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'Fire and rehire' – guidance for employers

What this practice is, why you should avoid it, and how to approach it if no other options are available

Where an employer needs to make contractual changes to an employee's terms and conditions this should always be approached through consultation and agreement with the employee(s) involved.

In exceptional circumstances, where there are genuine and pressing business needs and agreement cannot be reached, employers can sometimes be justified in unilaterally changing workers' terms and conditions by terminating their contracts and re-hiring them on new terms and conditions.

The CIPD's view is that such 'fire and rehire'* practices should only ever be considered as an absolute last resort if changes to employment contracts are critical and voluntary agreement is not possible.

Employers must recognise that this approach creates a high risk of legal claims, reputational damage and an adverse effect on employee relations. It should only be undertaken after extensive consultation and consideration of all other alternatives.

In this guide, we look at the laws around 'firing and rehiring' and, more importantly, ways to find a different solution.

*'Fire and rehire' – also known as 'dismissal and re-engagement' is not a new practice. It is legally allowed in the UK but does carry serious risk of costly claims and wider commercial repercussions if not managed or implemented correctly.

The impact of COVID-19 has had a huge effect on employers, causing operational disruption, increased supply costs, loss of revenue, reduced productivity. They have had to react, adapt and effect change to their processes.

Where contractual changes to employment terms and conditions have been sought,

organisations can reach agreement with employees, either through individual or collective discussion.

But the context of heightened disruption and business challenges has meant that some employers have been forced to consider firing and then rehiring their employees where an agreement can't be reached to vary the employment contract. In these situations, organisations will dismiss an employee from their current contracted employment and offer them employment under new terms – often less advantageous for the employee, but which are believed to be essential for the business.

When faced with difficulties, employers should first look to bring about a mutual agreement to change contracts through effective communication, explanation, and consultation with employees. This can be achieved if employees understand the immediate and pressing business need for change; for example, to reduce costs and/or improve efficiency to compete, or indeed survive.

But if they can still not obtain employee consent to change, an employer may find no option other than to fire and offer to rehire, especially where significant business impact or business survival may otherwise be a realistic consequence.

Reasons that an employer might seek to change the contractual terms and conditions of their employees may stem from a need to:

- reduce costs (salary/overtime and/or benefits)
- align with competitive or comparable internal or external market factors
- change the actual or range of working hours
- introduce or amend shift patterns
- better-meet customer demands
- increase flexibility in the job role
- upskill or multi-skill
- improve operational efficiency and effectiveness to stay competitive
- impose post-termination of employment restrictions to protect business interests.

1. Varying the contract of employment with consent

Ideally, having employees agree to any variation to their contract of employment is the best outcome, where the business rationale for the proposed change is explained through meaningful consultation that is compliant with statutory consultation requirements as appropriate.

Agreed variations to contracts of employment can be achieved by:

- issuing a new contract of employment for the employee to sign, or

- issuing a side letter to the existing contract, a copy of which they are asked to sign, or
- an agreement with the relevant trade union, if the contract of employment permits this and it is incorporated into the contract.

2. Variations permitted within existing contractual terms

Employers should review the terms of the existing employment contract to see if there is a flexibility clause that would allow variation within the current terms.

However, clauses along the lines of 'The Company reserves the right to make reasonable changes to your terms and condition of employment' would only suffice for minor contractual changes to be made – for example, a minor adjustment to tasks within a job role or a minor change to working hours.

Such a clause is unlikely to be accepted in tribunal to be relied upon for any fundamental contractual change such as reduction in pay, significant variation of working hours, reduced contractual benefits and so on without the consent of the employee or unless a variation clause specifically and unambiguously anticipates the proposed change. The employer would also be required to give appropriate statutory or reasonable notice prior to the change being affected.

3. Unilateral variation of contract – without consent

Where an employee is not willing to accept the proposed changes, an employer may choose to impose it on them as a **unilateral variation** of contract. This is a risky process for an employer to follow for the reasons outlined below:

3.1. Continuing to work under new terms

If an employee is not willing to accept a proposed change but the employer imposes it on them anyway, and the employee then continues to work under the new terms and conditions without making their objections known to the employer, after a period of time (usually months rather than weeks) the employee **could** be deemed to have impliedly accepted the change, and it would then be incorporated into their contract of employment. Exactly how long an employee must have continued to work before being deemed to have impliedly agreed depends on the facts of each case.

Employers should not assume, however, that an employee has accepted a change just because they have not specifically objected. This is especially the case regarding changes that do not affect the employee for some time, such as changes to sick pay, maternity pay or redundancy entitlement.

Example:

In the case of *Rigby v Ferodo* (1988), wages were cut by 5% to prevent closure. Rigby made it known that he did not accept the reduction but continued to work for over a year. He then claimed the amount he had lost (£30 a week) during that period. The House of Lords decided there had been a repudiatory breach of contract by the employer and the employee was entitled to claim his shortfall in full.

This case illustrates that continuing to work is not sufficient to constitute an implied acceptance of the variation, and wages reduced without consent meant that employees were entitled to claim the full amount of their continuing loss.

3.2. Working under protest

If the employee works under the new terms and conditions but under protest, in which case there is no acceptance by the employee, the employer would still be in breach of contract and the employee can issue a claim for this breach.

If the breach of contract is sufficiently fundamental, the employee could resign as a result of the breach and claim constructive unfair dismissal before an employment tribunal (assuming they have the necessary qualifying service) as well as pursuing a breach of contract claim. There will be a limit on the time an employee can continue to work under protest and keep open the option of resigning and claiming constructive dismissal. An employee may also claim that there has been an unauthorised deduction from their wages if the change affects pay.

As mentioned, apart from employment tribunal claims, an employee can bring a claim for breach of contract, but in a civil court. They will have six years from the date of the breach as long as the employee has made it clear that they do not accept the terms and are working under protest.

3.3. Refusal to work to the new terms

An employee who refuses to work to the new terms will force the employer to either consider dismissal (with the employee able to bring a potential unfair dismissal claim) or else allow them to continue on their existing terms.

Do

Have clarity and purpose in your business planning and rationale about the ‘why’ and ‘what’ you want to achieve and the likelihood and business impact of the risk of not

achieving the change.

Communicate and consult with employees outlining:

- WHERE we have been/what we did
- WHERE we are now/challenges faced
- WHAT we propose we need to do going forward
- WHY we believe these proposals are needed
- HOW we propose to implement.

Explain the commercial impact, risk and potential consequences if proposed changes are not achieved. Seek feedback, alternatives and suggestions.

If there are 20 or more employees who could be affected by the proposed change, consider starting a collective consultation process from the beginning, especially if fire and rehire is a possibility – whilst at all times aiming to seek agreement.

- Commit to consultation with a view to seeking agreement and demonstrate efforts taken to reach a compromise.
- Consult, consult, consult!
- Confirm meeting discussions in writing and keep detailed notes and documentation.
- Hold individual consultation meetings with employees to discuss any questions or concerns over the proposed changes, examine any reasons put forward by them for objecting to the change and then consider if it can be varied to address their collective or individual concerns.
- Respond to employees and their representations and hold further meetings as necessary.

Be open to alternative ideas that employees or the trade union may suggest.

Consider whether offering a cash payment, additional holiday or other incentives could secure agreement.

At all times recognise you are at the stage of it all being a proposal.

Don't

Don’t start the process of changing terms and conditions with the intent to ‘fire and rehire’ as a ‘done deal’ from the outset.

Don’t use ‘fire and rehire’ as a threat at the start of consultation to pressure employees into agreeing changes to terms and conditions of employment.

Don’t ignore statutory consultation periods (a minimum of 30 days before any dismissal for 20-99 redundancies, or 45 days for 100 or more). Costly protective awards could be awarded otherwise as a dismissal to rehire on new terms is a redundancy for collective consultation purposes. Consultation should start as soon as dismissals are contemplated, ideally even earlier.

Don’t rush the consultation process. Consultation must be meaningful. You may need to demonstrate in tribunal all the steps you took, meetings held, objections raised and what you considered.

Don’t have a closed mind to other alternatives that may be suggested or be dismissive

without giving due consideration.

Don't rule out compromises to achieving an acceptable deal.

Don't jump from it being a proposal to a plan, where there has not been adequate consultation and where you have not been able to demonstrate that you have aimed to try to seek agreement or compromise.

'Fire and rehire' enables an employer to vary the terms and conditions of employment by 'firing' the employee and then rehiring them by offering new and revised terms and conditions. It can often be viewed as a 'safer' option to terminate the employment than to unilaterally vary the contract as outlined above. However, it is a practice that can be risky in terms of claims, reputational impact and significant employee relations issues and should be considered only as an absolute last resort.

1. Outline

Where an employer believes there is a serious and pressing need to change the employment terms and conditions, and the employee does not accept changes, the 'fire and rehire' process involves first **'firing' the employee**; that is, dismissing them following a period of meaningful consultation. The employer must provide the appropriate contractual or statutory notice (whichever is greater) to dismiss from the current contractual terms. It then immediately offers to **rehire the employee** on revised contractual terms, with the new terms issued to commence on the day following the termination date of the current contract.

2. Acceptance or not of the new terms

If the employee accepts the new terms, their employment will continue under the new terms and their continuity of service will be preserved.

If the employee does not accept the new terms, their employment will terminate and there is a risk that the employee could bring a claim for unfair dismissal (subject to having two or more years of service, or with less service if the claim could be made to be an automatic unfair dismissal, such as discrimination). It will be for the employment tribunal to determine whether the decision to dismiss based on the business rationale was fair and reasonable in the circumstances and for a genuine and pressing business reason.

If the trade union accepts the terms on behalf of the employee but the employee objects and does not agree to be bound by the changes, any action the employee may be

able to take will depend on whether there was a collective agreement formally incorporated into the contract of employment. If it was incorporated, including reference to changes 'as from time to time' then the employee will be bound by the changes.

3. The legal situation

3.1. Allowed but...

The concept of 'fire and rehire' or to dismiss and re-engage has received increased attention, especially during the pandemic, as a number of large, household-name companies, together with other smaller businesses, have invoked or threatened to invoke the process.

What the law permits an employer to be able to do and what an employee believes is 'right' or acceptable can often be the subject of much debate and dispute among employers, employees and trade unions, with differing opinions as to whether the practice should actually be allowed.

'Fire and rehire' is a legally allowable practice and can support businesses where there are serious, genuine and pressing reasons to make changes to terms and conditions. Employers need to conduct thorough consultation and consider alternatives before turning to this as an absolute last resort when agreement cannot be reached with an employee.

Unlike redundancy, the starting point to consider 'fire and rehire' does not need to be because of a reduced requirement for work.

An employer deciding whether or not to 'fire and rehire' must weigh up the following:

- Is there a genuine and pressing business need that could confidently be defended in tribunal, which goes beyond what is believed to be 'wanted'?

- Has full and meaningful consultation taken place and every other option and consideration been explored before making the final decision to 'fire and rehire'?

- Could temporary variations to the contract be agreed as an alternative?

- Has there been any compromise offered or acceptable 'sweeteners' that could be offered such as a monetary payment, an additional day's holiday etc to reach agreement?

- Has consideration been given to ensure that changes to terms and conditions required will not have any direct or indirect discrimination risks?

- Has there previously been a TUPE process affecting employees, where changing terms and conditions would have to comply with the TUPE Regulations which make changes to terms very difficult?

- Have other wider and commercial factors been considered, including the potential of:

- adverse reputational risk, damage to the brand and competitive position
- reduced morale among the workforce
- actively disengaged employees and reduced productivity
- conflict at work
- resignations, loss of talent and additional cost to rehire and train
- loss of trust and respect in the business and impact on organisational culture, especially if 'how' the process to be carried out is not aligned to business values, ethos, and purpose.

In another words, deciding to invoke 'fire and rehire' can be seen as taking the 'nuclear' option.

It is recommended that very serious consideration be given to all of the above before an employer takes such action as to 'fire and rehire' – and even then only as an absolute last resort.

3.2. Legal reason for dismissal – some other substantial reason (SOSR)

In situations where there has been refusal to accept changes to terms and conditions of employment and an employer believes they have:

- sound and pressing business reasons for needing to change terms and conditions, and
- consulted extensively, considered alternatives, and taken all of the above into consideration,

the employer may wish to consider a 'fire and rehire' process and this would mean dismissing for 'some other substantial reason' (SOSR), which is one of the five potentially fair reasons for dismissal.

Such a dismissal would have to be with notice.

To be potentially 'fair', a dismissal must be for one of the following five reasons:

1. Capability (performance or sickness absence)
2. Conduct
3. Illegality or contravention of a statutory duty

4. Some other substantial reason (SOSR)
5. Redundancy

3.3. Legal framework

There are various legal factors an employer must consider before contemplating or entering into a 'fire and rehire' process:

Wrongful dismissal (contractual obligation). Irrespective of length of service, statutory or contractual notice, whichever is the longest, must be served to avoid a claim of wrongful dismissal or breach of contract.

Unfair dismissal (statutory obligation). There is a two-year qualifying period for an employee to make a claim for unfair dismissal unless the individual can make a claim for automatic unfair dismissal.

Consultation. Meaningful consultation must take place with employees or their representatives, irrespective of the numbers affected by any change:

- Where fewer than 20 employees are at risk of changes to terms and conditions that could result in 'fire and rehire', meaningful consultation must take place on an individual basis. There is no requirement for collective consultation nor is there a minimum timescale to consult.
- Where 20 or more employees are at risk of being 'fired and rehired', the employer will need to carry out meaningful consultation and comply with collective consultation processes, including notifying the Insolvency Service's Redundancy Payments Service by submitting the HR1 Form.
- If 20–99 employees are affected, the minimum consultation period is 30 days. If 100 or more employees are affected, the minimum consultation period is 45 days.

Protective awards of up to 90 days' pay per employee can be awarded for failure to comply with consultation requirements.

Employees dismissed through a 'fire and rehire' process would be treated as redundant for the purposes of collective consultation but would not be entitled to redundancy pay.

4. Process if you may need to consider 'fire and rehire'

- Conduct extensive, meaningful consultation. Consider suggested alternatives and compromises at all times with a view of seeking acceptable agreement with employees.
- If 20 or more employees are affected by the change – carry out a collective

consultation process as outlined above and comply with minimum timescales for consultation. Issue HR1 forms.
- Issue the details of the proposed changes and contractual variations.
- Set a deadline for obtaining written agreement to the change and to warn employees that if agreement cannot be reached by the deadline, serving notice of termination of current contracts, and immediately offering re-engagement on revised terms is being contemplated.
- Continue consulting, trying to reach agreement, considering alternatives and compromises.
- Then, only if agreement still cannot be reached in any circumstances, send written notice of termination of employment to the employees and enclose an offer of employment on the revised terms. This will identify the reason for dismissal (likely to be 'some other substantial reason') and the effective date of termination of employment, and will state that the new terms will take effect on expiry of the notice period, providing the employee accepts the offer of re-engagement by a specified date.
- Check the notice period required to be given – it must be the greater of the employee's contractual notice or statutory notice.
- Check that collective consultation processes have been enacted if 20 or more employees are dismissed at an establishment. Legally they will be redundant for the purposes of collective consultation, but they will not be entitled to redundancy pay.
- Although the SOSR process is not covered by the Acas Code of Practice for disciplinary and grievance procedures, it is recommended that a right of appeal is provided as there is both a requirement to have a fair reason for dismissal and to have acted reasonably in the procedure adopted for dismissal and re-engagement.

5. Was the dismissal fair and reasonable?

- Whether a decision to dismiss was fair and whether the employer acted reasonably in dismissing for SOSR would depend on the wider matters that led to the decision taken:
- Did meaningful consultation take place?
- Were the reasons the changes were needed clearly explained and were they substantial, pressing business reasons?
- Were the employees and trade union representatives involved provided with adequate details about the proposed changes and impact if the changes were not agreed?
- Was enough opportunity provided to question and challenge the proposals and present alternative ideas and suggestions?
- Business considerations – its size, options, and resources available to it.

- Employee considerations and the level of detriment.
- Were there any alternatives or compromises that the employer could reasonably have made, including temporary changes, financial compensation, or additional holiday entitlement?
- Had any other employees accepted the revised terms and how many relative to those who refused?
- Had any trade union representative involved recommended that the changes be accepted?

Example:

The case of *Slade v TNT Ltd* is an example of where the employer was able to demonstrate, to the tribunal's satisfaction, that the need to cut costs through the removal of a contractual bonus was held to be fair.

6. Avoiding the need to 'fire and rehire'

As already reiterated, 'firing and rehiring' should be a last resort and avoided where possible. Employers should consider the following to stave off the need to 'fire and rehire'.

- Look at alternatives – demonstrate that the organisation is taking meaningful consultation seriously and not acting on this being 'a means to an end' to achieve dismissal and re-engagement on new terms.
- Continue consulting with a view to seeking agreement. Any defined statutory consultation periods are the legal minimum number of days, not a maximum or absolute; if there is still opportunity that compromise and agreement can be reached, keep talking.
- Additional time spent consulting to try and reach employee agreement is often management time well spent. It will be better than the impact and likely time and disruption of dealing with the consequences of conflict and dispute if 'fire and rehire' is invoked.
- If there is a promotional opportunity with a new job, could any proposed terms and conditions be incorporated as conditional in the new role, especially where there may be a salary increase?

Employers can avoid 'firing and rehiring' through open and transparent discussion, where the challenges faced by the business are explained and the issues raised by employees understood, underpinned by a genuine intent to seek an acceptable agreement. At the very least, having an honest discussion will minimise the consequences of firing and rehiring, and perhaps gain acceptance from others.

Keep talking and try to find a way to reach acceptable agreement through to the very end,

recognising that many '11th hour' agreements are reached with employees. However, don't set out with a last-minute deal as the intent.

Case study: changing employment terms and conditions

A leading Scottish university made major changes to the employment terms and conditions of its facilities staff through effective consultation and agreement with recognised unions.

Needs prompted by the pandemic

The university needed to adapt how its buildings were being used, partly due to changes in ways of working caused by the pandemic. This meant there was a growing need for teachers and students to use space more flexibly, including 24-hour access. This required thinking differently about how janitorial, cleaning, estates and security staff in its facilities function worked across a whole range of new areas, covering compliance, security, operations, technical services and frameworks and contracts.

Rethinking roles

The university designed new ways of working to improve the customer service for anyone using the buildings and associated services. It also made changes to roles to create more fixed work patterns, aimed at enhancing teamwork, career development and improving work–life balance, while reducing working long hours and excessive overtime.

All this required significant changes to the terms and conditions of 600 staff employed across the function and meant some traditional jobs were no longer needed. For example, janitorial roles evolved into a facilities services-type job, which was more multi-skilled and included providing enhanced AV support.

About 75% of people in the function transitioned into their new positions without difficulty and the changes created more roles overall than previously existed. Nonetheless, between 150 and 170 jobs were effectively either made obsolete or resulted in new roles offering a reduced take-home pay.

Consultation and a range of options

However, through meaningful consultation with the three recognised unions whose members were affected, the university developed a number of approaches to support staff adversely impacted by the proposals, which ensured changes to terms and

conditions were achieved through agreement.

Some staff were able to benefit from a ring-fenced recruitment and development plan. This meant they could move into one of the new roles at a higher grade linked to a development plan to enable them to develop the new skills they required for the new role.

The university also provided support for employees who wanted to move into management roles to ensure they had a clear career pathway and pay progression.

Other staff were provided with pay protection for a period of time, which meant they did not have to take a pay cut in their new role until they reached retirement age and could access their pension.

A further option for employees was the chance to develop a completely new career by applying for jobs in other parts of the university.

For employees who did not want to take up the alternatives offered, there was an enhanced voluntary redundancy scheme.

The university's HR director said that the long-lasting partnership with their recognised unions had provided the foundation for meaningful consultation and agreement over the changes.

'Both sides work very hard to maintain trust. We might not always agree, but where we don't, we find a way forward through dialogue. Our reputation as an employer is very important to us, so trying to force through these changes without agreement was never an option,' she said.

7. In what situations could 'fire and rehire' be considered justifiable?

If, after extensive communication, consultation and reasonable compromise have taken place, there is still refusal to accept the changes, the following situations could be considered justifiable for 'fire and rehire':

- Where a company faces potential insolvency, through increased costs and where redundancy is not an option, as there is not a reduction in workload.
- When there is an urgent and pressing need to reduce salary or benefit costs for business survival, in conjunction with other business wide cost-cutting measures being implemented.
- Where the cost of contractual redundancy pay is prohibitive and would have an

impact on the need to make more jobs redundant. Where the change is to reduce the level of contractual redundancy pay as a means of saving more jobs.

- Where an employer has traditionally operated a customer service operation Monday to Friday, 9am–5pm but through a new business contract, requires the service to also cover Saturday working. As a consequence, change in working hours cover to be rostered for five days over a six-day operation is required.
- Where a company has relied on voluntary participation in an out-of-hours 'on call' roster but which places the business at risk of failing to comply with SLA agreements with customers. Where the change is for a contractual requirement to participate in 'on call' arrangements.
- Where voluntary agreements to change terms and conditions are reached with the vast majority of the workforce, but a number of people are still resistant to the change and no other compromises can be reached.

Managing people through changing times can be difficult. Much emphasis needs to be placed on explaining the important 'whys' and 'whats' of the change.

What is also important is 'how' the process is carried out. Managers and those responsible for making changes need to be considerate, empathetic and self-aware in communicating with employees and conveying their aim of seeking employee agreement. 'Standing in the shoes' of employees being consulted with and having a high level of emotional intelligence can go a long way to achieving change in the most effective way.

Ultimately, employees may not have wanted or be happy with the outcome of a process that changes their terms and conditions. However, if they understand the reasoning, and believe the manner the process has been carried out was fair, respectful and aligned with the values of the business, there is an improved chance of being able to move forward with the new changes in a better, more open and transparent employee relations climate and an improved organisation culture for the business.

Change is a constant in business. Not only are there internal business challenges to address, but external factors like the pandemic, Brexit and accelerating technology change can also impact on job roles and the terms and conditions of employment.

How businesses go about reviewing, consulting and implementing changes will be of increasing importance.

The concept of 'fire and rehire' to achieve changes to employment terms and conditions is not something employers should consider lightly, nor start with as an intended business outcome.

Consultation needs to go as far as possible, and ideally, achieving employee agreement will be the best outcome for an employer, whether that be through individual agreement, collective consultation or collective agreement.

While 'firing and rehiring' may achieve the changes to the employment terms and conditions of employees who accept revised terms, going through this process comes with it a high risk of reputational damage, poor employee relations and disengaged employees. Employers should understand that these are very real consequences even when this is taken as a last resort.

Employers should also recognise that the employees might well sue for dismissal whether or not they accept the new employment terms. If the employer follows this guidance, then the organisation has a good chance of showing it had a fair reason for dismissal and acted reasonably by following an appropriate procedure. However, the only way an employer can be relatively sure that it will not face claims (whether the employee is re-hired or not – there is nothing to stop a re-hired employee from suing as they will still have been dismissed) is to get the employees to enter into settlement agreements as a condition for re-hiring.

A business does not have to be at the point of collapse to consider the process of 'fire and rehire', although for many organisations it may be their reality. But even in those dire circumstances, 'firing and rehiring' might still be avoided through good communication, consultation, empathetic management and considering alternatives or compromises, without that final stage being reached. Openness, honesty and transparency could achieve the desired agreement by employees, through understanding the critical business rationale and accepting the needed changes.

However, for some employers, it may be the very last option that it is left with. If there is no other way, then good practice is to ensure that how the process is carried out is not only legally fair and reasonable but conducted in a considerate, understanding, and empathetic manner.

Scenarios where businesses need to consider changes to employment terms and conditions:

Scenario 1: Planning to avoid future redundancies

A wine and beverage company was impacted during the height of the COVID-19 pandemic. Its business operation was 'stop and start'. Although it was able to take advantage of the furlough scheme for some employees during the year, it was unable to claim the grant for others who couldn't be furloughed because of their joining dates.

The directors of the business have since carried out a business review and identified that they need more robustness and protection in the company should something similar happen again, particularly if furlough may not be available in the future. They want to minimise the risk of having to make employees who they value redundant, having spent money on their training, for what could be a short-term impact.

They now want to introduce short time working and lay off clauses to the terms and conditions of all their employees, ultimately as a means to avoid knee-jerk redundancies and to be able to protect jobs where possible.

The directors are unsure whether their employees would accept the changes, fearing what they think the changes could mean for them.

Scenario 2: Changing contracted break times

A customer service team in a large, family-owned insurance company has good, long-serving employees, many of whom have become friends over the years. They have contracts of employment that have not been reviewed or updated for many years, and traditionally all employees in the department have a contractual clause entitling them to a mid-morning paid break at 10.45am and a mid-afternoon paid break at 3pm – both 15-minutes in duration – when they leave their offices en masse to go to the canteen.

This has started to become more problematic for the company, as having all employees leave for the 15-minute break at the same time is causing serious operational issues, especially in customer-facing teams, where the allocated times can be peak times for customer queries.

In the past, the directors have tried to discuss their concerns with employees. They've proposed removing the two 15-minute paid breaks, buying out the benefit by increasing employees' salaries by 30-minutes per day and installing coffee machines in the office. This allows employees to take reasonable time to enjoy a coffee at their desk on an 'as-and-when' basis based on operational need, rather than having all employees on break at the same time. Unpaid lunch breaks of 30 minutes would continue as per the contract. However, employees did not accept the proposals in the past and, as a result, the employer took no further action at the time, since new orders were coming in and it was 'never the right time' to risk experiencing what might turn into a conflict.

The situation is now having a direct impact on service-level agreements and is causing customer complaints. Also, the directors have considered the cost of the outsourced catering company they engage and determined that, while they still plan to cover the costs for proposed lunch breaks, a better solution would be to install and provide free coffee machines in the offices and not use the canteen for morning and afternoon breaks.

The directors now propose to commence a formal consultation process to consider the removal of the fixed paid breaks and stop the serving of drinks during the morning and afternoon.

Scenario 3: Introducing different roster arrangements

A logistics company employs a number of drivers on traditional Monday to Friday, 9am to 5pm contracts of employment, working 37.5 hours per week.

Given the cyclical nature of their work, with peaks and troughs each week and at different times of the week, the company is finding that it is frequently asking drivers to work overtime on some days and weeks but at other times not having enough work to give them. As a result, it's failing to meet service levels at their peak times and the cost of the overtime payments is reducing the margins it makes.

The drivers are happy with the current arrangements. They have defined fixed hours, regular and expected premium-rate overtime payments on the days known to be busy that they agree to work when asked and can expect to be paid for idle hours when there is no or reduced work.

The directors have had a shock when they have costed out the chargeable work and the amount they are paying in overtime premiums, plus the cost of no productivity on some days, where they are still paying for the time.

They've looked at the work demand, and identified that if they were to introduce a new working pattern of 150-hours to be worked over a four-week reconciliation period with a window of operation between 7am and 7pm Monday to Friday (which still equates to an average of 37.5 hours per week over four weeks, though some weeks would have more hours and other less), they would be able to roster the working hours for longer days on the busy days. This means there would be more rostered non-working days for when delivery work was known to be quieter, enabling the drivers to have guaranteed days off while still receiving the same contractual pay.

By proposing to continue paying monthly – based on annual salary divided by 12, but now with 13 reconciliation periods of four weeks rather than 52 reconciliation periods of one week – the company would reduce its overtime costs. The directors expect that the drivers may not accept what is being proposed and would be happy to continue with the current arrangements. However, the directors have forecast that to continue following this practice would, in a few months, cause the company to be make losses.

This guide was written by Jill Bottomley, Director at The HR Dept.