

TACKLING DISMISSAL AND RE-ENGAGEMENT STRATEGIES

Introduction

With funding cuts hitting hard across the public services, employers are increasingly targeting terms and conditions in the search for major reductions in paybill costs. Among the strategies adopted by employers in mounting these attacks, dismissal of staff and re-engagement on inferior terms and conditions has emerged as a particularly aggressive tactic. This factsheet seeks to clarify regulations relating to dismissal and re-engagement as well as exploring the options available to branches in responding to such policies.

The organising response

Legal avenues in responding to dismissal and re-engagement strategies are set out below but the most effective response in practice usually lies in strong organisation of the workforce to make the employer think again.

The uncertainty and concern caused by an employer advancing proposals for dismissal and re-engagement of staff are likely to create an environment where employees will be receptive to the union's message and a recruitment campaign can be expected to deliver results, especially if staff see the union defending their interests through the process.

Mapping of the affected workforce will be a key starting point for any organising campaign and branches should seek to pinpoint early on the number of members, staff and other union members affected by the proposals. Gathering of information on the number and type of workplace reps affected, as well as identifying the physical location of members / activists will enable branches to move on to the next step of effective targeting.

Getting out to talk to members and staff individually, holding workplace meetings and utilising other communication tools such as leaflets or email networks will all be elements in a branch's armoury. In this way, the implications of the proposals can be set out, views can be gathered and branches will be in a position to take forward the priorities highlighted by members in defending terms and conditions.

Putting pressure on employers over their proposals can also be assisted by considering what other groups outside of the union may have an interest in the campaign (such as a local community group, councillors or newspapers) and targeting them with briefings on the proposals.

Ultimately, of course, if the employer cannot be persuaded to back down or make concessions, the value and feasibility of industrial action will need to be considered. To assist in establishing that a valid trade dispute exists for an industrial action ballot if it is necessary to go down that route, early registration of a trade dispute with the employer linked to the proposed redundancies is extremely valuable.

Such collective action offers protection in a way that individuals refusing to sign a new contract never can, since such workers are highly exposed if legal cases fail to come down in their favour. However, the next section of this factsheet explains the legal rules that apply in cases of dismissal and re-engagement, along with the possible grounds that can be available for legal challenge.

Consultation Requirements

For the purposes of consultation rights, proposals to dismiss employees in order to re-engage them on new terms must be treated as redundancy, even if it is not intended that any employee will be left out of work. This position rests on the Collective Redundancies Directive (Directive 98/59/EC) which defines “redundancy” as a situation where workers have become surplus to requirements or where they are dismissed because of a reorganisation or restructure. Such a dismissal does not have to be because the amount of work or business the organisation is receiving has diminished.

The application of collective redundancy consultation to dismissals for the purpose of changing contract terms was clarified in the case of *GMB v Man Truck & Bus UK Ltd* [2000] IRLR 636 EAT. In this case, the company sought to harmonise two different sets of terms through dismissal and re-engagement. However, the Employment Appeals Tribunal ruled that the dismissals were not connected to the employees and therefore were redundancies for the purpose of collective consultation, even though no jobs had been lost.

This means that, for any proposals involving the dismissal and re-engagement of 20 staff or more, Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 applies.

Period of consultation

This legislation places a requirement on the employer to consult representatives of the affected employees according to the minimum timetable set out below.

- Open consultation at least 30 days before the first of the dismissals takes effect where between 20 and 99 staff are facing dismissal at one establishment.
- Open consultation at least 90 days before the first of the dismissals takes effect where 100 or more staff are facing dismissal at one establishment (the minimum period is set to fall to 45 days from 1 April 2013)

This is a minimum requirement and ACAS recommends that consultation should be at “an early enough stage to allow discussion as to whether the proposed redundancies are necessary at all.”

It is important to guard against any employer attempts to chop up the proposals in a way that enables them to argue that “establishments” are individual workplaces containing fewer than 20 or 100 employees and therefore Section 188 does not apply or only the lower consultation period takes effect. Wherever possible, the union should build the case for the “establishment” to cover the whole workforce and thereby seek the maximum consultation rights. Branches should refer cases to the region to seek legal advice if employers seek to escape from the requirements of Section 188 by manipulating the definition of an “establishment.” The workers’ position on this point was strengthened in 2013 by the case of *USDAW v Ethel Austin Ltd*, which set a precedent that Section 188 applied even if the 20 employees were spread across separate offices, branches or stores.

Content of consultation

Section 188 specifies that consultation shall cover ways of:

- Avoiding the dismissals;
- Reducing the numbers of employees to be dismissed;
- Mitigating the consequences of the dismissals.

Employment tribunals have made it clear that consultation must be genuine and meaningful, while proposals are still at a formative stage. This position was bolstered by the ruling in *Middlesbrough Borough Council v TGWU and UNISON* [2002] IRLR 332, where the Employment Appeals Tribunal established that it was insufficient for the employer to consult over ways of reducing the numbers to be made redundant, it also had to consult over ways of avoiding the dismissals altogether. The European case of *Junk v Kuhnel* [2005] IRLR 310, went one step further to say that consultation must begin before any notice of dismissal is given, not just before any notice ends.

However, in the context of dismissal and re-engagement, consideration of these issues takes on a slightly different character to standard proposals for collective redundancies. Consultation needs to address the proposed changes to terms and conditions that lie behind the proposed dismissals, exploring their justification in equality, financial or other terms, the possible alternatives that would avoid dismissal or the changes that could limit the number of staff affected.

As part of the process, Section 188 specifies that the employer must disclose in writing (by post to the trade union's head office or handed to representatives) the following information:

- a) The reasons for the proposals;
- b) The numbers and descriptions of employees it is proposed to dismiss as redundant;
- c) The total number of employees of any such description employed by the employer at the establishment in question;
- d) The proposed method of selecting the employees who may be dismissed;
- e) The proposed method of carrying out the dismissals, taking account of any agreed procedure, including the period over which dismissals are to take effect;
- f) The proposed method of calculating any redundancy payments, other than those required by statute, that the employer proposes to make.

It is for the employer to provide information in relation to each of these items and it is no excuse for the employer to say that the representative already knew the answer and so did not suffer any prejudice. In *Securicor Omega Express v GMB* 2004] IRLR 9, the Employment Appeals Tribunal found that there had been a technical default on items c) and f), and the sanction for the employer was a one-day protective award (i.e. one day's salary) per employee.

In addition to the Section 188 requirements, the general duties of the Public Sector Equality Duty place a requirement on a public authority to examine the possible discriminatory impact of its proposed changes to terms and conditions and take appropriate steps prior to any implementation. Wherever possible, a branch should press for a full equality impact assessment to fulfil this requirement.

Possible grounds for legal challenge

Collective claim

Where there is a breach of a "collective" obligation in Section 188, then the remedy is for the trade union (and not the individual employee) to bring a claim to the employment tribunal.

The remedy is in two stages.

1. The first stage is a complaint seeking a declaration that the employer is in default, and, if appropriate, a "protective award" (the employee's gross earnings for a maximum of 90 days). If the employer is liable, then the award is payable in respect

of all those employees who have been dismissed as redundant or all those that the employer proposed to dismiss as redundant.

2. The second-stage remedy is that any aggrieved employee may complain to an employment tribunal to enforce payment of any sums due to him or her.

A complaint may be presented to an employment tribunal by the union that the employer has failed to comply with any requirement of s 188 (duty to consult) or s 188A (election of "special" employee representatives) within three months less one day of the date of dismissal.

Unfair Dismissal

Failure to consult with the employee or his or her representative may make a dismissal unfair, and so give the employees an additional ground of complaint against the employer. However, compliance with s 188 does not automatically mean that the employer has behaved reasonably with regard to consultation and failure to comply with s 188 does not automatically mean that the dismissal is unfair.

The ordinary principles of dismissal will apply. For dismissal to be considered fair, an employer has to show that an employee has been dismissed for a "potentially fair" reason that falls within one of the categories below.

- Lack of Capability (including ill health)
- Misconduct
- Redundancy
- Contravention of a Law
- Some Other Substantial Reason.

In the case of dismissal and re-engagement, the reason would fall within the "some other substantial reason" category as this encompasses the need to impose dismissals for a "sound business reason."

The case of *Forshaw and others v Archcraft Ltd* [2005] IRLR 600 EAT is an example of where an organisation has been unable to establish a sound business reason for dismissal and re-engagement. The company had decided that, as its contracts did not contain a restraint clause, it risked losing both staff and customers to a competitor. The employees were therefore dismissed in order to be re-engaged on terms and conditions that included a 12-month nationwide "non-compete" clause. However, the employment appeals tribunal ruled that this clause was wider than was needed to protect the business so the dismissals were unfair.

In general though employment tribunal decisions suggest that the burden of proof needed to show a sound business reason for the dismissals is fairly low. The other avenue for seeking to demonstrate unfair dismissal lies in the fairness of the procedure followed. An employment tribunal would focus on the following key points in determining whether the employer acted reasonably.

- The employer's motives for introducing the changes to terms and conditions;
- The employees' reasons for rejecting the changes;
- Whether the employees were given reasonable warnings of the proposed changes;
- Whether the changes and their impact were sufficiently explained to the employees;
- Whether the employer undertook an assessment of the impact of the changes on employees and whether alternatives to any changes were considered;
- Whether the employer attempted to obtain the employees' voluntary agreement to any of the changes;

- Whether a reasonable and genuine consultation process was undertaken with the affected employees. This would include the employer listening to their reasons for rejecting the changes, responding reasonably to objections and making concessions where reasonable to do so;
- Whether a majority of the employees accepted the changes;
- Whether any recognised trade union recommended or objected to the changes.

To have full protection from unfair dismissal an employee whose employment began on or after 6 April 2012 must have two year's continuous service with the same employer (if their employment began before 6 April 2012 they need only one year's continuous service) and notification to an employment tribunal must be lodged within three months less one day of the last dismissal. However, in the event of a finding for unfair dismissal each employee can make a claim of up to £74,200.

An employee may be unfairly dismissed even if they choose to sign up to a new contract of employment (i.e. where there has been a dismissal and an immediate re-engagement on inferior terms and conditions) with the employer.

Other potential claims

The adequacy of the public authority's steps to examine the equality impact of its proposals and the resulting steps taken to meet the general duties of the Public Sector Equality Duty offers another possible area for challenge

Small “establishments”

Where an establishment genuinely covers less than 20 employees, legal rights to consultation are limited to the requirements set out by the Information and Consultation of Employees (ICE) Regulations 2004. These consultation rights can be entered into voluntarily by an employer or triggered by a request from 10% of employees within an “undertaking” of more than 50 employees. The ICE regulations are summarised in the Information and Consultation Factsheet that can be accessed through the link at the end of this document.

Checklist

On announcement of proposals

Ensure Section 188 consultation rights are applied and “establishment” is interpreted correctly to offer maximum rights



Ensure specified consultation period begins in good time and by date specified under Section 188 as minimum



Launch recruitment campaign



Gather information from employer in accordance with duties placed on employer by Section 188



Explore economic justifications put forward by employer for changes, possibly with assistance of Freedom of Information Act or ACAS code on disclosure of information for collective bargaining purposes (see additional sources of information for web links)



Target affected staff with campaign built around their priorities in defence of terms and conditions



Set out alternatives to proposals



Seek equality impact assessment of proposed changes



If proposals proceed.



Consider legal redress -
lodging notification to
employment tribunal
within three months of
dismissal

Consider whether to
pursue industrial
action strategy

Additional useful sources of information

UNISON Guide to Negotiating and Campaigning with the Freedom of Information Acts
www.unison.org.uk/acrobat/B1959.pdf

Disclosure of information to trade unions for collective bargaining purposes
www.acas.org.uk/media/pdf/2/q/CP02_1.pdf

UNISON Unfair Dismissal Factsheet
www.unison.org.uk/file/Unfair%20Dismissal%20Factsheet.doc

UNISON Public Sector Equality Duty Factsheet
www.unison.org.uk/file/Public%20Sector%20Equality%20Duty%20Factsheet.doc

UNISON Collective Redundancy Factsheet
www.unison.org.uk/acrobat/B2781.pdf

UNISON Information and Consultation Factsheet
www.unison.org.uk/file/Information%20and%20Consultation.doc

Industrial Action Handbook
www.unison.org.uk/acrobat/18193.pdf