TUC
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Code of Practice on Dismissal and Re-engagement Consultation

TUC response

The TUC is the voice of Britain at work. We represent more than 5.5 million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

Unions have an excellent track record of fighting fire and re-hire attempts by employers. Notable union campaigns include successfully fighting employers attempts to dismiss and re-engage at Tesco[1], Clarks[2], Douwe Egberts[3] and British Airways.[4]

Nevertheless, the current legal framework still gives employers excessive leeway to impose unwarranted cuts to terms and conditions.

The TUC welcomes the opportunity to provide feedback to improve the draft code. We welcome the emphasis in the code on encouraging greater consultation with unions. We know that where unions have a voice in the process and put forward alternative proposals, fire and rehire can be avoided.

However, the TUC is concerned about the draft proposals for a statutory code for two principal reasons.

Firstly, the government has promised to strengthen the employment law framework to prevent P&O Ferries-type fire and rehire scandals. The government has failed to do this and the draft code, in isolation, is totally inadequate to deal with the escalating employer practice of large-scale dismissal and re-engagement. Below we set out the legislative steps that should be taken to effectively tackle dismissal and reengagement.

Secondly, the draft code needs significant improvement so that it is clear about what steps are required to ensure that employers engage in meaningful consultation, and it should be expanded to cover claims relating to breaches of consultation obligations in redundancy situations. For example, if an employer breaches collective redundancy consultation obligations and is liable to pay a protective award to an employee, this payment should also be subject to the 25 per cent uplift that could apply for not complying with the code.

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[1] https://www.usdaw.org.uk/About-Us/News/2022/Dec/Supreme-Court-grants-Usdaw-permission

[2] https://community-tu.org/fire-and-rehire-defeated-at-clarks/#2c1b631a

[3] https://www.unitetheunion.org/news-events/news/2021/august/banbury-coffee-workers-vote-overwhelmingly-in-favour-of-deal-that-removes-fire-and-rehire/

[4] https://www.unitetheunion.org/news-events/news/2021/january/unite-ends-ba-fire-and-rehire-dispute-by-securing-deal-to-avoid-forthcoming-cargo-strike-action/

The draft code is not an adequate response to the escalating use of fire and re-hire

The government press release[5] says that the draft code is being introduced in response to the "controversial dismissal tactics" used by P&O Ferries when it unlawfully sacked an entire workforce without notice and replaced them with an agency crew.

In the wake of the P&O Ferries scandal, Grant Shapps, Secretary of State for Transport at the time, said the government would *"send a clear message to the maritime industry that we will not allow this to happen again. That where new laws are needed, we will create them. Where legal loopholes are cynically exploited, we will close them. And where employment rights are too weak, we will strengthen them".*[6]

The proposed draft code does not adequately strengthen the UK's current employment law framework. It does not close the legal loopholes that allowed P&O Ferries to evade criminal and financial sanctions, and it does not strengthen unfair dismissal rights to prevent an employer from sacking their workforce and either re-hiring them on inferior conditions or replacing them with another workforce.

Unfair dismissal laws need to be strengthened

Fire and re-hire tactics are used by employers because it is relatively easy to lawfully sack workers and re-hire them.

Under unfair dismissal[7] legislation one of the potentially fair reasons for dismissal is "some other substantial reason" (SOSR). This is a broad test that gives employers a great deal of leeway to dismiss employees for a wide range of reasons. In Hollister[8] v National Farmers Union the Court of Appeal held that if an employer had 'good business reasons' for reorganising a business and dismissed an employee who would not accept new terms, they could rely on SOSR as the reason for dismissal.

As a result, it is too easy for employers to sack their workers and either re-engage them on inferior terms and conditions, or replace them with another workforce. The draft code does not change this position.

The sanctions for not complying with existing employment laws are not sufficient to deter employers from acting unlawfully

Effective sanctions are needed to deter employers from using fire and rehire tactics to reduce workplace terms and conditions.

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[5] Government cracks down on 'fire and rehire' practices - GOV.UK (www.gov.uk)
[6] Sillars, J. (30 March 2022). "P&O scandal: Ports reject Grant Shapps plan to police ferry firms' minimum wages", Sky News.
[7] https://www.legislation.gov.uk/ukpga/1996/18/section/98
[8] Hollister v National Farmers' Union [1979] ICR 542

At P&O Ferries, the employer was willing to brazenly flout the law because it could calculate the low financial cost of non-compliance with the relevant legislation. P&O Ferries had a legal duty to consult[9] with unions about the fire and rehire proposals as these concerned dismissals for a reason 'not related to the individual concerned'.[10] Failure to comply with these consultation obligations meant that every affected employee could have been entitled to compensation (a 'protective award'). This can be up to 90 days' full pay for each affected employee. Scandalously, P&O Ferries took the pre-meditated decision to cost in the price of non-compliance. If P&O Ferries had faced an increased, unspecified sanction then it may have chosen to engage in meaningful consultation with unions.

The consultation process is vital. It enables unions to put forward alternative proposals to save jobs. Employers should not be able to skip this important step and only face a meagre penalty for doing so.

The statutory code of practice does not sufficiently increase the sanctions that an employer will face for failing to fulfil their consultation duties.

The statutory code of practice does state that where an employer is found to have unlawfully dismissed a worker in a fire and rehire situation then the employee could be awarded a 25 per cent uplift in damages. This is unlikely to be a proper deterrent, not least because, as was the case with P&O Ferries, it still allows an employer to accurately price-in the cost of flouting the law.

Furthermore, the 25 per cent uplift in damages will only apply where an employer has been found by a tribunal to have unfairly dismissed an employee. As discussed above, it is relatively easy for an employer to dismiss an employee 'fairly', by relying on some other substantial reason.

The code is narrow in scope and the 25 per cent uplifted sanction will not apply in all situations where laws have been broken, in fire and rehire type situations

P&O Ferries engaged in a dismissal and re-engagement type exercise and admitted breaching its legal obligations under S.188 TULR(C)A.

The duty to consult with trade unions is a highly relevant statutory obligation in many fire and rehire exercises. However, if an employee brings a successful claim for a protective award and can show that the employer did not comply with the dismissal and re-engagement code, the tribunal would be unable to uplift any award by 25 per cent, because this area of law falls outside the scope of the draft code.

It is concerning that the draft code, introduced in response to the P&O Ferries scandal, would not apply to situations similar to the P&O Ferries scandal in the future.

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[9] Trade Union and Labour Relations (Consolidation) Act 1992 (legislation.gov.uk)
[10] https://www.legislation.gov.uk/ukpga/1992/52/section/195

Workers in insecure employment are not given any additional protection by the Code.

Workers in insecure employment do not fall within the scope of the draft code. This means that agency workers or zero-hours contract workers can be dismissed and re-engaged without employers having to consider the consultation procedures set out in the draft code. Workers in insecure, intermittent and precarious employment already have little in the way of job, hours or income security, so this only reinforces and perpetuates existing inequalities between them and those on more permanent employment arrangements. The code should have been extended to cover workers in insecure employment to give them some additional protection.

Redundancy situations

Paragraph 8 states that the draft code does not apply where the reason an employer envisages dismissing an employee is redundancy as defined in the Employment Rights Act 1996. This is concerning as there is case law which states that a redundancy situation covers circumstances where an employee is dismissed and indirect labour is engaged to perform precisely the same role as previously undertaken by the employee.

The differentiation between that scenario and where it is said the Code will apply (where an employee is dismissed and an employee or a "worker" is engaged on inferior terms) is potentially inconsistent and greater clarification is required.

If an employee is replaced by a worker an employer may well assert that is a redundancy within s139 (1) and the Code has no application which is clearly not what the Code itself envisages given what is made expressly clear in it elsewhere.

The code needs to be clearer about an employer's legal obligations under s.145B of TULR(C)A 1992

The TUC is concerned that paragraph 42 of the draft code doesn't make clear enough that an employer who recognises a trade union for collective bargaining, or where an independent trade union is seeking recognition with the employer, faces substantial risks from any 'offers' made direct to the affected workers under s.145B of the Trade Union Labour Relations (Consolidation) Act 1992. The UK Supreme Court has held such offers will cause the prohibited result where there is a 'real possibility' that, if the offers were not made and accepted, the workers' terms in question would have been agreed through collective agreement.[11]

What action is needed to effectively tackle fire and re-hire?

[11] Kostal UK v Dunkley and others [2021] UKSC 47

The TUC believes the following steps should be considered to deter employers from using fire and rehire tactics and to provide safeguards that protect job security in fire and rehire situations:

- S189 (4) of the TULR(C)A, which limits the amount of protective award that a worker can receive, should be amended to ensure that the risk of paying a protective award is a proper deterrent for employers who choose to flout their consultation obligations. The potential sanction of a 90-day protective award is clearly not enough to deter employers from breaking the law. The TUC believes the cap should be removed.
- Procurement law should be strengthened to prevent employers who recklessly use fire and rehire tactics from accessing public money. Despite Grant Shapps pledging to review[12] all its government contracts since March 2022, DP World is in line to benefit from many deals including several with the Ministry of Defence, and from involvement in the Solent and Thames Freeport sites. Employers who breach their legal obligations should not be rewarded with lucrative contracts.
- Unfair dismissal protections should be strengthened to increase job security for workers and give them additional protection in fire and rehire-type situations. Reforms should include a right to unfair dismissal protections for workers from day one in the job and tougher tests that require employers to explore reasonable economic alternatives and consult with trade unions:
- The TUC believes that S188 of TULR(C)A should be amended so that current thresholds are lowered, meaning consultation obligations are triggered where individuals are affected by proposed dismissals or measures connected with the dismissals. The 2013 legislative changes to the length of collective consultation periods should also be reversed, with the 45-day consultation period where 100 or more redundancies are being proposed, restored to a 90-day consultation period.
- Consideration should be given to relaxing some of the stringent requirements around taking industrial action in fire and rehire situations, so unions can respond promptly.
- Fire and rehire is often used to bring about increased casualisation, such as longstanding hotel staff on full-time contracts being rehired on short-hours arrangements. Or, as we saw with P&O Ferries, agency crew replacing employees on collectively agreed terms and conditions. Workers in insecure employment should be entitled to the same floor of employment rights as permanent workers so that we don't see workers in insecure employment being used to replace permanent jobs.
- Where an employer chooses to sack a workforce without complying with minimum legal standards, workers must have access to prompt injunctive relief. For example,

[12] (March 2022). Volume 711, "P&O Ferries and Employment Rights", Hansard.

there should be automatic reinstatement of workers where an employer doesn't carry out meaningful consultation in fire and rehire type scenarios.

What specific improvements could be made to the draft code?

- Paragraph 22 states that when an employer is considering varying the contractual terms of its workforce it should consider whether its plans carry any risk of discriminatory impacts. The TUC believes that the code should go further and require employers to carry out robust, comprehensive equality impact assessments. The draft code should set out the key steps that are required in an equality impact assessment. Trade unions have developed guidance on how to carry out an effective equality impact assessment. For example, Unite the Union have set out the necessary steps of an equality impact assessment in their guidance[13] for union representatives, at pages 12 & 13. Organisations like Inclusive Employers have published useful guidance[14] for employers on how to carry out an equality impact assessment. The findings of the equality impact assessment should be written down and shared with a recognised trade union as part of the consultation process. The employer should consider how to mitigate the impact of their actions and develop this plan with the recognised union.
- The TUC believes that the principle of good faith consultation set out in paragraph 19 should be underpinned by some concrete guidance about how consultation should take place, including guidance on the exchange of written information between union and employer. In paragraph 19, and throughout the draft code, guidance should be given about the importance of minuting meetings, including making a record of alternative proposals put forward by trade unions. Paragraph 19 sets out there should be a 'meaningful process' but doesn't stipulate what this involves. The guidance should be developed further in this area and suggest that a 'meaningful process' involves the exchange of ideas, with written responses from the employer to demonstrate that they have actively considered any trade union proposals put forward. The TUC believes that the draft code is too vague.
- Paragraph 43 of the draft code signposts parties to the role that ACAS could play in resolving a dispute related to proposals to dismiss and re-engage. The TUC believes that the draft code should go further and require the parties to involve ACAS if they have not been able to reach agreement.
- Paragraph 25 of the draft code should be expanded. The current list of suggestions for information that an employer should share with the union is insufficient. To enable unions to propose viable alternative proposals to dismissal and

[13] https://www.unitetheunion.org/media/3382/action-on-covid-19-equalities-booklet.pdf
[14] https://www.inclusiveemployers.co.uk/blog/equality-impact-assessments-a-definitive-guide/?cn-reloaded=1

reengagement they will need access to financial information. The TUC believes that the list should be expanded to include information similar to that set out at paragraph 11 of the ACAS Code of Practice on the disclosure of information for collective bargaining purposes.[15] This code outlines much more prescriptive examples of relevant information for the purposes of collective bargaining in relation to an undertaking, and that is also highly likely to be relevant to any proposals relating to dismissal and re-engagement:

  - Pay and benefits: principles and structure of payment systems; job evaluation systems and grading criteria; earnings and hours analysed according to work-group, grade, plant, sex, outworkers and homeworkers, department or division, giving, where appropriate, distributions and makeup of pay showing any additions to basic rate or salary; total pay bill; details of fringe benefits and non-wage labour costs.
  - Conditions of service: policies on recruitment, redeployment, redundancy, training, equal opportunity, and promotion; appraisal systems; health, welfare and safety matters.
  - Manpower: numbers employed analysed according to grade, department, location, age and sex; labour turnover; absenteeism; overtime and short-time; manning standards; planned changes in work methods, materials, equipment or organisation; available manpower plans; investment plans.
  - Performance: productivity and efficiency data; savings from increased productivity and output, return on capital invested; sales and state of order book.
  - Financial: cost structures; gross and net profits; sources of earnings; assets; liabilities; allocation of profits; details of government financial assistance; transfer prices; loans to parent or subsidiary companies and interest charged.

- The TUC believes that paragraph 35 of the draft code should be amended to encourage employers to facilitate full disclosure throughout the consultation process. The draft code should provide practical examples of how employers can share confidential and commercially sensitive information with a union, and to highlight that this is commonplace in industrial relations. It is imperative that a union has access to financial forecasts and information to enable them to propose viable alternatives to dismissal and reengagement. The draft code should encourage the disclosure of such information. As it is currently drafted, the draft code almost encourages employers to withhold information because of commercial sensitivity.

[15] https://www.acas.org.uk/acas-code-of-practice-on-disclosure-of-information-to-trade-unions-for-collective-bargaining/html

- The TUC believes Section D, as it stands, is wholly inadequate. Effective consultation relies on proper disclosure. Currently the code encourages employers to share limited information in limited circumstances.
- The Code could be used to highlight the financial penalties available to an employment tribunal in fire and rehire claims. Where an employment tribunal finds that an employer has breached the claimant's employment rights, the tribunal can order the employer to pay a financial penalty if it is of the opinion that the breach has aggravating features (s.12A of the Employment Tribunals Act 1996). Under s.12A ETA 1996, the Secretary of State could increase the cap on the level of penalty to an appropriate level that is likely to deter employers. The government should also publish guidance/directions for the employment tribunals to make clear that any relevant 'claims' include matters that are related to dismissal and re-engagement.