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DISMISSAL AND RE-ENGAGEMENT: CODE OF PRACTICE PUBLISHED

The Government has published the final version of its statutory Code of Practice on dismissal and re-engagement. It is expected to be in force from Summer 2024. One key change from the draft issued for consultation just over a year ago is in relation to Acas. The previous draft required employers to contact Acas if they were unable to reach agreement; the final version now says the employer should contact Acas "*before raising the prospect of dismissal and re-engagement*".

Although now considerably shorter, the Code's key message remains that dismissal and re-engagement should be a last resort and not used as a negotiating tactic. The consultation draft caused some uncertainty because it appeared to require the employer to be transparent about the prospect of dismissal and re-engagement whilst at the same time not using it as a negotiating tactic. This requirement has been mollified to an extent; it now says that the employer should be clear if it intends to opt for dismissal and re-engagement if agreement cannot be reached, but it should not raise the prospect of dismissal "*unreasonably early*".

Although the Code does not create any new legal obligations, it will have statutory force in the sense that courts and employment tribunals will take it into account, for example in unfair dismissal claims. Employment tribunals will have the power to increase an employee's compensation by up to 25% if an employer unreasonably fails to comply with the Code. Although the Code does not cover collective consultation obligations where 20 or more dismissals are proposed at a single establishment within a 90-day period, the Government has said that it will amend legislation so that the uplift can also be applied to protective awards for non-compliance.

Scope: As in the previous draft, the Code applies (regardless of the number of employees who may be affected) where an employer is considering making changes to employees' contracts of employment and "envisages" that, if the employees or their representatives do not agree to the changes, it might opt for dismissal and re-engagement (or engagement of new employees) on the new terms. The Code also appears to cover a scenario where the employer is relying on an existing contractual clause which gives them power to impose contractual changes, even though in theory employee agreement would not be required.

The Code is clear that it does not apply where the only reason the employer envisages that it might dismiss the employee is redundancy within the meaning of the Employment Rights Act 1996 – where there is a decrease in the need for employees to carry out a particular kind of work, or at a particular place. However, where both redundancy and dismissal and re-engagement (for the same employees) are envisaged, the Code will apply for as long as dismissal and re-engagement remains an option.

Information and consultation: The Code sets out the steps employers are expected to take in a potential dismissal and re-engagement situation:

- Assuming there is no recognised trade union, the employer can consult existing employee representatives, representatives chosen for the consultation or individual employees. The employer's choice will depend on what is reasonable in the

circumstances and on whether there are other collective consultation obligations, such as in relation to redundancies or pension scheme changes.

- The employer should provide as much information as is reasonably possible, depending on the circumstances and the nature of the proposed changes. The Code now says it is best practice for this to be in writing. The Code acknowledges that, for example, a financial crisis might necessitate a shorter consultation and consequently less information. If the employer considers that it is unable to provide commercially sensitive or confidential information, it should provide as full an explanation as is reasonably possible.
- Consultation should be in good faith and for as long as reasonably possible, with the employer being as clear as possible about its objectives and proposals and giving genuine consideration to any reasonable alternative proposals.
- If there is no agreement, the employer should re-examine its proposals, taking into account feedback from employees and considering any reasonable alternative options. The requirement in the previous draft to re-examine wider "business strategy and plans" has been deleted.

Dismissal and re-engagement: If the employer decides to impose new terms unilaterally, it should give as much notice of dismissal as is reasonably practicable (as well as complying with contractual or statutory notice). The employer should set out in writing the changes (limited to those on which there has been consultation), in addition to complying with the statutory requirements on written statements. The Code no longer requires employers to consider a phased introduction of changes; this is now just a suggestion. The employer should however consider whether to give employees additional time to make arrangements and consider practical support such as relocation assistance or counselling.

The Code no longer requires employers to continue to engage in discussions after dismissal and re-engagement, the Government acknowledging that this would contradict the policy that dismissal should be used only as a last resort. The Code now says that it is good practice to invite feedback on the changes and consider what might be done to mitigate any negative impacts. The Code adds that it is good practice for employees working under protest to make it clear to the employer, in writing, that they do not agree (setting out the terms to which they object).

Analysis/commentary: Although in general the Code reflects current good practice where dismissal and re-engagement may be a possibility, there are likely to be extra considerations for employers in the information and consultation process. Employers will need to tailor employee communications so as not to be seen as raising dismissal "unreasonably early" and have evidence to demonstrate that, if they decide to dismiss and re-hire, it is a "last resort". If collective consultation obligations are in play, the interaction with the Code will require careful management.

If in government, the Labour Party has committed to ending "fire and rehire". The 2022 Green Paper "New Deal for Working People", recently republished on its website, says it would amend unfair dismissal and redundancy legislation "*to prevent workers being dismissed for failing to agree a worse contract*", as well as improving information and consultation procedures to make employers consult on contractual changes and ensuring that notice and ballot requirements do not inhibit trade unions from taking "defensive action" to protect terms and conditions of employment.

There is also an upcoming Supreme Court decision in this area: *USDAW v Tesco Stores Ltd*. This is on the issue of whether the employer could dismiss and re-engage employees in order to remove a contractual entitlement to enhanced pay that had been stated to be permanent when it was introduced.

NO INJUNCTION TO ENFORCE POST-TERMINATION RESTRICTIONS IN INVESTMENT AGREEMENT

Summary: The High Court rejected an employer's application for an injunction to enforce restrictive covenants in an investment agreement, signed during the employee's probationary period, which were significantly wider than those in the employment contract and went further than reasonably necessary to protect the employer's legitimate business interests (*Sparta Global Limited v Hayes*).

Key practice point: This case is a reminder to tailor post-termination restrictions to the employee's seniority, updating them as necessary. A significant discrepancy between the length of an employee's notice and probation period and that of the restrictions is likely to tell against an employer in assessing reasonableness. Another factor in the successful defence of

the claim was that the competitor employer had adopted what the Court described as "pragmatic distancing" – ensuring that the employee was ring-fenced from any competing work.

Facts: The defendant was a sales director for Sparta Global Limited (Sparta), working in a niche area of recruitment in the technology sector, with access to confidential information. After resigning, he signed a contract to work for one of Sparta's competitors. His employment contract contained post-termination restraints. Towards the end of his six-month probation period (during which he could be dismissed on one week's notice; thereafter the statutory minimum notice period applied), he signed an investment agreement which also contained restrictions. Although the covenants in both the employment contract and the investment agreement restrained him from joining a competing business and soliciting Sparta's clients, the scope of restrictions in the investment agreement was wider. In particular, there was no carve out for undertaking a different role for a competitor; there was a prohibition on working for a competitor in any capacity, even in a role that did not compete. The investment agreement also prevented him from working for a competitor for 12 months, as opposed to the six months restriction in the contract of employment.

Initially, Sparta applied to the court for an interim injunction to enforce the restrictions in the employment contract pending a full trial but two weeks later made a second application which was primarily based on the investment agreement restrictions.

Decision: The High Court decided not to grant an injunction. The Court concluded that although Sparta had legitimate business interests to protect, the restrictions in the investment agreement went further than was reasonably necessary to protect those interests and were therefore likely to be found to be unenforceable at the full trial. Various factors counted against Sparta:

- There was insufficient evidence of the risk of disclosure of confidential information to justify the absolute prohibition on working for the competitor. The defendant was not going to be working for the competitor in any competing activity and he was ring-fenced from any client-based work. This significantly reduced the risk to Sparta, making it more likely that lesser restrictions in the employment contract would be sufficient to protect its interests.
- There was a risk that the defendant would lose his job if the investment agreement covenants were enforced, with serious consequences given that he was the sole family income provider. In addition, not being current in his niche field would be likely to damage his standing and future employability. The Court was not satisfied that the damages that would be paid if he won the case at full trial would provide a complete remedy as the impact might be unquantifiable.
- The Court's view was that the covenants in the employment contract would be likely to meet the test of going no further than reasonably necessary to protect Sparta's interests and therefore provided sufficient protection. Although harsher restrictions in shareholder agreements can be found to be reasonable, on the basis that they are a commercial arrangement, in this case there was evidence of inequality of bargaining power. The agreement was presented, during the defendant's probation period, as a fait accompli with no negotiation and without legal advice. The restrictions were heavy given that he had only a 0.35% shareholding. These factors made the agreement closer to a contract of employment than a shareholder agreement, and therefore more difficult to justify. In any event, Sparta had not provided sufficient evidence in its second application of the need for significantly greater protection than was provided by the employment contract.

PAYMENT IN SETTLEMENT OF DISCRIMINATION CLAIM WAS TAXABLE AS EMPLOYMENT INCOME

Summary: The Upper Tribunal has confirmed that a payment from a former employer in settlement of employment tribunal proceedings was taxable as employment income because it was received "*directly or indirectly in consideration or in consequence of, or otherwise in connection with*" the termination of employment, under Section 401 of the Income Tax (Earnings and Pensions) Act 2003 (*Mathur v HMRC*).

Key practice point: Discrimination awards will be taxable, even if the discrimination took place pre-termination, provided there is a connection with the termination. Tax aspects should be considered from the start of settlement discussions, and payments apportioned clearly in settlement agreements.

Facts: The claimant had been dismissed for alleged misconduct and offered compensation, which she had refused. She brought employment tribunal proceedings, including complaints of pre-termination discrimination and victimisation, but reached a settlement, under which she received £6m. HMRC agreed to an exemption for compensation for injury to feelings but taxed the remainder as employment income under Section 401.

Decision: The Upper Tribunal confirmed HMRC's assessment. Section 401 contains a final "catch-all" test (the words "*or otherwise in connection with*"), indicating that it should be construed broadly. There does not need to be close and strong nexus between the payment and the termination (although there was in fact such a connection in this case).

The parties had believed there was substance to the tribunal proceedings, the termination was central to the discrimination claims in those proceedings and a trigger for the tribunal claim, and the payment was directly related to the settling of those proceedings. Despite there being two links in the chain (from termination to tribunal proceedings to settlement), there was a clear and obvious connection between the termination and the payment. The settlement sum was paid "in connection" with the termination and so, irrespective of the employer's motivation for paying, was taxable under Section 401, except to the extent it fell within the exemptions: the £30,000 exemption in Section 403; the £40,000 agreed between the parties for injury to feelings (exempt under Section 406) and the legal costs (which were paid without deduction under Section 413A).

The Upper Tribunal also confirmed that the settlement sum should not be apportioned between taxable and non-taxable portions, as the claimant had supplied no evidence to support an apportionment.

APRIL EMPLOYMENT LAW CHANGES AND SPRING BUDGET

As a reminder, there are new employment rights taking effect next month:

- Workers will have the **right to request flexible working** from the first day of employment, for requests from 6 April 2024.
- There are amendments to the **holiday pay** rules, including a new system for part-year and "irregular hours" workers and clarifications of case law on what is included in "pay" for the statutory four weeks' leave and on the carry-over of leave due to sickness, family leave, or where the employer has failed to comply with its obligations. The changes apply to holiday years starting from 1 April 2024; details are in our **Employment Bulletin November 2023**.
- From 6 April 2024, the circumstances in which employers must offer **suitable alternative employment** to parents at risk of redundancy is widened. The amendments change existing requirements where an employee is on maternity or adoption leave, or shared parental leave provided it is for six weeks or more, so that those requirements also apply during pregnancy and for 18 months from birth or adoption.
- Also from 6 April 2024, employees caring for a dependant with a long-term care need will be entitled to one week's unpaid **carer's leave** per year.
- There are changes to **paternity leave** (where the expected week of childbirth/date of placement for adoption is on or after 6 April 2024) to allow it to be taken in two separate blocks of one week, and at any time in the first year.

Last week the Chancellor of the Exchequer delivered the **Spring Budget**. A further reduction in employees' National Insurance Contributions is the flagship measure, along with the introduction of a new HMRC-approved arrangement for individuals to hold UK-listed shares on a tax-favoured basis. In our 2024 HR Budget Briefing, we discuss the key issues for UK employees and their employers.

HORIZON SCANNING

What key developments in employment should be on your radar?

April 2024	Right to request flexible working becomes a "day one" right
April 2024	Amendments to the Working Time Regulations, including a new holiday pay system for irregular hours workers and clarification of the requirements on annual leave and record keeping
April 2024	Extension of the circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy
April 2024	Entitlement to one week's unpaid leave per year for employees caring for a dependant with a long-term care need
April 2024	Changes to paternity leave to allow it to be taken in two separate blocks of one week, and at any time in the first year after birth or placement for adoption
Summer 2024	Statutory Code of Practice on Dismissal and Re-engagement expected to be in force
July 2024	Employment (Allocation of Tips) Act 2023 expected to come into force: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and keeping records
July 2024	Amendment to Reg 13A TUPE to allow small employers, and all employers where a transfer of fewer than 10 employees is proposed, to consult directly with employees if there are no employee representatives
July 2024	Employment Relations (Flexible Working) Act 2023 expected to come into force: amendments to the flexible working request process
September 2024	Workers (Predictable Terms and Conditions) Act 2023 expected to come into force: right to request a more predictable working pattern
October 2024	Worker Protection (Amendment of Equality Act 2010) Act 2023 expected to come into force: duty to take reasonable steps to prevent sexual harassment of employees
April 2025	Neonatal Care (Leave and Pay) Act 2023 expected to come into force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care
Date uncertain	• Proposed three-month limit on non-compete clauses in employment and worker contracts • Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations

We are also expecting important case law developments in the following key areas during the coming months:

Employment status: *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes

Discrimination / equal pay: *Rollet v British Airways* (EAT: whether the Equality Act 2010 protects against indirect associative discrimination); *The Royal Parks Ltd v Boohene* (Court of Appeal: whether end-user had indirectly discriminated against contract workers on grounds of race by paying them a lower minimum level of payment compared to direct employees); *Higgs v Farmor's School* (Court of Appeal: whether dismissal was because of the manifestation of protected beliefs or a justified objection to the manner of manifestation); *Bailey v Stonewall Equity Limited* (EAT: whether a campaigning group had instructed, caused or induced religion or belief discrimination by the employer); *Randall v Trent College Ltd* (EAT: whether worker's treatment was belief discrimination or was treatment because of objectionable manifestation of belief)

Redundancies: *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *ADP RPO UK Ltd v Haycocks* (Court of Appeal: whether redundancy dismissal was fair in absence of consultation at a formative stage)

Industrial action: *Secretary of State for Business and Trade v Mercer* (Supreme Court: whether protection from detriment for participating in trade union activities extends to industrial action)

Unfair dismissal: *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Charalambous v National Bank of Greece* (Court of Appeal: whether a misconduct dismissal was fair when the decision to dismiss was taken by a manager who did not conduct the disciplinary hearing)

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