HR in the East Midlands

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In Deep with Darren

The practice of forcing through a change in terms and conditions by dismissing employees and offering them new contracts has been attracting a lot of political heat recently. Darren Newman's article addresses "fire and rehire tactics" along with the new Statutory Code of Practice aimed at addressing the issue.

The Labour Party has pledged to ban the practice if it comes into power – although it is not entirely what that would actually involve. Their campaign must have been hitting home however because the Government has responded by promising a new Statutory Code of Practice aimed at addressing the issue.

The press release that goes with the announcement[1] is long on rhetoric and short on detail. However, it appears that what is planned is a Code of Practice issued by the Secretary of State that will have to be taken into account whenever cases are brought to an Employment Tribunal. Until the actual content is published -and that might take a while - it is impossible to judge how meaningful this will be. Will it really make it harder to justify a dismissal and reengagement exercise or will it simply set out the principles that Tribunals already apply?

This latest announcement has of course been prompted by the controversy around P&O. The blatant way in which P&O chose to ignore the legal requirement to consult employee representatives before they announced the sacking of 800 workers has attracted outrage. Rather oddly, however, the proposed Code is aimed at employers using 'fire and

[1] New statutory code to prevent unscrupulous employers using fire and rehire tactics - GOV.UK (www.gov.uk)

rehire tactics' - and this is not what P&O did. The dismissed employees were not being offered reengagement on reduced terms – indeed they were not being offered reengagement at all. We will have to wait and see what the Code actually says but I would be surprised if it was confined to dismissal and reengagement scenarios. It will surely be applicable to all large-scale dismissals – whether they are redundancies or aimed at achieving a change in terms and conditions.

There will be some scepticism that a code of practice will make much difference, but I wouldn't necessarily dismiss the idea out of hand. A Statutory Code will have to be taken into account by Tribunals and it would be perfectly possible to draft a code that shifts the balance in terms of when resorting to large scale dismissals is a reasonable option.

Under the law as it currently stands the range of reasonable responses test applies. If an employer decides that dismissals are necessary – whether or not they will be followed by reengagement on different terms – the Tribunal must ask whether that was a decision open to a reasonable employer. There is no requirement that the employer's actions must be a last resort after all other options have been exhausted. What is needed is a reasonable business justification for the decision taken. The Tribunal cannot probe that too deeply without being held to have substituted its own view for that of a reasonable employer.

But if the Code of Practice were to require the employer to exhaust alternative options before deciding to dismiss, that would make a difference. The Tribunal would be judging the employer not against the standard of what other employers would do, but against the standard set in the Code. This could make it harder to justify resorting to dismissal and reengagement in order to change terms and conditions or to opt for large-scale redundancies.

I suspect, however, that the Code will not go so far. More likely is a Code setting out the principles that already apply with a focus on the importance of consultation. But the problem with employers like P&O is that they already know all that. P&O knew that dismissing so many staff without warning or consultation would lead to Tribunal claims that they would have no hope of winning. They simply calculated that it made commercial sense to implement their decision and reach settlements with the employees affected. If P&O were prepared to disregard the legal requirement for consultation and a fair dismissal process, they are hardly going to be deterred by a Code of Practice telling them what they already know.

Ultimately it comes down to the economic consequences of ignoring the law. Any Government that genuinely wants to prevent employers from behaving like P&O in the future will need to significantly increase the amount of compensation that Tribunals award when an employer fails to consult.

At the moment, such compensation is quite modest. The failure to consult representatives in the P&O case would lead to employees being given the maximum award of 90 days' pay. This is not a huge amount, but it does at least relate to the seriousness of the employer's failure rather than the loss inflicted on the individual employee. The same award is made to all the dismissed employees – even those who have suffered little or no loss as they have been able to find work elsewhere.

In theory, unfair dismissal compensation can be higher – capped at one years' pay. But the reality is that the maximum amount is rarely awarded – especially in cases of redundancy. Where the unfairness arises from a failure to consult then the Tribunal will have to decide what would have happened if full and fair consultation had taken place. If it concludes that the outcome would probably have been the same, then that will be reflected in the compensation awarded. So an unfairly dismissed employee may only get compensation covering the two or three weeks that a fair consultation process would have taken. In announcing a new Code of Practice the Government makes the point that a failure to follow its provisions will result in Tribunals being able to increase compensation by up to 25%. That is true, but a 25% increase in an award of two weeks' pay is not going to be much of a deterrent for employers looking to bypass the consultation process.

Local authorities, of course, do not act with the same disregard of the law as some commercial organisations

choose to. They cannot be so reckless with public money and they need to have regard to the views of the communicates they serve. But changes to the way in which redundancies are treated by Tribunals will still have an impact on how local authorities will approach restructuring exercises and the economic risks they are taking when they decide to go down the dismissal route. This new Code of Practice – when it emerges – could have a significant impact.