

July 7, 2021

The use of "fire and rehire", also less sensationally known as dismissal and re-engagement, has hit the headlines, particularly with a number of large, high-profile employers using the approach over the last year. "Fire and rehire" has been used by employers wishing to change employees' terms and conditions of employment for some time, but its use has become more prevalent with the pandemic and employers being forced to act promptly and propose drastic changes. Unite the Union has also started a campaign, backed by some MPs, to ban the use of "fire and rehire". Some large employers have also been named and shamed in the press for using this tactic.

Dismissal and re-engagement

Dismissal and re-engagement is typically used by employers to effect change in employees' terms and conditions of employment, where the change has not been mutually agreed. If, following a period of meaningful discussion, the employee refuses to accept the new terms and conditions, the employer, as a last step, dismisses the employee from the old contract and offers the re-engagement on the new terms and conditions. As this is a dismissal, there is a risk of an unfair dismissal claim where the employee has the necessary qualifying service. However, the employer may have a potentially fair reason for dismissal (some other substantial reason) providing that they have a good business rationale for the change which justifies dismissal. As with all unfair dismissal scenarios, the employer must show that it has followed a fair procedure, which will include consultation with the employees.

The recent case of *Khatun v. Winn Solicitors Ltd* ET/2501492/2020 demonstrates that dismissing employees and offering re-engagement must be carried out carefully. In that case, a firm of solicitors, in response to the pandemic, wished to change terms and conditions and gave their employees 24 hours to accept the changes or face likely dismissal. The claimant refused, and was ultimately successful in bringing an unfair dismissal claim. The tribunal found that there was a potentially fair business rationale, but the employer had acted unfairly and unreasonably in the circumstances. You can read more about the decision in our blog post [here](#).

ACAS report

On 8 June, ACAS published its report into "firing and rehiring" following a request from the government for it to produce guidance. The report itself does not come to any clear conclusions or recommendations. However, it does propose several legislative and non-legislative options.

The report contains various suggestions on how to strengthen employee protection against the use of "fire and rehire". One option, which would require the government to legislate, is to increase protection by tightening up the law around unfair dismissal. The report suggested that this could be done in the following ways:

- specifying that employees may challenge dismissals where employees have been dismissed and re-engaged with

the purpose of diminishing their terms and conditions;

- making such dismissals automatically unfair, and removing the requirement for employees to have two years' continuous service before they can bring such a claim;
- making redundancy and dismissal for some other substantial reason unfair in circumstances where the employer had a reasonable economic alternative to dismissal; and
- providing a remedy of re-engagement into the "old" terms and conditions of employment for successful claimants.

The report also suggests that legislation could be introduced to require employment tribunals to scrutinise the business rationale for change in these types of cases, although it recognises that employment tribunals would need the assistance of lay members with relevant experience to achieve this. Similarly, employers' consultation obligations around proposed dismissals could be strengthened by widening the collective consultation obligations to include workers as well as employees.

Other suggestions, which would not require the introduction of legislation, include the introduction of improved guidance for employers on relevant legal obligations and good practice, and "naming and shaming" employers' use of "fire and rehire" practices on a government website.

None of the suggestions from ACAS come with practical guidance on how these options might be put into action. For now, it seems that the report from ACAS is a theoretical first step in the direction of addressing the issue of "firing and rehiring".

Conclusion

The use of dismissal and re-engagement of employees who refuse to accept changes to terms and conditions of employment as a last step is not unlawful. However, any organisation looking to change contractual terms must ensure that it has a good business rationale, which is sufficient to justify dismissal. It must also ensure that it follows a fair procedure and looks to consult with employees about the change prior to dismissal. In the current climate, it must also ensure that it weighs up and takes into consideration any adverse publicity which it may receive, in the event that it needs to take that last step.

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