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Employment Spotlight: Can an Employer Vary the Terms of an Employee's Employment Agreement Without the Employee's Consent?

In light of COVID-19, many employers have been considering ways to reduce their overhead costs. Employees' wages often account for a large share of the employer's expenses, consequently, employees are increasingly being asked to vary their employment terms by agreeing to take no pay leave and/or a reduction to their wages. Often these requests are premised as an alternative to redundancy. This article examines the rights of both employers and employees in a relation to a variation of the employment contract.

Can an employer decide to vary the terms of an employment contract without seeking the employee's consent?

This largely depends on whether or not there is an enforceable contractual right which allows the employer to unilaterally vary the employment contract.

In principle, if such a right does exist, there appears to be no reason why the employer cannot unilaterally vary the terms of employment. However – a word of caution - Courts require such variation rights to be expressed in clear and unambiguous language in a valid contract before an employer can rely on it to push through its proposed variations. This is particularly the case if the variation affects the employee's rights/obligations rather than the employer's rights/obligations.

If a clear enforceable contractual right exists then subject to the employer fulfilling any conditions of that right (such as giving the agreed notice), the employer may vary the employment contract without the employee's consent.

Where there is no express right to unilaterally vary the terms of employment, the employer should not attempt to vary the employment contract without the employee's prior agreement.

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Discussing the matter with the employee and recording any subsequent agreement.

Prior to executing any plans to vary the contractual terms of an employment contract, employers should first discuss their proposals with the affected employee.

It may be helpful in this discussion for the employer to explain why it is seeking to vary the terms of employment. For instance, this may be, for example, as a consequence of the slowdown of business due to COVID-19, or as an interim measure to avoid having to make the employee redundant.

If having discussed the matter with the affected employee, there is an agreement to vary the terms of employee's contract, the variation should be recorded in writing to avoid any ambiguity over the terms and provide certainty over the agreement. This is often done in the form of a validly executed instrument such as a supplemental employment contract or a deed.

What if there is no contractual right to vary the employment contract and the employee does not agree to the proposed variations?

If an employer proceeds to unilaterally vary the terms of the employment contract and that course of action is met by the employee's objection, there is a risk that:-

(a) The variation may amount to a breach of the employer's obligations and entitle the employee to terminate the employment contract immediately and/or claim he/she has been constructively dismissed or unreasonably dismissed.

(b) In certain circumstances, for example, where an employer unilaterally reduces the employee's wages and consequently fails to pay the employee the agreed contractual wages, the employer may also be the subject of a criminal complaint.

Where an employer wishes to vary the terms of an employment contract, it is usually sensible to seek legal advice to understand (a) the parties' rights to a variation, (b) if variations are agreed, how to record that agreement in writing, and/or (c) if the variations are not agreed, the risks involved with implementing the variations without the employee's consent.

For further information in relation to employment contracts and other employment law related matters, please do not hesitate to contact Andrea Randall (andrearandall@gallhk.com / +852 3405 7688).

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