

Making Work Pay: Consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire

CONSULTATION RESPONSE by Thompsons Solicitors LLP

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Preliminary Observations

As a law firm fundamentally committed to representing trade unions and workers, we are very pleased that the Labour government has committed to “strengthening redundancy rights and protections” and “ending unscrupulous “fire and rehire” and “fire and replace” practices”. We agree that it is of paramount importance that any new provisions are underpinned by effective enforcement mechanisms. If they are not, there are significant risks that some employers will not adhere to any new legislative obligations introduced to strengthen workers’ rights in a collective redundancy and/or fire and rehire scenario. The Government must, therefore, remain steadfast in its desire to overhaul the existing legislative framework and deliver on its commitments in “Make Work Pay” following this consultation exercise by removing the current statutory cap in protective award claims and introducing the right to an interim relief remedy where an employer acts in breach of the statutory requirements in relation to collective redundancy obligations and/or in fire and rehire situations.

Response to Consultation Questions

Collective Consultation Obligations

Overview

The duty to collectively consult under s188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) was introduced to give effect to former Directive 72/159/EEC, now Directive 98/59 EC. The consultation must be undertaken “with a view to reaching agreement”. The duty arises when an employer proposes to dismiss as redundant 20 or more employees at one establishment within 90 days. The definition of “dismissal as redundant” is a wide one and applies to a “dismissal for a reason not related to the individual concerned or for any number of reasons, all unrelated”. It therefore does

not require any reduction in the number of employees employed or any change in the particular kind of work they do and covers fire and rehire dismissals.

If the employment tribunal finds that a complaint is well-founded, it makes a declaration and may make a “protective award” relating to one or more “descriptions” of employees in respect of whose dismissal, or proposed dismissal, the employer failed to comply with s188 TULRCA. Any protective award provides that the employer pays such employees remuneration for a “protected period” which must not exceed 90 days (s189 (4) TULRCA).

The responses below address removing or amending the 90-day cap on any award made by an employment tribunal and introducing the right to bring a claim for interim relief in the event of an alleged breach of s188 TULRCA.

Q1. 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 or not be increased?

We consider that the cap should be removed entirely and judicial guidance akin to sentencing guidelines issued that makes clear that protective awards should be set at a sufficiently high level to deter non-compliance with consultation requirements. We consider such guidelines necessary given the current wording of s189(4) TULRCA, which would not give employment tribunals sufficient guidance on the appropriate level for uncapped protective awards. Alternatively, we propose that a cap be set by primary or secondary legislation at a level that is sufficiently high to deter non-compliance. We set out below the basis on which we propose such cap should be fixed.

We suggest that any starting point for judicial guidelines or any cap on protective awards should be set by reference to the employer’s turnover, rather than a set number of days’ pay per employee. This approach has been adopted in the UK General Data Protection Regulation (“UK GDPR”) and the Data Protection Act 2018 (“DPA”), which provide for maximum fines of £17,500,000 or 4% of annual turnover, whichever is the higher. This is a significantly more effective mechanism for ensuring that penalties are sufficient to deter non-compliance, as it empowers Tribunals to make awards that are proportionate to the employer’s size. Whilst the mechanism is used in the UK GDPR and DPA to cap administrative fines (as opposed to damages), the protective award is punitive rather than compensatory in nature. It is therefore appropriate to adopt a turnover-linked approach to calculate protective awards, as this approach empowers Tribunals to impose awards that are capable of deterring all employers from breaching the legislative requirements,

regardless of financial strength. To be clear, we do not propose that awards be set at the same level as administrative fines under the UK GDPR, simply that a turnover-linked mechanism be adopted.

Increasing the cap to 180 days may have a marginal dissuasive effect for employers considering not complying with their statutory collective consultation obligations. However, it will not remedy the current problem with the legal framework as illustrated by the P&O Ferries scandal.¹ At present, employers can accurately calculate their potential liability for breaches of s.188 TULRCA and chose to pay off employees to avoid their statutory obligations if they have the resources. Alternatively, they may simply choose to breach their consultation obligations and defend any claims, knowing the maximum amount they would be liable for if they lose and having determined that this is a more advantageous option than complying with the law.

A well-financed company may still adopt this approach with a cap of 180 days (or even any other fixed number of days). It would also be possible for an employer to calculate their maximum liability with some accuracy if the cap was benchmarked to their turnover (although it would not be possible to do so with the same level of precision). It is for this reason that we suggest the cap be removed completely. However, if a cap is to be maintained, benchmarking to turnover is preferable to a cap of 180 days. We consider this will make the option of “contracting out” of liability for protective awards by reaching settlement agreements with individual employees, or choosing to fight litigation having acted in breach of obligations, less attractive and will therefore be a more effective deterrent.

In conclusion, we consider that the best option for achieving the policy aims of the incoming government would be for the award to be uncapped and a percentage-turnover formula used to guide judicial decision-making. Whilst employers would welcome the certainty of knowing their exact financial exposure for breaching the rules, the purpose of any penal sanction is to deter non-compliance; having a fixed, predictable ceiling facilitates efficient breach.

Alternatively, to offset the lack of commercial certainty that employers will face (which we do not think should be a pressing concern for those who act in breach of the law), a fixed cap could be maintained (which should be at least 180 days), but with provision for an

¹ Bogg, A. ‘Rhetoric and Reality: The P&O Ferries Scandal and the Right to Strike’ (*SSRN*, 1 October 2024) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5008721 accessed 14 November 2024, p.2.

uncapped/percentage-turnover fine in cases where employers have acted egregiously. As proposed by Professor Alan Bogg, this threshold could be reflected in a statutory formula, such that an uncapped/percentage-turnover fine applies where an employer's breach is "exceptionally serious" or "aggravated".² This would balance the need for commercial certainty with the need to ensure well-financed companies cannot abuse their financial resources to avoid legal obligations.

Increasing the protective award cap

Q2. Do you think that increasing the maximum protective award period to 180 days will incentivise businesses to comply with existing collective redundancy consultation requirements?

Increasing the cap to 180 days will be an incentive for employers to comply with existing consultation requirements, as it would become more expensive for them to "contract out" of statutory obligations by offering a settlement agreement to recompense an employee for what they might be awarded by an employment tribunal. It would, of course, also have the effect of increasing the employers' liability in litigation, which may deter some employers from breaching the statutory requirements. However, increasing the cap to 180 days does not altogether remedy the current problem with the legal framework. As referred to above, employers will still be able to calculate with exactitude their potential liability for breaches of s.188 TULRCA and determine if it is more advantageous to them to ignore their obligations.

Q3. What do you consider the impacts will be on employers of increasing the maximum protective award period from 90 to 180 days?

² Bogg, A and Ford KC, M, 'From fairness at work to making work pay: A preliminary assessment of the Employment Rights Bill' (*UK Labour Law Blog*, 14 October 2024) <https://uklabourlawblog.com/2024/10/14/from-fairness-at-work-to-making-work-pay-a-preliminary-assessment-of-the-employment-rights-bill-by-professor-alan-bogg-and-professor-michael-ford-kc/> accessed 12 November 2024.

As stated above, increasing the cap to 180 days would inevitably impact upon employers' behaviour by making the cost of non-compliance with statutory consultation requirements higher. However, where it remains commercially beneficial to avoid collective consultation, some employers will still choose to ignore statutory obligations. Nevertheless, as the penalty for a breach of s.188 TULRCA would become more costly, employers are likely to take more care to ensure that any consultation they do carry out is in accordance with the requirements of the legislation. This will be a positive step, as effective, meaningful collective consultation can save jobs and ensure businesses continue to operate effectively with staff deployed on appropriate terms and conditions.

Q4. What do you consider the impacts will be on employees of increasing the maximum protective award period from 90 to 180 days?

The impact on employees will be positive. Appropriate representatives will have greater bargaining power to compel employers to engage in collective consultation, insofar as they can highlight the consequences of not engaging properly are more significant than they are under the existing legislative framework. That is more likely to ensure effective consultation transpires, which will benefit employees in many circumstances by avoiding redundancies and keeping them in employment. However, as referenced above, employers may still decide to breach the consultation requirements if they consider it is in their financial interests to do so, whether the cap is 90 or 180 days. This is why we favour removal of the cap on protective awards.

Q5. What do you consider to be the risks of increasing the maximum protective award period from 90 to 180 days?

This amendment may be insufficient to deter non-compliance with consultation obligations for the reasons set out above. It still allows for a two-tier system whereby larger employers can afford to either "buy their way out" of legal obligations or litigate in the knowledge that, even if they are likely to lose, their maximum liability is capped at such a level that it remains advantageous to not consult.

Removing the protective award cap

Q6. Do you think that removing the cap will incentivise businesses to comply with existing collective redundancy consultation requirements?

Yes, provided guidance (as proposed above) is in place instructing employment tribunals to make awards at a sufficiently high level. Absent such guidance, the level of protective awards would be uncertain and may not sufficiently incentivise employers to adhere to statutory requirements. Therefore, it is essential that guidance be put in place, akin to sentencing guidelines, providing a mechanism for calculating sufficiently high awards to deter non-compliance. As suggested above, we propose that any judicial guidelines should provide for an award to be calculated by reference to the employer's turnover. This approach has been adopted in the UK GDPR and DPA, which provide for maximum fines of £17,500,000 or 4% of annual turnover, whichever is the higher. Benchmarking awards against turnover provides employment tribunals with the power to ensure awards have a sufficient deterrent effect and ensures that large multinationals are not able to leverage their financial strength to avoid legal obligations unfairly.

Assuming guidance is in place setting the quantum of protective awards at a sufficiently high level, then removing the cap would have a deterrent effect on non-compliance with collective redundancy consultation requirements. This is because the cost of non-compliance would be higher. It would also not be possible to quantify the potential cost with complete accuracy, making the option of "buying out" litigation (by paying dismissed employees not to bring protective award claims, as in the P&O case) more difficult to achieve. Of course, there remains a risk that companies will continue to take this approach based on their best estimates of their likely financial exposure for non-compliance. However, removing the cap entirely gives tribunals the power to make sufficiently high awards to make this approach commercially unattractive.

Q7. What do you consider to be the impact on employers of removing the cap on the protective award?

Removing the cap on protective awards would make it impossible for employers to calculate with certainty their potential liability for failing to consult in accordance with s.188 TULRCA. This will make the approach adopted by P&O, whereby employees were dismissed without consultation then "paid off" with a sum commensurate with what they could expect to receive in the employment tribunal, more difficult to achieve. Further, employers are less likely to ignore their statutory obligations in circumstances when they cannot be certain what level of financial penalty they may face in subsequent litigation. However, the quantum of awards will likely become more predictable over time as case law builds. It will, therefore, become possible for employers to estimate their likely liability. This will become a problem unless awards are set at such a level that it is commercially unviable to negotiate out of collective consultation. Therefore, if the cap is removed (which we propose it should be), judicial guidance will be necessary to direct tribunals towards the

factors to consider when determining awards. As detailed above, we propose that the mechanism adopted for calculating sanctions under the UK GDPR and DPA 2018 be adopted as a model. Employers would then have a significant incentive to comply with their consultation obligations.

Q8. What do you consider the impact will be on employees of removing the cap on the protective award?

If the removal of the cap results in generally higher protective awards (which it will with appropriate guidance), employers are likely to properly adhere to statutory requirements. This will mean an effective consultation process will ensue, increasing the chances of employees being retained or redeployed in a given organisation. Therefore, it will benefit employees.

Q9. What do you consider to be the risks of removing the cap on the protective award?

If the cap is removed without the publication of appropriate judicial guidance, there is a risk that employment tribunals will make significantly lower awards than at present. Under the current regime, where there is a complete failure to consult, employment tribunals calculate the protective award by starting at 90 days' pay and then adjusting the figure to account for any consultation that did take place. Absent such a yardstick, there is a risk that the value of protective awards falls, as there is little to guide employment tribunals under s.189(4) TULRCA, other than a broad statement that an award ought to be what is just and equitable based on the seriousness of the employer's default. Lower fines would, of course, increase the attractiveness to employers of avoiding consultation obligations. For this reason, it is important that judicial guidance on setting protective awards be published, providing for awards to be calculated by reference to company turnover.

Interim relief

Q10. Do you agree or disagree with making interim relief available to those who bring protective award claims for a breach of collective consultation obligations?

We agree with a broad principle of restricting the ability of employers to unilaterally terminate employees' contracts against their will prior to completing a collective

consultation exercise. Therefore, we agree with making interim relief available as a remedy for a breach of s188 TULRCA obligations. However, this will be a more complex undertaking than introducing the equivalent right for claims brought by individuals under the proposed new s.104I of the Employment Rights Act (“ERA”), as addressed below. We consider the case for interim relief to be compelling as a remedy for fire and rehire and dismissals in breach of s.104I ERA, but we also support its introduction for breaches of collective consultation obligations.

Interim relief is currently a remedy for unfair dismissal set out in TULRCA ss.161-167 TULRCA and in similar terms in ERA ss.128-132 ERA. It is restricted to dismissals for trade union reasons, some employee representative functions, and whistleblowing.

Under the existing framework, any application for interim relief must be made before the end of the period of seven days after the effective date of termination: (s.161(2) TULRCA and ERA s.128(2)) ERA. The application can be submitted in the notice period prior to the dismissal taking effect and the employment tribunal determines the application as soon as practicable. If the tribunal determines that it is ‘likely’ it will make a finding of unfair dismissal at the final hearing then (i) if the employer agrees, the tribunal makes an order for reinstatement or re-engagement pending the determination of the complaint (s.163 TULRCA and ERA s.129 ERA); or (ii) if the employer does not agree, the employment tribunal makes an order for the continuation of the employee’s contract of employment, which ensures the employee is paid for the period, until the determination of the complaint (s.164 TULRCA and s.130 ERA).

The structure of the application

Any interim relief provisions for a failure to consult need to be carefully structured to take into account the risk of unduly restricting the freedoms of individual employees to elect whether they wish to continue to be subject to their existing contract of employment. This is primarily because interim relief is a remedy for individual employees but claims under s189 TULRCA are usually brought by recognised trade unions or other appropriate representatives. There is, therefore, a risk that unions/appropriate representatives bring and succeed in an application for interim relief against the will of all employees, some of whom may prefer to take redundancy. One way to obviate this risk would be to empower tribunals to issue interim relief orders on an application of a union or appropriate representative (where they had the applicable standing), but only in respect of individual affected employees who opted into the interim relief application being brought by the Union or appropriate representatives. Without that mechanism individual employees would be automatically included within the scope of any interim relief order made on the application of a trade union or appropriate representative.

For the avoidance of doubt, we do not propose claimants would need to opt into the underlying Protective Award claim where the union or appropriate representatives had standing to bring the claim. The requirement would be solely attached to the immediate interim relief application.

The remedy for a successful interim relief claim

As outlined above, the existing remedy for a successful interim relief claim is an order for reinstatement or re-engagement pending the determination of the complaint or, if the employer refuses, an order that the contract will continue to subsist (with the employee being paid) until a final hearing. The consequence is that an employer is, at the very least, obliged to pay the employee until a final hearing. In some instances, that final hearing may not take place for 12, 18 or even 24 months. We recognise it is likely to be considered important to address that issue.

One way of doing that would be to ensure that any case for interim relief in a protective award claim is expedited when the employer adduces evidence of significant financial distress at the interim relief hearing. The test could be similar to the one set out in the proposed new ERA s.104I, (which we consider should be adjusted as we propose below). Where the test is satisfied, the final hearing will be heard within a prescribed timeframe (e.g. within 8 weeks of when interim relief was granted). Another option would be to introduce a different timeframe for the period in which interim relief is provided in regard to a breach of s188 TULRCA whereby an employment tribunal could be afforded a discretion that any order for reinstatement, re-engagement or the contract of employment should otherwise subsist would only be for a period equivalent to the statutory consultation period. Alternatively, where the breach of s.188 relates to a procedural defect rather than an absolute failure to consult, the period of interim relief would be limited to the length of time required to remedy the defect. However, even in the event of either of these models being adopted, we consider there should also be a different form of interim relief available altogether where it is lodged before any dismissals take effect.

A different form of Interim Relief

A further additional measure we would support would be to introduce an alternative form of interim relief to empower employment tribunals to make interim relief orders that provide that employers cannot dismiss employees (where the application can be made prior to the dismissal taking effect) where an employer has not met its consultation

obligations and that would remain the position until it had complied with those obligations. The Claimants in this position would need to show that it is likely the s188 TULRCA duty applies and likely that it is to be breached (we make some comments below about how the traditional interim relief test could be modified in regard to fire and rehire dismissals which could equally apply here or indeed to the more conventional interim relief remedy we propose above). This would then raise a question as to how to effectively “police” whether consultation has taken place such as to discharge the employer’s obligations following the interim relief order. If there were a dispute on that issue, we would propose clearance from a body like the Central Arbitration Committee (CAC) so that the employer can proceed with its dismissals. In the absence of that clearance, the employer would be compelled to continue employing the employees in accordance with the original order. If a Respondent ignored the CAC order, we would propose they would have the power to impose an uncapped fine linked directly to turnover.

We see interim relief of this nature running parallel to another more conventional form of interim relief, which would typically be granted to claimants after dismissals have already taken effect, and which we propose above.

Q11. 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, as they would be compelled to continue employing employees until they had done so and/or required to pay then until they had done so. Whether interim relief is available until the expiry of the consultation period, until any breach is effectively addressed or until a final hearing, this mechanism results in employers who fail to consult incurring costs, so is likely to have an incentivising effect. Further, if employment tribunals were empowered to make relief orders preventing dismissal until consultation had been concluded, businesses subject to such orders would have little choice but to consult prior to dismissing employees or would risk high-level fines.

Q12. What do you consider the impacts will be on employers of adding interim relief awards to collective consultation obligations?

Existing interim relief measures provide that, where an employee is likely to be able to establish they were unfairly dismissed for a qualifying reason, they will be reinstated until the final hearing (or at least paid under a subsisting contract). Applying this relief to breaches of s188 TULRCA would mean that employers looking to make redundancies

would have to employ those it had proposed to make redundant until a final hearing (or for a prescribed period as we propose above). If interim relief orders restricted employers from dismissing employees (as an additional form of interim relief) until they had carried out consultation, employers would also effectively be under an absolute obligation to employ employees and to consult prior to making redundancies. These, however, are not draconian measures in circumstances where an employment tribunal has concluded an employer is likely to have acted in breach of legislative obligations.

Q13. What do you consider the impacts will be on employees of adding interim relief awards to collective consultation obligations?

If the interim relief regime is extended to breaches of s188 TULRCA, the disadvantages of any failure to consult would be offset by (at the very least) the receipt of pay during the period of interim relief and under our proposal also by an obligation to compel employers to employ employees where the application is made before dismissal until such time as s188 obligations are met. This will disincentivise non-compliance by employers, resulting in more meaningful consultation which can result in employees remaining in post or being redeployed to new roles within an organisation, meaning redundancies are avoided.

Q14. What do you consider to be the risks of adding interim relief awards to collective consultation obligations?

We have addressed the potential hurdles to the introduction of interim relief to protective award claims above. If our proposal to introduce a different form of interim relief was adopted (which we think it should be) it would be imperative an expedited hearing could be listed to determine the application before any dismissals took effect. This will increase the burden on the employment tribunal system but that should not represent an insurmountable hurdle as we make clear elsewhere in this consultation.

Further questions

Q15. Are there any wider changes to the collective redundancy framework you would you want to see the government make?

Yes. We welcome the proposal in the Employment Rights Bill to remove the reference to “at one establishment” from the relevant legislation, meaning that employers must take into account redundancies across the entire organisation when determining if the requirement for collective consultation has been triggered. This is a very important step in

strengthening consultation rights, as the obligation will be engaged in a wider set of circumstances than at present. It will prevent absurd outcomes such as in USDAW v WW Realisation 1 Limited & Ethel Austin [2015] (Case No C-80/14), where collective redundancy obligations were not engaged in many Woolworths stores which were being closed, as those individual stores employed fewer than 20 employees, notwithstanding the fact there was one proposal to dismiss all of the employees concerned across the entire organisation. The fact that this change in law goes further than the EU Directive 98/59/EC is an extremely positive step. Effective collective consultation can save jobs and rescue struggling businesses. We hope all stakeholders will welcome this proposal.

The requirement to collectively consult for 90 days should be reinstated for any proposal to make 20 or more employees redundant. It was reduced to 45 days after the last Labour government lost power in 2010 (s.188A(1) TULRCA). As stated above, effective consultation can save jobs and rescue failing businesses. Curtailing the length of consultation is not in the interests of employers, trade unions, or workers.

We propose that the employers' requirement to consult under s.188(1) TULRCA be amended so that it is triggered when redundancies are "contemplated" instead of "proposed." This would bring the requirement to consult forward, so the union and/or representatives can engage in the process at an earlier stage, which will increase the likelihood of the parties agreeing on a solution that avoids the need for redundancies.

We also propose that s.188(2) require employers to consult about the "reasons" for the dismissals, as, although information about the reasons for dismissals must be provided at present, there is no requirement to consult on this. Some authorities have suggested there is already a requirement to consult on the business reasons for any proposal (UK Coal Mining v NUM [2008] ICR 163), but it is not explicit in the statute and arguably limited to circumstances where an organisation is closing. Consultation on the reasons for proposing dismissals by redundancy would facilitate more constructive dialogue between employers and representatives, as employers would be required to explain their commercial motivation and engage with representatives' views on these. It will also tie in with the provisions to be introduced by s.104I ERA, which will require employers to provide evidence of the necessity for dismissals to vary the terms and conditions of employment.

We further propose that s.188(1A) be amended such that employers are restricted from "issuing" notices of dismissal until the end of the consultation period rather than simply providing that dismissals cannot "take effect" until the end of that period. We propose that the default position should be that a final decision to dismiss cannot be made until the

expiry of the consultation period. This reflects the approach most employers already take in practice, and it should be formalised and enshrined in statute.

The obligations to collectively consult should also be expressly extended to encompass “workers” and employees, as the present differentiation in treatment cannot be justified.

The introduction of more robust consultation obligations, including higher penalties for non-compliance, may have the unintended consequence of incentivising companies to opt for administration/liquidation rather than restructuring. This is, of course, a broader issue beyond the scope of this consultation. However, we consider it is incumbent on the Government to address the circumstances in which businesses can change their legal identity by entering administration and reforming as a new entity. We also believe that the government should increase the amount that claimants can recover from the National Insurance Fund.

Section Two: Fire and Rehire

An employer is currently entitled to dismiss fairly in a fire and rehire exercise for “some other substantial reason” by simply advancing “a sound business reason”. That reason is tested against statutory criteria, but an employment tribunal will not challenge the underlying rationale for dismissals of this nature. The test is a low one for an employer to overcome and the government is correctly proposing to legislate to address that. Below, we set out our response to introducing interim relief as a remedy to a proposed change to legislation on fire and rehire. We also make some more general comments on what the government is proposing in the Employment Rights Bill with regard to fire and rehire.

Q16. Do you agree with adding interim relief awards to fire and rehire unfair dismissals? Please explain your reasoning behind your agreement or disagreement.

We agree with adding interim relief awards to fire and rehire unfair dismissal cases.

There is no impediment to applying the existing interim relief mechanism to claims brought under the proposed new s.104I ERA, such that it is automatically unfair to dismiss an employee in circumstances where (i) the employer sought to vary the contract and the employee did not agree to that variation and (ii) the employer was seeking to employ another person or re-engage the same employee under a varied contract of employment to carry out substantially the same duties as the employee carried out before being

dismissed. The only exception to this would be where the employer falls into the gateway prescribed by the proposed s.104I(4) ERA. We comment below on how the existing interim relief mechanism could (and should) be adapted.

For the provisions to be effective they must be underpinned by an effective enforcement mechanism. As we know from the P & O scandal, without an effective enforcement mechanism, an employer will simply ignore its obligations under any legal framework if it thinks the immediate benefit of acting unlawfully outweighs any compensation it might need to pay to claimants when the case is ultimately heard by the Employment Tribunal, which is likely to be 12, 18 or even 24 months after the dismissals take effect. The actions of P & O illustrated an important feature of UK employment law, which is that, save for the very limited number of cases in which interim relief is available, as highlighted above, the existing framework only seeks to punish employers who act unlawfully at an undefined later date but does not actually stop them and/or sufficiently deter them from acting in breach of the law at the relevant time. This is why P&O acted as it did, and unscrupulous employers will continue to do so unless an effective interim relief mechanism is in place.

Although it is possible to obtain an interim relief sanction in the Civil Courts, as Thompsons did on behalf of USDAW in the Supreme Court (*USDAW v Tesco* [2024] UKSC 28), this has only been the case in exceptional circumstances. *USDAW v Tesco* turned on very particular facts, and the courts have traditionally been very reluctant to interfere with an employer's right to serve notice on a contract of employment, such that issuing a notice of dismissal will only be a breach of contract in exceptional and unusual circumstances. Furthermore, any application of this nature is of considerable financial risk to any applicant as any such case would be pursued in a cost-bearing jurisdiction with a requirement to give a cross-undertaking in damages.

The introduction of a right to interim relief in the Employment Tribunal where the employer has dismissed under s.104I ERA would provide an avenue for immediate relief for employees in circumstances where it is "likely" the employer has acted in breach of s.104I of the ERA. This would prevent an unscrupulous employer from ignoring its legal obligations in the knowledge that it will not be held liable for its actions until the case finally reaches a hearing 12, 18 or 24 months later. A successful outcome would ensure, at the very least, that the contract subsists through the legal process and up until the final hearing, with the employee being paid for that period (although we comment below on how and why the right to interim relief in this context can, and should be, strengthened).

Q17. Do you think adding interim relief awards would incentivise employers to comply with the law on fire and rehire dismissals

Yes. We believe that the threat of facing an interim relief application would undoubtedly incentivise employers to comply with the proposed new s.104I ERA. In simple terms, it means employers cannot take advantage of the fact that obtaining a final ruling can take considerable time, such that they can opt to dismiss employees with no prospect of an immediate remedy. It also makes it more difficult to “buy out” employees with settlement agreements where the employer has acted unlawfully, as the employees concerned know they have the possibility of obtaining interim relief. The comparison between an employer knowing it may need to begin to defend its position in an employment tribunal within 2 or 3 weeks of dismissing employees as opposed to 12, 18 or even 24 months after dismissing employees cannot be overstated.

Q18. What do you consider the impact will be on employers of adding interim relief awards to fire and re-hire unfair dismissals?

As we make clear in our response to the question above, we consider adding interim relief awards to fire and rehire unfair dismissals will incentivise employees to comply with the proposed new ERA s.104I. If employees are successful in a claim for interim relief, then employers (under the existing framework) will be required to reinstate or reengage the employee up until any substantive hearing or, if they are unwilling to do so, pay them under their existing contract until any final hearing.

One consequence of a successful interim relief claim on an employer will, therefore be a requirement to pay the employees in question until any final hearing. Under existing case law, the employer cannot reclaim that money if the employee ultimately fails in the substantive claim. However, it can probably be done in the event of a successful appeal against the order (*Robinson v al-Quasimi* [2021] EWCA Civ 862). Therefore, we do not see this as a substantive problem. At most, it may be appropriate to introduce a mechanism whereby an employer can apply to have a final hearing expedited in the event they lose an interim relief hearing, to minimise the period in which they have to pay an employee in the unlikely event the decision on interim relief is overturned in a substantive hearing.

Q19. What do you consider the impacts will be on employees of adding interim relief awards to fire and re-fire unfair dismissals?

The impact on employees will be positive. We know from the ACAS report on Dismissal and re-engagement published on 8 June 2021³ that the practice of fire and rehire has become increasingly prevalent in recent years, and this firm has advised on a significant number of these exercises over the last five years. The government is correct in introducing legislation to address fire and rehire, as the existing provisions place very few limitations on an employer's ability to dismiss its staff and re-engage them on less favourable terms and conditions of employment. As we have made clear at the outset of this section of our consultation response the current test allows an employer to dismiss fairly for some other substantial reason, which simply requires them to advance a "sound business reason" (*Hollister v National Farmers' Union* [1979] ICR 542), and any dismissal is tested against statutory criteria whereby if it falls within the band of reasonable responses, it will be fair. In short, therefore, there is very limited opportunity for the employment tribunal to scrutinise the purported justification for dismissing in order to implement less favourable terms and conditions, and no requirement to show the need to do this was pressing or necessary.

The new test falls short of banning the practice of fire and rehire outright, which would have been the optimum position for the incoming government to adopt. Notwithstanding that, the proposed s.104I ERA will make a substantive difference to employees if it is underpinned by an effective interim relief remedy mechanism. It will mean employees will not feel compelled to agree to less favourable terms and conditions of employment in circumstances where the employer has not provided compelling evidence that such changes are needed for the wellbeing of the organisation, as they will know that if they are dismissed and they consider the proposed new test has not been met, they will be able to do something about this quickly. A successful outcome will mean that, at the very least, they will continue to be paid under their contract until any final hearing. We can see no credible basis that the right to interim relief should be opposed if the Government want to address one-sided flexibility and stop unscrupulous employers from dismissing their staff and re-engaging them on less favourable terms or bringing in new staff to perform what is substantively the same role on less favourable terms.

In our response to question 21, we set out whether adjustments could be made to the interim relief test for fire and re-hire dismissals. However, we also consider it important in this response to address how we think the proposed rights under s.104I could be improved and strengthened from the perspective of employees so they are not abused by unscrupulous employers.

³ ACAS, 'Dismissal and re-engagement (fire-and-rehire): a fact-finding exercise' (ACAS, 8 June 2021) <https://www.acas.org.uk/research-and-commentary/fire-and-rehire/report> accessed 14 November 2024

As we have made clear, the optimum position would be for an outright ban on fire and rehire dismissals. However, if there is no outright ban, then the focus inevitably shifts to the exception under s.104I(4) ERA), which allows an employer to avoid a finding of automatic unfair dismissal in circumstances where it dismisses to vary terms and conditions of employment. As drafted, the employer must show that the dismissal was to eliminate, prevent, significantly reduce or significantly mitigate the effect of any financial difficulties, which at the time of the dismissal were affecting, or was likely in the immediate future to affect, the employer's ability to carry on the business as a going concern or otherwise to carry on the activities constituting the business. Whilst this may superficially appear to be a stringent test for an employer to meet, we have concerns about the use of the word "likely" and precisely how it is intended that it would be construed. Section B12 of the Equality Act 2010 Guidance⁴ provides that "likely" should be interpreted as something that "could well happen". In our view, an employer only being required to demonstrate something "could well happen" to impact its ability to operate as a going concern is insufficiently robust to address unscrupulous fire and rehire tactics. All manner of things "could well happen" to affect the ability of an organisation to continue as a going concern in the current uncertain economic climate, but that is an insufficient basis to justify dismissing a workforce and re-engaging them on less favourable terms and conditions if the Government is seriously committed to ending the abuse of fire and rehire tactics. If there is to be no ban on fire and rehire, then the obligation of an employer should be to demonstrate that any variation is necessary to ensure its survival and therefore, the wording "or was likely in the immediate future to affect" should be removed from s.104I(4) ERA. We also consider that where an employer seeks to avail itself of this defence, it should be required under the provision to submit a report from its independent auditors that its financial circumstances are such that if the changes to terms were not made, it would affect the employer's ability to carry on the business as a going concern or otherwise to carry on the activities constituting the business.

If the current wording does remain, then we consider it imperative that guidance is provided as to how the term "likely" should be interpreted and that the test is significantly more robust than the one referenced above. For example, the interim relief test requires an employer to show that there is a "significantly higher degree of likelihood than more likely than not" that they will succeed at a substantive hearing. We consider that the test should

⁴ Disability Unit, 'Disability: Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability (HTML)' (2011) <https://www.gov.uk/government/publications/equality-act-guidance/disability-equality-act-2010-guidance-on-matters-to-be-taken-into-account-in-determining-questions-relating-to-the-definition-of-disability-html> accessed 14 November 2024.

not be this stringent if interim relief is introduced as a remedy for a potential breach of s.104I ERA (as we believe it should be), but in the context of legislating against fire and rehire, it is imperative an employer must meet a robust requirement like this one for the purposes of s.104I(4) ERA.

We further suggest that consideration is given to the risk that some unscrupulous employers may respond to the introduction of restrictions on fire and rehire by seeking to rely on widely drafted unilateral variation clauses in employment contracts. At present, employers have a broad power to rely on such clauses, as evidenced by the judgment in *Bateman v Asda Stores Ltd* [2010] 2 WLUK 337. Given the limited protection against unilateral variation available at present, we consider it would be in the interests of employees for legislation to be introduced limiting the circumstances in which employers can unilaterally vary employment contracts. This would also reduce the risk of unscrupulous employers seeking to sidestep fire-and-rehire restrictions through contract variation.

Q20. What do you consider to be the risks of adding interim relief awards for fire and rehire unfair dismissals?

We do not believe there are any substantive risks to introducing interim relief as an available remedy for claims brought under s.104I ERA. However, we do consider the test should be modified as we set out below. We acknowledge an increased burden on employment tribunals, but this is necessary if the government is committed to ending one-sided flexibility. Virtually all of these cases will be capable of binding a large cohort of dismissals, as the circumstances that justify such dismissals will apply across the board. Employment tribunals will not have extensive knowledge of the more thorough analysis they will need to undertake regarding the financial position of the entity seeking to make dismissals. That is why the provision of an auditor's report should be a statutory requirement.

Q21. 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?

We consider certain adjustments should be made to interim relief in fire and rehire cases. As set out above, under the existing framework, any application for interim relief must be made before the end of the period of seven days after the effective date of termination

(TULRCA s.161(2) and ERA s.128(2)). The application can be submitted in the notice period prior to the dismissal taking effect. The employment tribunal determines the application as soon as practicable. If it determines it is “likely” that it will make a finding at the final hearing that the employee was unfairly dismissed then (i) if the employer agrees, it makes an order for reinstatement or re-engagement pending the determination of the complaint (TULRCA s.163 and ERA s.129); or (ii) if the employer does not agree, the employment tribunal makes an order for the continuation of the employee’s contract of employment, which ensures the employee is paid for the period until the determination of the complaint (TULRCA s.164 and ERA s.130).

The requirement for an employee to show they are “likely” to have been unfairly dismissed in a final hearing is a very difficult hurdle to surmount. This high threshold risks the introduction of interim relief, which is an insufficient deterrent for some employers to engage in unscrupulous fire and rehire exercises. We consider the test should be modified where an employee would need to show on the balance of probabilities, they will be found to have been either automatically unfairly dismissed or unfairly dismissed for any breach of ERA s.104I. This is much more likely to ensure effective compliance with the newly introduced provision. It is also a test that employment tribunals are already familiar with applying.

Secondly, whilst the existing interim relief framework allows an employer to refuse any order for reinstatement or re-engagement (and in such circumstances, the employment tribunal will make an order for the continuation of the employee’s contract of employment), we do not think this option should be available to the interim relief provision introduced to address dismissals potentially in breach of section 104I ERA. In dismissals under section 104I, ERA it is highly unlikely that there will be trust and confidence issues relating to the employees in question. In fact, in most instances the employer is seeking to re-engage them, but just on less favourable terms and conditions. On that basis, there is no good reason why an employer should not be compelled to reinstate or re-engage the employees back into the organisation for the period of interim relief.

December 2024

Submission by Thompsons Solicitors LLP

Respondent consultation questions

6.1 About you

22. Please indicate whether you are responding as:

- an academic
- an employer
- an employee, worker or individual
- **a legal representative**
- a business representative organisation or trade body
- a trade union or staff association other (please specify)

23. What sector or industry do you operate in?

- manufacturing
- construction
- wholesale, retail and repair of motor vehicles
- transport and storage
- accommodation and food services
- information and communication
- financial, insurance and real estate activities
- **professional, scientific and technical activities**
- administrative and support services
- public admin and defence; social security
- education
- human health and 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

6.2 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

We do not consider the proposals to increase the protective award will have a negative impact on a specific protected characteristic under the Equality Act 2010. We do however recommend an Equality Impact Assessment is undertaken.

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 or individual, what is your sex?

- female
- male
- prefer not to say
- **not applicable**

28. If responding as an employee, worker or individual, what is your ethnic group? **N/A**

- Arab
- Asian or Asian British
- Black, African, Caribbean or Black British
- Mixed or multiple ethnic groups
- White
- other ethnic group
- prefer not to say

- **not applicable**

29. If responding as an employee, worker or 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 or individual, do you have any physical or mental health conditions or illnesses lasting or expected to last 12 months or more? **N/A**

- yes
- no
- prefer not to say
- **not applicable**

31. If responding as an employee, worker or individual, which of the following age brackets do you fit into?

N/A