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“Fire and re-hire”: Retain, abolish, or reform?

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The recent, well-publicised proposals of large employers such as British Gas, British Airways and Argos to dismiss and re-engage employees on less favourable terms and conditions (so-called, ‘fire and re-hire’) have highlighted the tension between the inviolability of contract, and the legitimate business needs of employers. The use of fire and re-hire as a business strategy to address challenges during the COVID crisis appears to be widespread, with statistics reported by the TUC based on a poll carried out in November 2020 suggesting nearly 9% of employees were dismissed and offered re-engagement on less favourable terms in the period from March 2020. Whilst it may be tempting to dismiss this as a temporary phenomenon triggered by the COVID crisis, some stakeholders interviewed recently by ACAS reported an increasing trend in employer use of fire and re-hire practices spanning several years.

The practice of fire and re-hire has, according to Press reports, been described by Boris Johnson as ‘unacceptable’, and by the General Secretary of the GMB as ‘a dirty, bullying tactic’. Nonetheless, using it to change employees’ terms and conditions of employment *is* lawful and has been used by employers for decades. It is well established that an employer, unable to obtain employee consent to a variation of contractual terms that still wishes to implement the change, has two options. The first is to make the change without the employee’s consent. The employee in this scenario would accrue the right to complain of breach of contract: a complaint which would likely be successful unless the employee continued to work under the new terms without protest and implied consent was, thereby, evidenced. The second option, which arguably provides greater certainty to employers, is to dismiss with notice after following a fair procedure (including compliance with any consultative obligations under TULRCA or otherwise) and offer to immediately re-engage on the new terms. The employee’s only redress in this scenario would be to argue that he or she was unfairly dismissed: an argument which is unlikely to succeed provided the employer can demonstrate it had a sound business reason for the reorganisation and acted reasonably in dismissing the employee for refusing to agree to the change.

Although fire and re-hire has been used in this way for decades and its use may well have been on the increase prior to the COVID crisis, media reporting on its present use by ‘high street’ names,

combined with recent calls from trade unions such as the TUC and GMB for its abolition or reform, have no doubt contributed to its appearance on the political agenda. In addition to House of Commons debates and a report by the Transport Committee on the aviation sector condemning British Airways' use of the practice, two Private Members' Bills, which would render fire and re-hire unlawful, have been introduced since July 2020 (although neither has been given a second reading). In November last year the Government made a request to ACAS to produce a fact-finding report on the practice: a request fulfilled by ACAS in February 2021. The report, which was published by the Government on 8 June of this year, draws and reports on its findings from interviews with relevant stakeholders (including legal practitioners, academics, HR professionals, trade unions and employers) highlighting different and shared views on the use and suitability of fire and re-hire, including the legal framework which supports it. Views among interviewees were mixed: some considered the practice to always be unacceptable; some thought it could be used but only as a last resort; others expressed concern about its use as a tactic in early negotiations; and some considered it uncontroversial provided it was triggered by a sound business reason and followed good faith negotiations.

On the same day as the ACAS report was published, the Government announced that it would not introduce legislation to ban fire and re-hire but would instead ask ACAS to produce updated guidance for employers on good practice in changing terms and conditions. Without any legislative reform imminent, tribunals must play their part in achieving equitable outcomes based on individualised assessments of the facts in each case and a delicate balancing of interests. The importance to an employee of the maintenance of their terms of employment should not be understated. Changing an employee's terms can impact detrimentally on their quality of life, their choice of living accommodation, and their ability to provide for their families. However, preventing an employer from ever exercising fire and re-hire to change employees' terms when there is a pressing business need would arguably upset the balance between employer and employee interests too much in favour of the latter. Employers who, in good faith, offer terms to employees which later become unsustainable following a change of circumstances should be legally supported to re-organise their operations. There is a risk that without the flexibility in appropriate circumstances to adapt in response to business need, employers will resort more to redundancies, employ fewer staff, and offer less generous conditions, leading to high unemployment and a general levelling down. Whether tribunals can balance these opposing interests is open to debate. There is a persuasive argument that employees are insufficiently protected by the current legal framework.

Employers who seek legal advice will likely be told to consider 'fire and re-hire' as the 'nuclear' option, to be triggered only where necessary after exhausting all reasonable attempts to achieve

employee consent to change through consultation, negotiation, and agreement. The 'fire and re-hire' option, however, is not a panacea. Whilst a tribunal will not, it would seem, minutely scrutinise an employer's business reason for its reorganisation as such, it *will* carefully consider whether the reorganisation necessitated a change to employees' terms. Relevant to this enquiry might be how many employees agreed to the proposed change (Garside & Laycock Ltd v Booth 2011 IRLR 735), the reasonableness of the proposed change including whether it is temporary or permanent, whether any financial incentive was offered to accept the change, and whether the change has a more detrimental impact on one group of employees than another (Martin v Automobile Proprietary Ltd 1979 IRLR 64). It would be a mistake to assume that the fire and re-hire practice can be safely executed through simply following certain procedural steps. Fairness under s98(4) is, after all, to be determined in accordance with 'equity' and with 'the substantial merits of the case'.

Employees, on the other hand, are offered scant protection. The 2 or more years' service requirement for an unfair dismissal claim effectively allows employers to make changes to new employees' terms with relative impunity (any potential non-discrimination or other 'day one' right aside). An employment tribunal will ask only whether the employer acted within the range of reasonable responses when dismissing an employee for refusing to agree to a change of terms: a test which is generally accepted as affording a fair degree of latitude to employers. Case law, moreover, has shown that tribunals will not delve too deeply into an employer's business reasons for changing terms: a 'good sound business reason' will suffice, there being no requirement to demonstrate that change is necessary to avoid business peril (Hollister v National Farmers' Union 1979 IRLR 238, CA). Bringing an employment tribunal complaint is, moreover, time consuming, and the remedies for a successful complaint are limited. Reinstatement is rarely ordered, and employers will argue that any compensation should reflect the employee's failure to mitigate loss by refusing to accept the offer of re-engagement.

If fire and re-hire is to remain possible, including in cases where its necessity does not hinge on a finding of near business insolvency, tribunals must be prepared to undertake a searching and exacting enquiry into the reasonableness of an employer's use of the practice in every case. Tribunals must not readily accept an employer's assertion that the COVID crisis necessitates change, but instead require the employer to evidence its reasoning to ensure employers who seek to take advantage of the current economic circumstances to downgrade employees' terms (as some interviewees in the ACAS study contend) are held accountable. Tribunals should require that all

reasonable alternatives to fire and re-hire have been explored, and that any change is no more burdensome on the employee concerned than is necessary. For example, dismissals to implement permanent changes to terms to address downturns in business which are anticipated to be temporary should, in most cases, be found to be unfair. Findings of unfair dismissal on procedural grounds, meanwhile, should be readily made when, as some interviewees in the ACAS study claim, employers introduce the fire and re-hire option as a 'tactic' early in negotiations with employees. Orders for reinstatement, moreover, should become the norm in successful cases and employees should (as in USDAW v Tesco Stores Limited, Court of Session, 2021 be supported to seek interim remedies to prevent dismissal pending full judicial consideration of the equity and substantial merits of the case (see Alan Bogg, 'Firing and Re-hiring: An Agenda for Reform' IER, 9 October 2020).

Where legislative intervention could be beneficial is in relation to those employees with less than 2 years' service. Without the right to claim unfair dismissal, these employees are particularly vulnerable to fire and re-hire. Particularly concerning is the suggestion by certain interviewees in the ACAS study that some employers also insist on a break in service prior to re-engagement to, thereby, sever continuity of employment. Permitting this to occur without affording redress to affected employees is to render the contract between an employer and employee all but worthless in the first 2 years of employment.

In an area of employment law which has been largely settled since the late 1970s, a fresh look is to be welcomed. In addressing the likely increase in litigation of cases concerning dismissal and re-engagement in the coming months and years, there is the opportunity for tribunals to re-state existing legal principles and develop robust modern precedent in an area of law which has, for some time, received little attention. It is hoped that the tribunal judgments which emerge will reassure opponents of the practice that any use of fire and re-hire will be subject to exacting scrutiny in the pursuit of a delicate balancing of interests under s98(4) and its requirement to consider fairness in accordance with equity and the substantial merits of each case.