



LITTLETON

What are the risks of running a dismissal and re-engagement process

David Reade QC

The Options

1. Is there a contractual provision which enables variation?
2. Even express terms will be subject to the implied duty of mutual trust and confidence, *United Bank v Akhtar* [1989] RLR 507
3. Express Agreement (Consideration and evidence of agreement, consideration may be continued employment)

Collective Consultation

- S.188 Trade Union and Labour Relations (Consolidation) Act 1992
- Proposed dismissal of 20 or more employees within a 90 day period at one establishment
- Technical redundancy because dismissals not relate to individual circumstances, GMB Man Truck and Bus Ltd [2000] IRLR 636.
- One may hope that it will not be necessary to dismiss 20 or more, but the obligation is engaged on the worst case scenario, Hardy v Tourism South East [2005] IRLR 242
- Therefore the question has to be addressed at the beginning of the process.
- HR1 Form notification to the Secretary of State, criminal offence to fail to do so. Covering letter explaining nature of redundancies

Consultation with whom

- Appropriate Representatives
- Trade Union recognised for collective bargaining, check that recognised for whole work force, if not affected employees outside must still be consulted
- Existing representative forum with a mandate to be consulted on collective redundancies
- directly elected by the work force for the purpose of consultation
- At least 45 days before the first dismissal takes effect if, 100 or more
- 30 days 20 or more but less 100
- Minimum period consultation should begin in good time
- Provide information for consultation, information consistent with a normal redundancy process but has to be provided

Consultation with a view to agreement

- Consultation with a view to agreement
- Ways and means of avoiding dismissals
- May in context be listening to counter proposals on variations which may give rise to agreement on the part of individual employees
- Safe course of action not to serve notices to terminate employment until end of relevant period
- Agreement could be reached with the representatives to serve the notice earlier

Other obligations

- Obligations to consult with Information and Consultation Forum, set up under the ICE Regs 2004
- Changes within the scope of a European Works Council?
- Changes impacting on pension scheme, obligation to consult under Occupational And Personal Pension Schemes (consultation by Employers and Miscellaneous Amendment) Regs

Individual Consultation

1. The need for individual consultation
2. Ultimately it has to be a fair process
3. “any other substantial reason”
4. Discrimination issues, indirect discrimination issues. Consider an equality impact assessment even if not evident on individual cases
5. Disability/associative discrimination

The danger of unfair dismissal claims

1. This may be the case even where employee has accepted the new contract
2. Hazel v The Manchester College [2014] EWCA Civ 72 [2014] IRLR 392
3. Seeking reinstatement or re engagement on the previous terms (actually a TUPE case)
4. Employer cannot be compelled to do so, but lost benefits may be awarded to the date of reinstatement re engagement order
5. But employees have to show unfairly dismissed



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