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REVIEW

VARYING WORK CONTRACTS IS RARELY PLAIN SAILING

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VARYING WORK CONTRACTS IS RARELY PLAIN SAILING

Advocate John T Aycock of M&P Legal reviews the controversial practice of 'fire and rehire' and highlights steps afoot in UK to protect affected staff.

Fire and re-hire, as a way of enforcing a contract change, is topical again in the Isle of Man as the state-owned ferry company managed staffing transitions to suit its new flagship vessel.

In the UK too this controversial employer practice is under review. A draft statutory code of practice on dismissal and reengagement is pending approval by Westminster Parliament. Should it become a statutory instrument, it will provide a protective framework for employees faced with this procedure.

It is worth recapping the rationale behind terminating the contract of employment and offering a new one starting seamlessly. Employers do this to enforce a contract change. It should very much be a last resort. So how should an employer seek to change the contract of employment?

In fact, changes to the contract of employment happen very regularly for instance each pay review usually results in a change to the remuneration term. Employees consent to that (unless the review decreases remuneration which might then be actionable by the employee). The problem amendments are when the employee does not consent. Some employers might seek to rely on a contract clause that ostensibly permits an employer to make unilateral change to terms and conditions – most contracts of employment include such a clause. But the mere existence of that power in the contract does not confer on the employer free range to effect any change. There is Isle of Man Tribunal authority confirming that such a power does not permit an employer to make a harsh or unreasonable change and Courts will be reluctant to approve any such change. Certainly if an employer seeks to rely on an express variation clause then it should as a basic first step conduct early and full consultation with staff otherwise it could be in breach of the implied term of mutual trust and confidence.

If there is no sufficiently enabling variation clause and employees do not consent to the proposed change in contract terms after meaningful consultation, then what further steps can the employer take? Clearly it is far better for businesses to procure employee buy in to changes as this helps unify the enterprise as a whole and strengthens the business' common identity and aims. This is why consultation is so important and should involve employee representatives and unions as early as possible in meaningful and transparent dialogue.

In law, an employer can ultimately enforce a unilateral change by dismissal and reengagement provided it acts reasonably which broadly means: there is a good business rationale for the change, it is a lawful

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change, meaningful consultation has taken place, individual circumstances have been considered (for instance to identify possible indirect discrimination that might result) and there are no other reasonable alternatives by which the employer can achieve its legitimate aim to effect the change.

The Isle of Man Government itself adopted this dismiss and re-engage process in 2013 when budgetary constraints prompted changes such as the removal of paid lunchbreaks for bus drivers; a union challenged the process by multiple claims. After a long test case hearing, the Isle of Man Employment Tribunal (as it then was) delivered a 206-page judgment finding in favour of the governmental employer; the 63 bus driver claimants were unsuccessful in their unfair dismissal claims. Overall, the employer had acted reasonably, it was found.

The UK draft Code of Practice aims to give employers guidance on how to act in these situations. The key components are:-

- Employers must consult and explore alternative options;
- The fire and re-hire procedure should not be raised unreasonably early or deployed as some form of negotiating tactic; and
- Dismissal and reengagement should be used only as a last resort.

In its introduction, the draft Code states:

'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.'

If adopted, the Code would apply to UK employers regardless of the number of staff affected. However, failure to follow the Code would not in itself make the employer liable to proceedings but would be admissible as evidence in labour law claims. This is similar in effect to our Code of Practice on Disciplinary and Grievance Procedures 2007 of Tynwald (in my experience, a helpful and much underused document).

Staff faced with the prospect of fire and re-hire certainly do have protective rights. If the dismissal and reengagement takes place, for instance, they can continue to work for the employer on the new terms under protest while claiming unfair dismissal arising out of the termination of the former contract. But it is an odd and uncomfortable situation to be claiming unfair dismissal against your current employer - and hardly conducive to healthy working relations.

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In the Isle of Man we have some clear case law principles that protect staff faced with this process. It may be that if the draft UK principles currently under discussion are indeed codified then the Isle of Man might seek to adopt such a Code. However, the principles in that Code do not seem to be markedly different from the case law principles that have evolved in any event - although its express disapproval of early or tactical threats of the practice is likely to be helpful. It is sometimes forgotten that dismissal and reengagement is a potentially lawful and useful manner in which an employer can enforce a necessary contract change for the benefit of the business. This is probably why legislators do not go as far as outlawing the practice. It creates political noise and easy social media soundbites but can nonetheless be a legitimate, if unpopular, way to effect a necessary contract change.

Management should always proceed with great care when considering how to effect change given the huge importance to a business of keeping staff on board (not a reference to the Manxman) and observing the crucial implied term in every contract of employment that the employer and employee will act with mutual trust and confidence.

John T Aycock is head of the employment team at M&P Legal and has 34 years' experience of advising on labour law matters in three jurisdictions.

Caveat: This article is not legal advice. Specific advice should be sought as to the facts of each individual case given the complexity of relevant employment laws.

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