Paper to lie before both Houses of Parliament until approved by a resolution of each House

Department for Business & Trade

DRAFT CODE OF PRACTICE

Issued by the Secretary of State under section 203 of the Trade Union and Labour Relations (Consolidation) Act 1992

On dismissal and re-engagement

February 2024

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On dismissal and re-engagement

Presented to Parliament pursuant to Section 204(2) of the Trade Union and Labour Relations (Consolidation) Act 1992

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Preamble

The legal framework within which this Code 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 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"). This section 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 practical guidance on avoiding, managing and resolving such conflict and disputes.

The Code is issued by the Secretary of State under section 203 of the 1992 Act and came into force 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. This may occasionally lead the employer to consider proposing changes to its employees' contracts of employment.

2. Contracts of employment, whether made in writing or verbally, are legally binding agreements and their terms cannot usually be changed by just one party. Instead, changes will usually need to be agreed by both the employer and the employee (or by their properly authorised trade union or other employee representatives).

3. If employees and/or their representatives do not agree to some or all of the contractual changes proposed by the employer, the employer may, as a last resort, dismiss employees, before either offering to re-engage them, or offering to engage other employees, in substantively the same roles, in order to effect the changes ("Dismissal and Re-engagement").

4. This approach has the following negative consequences:

- it creates legal and reputational risks for the employer;
- it can be harmful to employees' interests; and
- it can damage the employer's relationships with its employees, potentially leading to disengagement and industrial conflict.

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 a view to reaching an agreed outcome with employees and/or their representatives. The Code also seeks to ensure that the employer does not raise the prospect of dismissal

unreasonably early, or put undue pressure on employees by threatening dismissal where this is not, in fact, envisaged.

Scope of Code

6. This Code provides practical guidance to employers and employees (and/or their representatives) where an employer:

- is considering making changes to one or more of its employees' contracts of employment; and
- envisages that, if the employee and/or their representative does not agree to some or all of the changes, it might opt for Dismissal and Re-engagement in respect of that employee.

7. This Code does not apply in respect of any given employee where the only reason an employer envisages that it might dismiss that employee is redundancy as defined in the Employment Rights Act 1996 ("the 1996 Act")[1].

8. The Code applies regardless of the number of employees affected, or potentially affected, by the employer's proposals.

9. The Code applies regardless of the employer's reasons for seeking changes to its employees' terms and conditions.

10. References in this Code to an employee's or employees' 'contract', 'contract of employment', 'terms and conditions' or 'terms', are references to all an employee's contractual terms, whether these are express or implied and (if express) whether they have been agreed in writing or verbally. In addition to any individual employee's written contract, terms may be found in other sources such as collective agreements, handbooks or letters, provided that these have been expressly or impliedly incorporated into the contract.

11. Where this Code applies, there may be legal obligations with which the employer must comply, but which are not referred to in this Code. In addition, while some legal obligations are pointed out by way of example in the below, the Code does not give guidance on how to comply with those obligations.

Legal status / effect of Code

12. A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings.

13. The Code is admissible in evidence in proceedings before a court, employment tribunal or the Central Arbitration Committee, and any provision of the Code which is relevant to those proceedings must be taken into account by the court, tribunal or Committee[2].

[1] See section 139(1) of the 1996 Act. Note that this definition of 'redundancy' is narrower than that for the purposes of collective consultation under section 188 of the 1992 Act.
[2] See section 207(3) of the 1992 Act.

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
    - reduce any award by up to 25%, where it is the employee who has unreasonably failed to comply[3].

15. Where this Code states that a party "must" or must not do something, this indicates that that party is subject to a legal requirement. Where this Code states that a party "should" or should not do something, this indicates a recommendation, which is intended to be admissible in evidence and taken into account as described in paragraphs 13-14 above.

Section B: General considerations for information-sharing and consultation

16. The below provisions on information-sharing and consultation are intended to be viewed as an ongoing process, not a single event. Even where the employer considers that the employees and/or their representatives are unlikely to agree to the proposed changes, the employer should consult for as long as reasonably possible in good faith, with a view to reaching an agreed outcome.

17. Who the employer provides information to and consults with will depend on the circumstances. For all employees in respect of whom there is a recognised trade union, the employer should provide information to and consult with that trade union. For all employees in respect of whom there is no recognised trade union, the employer should provide information to and consult with whichever is the appropriate of:
    - an existing body of employee representatives who could appropriately be consulted on the employer's proposals (for example, if they have already been elected to represent employees on similar or related matters), if any;
    - representatives chosen to represent employees in consultations on the employer's proposals; and/or
    - each of the employees individually.

    The employer's choice will generally depend on what is reasonable in the circumstances, but the employer must also comply with any other applicable legal obligations in making this choice.

18. It is important that all employees who might be affected by the proposals are informed and consulted, whether directly or through their representatives. Employers and employee representatives (if any) should be mindful of any employees who might be absent, for example on sick leave, or on maternity, paternity or adoption leave.

19. Where this Code applies, there may be additional legal information-sharing and consultation obligations on the employer which are beyond the scope of this Code.

[3] See section 207A of the 1992 Act.

The employer must comply with any such obligations, which may include (but are not necessarily limited to):

- obligations to provide prescribed information for the purposes of collective consultation under the 1992 Act[4];
- obligations arising under any information and consultation agreement[5];
- information-sharing and consultation obligations arising in relation to a transfer of employment[6];
- information-sharing and consultation obligations in relation to any health and safety implications of the proposed changes[7];
- information-sharing and consultation obligations regarding proposed changes to occupational or personal pension schemes[8]; and
- obligations to provide prescribed information for the purposes of collective bargaining where there is a recognised trade union[9].

20. Where there is a recognised trade union, unless the agreed collective bargaining procedure has first been exhausted, the employer must not make a direct offer to employees, if that offer relates to a matter falling within the scope of the collective bargaining agreement[10].

Section C: Information to be provided by the employer

When should information be provided?

21. Information should be provided as early as reasonably possible. This promotes trust and enables meaningful consultation, giving the parties more time to reflect on the information, raise questions, suggest and explore alternative options, and formulate solutions.

What information should be provided?

22. Employers should share as much information regarding the proposals as reasonably possible with a view to enabling employees and/or their representatives to understand the reasons for the proposed changes, and to be able to ask questions and make counter-proposals. The better informed the employees and/or their representatives are

[4] See section 188 of the 1992 Act.
[5] See The Information and Consultation of Employees Regulations 2004 (SI 2004/3426).
[6] See regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).
[7] See the Safety Representatives and Safety Committees Regulations 1977 (SI 1977/500), the Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513) and the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242).
[8] See the Occupation and Personal Pensions Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349).
[9] See section 181 of the 1992 Act.
[10] The effect of section 145B of the 1992 Act where there is a recognised trade union, per the Supreme Court in Kostal UK Ltd v Dunkley and others [2021] UKSC 47.

about the proposals, the more likely it is that the parties will be able to reach an agreed outcome.

23. In particular, the employer should consider what information could be provided about:
    - what the proposed changes are (including what the proposed new and/or revised terms will look like);
    - who will be affected by the proposed changes;
    - the business reasons for the proposed changes;
    - the anticipated timings for the introduction of the proposed changes and the reasons for those;
    - any other options that have been considered; and
    - the proposed next steps.

24. As noted in paragraphs 22-23 above, the more information employers can share, generally the more productive the consultation process will be and the more likely it is that an agreed outcome will be reached. The information provided will, however, depend upon the circumstances and the nature of the proposed changes. For example, if a business is suffering a financial crisis necessitating a shorter consultation process, then that employer may not be able to provide as much information as a business in more settled times.

In what format should information be provided?

25. Employers and employee representatives (if any) should consider the type and style of communication used, to help avoid certain employees being excluded. It is good practice for the employer to provide information in writing.

Following the provision of information

26. It is likely that the employees and/or their representatives will have questions following the provision of information, and on an ongoing basis throughout the consultation process. The employer should always consider whether the information asked for can be provided, applying the approach set out in paragraph 22 above.

27. An employer may reasonably conclude that it is unable to provide information even if requested by employees and/or their representatives, for example where it believes that it is commercially sensitive or confidential. The employer should explain its reasons for any refusal to provide information as fully as reasonably possible.

Section D: Consultation

Meaningful consultation

28. Consultation is not a question of only following the right procedure. To enable meaningful consultation, parties should engage with each other openly and in good faith. They should genuinely consider the points that are put forward.

29. The employer should be as clear as possible about its objectives and the nature of its proposals. The employer should also genuinely consider any reasonable alternative proposals, with a view to reaching an agreed outcome.

Duration of consultation period

30. As set out in paragraph 16 above, the employer should continue to consult for as long as reasonably possible in good faith, with a view to reaching an agreed outcome. A longer consultation period is likely to allow for more in-depth discussion and a deeper understanding of the rationale for the proposals and the nature and intensity of any objections. This will facilitate a more thorough exploration of alternative options and increase the likelihood of an agreed outcome being reached.

Section E: Raising the prospect of Dismissal and Re-engagement

31. If, at any point, the employer intends, if an agreed outcome cannot be reached, to opt for Dismissal and Re-engagement, it is important that the employer be clear about that. However, raising the prospect of dismissal can be detrimental to attempts to reach an agreed outcome, so the employer should not do so unreasonably early. In addition, a threat of dismissal should not be used as a negotiating tactic to put undue pressure on employees in circumstances where the employer is not, in fact, envisaging dismissal as a means of achieving its objectives.

32. Acas (the Advisory, Conciliation and Arbitration Service) is an independent statutory body which offers impartial advice to employers, employees and/or their representatives on employment rights and obligations. It has expertise in helping parties to maintain good industrial relations and resolving disputes where they arise. While Acas may be contacted by any party wherever this Code applies, the employer should contact Acas for advice before raising the prospect of Dismissal and Re-engagement.

Section F: Re-examination by the employer

33. Once it has become clear to the employer that employees and/or their representatives do not agree to some or all of the contractual changes which it has proposed, but the employer considers that it still needs to implement the changes, the employer should re-examine its proposals. As part of this analysis, the employer should take into account any feedback it has received from employees and/or their representatives so far.

34. Factors which an employer should consider include (but are not necessarily limited to):

- the objectives which it is seeking to achieve;
- the negative consequences of imposing the proposed changes – these could include:
  - risks to the employer's reputation,
  - damage to 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 associated costs and management time;

- whether its proposals could have a greater impact on some employees than others. This might be on the basis that they share a protected characteristic under the Equality Act 2010[11]; and
- whether there are any reasonable alternative ways of achieving the employer's objectives.

35. The employer should return to the above analysis in response to a material change in circumstances, or material results of consultations with employees and/or their representatives.

Section G: If changes are agreed

36. If changes are agreed, it is good practice for the employer to communicate the changes to affected employees in writing, setting out clearly when the changes will come into effect (giving as much notice as reasonably practicable).

37. If there is a change to any of the particulars covered by a written statement of employment particulars, then the employer must give the employee a written statement of change within one month of the new terms taking effect[12].

38. Even where changes have been agreed, it is good practice for the employer to invite feedback about the changes as employees adapt to them, and consider what might be done to mitigate any negative impacts on employees.

Section H: Unilateral imposition of new terms

39. Where it has not been possible to reach an agreed outcome with employees and/or their representatives on the proposed terms, some employers may decide to try to impose those terms anyway.

40. An employer who opts to rely on an existing clause which gives them a power to impose contractual changes should consider the scope of that power, and the legal limitations on using it.

41. If there is no term in the employee's contract which allows unilateral imposition of the changes proposed by the employer, an employer who decides to impose its changes anyway will usually be breaching the employee's contract. This approach is likely to have damaging effects on industrial relations.

42. There are significant legal risks to the employer stemming from imposing changes unilaterally, especially where the contract does not clearly and unambiguously provide for this. An employee might, for example:

- resign and claim constructive unfair dismissal;

[11] See section 4 of the Equality Act 2010.
[12] See section 4 of the 1996 Act.

- refuse to work under the new terms;
- continue working, but under protest, potentially also bringing claims such as for breach of contract and/or any shortfall in wages;
- work under the new terms, but claim for unfair dismissal;
- bring a discrimination claim, if, for example, they consider that they have been treated less favourably on the basis of their protected characteristic under the Equality Act 2010[13].

43. Where an employee chooses to work under the new terms, but under protest, this can create a negative and uncertain working environment. It can sometimes be unclear whether the employee's continued working amounts to an implied acceptance of the new terms, or whether the employee is working under protest. This can create legal uncertainty for both parties.

44. It is good practice for an employee who decides to continue to work, but under protest, to make it clear to the employer, either directly or through their representative (if any), that this is what they are doing, and set out the terms that they do not agree to. It is good practice for the employee to put their objections in writing, either directly or through their representatives (if any).

45. An employer who imposes new terms unilaterally should follow the steps set out in paragraphs 36-37 above.

46. It is good practice for the employer to invite feedback about the changes as employees adapt to them, and consider what might be done to mitigate any negative impacts on employees. This is likely to reduce the likelihood of the revival of conflict over the new terms.

Section I: Dismissal and Re-engagement

47. An employer who has participated in a thorough and open information-sharing and consultation process, as part of which it has genuinely considered any reasonable alternative proposals, might opt for Dismissal and Re-engagement. The employer should treat this option as a last resort.

48. Subject to any applicable qualifying periods, in order for a dismissal to be fair, the employer must:
- have a potentially fair reason for dismissal[14];
- have acted reasonably in the circumstances in treating that reason as a sufficient reason for dismissal[15]; and
- have followed a fair dismissal procedure.

49. An employer opting for Dismissal and Re-engagement should give as much notice as reasonably practicable of the dismissal, and must comply with whichever is the greater

[13] See section 4 of the Equality Act 2010.
[14] See section 98(1) of the 1996 Act.
[15] See section 98(4) of the 1996 Act.

of the employee's contractual or statutory notice period as a minimum[16]. The employer should also consider whether employees might benefit from more time in order to make arrangements which might better enable them to accommodate the changes. For example, where the changes include changes to working hours, some employees may need to adapt their childcare arrangements, or plan new journeys to work.

50. The employer should also consider whether there is any practical support it might offer to employees, such as relocation assistance, career coaching or counselling for emotional support.

51. The employer might commit to reviewing the changes at a fixed point in the future, perhaps with a view to reconsidering whether it still considers the changes to be necessary. If the employer is implementing more than one change, it might also wish to consider introducing them on a phased basis.

52. It is good practice for the employer to set out the new terms of employment in writing. The employer must also comply with its obligations in respect of the written statement of employment particulars[17]. The employer should ensure that the only terms which are changed are those which have been subject to the information-sharing and consultation process, and should not use this as an opportunity to make any further changes.

53. The employer should re-engage the employee as soon as reasonably practicable.

54. It is good practice for the employer to invite feedback about the changes as employees adapt to them, and consider what might be done to mitigate any negative impacts on employees. This is likely to reduce the likelihood of the revival of conflict over the new terms.

[16] Nothing in this Code restricts an employer's ability to make a payment in lieu of notice.
[17] See Part I of the 1996 Act.

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