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.

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 Amanda Steadman (AmandaSteadman@bdbf.co.uk**) or your usual BDBF**

contact.

BDBF Webinar – Beliefs, backlash, and the workplace: navigating the new culture wars – 29 April 2025

In this 1-hour webinar, BDBF Managing Partner Gareth Brahams and Associate Emma Burroughs explore the legal rights and responsibilities surrounding belief expression in today's complex work environment. This webinar was originally delivered on 29 April 2025 and reflects our understanding as of that date. Do get in contact with either of the speakers if you would like to discuss any of the issues raised.

To view the PDF webinar slides please click on the image below, or view the recording of the webinar:

https://youtu.be/85bypaD9MVc

Please contact Gareth Brahams (GarethBrahams@bdbf.co.uk), Emma Burroughs (EmmaBurroughs@bdbf.co.uk) or your usual BDBF contact, for further advice.

BDBF Webinar – Unlocking the future: what the Employment Rights Bill means for employers – 28 January 2025

In this 1-hour webinar, BDBF Managing Associate Tom McLaughlin and Principal Knowledge Lawyer Amanda Steadman discuss the "once-in-a-generation" changes the Employment Rights Bill will bring for UK employers. This webinar was originally delivered on 28 January 2025 and reflects our understanding as of that

date. Do get in contact with either of the speakers if you would like to discuss any of the issues raised.

To view the PDF webinar slides please click on the image below, or view the recording of the webinar:

https://www.youtube.com/watch?v=dz9obtp5gRQ

Please contact Tom McLaughlin (TomMcLaughlin@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact, for further advice.