

Using legal flexibility to optimise your resources

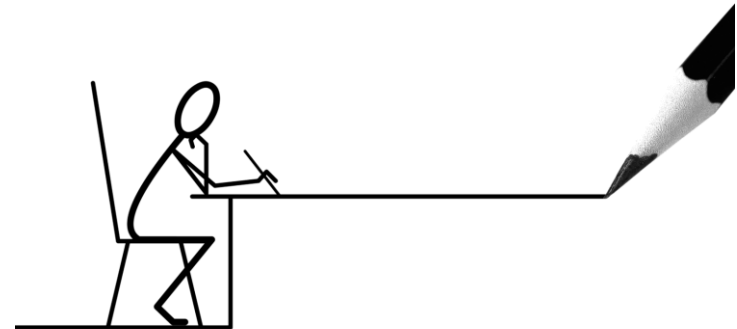
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Changing working practices



Changing working practices

Is it contractual?

- Yes – you need consent to change
 - unless contract flexibility
- No – you can change it
 - but duty of trust and confidence still applies

Changing working practices

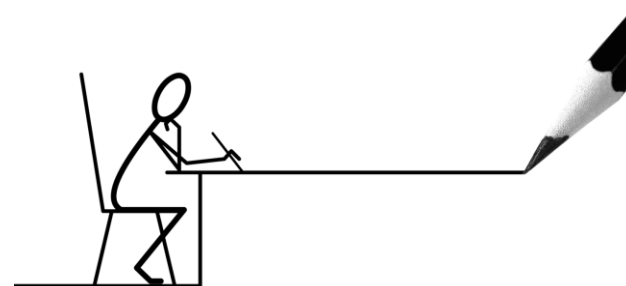
What's included in the contract?

- Start with the written contract
- Other documents - job description? staff handbook?
- Implied terms – custom and practice?

Custom and practice

- 'Apt for incorporation' i.e. purporting to confer a legal right rather than merely aspirational or procedural
- 'Reasonable, notorious and certain'

Changing working practices



Changing working practices

Evidencing consent

- Best not to rely purely on lack of objection by employee
- Oral agreement can be binding (subject to the terms of the contract itself) but could be denied later
- Seek signed written consent e.g. countersign letter
- Have a plan for what to do if no response



Changing working practices

The issue of consideration

- Consideration of “money or money’s worth” may also need to be shown from a legal perspective
 - continued employment may not be sufficient consideration if the change doesn’t take effect immediately
- Practical need for commercial incentive to agree e.g. bonus or pay rise



Changing working practices

What if no consent?

- It's possible in theory simply to announce the change unilaterally and treat lack of objection as acceptance
- BUT risk of constructive dismissal claims
- OR employee could 'stand and sue'
 - i.e. remain in employment but object to the change
 - and potentially sue for any loss



Fire and rehire

Recent developments

- In the press – e.g. Tesco and P&O
- 76% of the public think it should be illegal*
- ACAS report and guidance
- Unlikely to be any legislation
- Lawful termination v. bullying tactics

*2021 Survation poll for the GMB union



Fire and rehire

Process

- Establish your substantial business reason
- Consultation (possibly collective!)
- Notice of dismissal
- Re-engagement on new terms

Fire and rehire

Process

- Establish your substantial business reason
 - Legitimate – genuine business reasons
 - Substantial – what happens if the changes don't happen?
 - More than commercial expediency
 - Proportionate and reasonable

Fire and rehire

Process

- Consultation
 - Inform – the reasons and consequences
 - Meaningful consultation – consider alternatives, flexibility
 - Try to obtain consent
 - Collective consultation obligations if more than 20 employees to be dismissed within 90 days

Fire and rehire

Process

- Notice of termination
 - As per their contract
 - Detail the reasons for dismissal as per the consultation
 - Right of appeal

Fire and rehire

Process

- Offer re-engagement
 - Offer the new terms in writing
 - Ensure s1 ERA is complied with
 - Valid consideration? Salary is sufficient – consider loyalty bonus?
 - If they accept, make sure they sign it!

Fire and rehire

Legal Risks

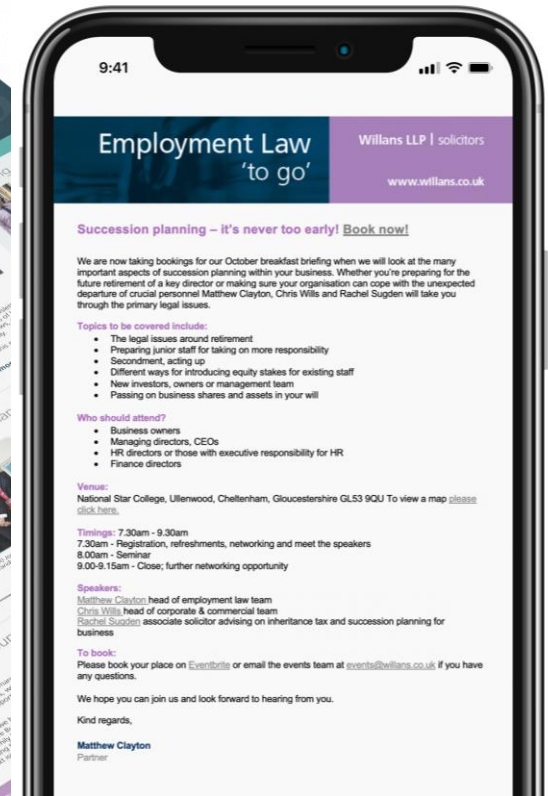
- Unfair Dismissal
 - Potentially fair reason for dismissal?
 - Some other substantial reason - SOSR
 - Fair process?
 - Consultation
 - Less than 2 years' service
 - Protective award
 - Failure to mitigate loss

Keep up-to-date

Please email us with any queries, or if you wish to be added to our mailing list to receive “Law News” and/or “Employment Law Dispatches”.

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Our next webinar...

Register for our **29 November webinar** at: www.willans.co.uk/events

The screenshot displays the Willans website interface. At the top, the Willans logo is on the left, and navigation links for 'Your business', 'Your personal life', 'Sectors', 'People', and 'About' are on the right. A search bar is also present. The main content area features the webinar title 'A guide to right to work checks for UK employers (webinar)' and the date '29 November 2022 @ 16:00'. Below this is a promotional graphic with a pink highlighter and a checklist, and a dark blue box containing the webinar details: 'Right to work checks for UK employers', 'Considerations for your organization', 'Tuesday 29 Nov 2022 | 4:00 - 5:00pm', 'Online webinar', and the registration link 'willans.co.uk/events'. To the right of the main content, there is a 'NEWS & INSIGHTS' section with a 'Subscribe' button, a 'Speakers' section listing 'Hayley Ainsworth' and 'Klára Grmelová', and a 'MESSAGE' button. A 'Contact' button is partially visible at the bottom right.

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