

Fire and re-hire: Updated statutory code summary for employers

29 February 2024

In January 2023, we brought you news that the Government had begun [consultation on a draft statutory code of practice](#) on dismissal and re-engagement (the Code). The consultation closed on 18 April 2023 and the Government has now published its response together with a [revised Code](#).

Only 50 responses to the consultation were received, however, in response several revisions have been made to the Code.

We summarise the key changes.

Key changes

The substance and scope of the Code remains unchanged. However, the Code has been re-ordered, and made shorter, less technical, and more concise. Duplication had been removed and plain English used so that the Code is easier to understand which is likely to be welcomed by employers, Trade Unions and employees.

The Code has been revised to provide greater clarity on obligations. This includes redrafting to make it clearer that whilst an employer must be transparent that dismissal and re-engagement is a possible option, they should not raise this prospect unreasonably early so that it is used as a negotiating tactic. Employers also now have to contact Acas before raising the possibility of dismissal and re-engagement. However, this does not change the position that Acas can be contacted whenever the Code applies. It is hoped that by encouraging early engagement with Acas and before dismissal and re-engagement is mentioned, it will help parties reach agreement.

The Code no longer states that it is important that employers and employee representatives continue to engage in discussions which remain open to the possibility of reaching agreement on the new imposed terms after dismissal and re-engagement has taken place. This reflects the need for finality in the process and recognises the fact that if dismissal has already taken place, it should have been the last resort. However, the Code now provides that it is good practice for employers to invite feedback about the changes and consider what may be done to mitigate any negative impacts on employees. This is unlikely to be controversial as feedback is one of the hallmarks of a reasonable consultation process which any employer engaged in change management process would be expected to undertake. Likewise, the Code provides that it is good practice for employers to give information in writing. Again, most employers would do this as part of any consultation process. Although not new, providing information in writing will be arguably more important now as it will help an employer to demonstrate compliance with the Code in the event of a challenge.

The Code does not apply in redundancy situations but will apply where both redundancy and fire and re-hire are both being considered as options. This reflects that in some circumstances where employers are looking reduce costs, they may consider changes to terms and conditions in the first instance but in the event, this cannot be achieved redundancy may also be an option. In such circumstances, the Code will apply as long as dismissal and re-engagement remains a potential option. Further, whilst there is no minimum time stipulated regarding how long consultation should last, the Code states it should be for "as long as reasonably possible". However, employers who are potentially dismissing 20 or more employees at one establishment within 90-day period will still need to comply with their collective consultation obligations.

Whilst there is no standalone claim for failure to comply with the Code, it can be taken into account by tribunals and the Central Arbitration Committee in relevant cases and an uplift (or decrease) in compensation of up to 25% applied. The effect of failure to comply is not set

out in Code itself. However, in response to concerns that a 25% uplift in consultation may not be sufficient to deter employers from seeking to dismiss and re-engage, the Government has confirmed it will bring forward secondary legislation to add protective awards for non-compliance with collective consultation to list of claims that could attract 25% uplift in consultation. Given that a cap on a week's pay does not apply and such an award is per "affected employee" this has the potential to significantly increase the amount of compensation where an employer is found to have breached the Code.

Next steps

An updated draft Code has been presented to Parliament for approval. Subject to that approval, the Code will then be brought into effect later in the summer.

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