Blackburn and District Trades Union Council

Response to BEIS Consultation on Draft Code of Practice on Dismissal and Re-engagement

The Advisory, Conciliation and Arbitration Service (ACAS) has defined "fire and re-hire", or "dismissal and re-engagement", as the practice of *"dismissing employees and re-engaging them on a new contract with new terms, in circumstances where the employees' agreement to the changes has not been obtained. The term is also used to refer to employers holding out the prospect of dismissal and re-engagement to workers or their representatives during negotiations about changing terms and conditions"*.

In the absence of a contractual right to vary, it has been acknowledged in British law that an employer cannot substantially change the terms of an existing contract without consent. In the case of **Rigby v Ferodo Ltd**, for instance, it was held by the House of Lords that a unilateral imposition of a wage cut by the employer constituted a repudiatory breach of contract entitling the employees to stand by the original terms as to pay and to bring an action for damages.

Because it is a term of most employment contracts that they may be terminated on a period of notice, however, employers can escape breach of contract claims by just by doing this – dismissing the employees after contractual notice and offering subsequent re-engagement on the varied terms.

It would seem, then, that there is a fundamental inconsistency within the law for so long as employers have the "loophole" of simply terminating a contract altogether, where there are provisions for bringing it to an end within a specified horizon.

Ironically, the law has no doubt partly evolved in the way it has because there is a necessity for both parties to have a means of leaving what would otherwise be a perpetually ongoing situation. The quirk in respect of dismissal and re-engagement is that the employer does still want the employment relationship to continue. What is intended simply to avoid binding parties to a relationship they no longer want becomes a means for one of the parties to unilaterally re-set the terms of that relationship.

Fundamentally, this undermines any sense of mutuality around the employment contract, and it allows employers a practical freedom to withdraw from agreements not seen in any other area of contract law because it does not rely on any repudiation or failure or anticipated breach by the other party.

A House of Commons Library "Debate Pack" on "Fire and re-hire tactics" (26.04.21) noted:

"Professor Alan Bogg, a Professor of Law at the University of Bristol, argued that under the current law the balance of power lies too much with the employer:

"In short, a determined employer with the right legal advice can achieve its goal of reducing terms and conditions with relative ease. English law provides the signposts to navigate the way,

abetted by a wide scope for legally compliant business reorganization dismissals. In other words, the contractual bargain is sacrosanct in English law except when it runs up against the employer's powers of dismissal, the totemic managerial prerogative of the English common law"."

We submit that this quirk of employment contracts does more than offend a common sense of fairness. As the **"OECD Employment Outlook 2022: Building Back More Inclusive Labour Markets"** noted, the overall health of economies can be harmed where there is weakness in collective bargaining. It defines as "monopsony" a *"situation in which employers possess unilateral wage-setting power, and use it to set wages and employment below the levels that would prevail in a competitive market, where firms have to pay workers a "market rate" aligned with their productivity. Monopsony does not just imply lower wages for affected workers, but also a misallocation of resources: wages, employment and social welfare are lower when firms have monopsony power, compared to competitive labour markets"*. Where employers have the power to simply terminate contracts and then re-set conditions, they are essentially granted such unilateral power.

The **International Labour Organisation** argues that: *"The recognition of the right to collective bargaining is the key to the representation of collective interests. It builds on freedom of association and renders collective representation meaningful. Collective bargaining can play an important role in enhancing enterprise performance, managing change and building harmonious industrial relation"* ("Freedom of association and the effective recognition of the right to collective bargaining"). It seems to us that dismissal and re-engagement goes beyond the autonomy of an employer to make a decision when "when collective bargaining is officially at an end" on a specific matter. It undermines the entire relationship. As Charlotte Nichols MP put it in a House of Commons debate on Wednesday 15 June 2022: *"Fire and rehire makes employment rights and contractual terms and conditions basically worthless"*.

The **OECD** also says that *"protecting living standards ..... requires rebalancing bargaining power between employers and workers, so that workers can effectively bargain for their wage on a level playing field"*.

Whilst "dismissal and re-engagement" has "always" been a potential course of action for employers, there is a feeling that it has recently become more widespread - with high profile examples at companies such as British Airways, Tesco and British Gas.

"BritainThinks" conducted an online survey for the TUC of 2,231people in England and Wales between 19th November – 29th November 2020, which found that that nearly 1 in 10 had been told to re-apply for their jobs on worse terms and conditions or face the sack.

We feel that many people, confronted with the recent real examples that have caught public attention, have reached the same conclusion - that there is something unacceptable about this practice, and that steps need to be taken to either outlaw it altogether or, if this cannot be done, to make the balance of obligations less one-sided. **"Personnel Today"** (30.01.23) said that *"A 2022 Reddit poll found that 75% of the British public said fire and rehire should be banned"*. Labour, the SNP and the Liberal Democrats have all called for fire-and-rehire to be banned by law and former Prime Minister Mr Boris Johnson MP felt that it is *"unacceptable as a negotiating tactic"* **(Fire-and-rehire: What is it and why is it controversial? - BBC News)**.

Professor Bogg has said that *"If the restrictions on 'dismissal and re-engagement' become too onerous, this creates incentives for employers either to restrict or even cease business operations and become insolvent"*, but against that we observe that firms throughout Europe appear to perform perfectly well under more prescriptive conditions. We have found getting precise information difficult, but **"France 24"** - "Fire and rehire: Britain's new labour battleground?" 09/05/21 - reported that: *"Fire and rehire is banned in neighbouring Ireland, while other European countries require sector-level consultation with unions and social partners when employers seek to terminate contracts"* and that *"Fire and rehire is virtually unknown in Germany thanks to legislation protecting workers on permanent contracts"*.

The approach being presented by the Government, on the other hand, goes no further than trying to ensure that there is a right way for employers to do the wrong thing. It is like having a law on burglary that simply decrees that burglars should not make a mess.

We would prefer to see legislation to prohibit entirely dismissal for the purposes of re-engagement.

There may be concern about this from the point of view that it is not normally regarded as being possible to order parties to an employment contract to continue to operate where one party no longer wishes to do so. Dismissal and re-engagement, however, seems to us to mirror those circumstances where courts already have a record of setting this aside, namely where the facts show:

- That the employer still had sufficient confidence in the employee to want the employment relationship to continue (**Powell v LB Brent 1987**)
- That the employee was willing to continue working (**Wadcock v LB Brent 1990**), or
- That the employee was seeking to have the situation returned to that where it would have been, had it not been for the employer's breach (**Robb v LB Hammersmith and Fulham 1991**)

(See **Labour Research Department** booklet "Contracts of Employment" p27).

If it is thought that simply establishing a more challenging environment for the practice would be preferable to an outright ban, we submit that the focus should be on two possibilities.

Both really involve imposing constraints on the power of termination of contract, even where a contract makes provision for this to be done. To some extent, this is already applied in respect of "unfair" dismissal - so it merely involves the extension, rather than the invention, of a principle.

The first possibility would be to legislate that once an employer has indicated an intention to dismiss employees for the purpose of reengagement, even where a contract allows for termination on notice, the employees should be permitted to identify an anticipatory breach of contract and sue for damages.

To be effective, such an approach would be best combined with a commitment to implement those recommendations of the **Law Commission's Report** on "Employment Law Hearing Structures" (28.04.20), which proposed:

"that employment tribunals should have jurisdiction to determine claims by an employee and counterclaims by an employer for damages for breach of, or a sum due under, a contract of or connected with employment notwithstanding that the employee's employment has not terminated"
and

"that the current £25,000 limit on employment tribunals' contractual jurisdiction in respect of claims by employees be increased to £100,000 and thereafter maintained at parity with the financial limit upon bringing contractual claims in the county court".

The second measure, which, incidentally, need not be "either/or", would involve tightening the definition of the statutory grounds on which any dismissal might be regarded as being "fair" and "reasonable". The rarity of "dismissal and re-engagement" in some other parts of Europe would appear to relate less to differences in temperament than to it being "more difficult" to sack employees under any circumstances.

In in **Kent County Council v Gilham and others (No.2) [1985]** the Court of Appeal considered a specific case where an employer dismissed staff who refused to accept a unilateral worsening of their terms of employment and found that its actions were unfair because it felt that in the circumstances this employer acted unreasonably in treating the reason in this particular case as a sufficient reason for dismissal. But precedent is not strong enough to give any employees faced with similar circumstances the confidence that they will be treated accordingly.

One key issue is whether the test of "some other substantial reason" should apply in cases of dismissal and re-engagement.

Barry Gardiner MP proposed in the House of Commons an "Employment and Trade Union Rights (Dismissal and Re-engagement) Bill", for instance, that suggested the following in regards to the Employment Rights Act 1996:

"In relation to an employee who claims to have been unfairly dismissed in circumstances in which the reason (or, if more than one, the principal reason) for the dismissal is that the employee has refused to agree to a variation of contractual terms—
(a) section 98(1)(b) shall not apply save that it shall be for the employer to show that the reason for the dismissal fell within section 98(2);
(b) section 108(1) shall not apply".

An additional measure would be to amend Section 98(4) of the Act to provide that a tighter test of "reasonableness" should apply, so as to make it unfair to dismiss an employee for economic or organisational reasons that are not necessary to the survival of the business, and define a burden of proof.

We are less inclined to advocate a particular form of words in these regards than to note that the Government made no adverse comment as to the practicality of Mr Gardiner's Bill, and simply indicated that they were not "minded" to legislate. The implication we draw is that legislation, as suggested, would be perfectly feasible.

What is equally clear is that a **"Code of Practice on Dismissal and Re-engagement"** will entirely fail to settle or draw a line under this issue. There will continue to be efforts to implement substantive reform and Trade Unions will continue to pursue industrial and legal actions.

We suggest, however, that Para.58, might be strengthened by requiring that employers at this point should provide to all the employees affected a written statement outlining their arguments on

the areas identified, and specifying that the reasons given in this statement will be the reasons considered by the courts in determining the reasonableness of the employer's decision to dismiss.

One specific part of the Code that gives us concern, in addition, is that which deals with "continuing to work under protest", where an employer has imposed contractual changes without resorting to dismissal. The Draft Code says (Para.53) that: "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". We do not see the point of the "regular intervals", which introduces an unnecessary potential further bone of contention. One letter should be enough.

KAREN NARRAMORE
SECRETARY – BLACKBURN & DISTRICT TRADE UNION COUNCIL
UNISON Office
Room G2
Staff Residence
Royal Blackburn Hospital
Haslingden Road
Blackburn
BB2 3HH