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NEWSLETTER

DECEMBER 2021

# EMPLOYMENT BULLETIN

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## ACAS ADVICE ON AVOIDING FIRE AND REHIRE

If changes to employees' terms and conditions of employment cannot be made by agreement between employer and employee or under the terms of the employment contract, one option is dismissal and re-engagement: the employer terminates the existing contract and offers the employee a new contract on the varied terms. This is often referred to as "fire and rehire" and has become controversial recently, triggered by reports that its use has increased during the pandemic.

Earlier this year, the Government declined to support a Private Members' Bill that would have classified fire and rehire as unfair dismissal, pointing out that dismissal and re-engagement may already give rise to liability for unfair dismissal and potential collective redundancy issues. Nevertheless, the Government asked the Advisory, Conciliation and Arbitration Service (Acas) to produce guidance for employers, to "send a clear message" that all other options should be exhausted before considering dismissal and re-engagement. The Government says it has not ruled out looking at further measures if necessary.

Acas has now published a revised version of its guidance on Making changes to employment contracts - employer responsibilities, "to help employers avoid fire and rehire practices". The guidance, which is non-binding and does not change the law, offers advice on:

- Considering, proposing and consulting with employees about contract changes. Employers should first consider whether a contract change is needed to resolve the issue; clarity about why a contract change may be needed should help the information and consultation process if the proposal goes ahead. On consultation, Acas recommends that managers and employee representatives should be given training on the consultation process. The advice refers to the specific restrictions on amendments after a TUPE transfer or where the changes are covered by a collective agreement. (On collective agreements, employers should note that an employer with a recognised trade union will be acting unlawfully if it makes an offer of new terms directly to employees before the agreed collective bargaining procedure has been exhausted. For more detail, please see our Employment Bulletin November 2021.)
- Recording and monitoring agreed changes.
- Going ahead if changes cannot be agreed. In this section, the advice highlights the potential risks for employers in using fire and rehire: damage to reputation and workplace relations; possible claims for breach of contract, constructive dismissal and unlawful discrimination (where changes put employees with a protected characteristic at a disadvantage); and industrial action.

The key message from the Acas advice is that if contract changes cannot be agreed, employers should continue to explore all options for as long as is reasonably possible; dismissal and re-engagement in order to make the proposed change should be a last resort.

**Analysis/commentary:** The Government has said that the Employment Bill, to be published "when Parliamentary time allows", will (amongst other measures) tackle concerns that fire and rehire has been used to break continuity of service. The Bill will extend the time required to break a period of continuous service for the purposes of entitlement to employment rights from one week to four weeks.

## ADMINISTRATOR AND DIRECTOR CAN BE PROSECUTED FOR FAILURE TO GIVE NOTICE OF REDUNDANCIES

**Summary:** The High Court decided that an administrator and a director could be prosecuted for the criminal offence of failure to notify collective redundancies to the Secretary of State, under Section 194 of the Trade Union and Labour Relations (Consolidation) Act 1992 (*R (Palmer) v Northern Derbyshire Magistrates' Court*).

**Key practice point:** The Court concluded that an administrator could be prosecuted for the criminal offence of failure to notify, despite the potential consequences in terms of conflicts of interest between administrators' statutory duties and the stringent notice requirements of the information and consultation legislation. The prosecution in the Magistrates' Court will now deal with the issue of whether the offence was committed with the consent or connivance of the administrator and director, or was attributable to their neglect. There may be an appeal to the Court of Appeal before that can go ahead.

**Background:** Where an employer is proposing to dismiss as redundant 20 or more employees within any period of 90 days or less, it is obliged to notify the Secretary of State (on Form HR1). Failure to do so before giving notice of termination and at least 30 days (or 45 days if there are 100 or more redundancies) before the first of those dismissals takes effect is a criminal offence. Under Section 194, individual directors, managers, company secretaries, or a "similar officer" of the employer can be guilty of the offence, where it is committed with their consent or connivance or is attributable to their neglect. The penalty is now an unlimited fine. As with the duty to inform and consult, there is a "special circumstances" defence to a failure to give notice. However, as we have seen recently, this defence is limited to an event that is uncommon or out of the ordinary; please see our Employment Bulletin November 2021.

**Facts:** In 2015, following media reports of proposed collective redundancies at the company's warehouse in Scotland, the Government's Insolvency Service became aware of the fact that Form HR1 had not been submitted. It appears that the administrator had completed the form in draft but had overlooked its completion and return. A criminal prosecution was brought against the administrator and a director, for failure to give notice of proposed redundancies. These are thought to be the first criminal prosecutions under Section 194. The Employment Tribunal had already awarded the maximum protective award of 90 days' pay per employee for failure to inform and consult.

The case has been long running, with the proceedings being challenged at various stages. The latest development was a judicial review application to the High Court, where the administrator argued that he could not prosecuted for an offence under Section 194.

**Decision:** The High Court dismissed the application, confirming that an administrator could be prosecuted for an offence under Section 194 in the same way as a director, despite the fact that administrators derive their authority from insolvency law, not the company, and have a duty to act in the interests of the creditors rather than the company. The intention behind the legislation is that anyone with responsibility for the day-to-day management and control of the company should be capable of being found to have personal liability for the employer's failure to give the statutory notices. In practical terms, once the administrator assumes office there is no one else who could give the statutory notices on behalf of the employer, unless they do so under the administrator's direction.

The Court accepted that making administrators criminally liable under Section 194 could lead to a conflict between their statutory duty to safeguard company assets and committing a criminal offence. The Judge commented that if that led to an increase in windings-up or to refusals by insolvency practitioners to take on the role of administrator, that would be a matter for Parliament to address.

**Analysis/commentary:** The director contended (unsuccessfully) that the prosecution should have been brought in Scotland, as the proposed redundancies would have taken place there. Although it was not necessary for the decision, the Court considered (and rejected) the argument that the offence was completed only if and when the first dismissal took place. The Court's view was that the offence is committed at the point at which the employer fails to notify in accordance with the timetable specified (or inherent in the proposal). The Court said that this interpretation is consistent with the case law on the information and consultation legislation, which emphasises that what matters in terms of triggering the employer's obligations to inform and consult is the proposal, rather than what ultimately transpires.

## DISMISSAL FOR COMMENTS MADE AT A POLITICAL RALLY WAS UNFAIR

**Summary:** The Employment Appeal Tribunal (EAT) confirmed that dismissal of an employee for comments made at a political rally was unfair. The employee had not been given the opportunity to respond to the employer's interpretation of the comments (*London Borough of Hammersmith and Fulham v Keable*).

**Key practice point**: This decision is one to bear in mind in scenarios involving social media "misconduct" which may harm the employer's reputation. Although the employer relied on the wording of its social media policy, it failed to engage with the employee about the circumstances leading to the comments being on social media, or to consider alternatives to dismissal; specifically whether a warning would have been appropriate. It is well established that in order for a disciplinary process and investigation to be fair, the employer must hear the employee's explanation or mitigation before deciding whether disciplinary or other action is justified. In this case, the EAT said that this required the dismissing officer to ask the employee if he would abide by a warning. Although the Acas Code of Practice on disciplinary and grievance procedures does state that where misconduct is confirmed it is usual to give the employee a written warning, discussing possible sanctions with the employee appears to go further than accepted practice.

**Facts:** K was a long-serving Council employee in a "non-politically restricted" post. He was free to be politically active, to attend political meetings and demonstrations, to discuss political views there and to state his opinions. However, the Council's Code of Conduct required employees to avoid conduct, either inside or outside work, which might discredit the Council and to abstain from actions which might damage public confidence in the Council.

K had attended a public rally in his own time, at which he briefly exchanged words with a counter-demonstrator, which included references to anti-Semitism, Nazis and the Holocaust. This discussion was filmed and subsequently broadcast on social media without K's knowledge or consent. This led to him being identified as a Council employee. The Council conducted a disciplinary investigation resulting in K's dismissal for serious misconduct because the comments were "likely to cause offence to the average person" and were in breach of the Code of Conduct. The Employment Tribunal held that the dismissal was unfair; the Council appealed.

**Decision:** The EAT dismissed the appeal, confirming that the dismissal was unfair because it fell outside the band of reasonable responses. K had not been told clearly why the comments would bring the Council into disrepute or how the Council considered they would be interpreted. The dismissing manager had failed to give K the opportunity to respond to the Council's interpretation. In addition, he had apparently assumed that K would not have heeded a warning, based on his understanding of K's insistence that he had a "right to offend". The EAT found that, when undertaking a disciplinary process and investigation, an employer must hear whatever an employee wishes to say in defence, by way of explanation or mitigation. In this case, that required the dismissing manager to ask K if he would abide by a warning. That would have provided an opportunity for meaningful engagement and for the dismissing officer then to consider the possibility of a lesser sanction in the light of what was said. K's length of service and previously good record required the alternative of a warning to be given full consideration, including raising it with K.

**Analysis/commentary:** The EAT also found that the Tribunal had been entitled to make a reinstatement order following its unfair dismissal finding. Reinstatement orders are rare, particularly in misconduct cases, because of the need for the Tribunal to consider whether it is "practicable" for the employer to comply. Crucially in this case, even though the dismissing manager had genuinely believed misconduct had occurred, there had not been a breakdown in the relationship of trust and confidence between employer and employee.

## STRIKING WORKERS PROTECTED FROM DETRIMENT

**Summary:** The EAT held that Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), which protects workers from detriment connected with trade union activities, confers protection on workers who take industrial action, regardless of whether the union is protected from claims in respect of such action because it is compliant with the balloting and notification rules (*Ryanair DAC v Morais*).

**Practical impact:** Earlier this year, the EAT in *Mercer v Alternative Future Group Ltd* decided that the protection under Section 146 had to be read as encompassing participation in "industrial action". This latest decision adds to the protection for workers taking part in industrial action by confirming that Section 146 applies to all industrial action, whether or not protected.

**Background:** Section 146 of TULRCA provides that employers must not subject employees to a detriment for the sole or main purpose of deterring them from "*taking part in the activities of an independent trade union at an appropriate time*". Previous cases had found that this did not cover participation in industrial action, even though dismissal for participating in "protected" industrial action (i.e. compliant with the balloting and notification rules of TULCRA) is automatically unfair under a different part of TULRCA. However, *Mercer v Alternative Future Group Ltd*, decided between the Tribunal and EAT decisions in this case, found that in order to make it compatible with Article 11 of the European Convention on Human Rights (which protects the right to take industrial action), Section 146 had to be read as if it included participation in industrial action.

**Facts:** A group of Ryanair airline pilots participated in a strike called by BALPA, the recognised trade union. In consequence, Ryanair withdrew concessionary travel benefits from the pilots for a year. The pilots claimed that the withdrawal of benefits constituted an unlawful detriment under Section 146, as well as under the regulations that prevent detriment in relation to blacklists of those who have taken part in trade union activities.

The Employment Tribunal held that the pilots were taking part in trade union activities for the purposes of both Section 146 and the blacklists regulations. Although the Tribunal did not have to consider whether BALPA's action was protected, it expressed the view that the Section 146 protection would apply only to protected industrial action.

**Decision:** The EAT dismissed Ryanair's appeal, finding that the requirement to interpret Section 146 compatibly with the European Convention on Human Rights meant that the Tribunal had correctly concluded that the pilots had been taking part in trade union activities for the purposes of that Section. However, it should not have found that this depended on the strike being protected industrial action. This point was not directly considered in *Mercer* but, in order to ensure compatibility with Article 11, Section 146 must extend to all union industrial action, regardless of whether it is protected.

## HORIZON SCANNING

What key developments in employment should be on your radar?

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| **2022** | Legislation expected to provide for:<br>• Entitlement to one week's unpaid leave for employees who are carers<br>• Extension of redundancy protections for mothers<br>• Neonatal leave and pay<br>• Extension of permissible break in continuous service from one week to one month<br>• Right to request a more predictable contract<br>• Single enforcement body for employment rights<br>• Tips to be paid to workers in full |

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

- **Employment status:** *Stojsavljevic v DPD Group* (EAT: whether individuals working under franchise agreements were workers); *Angard Staffing Solutions Ltd v Kocur* (Court of Appeal: agency workers' rights); *Nursing and Midwifery Council v Somerville* (Court of Appeal: whether an irreducible minimum of obligation is a prerequisite for worker status); *HMRC v Atholl House* (Court of Appeal: whether the IR35 rules applied to a presenter providing services through a personal services company)
- **Employment contracts:** *AMDOCS Systems Group v Langton* (Court of Appeal: whether employer was obliged to pay PHI escalator payments no longer covered by its insurance policy); *Penhallurick v MD5 Ltd* (Court of Appeal: whether the employer was the owner of copyright in software created by an employee at home outside working hours)
- **Discrimination / equal pay:** *Lee v Ashers Baking Co* (European Court of Human Rights: whether refusal to provide cake supporting gay marriage is discrimination in provision of goods and services); *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010)
- **Trade unions:** *Mercer v Alternative Future Group* (Court of Appeal): whether protection from detriment for trade union activities extends to participation in industrial action
- **Unfair dismissal:** *Rodgers v Leeds Laser Cutting Ltd* (EAT: whether, for automatic dismissal for a health and safety reason, the serious and imminent danger must be directly linked to working conditions)
- **Vicarious liability:** *Chell v Tarmac Cement and Lime* (Court of Appeal: whether employer vicariously liable for consequences of employee's practical joke in the workplace)
- **Whistleblowing/detriment:** *UCL v Brown* (Court of Appeal: whether disciplining a trade union rep employee for failure to comply with an instruction was a detriment
- **Working time:** *Smith v Pimlico Plumbers* (Court of Appeal: whether holiday pay back claim was out of time).

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