Fire-and-rehire – is it lawful?

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The practice of fire-and-rehire is a last resort to effect changes in terms of employment contracts where voluntary agreement fails. Following the recent Acas report and guidance, the case for law reform and lessons learned from the pandemic are examined.

During the pandemic as businesses started failing, some employers used dismissal and re-engagement (fire-and-rehire) to change terms for their employees as part of measures said to safeguard the business. Others achieved changes by consent; however, the prospect of fire-and-rehire if changes are not agreed is obviously a motivating factor. Unions and politicians have attacked employers for using the pandemic as a pretext to diminish workers' terms or using fire-and-rehire as a negotiating tactic to undermine workplace dialogue on change. A similar strategy was deployed by P&O Ferries in its controversial decision to fire its entire workforce without consultation and to re-engage some of them as agency workers.

At present, the law only permits an employer to fire-and-rehire where the employer has some other substantial reason (SOSR) for so doing and acted reasonably in all the circumstances under s.98(4) ERA. If not, it risks an unfair dismissal finding and an award of compensation.

The Labour Party criticised that threshold as too weak and some said that fire-and-rehire should be prohibited. A defeated Private Members' Bill suggested that all dismissals should be automatically unfair if the purpose of the dismissal was to re-employ the employee on less favourable terms, bypassing the reasonableness test entirely. The issue was also considered by the BEIS Select Committee, most recently in the context of the redundancies made by P&O Ferries.

Acas report and advice

In June 2021, Acas reported to BEIS on the use of fire-and-rehire practices, confirming what employment lawyers have long known that it is not a new phenomenon but has been a strategy of last resort for a long time. It was perceived as becoming more common in recent years and particularly during the pandemic. Acas reported the opposing perceptions: what some saw as 'opportunism', others viewed as changes 'driven by the need for significant, rapid and long-term re-shaping of business operating models'.

The report highlighted its use:

- to minimise redundancies and maximise overall headcount reduction;
- to harmonise terms and conditions; and
- to introduce temporary or permanent flexibility into contracts in terms of working hours, shift patterns, payment entitlements and security of hours or employment.

Acas reported suggestions to tighten up the law of unfair dismissal, enhancing the requirement for tribunals to scrutinise the employer's business rationale for change and strengthening employers' consultation obligations. Other contributors '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'.

Particular issues arose in respect of collective redundancy consultation requirements. If its proposals are at a formative stage, an employer may have a duty to consult about fire-and-rehire early in a negotiation process. This results in a tension. Trade unions routinely criticise early consultation as a threat or negotiation tactic to try to ensure that negotiations proceed within certain parameters set by an employer. They told Acas that it brought 'significant imbalance' to the negotiation process.

Employers said that, in the context of the pandemic, notices issued pursuant to s.188 TULR(C)A were not indicative of an unreasonable, heavy-handed tactic, but

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rather were driven by the concern about a punitive protective award if consultation was not started 'in good time', especially when there were shorter timescales available to agree solutions.

In response to its report, the Government asked Acas to produce guidance to help employers take appropriate steps, including exploring its options before considering fire-and-rehire to change employment contracts. This was published in November 2021 (with minor amendments shortly thereafter). Acas provided advice regarding the types of circumstances when contractual changes could be made, the risks to be considered, the need for clear and effective consultation, and what to consider when changes to employment contracts cannot be agreed. The Acas guidance restates the law and good practice and does not introduce anything new.

Options for legislative reform

Reform the law on unfair dismissal

A range of suggestions were made to Acas to amend the ERA to:

- specify that dismissals are unfair where the employer dismisses and re-employs in order to diminish terms and conditions. The suggested remedy is reinstatement based on the 'old' contract, though with scope for fair flexible adjustment of work organisation. This is likely to result in employers being unable to compel reduced terms in response to economic distress and makes redundancies to save money the natural alternative;
- provide that dismissal and re-engagement on less favourable terms is automatically unfair, giving rise to a 'day one' right to make a tribunal complaint; with the burden of proof on the employer to show the reason for dismissal; and make 'interim relief' available in such cases pending a full hearing on the merits;
- specify that redundancy and SOSR dismissals are unfair where the employer had reasonable economic alternatives open to it which would have avoided dismissals. Legislation could specify factors relevant to fairness. The tribunal should consider the 'equity' of the diminished terms and conditions in determining reasonableness; and
- strengthen a tribunal's requirement to scrutinise the business reasons advanced by employers in fire-and-rehire dismissals; and improve their capacity to carry out such scrutiny, for instance with the assistance of lay panel members with relevant expertise.

The difficulty with some of these proposals is that a fire-and-rehire dismissal is unfair at present only where the employer acts unreasonably. These proposals for reform seek to make it unlawful to fire-and-rehire, even when it may be regarded as reasonable to do so. That would seem to be a strange result. Trying to legislate about the factors an employment tribunal must take into account is fraught with drafting danger. Instead, the Acas guidance gives an indication of the types of factors that a tribunal can consider in determining fairness (ie the clarity of information provided to employees about the proposed changes and adequacy of consultation).

The Government has now indicated that it will ask Acas to go one step further and devise a Statutory Code of Practice on fire-and-rehire that a tribunal has to take into account when assessing fairness (although the proposal remains at a formative stage). The factors mentioned in Acas's report and advice could be included in such a Code of Practice and used to assess fairness and reasonableness, potentially with a 25% uplift for non-compliance and disapplication of the statutory cap for compensation awards in respect of ordinary unfair dismissal claims.

In any case, where an employer has poor evidence of its sound business reason or does not go through a reasonable process, there remains a substantial risk of claims. An employer who does not use fire-and-rehire as a last resort may find a tribunal holding the dismissal to be unfair on the basis that no reasonable employer would have dismissed in those circumstances. That is likely to apply to the redundancies made by P&O Ferries where its workers were subsequently re-engaged, albeit that P&O appears to have avoided mass claims by offering a settlement figure in excess of the likely compensation from a tribunal claim.

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Reform collective consultation obligations
The Acas report noted proposals to extend the obligations under s.188 TULR(C)A to ‘workers’ as well as ‘employees’; reduce the numerical thresholds for triggering consultation obligations; and explicitly state in legislation that no notices of dismissal can be given until the consultation process is completed.

It was also suggested that legislation could widen the requirement to consult with trade unions in such circumstances, ie beyond the requirements of s.188 TULR(C)A, for example. by imposing a requirement of ‘good faith’. The difficulty is that courts and tribunals have, for some decades, sought to avoid deciding the rights and wrongs of trade disputes and assessing whether an industrial party is negotiating in good faith – which can be a political as well as an industrial judgement.

Comment

The Acas report revealed a polarised view: some called for fire-and-rehire to be unlawful in all situations; other participants said the present law already strikes the correct balance. Removing the option of fire-and-rehire entirely might give some employees or a trade union the power of veto on any changes, even if other employees (and/or unions) supported the change. Most commentators accept that in certain circumstances, fire-and-rehire is unavoidable. In our view, where it is reasonable (in accordance with the present test) and a last resort, fire-and-rehire should continue to be permitted by the legal framework.

Without this approach as a last resort, an employer would either have to dismiss and not re-engage, or retain terms of employment that worked to the detriment of its business and, ultimately, to the long-term employment prospects of its workforce. The existing concept of unfair dismissal provides an employee who has been unreasonably dismissed to bring a claim, while allowing employers the flexibility required to ensure that their organisations can adapt to changing external circumstances while protecting employees from unfair dismissals.

It does not provide an immediate interim remedy but it is difficult to see what would work. Large companies can be fined millions of pounds for failing to serve an HR1 – that now looks like an obligation with teeth rather than a paper tiger. Alternatively, legislation might provide for an injunction to prevent dismissals where an employer has entirely failed to serve any s.188 notice (as in the case of P&O).
There may be limited circumstances where an injunction can be obtained to prevent dismissals as in *USDAW* (where, exceptionally, a promise of ‘permanent’ rights impliedly circumscribed the express power to dismiss). It is under appeal but is unlikely to be precedent-setting due to its very unusual facts. Certainly, a Statutory Code of Practice will define where fire-and-rehire will be reasonable and should provide welcome clarity. The provision of adequate resources for the tribunal system to ensure such rights can be enforced and strict penalties for deliberate failures to serve HR1s are vital.

The looser the link between the business’ financial situation and its need for reduced terms, the more scrutiny is likely to be applied by a tribunal. The concept of a ‘substantial’ reason for dismissal is nebulous when applied in these circumstances and the Code of Practice should give better definition.

Employers should be ready to make the case to workers and unions that such changes are objectively justified by showing some necessary reason to improve the business’ commercial situation and why fire-and-rehire is proportionate in all the circumstances. Using a necessity test helps take them safely above the present ‘substantial reason’ and ‘reasonableness’ threshold that the tribunal applies.

KEY:

ERA	Employment Rights Act 1996
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act 1992
USDAW	*USDAW v Tesco Stores Ltd* [2022] IRLR 407