Linklaters

EMPLOYMENT & INCENTIVES

Draft code of practice on dismissal and re-engagement

January 2023

The government has published its long-awaited draft code of practice on dismissal and re-engagement. The draft code contains detailed and prescriptive requirements as to the process employers should follow when terminating contracts of employment and seeking to re-engage on new less favourable terms and conditions. While the code effectively builds in safeguards for employees, some employers may struggle to meet some of its more stringent obligations. A consultation on the draft code is underway and will remain open until 18 April 2023.

The practice of terminating and re-engaging employees as a means of imposing less favourable terms and conditions first came to the attention of the public in the early stages of the pandemic. A number of high-profile companies suffering the economic effects of the pandemic were criticised for using the process as a means of making workforce wide changes to reduce pay and introduce less favourable working arrangements.

The government debated whether to ban the practice but concluded that unintended consequences, such as job losses, could flow from legislating to prohibit employers from terminating and re-engaging. Instead, it committed to the production of a code of practice to provide protection for employees.

Termination and re-engagement: the legal risks

When an employer wants to make changes to terms and conditions but is unable to reach agreement to do so with its workforce, one option available to it is to terminate existing contracts and offer re-employment on new terms. The advantage to the employer is that it affords a greater ability to mitigate risk than unilaterally imposing a change to terms and conditions. However, the employer will nonetheless be at risk of claims for breach of contract, unfair dismissal and, in some circumstances, discrimination.

Purpose and application of the draft code of practice

The draft code of practice on dismissal and re-engagement (the "**Draft Code**") was published on 24 January 2023. The Draft Code is intended to provide practical guidance with a view to ensuring that employers take all reasonable steps to explore alternatives to dismissal and engage in meaningful consultation with employees and their representatives in good faith. It emphasises that threats of dismissal should not be made as a means of putting undue pressure on employees to accept new terms instead of finding an agreed solution.

The Draft Code applies in situations where an employer who wishes to make contractual changes envisages that without agreement to the changes by employees it might dismiss and re-engage them, or engage new employees or workers.

It does not apply where an employer envisages dismissing on grounds of redundancy where the redundancy situation meets the Employment Rights Act 1996 ("**ERA 1996**") definition (see *Redundancy* below). However, the Draft Code will still apply in other circumstances where the duty to collectively consult applies such as business reorganisations where 20 or more employees are to be dismissed. The Draft Code expressly acknowledges that employers may have to comply with its obligations concurrently with other legal obligations, such as collective consultation.

Redundancy: definition in s.139 ERA 1996

An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:

> The employer ceasing to carry on the business for the purpose of which the employee is employed;

> The employer ceasing to carry on the business in the place where the employee is employed;

> The employer having a reduced requirement to carry out work of a particular kind.

No minimum threshold

The Draft Code applies regardless of the number of employees affected by the employer's proposals so there is no requirement that 20 or more employees be in scope as per the requirements of collective consultation. Similarly, there are no exemptions to the Draft Code for small or medium sized businesses which may have more difficulty in meeting some of the more stringent requirements.

Failure to follow the Draft Code

Although breach of the Draft Code does not in itself give rise to a claim, the code is admissible in evidence in proceedings before a court or employment tribunal and must be taken into account.

Where an employer fails to follow the code and an employee brings proceedings for unfair dismissal, unauthorised deductions from wages, breach of contract, discrimination or various other claims and the claim concerns a matter to which the Draft Code applies, the tribunal can increase any award it makes by up to 25%. It can also reduce the amount of an award by 25% in the event of an unreasonable failure by an employee to follow the Draft Code but the obligations on employees are limited.

The Draft Code

Considering the need for changes

The Draft Code places particular emphasis on the importance of examining the need to make changes in light of the seriousness of the consequences for employees. In particular the code indicates that an employer should consider:

> Its objectives.

> The negative consequences of acting unilaterally (including the risks to the employer's reputation, damaging relationships with the workforce or trade union, the potential for strikes, the risk of losing valued employees, the risk of legal claims and the time and cost involved in defending such claims).

> The potential for discriminatory impacts including whether there is likely to be a disproportionate impact on a specific group of employees with a shared protected characteristic.

> Alternative ways of achieving its objectives.

Examining the need to make changes should be viewed as an ongoing requirement, rather than a single event, which the employer should revisit on several occasions as the consultation process progresses and during notice periods (see *Consultation* below).

Provision of information

The Draft Code emphasises the importance of providing information in order to try to reach consensus. Employers should share as much information as possible as early in the process as possible in order to allow employees to understand, ask questions and make counter proposals. This includes providing information about:

> The nature of the proposals.

> Who will be affected.

> The business reasons and rationale for the proposed changes.

> The timeframe for the proposed changes and the reasons for the timeframe.

> The benefits of any changes.

> The impact on the employer if the changes do not take place.

> Other options that have been considered.

Employers may also be under an obligation to provide other information pursuant to other applicable legal obligations.

Consultation

The key tenets of the consultation process are that it must be meaningful and must be conducted in good faith. The employer should listen carefully to objections, seeking to understand reasons and consider alternative proposals that are made, genuinely exploring whether they are workable.

While the Draft Code does not lay down any specific timeframe for consultation, it plainly envisages that it will last for a substantial period of time. A longer consultation period is likely to allow for a more in-depth discussion and deeper understanding of the requirements. It notes that it is unusual for it to be detrimental to consult for a lengthy period of time.

Following consultation, there are three potential outcomes:

1. Agreement is reached on the new terms.
2. Agreement is not reached and the employer unilaterally imposes the new terms.
3. Agreement is not reached and the employer dismisses and re-engages the employees on the new terms (or engages new employees).

Agreement is reached on the new terms

Where an employer and employee have been able to agree on the changes, these should be confirmed in writing within one month if they relate to any of the basic employment particulars like pay, benefits or hours of work as required under Section 1 ERA 1996.

The Draft Code recommends maintaining good communication with the employees and inviting feedback as they adapt to the new terms.

Beware! Employees working under protest

If an employee works under the new terms but has made it clear that they have not accepted them, this could result in a dismissal if the changes are substantial. In such a situation, an employer would be vulnerable to unfair dismissal, breach of contract, and/or unlawful deductions from wages claims. In practice, employers may need to consider how to persuade employees to expressly agree to the changes.

Unilateral imposition of new terms

Where it has not been possible to reach agreement, employers might consider imposing the terms anyway (either with or without a contractual power to do so).

Even where a contractual power to vary the contract exists, the Draft Code requires employers to consider the limitations of relying on such terms to make fundamental changes such as to levels of pay.

Where there is not a contractual power to make unilateral changes, the Draft Code warns that going ahead and imposing the changes will likely damage industrial relations and carries legal risk. Employers should therefore explore all reasonable alternatives first and in line with their ongoing requirement to consult, they would be expected to continue to discuss the changes with the employees/their representatives in a genuine attempt to reach agreement and to understand how they could improve any adverse impacts.

Any new terms should be shared with the employee in writing, explaining the nature and impact of the changes and when they will apply, giving as much notice as possible.

Dismissal and re-engagement

The Draft Code reiterates that dismissal should be a last resort. Before making the decision to dismiss, employers should again reconsider whether the changes are necessary (see *Considering the need for changes*).

Notice

Where an employer has decided to dismiss and offer new terms, the Draft Code envisages situations where it will be appropriate to give employees a longer period of notice than that required under their contract, for example where a longer notice period will help employees to make arrangements to accommodate the changes. The employee's contractual notice should be seen as the minimum period.

Phased introduction of changes

The Draft Code suggests employers consider a phased introduction of changes where they are implementing more than one change.

Practical support

There is a requirement for employers to consider whether any practical support like relocation assistance, coaching or counselling could be offered.

Re-engagement on new terms

In line with the requirements under the ERA 1996, employers will need to confirm the new terms in writing. The Draft Code provides that good practice is to re-engage employees as soon as possible to preserve continuity of service (generally a week with no contract in place will break continuity).

And it doesn't all end for employers after re-engagement. The Draft Code expects employers to continue their discussions with employees to see if they can do anything to mitigate any negative impact of the changes and to monitor the situation over time in case they are able to revert to the previous terms. This could include agreeing to a future review of the changes to see if they remain necessary.

Consultation questions

The consultation questions seek views on whether various steps in the Draft Code are necessary, including the requirement to re-examine business strategy when it becomes clear that employees are not prepared to accept the proposed changes and the detailed information sharing requirements. Ultimately the government wants to understand whether the Draft Code strikes the right balance between protecting employees on the one hand and retaining business flexibility on the other.

Commentary

With the requirement for employers to periodically revisit whether imposing new terms is necessary and the emphasis on adopting longer consultation and notice periods, the Draft Code provisions will undoubtedly impact the time frame for businesses looking to make contractual changes. However, for businesses facing financial hardship or smaller employers, compliance with such provisions might be potentially unworkable particularly when grappling with concurrent obligations like collective consultation.

This could leave some businesses exposed to higher awards against them if a Tribunal finds that they have unreasonably failed to comply. And whilst the Tribunal can also take into account any unreasonable failure on an employee's part to comply (and decrease any award as a result), their obligations under the Draft Code are extremely limited. For example, there will be no penalty for an employee who unreasonably refuses to accept an offer of new terms after meaningful consultation. It is therefore conceivable that there will be more situations where the award is instead increased for an employer's unreasonable failure to comply given the prescriptive obligations on their side.

The Draft Code requires employers to consider the discriminatory risk of their actions. Such a risk might arise, for example, where changes to working hours disproportionately impact more women because they are more likely to be responsible for childcare. However, this is merely a requirement to take into account the risk rather than to change plans to avoid such a risk.

With the Draft Code having been long in the gestation, it is likely that the government will move promptly to bring it into force following closure of the consultation process. As such, employers considering undertaking workforce processes involving dismissal and re-engagement should begin factoring the Draft Code into their plans.

Contacts

Nicola Rabson
Partner, London
Tel: +44 20 7456 5284
nicola.rabson@linklaters.com

Jean Lovett
Partner, London
Tel: +44 20 7456 3698
jean.lovett@linklaters.com

Sinead Casey
Partner, London
Tel: +44 20 7456 2723
sinead.casey@linklaters.com

Louise Mason
Senior Associate London
Tel: +44 20 7456 4080
louise.mason@linklaters.com

Kloe Halls
Associate, London
Tel: +44 20 7456 3341
kloe.halls@linklaters.com

linklaters.com

GC27400_F/01.23