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Fire and rehire – what does it mean and is it lawful?

30 March 2021

"Fire and rehire" is a term that has been in the news recently because several high profile organisations, including British Gas, are using this approach to try to change their employees' terms of employment, and they have attracted some criticism from unions for doing so. However, although this approach may have a new(ish) name, it is not necessarily a new tactic, nor is it unlawful – provided that it is handled properly.

As employment lawyers, one question which we are frequently asked is "How do I change my employees' terms of employment?" There is no single answer, and, assuming that the change involves the employees being worse off, then all the options have risks and are potentially fraught with difficulty.

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The current climate caused by the coronavirus pandemic has meant that many businesses have seen a dramatic fall in their income. Several have been forced to make savings, and for most businesses employment costs are the biggest single overhead. Many have had to make redundancies, and approximately 9.6 million employees have been furloughed in the past 12 months. Recovery will obviously take time, and employers who are looking to retain as many employees as possible may well look to reduce their employees' terms of employment. This may be a temporary change, or possibly a permanent one.

Clauses which allow change without employee agreement

Employment contracts are no different from any other contract in the sense that normally neither party can unilaterally change the terms without the agreement of the other. Some contracts include clauses which purport to allow employers to implement changes, by giving say a month's notice of the change. These can be effective for minor changes, but it would be risky to rely on them for more fundamental changes to terms, e.g. pay. There are two reasons for this: firstly, if they are implemented unreasonably the employer may be in fundamental breach of contract (enabling the employee to resign and claim unfair constructive dismissal) and secondly, they may be deemed to be void for uncertainty.

So how can employers set about changing the terms?

The first thing for employers to do is to look at the existing contract and see what terms they are looking to change. It could be pay, hours, benefits, or any other contractual term. Once the desired changes have been identified, the next step is to consult with the affected employees. This will involve explaining the proposed changes and explaining why they are required. This may be to preserve jobs, or for operational reasons, or sometimes just for the company to increase its profits. The

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taken into account, and hopefully agreement reached.

If agreement is not reached, then the employer can impose the new terms. This is not without risks – employees may resign and claim unfair constructive dismissal (subject to having 2 years' service). Whether such a claim will succeed will depend on the facts of the case, including the reasons for the change and the level of consultation. The employee may alternatively seek some other form of legal remedy, for example where there is a reduction in pay, refusing to accept the reduction and bringing a claim for unauthorised deduction of wages. Another option potentially open to employees is some form of industrial action.

The other route open to employers is to dismiss all the employees by giving them their contractual notice, and then offering them fresh employment on revised terms. This is something of a last resort for employers. In the right circumstances it can be an effective way of getting new terms in place, but again it is not without risk. Dismissed employees would be able to bring claims of unfair dismissal (again, subject to having sufficient continuous service). As with the claims of unfair constructive dismissal outlined above, the question whether the claims would succeed will depend on the particular circumstances, and again the level of consultation will be an important factor. Another factor will be how many employees accepted the changes without the need for dismissing and offering new terms. If a substantial majority did, it will make it harder for those who did not, to argue that their dismissals were unfair.

Other factors to consider

Other factors for employers to consider in this scenario is whether the obligations to enter into collective consultation under the Trade Union and Labour Relations (Consolidation) Act 1992 are triggered. They may well be if the company has proposed to dismiss 20 or more employees at one establishment, and to offer the re-engagement. There is also a

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entioning that if an employer is trying to of employment of employees who have

transferred to them under TUPE, there are other significant constraints which may apply. See our article on the risk of harmonising terms post TUPE transfer.

Conclusion

In short, although "fire and rehire" is potentially lawful, it can be a high-risk strategy which employers should not take on without understanding the risks and pitfalls involved. It is certainly an area where specialist legal advice will significantly reduce the risks.

If you are an employer who is wanting to understand the legal implications of making contractual changes then we can help. Please call us on 01243 836840 for a no obligation chat, or email us at enquiries@pureemploymentlaw.co.uk.

Please note that this update is not intended to be exhaustive or be a substitute for legal advice. The application of the law in this area will often depend upon the specific facts and you are advised to seek specific advice on any given scenario.

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