Unfair dismissal: progression-based performance models and Polkey pitfalls

In *Pal v Accenture (UK) Ltd*, the EAT held that Employment Tribunals must apply the correct counterfactual when assessing Polkey deductions and carefully analyse whether "up or elsewhere" (also known as "up or out") dismissals fall under capability or some other substantial reason.

What happened in this case?

Ms Pal commenced employment at Accenture in August 2009 as an Analyst. In 2011 she was promoted to Consultant, and in 2013 she was further promoted to Manager. The next promotion would have been to become a Senior Manager. Accenture operated what was a called an "up or elsewhere model". Under that model, employees are expected not only to perform competently at their current grade but also to demonstrate readiness for promotion within a typical timeframe. Failure to show such progression is treated as underperformance, which could lead to dismissal.

In August 2018, Ms Pal's performance was rated as "Not Progressing", however, this was not communicated to her until November 2018. In the meantime, in September 2018, Ms Pal informed her managers that she needed to have an urgent operation to remove two ovarian cysts. It was then discovered that she had endometriosis. Ms Pal was off work for a month after the surgery.

In October 2018, she returned to work of her own volition, and against Occupational Health advice. However, she needed a second period of sick leave from late November 2018 to early January 2019. In mid-January 2019, Ms Pal had a further Occupational Health assessment. A report was issued setting out some of the impacts on Ms Pal's daily activities. It said that Ms Pal was experiencing a poor sleep pattern, that she was completing light everyday tasks, but she was not carrying heavy shopping, and that she could only walk for periods of up to 20 minutes as anything longer was exacerbating her fatigue.

An eight-week phased return was agreed covering the period through to early March 2019. During that eight-week period, Ms Pal met with her managers to discuss her performance and Accenture's expectations. At a midyear talent discussion held on 21 March 2019, Ms Pal was again rated as "Not Progressing", however, this was not communicated to her until June 2019. In July 2019, Ms Pal attended a meeting to discuss her performance. At the end of the meeting Ms Pal was told that she was to be dismissed, which was confirmed in a brief letter sent that day. Ms Pal's appeal against that decision was dismissed.

Ms Pal brought claims for unfair dismissal and disability discrimination:

- On unfair dismissal, the Employment Tribunal found that the dismissal was procedurally unfair because Accenture had failed to comply with aspects of its own Disciplinary and Appeals Policy (i.e. by not conducting a formal investigation and by allowing individuals involved in the performance management process to sit on

the dismissal panel). However, the Tribunal applied a 100% "Polkey" reduction to compensation to reflect the fact that Ms Pal would have been dismissed in any event.

- On the question of disability, the Tribunal held that Ms Pal was not disabled on the basis that she had not shown that her endometriosis had an ongoing substantial effect on her normal day-to-day activities, nor had these effects lasted, or were likely to last, more than a year. It was also found that Accenture had no knowledge of disability, nor could it reasonably be expected to have had such knowledge.

Ms Pal appealed to the Employment Appeal Tribunal (the **EAT**).

What was decided?

The EAT (HHJ James Tayler presiding) held that the Tribunal had erred in law in several respects.

The Polkey deduction

The Tribunal had applied the wrong counterfactual when making the 100% Polkey deduction. Instead of asking what this

employer would have done had it complied with its own policy (including conducting an investigation and using independent decision-makers), the Tribunal effectively assumed the employer would have operated under a *different*, more suitable policy. Yet there was nothing in the judgment that demonstrated that Accenture led any evidence that it would have introduced such a new policy or had done so by the time of the Employment Tribunal hearing.

A Polkey assessment must consider what the actual employer would have done if it had corrected the procedural defect. The Tribunal cannot substitute its own view of what would have been fair or assume the employer would have restructured its procedures. Therefore, the Tribunal should have considered whether Ms Palwould still have been dismissed (or dismissed at the same time as she was actually dismissed) had Accenture applied its procedure correctly i.e. what would have happened if the decision been taken by independent managers following a formal investigation?

Capability and "up or elsewhere" models

The EAT provided important analysis on the potentially fair dismissal reason of capability. It said that capability must be assessed by reference to the work the employee was contractually employed to perform. Where dismissal is based on a failure to demonstrate readiness for promotion, that may not necessarily amount to a fair dismissal for capability if the employee is performing their existing contractual role competently.

Instead, such dismissals may fall within the alternative fair reason of "some other substantial reason". However, in such

cases the substantial reason must justify the dismissal of an employee holding the "position" which the employee held. A Tribunal would need to consider the reason in light of the employee's status, the nature of their work and their terms and conditions of employment.

The EAT did not determine the correct label in this case, but made clear that Tribunals must take care to analyse progression-based expectations.

Disability discrimination

The EAT also held that the Tribunal had failed properly to analyse whether Ms Pal was disabled within the meaning of the Equality Act 2010 at the material time and whether dismissal was because of something arising in consequence of disability. The Tribunal had relied heavily on an Occupational Health comment that symptoms had not lasted 12 months, without properly analysing the statutory test (including addressing likely duration and recurrence).

The case was remitted to a different Employment Tribunal.

What does this mean for employers?

This is a significant decision for employers operating structured progression or "up or out" models, particularly in professional services, consulting and law firms.

Employers cannot assume that a failure to demonstrate

promotion-readiness automatically equates to poor performance justifying a capability dismissal. Tribunals will examine what the employee was contractually employed to do, whether progression expectations are incorporated into the contract; and whether dismissal is properly characterised as capability or SOSR.

As far as Polkey is concerned, employers must be able to demonstrate what they would have done had they complied with their own policy. Tribunals will not assume employers would have redesigned their procedures to avoid unfairness. Evidence is required to support an argument that dismissal would have occurred in any event.

The impact of this decision is likely to be more keenly felt from 1 January 2027 when the statutory cap on compensation for unfair dismissal is lifted.

The decision also highlights a common pitfall: over-reliance by employers on Occupational Health advice instead of considering the legal definition of "disability".

Pal v Accenture (UK) Ltd

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact James Hockley (JamesHockley@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

Employment Rights Act 2025: refusing flexible working requests comes under the spotlight.

On 5 February 2026, the Government opened a consultation on the flexible working changes included in the Employment Rights Act 2025. In particular, views are sought on the new statutory process that an employer must follow should it wish to reject a flexible working request.

What is the current position on flexible working requests?

All employees have the right to request a flexible working arrangement from Day 1 of their employment. Currently, employers may refuse flexible working requests where they consider that at least one of eight grounds specified in the Employment Rights Act 1996 applies. This includes things like the burden of additional costs, an inability to reorganise work among existing staff or detrimental impact on quality or performance. Importantly, this is a *subjective* test, which means that as long as an employer considers that one of the eight grounds applies, and that view is based on correct facts, that is a sound basis upon which to reject a request.

In terms of process, from 6 April 2024 employers have been required to consult with employees *before* refusing a request.

However, the nature of the consultation is not set out in law. Instead, the statutory Acas Code of Practice on requests for flexible working (the **Code**) sets out recommendations on the scope of such consultation. The Code suggests gathering all relevant information, holding a meeting with the employee to discuss the request and considering alternatives if needed. A written record of the meeting should be kept, and a right of appeal is also recommended. A failure to follow the Code does not give rise to a claim, but Tribunals are able to take into account when considering relevant cases.

What changes will be made by the Employment Rights Act 2025 (the ERA)?

The ERA will make changes to the flexible working regime in 2027.

First, it will require an employer's refusal of a request to be based on one of the existing eight grounds and be an *objectively reasonable* one. The employer will need to notify the employee of the ground for refusing the request and explain why it considers that it is reasonable to refuse the application on a particular ground. Where an employer's decision is not reasonable, or where it fails to explain this to the employee, the employee will be able to complain to an Employment Tribunal. A Tribunal could order the employer to reconsider its decision and/or award compensation of up to eight weeks' pay (currently capped at £719 per week).

Second, the steps that an employer needs to take to consult with an employee before refusing a request will be set down in legislation for the first time. The aim is to introduce consistency for employees and clarity for employers.

The Government promised to consult about the detail of these changes before bringing them into force in 2027. The Consultation on improving access to flexible working was launched on 5 February 2026 (the **Consultation**).

What does the Consultation say?

As far as the new reasonableness test is concerned, the Consultation simply seeks evidence on current approaches to handling flexible working requests. It is said that this information will be used to help shape guidance and resources for employers, employees and other stakeholders.

As to the new statutory process, views are sought on the proposed process that employers will need to follow. It is said that the proposed process represents a *"a series of light touch requirements"* which have been drawn from the current Acas Code of Practice.

The proposed statutory consultation process will require an employer that is considering refusing a flexible working request to meet with the employee. Views are sought on the following matters:

- **The objective of the meeting:** it is said that the purpose of the meeting is to discuss challenges with the request and explore alternative options. Views are sought on whether this is the right objective for the meeting.

- **Setting up the meeting:** it is said that the meeting must take place within the two-month period for making a decision (but that, in practice, it should take place within six weeks of the request to allow time for follow up conversations). The employee must be informed about the context of the meeting in advance to give them time to prepare. A person with authority to make a decision must attend the meeting and keep a record of the discussion. Views are sought on whether these requirements are right and how much notice should be given to the employee.

- **During the meeting:** it is said that the meeting must allow for sufficient discussion of the request and potential alternatives. The decision-maker must:
    - clarify whether the proposed arrangement should be treated as a reasonable adjustment under the Equality Act 2010;
    - explain any challenges with the original request and why it would not be feasible to accommodate it, referring to the relevant business reason;
    - consider whether there are any ways around the identified challenges;
    - consider alternative arrangements; and
    - consider allowing a trial period if the impacts of an arrangement are unclear.

View are sought on whether these are the right things to be addressed at the meeting.

- **Communicating the outcome in writing:** it is said that employers must provide written notice of the outcome of the meeting, including a summary of the discussion and any conclusions or next steps that were agreed. It must also provide written notice of its final decision on the request (i.e. whether it was approved, rejected or if an alternative arrangement is agreed). Views are sought on whether it is right to require employers to communicate both the outcome of the meeting and the decision on the request in writing. Views are also sought on whether the new process will take more, less or a similar amount of time to existing processes.

What will these changes mean for employers in practice?

We think the change to the reasonableness test means that employers will have to go further to be able to justify the ground or grounds for refusal. For example, if a request is refused on the basis of an inability to reorganise work among existing staff or recruit additional staff, and the employer has not consulted with existing staff about the possibility of doing so, or considered the feasibility of recruiting additional staff, it is likely that a refusal on such grounds would be unreasonable. Or where a request is refused on the

basis of detrimental impact on quality or performance, again, the question will be: what is the evidence for this view? Unless there is some historical evidence (e.g. if an employee has worked the same or similar pattern in the past and it was unsuccessful), it is likely that an employer would need to allow a trial period of the proposed working pattern for a reasonable period of time in order to assess whether there was, in fact, such a detrimental impact. The end result is that more requests are likely to be accepted.

The impact of the changes to the consultation process is likely to be minimal. Employers are used to the requirements of the Acas Code of Practice, including the need to hold a meeting. That said, employers will need to take care not to trip up on the finer detail since mistakes could give rise to a Tribunal claim. Interestingly, unlike the Acas Code of Practice, the proposed statutory procedure does not provide that the employer should allow an employee to be accompanied to the meeting, nor offer a right of appeal.

What are the next steps?

Employers wishing to respond to the Consultation may do so online, by email or in writing by 30 April 2026.

The Government will finalise its proposals and publish a response in due course, to be followed by draft regulations. In addition, it is said that Acas may open a consultation on revising its Code of Practice and guidance on flexible working.

The reforms are due to come into force on an as yet

unspecified date in 2027.

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Employment Rights Act 2025: consultation launched on the detail of the fire and rehire reforms

On 4 February 2026, the Government opened a consultation on certain aspects of the fire and rehire changes included in the Employment Rights Act 2025.

What is the current position?

"Fire and rehire" is a shorthand used to describe the practice of dismissing an employee then offering to re-engage them (or someone else) on inferior terms and conditions. It is usually deployed where employees are not willing to agree to changes to their terms and conditions.

Provided the employer can identify a fair reason for the dismissal (usually "some other substantial reason") and can demonstrate that it acted reasonably, a fire and rehire dismissal may be fair. In addition, if an employer wishes to fire and rehire, it should also comply with the requirements of the statutory Code of Practice on dismissal and re-engagement, which came into force in July 2024 (the **Code**). The Code requires employers to undertake good-faith discussions with employees or their representatives, engage with Acas and consider alternatives. A failure to comply with the Code may lead to an uplift of up to 25% to any compensation awarded to an employee by an Employment Tribunal.

What changes will be made by the Employment Rights Act 2025 (the ERA)?

Fire and rehire

The ERA provides that a dismissal will be "automatically unfair" from Day 1 of employment where an employee is dismissed:

- for failing to agree to "restricted variations" to their terms and conditions of employment; or

- in order to re-employ them (or to employ someone else) under varied terms and conditions, where one of more of the differences between the two sets of terms is a

restricted variation, but where the role is otherwise substantially the same.

A “restricted variation” means a variation relating to pay, pensions or pension schemes, working hours, a reduction in the amount of time off or the timing or duration of shifts (where such shifts meet certain conditions to be specified in regulations). It also covers the inclusion of a unilateral flexibility term allowing the employer to make a restricted variation in future without the employee’s agreement. These terms are said to be the ones which could have a significant impact on employees if changed without agreement. The ERA provides that the list of restricted variations may be expanded in future and, that regulations may specify that “pay” excludes expenses and benefits in kind.

Where either:

- a restricted variation is made in response serious financial difficulties affecting the employer’s ability to carry on business as a going concern and where there is no reasonable alternative; or

- an employee is dismissed (i) for refusing to agree to other types of non-restricted variations or (ii) to re-employ them (or to employ someone else) on non-restricted varied terms,

then any dismissal will not be automatically unfair. However, it could still be ordinarily unfair, and subject to a slightly enhanced regime. In such cases, certain matters *must* be considered by the Employment Tribunal to determine whether the dismissal is ordinarily unfair including: the reason for the variation, any consultation carried out about the proposed variation (including with a trade union), anything offered to the employee in return for agreeing to the variation and any other matters specified in regulations.

Fire and replace

Separately, the ERA contains a provision designed to prevent employers from simply replacing an employee with a non-employee. This provision is **not** linked to contractual variations. The ERA says it will be automatically unfair to dismiss an employee in order to replace them with a non-employee (e.g. a self-employed contractor, agency worker or outsourced worker) where the new non-employee would carry out the same, or substantially the same, role (either alone or taken together with others). This will even capture the scenario where the employee is dismissed and offered re-engagement but stripped of their employment status.

The Government promised to consult about some of the detail of these changes before bringing them into force in 2027. The "Fire and Rehire: changes to expenses, benefits and shift patterns" consultation was launched on 4 February 2026 (the **Consultation**).

What does the Consultation say?

The Consultation is confined to the following two aspects of fire and rehire, namely:

- the exclusion of certain expenses and benefits in kind from the scope of the restricted variations of reducing pay; and

- which types of changes to shift patterns, if any, should be treated as a restricted variation.

The Consultation does not seek views on any aspect of fire and replace.

Exclusion of expenses and benefits/payments in kind from counting as "pay" for restricted variation purposes

The Consultation sets out two possible options:

- Option 1: the exclusion of all expenses and benefits or payments in kind: under this option, a dismissal made in order to reduce or remove any expenses or benefits / payments in kind would not be automatically unfair. It could be ordinarily unfair and subject to the enhanced regime discussed above. The Consultation gives an

example of an employer using fire and rehire to reduce expenses to a level which leaves the employee out of pocket. Under this option, this would not be automatically unfair but would be likely to be ordinarily unfair as the employer will find it difficult to demonstrate that it acted fairly in dismissing in these circumstances.

- Option 2: the exclusion of all expenses and benefits or payments in kind **except** certain types of share schemes, accommodation-related entitlements or travel expenses: under this option, dismissals made in order to reduce or remove: (i) certain travel or accommodation expenses; or (ii) benefits or payments in kind which are long-term accommodation benefits or certain share schemes, could be automatically unfair. However, the Consultation says that even these types of expenses and benefits should only be treated as "pay" if they have *"…an equivalent character to pay and form part of an employee's remuneration package".* The Government said there should be a high bar for inclusion, for example, only if they make up a significant aspect of the employee's remuneration such that the employee has structured their life around it. A narrow approach is justified on the basis that it gives employers reasonable operating flexibility. The Government seeks views on which types of share schemes, accommodation entitlements and travel expenses have the character of pay.

However, the Consultation goes on to say that the Government is minded to adopt **Option 1**, which excludes all expenses and benefits / payments in kind. This would provide employers with flexibility to use fire and rehire to impose changes, but still allow employees to raise ordinary unfair dismissal claims (which would be subject to the enhanced regime discussed above).

Inclusion of changes to shift patterns as restricted variations

The Consultation recognises that employers need flexibility to adjust shifts patterns to accommodate business needs (e.g. market changes, extended hours, new customers). However, major shift changes also significantly affect employees' lives, particularly those with caring responsibilities. The Government is, therefore, considering whether *some* shift changes should be classified as restricted variations, meaning any fire and rehire dismissal would be automatically unfair.

The Consultation sets out two possible options:

- Option 1: only day to night (or vice versa) and weekday to weekend (or vice versa) changes would be restricted variations: under this option dismissing an employee to impose these especially disruptive type of shift changes would be automatically unfair. Other types of shift changes would not be restricted, but a related dismissal could be ordinarily unfair (and subject to the enhanced regime discussed above). Existing protections for night workers and Sunday workers under the Working Time Regulations 1998 and the Employment Rights Act 1996

would remain in place.

- Option 2:No shift pattern changes would count as restricted variations. Under this option no shift pattern changes would count as restricted variations. Employees would instead rely on enhanced ordinary unfair dismissal protections if they were dismissed for not agreeing a change.

The Consultation flags that the Government considered restricting changes affecting a certain percentage of shifts, changes above a fixed number of hours, or changes causing "substantial detriment". However, these were rejected as impractical, unclear, or likely to increase disputes and litigation. The Consultation goes on to say that the Government is inclined to adopt **Option 1**, restricting only the most extreme shift changes, to balance business flexibility with employee protection.

What will these changes mean for employers in practice?

The fire and rehire provisions are complex and contain many pitfalls. Employers considering changing terms and conditions or restructuring their workforce will certainly need to spend time familiarising themselves with the new rules and will likely require specialist legal advice before proceeding.

In future, employers wishing to change terms and conditions will have a higher exposure to automatic unfair dismissal claims. The terms which constitute "restricted variations" if varied are the very terms that would usually lead an employer to consider the extreme solution of fire and rehire in the first place – namely, pay, benefits, hours and leave entitlements.

If taken forward, the proposal to exclude expenses and benefits / payments in kind from the concept of "pay" would make life slightly easier for employers and preserve some degree of flexibility in respect of making changes to relevant terms (albeit the risk of an "enhanced" ordinary unfair dismissal claim remains).

The proposed limitation on shift changes is quite narrow but will disproportionately affect employers in certain sectors such as manufacturing (where day and night shifts are common) and retail and hospitality (where weekday and weekend shifts are common).

Overall, the increased risk will reduce flexibility for employers in imposing workforce changes. Instead, employers will need to seek agreement to vary terms through negotiation.

What are the next steps?

Employers wishing to respond to the Consultation may do so online, by email or in writing by 1 April 2026.

The Government will finalise its proposals and publish a

response in due course, to be followed by draft regulations later in 2026 or early 2027. In addition, it is said that the Government will open a separate consultation on updating the statutory Code of Practice on dismissal and re-engagement.

The Government intends to bring these changes into force in January 2027.

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