THOMPSONS SOLICITORS

Fire & Rehire: changes to expenses, benefits, and shift patterns

Consultation response on behalf of Thompsons Solicitors LLP

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Summary

We note the policy objective of the introduction of s 28 Employment Rights Act 2025 (ERA) was to "end the scourge of fire and rehire" which had become an increasingly popular tactic adopted by unscrupulous employers to undermine the terms and conditions of their existing workforce. As early as 2020, the (then) Government invited ACAS to conduct a fact-finding exercise with stakeholders to better understand how the practice of dismissal and re-engagement, also known as "fire and rehire" was being utilised by employers to erode term and conditions of employment and how prevalent the tactic had become during the pandemic following high profile controversy generated by its use at major employers such as British Airways and British Gas. The ACAS findings were published in June 2021 and intimated that even though the practice was nothing new, it had become more widespread during the pandemic. ACAS also outlined concerns that employers were increasingly using the threat of fire and rehire as a pressure tactic at the commencement of any consultation exercise to effect changes to terms and conditions.

On 17 March 2022, P&O Ferries dismissed approximately 800 members of its workforce, primarily from the Port of Dover but also at Kingston upon Hull, Liverpool and Cairnryan. P&O did this without consulting any of its recognised trade unions, and in contravention of its obligations under both the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**") and the Employment Rights Act 1996 ("**ERA 1996**"). The actions of P&O shed further light on how prevalent it had become for employers to dismiss employees and re-engage them on inferior terms or dismiss an existing workforce outright and recruit a new one on much less favourable terms and conditions. The actions of P&O correctly received condemnation across the political spectrum. In many senses, the actions of P&O were a "watershed moment" that led the current government to conclude that the banning of fire and rehire should be a manifesto commitment.

Notwithstanding the stated commitment in its manifesto, the government has since watered down its commitment to ban fire and rehire, limiting it to circumstances in which an employer seeks to use the practice to make a "restricted variation", as opposed to any contractual change.

A "restricted variation" means, among other things, (and of particular relevance to this consultation) any of the following:

- A reduction of, or removal of an entitlement to, any sum payable to an employee in connection with their employment (*section 104I(5)(a), ERA 1996*).
- A variation of the timing or duration of a shift which meets such conditions as may be specified in regulations made by the Secretary of State (*section 104I(5)(e), ERA 1996*).

The Secretary of State has the power to add new types of restricted variation by regulations and may also make regulations to provide that any of the following do not constitute restricted variations under section 104I(5)(a):

- A sum payable in respect of:
    - any expenses incurred by an employee;
    - any expenses of a specified description incurred by an employee; or
    - any expenses incurred by an employee other than expenses of a specified description.
- A payment or benefit in kind, a payment or benefit in kind of a specified description, or a payment or benefit in kind other than one of a specified description.

(See *Section 104I(6), ERA 1996*.)

On 4 February 2026, the government published this consultation considering which contractual changes to employment expenses, benefits and payments in kind, and shift patterns, should and should not constitute restricted variations for the purposes of section 104I(a) and (e) of the ERA 1996.

The stated rationale for the proposals detailed in this consultation is to ensure employers have sufficient "flexibility" to make operational changes to the provision of benefits and the structuring of shifts. Whilst we of course appreciate that employers often have a legitimate requirement for a degree of flexibility from their employees, particularly as regards shift availability, we do not consider that the proposals in this consultation are necessary to achieve this aim. We note that the Government are open to alternative views and our prevailing view is no further changes should be made to the prescribed "restricted variations" to narrow them any further.

Section 1: Expenses and benefits in kind

Question 1 – Which of the following options regarding expenses and benefits in kind protections do you agree with?

Other.

We consider that all expenses and benefits to which employees are *contractually* entitled should be subject to protection against unilateral variation by employers. Whilst we understand the government's policy objective in seeking to ensure employers are not unduly prevented from allocating their resources as they see fit, it is important to note that there is a fundamental difference between an employer using a discretion within the contract to make a change or varying a non-contractual benefit or expense policy and an employer seeking to unilaterally vary a term in a contract of employment to change a benefit or expense to which an employee has a strict contractual right.

"Expenses and benefits" cover a broad category of entitlements that an employer can agree to provide an employee as part of the overall bargain. These can take the form of reimbursing employees for the costs they incur in discharging their duties (e.g. fuel costs), they can also effectively represent an additional aspect of salary (e.g., a "car allowance" that takes the form of a cash payment), a right to accommodation or a benefit that is less closely related to the specific job function (e.g., health benefits). Whilst these can all accurately be described as "expenses and benefits", the distinction between, for example, an agricultural worker's right to be accommodated at or near a rural worksite or an international worker's right to visa assistance and a cycle-to-work scheme is immense. In the case of the former, such benefits are in many cases essential to an employee being able to do their job. If a farm worker's contract was varied such that they no longer received free or subsidised accommodation, they would effectively be subject to a pay cut in the amount of the rent/purchase money they would subsequently be required to pay. Similarly, were an employee to lose the right to reclaim their travel costs, this would likewise result in an effective salary cut.

On this basis, we consider Option 2 to be preferable to Option 1, in that we cannot see any basis by which it would be appropriate to exclude all expenses and benefits from protection, given some such terms are essential components of employees' benefit packages. However, rather than the government seeking to define a precise list of benefits and expenses that are in and out of scope of the definition of a restricted variation, we consider it would be preferable for the legislation to distinguish simply between provisions that are contractual in nature and cannot be varied without the consent of both parties on the one hand, and benefits and expenses that can be varied by the employer unilaterally in accordance with a discretion under the contract itself and/or as a result of the fact the term in question is not contractual in nature.

Employers have a choice between making a benefit contractual in nature or not. It is a sensible assumption that those benefits that are contractual in nature and incapable of amendment without the consent of both parties are generally of greater importance. By way of illustrative example, a job that offers accommodation is more likely to include the accommodation benefit

as a contractual right given the importance of such a term to a potential employee (who would find themselves out of a home should an employer remove the right), whereas benefits that might be characterised as "perks", such as a cycle-to-work scheme would often not be a benefit that is contractual in nature.

We further note the application of the financial distress exemption at s 28(8) ERA 2025. An employer who can genuinely no longer afford to provide a benefit could potentially avail itself of this provision to avoid a finding of automatic unfair dismissal if it sought to dismiss and re-engage to remove the provision of that benefit. We therefore consider there are sufficient protections in place to make the proposed "carve out" unnecessary, and do not consider that any further changes should be made that would effectively allow employers to fire and rehire in order to make unilateral changes to contractual terms relating to expenses and benefits.

The potential harm to employees of further narrowing fire and rehire protection in this way is significant. Whilst such a dismissal would not necessarily be "fair" if the s 28 restriction did not bite, by expressly "carving out" changes to some or all benefits from the definition of "restricted variation", it is clear that the legislation envisages that some such dismissals and re-engagements would be fair. This could mean that, for example, an employee who suddenly lost the right to claim a fuel allowance despite having substantial driving requirements would have no remedy despite, effectively, suffering a pay cut. This is exactly what the manifesto commitment to ban fire and rehire is supposed to guard against.

We therefore do not consider it necessary or prudent for government to seek to define which benefits and expenses should attract protection, beyond distinguishing between those with and without contractual force. However if the Government is wedded to that approach than option 2 is the appropriate option and we would urge it against proceeding with option 1.

Question 2 – If the government were to pursue Option 2, which expenses and benefits in kind should be protected (and therefore subject to higher protections from fire and rehire)? (Select all that apply)

Mileage, other travel expenses incurred in performance of duties, not including commuting, accommodation expenses incurred in performance of duties, long term accommodation offered as a benefit in kind, share scheme and ownership arrangements, other expenses and benefits in kind.

As stated in response to question 1, we believe all expenses and benefits in kind should be protected. Almost all expenses and benefits, and all those listed above, impact on what employees earn, either by constituting additional consideration for their work or by reimbursing them for costs incurred. In that sense, benefits are akin to pay, which is a restricted variation. Notwithstanding this position, if the government were to pursue Option 2, we consider that as a minimum, protection should be in place for such expenses as indemnify employees for costs incurred fulfilling their duties, such as fuel, accommodation and other out-of-pocket expenses. Further, benefits that effectively amount to salary under another name (e.g., a car allowance) should attract the same protection as pay, given the impact that an employer removing such benefits could have on employees' take-home pay.

Question 3 – If share schemes were to be protected, which types should be in scope of the restricted variation of sums payable for these purposes (and therefore subject to higher protections from fire and rehire)?

Direct share allocations, participation in schemes which allow employees to buy shares from a company reserve, other.

As stated in response to question 1, we believe all expenses and benefits in kind should be protected, and that a more appropriate distinction between types of benefit (as opposed to category) is the distinction between contractual and non-contractual. With respect to share arrangements, these are often by way of discretionary schemes outside the terms of the employment so could be amended without any need to dismiss and re-engage. However, we consider that where an employer has chosen to grant a contractual right to a share scheme, be that a direct share allocation or a right to participate in an option scheme, this forms part of the employee's core consideration for the job they undertake and it should not be open for employers to unilaterally vary that term. We note that employers would still be entitled to rely on the financial difficulty exception under s 28(8) ERA 2025, such that it would potentially be able to fairly impose a variation to such terms if it had a genuine financial need to do so.

Question 4 – In your view, how common is it for expenses and benefits in kind to be part of core contractual terms (without a contract variation clause that would allow the employer to change these terms)?

Other.

In our experience, whether a given expense or benefit forms part of an employee's core contractual terms without a pre-existing variation clause being in place to amend it unilaterally is largely dependent on the nature of the expense or benefit. As set out in our response to questions 1 and 2, above, it is generally the case that the more essential a term is to the bargain between the parties (e.g., mileage for a driver, accommodation for an itinerant worker), the more likely it is that the term will be provided for expressly in the contract as an unqualified entitlement. This may be by way of inclusion in the core contract itself or by way of incorporation, with the term set out in a collective agreement or policy that forms part of the employment contract. Whether there is a power to vary again depends on the nature of the benefit or expense. Ordinarily, matters such as mileage or some expense policies are subject to an employer reserving the right to vary the appropriate rates, so that the amounts employees can claim can be adjusted from time to time to reflect inflation and price changes. However, it would be unusual for the variation/discretion clause to go beyond a right to change the terms on which the benefit/expense was offered and include a right for the employer to withdraw the benefit/expense outright. Rather, the clause would likely provide that an employee is entitled to a certain type of benefit, to be paid at such rate and as such terms as set out in an associated policy document as revised from time to time at the employer's discretion.

Where benefits are less central to the discharge of employees' functions (e.g., ancillary perks such as cycle-to-work schemes or other wellness programmes), these are typically expressed to be non-contractual. Such benefits are therefore subject to change without requiring contractual variation.

Question 5 – In your view, which expenses and benefits in kind are commonly part of core contractual terms (not including those which can be changed via a contract variation clause that would allow the employer to change these terms)?

Expenses and benefits that are monetary in nature more typically acquire contractual status than ancillary, non-monetary benefits. However, non-monetary benefits (such as provision of accommodation) can have contractual force, and are more likely to do so when they form an essential part of the bargain between the parties. As explained in our response to question 4, above, it is not uncommon for some terms to be subject to limited variation as to the applicable rates. For example, the precise rates an employee can claim in expenses or for mileage would very rarely if ever be set out in the core contract of employment, but rather the contract would incorporate a policy that is subject to variation from time to time. The employer would therefore have the power to update the applicable rates.

With respect to which benefits and expenses are commonly part of contractual terms and not subject to any variation, this would typically only be the case where the benefit or expense was an essential part of the consideration for the contract, for example tied accommodation.

Question 6 – In your view, how important are expenses and benefits in kind, which are granted in employment contracts to employees?

Very important.

Many expenses and benefits form an essential part of the consideration given by an employer to an employee for their service. Such benefits are often indistinguishable from pay in practical terms, for example the provision of a car allowance. In the case of benefits such as mileage policies and tied accommodation, these are necessary for the employee to be able to undertake their roles. As also explained above, we would ordinarily expect it to be the case that those expenses and benefits that are more important to employees and more intimately related to their work would have contractual status over less important, ancillary benefits. That is, whether a benefit has contractual status or not is a likely indicator of its importance.

We also observe that, as regards categories of benefits and expenses, their importance may vary from employee to employee. For example, for some employees a provision around childcare may constitute an essential condition for them being able to remain in role, whereas in other workplaces, it may simply be a positive, but inessential perk.

It is for this reason that we would urge caution in introducing legislation that effectively creates a hierarchy of benefits/expenses based on category, beyond distinguishing between those that are contractual and those that are not. We consider all those that have acquired contractual

force to be of sufficient importance that employers should be restricted from varying them unilaterally.

Question 7 – In your view, how common is it, specifically, for share schemes to be part of contractual terms without a contract variation clause that would allow the employer to change these terms?

Other.

We are unable to provide a meaningful estimate of how common it is for share schemes to be incorporated into contracts without a variation clause. We understand it is often the case that share schemes will be governed by external scheme rules, such that they are not prescribed in the contract of employment, albeit the contract of employment may grant a right to participate in a share scheme.

Question 9 – In your opinion, what would be the impact on employees of excluding all expenses and benefits in kind from the automatic unfair dismissal protections of the fire and rehire measure?

We repeat the comments made elsewhere in this response concerning the significant impact that the proposed exclusion would have on workers. Certain benefits and expenses form a key part of the consideration given to workers in exchange for their services, such that an employer unilaterally varying the same would result in an effective pay cut to the worker. Therefore, removing the right of automatic unfair dismissal protection for dismissals made to impose such changes would significantly weaken employees' rights and would not be in accordance with the manifesto commitment to ban fire and rehire. Further, provisions such as tied accommodation and mileage benefits are often essential to an employee being able to undertake their job at all, such that their removal would have disastrous consequences. By carving out variations to benefits and expenses clauses from the definition of restricted variations, employees will be vulnerable to employers unilaterally degrading these key terms at any time, significantly increasing job insecurity, contrary to the stated aims of the government.

Further, we consider that expressly excluding benefits and expenses from the ambit of s 28 ERA 2025 protection could have the unintended consequence of effectively "greenlighting" such unilateral variations by employers. That is, by passing regulations stating that such changes are not restricted, the government is signalling to employers that it is possible to vary such terms fairly. As is widely known, existing law is generally permissive of dismissal and re-engagement, such that it is no answer to refer to "ordinary unfair dismissal protections". We do not consider this position is fundamentally changed by the introduction of s 104J ERA 1996 (by virtue of s 28(3) ERA 2025), which sets out a number of factors tribunals must consider when assessing the fairness of a dismissal.

Question 10 – In your opinion, what would be the impact on employers of including travel expenses, accommodation expenses and share scheme expenses in scope of the restricted variation for sums payable (and therefore subject to higher protections from fire and rehire)?

We consider the impact on employers would be minimal, particularly with respect to travel and accommodation expenses. To the extent these expenses are provided to cover employees for costs they incur in discharging their functions, it is unlikely to be the case that employers would ever have a legitimate reason to remove them. Should the need for a given employee to travel or reside in tied accommodation cease, there would no longer be any expense for the employer in any event. Further, as explained elsewhere in this response, the precise values that can be claimed under an expense policy would ordinarily be set out in a side agreement to the key contract with a power for the employer to prescribe applicable rates. Therefore, including travel expenses, accommodation expenses and share scheme expenses in the scope of restricted variations would impact employers only insofar as they sought to vary the underlying contractual right to the same. With respect to share agreements, should the terms of the same be set out in a document that forms part of the employee's contract (as opposed to a discretionary policy), it would be legitimate and appropriate to restrict the employer's ability to unilaterally amend this. Employers would of course remain able to rely on the financial difficulties exemption at s 28(8) ERA 2025.

Question 11 – Do you believe that the proposals discussed in this consultation relating to expenses and benefits in kind will have an impact on individuals with a protected characteristic under the Equality Act 2010?

Yes.

Excluding changes to travel/mileage expenses from fire and rehire protection is likely to disproportionately affect people with disabilities, on the basis that should it become economically impractical for an employee to travel by car due to a change in employer policy, they may be required to procure alternative transport including public transport. This could present a substantial barrier to people with disabilities.

Further, women are statistically more likely to have caring responsibilities than men, such that changes to any benefits relating to childcare or homeworking expense agreements are likely to have a disproportionate impact on women.

Question 12 – Where you have identified potential negative impacts in your response to question 11, are there ways to mitigate these?

We consider the most appropriate way to mitigate the potential negative impact is to grant automatic unfair dismissal protection to all variations to contract terms regarding expenses and benefits.

Question 13 – Is there anything else you would like to share your reflections on, that was not covered by the previous questions (e.g. broader risks or alternative options)?

We reiterate that we do not favour the proposals put forward in the consultation as they undermine the protections that were originally afforded to employees. These provisions should not be watered down any further.

Section 2: Shift Patterns

Question 14 - Which of the following options regarding shift changes do you agree with?

Other types of shift pattern changes should be protected as a restricted variation.

We do not consider either of the proposed options serve the policy aim of "ending the scourge of fire and rehire". On the contrary, we consider that the proposals risk tacitly endorsing the idea that employers have a unilateral right to erode important terms and conditions.

We acknowledge that forced contract variations that are not restricted variations can still amount to unfair dismissals (and are subject to the "enhanced" protections of s 104J(5) Employment Rights Act 1996). However, as is evident from the many cases of fire and rehire that led to the statutory intervention of s 28 Employment Rights Act 2025, it is all too easy for employers to dismiss and re-engage employees without breaching unfair dismissal law. We are concerned that the approach of the government expressly identifying a narrow set of shift changes that are restricted risks signalling to employers (and the judiciary) that changes other than these are acceptable to unilaterally impose. It is obvious from the acknowledged deficiencies in the existing law that the general unfair dismissal protections (including as "enhanced" by the extra factors for consideration under s 104J(5)) are insufficient to prevent such changes being imposed and employers avoiding any liability for unfair dismissal.

We consider both options are deficient. The consequences of adopting Option 1 would be that all changes to shift other than imposing a condition on day workers to work nights (and vice versa) and weekday workers to weekends (and vice versa) are potentially fair, notwithstanding the significant impact such changes would have on the lives of those affected. We agree that an employer should not be able to force a day worker onto nights or to force its staff to work weekends. However, we see no reason why it is less egregious to force an employee who has signed a contract requiring them to work Monday-Wednesday to work Wednesday to Friday. The impact on the worker could easily be equivalent in many circumstances to a change to weekend working; the level of disruption is the same in that one day on which they were not required to work would now be a working day. For employers, their interest in moving a staff member from Mondays to Fridays is no different to moving them from Mondays to Saturdays. Similarly, with respect to working hours, whilst moving a staff member from days to nights is of course particularly egregious, it is not the case that changing a staff member's contracted hours from, for example, early morning to late evening or vice versa is necessarily any less disruptive to their life.

The parties to an employment contract strike a bargain whereby the employee agrees to make themselves available at certain times (invariably prescribed by the employer). It is a matter for the parties (and particularly the employer) to agree terms that provide the required flexibility to cover the shifts it may require its employee to work. Should an employer wish to change this, they should be required to offer sufficient consideration. We simply see no basis for government intervention to carve out exemptions that mean shift changes as a whole or certain shift changes are no longer restricted variations. We note the stated objective is to give businesses flexibility to promote effectiveness. This flexibility can be achieved either through employers relying on existing contractual terms that afford them flexibility to make changes to shift patterns (where they exist as part of the overall bargain) or by seeking agreement to the proposed changes, either at a collective level or with individual employees. Further, it is clear from the Options assessment that any "savings" from these measures are in fact transfers of wealth from employees to employers (see Table 9, p.30). The proposed Option 1, whilst not expressly endorsing such changes, is likely to have the effect of employers believing they have a right to impose significant disruption on their employees lives by changing their working patterns.

It is also to be noted that this narrow definition of restricted shift changes would have a disproportionate impact on those with caring responsibilities for disabled people, older people and children, in that they are most likely to be negatively impacted by the government carving out from protection all shift changes other than day/night and week/weekend. Statistically, this is likely to disproportionately affect women.

With respect to Option 2, we repeat the concerns set out with respect to Option 1. It is of course the case that the problems outlined with respect to Option 1 would be even more acute than if Option 2 were adopted, as this would carve out all shift changes, effectively allowing employers to make unilateral changes and dismiss and re-engage to achieve the same without any risk of a finding of automatic unfair dismissal. We further have concerns regarding the Minister's delegated powers to implement Option 2. We note that s 28(5)(e) ERA 2025 defines "restricted variation" to include "a variation of the timing or duration of a shift which meets such conditions as may be specified in regulations made by the Secretary of State". This grants the Secretary of State the power to prescribe the conditions a variation to shifts must satisfy to be restricted. Option 2 states that no shift changes are restricted. This amounts to the Secretary of State depriving the restriction on imposing shift changes of any substance. This conflicts with the clear intention of Parliament in introducing this restriction.

We appreciate the government's response may be that excluding such changes from the definition of "restricted variations" is not akin to condoning the practice of fire and rehire to achieve changes to shift patterns. However, it is established that employers are often able to "get away with" firing and rehiring employees lawfully under existing legislation, and this position is not materially changed by the "enhanced" protections at s 104J(5) ERA 1996.

We urge the Minister to carefully consider the real-world impact on employees of their employer forcing a change to the days and hours they are required to work under their contract.

We note the analysis in the Options Assessment as regards the likelihood of staff agreeing to variations voluntarily / for consideration (from para 142, p.46). We do not endorse the probability assumptions made in the Assessment or the conclusions drawn from this. Rather, we consider that this approach fundamentally misunderstands the nature of contract and the employment relationship. The government has ascribed a probability of 0.2 to employees agreeing to shift changes for consideration. However, the likelihood of employees agreeing to shift changes for consideration depends entirely on the consideration offered. If employees reject such changes, it is open for employers to offer greater consideration. In any ordinary contractual situation, that is how bargaining would proceed. The suggestion that there is a 0.2 probability that the change will be accepted and a 0.7 probability that it will be rejected and imposed is not understood, and we consider the reasoning perverse. If an employer wishes to change terms, it should be required to make an offer (through collective bargaining where a union is recognised or seeking to be recognised) and seek acceptance as is the case in any other contractual situation. The probability of acceptance increases in line with the value of the offer. We see no basis for legislative intervention at this stage to make it easier for employers to erode terms other than by agreement.

Question 15 - Do you agree with the proposed definition of night-time working (any time 11pm-6am)?

Other.

We agree that 11PM-6AM is an appropriate definition of nighttime, as this largely fits with the provisions of the Working Time Regulations 1998. However, we consider it is necessary to define the restrictions such that they capture a change from exclusively day working to exclusively night working, exclusively day working to day and night working, exclusively night working to day and night working, day and night working to exclusively day or night working. This is necessary to ensure that that appropriate provision is in place to protect employees whose shifts do not fall completely within the period 11PM-6AM. We consider any change of this nature to be suitable for inclusion as a restricted variation given the substantial impact it would have on employees.

Question 16 - If answered no, don't know or other to question 15, what do you think the definition of night-time working should be?

See response to question 15.

Question 17 - Do you agree that changes from weekday to weekend and weekend to weekday shifts should be included in this list of protected shift changes?

Other.

We consider that firing and rehiring/replacing an employee for refusing to agree to a change from weekday to weekend working or vice versa should be automatically unfair. However,

see our comments elsewhere as the reasons why we consider this does not go far enough and is not a coherent approach to take to achieve the government's stated policy aims. We do not repeat these in full here, but in short, we do not see a reason why it should not be automatically unfair to fire and rehire/replace an employee with a contractual obligation to work on Mondays for refusing to change to a Wednesday rather than a Saturday. The distinction between weekday and weekend working is universal in some, predominantly white-collar, office-based workplaces, but this is not the case in all industries, and many people work shift patterns that differ from Monday-Friday 9-5. The proposal overlooks the real-world impact on workers' lives of an employer changing a contractually agreed working pattern under threat of dismissal. As stated elsewhere in this response and acknowledged in the consultation documents, contracts can provide for flexibility in rostering where an employer considers that necessary. Where a contract provides for specific working days and times, it is reasonable to surmise that this reflects the intentions of the contracting parties.

The only possible justification for restricting the definition of restricted variations to changes between weekday and weekend working is that it causes a greater level of disruption or harm to workers. However, for the reasons set out above, we do not consider this is necessarily the case.

We consider that all changes to contractual terms regarding shift time and duration should be restricted.

Question 18 - Do you agree that changes from day to night and night to day shifts should be included in this list of protected shift changes?

Other.

We consider that firing and rehiring/replacing an employee for refusing to agree to a change from day to night working or vice versa should be automatically unfair. However, see our comments elsewhere as the reasons why we consider this does not go far enough and is not a coherent approach to take to achieve the government's stated policy aims. Whilst unilaterally imposing a change to night work would constitute a particularly egregious abuse of employer power, there is simply no way to support the statement evidentially that this is qualitatively or quantitatively worse than moving an employee from mornings to evenings, or one part of a night shift to another. Workers plan their lives, including care responsibilities, around their shifts. If a worker is required to change their working pattern under threat of dismissal, this could have a major impact on their ability to tend to their personal lives and make it impossible to remain in a job. Under the current proposal, it would not be a restricted variation for an employer to require a parent who has a contractual right to finish work at 2PM to collect their child from school to instead work until 4PM. We reiterate our comments above as to the existing law (outside s 28 ERA 2025) being generally permissive of such changes (regardless of the "enhanced" provisions under s104J(5) ERA 1996).

As for changes to specified days of working, it is simply not the case that the type of variations proposed to be "restricted" are necessarily more harmful to workers than those that will be excluded. Similarly, where workers do work irregular patterns or may be required to do so,

there has been no restriction on their contracts accommodating such flexibility. Employer should only be permitted to exercise the discretion as regards rostering as the parties have agreed. Should they wish to go beyond this and fundamentally change the hours over which a staff member can be rostered, this should be a matter for further agreement, with the employer providing appropriate consideration.

Question 19 – Do you think that the government should consider whether there are certain kinds of changes to contractual availability windows which should be protected from being changed through fire and rehire?

Yes.

It is the case that many employment contracts set out the parameters of how and when staff can be rostered rather than prescribing fixed shifts. This is the ordinary position with shift work where workers do not work regular patterns. As stated elsewhere in this response, it is for this reason that we have significant doubts about the extent to which the proposals in this consultation address a genuine or meaningful business concern. Rather, they significantly harm workers and give employers further power to compel workers to change their hours.

We consider that the same rules should apply to variations of availability window terms as apply to terms governing fixed shift patterns. We see no basis for a different approach to be taken; both represent the period during which a worker has agreed to work in exchange for the consideration given by the employer. A unilateral variation to either will require a worker to work at different times to the hours they had agreed to. A worker is no less harmed by a variation to a clause that requires them to work a prescribed number of hours in a prescribed period in accordance with a roster than they would be by a variation to a contract providing for fixed working hours.

Question 20 – If you answered yes to question 19, which changes to contractual availability windows should be protected?

See response to question 19.

Question 21 – In your opinion, how common is it for shift patterns (specific days and times) to be specified in employment contracts or as a contractual term?

Other.

In our experience, clauses governing shift patterns in an employment contract vary significantly based on the nature of the work. In jobs where it is standard practice to work "office hours", these usually state specific days and times of work. However, where the nature of the work requires more flexibility (e.g., hospitality), the equivalent clause will set out the period over which the employee can be rostered. This is not a new development, and employers are well versed in drafting contracts that set out their requirements as regard working patterns. It is for this reason that we do not consider there is any compelling need for restricting the

definition of "restricted variations" to shifts as proposed; employers already accommodate for the required flexibility in their contracts, with appropriate consideration given to account for the employee's flexibility and making themselves available.

Question 22 – In your opinion, how common is it for there to be a flexibility clause in an employment contract that would allow the employer to change an employee's shift patterns without the employee's agreement?

Other.

See our response to question 21 above.

Question 23 – What would the impact on employees be of only protecting the proposed narrow list of shift changes (day-night, night-day, weekday-weekend and weekend-weekday)?

If the narrow list of shift changes is adopted, employees would continue to be at risk of being dismissed and re-engaged/replaced for not agreeing to changes to their contractual terms concerning shifts, with the exception of changes requiring them to move from days to nights or weekdays to weekends (or vice versa). Employees would continue to be as vulnerable (materially) as they are under the current law to fire and rehire if they refused to agree to significant contract changes, including requiring them to work on days they are not currently required to work on or at times of the day / night that they do not currently work. As explained elsewhere in this response, for many people, a change other than a night/day weekend/weekday change would be just as disruptive to their life. The impact on employees would be that they would be exposed to the very same harm that the proposed narrow list of protected shift changes seeks to remedy, namely job insecurity and unpredictability.

Question 24 – What would be the impact on employers of only protecting the proposed narrow list of shift changes (day-night, night-day, weekday-weekend and weekend-weekday)?

Employers, who already enjoy substantial bargaining power in the employment relationship, would be further empowered to unilaterally impose contractual changes. As stated above, employers have to date been able to incorporate flexibility into employment contracts if they require it as part of the overall bargain, such that we do not consider the proposal serves a genuine policy need; it simply further tilts the balance of power away from employees and tacitly endorses the right to fire and rehire.

Question 25 – In your opinion, are there any concerns or risks you think should be considered with protecting the proposed narrow list of shift changes (day-night, night-day, weekday-weekend and weekend-weekday)?

Yes. See above as regards our concerns that drawing the restrictions in this way is insufficient and could inadvertently lead to an understanding among employers that fire and rehire is appropriate where they are seeking to impose variations that fall outside of the narrow definition. As stated above, consideration should be offered for such changes.

Question 26 – Do you believe that the proposals discussed in this consultation relating to shift changes will have an impact on individuals with a protected characteristic under the Equality Act 2010?

Yes.

We consider that the narrowness of the proposed restrictions will have a significant disproportionate impact on people with protected characteristics under the Equality Act 2010, in particular women, people with disabilities (including people who are associated with people with disabilities through caring responsibilities).

This is because the proposals fail to protect against (and tacitly endorse) employers compelling staff to accept changes to the hours and days they work. This is likely to have a particularly acute impact on those with caring responsibilities (for children, people with disabilities or people with other needs), people with disabilities who may have needs around shift times or predictability (including neurodivergent people and those with acute medical needs). This is because it will be particularly challenging with those who have fixed childcare or other caring responsibilities or medical needs to accept unrestricted variations to their shifts given the disproportionate impact it would have on their day-to-day lives.

With respect to minority ethnic people, ONS data from 2022 notes that the night-time economy relies heavily on people born outside the UK[1] and TUC data from 2024 indicating that Black and Minority Ethnic people make up a "disproportionate" part of the UK's night work force, with the number of BME night workers rising by 360,000 (71%) since 2014.[2] The same analysis identifies that night workers are twice as likely as the general population to be on zero-hours contracts. Further, in its 2025 report *The Experience of Insecure Work*, the TUC noted that BME workers are more likely to be in insecure work, particularly BME men.[3]

It is predominantly those who do regular shift work who are likely to be impacted by the proposals, as there will be little likelihood of application to office workers who work regular weekday hours. At present, many of these are subject to zero hours contracts, such terms to be reformed in accordance with the relevant provisions of the ERA 2025. Once those provisions of the ERA 2025 have come into effect so as to provide for guaranteed hours, workers who ought to benefit from the reforms will face additional insecurity if they are

[1] ONS (20223) The night-time economy, UK: 2022
[2] TUC (2024) Number of Black and ethnic minority workers doing nightshifts has "skyrocketed" by 360,000 over the last decade
[3] TUC (2025) The Experience of Insecure Work

exposed to the risk that employers can impose variations to their shifts without agreement. Due to the fact that BME people are more likely to be subject to such contracts, a decision not to restrict employers from using fire and rehire to force through changes to contractual terms on shifts will disproportionately affect BME people.

Question 27 – Where you have identified potential negative impacts in your response to question 26, are there ways to mitigate these?

We consider the only appropriate way to mitigate the disproportionate impact the proposed legislation is likely to have on women, people with disabilities, and minority ethnic people is for the government to revisit its proposal to carve out from fire and rehire protection changes to shift patterns other than those listed in Option 1. As stated elsewhere in this response, it is simply not possible to conclude the impact on workers as regards non-restricted shift variations is less than restricted variations. Whilst those currently stated as restricted variations under Option 1 do appear particularly egregious, the impact on individual workers of a non-restricted variation could be just as significant. On that basis, there is little justification for adopting this approach. Combined with the likely discriminatory impact of the carve out from protection, we consider it would be appropriate to mitigate the downside by stating that all contractual changes to terms as regards shifts should be restricted.

Question 28 – Is there anything else you would like to share your reflections on, that was not covered by the previous questions (e.g. broader risks or alternative options)?

No. However, we reiterate the position that the provisions relating to fire and rehire should not be "watered down" any further. It was inevitable a strong business lobby would oppose changes of this nature but now is not the moment to cede further ground. The protections against fire and rehire are a key cornerstone of the Act and a further weakening of the provision leaves workers exposed to bad practice deployed by unscrupulous employers.