Employment

Fire-and-Rehire – is it lawful?

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During the COVID-19 pandemic, the use of 'fire-and-rehire' as a means of implementing changes to terms and conditions of employment has come under the spotlight from trade unions and politicians. Last month, Acas published its report on such practices containing views from a range of trade unions, employer organisations and lawyers, which it had been asked to produce by the Department for Business, Energy and Industrial Strategy. In this blog, Andrew Burns QC and Marianne Tutin consider the report and lessons learned from the pandemic from different perspectives, and examine the current legal framework and case for law reform.

The practice of dismissal and re-engagement has become known as 'fire-and-rehire'. It is an option to effect changes in the terms of employees' contracts where they or their union will not agree to changes voluntarily. It involves dismissing employees and immediately re-engaging them on a new contract with new terms. During 2020 as so many businesses started failing, some employers used fire-and-rehire to achieve reduced terms for their employees as part of measures to safeguard the business. Many others achieved changes by consent; however the prospect of dismissal and re-engagement if the changes are not agreed can be a strong motivating factor on workers and unions. Unions and some politicians have attacked employers for using the pandemic as a pretext to diminish workers' terms and conditions and using fire-and-rehire as a 'negotiating tactic' to undermine workplace dialogue on change.

At present the law only permits an employer to fire-and-rehire where the employer has a 'substantial' reason for so doing and acted reasonably 'in the circumstances' under s.98(4) Employment Rights Act ("ERA") 1996. If unreasonable, an employment tribunal will find fire-and-rehire to be an unfair dismissal and then can award compensation for any losses. Some criticise that threshold as too weak and say that dismissal and re-engagement should be unfair even where it is reasonable to dismiss. A Private Members' Bill even went as far as suggesting 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 and the issue has also been considered by the Business, Energy and Industrial Strategy ("BEIS") Select Committee.

Acas report

In October 2020, the Department for BEIS asked Acas to report on the use of fire-and-rehire practices. The Acas report confirmed what employment lawyers have long known – that fire-and-rehire is not a new phenomenon but has been a strategy of last resort for a long time. However, it is perceived as becoming more common in recent years and particularly during the pandemic. Acas reported that it is used "in a wide range of industries and sectors; in small, medium and large organisation sizes; and in both unionised and non-unionised workplaces".

Acas reported the opposing perceptions – the political criticism that it was merely used "as a tactic" at an early stage of negotiation processes and the view that it was necessary due to the urgent business challenges thrown up by the

COVID-19 crisis, both in terms of immediate business survival and long-term sustainability. 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,
- In harmonising terms and conditions, and
- Introducing temporary or permanent flexibility into contracts in terms of working hours, shift patterns, payment entitlements and security of hours or employment.

Acas noted that while there were calls for potential legal reforms and other interventions to either prohibit or to restrict the practice, others "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".

Acas heard from those suggesting a tightening up of the law of unfair dismissal, enhancing the requirement for employment tribunals to scrutinise the employer's business rationale for change and strengthening employers' consultation obligations.

Workplace circumstances in which fire-and-rehire is used

Avoiding or minimising redundancies

Fire-and-rehire is often used in relation to avoiding or minimising redundancies, both historically and during the pandemic. Acas noted that part of its potential attraction was that a fire-and-rehire approach can enable employers to reduce costs while, assuming the new contracts are accepted, largely retaining the knowledge and skillset of their workforce with a view to a future upturn in business. Redundancies tend to shed staff even if some are offered alternative roles.

Changing terms and conditions for other reasons

Employers sometimes seek to vary existing terms and conditions without agreement. It is the fall-back whenever negotiations on changing terms and conditions break down. At that point an employer either has to abandon the changes or try to impose them. Employers may need to rationalise or 'streamline' disparities in staff contracts on matters such as pay, hours or shifts where the objective is to address disparities between existing contracts within an organisation.

After business transfers, employers may inherit contractual terms which cannot be sustained financially in the medium or long term, or create disparity with existing contracts or undermine the organisational culture. TUPE regulations place a substantial restriction on making changes after a transfer and so some disparities can be long-standing. In some sectors Acas noted a "mushrooming" of different terms and conditions with employees inheriting terms from a wide range of different previous service providers.

Employers told Acas that fire-and-rehire was a tool for the introduction of more flexibility into longstanding workers' contracts. This was relied on where there is a perceived need to change working patterns and/or associated payment entitlements – for instance, in response to changes in consumer behaviour, other sectoral change, or changing operational needs.

Perspectives on the use of fire-and-rehire

The use of fire-and-rehire must be regarded as reasonable when used a genuine option of last resort – for example,

where a negotiated solution cannot be reached, and the severity of the situation is such that the only alternative left would be the insolvency of the business itself and the consequent redundancy of its entire workforce.

Unions suggest agreement with workers is always achievable with honest, transparent and trusting employment relations. They told Acas that they are opposed to the use of fire-and-rehire even as an ostensible 'last resort', regarding its availability as something which undermines the value of building and maintaining good relations between employers and their workforce. This is controversial as businesses will want to remedy defects before the business is in the verge of failure, whereas workers and unions criticise the employer's rationale for change as not genuine if the business is not already failing. Unions told Acas that proposed changes can be seen as excessive and that employers draw a line under negotiations when workers or representatives feel there is still reasonable scope for further negotiation and agreement. Unions often argue that the employer is not genuinely attempting to seek agreement.

The duty to consult when proposals are at a formative stage means that fire-and-rehire must be put forward as a prospect even early on in a negotiation process. This results in a tension. The unions routinely criticise early consultation as using it unreasonably as '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.

A contrasting employer-side perspective was that, at least in the context of the COVID-19 pandemic, notices issued pursuant to s.188 of the Trade Union and Labour Relations (Consolidation) Act ("TULRCA") 1992 are not indicative of an unreasonable, heavy-handed tactic, but rather are driven by the concern about a punitive protective award if consultation is started late and due to the shorter timescales available to agree solutions at this time.

Some participants told Acas that in some cases the COVID-19 pandemic is being used opportunistically, as a pretext for forcing through employers' longer-standing plans for change at a time when workers are more vulnerable and less able to challenge detrimental changes to their terms and conditions. However, employers pointed to the very high incidence of business failure as justifying change to avoid business closure.

Brief overview of existing law relevant to fire-and-rehire

The valid variation of contractually binding terms and conditions usually depends upon mutual agreement between the employer and worker as parties to the contract. A worker's agreement to a variation may be either express or implied and there are a number of ways by which it may be given, such as:

- The employment contract itself may contain a clause expressly allowing the variation (such clauses are usually limited to permitting variations in specific circumstances and they tend to be interpreted narrowly by courts and tribunals: see e.g. *Wandsworth LBC v D'Silva* [1998] IRLR 193),
- The agreement of individual workers may be sought directly through consultation (as to which continued employment may be seen as valid consideration: see *Lee v GEC Plessey Telecommunications* [1993] IRLR 383),
- A trade union may agree the changes where the relevant contractual terms are covered by a collective agreement (although whether such a term is binding in an individual depends on whether it is apt for incorporation: see *Kaur v MG Rover Group Ltd* [2005] IRLR 40). Unions will usually seek to obtain their members' approval before agreeing to changes that diminish contractual terms and conditions.

Where agreement is not reached, an employer may seek to force a contractual variation by either:

- Unilaterally imposing the change and relying on implied worker consent (which may be implied, for example, by their continuing to work under the new terms without protest: see e.g. *Dixon v London General Transport Services Ltd EAT/1265/98*), or
- A fire-and-rehire process.

Where an employer is considering making contractual variations without agreement, there are a number of legal

obligations and protections which they may need to comply with depending on the circumstances. In brief:

- **Wrongful dismissal**: employers need to provide the relevant statutory or contractual notice period to lawfully terminate a contract.
- **Breach of contract / constructive dismissal**: where a less favourable change is imposed unilaterally without worker consent, this will constitute a breach of contract. Attempting to impose significantly less favourable terms in this way may constitute a repudiatory breach of contract (see *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221), in which case qualifying employees might resign and claim constructive unfair dismissal.
- **Unfair dismissal**: if dismissed from their original contracts, qualifying employees may bring an unfair dismissal claim. Employers then need to show they had a fair reason for dismissal and that they acted reasonably in deciding to dismiss for that reason. There are generally two potentially fair reasons that may apply in fire-and-rehire cases:
    - Redundancy, broadly speaking if the dismissal was related to fewer workers being needed by the employer: see s.139(1) ERA 1996; or
    - Some other substantial reason ("SOSR"), if there was some other sound business reason for the change. Employers usually rely upon SOSR in dismissal and re-engagement cases. In doing so, employers must show:

    1. A "sound good business reason" in order to establish a fair dismissal for SOSR where an employee has refused to accept a change to their terms and conditions: see *Hollister v NFU* [1979] IRLR 238,
    2. The reason must also be a reasonable one to rely upon for dismissal and re-engagement – within the 'range of reasonable responses of an employer',
    3. A fair process has been followed which would usually involve collective consultation (including, in many cases, compliance with s.188 TULRCA 1992) and individual consultation.

- **Collective redundancy consultation requirements**: s.188 TULRCA provides that where there is a proposal to dismiss 20 or more employees at one establishment within a 90-day period (for reasons not related to the individuals concerned) certain collective consultation obligations will apply. These require an employer to provide certain statutory information and engage in discussions with a view to reaching agreement with, either trade union representatives (where there is a recognised trade union) or other elected employee representatives. The employer must also notify BEIS at least 30 days before the first of those dismissals takes effect, or 45 days where the proposal relates to 100 or more employees.
- **Inducements relating to collective bargaining**: where there is a recognised trade union, s.145B TULRCA prohibits employers making offers to workers with the 'sole or main purpose' that any terms of their employment will not, or will no longer be, determined by a collective agreement with the union. Tribunals may make an inference that the employer has such a prohibited purpose where, for instance, they do not engage in arrangements agreed with the union for collective bargaining (s.145D TULRCA).
- **TUPE**: the TUPE Regulations provide protections against dismissal and variation of contractual terms in the context of a business transfer. For instance, dismissals will be unfair and contractual changes void if the sole or principal reason for them is the transfer itself (e.g. simply to harmonise terms and conditions with existing workers), or if they are made for a reason that is not an 'economic, technical or organisational reason' ("ETO") entailing changes in the workforce. Changes that are made for ETO reasons can be valid if agreed by the affected workers or their representatives.

Protections against fire-and-rehire offered by the current legal framework

An employer which uses fire-and-rehire for as a pretext or for any non-genuine reason will be vulnerable to unfair dismissal claims. The employment tribunal is entitled to assess whether an employer's reason is substantial or insubstantial. The case law shows that there are sometimes powerful reasons why an employer needs to dismiss and re-engage its workforce:

- *Ellis v Brighton Co-op*
  [1976] IRLR 419: the employee refused to agree the change even after the trade union had agreed the reorganisation.

- *Hollister v NFU*
  [1979] IRLR 238: the union employer made the changes to benefit the employees, but Mr Hollister unreasonably refused to accept it.

- *Bowater Containers Ltd v McCormack* [1980] IRLR 50: changes agreed with a union led to a supervisor being made responsible for more staff.

- *Catamaran Cruisers v Williams* [1994] IRLR 386: a company in serious financial state agreed changes with union to improve safety and efficiency but were refused by some employees.

However where an employer has poor evidence of its sound business reason or does not go through a reasonable process, there is a substantial risk. An employer who does not use fire-and-rehire as a last resort, but as a first resort, may find a tribunal holding the dismissal to be unfair on the basis that no reasonable employer would have dismissed in those circumstances.

A fire-and-rehire approach can help retain the knowledge and skills of affected staff which would otherwise be lost through making them redundant. Redundancy exercises can be costly and businesses that make mistakes may face expensive claims and pay-outs at the employment tribunal. The employer must use a fair consultation process, whereby sufficient warning is given, the proposed changes are clearly explained to the workforce and proper consideration is given to alternatives, whichever option it takes. Negotiating and reaching agreement with workers and representatives can be a time-consuming process and, even when agreement is reached in principle with union representatives, these may be rejected when the workforce is balloted. Nevertheless, an employer that does not try to negotiate and obtain voluntary agreement is likely to be acting unreasonably.

Participants to the Acas report expressed a wide range of views on the various legal protections available, including as follows:

- **Unfair dismissal**: some participants felt the scope for dismissals to be found fair on the basis of business reorganisation needs is quite broad, given the currently settled case law on SOSR dismissals. Some thought that tribunals do not tend to inquire in any great detail into an employer's financial situation and business rationale for the proposed changes. Members of the legal profession commented that: "from an employer perspective, so long as you follow your consultation process you're OK. If it gets to a tribunal, no judge looks [very closely] behind to the reasons why an employer is doing it, it's all about procedure. In that respect, the employee perhaps isn't so well protected."

- **Collective redundancy consultation requirements**: participants noted that the consultation obligations relating to proposed dismissals (including fire-and-rehire) of 20 or more employees at one establishment over a 90-day period are quite detailed (see paragraph 61), with potentially costly claims and penalties attached if not carried out correctly. Some from trade unions and the legal profession considered that the requirements were mostly procedural in nature, such that they can be met fairly easily by a well-advised employer. However an employer who does not consult at an early stage when its proposals are still formative is at risk of protective awards.

- **TUPE**: along similar lines to the comments made around SOSR, some participants noted that the degree of scrutiny at a tribunal of an employer's business and financial rationale tends to be quite limited in complaints under the TUPE legislation.

Options for legislative reform

Reform the law on unfair dismissal

A range of suggestions were made to Acas to amend the ERA 1996 to:

- Specify that dismissals can be challenged as unfair where the employer dismisses employees and subsequently re-employs them for the purpose of diminishing the terms and conditions of employment. The primary remedy in such cases should be reinstatement based on the 'old' contract, though with scope for fair flexible adjustment of work organisation.
- Provide that dismissals for the purpose of re-engaging employees on less favourable terms and conditions are automatically unfair, giving rise to a 'day 1' right to make a complaint to a tribunal; put the burden of proof on the employer to show that this was not 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 such that it could have avoided taking that approach. Legislation could specify factors that may be relevant to the fairness determination at tribunal, e.g.: that the employer can demonstrate that it has consulted with worker representatives and that they were supportive of the employer's proposed course of action; and that the tribunal should consider the 'equity' of the diminished terms and conditions in determining the overall reasonableness of the employer's conduct in dismissing the employees.
- 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 dismissal is judged to be unreasonable. These proposals for reform therefore 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. A more sensible approach could be to ask Acas to devise a Code of Practice on dismissal and re-engagement which an employment tribunal have to take into account when assessing fairness. The factors mentioned in the report could be included in such a Code of Practice and used to assess fairness and reasonableness, potentially with an uplift for non-compliance.

Reform collective consultation obligations

It was proposed to extend the obligations under s.188 TULRCA to 'workers' as well as 'employees'; reduce the numerical thresholds for triggering consultation obligations; and state explicitly 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 unions in such circumstances, i.e. beyond the requirements of s.188, e.g. by imposing a requirement of 'good faith'. The difficulty with that is that courts and tribunals have for some decades sought to avoid deciding the rights and wrongs of trade disputes and assessing whether a party is negotiating in good faith or not – which can be a political as well as an industrial judgement.

Strengthen employers' obligations concerning inducements related to collective bargaining

Unions seek to reduce the scope for employers to make direct contractual offers to workers where there is a recognised trade union under s.145B TULRCA. There is already an argument in Kostal v Dunkley in the Supreme Court to restrict an employer's ability to make offers. Some suggested to Acas that law reform could require the employer to honour its agreed procedural commitments under a collective agreement by modifying s.145D TULRCA to give rise to a presumption at tribunal that, where agreed procedures are not followed, the employer had a 'prohibited purpose' that the workers' terms of employment will no longer be determined by collective agreement.

Prohibit use of wide contractual variation clauses

Some suggested to Acas that the law should prohibit the use of wide contractual powers that enable employers to vary terms and conditions unilaterally. The courts have already restricted this to cases where it is reasonably to vary terms, but those participants may want this restricted further.

Protect continuity of employment

It was suggested that Parliament should legislate to protect the continuity of service of employees and workers who are fired-and-rehired. This will not be a problem in most cases as there is unlikely to be any or any substantial gap between dismissal and re-engagement.

Conclusion

The Acas report reveals a polarised view with some workers calling for fire-and-rehire to be unlawful in all situations and other participants saying that the present law already strikes the correct balance. Removing this as an option for employers could simply result in employees who refused to accept reasonable changes being dismissed and not re-engaged. If the option of fire-and-rehire did not form part of an ongoing consultation about changes to terms and conditions or was always unlawful, it would 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 may be unavoidable. Therefore where it is reasonable and where it is a last resort, fire-and-rehire should continue to be permitted by the legal framework in our view.

Without the ability to impose contractual variations via this approach as a last resort, an employer would either have to dismiss and not re-engage (which is of no benefit to the employee who wishes to protest, but eventually stay in employment), or retain terms of employment which worked to the detriment of its business and ultimately to the long term employment prospects of its employees. 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. There may be room for Acas to help define the circumstances in which fire-and-rehire will be reasonable which could provide welcome clarity for employers and employees alike. Further, the provision of adequate resources for the tribunal system to ensure such rights can be enforced is also vital.

The looser or more indistinct the link between the business' financial situation and its desire to introduce any reduced terms, the more scrutiny is likely to be applied by workers, worker representatives and ultimately a tribunal, if any claims for unfair dismissal are presented. The concept of a 'substantial' reason for dismissal is perhaps a little nebulous when applied in these circumstances. Certainly employers would be well advised to make the case to workers or their representatives (and, if required, obtain evidence) that such changes are objectively justified – perhaps showing some necessary reason to improve the business' financial or commercial situation and that fire and rehire was proportionate in all the circumstances. That would take them safely above the present 'substantial reason' and 'reasonableness' threshold that applies.

Andrew Burns QC specialises in complex commercial, employment and industrial disputes, particularly injunctions. He has featured in some of the leading appellate cases in employment law and trade disputes in recent years. He is ranked as a Leading Employment Silk by Chambers UK and Legal 500.

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