CONTRACT VARIATIONS

Contract variations: ‘Fire and rehire’ – not such an easy option

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For employment lawyers, there is nothing new about dismissal and re-engagement exercises. Employers have been carrying them out for many years. During the Covid-19 pandemic, however, they have fallen under the spotlight and been given a new name: ‘fire and rehire’.

To give just one example, in the summer of 2020, British Airways began a process of cutting up to 12,000 jobs from its workforce of 42,000 after most of its flights were grounded during the pandemic. Staff were given the choice between a redundancy package or continued employment on new terms but, if rehired, their pay was to be reduced to roughly 80% of basic pay. Following a backlash, a deal was reached with the Unite union but not before much criticism had been heaped on BA and the Transport Select Committee had questioned its chief executive about its approach.

This and other high-profile examples led the government to commission a report from Acas into the fire and rehire process and to consider ways in which the law might be reformed. More recently, we have seen an employment tribunal rule on a pandemic-related fire and rehire case: *Khatun v Winn Solicitors Ltd* [2020] (more of which below).

As employers prepare for a return to their offices and the furlough scheme reaches its end, some may be considering using the fire and rehire approach to effect contractual changes. In this article, we will explain what the process involves and examine some of the pitfalls for employers.

Is it, as the trade unions claim, too easy for employers to fire and rehire their staff and how can employers mitigate the legal risk of using this tactic?

What is fire and rehire?

In its simplest terms, fire and rehire is a way for an employer to force through changes to employment contracts without obtaining employee consent and without breaching the contract by making the changes unilaterally. The employer will terminate the employee’s current employment contract on notice and offer a replacement contract containing the

new (worse) terms, to take effect on expiry of the notice period. The employee has the choice of accepting the new contract and remaining in employment or leaving. Whether the employee stays or leaves, they may bring an unfair dismissal claim if they have the requisite two years' service. Crucially, however, the employer will not have breached the contract and so the changes (if the employee accepts the new contract) will be enforceable.

The principal risk, then, is unfair dismissal and the employer will hope to defend any claim on the basis that the termination was for some other substantial reason (SOSR). Under s98(1)(b) of the Employment Rights Act (ERA), a dismissal will be fair if it is within one of the categories under s98(2) (such as redundancy) or if it is for:

> *… some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

If the employer can demonstrate SOSR, the fairness of the dismissal will then turn on s98(4) ERA, under which the question is:

> *… whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.*

In order to demonstrate that the reason for dismissal was 'substantial', the bar for the employer is not particularly high, which is partly why fire and rehire has recently received such criticism. The employer simply needs to show a 'sound business reason' for the changes it is looking to make – in other words, they must not be for arbitrary or capricious reasons (*Hollister v National Farmers' Union* [1979]). Certainly, the employer does not need to show that the changes are necessary for the business to survive and employment tribunals must be careful not to substitute their view for that of the employer when considering whether the change is one which a reasonable employer would consider to be 'sound'.

Owing to the relatively low bar for showing SOSR, the challenge against such dismissals often centres on the second limb of s98 ERA, namely whether the employer has acted reasonably. Again, tribunals must be careful not to substitute their view of what is reasonable. Factors commonly taken into account will include:

- the employer's reasons for the changes and the employee's reasons for rejecting them;
- how much warning the employer gave of the changes and how much consultation it carried out with a view to obtaining the employee's agreement; and
- whether a majority of the other affected employees accepted the changes.

So far, so straightforward and it is perhaps not difficult to see why there is a view that this is an easy option for employers. The problem, however, with the fire and rehire process is that it is rarely directed at one or even a handful of employees. It is normally deployed when changes need to be made affecting a large number of employees at the same time. Certainly, that has been the case during the pandemic when employers have faced a need to make often drastic changes to employees' terms and conditions on a mass scale.

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When that is the case, things start to become more difficult because, if 20 or more employees are affected within a 90-day window, the process will require collective consultation under s188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). TULRCA applies not only to redundancy dismissals but to any dismissal that is not for conduct or performance, including SOSR. Once TULRCA is in play, the process becomes a very different one. First, employee representatives must be elected or, in unionised environments, the trade union will need to be consulted. With many employees still working remotely, the logistical challenges which this entails are obvious. Secondly, the length of time that the process will take is extended due to the minimum waiting periods between the start of collective consultation and the date when the first dismissal can take effect: 30 days when 20 to 99 dismissals are proposed and 45 days where that number is 100 or more. And that is all before the employer can begin the individual consultation and dismissal process that will follow the collective consultation.

It is a process that does not lend itself to an employer looking to make changes urgently. While tribunals are likely to have had sympathy for employers at the outset of the pandemic when they had no advance warning of the need to make contractual changes, the situation is now different and tribunals will expect them to follow a fuller process. Otherwise, the risk of protective awards of 90 days' pay per employee for failing to comply with TULRCA will be a very real one.

Khatun

Despite the reported number of fire and rehire exercises taking place during the pandemic, we have seen very few claims, though perhaps that is due to the backlog being experienced in the tribunal system. One recent example is the case of *Khatun.* While not an example of a collective exercise, it offers an interesting perspective on what a tribunal might expect of an employer when faced with a need to make changes urgently.

Ms Khatun worked for a firm of solicitors that specialises in personal injury claims. When the pandemic hit in March 2020, the firm could see that it was going to need to make some drastic changes very quickly because it was predicting a dramatic downturn in the volume of its work. So it did two things. First, it placed a number of staff on furlough. Secondly, it asked the remaining staff to agree to a new term in their contracts providing that they would consent, if asked in the future, to go on furlough or take a reduction in their working hours and pay.

Ms Khatun refused. She said that she would be happy to consider going on furlough or accepting a reduction in pay and hours if she was asked in due course as and when it became necessary. However, she did not want to agree in advance that the firm could make those changes whenever it wanted. The firm did not accept that position and it terminated Ms Khatun's employment. She brought a claim of unfair dismissal and the firm's defence was to rely on SOSR, ie it had sound business reasons for the changes and the dismissal was for those reasons.

As discussed above, the tribunal had to start by deciding whether the firm had shown that there was a substantial reason to justify the dismissal. On that point, the tribunal found that there was. In the circumstances of the pandemic, the tribunal was satisfied that the firm had good enough reasons to require the changes in the contract. Indeed, it did not

matter that this was at a very early stage of the pandemic when the firm's reasoning was based on a predicted downturn that was yet to come (and, in the event, was not as bad as it had predicted).

The second limb of SOSR, however (the requirement on the employer to act reasonably) was where the firm fell down. The tribunal accepted that because of the pandemic the firm could not have carried out a lengthy consultation process but it had only allowed 48 hours between requesting the variation and terminating Ms Khatun's employment. There was only one meeting, one phone call and a handful of emails. It was also clear from what the firm was saying to Ms Khatun that it had made its mind up that dismissal was the only alternative to the variation in the contract. There was no sign of any meaningful consideration of the points Ms Khatun was making.

Interestingly, too, the firm made no formal offer of replacement contract terms; it simply dismissed Ms Khatun when she rejected the proposed variation. Not only that, but it dismissed without notice. Much more 'fire' than 'rehire'.

Will the law be changed?

In October 2020, the Department for Business, Energy and Industrial Strategy (BEIS) asked Acas to carry out a fact-finding exercise into the issue of fire and rehire. The report was completed and delivered to BEIS in February 2021 but not published until June.

Since it was a fact-finding exercise, Acas made no recommendations for reform. However, it did set out a wide range of views, from those who consider the practice unacceptable under any circumstances to those who consider it justified provided it is driven by a genuine business need and preceded by consultation. The report canvasses various options for legislative and non-legislative reform, including:

- tightening up the law around unfair dismissal in cases of fire and rehire;
- enhancing the tribunal's ability to scrutinise the business rationale for the proposed contractual changes;
- increasing employers' consultation obligations;
- issuing improved guidance for employers; and
- naming and shaming employers who use the practice on a government website.

The government has recently responded to the report. No doubt concerned that limitations on the fire and rehire process could leave employers with no option but redundancy, BEIS has said it does not intend to legislate on the issue. On the other hand, it has also said that 'nothing is off the table'. Instead, for now, BEIS has asked Acas to prepare guidance on when fire and rehire should be used and on good practice for employers.

Mitigating the risks

So for now at least, the fire and rehire process remains available to employers but, while it is undoubtedly a well-trodden path, it is far from free of legal risk. The practical points in the box below are therefore worth bearing in mind.

Practical steps for employers

Plan ahead

Consider by when the changes need to take effect and work back from there. Factor in notice periods, individual discussions and, when changes are proposed to large numbers of employees, the added layer of collective consultation under TULRCA.

Formal or informal?

It may be appropriate to try to avoid a formal (eg collective) process of fire and rehire by firstly going out to the workforce on an informal basis in the hope of obtaining agreement to the changes proposed. In our experience, this is what was done in the early days of the pandemic when employers simply had no time to carry out even the most rudimentary consultation process, let alone a formal collective exercise under TULRCA. They relied on the goodwill of their employees in understanding the dire straits they were in and accepting (hopefully temporary) changes that were necessary to avoid job losses. If, however, employees reject the informal approach, you will have to extend your timetable and start from square one.

Explain

If employees understand why their employer is proposing the changes and they believe the reasons are genuine, they are far more likely to agree. Try to predict the questions they will have and answer them ahead of time with FAQ documents. Show that you have assessed the impact of the changes you are proposing on your workforce and considered alternatives.

Listen

One of the most common reasons for consultation processes (whether collective or individual) falling foul of the law is because it is apparent that the employer has gone into the process with a closed mind and has already made its decision. In *Khatun*, this is essentially where the employer fell down. The consultation process does not necessarily need to be a long one (even when the TULRCA waiting periods apply) as long as it is a genuine one. Ideally, you should show some movement in your position to demonstrate a genuine process.

Paper trail

Take care over what is put in writing about the changes, not only in formal communications with employees and employee representatives and in board minutes, but informally over internal email and other forms of management communication. Until the decision point has been reached to terminate contracts and offer re-engagement, the changes must remain ‘proposals’.

At the start of the pandemic, it was recognised that employers had little or no time in many cases to consult over changes to employment contracts. The employment tribunal in *Khatun* accepted this (though it still found the dismissal unfair). Now, more than a year on, employers have had time to plan and tribunals are likely to expect more of them.

Fire and rehire is still an option but it is not an easy one. In its response to the Acas report, BEIS commented that it should be a last resort and, in our experience, this is how employers view it. Apart from the legal risk, the inevitable adverse impact on employee morale means this is not an option any employer will embark upon easily. Now, thanks to the pandemic, the process has a new name and carries far greater reputational risk for those who use it.

Cases Referenced

- Hollister v National Farmers' Union [1979] ICR 542
- Khatun v Winn Solicitors Ltd [2021] ET/2501492/2020

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