



COUNCIL NEWSLETTER JUNE 2022

What is Fire and Re-Hire, and can Councils Change their Employees' Contracts?

The term “Fire and Re-Hire” was one of those phrases like Furlough Leave and Hybrid Working, that have emerged out of the pandemic. But what exactly is it, and can it benefit a Council?

Fire and Re-Hire was adopted by big Employers such as British Airways and British Gas during the pandemic as a means of addressing lost income and high wage bills. According to their management teams it was an essential response to extreme and unprecedented trading conditions. However, critics accused the Employers of acting immorally and potentially in breach of contract. Although the P&O incident of February this year didn't involve the “Re-Hire” element; they recruited agency workers instead of ex-Employees; it resulted in a huge backlash from the public as well as a criminal investigation.

Looking at Town and Parish Councils, it is now very clear that a lot has changed in the past three years. Many have experienced a decrease in the use of community facilities, community centres and village halls. At the same time practices such as home working are now much more widespread. As a result many Councils are now looking at their current terms and conditions and staff numbers, and wondering how can they be updated to respond to these new challenges.

In light of incidents such as P&O, the Government has announced that ACAS are planning to produce a new statutory Code of Practice to help Employers make these changes, although no date has yet been set for its publication.

However demand within Councils to change and update their workforce continues to be a pressing demand. The problems caused by loss of revenues and adapting to new working patterns needs to be addressed now. One of the biggest risks to any Town or Parish Council when making such changes is that Employees will reject them, and submit claims to the Employment Tribunal for “Breach of Contract”.

Rather than waiting for these updated guidelines to be published, ACAS have already set out what steps a Council, as with any other Employer, needs to follow to be able to do this:

1. Why Make Changes

An Employment Contract is a legally binding document between a Council and its Employees, and any changes must be agreed by both parties.

Part of that agreement process requires the Council has a real need to make changes, and is acting in pursuit of a legitimate aim – the business case. What has changed to justify the Council have to propose terminating its previous agreement? Justification would normally result from something detrimental that had happened, such as loss of revenues due to reduced demand for its facilities, or the loss of a major grant.

When problems such as this happen, the Council has to respond, and as the wage bill tends to be one of its biggest budgets, it is understandable that it will come under scrutiny. Typical solutions might include reducing hours, pay rates, overtime rates, pension entitlements or sick pay, but not redundancy.

Councils need to be aware that if hours are significantly reduced, affected Employees are legally entitled to reject this reduction and to ask for redundancy. A major financial concern for Councils who are members of the Local Government Pension Scheme (LGPS) could be top up costs for those who chose to be made redundant. The LGPS should be contacted to see what the liability would be, so that this can be considered as part of the costs, before any decisions are made. This can add tens of thousands to the cost.

2. Options for the Council to Consider

Faced with such a business case, the Council has to make proposals to help it respond. This would normally entail conducting a meeting of Elected Members in closed session, to assess various options. In doing this, Members may well want to take into account;

- Potential damage such options may cause to working relationships with staff.
- The risk of claims of breach of contract as well as Constructive/Unfair Dismissal.
- The inevitable stress of going through the change process.
- Loss of valuable staff who don't like the changes.
- Bad publicity within the community.
- Possible industrial action.

To be able to defend their position, Members need to make sure that the business case is genuine and sufficiently demanding upon the Council that the option of doing nothing simply isn't realistic.

At its meeting the Council, or relevant subcommittee, needs to decide which option is most likely to address its problem, and resolve to enter into consultation with Employees over this proposed change.

It is essential that all options are referred to as proposals at this stage, and that there is no indication that a decision has already been made. The Consultation process has to

be seen to be “meaningful” and to do that, it can only concern itself with proposed changes. The final decision will be made by the Council once the consultation process has ended.

3. Time to Talk

Following the Council’s resolution, staff would be informed of the business case, and what the Council is proposing to do to address the problem. They would also be informed that the Council is conducting a consultation process with them, to ensure that the proposals are thoroughly tested before any decisions are made.

If 20 or more staff are involved, consultation has to be over a thirty day period. If the number of staff is below 20, the period can be shorter, but still long enough to be considered meaningful. Normally 2 to 3 weeks would be sufficient.

The purpose of consultation is to;

- Enable staff to challenge the validity of the business case.
- Consider alternative proposals that Employees want to make.
- Discuss the full financial implications. For example a proposal to reduce hours will obviously reduce pay, but also holiday entitlement and pension payments.

Employees should be able to consult with their line manager at any time during this period, but to make sure that staff have every opportunity to discuss these matters, a specific consultation meeting also needs to be conducted.

4. Decision Time

Once the Consultation Period has ended, the Council needs to reconvene in closed session to consider all points that have been raised by the workforce. A formal resolution can then be taken to either;

- Reject the proposals altogether.
- Accept the original proposal.
- Implement a changed proposal that has been produced in response to what Employees have raised.

Following that resolution, a formal meeting needs to be conducted with the affected Employees to inform them of the outcome. They also need to be informed that these changes will only be introduced after either their contractual or statutory notice period, whichever is the longer (statutory notice is one week for each completed year up to 12 weeks).

Employees also have the right to Appeal against the Councils decision.

5. Working under Protest

If an Employee objects to the changes and Appeals, but their Appeal fails, they can put the Council on notice that they are “working under protest”.

They would need to issue a letter stating that they disagree with the change, are working under protest and reserve the right to take legal action.

If their complaint does end up in front of a Judge, the Council has to accept that the old contract has been breached as a result of the changes. However, its defence will hinge on;

1. Did it have sufficient justification to do this? Was the problem of such magnitude that the Council had no other reasonable option but to make these changes?
2. Was there sufficient and meaningful dialogue between the Council and its Employee before making the change; i.e. the Consultation process.

PROFILE

Chris Moses LLM Chartered FCIPD is Managing Director of Personnel Advice & Solutions Ltd. He is a Chartered Fellow of the Chartered Institute of Personnel and Development, and has a Master's Degree in Employment Law. If you have any questions regarding these issues please feel free to contact him on (01529) 305056 or email p.d.solutions@zen.co.uk
www.personneladviceandsolutions.co.uk