outset.

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work place news by Chloe

Changing Terms of Employment – Fire & Rehire

Recent, highly publicised, events have brought the practice of 'fire & rehire' into the spotlight and led to the government announcing that a new Code of Practice will be introduced.

What is fire & rehire?

It usually starts with an employer wanting to change terms and conditions of employment. For example, altering hours of work or pay in a way that will disadvantage the employee.

The first step is to check whether the contract of employment contains specific flexibility wording that allows the employer to make the change they want.

If it does, it's usually fairly straight-forward to introduce the change. It's rare though that substantial negative changes will be permitted by the contract.

In those cases, if the employer introduces the change without the employee agreeing, the employer will be in breach of contract.

In this type of situation, the employer has no defence to their actions and will be exposed to a claim which the employee has a high chance of being successful with.

For employees with at least 2 years' service, the employer could be facing constructive unfair dismissal as well as breach of contract claims.

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The editor's welcome

With the joys of Spring in full flow everything seems better when it's sunny, doesn't it?

This month we have a couple of guest writers including a great piece for those Ed Sheeran fans among you, from trainee solicitor Molly Mackay. We also take a look at changing terms and conditions of employment and some interesting employment discussion points taking place at the moment.

As always, please follow us on LinkedIn to make sure you don't miss out on important updates in between newsletters.

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This month...

The Shape of You... & your reputation

A guide to reputational damage for employers

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Spotlight on... Garden Leave

What is garden leave and how can employers use it?

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Employment & HR Discussion points

Ongoing developments happening in the HR & employment law sphere.

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To minimise these risks, employers should consult with employees about the proposed changes and seek their agreement. If, ultimately, employees fail to agree and the employer is determined to introduce the changes, one option is to dismiss those employees who don't agree. That's the fire bit.

The potential fair reason for dismissal in these situations is usually some other substantial reason (SOSR). If the employer followed a fair and open consultation process and was reasonable in dismissing the employee for failing to agree the change, they have the prospect of being able to defend claims of unfair dismissal.

The employer can go one step further, and offer the employees immediate re-engagement (which, naturally, will be on the new, amended terms). That's the re-hire bit. By doing this, the employer is providing the employee with an opportunity to mitigate their loss. In other words, an employee bringing an unfair dismissal claim is under a duty to mitigate – and the employer has offered them that opportunity, thereby reducing the risk of the employee being able to obtain substantial, or any, compensation.

Collective consultation

When an employer knows they want to make a contractual change:

- that isn't permitted by the contract,
- is detrimental
- and if employees don't agree, they may decide to dismiss them, they must carefully consider how many employees it affects.

If it's 20 or more at a single establishment then this will trigger collective consultation obligations. That means consultation for a minimum of 30 or 45 days (if 100 or more employees are affected) before any dismissals can take effect, and ensuring consultation with an appropriate representative employee body. There are other procedural requirements involved, which must be followed to minimise the risk of the employer being exposed to claims or fines.

The fire & rehire misconception

There is a common misconception that an employer can simply give 30/45 days' notice of a proposed change to contractual terms, pay lip service to 'consultation', then dismiss anyone who fails to agree at the end of that period, with impunity.

That isn't the case. Even if a proper consultation process has been followed, it doesn't automatically mean that the employer will be acting reasonably in dismissing those who don't agree to the changed terms of employment. There's even more risk involved if affected employees are protected by TUPE.

Nevertheless, this widely held misconception has led to the practice of fire & rehire being fairly common on both small and large scales. Not only that, but many employers conduct the process as a tick box exercise, often without even realising the risks they're taking.

The new statutory code

On 29 March the government announced that it will be introducing a new statutory code to crack down on fire & rehire practice, and on employers who fail to engage in meaningful consultation with employees.

The aim of this Code is to build on guidance issued by Acas in November 2021 that said employers should only consider fire and rehire as a last resort. The new Code will include the parameters for employers to operate within when seeking to change terms of employment.

An unreasonable failure to act in line with a statutory code usually increases the risk of an employer being held liable and, where an employer is, an uplift in compensation of (usually) up to 25%.

Is this the end of fire and rehire?

In short, no. Fundamentally, fire and rehire is the use of a number of established principles of law, many of which are laid down in statute. The Code is unlikely to have much of an impact on those responsible employers who already ensure they act fairly, within the law and take specialist advice.

What the Code will do is help bring all employers into line – educating those who are unaware of how they should be handling the process, and punishing those who ignore the rules.

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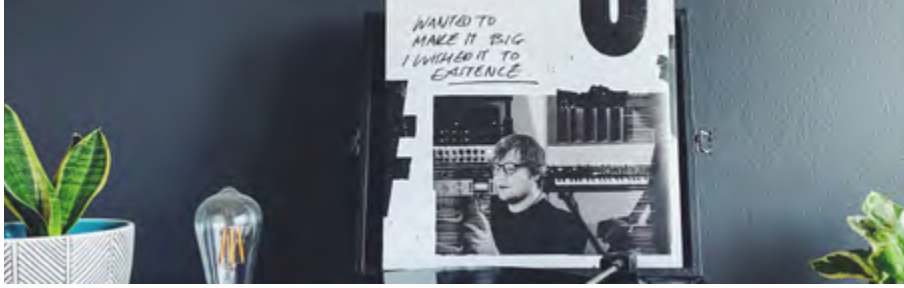
Guest Article

The 'Shape of You'... and your reputation



As the hit track 'Shape of You' is currently the most streamed song on Spotify, with over 3 billion streams worldwide, singer Ed Sheeran could have previously been forgiven for thinking that the catchy lyrics and hard-to-ignore beat would the most commonly associated thoughts with his work.

However, in the recent high-profile copyright case, Sheeran and his co-writers were accused of copying the 2015 Sami Chokri song 'Oh Why' and passing off the work as their own.

After a lengthy trial, Sheeran was ultimately successful and has criticised so-called 'damaging' claims such as this, and their impact on songwriters.

Despite the ultimately favourable outcome for Ed, the initial damage to Sheeran's reputation has inspired us to visit the topic of employee behaviour, when this can cause reputational damage to their employer.

Can potential reputational damage lead to dismissal?

There are five reasons for which an employee could potentially be fairly dismissed, including misconduct and some other substantial reason (SOSR).

In some cases, Employment Tribunals have found that where certain employee misbehaviour outside of work is associated with their employment, causing tangible damage to that company's reputation, this could give grounds for a fair dismissal. Depending on the circumstances, this could be categorised as a misconduct or SOSR dismissal.

An example of a forum with an increased likelihood of reputational damage occurring is social media. It is estimated that there are over 50 million active social media users in the UK, therefore it is unsurprising to imagine that employees can sometimes post comments on their personal social media that may bring their employer into disrepute.

Whilst it is outside of an employer's reach to control what employees post on their personal social media, it may be possible to take action following any unacceptable posts.

Should an incident take place for which the employer feels that action is needed, initial caution should be exercised. The employer must make it clear that a risk of genuine reputational damage is the reason that disciplinary action (perhaps even dismissal) is being considered.

A fair process must be followed and the employee given the opportunity to have their say. Once a fair process has taken place, the employer must decide on the appropriate course of action. When it comes to dismissal, the employer must act reasonably in treating the conduct as sufficient reason for dismissal.

It should be noted that reputational damage cases are rarely straightforward. By way of example, just because an employee has been charged with a criminal offence, that does not automatically permit an employer to dismiss them fairly.

Should any resulting reputational damage be sufficient, the employer would need to show a legitimate connection between the alleged incident and the damage to reputation for the employer – this includes whether there is likely to be any negative press coverage.

If an incident occurs leading the employer to be concerned about possible reputational damage, it is important that a proper process is followed.

Some top tips for employers when considering these matters include:

- Having an up-to-date Code of Conduct and also considering implementing other policies such as a Social Media and Internet Policy.
- Noting that each case is very fact-specific and avoiding taking disproportionate action based on assumptions about potential damage to their reputation. If in any doubt, it would be sensible to seek legal advice.
- Ensuring that a correct process is implemented should any action be taken regarding the matter. This includes, but is not limited to:
    - Establishing the facts of the case through a thorough investigation;
    - Informing the employee in writing of the matter and inviting them to a disciplinary meeting;
    - Allowing the employee to be accompanied to the meeting and ensuring that this is carried out by an independent individual not involved in the investigation stage;
    - Deciding on the appropriate outcome and informing the employee in writing accordingly; and
    - Providing the employee with the opportunity to appeal.

Employees should be mindful of their behaviour outside of the workplace. Most people think they can post whatever they want on their social media, for example, but individuals should be sensible as, in worst case scenarios, their employer could dismiss them on the basis of the potential reputational damage.

Molly Mackay
Read more about Molly here or contact her here.

Positively Working with Ayda

How's my tone?

Composing an email to senior colleagues, partners, clients, solicitors on the other side and entire distribution lists can be nerve-wracking to some or second nature to others.

The average person receives over 100 emails a day and sends out approximately 40 work emails daily. So it's important to get the words right. With just a few clicks you could come across overly friendly, dry, vague, unprofessional or even hostile. The recipient may never meet you in person but forms a preconception based on the words that you type.

Experience in the art of email writing helps. There are many elements to consider like addressing the email to the right person, using the correct title, including an appropriate subject line, the accuracy of the content, correct spelling and grammar and actually remembering to attach the attachment!

One thing that can be easily missed is the appropriate tone of the email. It is so easy to feel frustrated, stressed and send a rushed email without reading it through objectively. We are ever more aware about mental health triggers and everyone is continuing to deal with the aftermath of the pandemic. No-one enjoys receiving an email that comes across passive aggressive or sounds like they have been shouted at.

Despite our bad days, in fact even acknowledging you may be having one and taking extra care to proof read an email, may help you temper any unnecessary hostility. Read it through and imagine how you would feel if you were the recipient. A well-mannered and professional email will often have the same desired outcome.

Discussion points

Here are some updates on a few ongoing topics in the employment field:

4-day working week

We've written previously about the national trial of a 4 day working week that a number of businesses are taking part in. A recent paper looking at the move to a 4 day working week (at the same rate of pay) reports that it would improve productivity as well as addressing a number of other issues. The paper says that moving away from such a work-focused way of life will see improvements across well-being, social cohesion and inequality.

However, this can only have maximum impact if it's something that is adopted nationwide, and the paper reports that state intervention is needed in order to achieve this.

A 4 day working week may seem like a pie in the sky idea, but that's what everyone thought in 1926 when the Ford Company introduced the 40 hour, 5 day week without reducing the pay of their staff. It took another 14 years but it became the standard around the world, making an enormous impact to peoples' quality of life. Edsel Ford's words seem just as relevant today as they were then:

> "Every man needs more than one day a week for rest and recreation...The Ford Company always has sought to promote [an] ideal home life for its employees. We believe that in order to live properly every man should have more time to spend with his family."

More redundancies?

An Acas survey reports that almost 1 in 5 UK employers are planning to make redundancies in the next 12 months. The lion's share comes from large employers, those with 250 employees and more, with 30% considering redundancies over the next year.

These are surprising results considering the huge number of vacancies being advertised and reported challenges across the board of recruitment. It could be that many employers as they grow and focus on strategy moving forward are finding new ways of working, resulting in different needs from their workforce.

Menopause

Over 600 employers have signed the Menopause Workplace Pledge – part of a campaign by Well-being of Women.

The pledge demonstrates a commitment to open, positive and respectful dialogue at work about the menopause and active steps to support employees. Household names like the Royal Mail and Tesco have already put in place measures to support their menopausal staff by looking at things like the material of their uniforms and internal discussion campaigns.

Around three quarters of employers have no menopause policy and fewer than a quarter provide line manager training. It's a fact of life that simply can't, and shouldn't, be ignored. By equipping themselves with knowledge from organisations like Well-being of Women, employers can place themselves at the forefront of providing the best support possible to their employees.

Gender pay inequality

YouGov has published results of a poll finding that women are less likely than men to ask for (and get) a pay rise.

60% of women polled have never asked for a payrise compared to 48% of men. Of those who do ask for a payrise, 31% of men are successful compared to 21% of women.

The age breakdown is interesting, with younger men and women coming out fairly evenly matched. The real disparity starts to show in those aged 30 and older. It seems that social class makes little difference for men, but the gap grows even bigger for working class women.

The Fawcett Society, a leading charity for gender equality, suggests that it's the gender imbalance in flexible working due to childcare commitments that is playing out when it comes to pay. Women who feel they have already been cut slack over a flexible working request, may be less likely to ask for a payrise.

There is likely a multitude of factors that are contributing to these findings, but it does suggest that employers still need to do more to address gender pay inequality, including challenging scenarios like this. For example, if a male employee requests and is granted a payrise, does he have a female counterpart who hasn't asked but deserves the rise as well?

RECENT CASE LAW

Allen v Primark Stores Ltd

Establishing the PCP in indirect discrimination cases

Ms Allen was a Department Manager at Primark. Following her maternity leave, she requested flexible working prior to her planned return in November 2019, due to childcare responsibilities.

The main challenge for Ms Allen's was that she would be required to be available for working Thursday late shifts. She felt that, as a woman and due to her responsibilities with childcare, she was substantially disadvantaged.

Primark made some adjustments but ultimately insisted she make herself available for the late shifts on Thursdays. Ms Allen resigned and claimed constructive dismissal and indirect sex discrimination.

Arguing that Primark applied a provision, criterion or practice (PCP) that managers had to guarantee availability for the late shifts, Ms Allen submitted that this put women with childcare responsibilities at a particular, substantial, disadvantage.

The Employment Tribunal found that when considering the comparison pool of two men, who would work the late shifts in emergencies only, and one woman (Ms Allen), women were not at a particular disadvantage.

However, Ms Allen's appeal to the EAT was upheld, where it was found that the Tribunal had erred in its definition of the complaint. Where the Tribunal had focused on Ms Allen being 'asked' to work on the late Thursday shifts, the EAT determined that the correct PCP was in fact that Ms Allen had to 'guarantee' that she would be available for these shifts. Her two male colleagues were not subject to the same guarantee. This meant that the pool of comparison had been incorrect. The Tribunal's decision was set aside and the case remitted for a re-hearing.

This case demonstrates that in indirect discrimination claims, the comparator is someone subject to exactly the same PCP as the claimant.

Mental health

A consultation has been launched with the Department for Health and Social Care seeking views on improving mental health and wellbeing. Two main challenges have been identified:

1. The need for a clear role for employers to prevent the onset of poor mental health; and
2. Wider implementation of workplace interventions to support mental health

The discussion paper focuses heavily on the role of employers in helping to prevent and address poor mental health.

This is an opportunity for employers to have their say in a topic that continues to become increasingly relevant.

Responses can be submitted via an online survey which is open until 5 July 2022.

New guidance

Here are links to new and updated guidance issued in the last month that are relevant for employers:

NEW **EHRC guidance on the provision of services to trans people:** the Equality and Human Rights Commission has published guidance for service providers or separate or single-sex services and their approach to trans service users. This guidance will help service providers determine whether, and how, they can provide single sex services and how such services apply to trans people. For example, single-sex hospital wards, women's only homeless hostels and sports activities limited to single-sex.

NEW **ICO guidance on data protection** following relaxation of COVID-19 measures. This includes guidance that employers will find relevant concerning the collection of information about testing and vaccination.

REVISED **guidance from the Health and Safety Executive** following relaxation of COVID-19 measures. The guidance confirms that restrictions are being replaced by public health advice (see below).

NEW **public health advice on living safely with respiratory infections following relaxation of COVID-19 measures**. The guidance talks about COVID-19 in conjunction with other conditions, like the flu, and sets out four steps to reduce spread and protect higher risk individuals: get vaccinated, let fresh air in, practice good hygiene and wear face coverings. Employers should refer to the general guidance when deciding workplace policy, reviewing safety measures, and dealing with related employee matters.

Several pieces of COVID-19 related guidance for those in social care settings have been removed following withdrawal of the vaccination mandate. These have been replaced by **Coronavirus (COVID-19) testing for adult social care services** and **COVID-19 supplement to the infection prevention and control resource for adult social care.**

RECENT CASE LAW

White v HC-One Oval Ltd

Voluntary redundancy can still result in unfair dismissal

The Respondent in this case was an operator of care homes and announced redundancy plans for their reception and administration staff. Ms White was one of the employees provisionally selected for redundancy. She went on to apply, and be accepted for, voluntary redundancy.

Following this, Ms White submitted a claim for unfair dismissal surrounding three points, one of which was that the redundancy process had been doctored to dismiss the two part-time receptionists whilst offering a recently joined receptionist, with no childcare responsibilities, a full-time position. An alternative role also became available during the redundancy process which wasn't offered to Ms White.

The Respondent submitted that Ms White had been fairly dismissed due to her application for voluntary redundancy and therefore, the claim should be struck out as having no reasonable prospect of success – the Employment Tribunal agreed.

On appeal, the EAT found that the Tribunal was wrong. They stated that there could not be a finding of no reasonable prospect of success, had consideration been properly given to whether the process was a sham, as Ms White had suggested. Additionally, if Ms White's submission of the surrounding incident to the case was successful, there were likely to be further facts requiring consideration.

The case was therefore remitted to be heard by a new judge.

This case is a good reminder that even in cases where someone volunteers for redundancy, it isn't a given that the employer will be immune to claims of unfair dismissal. Employers should still follow a fair consultation process and continue to consider whether there are alternatives to redundancy.

Spotlight on... Garden leave

Garden leave is a tool employers can use to keep an employee who is serving their notice period out of the business. It's the employer's choice whether to place an employee on garden leave, and it can apply for some or all of the notice period.

The key point to remember is that, unlike PILON (see our March newsletter), the employment will continue and the employer must carry on paying the employee their normal salary throughout the notice/garden leave period.

The advantages of using garden leave are that the employer can prevent the employee from starting new employment sooner, potentially with a competitor. At the same time, the employee can be excluded from the workplace and therefore having access to confidential information, clients and even other employees. Particularly in acrimonious situations, it can be a helpful tool.

Employers should ensure that they have the contractual right to place an employee on garden leave before doing so, to avoid the risk of claims for constructive unfair dismissal and breach of contract.

Bear in mind that holiday will continue to accrue during garden leave. In many situations, an employer will be able to require the employee to take any accrued outstanding holiday during garden leave, avoiding the need to pay it out in lieu on termination. You need to ensure your garden leave or holiday contractual wording cover this, or that the correct amount of notice for taking holiday is given.

You should also check your contract wording carefully to see what other terms are affected by garden leave. For example, any post termination restrictions will usually be reduced by the amount of time the employee spends on garden leave.