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NEWSLETTER

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EMPLOYMENT BULLETIN

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DRAFT CODE OF PRACTICE ON DISMISSAL AND RE-ENGAGEMENT

As promised last year, the Government is consulting on a draft Code of Practice on Dismissal and Re-engagement - guidance that employers should follow if they are considering changes to employees' terms and conditions which might lead to dismissal and re-engagement of the employees (or engagement of new employees) on the new terms. Consultation closes on 18 April 2023 but the Government has not indicated when the Code might come into force.

The Code as drafted does not prevent the use of dismissal and re-engagement but its key message is that it should be a last resort and should not be used as a negotiating tactic. Employers should explore alternatives to dismissal, have meaningful consultation with employees or their representatives, in good faith and with a view to managing conflict, and avoid threats of dismissal. The Code notes that employers may also have information and consultation obligations, including in relation to collective redundancies, collective bargaining or pension changes; if so, employers must comply with those requirements in addition to following the Code.

The Code, which applies regardless of the number of employees who may be affected by the employer's proposals, sets out steps employers are expected to take in a potential dismissal and re-engagement situation:

- If the employees (reference to employees includes employee representatives) make clear that they are not prepared to accept the changes, the employer should "*re-examine its business strategy and plans*", taking account of feedback received and of factors such as the negative consequences of acting unilaterally, whether the plans carry any risk of discrimination against groups of employees sharing a protected characteristic, and alternative ways of achieving the employer's objectives (relying instead on existing contractual clauses, for example).
- The employer should share as much information as is reasonably possible to help reach consensus. If the employer considers that it is unable to provide commercially sensitive or confidential information, it would be good practice to explain the reasons as fully as possible.
- Employers should engage in meaningful consultation with employees, responding to questions.
- If changes are agreed, the employer should put the new terms to employees in writing and maintain good communication as employees adapt to the new terms.
- If changes are not agreed and employer considers imposing new terms unilaterally, the employer should set out the changes in writing to the employees, explain their nature and impact, and continue to discuss them with employees and to assess whether implementation is necessary.

The draft Code then has a separate section on **dismissal and re-engagement**, setting out what the employer should do if changes are not agreed and it wishes to dismiss and re-engage employees on the new terms:

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- The employer should reassess the need for the changes and consider alternative options, any discriminatory impact and whether it is a redundancy scenario (and, if so, comply with the resulting obligations).
- Next, the employer should give as much notice as possible of the dismissals and consider practical support, including whether any employees might need longer notice to make arrangements (for childcare, for example). Where there are multiple changes, a phased introduction should be considered.
- The new terms of employment should be set out in writing and employees re-engaged as soon as possible to preserve their continuity of service.
- After the new terms have taken effect, the employer should continue to review the need for them and their impact (and if circumstances change, consider a return to the original terms). The Code adds that the discussions with employees should "*remain open to the possibility of reaching agreement on the new imposed terms*".

Although the Code does not create any new legal obligations, it will have statutory force in the sense that a court or employment tribunal will take it into account when considering relevant cases, such as unfair dismissal. 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. They could also decrease any award by up to 25%, where it is the employee who has unreasonably failed to comply. However, the only specific obligation on the employee, apart from the general duty to act in good faith in the consultation process, appears to be in relation to employees working under protest – the Code says they should make it clear to the employer at regular intervals that they do not agree to the changes.

Analysis/commentary: Although in general the draft Code reflects good practice, there are some details, such as providing longer notice or phased introduction of changes to terms and conditions, that employers will need to consider where dismissal and re-engagement may be a possibility.

The Code as drafted adds an element of uncertainty for employers in negotiating with employees. It advises the employer to be transparent about the fact that it is prepared, if agreement cannot be reached, to attempt to impose changes unilaterally or to dismiss employees, whilst going on to say, "*a threat of dismissal should never be used only as a negotiating tactic in circumstances where the employer is not, in fact, contemplating dismissal as a means of achieving its objectives*".

The Code states that it does not apply where the reason for dismissal is redundancy. However, if the reason the employer needs to change contractual terms is related to a decrease in the need for employees to carry out a particular kind of work, or at a particular place, there could be redundancy dismissals even if new contracts are being offered. In that case, the employer will need to follow a proper redundancy process and may also have collective redundancy information and consultation obligations (not covered by the Code).

NEW RIGHT TO REQUEST A PREDICTABLE WORK PATTERN

The Government, continuing its approach of legislating through Private Members' Bills, has announced its support for the *Workers (Predictable Terms and Conditions) Bill*. The Bill introduces a right to request a predictable work pattern, the format of which is similar to the right to request flexible working. There is no indication yet as to when the Bill's provisions will become law. The new right, which was first proposed in a Government consultation on one-sided flexibility in 2019, will allow qualifying employees and workers to apply for a change in terms and conditions if:

- There is a lack of predictability, in relation to the work that the worker does for the employer, as regards any part of the worker's "work pattern" (the hours/days/times of work and the period the worker is contracted to work). A fixed term contract of 12 months or less is presumed to lack predictability, but there is no other definition of "predictability".
- The proposed change relates to the worker's work pattern and the worker's purpose in applying is to get a more predictable work pattern.

A qualifying period of employment for the right to apply will be set by regulations – the Government has said that this is likely to be 26 weeks. (By contrast, the right to request flexible working will, following the Government's recent announcement, become a "day one" right. For more details on the changes to the right to request flexible working,

including the need to consult the employee before refusing an application, please see our *Employment Bulletin December 2022*.)

There is a limit of two applications for a more predictable working pattern in any 12-month period. This limit includes an application for flexible working, if it is for a change in terms and conditions which would have the effect of delivering a more predictable contract.

Employers must deal with the application "in a reasonable manner", notify the worker of their decision within one month, and may only refuse a request on one of the specified grounds:

i. the burden of additional costs
ii. detrimental effect on ability to meet customer demand
iii. detrimental impact on the recruitment of staff
iv. detrimental impact on other aspects of the employer's business
v. insufficiency of work during the periods the worker proposes to work
vi. planned structural changes.

The grounds for refusing a request are similar to the grounds for refusal of a flexible working request, although arguably grounds (iii) and (iv) above are a little wider in scope than the equivalent for refusing a flexible working request.

A worker will be able to make a tribunal complaint if their employer has failed to fulfil their duties in relation to considering the request or has made a decision to reject the application which was based on incorrect facts. The tribunal must make a declaration, can award compensation to be paid by the employer and/or order the employer to reconsider the application. Workers would be protected against detriment and dismissal for making a request.

WRITTEN TERMS WERE RELEVANT TO EMPLOYMENT STATUS

Summary: The Employment Appeal Tribunal (EAT) held that it was not an error for the Employment Tribunal to begin their analysis of whether the claimant was an employee by considering the terms of a written agreement, which had included a clause stating that there was no contract of employment. However, the Tribunal had incorrectly analysed the effect of what it had found to be a genuine substitution clause (*Ter-Berg v Simply Smile Manor House Ltd*).

Key practice point: The judgment is a helpful analysis of the relevance of written terms to employment status. In *Uber*, the Supreme Court, deciding that drivers were "workers" under the Employment Rights Act 1996 rather than self-employed, said that it is wrong to treat the written agreements as a starting point, as the rights are not contractual but created by legislation the purpose of which was to give protection to vulnerable individuals. The EAT's take on *Uber* in this latest case is that it does not mean that written terms are irrelevant; they remain part of the overall factual matrix when considering whether the written terms reflect the true reality of what was agreed. The EAT comments that *Uber* does not prevent parties from agreeing that they want to form a working relationship which is not one of employee or worker. However, courts and tribunals will continue to look behind the contractual formalities to identify the genuine relationship.

Facts: The claimant had been the principal of a group of dental practices. He sold the business to a company, entering into a standard agreement under which he was engaged by the company as an Associate, to provide dental services at its specified premises. The agreement was stated to be personal to the parties and not capable of assignment. It also contained provisions asserting that nothing in it constituted a partnership or contract of employment.

Clause 36 said "*In the event of the Associate's failure (through ill health or other cause) [emphasis added] to utilise the facilities for a continuous period of more than 20 days the Associate shall use his best endeavours to make arrangements for the use of the facilities by a locum tenens, such locum tenens being acceptable to the PCO and the Practice Owner to provide dental services as a Performer at the Premises, and in the event of the failure by the Associate to make such arrangements the Practice Owner shall have authority to find a locum tenens on behalf of the Associate and to be paid for by the Associate. …*"

The claimant contended that he had been unfairly dismissed for making a protected disclosure. He accepted that he was initially engaged as a self-employed contractor; his case was that matters had changed over time. The Employment Tribunal dismissed the claim, finding that he was not an employee, in particular because there was no personal service and clause 36 was a genuine substitution clause. The claimant appealed.

Decision: The EAT found that the Tribunal had not been wrong to begin their analysis of whether the claimant was an employee by scrutinising whether the agreement was a contract of service. The Tribunal had concluded that the agreement was a genuine reflection of what the other evidence showed were the parties' true intentions as to how the relationship would operate, supporting the conclusion that this was not a contract of employment. The reference in *Uber* to it being wrong to treat the terms of the written contract as the starting point was not intended to signify that the written terms are always irrelevant; in a case where what was the true intention of the parties in reality is a live issue, it is necessary to consider all the circumstances of the case, including the written terms.

The EAT summed up the current position as follows:

a) A clause to the effect that a written agreement is not intended to create a relationship of employment (or a worker relationship) will be void and ineffective if, on an objective consideration of the facts, the tribunal finds that its object is to exclude or limit the operation of the Employment Rights Act (because parties cannot agree to contract out of the Act).

b) In any event, if, apart from the clause, the other facts found by the tribunal point to the conclusion that the relationship is one of employment or a worker relationship, the clause cannot affect that conclusion.

c) However, if neither (a) nor (b) applies, then, in a marginal case, in which the tribunal finds the clause to be a reflection of the genuine intentions of the parties, it may be taken into account as part of the overall factual matrix when determining the correct legal characterisation of the relationship.

However, the EAT went on to allow the claimant's appeal because the Employment Tribunal had been wrong in its analysis of the substitution clause in clause 36. The Tribunal had taken the view that clause 36 effectively gave the claimant a free choice, if he wished, for any reason, to nominate a substitute. That construction failed to take on board that the triggering event was a failure to utilise the facilities to a minimum extent, which he ordinarily was required to do. In addition, "*through ill health or other cause*", had to be read as meaning "*ill health or other similar cause*", in other words, a cause that had not been "chosen" by him. If the clause was meant to be capable of applying whenever he chose not to use the facilities for more than 20 days, it would not need to have referred to "*ill health or other cause*" at all. The Tribunal's error contributed to its conclusion that the personal service requirement of an employment contract was not satisfied; therefore the case had to be sent back for reconsideration.

NOT UNFAIR TO REOPEN DISCIPLINARY PROCESS

Summary: The Employment Appeal Tribunal (EAT) found that, where an employer had dismissed the claimant after re-opening a concluded disciplinary process which had led to a final written warning, the dismissal was fair in the particular unusual circumstances (*Lyfar-Cisse v Western Sussex University Hospitals NHS Foundation Trust*).

Key practice point: Despite the result of this case, employers should be cautious about re-opening a previously concluded disciplinary process and imposing a harsher sanction – they would need to justify the decision and whether it was reasonable would depend on the facts. The unusual circumstances of this case included that the re-opening of the disciplinary proceedings was triggered by the employer being alerted to a potential breach of health service regulations.

Facts: The claimant was a race equality lead for an NHS Trust. She had made a number of protected disclosures and had brought tribunal claims against her employer. In 2016, she had been the subject of disciplinary proceedings and a number of allegations, including of bullying and discrimination, were upheld. A final written warning was issued.

Meanwhile, a Care Quality Commission (CQC) report on the employer referred to bullying, harassment and discrimination being "rife in the organisation". The employer was placed in special measures and the executive team from a second Trust took over in 2017. The second Trust looked again at the findings against the claimant and decided that they raised a "fit and proper person" issue under health service regulations and her leadership role was "fatally undermined" by having been found to have acted in the way she had. The claimant was dismissed. The Employment Tribunal rejected

her unfair dismissal and victimisation claims. In the EAT, she argued that her employer should not have re-opened the 2016 disciplinary proceedings and dismissed because of the same matters.

Decision: The claimant's appeal was dismissed. The EAT noted that re-opening a previously concluded disciplinary process is an unusual step which will always require a sufficient justification. However, dismissal was within the band of reasonable responses by the employer (and therefore fair), taking into consideration the very unusual circumstances of the CQC's findings, the management's belief that there was a "fit and proper" issue which had not been raised in the original disciplinary proceedings, and the claimant's continued denial of misconduct.

HORIZON SCANNING

What key developments in employment should be on your radar?

2023-2024	Strikes (Minimum Service Levels) Bill: minimum service levels during strikes in certain services Private Members' Bills with Government support: • Worker Protection (Amendment of Equality Act 2010) Bill: duty to take reasonable steps to prevent sexual harassment of employees; protection from harassment by third parties • Protection from Redundancy (Pregnancy and Family Leave) Bill: extension of circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy • Workers (Predictable Terms and Conditions) Bill: right to request more predictable working pattern • Employment Relations (Flexible Working) Bill: amendments to the flexible working request process; separate secondary legislation to make the right to request a "day one" right • Carer's Leave Bill: entitlement to one week's unpaid leave for employees who are carers (expected to come into force in 2024) • Employment (Allocation of Tips) Bill: obligations on employers to deal with tips, gratuities and service charges • Neonatal Care (Leave and Pay) Bill: right to paid leave to care for a child receiving neonatal care
31 December 2023	Retained EU Law Bill: expiry of EU-derived secondary legislation on 31 December 2023 e.g. TUPE, Working Time Regulations and Regulations protecting part-time, fixed-term and agency workers, unless Government legislates to incorporate into UK law (or extends sunset to no later than 23 June 2026)
2023/24	Removal of the bonus cap applicable to banks, building societies, and PRA-designated investment firms.
Date uncertain	Statutory Code of Practice on "fire and rehire" Legislation expected to provide for extension of permissible break in continuous service from one week to one month

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

- **Employment status:** *Griffiths v Institution of Mechanical Engineers* (EAT: whether trustee of professional body is worker for whistleblowing protection); *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes)
- **Employment contracts:** *Cox v Secretary of State for the Home Department* (Court of Appeal: whether employer withdrawal of check-off arrangements was in breach of employment contract; *Benyatov v Credit Suisse Securities (Europe) Ltd* (Court of Appeal: whether employer had duty of care to protect employee from criminal conviction)
- **Discrimination / equal pay:** *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010); *Kocur v Angard Staffing Solutions Ltd* (Supreme Court: whether agency workers were entitled to same treatment on vacancies as directly recruited employees)
- **Redundancies:** *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *R (Palmer) v North Derbyshire Magistrates Court* (Court of Appeal: whether administrator could be prosecuted for failure to notify Secretary of State of collective redundancies)
- **Industrial action:** *Mercer v Alternative Future Group Ltd* (Supreme Court: whether protection from detriment for participating in trade union activities extends to industrial action); *UNISON v Secretary of State* (High Court: whether removal of the restriction on employment businesses supplying temporary workers to cover striking staff was lawful)
- **Unfair dismissal:** *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Hope v BMA* (Court of Appeal: whether dismissal for raising numerous grievances was fair)
- **Working time:** *Chief Constable v Agnew* (Supreme Court: whether a gap of more than three months in a series of unlawful deductions from holiday pay breaks the series)

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