Browne Jacobson

Fire and re-hire: Draft statutory code consulatation

27 January 2023 Nicole Judah

The Government has, this week, published a draft statutory code of practice on dismissal and re-engagement (the "Code"), opening a 12 week consultation period for comment on the Code. That consultation period ends at 11:45pm on 18 April 2023. All interested individuals and groups are invited to respond. The finalised Code will be brought into force when Parliamentary time allows.

What does the Code do?

The Code doesn't change the law or the application of it but sets out practical guidance as a means of "avoiding, managing and resolving conflict and disputes" that arise from employers seeking to change their employees' terms of employment. The Code does not impose any legal obligations and a breach of it does not create a freestanding right to bring a claim. However, if an unfair dismissal claim is brought by an employee and the employee succeeds, an Employment Tribunal can increase any award it makes by up to 25% if an employer unreasonably fails to comply with the Code; conversely, the Tribunal can decrease any award by up to 25% if an employee unreasonably fails to comply with it.

What does the Code say?

The Code makes clear that dismissal and re-engagement (often referred to as "fire and re-hire") should be an option of last resort. However, the current drafting is slightly inconsistent, referring in one part to this option being taken once an employer has concluded there is no "reasonable alternative" whilst in another, stating that it should only be used where an employer cannot achieve its objectives "in any other way". It states that the threat of dismissal should never be used as a negotiating tactic in circumstances where the employer is not, in fact, contemplating dismissal. The Code makes clear when seeking to change terms and conditions of employment, employer consultation with employees/their representatives is key. It recommends that employers provide certain information to employees/their representatives regarding the proposals, such as the business reasons for them, the anticipated timings and the consequences of them. This goes above and beyond the legal requirement for providing information, which is limited to where a proposal affects more than 20 employees in a 90-day time period.

The Code also encourages employers to analyse their proposals and keep their analysis under review, considering a range of factors, including reputational risks, damage to employee relations and the risks of industrial action before making any decisions. It recommends employers review their requirement for the changes even after they have taken place, thereby raising the possibility of employees reverting to their previous terms.

What now?

In these uncertain economic times where employee discontent is running rife, the risk of industrial action is strong and the fall-out from high profile cases such as the P&O and Twitter sackings runs on, it is highly likely that the Code will be introduced in due course, albeit that there may be some slight tweaks to the wording. However, clearly the practicalities of actually following the Code may often be an issue, particularly where quick decisions need to be made in short time-frames, and disputes over whether the Code has been fully complied with may strain employee relations further. The need to balance economic decisions and legal risks is not an easy one, and one on which we recommend advice be sought.

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