Consultation on

Code of Practice on Dismissal and Re-engagement

Submission by Prospect to the Department for Business, Energy & Industrial Strategy

18 April 2023

www.prospect.org.uk

Introduction and Summary

Prospect is an independent trade union representing over 150,000 members. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, broadcasting, entertainment and media, defence, education, energy, environment, heritage, industry, scientific research and telecommunications.

We are happy for our response to be published.

Prospect welcomes the opportunity to respond to the consultation on the proposed Code of Practice on Dismissal and Re-engagement. We believe that this is a significant issue affecting workers across all sectors.

Before addressing the specific questions in the consultation document, we would like to make a number of general points in this introductory section of our response.

Fire and Rehire

While we recognise the Code will provide some limited improvement for employees, we strongly believe that much firmer action needs to be taken to protect employees from unscrupulous employers adversely changing their terms and conditions.

Fire and rehire is an appalling practice that has rightly received much attention over the last couple of years. However, this has been a long-standing problem, with employers using this as a threat to worsen existing terms and conditions of their workforce. Unfortunately, the law currently allows employers to use this threat to impose changes and there is no legal scrutiny on the employers' decisions.

Crucially Prospect believes that there needs to be much stronger measures to protect workers' rights.

Detrimental variation of contract

While the Code states that the position of dismissal and re-engagement should be a last resort, we believe the code should be much more explicit that terms and conditions cannot be varied unilaterally lawfully. It should stress that employers should do all they can to avoid using dismissals to impose change. We also believe it is important for the code to stress that any detrimental change to contracts should be seen as a last resort by employers.

In many cases employers use the explicit, or implied, threat of dismissal to impose the change of contract they seek. So often changes may be imposed without the employer having to actually reach the stage of discussing dismissals. The Code needs to be much stronger in challenging the earlier decision making process of the employer.

Protection for all workers from day one

Prospect believes that the Code should explicitly apply to all workers, and not just employees. This would ensure that many of the most vulnerable workers, including those on casual or zero hours contracts would have the same protection. We believe there should be a binary approach to workers' rights, which would ensure that all economically dependent workers would have statutory employment protection and only those genuinely self-employed should be excluded.

Prospect also firmly believes that all employment protection rights should apply from day one of employment. This would also provide much more significant protection against dismissal and re-engagement.

We are pleased that the Code applies regardless of the number of dismissals being considered, but to make this an effective principle there needs to be statutory employment rights to back this up. For example, while the code may apply to a group of say 19 workers each with less than 2 years' continuous employment, if those same workers have no rights to brings claims of failure to consult or unfair dismissal the impact of the Code is likely to be minimal.

Equality Impact Assessments

We recognise that it is often lower paid and less secure workers who may be targeted for changes to terms and conditions. This is likely to adversely impact black, Asian and minority ethnic, women, and disabled workers, who are often amongst the lowest paid and less secure parts of the workforce.

Therefore, we believe it is essential that an employer considering changing terms and conditions should ensure they complete an Equality Impact Assessment (EIA) of the changes. The Code recognises at paragraph 22 that discriminatory impacts should be a factor to consider, but we believe this needs to go much further and there should be a requirement on employers to do an EIA.

Such an assessment must be undertaken early in the process and must be shared with trade unions and the workforce. There must be an opportunity for consultation on the process and outcome of the EIA.

Rehire of existing workers and appointment of new workers

We welcome that the Code is clear that it covers both dismissal and re-engagement of existing workers and the situation where an employer dismisses the existing workers to bring in new workers on lesser conditions, as occurred in the outrageous situation with P&O Ferries last year. This case brought to the fore the very significant limitations with our laws surrounding the protection of terms and conditions and the obligation of employers to consult on collective redundancies.

Greater penalties for unfair dismissal/non-compliance with the Code

Whilst we are pleased that an uplift on compensation will apply where there has been an unreasonable failure to comply with the Code, we believe that for some employers this still will not act as a sufficient penalty and in some cases, this will simply be 'costed' into the dismissal and re-engagement plan.

Further, where employers risk unfair dismissal claims being brought against them if employees do not agree to the new terms, the remedies in unfair dismissal claims are often not sufficient to deter employers from taking this kind of action.

We have seen instances where employers have sought to make changes to contracts and when employees do not agree to the changes, the employer makes an offer which factors in what the employee would likely receive at an employment tribunal by way of an unfair dismissal claim. Therefore, in practice, the employee is left with very little option but to accept the changes or be dismissed (albeit with limited compensation).

Collective consultation

The Code rightly recognises that the statutory obligation to consult applies in situations of dismissal and re-engagement. This is a long-standing principle that the obligation applies wherever there is a dismissal which is not related to the individual worker's personal circumstances, so it would apply in cases of redundancy, but also to dismissals arising from reorganisations or changes to terms.

Prospect believes there should be a significant overhaul of the law on collective consultation to ensure that the legal provisions are enforceable and that employers cannot either pay lip service to their obligations or simply ride roughshod over workers' rights by paying them off.

Prospect believes the following improvements should be made to the existing legislation:

- Employers should not be able to make workers redundant or dismiss and offer re-engagement without having completed a proper consultation exercise. Unions should be able to apply for an injunction in the High Court to stop the dismissals taking effect until consultation has taken place.

- There should also be automatic re-instatement orders where a tribunal finds a worker has been dismissed without proper consultation.

- There should also be significantly higher sanctions on employers who do not comply with the consultation obligations. The current remedy of up to 90 days' pay is insufficient and should be much higher. In addition, there should be a fine against the employer and potentially criminal proceedings.

- The minimum period for consultation is currently 30 days where there are more than 20 but less than 100 dismissals and 45 days for 100 or more. This is often

wholly inadequate for meaningful consultation to take place. There are often complex consultations required and the time frame is too short. We believe a more appropriate minimum consultation period would be three months for all cases and six months for larger scale dismissals.

- We also believe the minimum threshold of 20 or more redundancies at one establishment over a 90-day period should be removed. The statutory obligation to consult should apply in all cases of collective redundancies or dismissals (i.e., 2 or more redundancies).

- The distinction in terms of the number of dismissals at each 'establishment' of the employer should also be abolished. This is often narrowly defined and can currently allow employers to avoid obligations to consult where there are only a small number of employees at a particular workplace.

- Currently claims for a failure to consult are heard by a tribunal many months after the failure occurred. We propose that there should be a speedy application process, where unions can lodge a claim for a failure to consult during the consultation period and the tribunal would hear these cases and make determinations on an expedited basis. This could mean that the tribunal would be able to make a declaration that a failure had occurred and that they should be able to make recommendations for the proper consultation. This proactive approach could save jobs.

The Role of Trade Unions

Prospect believes that many of the issues this consultation seeks to address would be significantly reduced if there was greater trade union representation in workplaces. The government should give unions better rights of access to workplaces to ensure employees and workers engage with information about their work, encourage the positive role of collective bargaining and adopt measures to extend its scope. This would also begin to redress the power imbalance between employers and workers and would drive change through the workforce.

The Code refers to the need to consult with a recognised trade union. However, we believe this message needs to be reinforced throughout the Code. It must be clear that the consultation must be with the trade union where one exists.

CONSULTATION QUESTIONS

Specific questions:

1. Paragraphs 6-10 of the Code set out the situations in which it will apply. Do you think these are the right circumstances?

We believe the situations set out are largely right. Particularly we agree that the Code should be at the forefront of the employers' considerations when wanting to make changes to terms and conditions, and not just at the point the decision to dismiss is being considered.

We also agree that it should apply regardless of the numbers affected or the employer's business reasons.

Additionally, though we believe it should extend to those on a-typical contracts, such as casual or zero-hour workers.

Further, as set out above, while the code may apply to a group of workers each with less than 2 years' continuous employment, if those same workers have no rights to bring claims of failure to consult or unfair dismissal the impact of the Code is likely to be minimal.

2. If employees make clear they are not prepared to accept contractual changes, the Code requires the employer to re-examine its business strategy and plans taking account of feedback received and suggested factors. (Steps 3 – 4 in table A and paragraphs 20 – 23 of the Code). Do you agree this is a necessary step?

Yes, it is essential that the employer is open to reconsidering their proposals. We believe the code should be more explicit in requiring the employer to consider and engage with the union on ways to mitigate any determinantal changes to the employees. An open and effective dialogue with the workers, through the trade union where there is one, is essential.

3. Do you have any comments on the list of factors which an employer should consider, depending on the circumstances, in paragraph 22 in the Code?

As mentioned in other comments, we believe that it should be clearer that the detrimental impact on the workers should be the focus. The list of factors at paragraph 22 are almost entirely focused on the needs of the employer, we would hope that a reasonable employer would also seriously consider the detrimental impact on their employees.

Employers should be encouraged to consider other means of saving costs or reducing profits before reducing workers' terms and conditions. Employers should be reminded that legally the contract cannot be varied without agreement.

4. The Code requires employers to share as much information as possible with employees, suggests appropriate information to consider, and requires employers to answer any questions or explain the reasons for not doing so. (Steps 5 and 6 in table A and paragraphs 24 – 42 of the Code). Do you agree this is a necessary step?

Yes, it is a necessary step.

5. Is the information suggested for employers to share with employees at paragraphs 25 and 33 of the Code the right material which is likely to be appropriate in most circumstances?

We believe the information to be provided should reflect existing provisions for disclosure of information for collective bargaining. The explanation of information which is required and the manner of disclosure as set out in the Code of Practice on Disclosure of Information have worked well and are understood by many employers already, these provisions should be included in this new Code.

Prospect also believes that an Equality Impact Assessment should be undertaken by the employer, in consultation with the union, and the outcome of that assessment should be shared with employees.

6. Before making a decision to dismiss staff, the Code requires the employer to reassess its analysis and carefully consider suggested factors. (Step 13 in table D and paragraphs 57 – 59 of the Code). Do you agree with the list of factors employers should take into consideration before making a decision to dismiss?

Yes, subject to our comments throughout this response, that all other options need to be considered first and the impact on the workers must be a prime consideration.

7. The Code requires employers to consider phasing in changes and consider providing practical support to employees. (Step 15 in table D and paragraphs 61 - 63 of the Code). Do you agree?

Yes, as a matter of principle this is right. There needs to be full consideration of the way changes are made.

We note that at paragraph 61 the Code says the employer should give as much notice as possible and the contractual notice period as a minimum. We do not accept that the contractual notice period should be applied as a minimum, as in many cases this will reflect the statutory entitlement and may only be a week or a few weeks.

Instead, we think the Code should require a set period, of say 3 months notice, and that this should only be departed from in exceptional circumstances. Providing a longer period would significantly assist employees who may need to make alternative arrangements or decide to seek a new job.

General questions:

8. Do you think the Code will promote improvements in industrial relations when managing conflict and resolving disputes over changing contractual terms?

It may help somewhat, particularly where there is an organised trade union with informed representatives.

However, it should be noted that unless the law is also strengthened, there may be little impact on the worst employers. The code in our view would have had little impact on the P&O Ferries situation. There will still be cynical employers who decide the penalties

for breaching the Code (and indeed the law currently) are worth the risk to drive through the changes they want to make.

9. Does the Code strike an appropriate balance between protecting employees who are subject to dismissal and re-engagement practices, whilst retaining business flexibility to change terms and conditions when this is a necessary last resort?

No, we believe the Code needs to stress the adverse impact on employees and strengthen a number of provisions, as we set out above, to protect workers.

10.Do you have any other comments about the Code?

Prospect believes the section on the purpose of the Code (1-5) needs to be much more cognisant of the impact on the workers of detrimental changes. Whilst it is right that the practice of fire and rehire can adversely impact on industrial relations, create reputational risks for the employer, surely the most negative consequence is on the livelihood of individual workers, and we believe it is crucial that the Code majors on this as the reason it really should be an absolute last resort.