



## The P&O Ferries aftermath: gaming the system or business as usual?

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*9th June 2022*

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### HR Magazine

Employers breaching employment law is commonplace in the UK and the law often allows employers to buy out their legal breaches in areas such as dismissals, company acquisitions, and even discrimination.

### Dismissals

Many senior dismissals in the UK are technically unfair under the Employment Rights Act 1996, as employers often don't follow a

full fair process involving a series of meetings and attempts to preserve the employment.

Typically, the employer will offer the employee an exit package to waive their right to claim for unfair dismissal and leave swiftly and (reasonably) amicably.

It's not uncommon for exit packages to exceed the amount that an employee might hope to recover in litigation for unfair dismissal, especially once legal fees are considered.

### Company acquisitions

In certain acquisitions, the UK's automatic transfer legislation (TUPE) will operate to transfer the seller's employees to the buyer automatically. Affected employees have several legal protections, including protection of their existing employment contracts.

However, in practice, the new employer often won't want different employees on different terms, benefits, and forms of contract, so will sometimes pay employees to opt out of these rights.

### Discrimination

Employers often don't realise that certain policies or practices are indirectly discriminatory until an affected employee brings a complaint or claim.

The most common course of action at that point is for the employer to reform the offending policy and pay the employee to settle their claim (or right to claim) for any past harm caused.

The common thread in all the above examples is a breach of employment law by the employer, followed by an entirely legal agreement with the affected employee(s) – which usually involves a payment.

This flexibility for employers to deviate from the letter of the law can be beneficial to both sides of the employment relationship, as employees might often prefer a certain payment now to pursuing a given legal right.

### The solution?

There seem to be two ways forward for UK employment law.

The government could reform the law by making it harder for employers to buy employees out of their legal rights and create punitive remedies for certain breaches of employment law. Some other European countries have taken this approach, with much more procedural, restrictive employment laws with very defined penalties for non-compliance.

The advantage of this option is that it would better protect employees against the types of employment law breaches described above.

However, it would also lead to significantly less flexibility in employment relationships. Time will tell if this is a trade-off which the government considers worthwhile. It would be a dramatic turnaround from the current government's approach.

Alternatively, we can accept this tension between UK employment rights and individual agreements.

The downside of this system is that it can create bad habits amongst employers, such as what we saw with P&O Ferries.

The advantage is that in many circumstances, employers and employees can agree the solution which works best for them, rather than strictly adhering to the letter of the law.

In truth, the extreme nature of the P&O case would never be business as usual for any employer, and we certainly don't support treating employees in this way. They did game the system, with significant consequences (loss of a government contract, a proposed new statutory code for employers, a PR disaster that went on for weeks).

However, for employers trying to square today's flexible and agile business environment with UK legislation largely written decades ago, it will often be necessary to step outside the letter of the law.

Provided employers act responsibly, employees have proper legal advice and agreements reached are truly voluntary, our view is that this is better for both sides and very much business as usual.