UK Government

Making Work Pay:

Consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire

21 October 2024

Closing Date: 2 December 2024

Ministerial foreword

The government will deliver a new deal for working people. The plan to Make Work Pay sets out an ambitious agenda to ensure workplace rights are fit for a modern economy, empower working people and contribute to economic growth.

This is a cornerstone of the government's mission to grow the economy and raise living standards across the country.

Studies have shown time and time again that workers that feel safer are happier, and that workers that are happier are more productive. Strengthening workers' rights is good business for everyone – not least businesses themselves.

The UK is ranked well below the OECD average on the strictness of our employment protections on individual and collective dismissals. TUC polling in 2021 revealed that nearly 1 in 10 workers had been told to reapply for their jobs on worse terms and conditions or face dismissal.

We are strengthening redundancy rights and protections and ending unscrupulous 'fire and rehire' and 'fire and replace' practices. Crucially as part of this, we are considering how to strengthen the action people can take against the abuse of the rules, including collective consultations and fire and rehire.

Consultation periods exist as a way for employers and employees to collaborate on avoiding redundancies, such as discussing relocation or changing roles within the business.

Let me be clear - most employers do exactly that. Most employers do their best to ensure that they are going through the process properly and reach or exceed the standard expected.

However, there are employers, who are choosing to ignore their statutory obligations. Instead, they are offering their employees more money than an employment tribunal can award so that said employees will accept unlawful dismissal through individual settlement agreements. We cannot let employers believe that they can essentially outbid the law and pay their way out of their obligations.

That is why we are consulting on increasing the level of protective award an employment tribunal can make and on applying interim relief to collective consultation and fire and rehire obligations. We believe these changes would help to prevent abuse of the laws on collective consultation and fire and rehire and give employers reason to pause before not complying with their obligations in the future. They are just one part of our plans to strengthen redundancy protections for working people and end unscrupulous fire and rehire tactics.

Thank you for taking the time to read and respond to this consultation. In doing so, you are helping us build the new pro-business, pro-worker economy that delivers for everyone. I look forward to considering your responses.

Justin Madders MP

Minister for Employment Rights, Competition and Markets

Contents

Consultation details

Geographical scope:

1. The proposals would apply to England, Scotland and Wales.

Responsible body

2. This consultation is being carried out by The Department for Business and Trade's Collective Rights Team on behalf of the UK Government.

Duration

3. This consultation will run for 6 weeks. This is in line with the Cabinet Office's 'Consultation Principles' which advises government departments to adopt proportionate consultation procedures. The consultation opens 21st October 2024 and closes 2nd December 2024.

How to respond

4. Respond online at:
   https://ditresearch.eu.qualtrics.com/jfe/form/SV_56WNVgq613hJBum

   Email to: collectiveredundancy@businessandtrade.gov.uk

   Write to: Collective Redundancy, Employment Rights Directorate
   Department for Business and Trade
   Old Admiralty Building
   Admiralty Place
   London
   SW1A 2DY

Confidentiality and data protection

5. Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018, and the Environmental Information Regulations 2004). If you want the information that you provide to be treated as confidential, please tell us, but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.
   We will process your personal data in accordance with all applicable data protection laws.
   Further details can be found on the Department for Business and Trade's Public Consultations Privacy Notice
   We will publish a government response on GOV.UK.

Quality assurance

6. This consultation has been carried out in accordance with the government's consultation principles.

   If you have any complaints about the way this consultation has been conducted, please email: enquiries@businessandtrade.gov.uk

Introduction

7. The government is committed to updating Britain's employment protections so that they are fit for our modern economy and for the future of work. This is set out in the plan to Make Work Pay, which includes commitments to strengthen redundancy protections, to end unscrupulous fire and rehire practices and to ensure that there are effective remedies against abuse.

8. Under the current law businesses already have to collectively consult when proposing to make redundant 20 or more employees at any one establishment. This applies in both redundancy and fire and rehire scenarios. But they don't have to collectively consult when they dismiss fewer than 20 people at each worksite, even if they're dismissing many more than 20 overall.

9. Collective consultations are an important part of ensuring fairness and transparency between employers and employees. The benefits of consultation are felt by both employees and their employers. They ensure that affected employees can input into the process with a view to reducing or negating redundancies wherever possible and they help employers to retain skilled workers and reduce the risk of disputes.

10. That is why the government is strengthening the collective redundancy framework in a number of ways.

11. The Employment Rights Bill will amend the collective redundancy framework to ensure that employers must fulfil collective consultation obligations whenever they are proposing 20 or more redundancies, so that these obligations apply regardless of whether the redundancies are taking place at one establishment or not. This will ensure that more employees, many in vulnerable positions, will now benefit from redundancy consultation, regardless of how they might be dispersed across an employer's business. This change will also provide clarity to employees who work remotely who may have previously been unclear how the term 'establishment' would apply to them.

12. This consultation seeks views on increasing the maximum period of the protective award for failing to adhere to collective consultation requirements. The protective award is awarded by an employment tribunal where an employer has failed to consult with employees when proposing 20 or more redundancies. It is paid by the employer in question to the affected employee(s). It is currently capped at the equivalent of 90 days' pay.

13. To deliver on the commitment in Make Work Pay, the government is also taking action to provide additional protections for employees against fire and rehire. Currently employers can use fire and rehire where they have a sound business reason for seeking to change a contract of employment. This may

include responding to economic changes, changing working practices or harmonising terms and conditions. They also have to comply with collective consultation obligations when firing and rehiring 20 or more employees.

14. The government is bringing forward legislation to end unscrupulous fire and rehire tactics in the Employment Rights Bill. If passed by Parliament, clause 22 will ensure that employers can only use the practice of fire and rehire if they can demonstrate that they were facing financial difficulties that threatened their viability, and that changing the employee's contract was unavoidable (e.g. it was the only way to prevent insolvency).

15. To further strengthen the protections for workers against fire and rehire practices and in collective consultation scenarios, this consultation is also seeking views on applying interim relief to fire and rehire scenarios and collective consultation obligations.

16. The measures the government is taking on collective redundancy and fire and rehire are an essential component of building a pro-business and pro-worker economy that works for everyone. They will help ensure that employers do the right thing and engage their staff in situations where they propose redundancies or a restructure, whilst enhancing protections for workers to make them feel safer and ultimately lead to happier and more productive workplaces.

Section one: collective consultation obligations

Policy background

17. Collective redundancy obligations apply where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a 90-day period or less. In these scenarios, employers have a statutory duty to consult the affected employees' representatives about proposed redundancies.

18. Currently, the requirements for the consultation to start prior to the first dismissal depends on the total number of proposed redundancies. Where an employer is proposing to make 20 or more employees redundant from one establishment in a 90-day period, the consultation must begin in good time and in any event:
    a. At least 45 days before the first dismissal for 100 or more proposed redundancies at one establishment.
    b. At least 30 days before the first dismissal for 20-99 or more proposed redundancies at one establishment.

19. The collective redundancy consultation must be with the affected employees' trade union representatives, or other elected employee representatives where there is not a recognised trade union in place. It must be completed before any dismissal notices can take effect and must be undertaken with a view to reaching agreement where possible.

20. Where employers do not comply with these obligations, the primary means of enforcing rights under the collective redundancy framework is to make a claim to an Employment Tribunal, which may in addition to making a declaration to that effect, make a protective award of up to 90 days' pay to each affected employee. The Employment Tribunal has the discretion, under section 189 of the Trade Union Labour Relations (Consolidation) Act 1992, to vary the value of this protected period having regard to the seriousness of the employer's actions, but currently not exceeding 90 days. The protective award is designed to penalise the employer and to reduce any financial benefit to employers from not following consultation requirements.

21. Broadly speaking, the length of the protected period, for which the protected award is payable, is of such length as the tribunal determines to be just and equitable. In practice, this means the award would be linked not solely to the length of consultation but to the efforts of the employer to comply with the totality of the rules. For example, where no consultation whatsoever has taken place, a Tribunal's starting point will be the full 90 days' pay. The Tribunal will then consider whether this amount should be reduced to reflect any mitigating

circumstances for example, third party pressures or where employee representatives were unwilling to participate. The greater the extent to which the employer has attempted to comply with the consultation requirements, the lower a protective award is likely to be.

22. The government has recently laid the draft Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment of Schedule A2) Order 2024 in Parliament. Subject to Parliamentary approval, this will add the protective award to Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992. This will mean that where a party brings a successful claim for the protective award, an employment tribunal can adjust any protective award made by up to 25% if it finds that one of the parties has unreasonably failed to comply with a relevant Code of Practice, for example the Code of Practice on dismissal and re-engagement (fire and rehire).

Protective award

23. While most employers comply with their collective consultation obligations, there have been some egregious cases where employers have chosen not to fulfil their obligations on collective consultation. This has included scenarios where employers have offered their employees more generous terms in comparison to the protective award an employment tribunal can make and agreed these terms in individual settlement agreements. In 2022/23, there were 5,026 cases where employers failed to inform and consult on redundancies.

24. Employers who avoid their collective consultation obligations remove the opportunity to prevent or reduce the volume of redundancies needed. This means employers lose valuable staff and employees have their livelihood put at risk.

25. Likewise, employers should not be able to pick and choose when to fulfil their legal obligations, nor should it be financially beneficial to ‘buy-out’ employees from their rights.

26. The purpose of this consultation is to seek views on the proposal to increase the maximum period of the protective award that a tribunal can award. The government is considering two options:
    - Increase the protective award that a tribunal can award from 90 to 180 days;
    - Remove the cap on the protective award entirely. This would leave it to the discretion of the employment tribunal to decide the penalty of the employer.

27. These policy options both aim to reduce the incentive for employers to avoid their obligations. This will ensure the benefits and protections of collective redundancy consultations are experienced by more working people.

28. Increasing or removing the protective award cap entirely, would mean that Employment Tribunals would be able to grant larger awards to employees for their employer's failure to meet consultation requirements.

29. Tribunals would still retain discretion as to the length of the protected award period under either option, based on what the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's failure to comply. This means that minor failures to follow the rules or cases where there are genuinely good reasons for not being able to comply are unlikely to attract severe sanction.

30. A key attraction of either increasing or removing the cap is that it would not add any additional burdens on most businesses who already play by the rules. It would, however, mean that the small proportion of companies who flout existing rules could end up paying significantly more per employee, if an Employment Tribunal finds that appropriate. It would also likely be much more costly for employers to "buy off" potential employment claims by offering employees conditional settlement agreements. For these reasons we believe that it will help improve compliance.

31. Completely removing the cap would allow tribunals to make potentially higher awards than if the cap was increased from 90 to 180 days. This would increase the deterrent effect of the protective award, but an uncapped award could cause uncertainty for business.

32. We are seeking views on which option would best achieve the government's objective of ensuring employers fulfil their collective consultation obligations in a proportionate way, delivering the benefits that these consultations are designed to achieve for both the employer and employees.

33. While we are proposing to increase or remove the cap on the maximum protected period for calculating a protective award in the event of a failure to consult, we do not propose to apply this increased maximum period to insolvent firms. Where a company is insolvent the Insolvency Service will pay the Protective Award, but the amount is capped at 8 weeks' pay. The cap is in place to balance exposure and risk to the taxpayer of having to meet the cost of an insolvent employer's non-compliance.

Interim relief

34. The government is also considering whether interim relief should be available to employees who bring claims for the protective award. This would provide an additional deterrent against abuse of the collective consultation framework.

35. Interim relief is currently available for certain types of unfair dismissal claim under sections 128-132 of the Employment Rights Act 1996 and sections 161 – 166 of the Trade Union and Labour Relations (Consolidation) Act 1992. It would normally be applied for by the claimant at the point when they bring an

unfair dismissal claim against an employer. If the application is successful, the court would issue an order for the employer to either re-instate or re-engage the employee pending the final hearing; or, if the employer is unwilling to re-employ them, to continue to pay the employee their salary and benefits until the full hearing. An Employment Tribunal would only order interim relief in those dismissal cases which, on application, demonstrate that it is 'likely' that they were dismissed for the protected reason, in other words, that their claim has a 'pretty good' chance of being judged to be unfair in a tribunal. For example, in whistleblowing claims the claimant would need to show that it is likely that the reason for the dismissal was a protected disclosure and therefore it is likely that the dismissal will likely be deemed as automatically unfair.

36. In a collective consultation scenario, we are exploring whether an employee who makes a claim for the protective award should be able to make an application for interim relief to the Employment Tribunal. An award of interim relief would mean that the employee would be continue to be paid, pending the final hearing, but interim relief would only be awarded where the employee can show it is 'likely' that their claim for the protective award would succeed, i.e., that they have a pretty good chance of showing that their employer breached their collective redundancy obligations. This would ensure that they are no worse off pending the hearing, and further disincentivise employers from making a calculated decision to 'buy out' employees from their right to be consulted on the proposed redundancies.

37. We are interested in views on this proposal, including the impacts on employers and employees, how this would work in practice and how it might interact with any increase to, or removal of, the protective award cap.

Consultation questions

1. **Do you think the cap on the protective award should:**
    - be increased from 90 to 180 days?
    - be removed entirely?
    - be increased by another amount?
    - not be increased?

Please explain your answer

Increasing the protective award cap

2. **Do you think that increasing the maximum protective award period to 180 days will incentivise businesses to comply with existing collective redundancy consultation requirements?**

    - Yes
    - No
    - Don't Know

    Please explain why and note any other benefits?

3. **What do you consider the impacts will be on employers of increasing the maximum protective award period from 90 to 180 days?**

4. **What do you consider the impacts will be on employees of increasing the maximum protective award period from 90 to 180 days?**

5. **What do you consider to be the risks of increasing the maximum protective award period from 90 to 180 days?**

Removing the protective award cap

6. **Do you think that removing the cap will incentivise businesses to comply with existing collective redundancy consultation requirements?**

    - Yes
    - No
    - Don't Know

    Please explain why and note any other benefits?

7. **What do you consider to be the impacts on employers of removing the cap on the protective award?**

8. **What do you consider the impacts will be on employees of removing the cap on the protective award?**

9. **What do you consider to be the risks of removing the cap on the protective award?**

Interim relief

10. **Do you agree or disagree with making interim relief available to those who bring protective award claims for a breach of collective consultation obligations?**

    - Agree
    - Disagree
    - Don't Know

    Please explain your answer

11. **Do you think adding interim relief awards would incentivise business to comply with their collective consultation obligations? Please explain why and note any other benefits.**

    - Yes
    - No
    - Don't Know

    Please explain your answer

12. **What do you consider the impacts will be on employers of adding interim relief awards to collective consultation obligations?**

13. **What do you consider the impacts will be on employees of adding interim relief awards to collective consultation obligations?**

14. **What do you consider to be the risks of adding interim relief awards to collective consultation obligations?**

Further questions

15. **Are there any wider changes to the collective redundancy framework you would you want to see the government make?**

Section two: fire and rehire

Policy background

38. Employers may sometimes need to consider proposing changes to employees' contracts of employment. If employees do not agree to some or all of the contractual changes proposed by the employer, the employer may dismiss employees, before either offering to re-engage them, or offering to engage other employees, in substantively the same roles, in order to effect the changes. This is referred to as "fire and rehire". Currently employers can use fire and rehire where they have a sound business reason for seeking to change a contract of employment. This may include responding to economic changes, changing working practices or harmonising terms and conditions.

39. The threat of fire and rehire is often enough to ensure employees 'voluntarily' agree to lower pay and reduced terms and conditions.

40. The government is bringing forward legislation to change this and end unscrupulous fire and re-hire tactics. The provision in the Employment Rights Bill (clause 22) will, if passed by Parliament, ensure that employers can only use the practice of fire and rehire if they can demonstrate that they were facing financial difficulties that threatened their viability, and that changing the employee's contract was unavoidable (e.g. it was the only way to prevent insolvency).

41. Additionally, a tribunal will be required to take into account whether the employer consulted with employees and recognised trade unions in the workplace when deciding if the dismissal was fair.

42. This measure means that employers will no longer be able to use the practice as an intimidation technique towards employees to make them change to unfavourable contacts or be replaced by new employees on a less favourable contract.

43. In addition to this reform, the government is now seeking views on applying interim relief to fire and rehire scenarios.

Interim relief

44. The government is considering whether interim relief should be available to employees who are bringing an unfair dismissal claim under the new right which will be introduced by the Employment Rights Bill (subject to Parliament's approval).

45. Interim relief is currently available for certain types of unfair dismissal claim under sections 128-132 of the Employment Rights Act 1996 and sections 161

– 166 of the Trade Union and Labour Relations (Consolidation) Act 1992. It would normally be applied for by the claimant at the point when they bring an unfair dismissal claim against an employer. If the application is successful, the court would issue an order for the employer to either re-instate or re-engage the employee pending the final hearing; or, if the employer is unwilling to re-employ them, to continue to pay the employee their salary and benefits until the full hearing. An Employment Tribunal would only order interim relief in those dismissal cases which, on application, demonstrate that it is 'likely' that they were dismissed for the protected reason, in other words, that their claim has a 'pretty good' chance of being judged to be unfair in a tribunal. For example, in whistleblowing claims the claimant would need to show that it is likely that the reason for the dismissal was a protected disclosure and therefore it is likely that the dismissal will likely be deemed as automatically unfair.

46. In a fire and rehire scenario, we are exploring whether an employee who makes a claim for unfair dismissal in a fire and re-hire scenario, under the new right which will be introduced by the Employment Rights Bill (clause 22), should be able to make an application for interim relief to the Employment Tribunal. An award of interim relief would mean that the employee would be continue to be paid, pending the final hearing, but interim relief would only be awarded where the employee can show it is 'likely' that their unfair dismissal claim would succeed, i.e., that they have a pretty good chance of showing that their dismissal was unfair under clause 22 of the Employment Rights Bill. This would ensure that they are no worse off pending the hearing, which would lead to greater protection of employees in fire and re-hire situations, which often can affect large numbers of employees / a substantial part of a workforce. It would also further disincentivise employers from using fire and rehire, unless it is genuinely a last resort.

47. The nature of interim relief applications is that they are made quickly (within 7 days of dismissal), and considered by the tribunal shortly afterwards. We are seeking views on whether the approach which currently applies to interim relief for certain unfair dismissal claims, under s128-132 of the Employment Rights Act 1996 and s161-166 of the Trade Union and Labour Relations (Consolidation) Act 1992, should be applied to any new right to interim relief for fire and rehire dismissals. We are considering whether any adjustments to the current approach would be needed to ensure that interim relief for these cases can work effectively and be determined promptly by the tribunal.

Consultation questions

16. **Do you agree or disagree with adding interim relief awards to fire and rehire unfair dismissals? Please explain your reasoning behind your agreement or disagreement.**

17. **Do you think adding interim relief awards would incentivise employers to comply with the law on fire and rehire dismissals?**

- Agree
- Disagree
- Don't Know

Please explain why

18. **What do you consider the impacts will be on employers of adding interim relief awards to fire and re-hire unfair dismissals?**

- Yes
- No
- Don't Know

Please explain why and note any other benefits

19. **What do you consider the impacts will be on employees of adding interim relief awards to fire and re-hire unfair dismissals?**

20. **What do you consider to be the risks of adding interim relief awards for fire and rehire unfair dismissals?**

21. **What is your view on whether any adjustments to the current approach to interim relief would be needed to ensure that interim relief for fire and rehire cases can work effectively and be determined promptly by the tribunal?**

Respondent consultation questions

About you

22. **Please indicate whether you are responding as:**

- **An academic**
- **An employer**
- **An employee/worker/individual**
- **A Legal representative**
- **A Business representative organisation/trade body**
- **A trade union or staff association**

Other (please specify)

23. **What sector/industry do you operate in?**

- **Manufacturing**
- **Construction**
- **Wholesale, retail & repair of motor vehicles**
- **Transport & storage**
- **Accommodation & food services**
- **Information & communication**

- **Financial, insurance & real estate activities**
- **Professional, scientific & technical activities**
- **Administrative & support services**
- **Public admin & defence; social security**
- **Education**
- **Human health & social work activities**
- **Other services**
- **Do not know**
- **Prefer not to say**

24. **If responding as an employer, business, business owner, business representative, what is the size of your business? If responding as an individual or worker, what size workplace are you employed in?**
    - **Micro (fewer than 10 staff)**
    - **Small (11 to 50 staff)**
    - **Medium (51 to 250 staff)**
    - **Large (250+ staff)**
    - **Do not know**
    - **Not applicable**

Equality impact

25. **Do you believe that our proposals to increase the protective award will have an impact (either positive or negative) on a specific protected characteristic under the Equality Act 2010?**

    Protected characteristics under the Act are disability, gender reassignment, age, pregnancy and maternity, race, marriage and civil partnership, sex, sexual orientation and religion or belief.

    - Yes
    - No
    - Do not Know

    Please explain your answer.

26. **Where you have identified potential negative impacts, can you propose ways to mitigate these?**
    - Yes
    - No
    - Do not know
    - Not applicable (no impacts identified)

    Please suggest mitigations

27. **If responding as an employee/worker/individual, what is your sex?**
    - **Female**

- **Male**
- **Prefer not to say**
- **Not applicable**

28. **If responding as an employee/worker/individual, what is your ethnic group?**
    - **Arab**
    - **Asian/Asian British**
    - **Black / African / Caribbean / Black British**
    - **Mixed/Multiple ethnic groups**
    - **White**
    - **Other ethnic group**
    - **Prefer not to say**
    - **Not applicable**

29. **If responding as an employee/worker/individual, what is your religion?**
    - **No religion**
    - **Christian**
    - **Buddhist**
    - **Hindu**
    - **Jewish**
    - **Muslim**
    - **Sikh**
    - **Any other religion**
    - **Prefer not to say**
    - **Not applicable**

30. **If responding as an employee/worker/individual, do you have any physical or mental health conditions or illnesses lasting or expected to last 12 months or more?**
    - **Yes**
    - **No**
    - **Prefer not to say**
    - **Not applicable**

31. **If responding as an employee/worker/individual, which of the following age brackets do you fit into?**
    - **15 or below**
    - **16-17**
    - **18-24**
    - **25-34**
    - **35-44**
    - **45-54**

- **55-64**
- **65-74**
- **75+**
- **Prefer not to say**
- **Not applicable**

Next steps

48. This consultation will close on 2nd December 2024. Following the closure of this consultation, we will analyse all responses and publish a government response in due course. Subject to the outcome of the consultation, responses to the consultation may inform changes to the Employment Rights Bill.

49. The government intends to gather further views on strengthening the collective redundancy framework in 2025. This includes consulting on doubling the minimum consultation period when an employer is proposing to dismiss 100 or more employees from 45 to 90 days.