

Fire and rehire - is it a good idea?

May 2023

The Government is analysing feedback on its draft statutory [Code of Practice tackling the use of 'fire and rehire'](#).

The draft Code outlines detailed steps employers should take when seeking to make changes to contractual terms of employment. For example, it makes clear that employers should not use threats of dismissal as a negotiating tactic and that fire and rehire should only be used to change employees' terms and conditions as "a last resort".

The consultation closed on 18 April 2023, and the finalised Code will come into force when parliamentary time allows.

What is fire and hire?

Fire and hire is a practice whereby an employer who wants to change their staff's terms of employment does so by serving the necessary notice to terminate the current contracts and then offers to rehire staff immediately on the new terms and conditions. The employer is, in effect, acting unilaterally and not engaging in meaningful consultations with employees.

Background

In November 2021, [ACAS published guidance](#) for employers that the practice of fire and rehire should be an option of last resort, and employers should make all reasonable attempts to reach an agreement and have a full consultation with employees.

Why has the Government taken this further step?

In March 2022, P&O Ferries dismissed approximately 800 workers without consultation or notice. Strictly speaking, P&O Ferries was, to quote Labour Markets minister Paul

Scully: "not a case of fire and rehire – just fire" but was the most flagrant example of an employer not consulting with their staff properly to date. It attracted significant media attention too. As a result, the then Department for Business, Energy & Industrial Strategy ([BEIS](#)) announced a proposed statutory Code of Practice tackling the use of 'fire and rehire'.

Highlights of the draft Code

The Code applies no matter the number of staff, creating a new obligation for those with fewer than 20 employees and something small businesses need to be alive to. In addition, it will apply where an employer envisages that a dismissal and re-engagement situation may arise.

Employers will still need to ensure they comply with other legal obligations that may arise over information sharing beyond the scope of the Code, such as collective redundancy consultations and TUPE transfers.

The Code will apply regardless of the business's objective or reasons for the proposed changes to the contract terms. Notably, the Code will not apply to redundancy dismissals.

Employers should constantly review contractual changes until the Code comes into force and consider alternative ways of achieving the objective.

The Code requires that employers communicate information about the proposals, including whom they might affect, what they are and the proposed timeframe as early as possible when contemplating any contractual changes.

Suppose it becomes evident that employees are not prepared to accept the proposed changes without continuing negotiation. In that case, the employer should



consider their plans against the backdrop and the consultation's responses.

The longer the process, the greater the need to consider alternative solutions to avoid dismissals.

Employers should only use fire and rehire as a last resort.

Whilst the Code imposes no legal obligation, a court or employment tribunal will consider the Code when considering relevant cases, including unfair dismissal.

The employment tribunal can apply up to a 25% uplift on an employee's compensation if the employer has unreasonably failed to comply with the Code. The uplift is similar to the sanction on employers for failure to comply with a disciplinary or grievance process.

Assuming the Code comes into force, subject to Parliamentary time, can an employer still fire and rehire whilst complying with the Code?

The short answer is yes, but this can only be as a last resort. The new Code does not outright ban its use, but there are many hoops to jump through and with-it pitfalls which may lead to a claim against the employer in the employment tribunal. The employer must comply with the new Code and conduct a suitable consultation process for the proposed changes. If, by doing this, an agreement is unachievable, then the employer may, as a last resort, opt to dismiss the worker and rehire them on new terms.

The takeaway lesson for employers

Employers, especially those with fewer than 20 staff, considering making changes to staff terms and conditions, including the idea of firing and rehiring, should take account of the draft Code of Practice and consider acting sooner rather than later. In addition, employers should be mindful of the ACAS guidance published in November 2021 until the new Code becomes law. At this point, even more, thought will be needed.

The wind is changing direction in favour of the employee as it becomes increasingly more difficult to impose changes on staff unilaterally. As a result, the practice of fire and rehire is becoming more challenging, and the chances of a misstep are increasing. However, it is not all doom and gloom. Fire and rehire has always been a sharp practice for businesses to adopt, which can damage staff morale, productivity and working relations. The Code puts into effect what has always been considered best practice.

Employers should seek early legal advice before embarking on any change to terms and conditions to avoid the potential pitfalls an employer may fall foul of.

Speak to [Karen Cole](#) today to conduct an initial review of your employment documentation and discuss any changes.

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Note: This is not legal advice; it provides information of general interest about current legal issues.

