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Fire and rehire practices

1 Background

The practice of fire and rehire (also called dismissal and re-engagement) occurs when an employer dismisses an employee and offers to rehire them on new terms. The new terms are usually more favourable toward the employer. The tactic is typically used when it has not been possible for the employer to vary the terms of the contract by agreement.[1]

The practice is not unlawful in and of itself. However, as it does involve dismissal, the employer might face claims for unfair dismissal. If there are sufficient numbers of employees involved, the employer will also have a legal duty to undertake collective redundancy consultations first.

1.1 Varying the contract of employment

The relationship between an employer and an employee is principally governed by the contract of employment. There are a number of different ways in which an employer can seek to vary the terms and conditions of the employment contract. Some contracts will contain a clause that allows an employer to unilaterally vary certain terms. If there is no such clause, an

[1] CIPD, "'Fire and rehire' – guidance for employers", 31 March 2022

employer could vary the contract with the consent of the employee or the consent of a union for collective agreements. The Advisory, Conciliation and Arbitration Service (Acas) guidance on Changing an employment contract[2] provides a detailed overview of the different ways in which a contract of employment can be changed, along with advice for both employers and employees to consider when dealing with contract changes.

1.2 Dismissal and re-engagement

If an employer is unable to reach an agreement with an employee on changes to the contract, they may decide to dismiss the employee by notice and then offer to re-employ them on new terms.

This practice is not unlawful in and of itself. However, there are various statutory protections that may be relevant. The Acas guidance on this subject discusses the risks that an employer should consider before following this route, that it might:

- cause immediate and long-lasting damage to trust and working relations in an organisation
- make it harder for both sides to reach a negotiated solution

Other risks include:

- losing valued people from an organisation – either because they do not accept the offer of a new contract, or they leave afterwards because they're not happy with the change or the way it was made
- legal claims, such as potentially costly claims of constructive dismissal and unfair dismissal
- reputational damage to an organisation or brand, making it difficult to attract new employees
- likely industrial action if there's a trade union, as well as longer-term damage to relations with the union – find advice on industrial action on GOV.UK
- the issue you're looking to deal with still not being resolved satisfactorily[3]

If deciding to dismiss and rehire, Acas states that the employer must:

- have a fair reason for dismissal

2 Acas, Changing an employment contract, [accessed 10 June 2022]

3 Acas, Making changes to employment contracts – employer responsibilities/If employment contract changes cannot be agreed, 13 December 2021

- follow a fair dismissal process
- provide the correct amount of notice
- offer the employee the right of appeal against their dismissal[4]

There are three main legal protections for employees that are relevant in such cases:

- Protection against unfair dismissal;
- Protection against wrongful dismissal; and
- Duty to consult in cases of collective redundancy.

A brief summary of these three protections is set out below, including relevant case law examples. For an explanation of the respective roles of the different courts and tribunals in these cases, see the Courts and Tribunals Judiciary page on the structure of the courts & tribunal system[5].

Unfair dismissal

Employees who have worked for their employer for two or more years are protected from unfair dismissal. The protection is set out in the Employment Rights Act 1996.[6]

A dismissal will be unfair unless it is for a potentially fair reason listed in the legislation and the employer's decision to dismiss was reasonable in the circumstances. Common potentially fair reasons include conduct, capability and redundancy.

One of the potentially fair reasons for dismissal is "some other substantial reason" (SOSR). Whether an employer can use SOSR as a fair reason for dismissal will depend on the facts of a case. In *Hollister v National Farmers Union* the Court of Appeal held that if an employer had 'good business reasons' for reorganising a business and dismissed an employee who would not accept new terms, they could rely on SOSR as the reason for dismissal.[7]

Whether a dismissal is reasonable in the circumstances will vary from case to case. An Employment Tribunal will consider a range different factors. The reasonableness of the new terms that are offered by the employer will be relevant but not decisive. Other factors, such as the number of employees who did accept the new terms might also need to be considered.[8]

4 As above
5 Courts and Tribunals Judiciary, "Structure of the courts & tribunal system" [accessed 10 June 2022]
6 Part X, Employment Rights Act 1996, legislation.gov.uk
7 *Hollister v National Farmers' Union* [1979] ICR 542
8 *St John of God (Care Services) Ltd. v Brooks* [1992] ICR 715

In *Catamaran Cruisers Ltd v Williams*, the Employment Appeal Tribunal held that when deciding whether a dismissal was reasonable, tribunals must take a balanced approach. It should not focus solely on whether the new contract disadvantages the employee but must also consider the benefits to the employer in reorganising. It does not need to be shown that reorganisation is vital for the survival of the business.[9] [10] However, there is case law which suggests that an employer will need to show that it was under some pressure to put its employees on new contracts. It may not be enough for the employer to just show that reorganisation is convenient.[11]

Wrongful dismissal

Wrongful dismissal occurs where an employer dismisses an employee in breach of contract. This could occur, for example, where an employer does not give an employee the amount of notice set out in their employment contract, or other otherwise violates contractual terms relating to the process they must follow during dismissal. Unlike unfair dismissal above, which is a statutory protection arising from the Employment Rights Act 1996, wrongful dismissal gives rise to a common law claim for breach of contract.[12]

Wrongful dismissal claims can be brought in the civil courts or an employment tribunal. The court or tribunal will not be concerned with the fairness of the dismissal. Rather, it will look at whether the employer complied with its contractual obligations.

Collective redundancy consultation

Under the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), an employer who is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days must consult employee representatives. Consultations must begin 30 days before the first dismissal takes effect (or 45 days if the employer is proposing to dismiss more than 100 employees).[13] The definition of redundancy in this context is very broad, covering any reason for dismissal not related to the individual's circumstances, and it is generally accepted that the duty to collectively consult applies in cases of dismissal and re-engagement.[14]

If an employee is dismissed during the consultation period they can apply to the employment tribunal for a 'protective award' (a financial penalty against the employer).

9 *Catamaran Cruisers Ltd v Williams* [1994] IRLR 386
10 *Garside and Laycock Ltd v Booth* [2011] IRLR 735
11 *McGibbon v OIL Ltd* [1994] EAT 537/94
12 HM Government, Dismissing staff, Gov.uk
13 Section 188, Trade Union and Labour Relations (Consolidation) Act 1992, legislation.gov.uk
14 Section 195, Trade Union and Labour Relations (Consolidation) Act 1992, legislation.gov.uk

1.3 Prominent recent cases

The Covid-19 pandemic and the associated lockdowns had a significant impact on the labour market. A detailed overview can be found in the Library Briefing, Coronavirus: Impact on the labour market.[15]

During the pandemic there were a number of high-profile disputes about the use of fire and rehire tactics. The exact number of workers affected by fire and rehire is unknown. A report published by the Trades Union Congress in January 2021 estimated that 9% of workers had been told to re-apply for jobs on worse terms since March 2020, with higher rates among young and BME workers.[16]

British Airways

In June 2020, the Transport Committee published a report criticising the use of fire and rehire tactics by British Airways as "a national disgrace".[17] The Government response to the inquiry in September 2020 stated that:

> Ultimately, private businesses will need to make their own decisions on how they adjust their businesses. However, the Government has been clear that employers should always treat employees fairly and in a spirit of partnership.[18]

On 16 September 2020, Alex Cruz, then CEO of British Airways, told the Committee that an agreement had been reached with workers.[19] Unite the Union welcomed the agreement but noted that it did not cover all workers.[20] In December 2020, British Airways cargo workers voted to strike over a dispute about fire and rehire.[21] However, an agreement was reached on 27 January 2021.[22]

Centrica (British Gas)

The GMB Union was also involved in a dispute over fire and rehire with Centrica (British Gas). In February 2021, Chris O'Shea, CEO of Centrica, gave

15 Commons Library briefing CBP-8898, Coronavirus: Impact on the labour market, 20 April 2022
16 Tim Sharp, "Fire and rehire tactics are levelling down pay", TUC, 25 January 2021
17 Transport Committee, The impact of the coronavirus pandemic on the aviation sector (pdf), HC 268, 13 June 2020
18 Transport Committee, The impact of the coronavirus pandemic on the aviation sector: Government and Civil Aviation Authority Responses to the Committee's Second Report, HC 745, 7 September 2020
19 Transport Committee, Oral evidence: Coronavirus: implications for transport, HC 268, 16 September 2020, Q624
20 Unite the Union, "Unite welcomes British Airways partial u-turn on fire and rehire - but warns issues not yet settled", 16 September 2020
21 Unite the Union, "British Airways cargo workers vote overwhelmingly for strike action in fire and rehire dispute", 7 December 2020
22 Unite the Union, "Unite ends BA 'fire and rehire' dispute by securing deal to avoid forthcoming cargo strike action", 27 January 2021

evidence to the Business, Energy and Industrial Strategy (BEIS) Committee, arguing that reorganisation was necessary to protect the wider employment model:

> We have been going for over 200 years and we have terms and conditions that have been built up over a number of years. The market has changed. Customer needs and wants have changed. We have to change as well. Companies should not have the right to do this under any circumstance at all—employment rights are important—but it is inescapable that our use of contractors and the gig economy has increased substantially over the past several years.
>
> What I am trying to do is to stop that and to protect the direct-labour employed model that we have. We have the biggest unionised workforce of our kind in the UK and I am proud of that; I want to keep that, but we need to be able to change. That is why I have told your colleague, Gavin Newlands, that we should not lose the ability for companies to make changes, but we should change when the Section 188 notice has to be served.[23]

However, Justin Bowden, an officer at the GMB Union, told the Committee that fire and rehire tactics were not necessary and harmed meaningful negotiations with the union and workers.[24] Workers at British Gas went on strike in March 2021 to protest the use of fire and rehire, but after 44 days of strike action and 500 workers being dismissed, an agreement was reached that brought the dispute to an end.[25]

P&O Ferries

P&O Ferries Ltd (P&O) made 786 of its seafarers redundant, without prior consultation, on 17 March 2022. The company announced plans to move to a new operating model using third-party agency workers to crew its ships.[26]

The issue of fire and rehire was raised in parliamentary debate in relation to P&O ferries, though this case differs from those above in that P&O was not attempting to directly rehire the dismissed staff under new terms. Instead, staff were dismissed and replaced with agency workers. As Micky Smyth, representative of Nautilus International union, described "everybody onboard that vessel from the Captain down is an agency worker. There is no permanent employees employed by P&O Ferries".[27] While he added that some previous P&O Ferries staff had now re-joined via the agency, they were no

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23 BEIS Committee, Oral evidence: The impact of coronavirus on businesses and workers, HC 219, 2 February 2021, Q354

24 BEIS Committee, Oral evidence: The impact of coronavirus on businesses and workers, HC 219, 2 February 2021, Q346

25 GMB Union, "British Gas fire & rehire dispute 'over' after GMB members back improved pay deal", 20 July 2021

26 "Outrage and no ferries after mass P&O sackings", BBC [online], 18 March 2022 (accessed on 12 April 2022)

27 Peter Moor, "Union claims P&O Ferries has resumed Larne sailing with 'fired staff rehired as agency workers'", ITV News, 10 April 2022

longer employed directly by P&O Ferries and so had officially changed employer rather than changing terms of contract with the same employer.

As Parliamentary Under-Secretary of State for Small Business, Consumers and Labour Markets, Paul Scully, commented, these dismissals "were not a case of fire and rehire - just fire."[28] Professor Alan Bogg, Professor of Law at the University of Bristol, put it slightly differently referring to it as "fire and rehire on steroids":

> There is no question—this isn't a fire and rehire situation, but this is fire and rehire on steroids. These are things that are on the same spectrum of contractual deregulation.[29]

For more details about this case, see the Library Briefing P&O Ferries: Employment law issues.[30]

1.4 Calls for reform

The use of fire and rehire tactics in recent years has led to a number of calls to reform the legislation. Professor Alan Bogg, Professor of Law at the University of Bristol, has argued that under the current law the balance of power lies too much with the employer:

> In short, a determined employer with the right legal advice can achieve its goal of reducing terms and conditions with relative ease. English law provides the signposts to navigate the way, abetted by a wide scope for legally compliant business reorganization dismissals. In other words, the contractual bargain is sacrosanct in English law except when it runs up against the employer's powers of dismissal, the totemic managerial prerogative of the English common law.[31]

Professor Bogg proposed a number of reforms that could provide greater protection to employees in these cases including:

- Amend the Employment Rights Act 1996 to make protection from dismissal a 'day 1' right in cases of dismissal and re-engagement
- Amend the Employment Rights Act 1996 to provide that dismissal and re-engagement will be unfair if the employer had reasonable economic alternatives

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28 Gov.uk, New statutory code to prevent unscrupulous employers using fire and rehire tactics, 29 March 2022

29 Transport Committee & Business Energy and Industrial Strategy Committee, Oral evidence: P&O Ferries, 24 March 2022, Q7

30 Commons Library briefing CBP-9529, P&O Ferries: Employment law issues

31 Alan Bogg, Firing and Rehiring: An agenda for reform, Institute for Employment Rights, 9 October 2020

- Amend the Employment Rights Act 1996 to provide that when assessing the reasonableness of the dismissal it is relevant to consider whether the employer had consulted with unions and obtained their agreement

- Amend the Trade Union and Labour Relations (Consolidation) Act 1992 so that workers as well as employees count towards the threshold of 20 dismissals.

Private Members' Bills

In Parliament, there were few mentions of "fire and rehire" (or "dismissal and re-engagement") prior to the Covid-19 pandemic. In the summer and autumn of 2020, SNP MP Gavin Newlands introduced two identical Private Members Bills to reform the law on dismissal and re-engagement: the Employment (Dismissal and Re-employment) Bill and the Employment (Dismissal and Re-employment) (No.2) Bill. The Bills proposed adding a new provision to the Employment Rights Act 1996 to make a dismissal automatically unfair if the purpose of the dismissal was to re-employ the employee on less favourable terms. This approach would effectively make dismissal and re-engagement unlawful in any circumstance.

Introducing the second of the two Bills in the House of Commons in November 2020, Mr Newlands argued that it would provide protection to employees:

> My Bill would make a simple amendment to the Employment Rights Act 1996 to add the re-employment of a worker on less favourable terms and conditions to the definition of unfair dismissal. That would allow employees to use the existing employment tribunal system to enforce their rights if required, and would mean that employers could no longer act with impunity. Amending the Act in that way would allow employees targeted for fire and rehire to take cases against unscrupulous employers and, where appropriate, secure reinstatement and compensation. In short, the Bill creates no extra bureaucracy, no extra administration and no extra complexity, but creates a necessary protection for workers that employers will be forced to respect or face judicial proceedings.[32]

Neither Bill was given a second reading and both fell with the end of the 2019-21 session.

In the following 2021-22 session, Labour MP Barry Gardiner introduced his own Private Members Bill, the Employment and Trade Union Rights (Dismissal and Re-engagement) Bill. This Bill proposed to:

- Introduce a new duty for employers to consult employees in certain situations when they might be looking to dismiss or change the work terms of 15 or more employees. Any changes to an employment contract aren't valid unless this consultation was done

[32] HC Deb 4 November 2020 c329

- Provide additional employee protections, by:
  - prohibiting employers from including in employment contracts a right to vary terms in ways less favourable to employees, without employee consent; and
  - making it easier for employees to bring claims for "unfair dismissal" in cases of fire and rehire
- Provide additional legal protections by making it easier and quicker for industrial action to be taken in cases of fire and rehire.

The Library briefing on this Bill has more details.[33] The Bill did not progress beyond second reading on 22 October 2021 and fell at the end of the session.

Acas review and ongoing debate

On 25 January 2021 the Labour party used an Opposition Day debate to seek to pressure the Government to set a timetable to bring forward legislation to end fire and re-hire tactics by the end of January 2021. Responding in the debate for the Government, Business Secretary Kwasi Kwarteng told the House of Commons that the Government had asked Acas to conduct a review of fire and rehire:

> As I was saying, we have been very clear that this practice is unacceptable and the Under-Secretary of State for Business, Energy and Industrial Strategy, my hon. Friend the Member for Sutton and Cheam (Paul Scully), who is the Minister responsible for labour markets, has condemned the practice in the strongest terms on many occasions in this House. We have engaged ACAS to investigate the issue and it is already talking to business and employee representatives to gather evidence of how fire and rehire has been used. ACAS officials are expected to share their findings with my Department next month and we will fully consider the evidence that they supply.[34]

A Westminster Hall debate on fire and rehire was secured by Labour MP Kate Osborne in April 2021. In the debate she sought to pressure the Government to include legislation to end fire and rehire in its upcoming Queen's Speech. Labour Markets Minister Paul Scully reiterated that he believed it was "completely unacceptable to use threats of fire and rehire as a negotiating tactic" but did not commit to bring forward legislation soon, saying "We have to consult and ensure that legislation is made with careful consideration and debate, and that it is made with people—companies and workers—and not done to them."[35] Mr Scully noted that the BEIS Department had asked Acas to

[33] Commons Library briefing CBP-9344, Employment and Trade Union Rights (Dismissal and Re-engagement) Bill

[34] HC Deb 25 January 2021 c88

[35] WH Deb 27 April 2021, vol 693

conduct an "evidence-gathering exercise" on this issue which he is "carefully considering".[36]

Acas reported in June 2021 that it could not identify any large-scale surveys or quantitative data on fire and rehire. They noted that fire and rehire has been used for many years, but seemed to become more common in recent years and especially during the pandemic. Acas noted "mixed views" on the need for reforms to address the practice, commenting that:

> A range of potential legal reforms and other interventions were suggested to either prohibit or to more strongly disincentivise the practice; while some urged caution in considering whether any particular remedy might create a worse problem than the one it is intended to address, for instance by driving more redundancies or business failures.
>
> Suggested legislative options included: tightening up the law around unfair dismissal; enhancing the requirement and capacity for employment tribunals to scrutinise business' rationale for change in relevant cases; protecting continuity of employment in fire-and-rehire-scenarios; and strengthening employers' consultation obligations around proposed dismissals. [37]

On 8 June 2021 Labour Markets Minister Paul Scully made a statement to the House of Commons, in which he responded to the publication by Acas of its findings. He said the Government's next step would be "charging ACAS with strengthening the guidance in this area" but did not rule out further action, saying that "nothing is off the table".[38]

Proposed new Statutory Code of Practice

On 29 March 2022, in response to the dismissals at P&O Ferries discussed above, Labour Markets Minister Paul Scully announced the Government plans to introduce a new Statutory Code of Practice on fire and rehire under section 203 of the Trade Union and Labour Relations (Consolidation) Act 1992.[39] This aims to set down in law certain expectations of behaviour when companies seek to change employees' terms and conditions. The courts will be given a power to apply an uplift of up to 25% to an employee's compensation if the employer has unreasonably failed to comply with the Code.[40]

On 7 June 2022 Mr Scully responded to an oral question in the Commons by Rosie Cooper MP that "We will publish a draft for consultation in due course, and bring the code into force when parliamentary time allows."[41]

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36 As above

37 Acas, Dismissal and re-engagement (fire-and-rehire): a fact-finding exercise, 8 June 2021

38 HC Deb 8 June 2021, col 841 onwards

39 HC Deb 29 March 2022 c693

40 Gov.uk, New statutory code to prevent unscrupulous employers using fire and rehire tactics, 29 March 2022

41 HC Deb 7 June 2022 c665

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