Government publishes final Statutory Code of Practice governing fire and rehire practices

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. A new Statutory Code of Practice regulating this practice will come into force later this year. In this briefing, we look at the new Code and what it means for employers.

What's the background?

Back in 2021, the Government asked Acas to investigate the use of fire and rehire practices and in November 2021, Acas released new guidance in this area. The overall message of the guidance was that fire and rehire should be used as a last resort. You can read our briefing on the Acas guidance here.

In March 2022, following the P&O Ferries scandal, where 800 employees were dismissed without consultation, the Government announced plans to introduce a new Statutory Code of Practice on the use of fire and rehire practices. The intention was that the new Code would set the standards for employers to consult meaningfully about proposed contractual changes. A consultation on a draft Code commenced in January 2023 and closed in April 2023.

On 19 February 2024, the Government published its response to the consultation, together with a revised draft of the new Code. The Code will be laid before Parliament and, if approved, will come into force in the Summer of 2024.

What does the new Statutory Code require?

Purpose and scope

The Code underlines – as the Acas Guidance does – that firing employees who do not agree to contractual changes and offering to rehire them is a practice which should be used *"as a last resort"*. It states that the purpose of the Code is to ensure that employers take *"all reasonable steps to explore alternatives"* and to engage in *"meaningful consultation with a view to reaching an agreed outcome".*

The Code is said to apply where an employer:

- is considering making changes to one of more of its employees' contracts of employment (covering both express and implied terms); and
- envisages that, if the employee and/or their representative does not agree to some or all of the changes, it might opt for dismissal and re-engagement in respect of that employee.

The Code applies regardless of the number of employees affected and regardless of the employer's reasons for the changes. However, it does not apply where the only reason the employer envisages it might dismiss the employee is redundancy.

General considerations for information-sharing and consultation

The Code provides that where there is a recognised trade union, the employer should provide information to, and consult with, that trade union. Where there is no recognised trade union, the employer should provide information to, and consult with, either:

- an existing body of employee representatives who could appropriately be consulted;
- representatives chosen to represent employees in consultations on the proposals; and/or
- each of the employees individually.

Employers should ensure that all affected employees are included in the consultation process, including those absent

from work, for example on sick leave or maternity leave.

The Code highlights that employers must comply with other applicable legal obligations to provide information to, and consult with, employees, arising, for example, under collective redundancy consultation law or TUPE.

Information to be provided

Employers should share *"as much information regarding the proposals as reasonably possible"* with a view to enabling employees to understand the reason for the proposed changes, be able to ask questions and make counter proposals. Depending on the circumstances, this could include information about the following matters:

- what the proposed changes are (including the proposed new terms);
- who will be affected by the proposed changes;
- the business reasons for the changes;
- the anticipated timings for the introduction of the proposed changes and the rationale for those timings;
- any other options that have been considered; and
- the proposed next steps.

The Code says the information should be provided *"as early as reasonably possible"*, but it does not prescribe a timeline. It says it is *"good practice"* for the employer to provide the information in writing but, again, this is not prescribed.

Consultation process

The Code underlines that consultation should not be viewed by employers as a tick-box exercise; it should be conducted openly and in good faith, with genuine consideration given to the points put forward in response. Employers should *be "as clear as possible"* about their objectives and the nature of the proposals and consider reasonable alternative proposals.

The format and length of the consultation process is not prescribed by the Code. Rather, it is said that employers should consult *"for as long as reasonably possible"*. It is noted that a longer consultation period is likely to allow for a more meaningful consultation.

Raising the prospect of dismissal and re-engagement

The Code states that if the employer intends to fire and offer to rehire in the event that an agreed outcome cannot be reached, the employer should be clear about that. That said, raising the prospect of dismissal can be detrimental to the consultation process and so employers should not do so *"unreasonably early"*. However, no indication is given as to what would be considered unreasonably early.

Wherever the Code applies, the Code states that employers should (not must) contact Acas for advice *before* raising the prospect of fire and rehire.

Re-examination by the employer

Where agreement cannot be reached, but the employer still considers it needs to implement the changes, the employer should re-examine its proposals, taking into account any feedback from employees and/or their representatives.

The Code sets out a list of factors that employers should consider, including whether the proposals could have a greater impact on some employees than others (including those with particular protected characteristics) and whether there are any reasonable alternative ways of achieving their objectives.

If changes are agreed

If the employer and employees reach agreement on the proposed changes, the Code says it is good practice to communicate the changes in writing. Where there is a change affecting the statutory particulars of employment, the employer must provide a revised statement of particulars within one month of the change. In practice, the majority of employers would update the employment contract by either providing a new contract or a side letter amending the original contract.

Unilateral imposition of new terms

If no agreement is reached, the Code notes that some employers would seek to impose the change unilaterally. Sometimes this is done by relying on an existing contractual term which gives them the power to impose changes. However, such clauses are not designed to cover major changes and so the Code reminds employers to consider the scope of the term and the legal limitations on using it.

If there is no such term (or the term does not extend to the change proposed), then the imposition of a contractual change will usually amount to a breach of contract. The Code outlines the risks that could flow from this, including various legal claims.

On the employee side, the Code highlights that where an employee chooses to work under the new terms under protest, he or she should make it clear to the employer in writing that this is what they are doing and set out the terms that they do not agree to.

Dismissal and re-engagement

The Code highlights that once an employer has completed a thorough information-sharing and consultation process, it might still opt to fire and offer to rehire. The Code outlines that the need for any such dismissal to be fair in law (where the employee has the requisite service) and for employers to give notice of the dismissal.

The employer should then set out the new terms in writing (and update statements of particulars as discussed above) and should offer to re-engage the employees *"as soon as reasonably*

possible”. The Code also suggests that employers should consider:

- whether employees would benefit from more time in order to make arrangements to accommodate the changes;
- whether there is any practical support it might offer such as relocation assistance or career coaching;
- introducing the changes on a phased basis (where there is more than one change);
- committing to reviewing the changes at a fixed point in the future;
- inviting feedback about the changes as the employees adapt to them; and
- what might be done to mitigate any negative impacts of employees.

What are the consequences of breaching the Code?

A breach of the Code does not, in itself, expose employers to a legal claim. However, a breach of the Code may be taken into account by a Court of Tribunal in relevant claims and may count against them.

Further, the Tribunal may:

- increase the amount of compensation awarded by up to 25% if the employer has unreasonably failed to comply with the Code; or
- decrease the amount of compensation awarded by up to 25% if the employee has unreasonably failed to comply with the Code.

The relevant claims include claims for unfair dismissal, breach of contract, discrimination, detriment and unauthorised deductions from wages.

Next steps for employers

All employers should review the new Code of Practice and keep track of the date that it will come into force. Although the information and consultation process will vary from case to case, it would be sensible for employers to prepare a template letter covering the information outlined by the Code. This skeleton letter could then be adapted to suit different situations and would ensure that all the recommended points are covered.

It would also be sensible to consider the appropriate

timelines for providing information and consulting in different cases. For example, where a proposed fire and rehire would affect just one employee, a process lasting two weeks might be sufficient. However, where fire and rehire is one option in a wider collective redundancy exercise, then it would probably make sense to track the collective redundancy consultation process timeline (i.e. at least 30 days where between 20 -99 employees are potentially redundant and 45 days where 100+ employees are potentially redundant).

In all cases where the Code applies, employers will need to take care to ensure they keep records of each stage of the process in order to demonstrate compliance with the Code in any future Tribunal proceedings and avoid the risk of an uplift to compensation.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Draft Code of Practice on dismissal and re-engagement (February 2024)