Acas publishes new “fire and rehire” guidance

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Employers sometimes try to enforce contractual amendments on their workforce by using a "fire and rehire" strategy – terminating employment and offering to hire staff back on the new terms. The Government has confirmed that it does not intend to legislate against such practices, but it asked Acas to publish new guidance for employers wanting to make contractual changes which Acas has now done. In this article, we summarise the key points for employers and give our own tips at the end.

The guidance covers six in-depth sections, which can be found here and are summarised below.

Considering employment contract changes

Changes to employment contracts must be agreed by both employee (or in some cases with trade union or employee representatives) and employer. Some common scenarios which may make contractual changes desirable include introducing benefits such as enhanced maternity pay or updating contracts to accommodate new law or regulations.

Before proposing changes, it is helpful for employers to consider what issue they are trying to solve, and whether a contractual change will indeed solve it. Employers should also consider how the proposed change may impact the workforce, whether certain groups of people may be affected differently to others, and whether this amounts to unlawful discrimination.

Employers should also give thought to the number of employees which may be affected by the change and whether it is necessary to consult with employee representatives rather than only individuals. If terms and conditions are governed by a collective agreement (i.e. an agreement with a recognised trade union), then employers may be required to consult with

that trade union.

Proposing employment contract changes

Whilst some contracts contain provisions purporting to permit employers to amend or vary contracts unilaterally, these are not failsafe clauses, and employers should not rely on "flexibility" clauses in contracts alone when trying to vary terms. Doing so risks claims of breach of contract and/or constructive dismissal.

Where employers propose contractual changes, they must inform all affected employees (and workers) and/or any relevant representatives about:

- what the proposed changes are;
- who might be affected;
- why the changes are required;
- a timeframe regarding the proposed changes; and
- any other options which the employer has considered.

Employers should open a consultation process to discuss the proposed changes and allow the employees and/or representatives to provide feedback. This should be done as early as possible to allow sufficient time to reach an agreement.

Consulting about employment contract changes

Consultation regarding proposed changes is helpful as members of staff are more likely to support them where they understand the rationale for them, they are given the opportunity to provide their views and feel that these have been properly considered.

As above, employers should consider whom the appropriate employees and/or representatives are to be consulted. Consultation should be a genuine two-way discussion between the parties, and employers should approach this with an open

mind. The aim should be to try to understand any concerns and address any questions raised during this process. Employers should avoid being threatening, intimidating or giving ultimatums. Not only is this not conducive to having a meaningful consultation, but it may give rise to legal claims.

Providing training to those involved in the negotiations and consultations can assist in ensuring constructive discussion and increases the chances of the parties reaching a solution which is acceptable to all.

Handling requests to change an employment contract

Of course, it is not just employers that can propose contractual changes, but employees as well. Circumstances where employees may request changes to their existing contractual terms include making a request for flexible working or amending their contractual duties.

All such requests should be treated reasonably, and it is again advisable to have a discussion about the proposed change in order to understand why it is thought to be needed. Employers should then consider how they might be able to accommodate the request.

If employment contract changes are agreed

Where changes are agreed, it is important to record these in writing. For example, changes around pay, working hours and holiday entitlement form part of the written particulars which must be provided to an employee. Therefore, it is safest to record all variations in writing.

If the change is going to be temporary, this should be explicit and a clear timeframe should be set out regarding when the change will take effect and for how long. Acas also recommends monitoring changes once implemented to ensure that the workforce is not being adversely affected, especially where the changes had been met with some resistance.

If employment contract changes cannot be agreed

Employers should keep in mind that agreeing changes does not always happen after the first consultation and will likely take some time. Patience is important to avoid unnecessary and costly legal claims as well as industrial action.

If employees are reluctant to agree, employers could consider alternatives or whether there is anything they could offer that would make the proposal more attractive, such as offering more beneficial other terms to compensate for the change. In addition, another practical suggestion is to introduce the changes gradually or on a temporary basis initially.

If an agreement cannot be reached, and considerable attempts have been made, in limited circumstances it may then be possible to give employees notice of termination of employment together with an offer to rehire them on the basis of the new terms. Doing so is not as easy as it sounds, and employees may resign and claim constructive dismissal or continue to work, but under protest, meaning they are still within their rights to bring claims against an employer.

In addition, where employers are proposing to dismiss 20 or more employees there is the added requirement to consult collectively about the proposed dismissals. Employers must also have a fair reason for dismissing employees, follow a fair process and provide the correct amount of notice.

Top tips for employers considering contractual variations

The overall message from Acas is that fire and rehire should be used as a last resort, given the damaging effect it can have on the trust, morale and productivity amongst the workforce.

Some of this advice from Acas may be over cautious (e.g. not setting an ultimatum or time limit). Our top tips for effecting changes to contracts are as follows:

- Consult with the workforce when making changes and try to reach agreement on the variations wherever possible.
- Listen to the views of the workforce and do consider whether any proposed amendments could be made to accommodate their views or suggestions.
- Remember that unilateral changes can be completely ineffective, can lead to legal claims and often do cause despondency, which, in turn may damage productivity and your reputation.
- Seek legal advice as early as possible.

If you would like to discuss any issues arising out of this article please contact Blair Wassman (blairwassman@bdbf.co.uk), Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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