



Department for
Business, Energy
& Industrial Strategy

Draft Code of Practice on Dismissal and Re-engagement

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Preamble

The legal framework within which this Code of Practice will operate is explained in its text. While every effort has been made to ensure that explanations included in the Code are accurate, only the courts can give authoritative interpretations of the law.

The Code is issued under section 203(1)(a) of the Trade Union and Labour Relations (Consolidation) Act 1992 (in the Code, this is referred to as “the **1992 Act**”). This gives the Secretary of State a general power to issue Codes of Practice containing practical guidance for the purpose of promoting the improvement of industrial relations. The Secretary of State considers that the practice of dismissing and re-engaging employees (sometimes referred to as ‘fire and rehire’) as a means of changing their terms and conditions of employment can give rise to conflict between employers, employees and trade unions, which can lead to a deterioration in industrial relations. This Code is intended to provide basic practical guidance on avoiding, managing and resolving such conflict and disputes.

The Code was laid before both Houses of Parliament on [date]. It comes into effect by order of the Secretary of State on [date].

Section A: Introduction

Purpose of Code

1. It is for an employer to make economic decisions for the benefit of the business and to set the strategic direction of the business, and this may on occasion lead the employer to conclude that it is necessary to make changes to its employees’ employment contracts. However, employment contracts, whether made in writing or verbally, are legally binding agreements and their terms cannot usually be varied by just one party alone. Instead, changes will need to be agreed by both the employer and the employee (or with a trade union or other employee representatives in some circumstances).
2. This can lead to conflict if an employer seeks to vary the terms of an employment contract in the interests of the business, but employees are not prepared to agree to those changes and indicate that they intend to rely upon their existing contractual terms. In these circumstances, an employer may ultimately resort to the option of dismissing employees, before either offering to re-engage them, or engaging new employees, on the new terms. This enables the employer to achieve its business objectives by overcoming binding employment contracts.
3. This option has a number of negative consequences. It creates legal and reputational risks for the employer; it is harmful to the interests of employees; it can damage relationships with employees, lead to disengagement and to industrial conflict. It is not conducive to good industrial relations. In the event that a dispute arises concerning a

variation of terms, it is better to seek to resolve that dispute through consultation and negotiation, rather than resorting to dismissal.

4. While there may be circumstances where no agreement can be reached and an employer concludes that dismissal and re-engagement is necessary, the damaging consequences for industrial relations mean that this should be viewed as an option of last resort, once the employer has concluded that there is no reasonable alternative.
5. The purpose of this Code is to ensure that an employer takes all reasonable steps to explore alternatives to dismissal and engages in meaningful consultation with trade unions, other employee representatives or the individual employees in good faith, with an open mind, and does not use threats of dismissal to put undue pressure on employees to accept new terms, instead of seeking to find an agreed solution.

Scope of Code

6. This Code provides practical guidance to employers and employees in situations where an employer:
 - considers that it wants to make changes to its employees' contracts of employment; and
 - envisages that, if the employees do not agree to those changes, it might dismiss them and either offer them re-employment on those new terms or engage new employees or workers to perform the relevant roles on the new terms.
7. Such situations often lead to damaging disputes between employers, employees and trade unions. The focus of the Code is on ensuring that both the employer and the employee (or their representatives) act in good faith in seeking to resolve such disputes. In those circumstances, there may well be legal obligations not referred to within this Code, which fall upon the employer relating to its interactions with employees and their representatives. Some obligations are pointed out by way of example in Sections B and D below, but the Code does not give guidance on how to comply with those specific legal obligations.
8. This Code does not apply where the reason an employer envisages dismissing an employee is redundancy as defined in the Employment Rights Act 1996¹.
9. The Code applies regardless of the numbers of employees affected, or potentially affected, by the employer's proposals.
10. The Code applies regardless of the business objectives pursued by the employer, or the nature of its reasons for seeking changes to its employee's terms or conditions.
11. References in this Code to an employee's 'employment contract' or 'terms and conditions', are references to all of an employee's contractual terms, whether or not they

¹ See section 139(1) of the Employment Rights Act 1996.

are agreed orally or in writing, and whether they are contained in an individual contract or in other forms such as collective agreements, handbooks or letters.

Legal status / effect of the Code

12. The Code itself imposes no legal obligations, and a failure to observe it does not, by itself, render anyone liable to proceedings.
13. But the Code is admissible in evidence in proceedings before a court or employment tribunal, and any provision of the Code which is relevant to those proceedings must be taken into account by the court or tribunal².
14. In addition, if an employee brings one of the employment tribunal claims listed in Schedule A2 to the 1992 Act, and the claim concerns a matter to which this Code applies, then the tribunal can:
 - increase any award it makes by up to 25%, if the employer has unreasonably failed to comply with the Code; or
 - decrease any award by up to 25%, where it is the employee who has unreasonably failed to comply³.

Section B: The role of trade unions and employee representatives

Contractual changes

15. A contract of employment, whether made in writing or agreed verbally, is a legally binding agreement between parties. In order for a term of an employment contract to be varied, both parties to the agreement must usually agree to that change. There are also circumstances where a trade union has a legal power to negotiate with the employer, and agree changes to individual employment contracts, on behalf of the employee. When changing contractual terms, an employer must bear in mind all of its legal obligations, many of which are not dealt with in this Code. For example, in the event that an employer makes any offers to employees when there is a recognised trade union, it must be mindful of adhering to any collective bargaining arrangements which are in place⁴.

Information and consultation

16. This Code makes reference to the importance of the employer providing information to, and consulting with, employees (or their representatives) in the circumstances covered by the Code. This is not a single event, but should be viewed as an ongoing process.

² See section 203(3) of the 1992 Act.

³ See section 207A of the 1992 Act.

⁴ See section 145B of the 1992 Act.

Even if the employer considers that the employees or their representatives are unlikely to agree to the proposed change, the employer should continue to consult and negotiate for as long as possible in good faith in order to try to seek a resolution.

17. Who the employer should consult with will depend upon the circumstances. Where there is a trade union which is recognised in respect of any of the employees potentially affected, then the employer should consult with that union. Similarly, if there is an existing body of employee representatives who could appropriately be consulted on the employer's proposals (for example, if they have already been elected in order to represent employees on similar or related matters), then it may be appropriate to consult that body. In the event that there are affected employees who are not represented by a trade union or appropriate group of employee representatives, the employer should ensure that it either consults with each of those employees individually, or considers whether it would make sense to allow representatives to be chosen to represent them in consultations.

18. In the circumstances to which this Code applies, there are likely to be specific legal information and consultation obligations which are beyond the scope of this Code. The employer will need to ensure it complies with these obligations, including identifying the correct body or bodies with which to consult. Those obligations may include:

- Obligations to engage in collective consultation in certain circumstances involving redundancies under the 1992 Act⁵;
- Obligations arising under any information and consultation agreement⁶;
- Obligations arising in relation to a transfer of employment⁷;
- Obligations to consult with health and safety representatives to ensure the health and safety of employees under any proposed variation in terms⁸;
- Obligations to consult regarding changes to occupational or personal pension schemes⁹.

19. It is important for good industrial relations that, regardless of which party the employer is consulting with, it engages in good faith and with a view to managing conflict effectively and resolving any dispute as openly and collaboratively as possible. The employer should ensure that it listens to trade union and representative feedback and genuinely considers the points that are put forward, including considering any alternative proposals. A meaningful process should be followed with a view to reaching an agreement and avoiding the need for dismissals.

⁵ See section 188 of the 1992 Act.

⁶ See The Information and Consultation of Employees Regulations 2004.

⁷ See regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

⁸ See the Safety Representatives and Safety Committees Regulations 1977, the Health and Safety (Consultation with Employees) Regulations 1996 and the Management of Health and Safety at Work Regulations 1999.

⁹ See the Occupation and Personal Pensions Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.

Section C: Reconsidering the need for changes

20. Once it is clear to the employer that employees are not prepared to accept without further negotiations the contractual changes which it has proposed, but the employer decides that it still needs to implement those changes, and that this may require either the unilateral imposition of new terms or dismissal and re-engagement, the first step is for the employer to re-examine its business strategy and plans in light of the potentially serious consequences for employees.

21. There are a range of reasons an employer might want to make changes to employment contracts. These could include, for example:

- economic, business and/or financial reasons such as a need to act swiftly to save the business from collapse; a need to alleviate financial distress; or a need to ensure better use of investment in machinery or technology;
- organisational reasons such as a need to change working practices to meet shifting customer and market demands; or to adapt to new technologies or market practices;
- human resource reasons such as a need to harmonise terms and conditions for reasons of fairness; or to adjust working patterns in order to be able to expand the ability to offer flexible working to newer cohorts of employees (for example parents of young children) who may have a more pressing need for those patterns than employees who currently have contractual rights to them.

22. Taking into account any feedback it has received from discussions with employees and their representatives so far, the employer should consider carefully its analysis of why the changes to the contracts are thought to be needed. Factors which an employer should consider, depending on the circumstances, include:

- the objectives which it is seeking to achieve;
- the negative consequences of acting unilaterally – these could include:
 - risks to the employer's reputation,
 - the damaging of relationships with its workforce or representative trade unions,
 - the potential for strikes or other industrial action,
 - the risk of losing valued employees,
 - the risk of facing legal claims, and the cost and management time needed to defend those claims;
- whether its plans carry any risk of discriminatory impacts: in other words, whether the changes it is trying to achieve, and its methods for achieving those changes, could have a disproportionate impact on a specific group of employees who share a particular protected characteristic; and

- whether there are any alternative ways of achieving those same objectives, for example, whether there are existing clauses in the contract it could reasonably rely on, such as mobility clauses.
23. An employer should continue to reassess its proposals, considering all relevant factors (such as those listed above), as its discussions and consultations progress. It is good practice to return to this analysis at regular intervals, in order to factor in the impact of any new information received, or the results of consultation and negotiations with employees or their representatives.

Section D: Providing information for employees

24. In order to try to achieve an agreed resolution, the employer should consider what further information it could share with employees or their representatives which might help reach consensus.
25. The employer should consider what further information could be provided about:
- the nature of the proposals;
 - who will be affected by the proposals;
 - why there is a need for the proposed changes;
 - the timeframe for the proposed changes; and
 - any other options that have been considered.
26. Employers should share as much information regarding the proposals as is reasonably possible, in order to enable employees and their representatives to understand the need for the changes, and to be able to ask questions and make counter proposals of their own. The more that the employees and their representatives are able to understand about the background to the proposals, the more likely it is that the parties will be able to come to agreement, or else suggest alternative solutions.
27. Information should generally be provided as early into the process as possible. This promotes trust as well as enabling meaningful consultation by allowing the parties longer to reflect on the information, to raise questions, to suggest alternative options which can be explored; and to formulate solutions.
28. An employer in this situation must ensure that it complies with any other specific legal obligations which might arise in relation to information sharing, and which are beyond the scope of this Code. Such obligations may include:
- Obligations to provide information for the purposes of collective bargaining¹⁰;

¹⁰ See section 181 of the 1992 Act.

- Obligations to provide prescribed information during collective redundancy consultation under the 1992 Act¹¹;
- Obligations arising under an information and consultation agreement¹²;
- Obligations to provide prescribed information arising in relation to a transfer of employment¹³;
- Obligations to provide information to health and safety representatives to ensure the health and safety of employees under any proposed variation of terms¹⁴;
- Obligations to provide prescribed information regarding changes to occupational or personal pension schemes¹⁵.

Who should information be provided to?

29. Depending upon the circumstances (and without prejudice to any other legal obligations which might apply) information should be provided to:

- trade unions;
- employee representatives; and/or
- individual employees.

30. It is important that all employees who might be affected by the proposals are consulted with, either directly or through their representatives. Parties will need to be mindful of any employees who might be absent on sick leave, or on adoption, maternity or paternity leave for example. It is important that no-one is excluded.

31. Parties should also consider carefully the type and style of communication used, to ensure that certain groups are not excluded (for example employees for whom English is not their first language, or neurodiverse employees who might find particular forms of communication easier to absorb than others).

What information should be given?

32. The information to be provided will be dependent upon the circumstances and the changes which are proposed. For example, if a business is suffering a financial crisis which is necessitating a quick consultation process, then it is likely that the employer may not be able to provide as full information as a business in more settled times. However, employers should be mindful that the more information they can share, generally the more productive the consultation process will be and the more likely it is that agreement may be achieved.

¹¹ See section 188 of the 1992 Act.

¹² See the Information and Consultation of Employees Regulations 2004.

¹³ See regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

¹⁴ See the Safety Representatives and Safety Committees Regulations 1977, the Health and Safety (Consultation with Employees) Regulations 1996 and the Management of Health and Safety at Work Regulations 1999.

¹⁵ See the Occupation and Personal Pensions Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.

33. Information which is likely to be appropriate in most circumstances will include:

- the business reasons and rationale for the proposed changes;
- the anticipated timings for the changes and the reasons for those;
- the benefits of any changes;
- the impact on the employer if the changes do not take place.

34. It is likely that the employees and their representatives will have questions following the provision of the information, and again, the more detailed that the employer's responses are, the more likely it is that matters can be settled as amicably as possible.

35. There will be occasions where an employer considers that it is unable to provide information even if requested by employees or their representatives, as it believes that it is commercially sensitive or confidential. It would be good practice for the employer to explain its reasons for its refusal as fully as possible.

36. The provision of information is an ongoing feature of the consultation process and, if requested by employees or their representatives, the employer should always consider whether the information asked for can be provided.

Section E: Consultation

37. Consulting in the right way with employees and/or their representatives is of critical importance. Neither party should approach consultation as a question only of following the right procedure. Instead, consultation must be meaningful and conducted in good faith, with the intention of seeking an agreed resolution.

38. In order to ensure that consultation is meaningful, it is important that employees and their representatives understand the employer's objectives and the nature of its proposals. It is also important that the employer is honest and transparent about the fact that it is prepared, if negotiations fail and agreement cannot be reached, to attempt to unilaterally impose changes or to dismiss employees in order to force changes through. However, 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.

39. Both parties should listen to one another and seek to respond openly and in good faith to questions and concerns. The employer should consider whether it has explained clearly its reasons for the changes. It should listen carefully to objections raised, and seek to understand the reasons for those objections, and the impact of its proposals on employees. It should also consider any alternative proposals which are made and be prepared to engage in a genuine exploration of whether they are workable or will meet the employer's objectives.

40. The timing of the consultation process will depend upon the circumstances. However, a longer consultation period is likely to allow for a more in-depth discussion and a deeper understanding of the requirements for the proposals and the nature and intensity of any objections. This will facilitate a more thorough exploration of different options and strengthen the possibility of matters being resolved by agreement. Whilst it will always be dependent upon the particular circumstances, it is unusual for it to be detrimental to consult for a lengthy time period, even taking into account that this can be an unsettling time for employees.
41. As with the sharing of information, an employer needs to consider what specific consultation obligations it may have, for example under any collective agreement that is in place. It is also important that it complies with any particular statutory consultation obligations including those mentioned in paragraph 18 above.
42. Employers should also be mindful to ensure that discussing new contractual terms directly with employees, without engaging with a recognised trade union, does not amount to an inducement to bypass collective bargaining¹⁶.
43. Acas (the Advisory, Conciliation and Arbitration Service) is a statutory body which, as part of its remit to prevent and resolve workplace conflict, offers an independent and confidential mediation service. If it has not proved possible for the parties to reach an agreed outcome at this stage, they may wish to consider contacting Acas to see whether further progress can be made with their assistance.

Section F: If changes are agreed

44. If agreement is reached about new contractual terms, the employer should put the changes in writing, setting out clearly what the amendments are and when they will commence. Even if the new terms have been agreed with the trade union, the employer should write to each employee affected, setting out the new terms.
45. If there is a change to any of the particulars covered by a statutory written statement¹⁷, then the employer must issue the employee with a written statement of change within one month of the new terms taking effect¹⁸.
46. The employer will need to bear in mind that, if an employee continues to work, seemingly (but not expressly) having accepted the new terms, there is still a possibility that, legally, this could nevertheless constitute a dismissal and re-engagement. This could be the case if the term which has been varied is of such fundamental importance that it goes to the very root of the contract itself.

¹⁶ See section 145B of the 1992 Act.

¹⁷ The particulars required by a statutory written statement are set out in Part 1 of the Employment Rights Act 1996.

¹⁸ See section 4 of the Employment Rights Act 1996.

47. Even where changes are clearly agreed, it is good practice to maintain good communication with the affected employees over a period of time as they adapt to the new terms. Inviting feedback about the changes and considering what might be done to mitigate any negative impacts is likely to reduce the likelihood of conflict over changing terms continuing or being revived.

Section G: Unilateral imposition of new terms

48. If it has not been possible to reach agreement with employees or their representatives to the proposed new terms, some employers may decide to go ahead and try to impose those terms anyway. They may do this either because the existing contract gives them a power to change terms unilaterally, or they may attempt to do it without such a power.

49. An employer who opts to rely on an existing clause with a power to impose contract changes should carefully consider the nature of the contractual power in that contract, and the legal limitations on using such a power. For example, it is unlikely that a tribunal would consider that an employer has the power to vary a fundamental term such as pay without the employee's agreement.

50. If there is no term in the employment contract which allows a unilateral variation of the kind the employer wants to make, an employer might decide to go ahead and try to impose a variation anyway despite the risks of doing so. This will usually be a breach of the employee's contract and is likely to have damaging effects on industrial relations. It should not therefore be considered unless the employer is satisfied that all reasonable alternatives which might result in agreement have been fully explored first.

51. There are significant legal risks to the employer stemming from this approach. An employee might:

- bring a claim for breach of contract;
- resign and claim constructive unfair dismissal;
- continue working, but under protest;
- continue working to the new terms, either on the basis that there has been an agreed variation of terms, or potentially on the basis that there has been a constructive dismissal and re-engagement which might enable a claim for constructive unfair dismissal;
- bring a discrimination claim if they consider that they have suffered disadvantage which is connected to a particular protected characteristic.

52. Some employees in this situation might continue working under the new terms, but under protest. This can create a negative and uncertain working environment. It may sometimes be unclear whether the employee's continued working is an acceptance of the new terms, or whether the employee is working under protest. This can create legal uncertainty for both parties.

53. Any employee who decides to continue to work under protest, should make it clear to the employer at regular intervals that this is what they are doing, and that they do not agree to the changed terms, usually putting their objections in writing. They might still be able to bring legal claims against the employer, including claims for constructive unfair dismissal. An employer in this situation should therefore consider proceeding as though the employment had been terminated in any event (see below). This means that they should ensure that the correct notice is given, that the new terms are notified in writing to the employee and that the new terms are reviewed after a set period of time.
54. An employer who decides to impose new terms unilaterally should also follow the same steps set out in Section F above (If Changes are Agreed). It should share the changes in writing with the employee, explain the nature and impact of the changes and notify them of when these changes will apply, giving as much notice as possible. Any required amendments should be made to the particulars included in a statutory written statement of particulars.
55. In addition, the employer should continue to discuss the changes with the employee or their representatives. The discussion should continue to be open minded and be a genuine attempt to find agreement. The employer should continue to assess whether it really needs to implement the changes, or whether a change in circumstances might mean it can either return to the previous terms or else consider alternative proposals which it was not able to earlier. The employer should continue to discuss with the employees any adverse impacts which the new terms have had and consider whether there is anything that it can do to ameliorate those.
56. Whether an employer acts unilaterally simply by imposing changes, or whether it relies on an existing contractual power, it must always consider whether there are particular impacts on any employee or groups of employees which relate to a protected characteristic – whether those impacts affect a particular group directly, or affect them disproportionately compared to others. If any such impact is identified, the employer will need to take account of the risk of discrimination claims.

Section H: Dismissal and re-engagement

57. An employer who has participated in a thorough and open information and consultation process; has listened carefully to and explored fully any alternative proposals; and has concluded that it still needs to make the changes to the employment contracts, might at this point, as a last resort, decide to dismiss the employees and offer to re-engage them on the new terms (or engage new employees for the same roles on those new terms).
58. Before making that decision to dismiss, the employer should take some time to re-assess its analysis and consider carefully again:
- if it is truly necessary to impose these new terms on its employees to achieve its objectives;

- if there are any alternative options, whether these are revealed by the employer's own analysis, or are suggested by employees or their representatives, which could achieve those same objectives; and
 - if the changes could have a greater impact on one group of employees who share protected characteristics, compared to others.
59. The decision to dismiss and re-engage the employees should be treated by an employer as an option of last resort, if the employer considers it can't achieve its objectives in any other way.
60. 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 the need for them to carry out that work in a particular place, then the reason for dismissal could be redundancy, even if a new contract is being offered. In that case, an employer will need to consider and comply with its obligations to follow a proper redundancy process and assess whether redundancy payments may be due.
61. If the employer decides to dismiss and offer new terms, it should give as much notice as possible of the dismissal, complying with the employee's contractual notice period as a minimum. The employer should consider whether any particular employees might need longer notice in order to make arrangements which might better enable them to accommodate the changes. For example, where the changes involve changes to working hours, some employees may need more time to make changes to childcare arrangements, or to plan new journeys to work which can accommodate mobility needs. Where possible, an employer should agree to a longer notice period to enable employees to make these kinds of arrangements, or to find alternative work.
62. If the employer is implementing more than one change to terms, it should also consider whether it could have a phased introduction of changes over a longer period of time. It might also be able to agree to review the changes at a fixed point in the future, perhaps with a view to reconsidering whether it still considers those changes to be necessary. A change in circumstances might mean that the change to the contractual terms could be temporary and could return to their original form.
63. The employer should also consider whether there is any other practical support it might offer to its employees such as relocation assistance, career coaching or counselling for emotional support.
64. The employer should ensure that the new terms of employment are set out clearly in writing and contain all the details required by section 1 of the Employment Rights Act. The employer should take care that the only terms which are varied are those about which employees or their representatives have been notified and which have been subject to the information and consultation process and should not use this as an opportunity to alter any other terms and conditions.

65. It is good practice for the employer to re-engage the employees as soon as possible in order to preserve their continuity of service and it should not use re-engagement as an opportunity to break that period of continuous employment.
66. Even after the new terms have taken effect, it is still good practice for the employer to continue to review the requirement for the imposed changes. It might find that, due to a change in circumstances, it is able to discuss a return to the previous terms with employees and their representatives (remembering that this will be a contractual change to the newly imposed terms), or at least to consider alternative proposals which it was not able to accommodate previously.
67. It is also good practice for the employer to continue to monitor the impact of the imposed changes over time to see if it is able to do anything to ameliorate any negative impact on the employees. The employer should be particularly aware of any negative impact which becomes apparent as impacting particularly on a group of people who share a protected characteristic.
68. It is also important that the employer and the employee representatives continue to engage in discussions which remain open to the possibility of reaching agreement on the new imposed terms.

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