Consultation on expanding the remedies for breaches of collective redundancy and fire and rehire laws

On 21 October 2024 the Department for Business and Trade opened a consultation on proposals for further reforms to the rules on collective redundancy consultation and fire and rehire (the Consultation). The Consultation will run for just six weeks, closing on 2 December 2024. In this briefing, we explain what is proposed and what it means for employers.

Collective redundancy consultation

What is the current position and how will the Employment Rights Bill change things?

Currently, collective redundancy consultation is triggered where there is a proposal to dismiss as redundant 20 or more employees assigned to one "establishment" within a 90-day period. Where 20 to 99 redundancies are proposed, the consultation must begin at least 30 days before the first dismissal. Where 100 or more redundancies are proposed, the consultation must begin at least 45 days before the first dismissal. The question of what counts as an "establishment" has been ventilated in litigation – with the courts concluding that it means the local unit where the employee works, not the business overall.

A failure to comply with these obligations may lead to a "protective award" of a sum not exceeding 90 days' gross actual pay per employee. This award is intended to penalise the employer and disincentivise breaching the rules. The

amount of the award is determined by the Employment Tribunal according to what is just and equitable but, in a nutshell, the worse the breach, the higher the protective award and vice versa.

The Employment Rights Bill proposes to change the law to trigger collective consultation where there are 20 or more proposed redundancies within 90 days across the business overall rather than in just one workplace. This would mean that collective consultation would be triggered more frequently as redundancy numbers would need to be counted across the whole business, even where the redundancies are unrelated. The Government has said that this change will mean that more employees will benefit from collective consultation, including those who are not assigned to a local unit and work remotely.

What is proposed in the Consultation?

The Consultation does not revisit the Bill proposal, but, rather, seeks views on strengthening the remedies available for breaches of the rules.

Raising the protective award

Firstly, the Consultation asks whether the maximum period of the protective award should be raised from 90 days, in an effort to tackle the problem of employers flouting the rules and "buying out" potential claims in settlement agreements. The Government says that an absence of consultation removes the chance to prevent or reduce the volume of redundancies needed. The consultation proposes two options: doubling the cap to 180 days' gross actual pay or removing the cap altogether. In either case, the Tribunal would retain discretion as to the length of the protected award, based on what it determines to be just and equitable in light of the severity of the employer's breach. However, any increased period would not apply to insolvent firms, where the award is

paid by the Insolvency Service and is capped at 8 weeks' pay.

Introducing the remedy of interim relief

Secondly, the Consultation asks whether the remedy of interim relief should be made available to affected workers. Interim relief is a remedy available in a limited number of automatic unfair dismissal claims (e.g. dismissal for having made a protected disclosure). In such cases, the dismissed employee may be able to apply to the Employment Tribunal for interim relief within seven days of the date of termination of employment. If granted, the Employment Tribunal will order the employer to reinstate the claimant to their previous role or re-engage them in a different role pending the determination of the unfair dismissal claim at the final hearing. If the employer is willing to reinstate or re-engage the claimant then they go back to work.

Where (much more commonly) the employer is not willing, the Tribunal will make a "continuation order", meaning the employer is ordered to pay the claimant as if their employment contract was still continuing, until the final hearing. Sums paid under a continuation order are irrecoverable. This means that a claimant does not have to repay the salary paid even if they ultimately lose their claim at the final hearing. This makes interim relief a potentially very valuable remedy for claimants, and a burdensome one for employers. The Consultation says that extending the remedy of interim relief to employees who have protective award claims would be an additional deterrent to employers against abuse of the collective consultation rules.

Fire and rehire

What is the current position and how will

the Employment Rights Bill change things?

“Fire and rehire” is a shorthand used to describe the practice of dismissing an employee then offering to re-engage them on inferior terms and conditions. Currently, this practice is lawful provided that the employer has a good business reason for needing to make change. Since 18 July 2024, employers have also been required to comply with a new statutory Code of Practice on dismissal and re-engagement. A failure to do so may give rise to an uplift to compensation of up to 25% in certain related claims. Further, where over 20 employees are affected in a 90-day period at one establishment, the employer must also undertake collective consultation.

The Employment Rights Bill will change the law so that it will be automatically unfair to dismiss an employee:

- for not agreeing to change their terms and conditions of employment; or
- in order to rehire them (or hire someone else) under varied terms and conditions for substantially the same role.

The sole exception will be where the reason for the variation was to eliminate, prevent or significantly reduce or mitigate the effect of any financial difficulties which, at the time of the dismissal, were affecting, or were likely in the immediate future to affect, the employer’s ability to carry on its business, and there was no way the need to make the variation could reasonably have been avoided.

What is proposed in the Consultation?

Again, the Consultation does not revisit the Bill proposal, but seeks views on strengthening the remedies available for breaches of the rules. The Consultation asks whether the remedy of interim relief (as discussed above) should be

extended to employees who have fire and rehire-related automatic unfair dismissal claims. The Government believes that permitting interim relief in this situation would lead to greater protection of employees and further disincentivise employers from using fire and rehire at all.

Interestingly, the Consultation goes on to say that the Government is considering whether, in fire and rehire cases, adjustments are needed to the interim relief process to ensure that the remedy can work effectively and be determined promptly. Given that the window for applying for interim relief is extremely short (seven days from dismissal), this suggests that the extra time may be afforded in fire and rehire-related cases.

What do these proposals mean for employers?

The Government is satisfied that employers who "play by the rules" will not be subject to any additional burden as a result of these changes. Only those who flout the rules could end up paying significantly more. However, a steep increase to the protective award is likely to deter employers from buying out such claims and force their hand to undertake consultation of either 30 or 45 days instead – which appears to be the aim behind this measure. Indeed, if the cap is removed altogether, it may be impossible to even agree the level at which the claim could be bought out. The Consultation does recognise that removing the cap altogether "could cause uncertainty" for business, which may indicate that the Government is leaning towards a cap of 180 days.

Extending the remedy of interim relief to claimants who have protective award claims or fire and rehire dismissal claims clearly raises the stakes for employers. Breaching the rules in either case would carry not only the risk of a Tribunal award at the end of the litigation but would also present the

immediate risk of paying salary until the final hearing, which may be many months away. That said, the threshold for granting interim relief is high – a claimant must show that they have a "pretty good chance" of winning their claim. In whistleblowing claims, this is not straightforward: the claimant has the uphill battle of showing that they are a worker, that they have made a protected disclosure and that protected disclosure was the sole or principal reason for the dismissal. The result is that interim relief is rarely granted.

However, in a protective award claim, it will usually be clear whether the collective consultation rules have been breached. If breached, even in a minor way (e.g. the consultation fell a day short of the minimum period before the first dismissal), surely it could be said that the claimant has "a pretty good chance" of succeeding in their protective award claim? Although any protective award ultimately awarded might be adjusted downwards by the Tribunal to reflect the minor nature of the breach, it is not clear that the severity of the breach would be relevant to a decision to grant interim relief. As such, in cases of minor breaches, the threat of interim relief will be viewed as a more powerful weapon than the protective award claim itself. It also fast-tracks the case to an early public hearing.

If taken forward, these proposals will raise the stakes in collective consultation exercises (which will occur more frequently as a result of the Employment Rights Bill change). The majority of employers will be forced to undertake consultation and manage it with care to avoid the risk of claims and interim relief applications. Legal advice is likely to be needed to avoid inadvertent and costly errors. Similarly, introducing interim relief on top of a new right to claim automatic unfair dismissal in fire and rehire scenarios will make such dismissals more hazardous for employers. Employers wishing to respond to the consultation have until 2 December 2024 to do so.

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

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