discretion arbitrarily or irrationally. Alternatively, employees may be able to argue that they have a legitimate expectation of a bonus or other benefit as a result of custom and practice, giving rise to an implied contractual right.

Redeployment, secondment and sabbaticals

A good way of retaining key skills and avoiding redundancies is to redeploy affected staff elsewhere within the organisation wherever possible, or alternatively arrange for them to be seconded to other companies. Once again, this will need to be done with the employee's consent in the absence of an express right to redeploy or second in the contract of employment.

A sabbatical, or career-break, is not a legal concept, but simply time away from work. Many employers operate discretionary schemes, which can be paid, part-paid or unpaid. Staff who can afford time off work and who are perhaps seeking an opportunity to change their lifestyle are offered an extended period of leave, with the promise of a job on their return. Continuity of employment is generally preserved during a sabbatical, for both statutory and contractual purposes.

It would be unusual for a sabbatical or career-break policy to provide for the employer unilaterally to enforce their use, as this would effectively amount to a right to lay off without pay (see above).

Recruitment freezes or deferrals

A freeze on recruitment is an obvious and straightforward way of reducing overheads without fear of legal consequences, especially in industries with high rates of staff turnover. Recruitment deferrals may be another option, where already planned recruitment is deferred or job offers are withdrawn.

Employers do need to proceed with some caution if they already have committed themselves to a particular start date. A prospective employee may be entitled to claim some notice

pay if a job offer is withdrawn shortly before they were due to start work, if they are given less than the notice agreed under the new contract. The rules on collective consultation and HR1 forms also apply to new employees who have signed a contract but not started work yet. It is important to bear in mind that withdrawn job offers may cause an employer to reach the collective consultation threshold of 20 or more dismissals within 30 days - either because 20 or more offers are withdrawn within a short space of time, or (more likely) when these are added together with other redundancy dismissals within a 30 day period.

Flexible working

Introducing part-time working or job-sharing can sometimes be a feasible way of reducing costs. The incentive of improved work-life balance may mean some employees would welcome the opportunity to enter into such arrangements. If so, the employer should seek their consent and the details of the new working regime should be clearly set out in writing.

Another cost-saving option may be to encourage employees to work flexibly or remotely, for example at home. This could be full-time homeworking, or hybrid working where employees only attend the office for part of each week. Agreements to allow employees to work from home could also include asking them to agree to a lower salary in recognition of the fact they may be able to live in a cheaper area or avoid commuting costs. Similar issues arise here as in relation to other changes to terms and conditions (see above). Where employees' consent is not forthcoming, the employer can seek to rely on any flexibility clauses in the contract or consider terminating and re-engaging on new terms as a final resort.

Practical issues to consider include: monitoring and recording core hours; access to IT systems and equipment; and health and safety.

Immigration issues

Where employers are considering redundancies, or alternatives such as lay-offs or salary reductions), they should assess whether this has any effect on the immigration status of any of the employees affected. Any of them who holds a sponsored visa will have reporting requirements that are likely to be triggered, which may then have knock-on implications for whether they can keep their visa or not. Lewis Silkin's dedicated immigration team can assist you in navigating this part of the process.

For more information on this subject please contact:

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