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

Section 1: collective consultation obligations

1. *Do you think the cap on the protective award should:*
    a. *be increased from 90 to 180 days?*
    b. *be removed entirely?*
    c. *be increased by another amount?*
    d. *not be increased?*

    Please explain your answer.

D – not be increased.

Although egregious cases have hit the headlines, it is not our experience that most employers deliberately ignore collective consultation obligations or try to buy them out. The sanctions are already punitive. After situations such as the P&O ferries scandal, we've also seen employers being more aware of the employee relations and reputational consequences of non-compliance.

In cases where payments are offered instead of collective consultation, this is sometimes instigated by employees and their representatives preferring a cash payout to a prolonged period of employment where the eventual redundancy is inevitable.

In our experience, it is in insolvency situations that collective consultation obligations are ignored (given the challenging timescales), but we note that the proposals won't benefit employees in this scenario. The policy background refers to 5,026 ET cases about failure to go through collective consultation during 2022/3 - but how many of these involved insolvencies?

Increasing the protective award cap

2. *Do you think that increasing the maximum protective award period to 180 days will incentivise businesses to comply with existing collective redundancy consultation requirements?*
    a. *Yes*
    b. *No*
    c. *Don't know*

    Please explain your answer.

C – don't know

The real answer is probably both yes and no. We can see that that increasing the maximum protective award could incentivise *some* businesses to comply when they might not otherwise do so, but we do not think this will make any difference in insolvency cases and our experience is that the vast majority of employers are *already* compliant. Nor will it change the reality that employees and their representatives will sometimes want employers to speed up redundancies and make a cash payout where redundancies are inevitable.

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

See answer to question 2.

We would expect to see an impact on mergers, acquisitions and other corporate transactions. Pricing tends to factor in maximum penalties, the increase of which may have a distorting effect on transactions with large numbers of employees. In a business purchase scenario, where collective redundancy consultation may be carried out pre TUPE transfer with seller agreement, buyers may wish to take more control of the process to ensure it is done well; or sellers may be more reluctant to have any part of the process happen 'on their watch', in case of argument over the extent to which they become liable under the typical indemnities for pre transfer failings. Post completion, buyers may seek to stagger dismissals, to avoid triggering collective redundancy consultation duties at all (albeit that making cuts quickly may still remain the priority where private equity-backing is in play).

We do not think we would see a change in practice in insolvency cases. As explained above, this is the situation in which collective consultation obligations are routinely ignored.

Employers may be less likely to agree to requests from employees and their reps for a cash payout. Employers might also be less likely to release any individuals early if they want to leave before the end of the 30/45 day consultation period. Early release is sometimes requested, for example, if a person has volunteered for redundancy or found another job. Employers do tend to agree to this (usually with the reps' consent) but it's a grey area legally and carries a degree of risk - because the minimum periods are essentially a freeze on dismissals. We think an increase to the maximum award may well dissuade employers from agreeing to early release even where the employee(s) and representatives are requesting it.

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

See above.

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

See above.

Removing the protective award cap

6. *Do you think that removing the cap will incentivise businesses to comply with existing collective redundancy consultation requirements?*
    a. *Yes*
    b. *No*
    c. *Don't know*

    Please explain why and note other benefits?

C – Don't know. See answer to question 2.

7. *What do you consider to be the impacts on employers of removing the cap on the protective award?*

Removing the cap would lead to uncertainty for businesses and a lack of consistency, with different tribunals taking different approaches. It would not necessarily lead to tribunals making higher awards (if that is the aim) but it will make it very difficult to predict what level of award would be likely. In the context of business purchases, it will make it very difficult for purchasers to budget for their potential exposure.

8. *What do you consider the impacts will be on employees of removing the cap on the protective award?*

See above.

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

See above.

Interim relief

10. *Do you agree or disagree with making interim relief available to those who bring protective award claims for a breach of collective consultation obligations?*
    a. *Agree*
    b. *Disagree*
    c. *Don't know*

Please explain your answer

B – disagree.

The employment tribunal system is struggling to cope and delays in the system are becoming extreme. As we write this (in November 2024), it is normal to see final hearings listed well into 2026 and even beyond.

We have serious doubts about the ET system being able to cope with an influx of new claims for interim relief on top of the increase already expected because of the measures already included in the Employment Rights Bill.

The need to list interim relief hearings at very short notice will mean that other types of claim will be put to the back of the queue. It is not clear why collective redundancy consultation cases should take priority over, for example, discrimination or unfair dismissal claims.

Even if a Tribunal could make room for an urgent interim relief application, there would be significant delay until the final hearing - likely at least one year to 18 months. It is not appropriate for an employer to be required to continue pay employees full salary and benefits for this length of time in a redundancy situation, when the maximum consultation period would have expired long before the final hearing and the roles are redundant.

It is also unclear how this could work in practice. As the consultation document acknowledges, interim relief applications can currently only be made in dismissal cases. Is it the intention that interim relief applications relating to collective consultation would not be available until an employee is actually dismissed? If so, this is very late in the process, when any collective consultation process would have closed. Would the employer then be expected to re-open the collective consultation process? On the other hand, if applications are made too early in a collective consultation process, how can the ET judge whether collective consultation obligations are likely not to be complied with?

Currently, claims about a failure to go through collective consultation must be brought by the employee reps, unless there has also been a failure relating to the election of employee reps. It is not clear if the proposed application for interim relief would be a collective claim (brought by the reps on behalf of all potentially-redundant employees) or an individual one. If it is intended to be a collective claim, it presumably means the employer could be required to pay all potentially redundant employees their full salary until the final hearing (as we say – likely 12-18 months) in a case where an ET decided that it was likely the employer had breached collective consultation requirements. This would be prohibitively and disproportionately expensive and could potentially threaten the survival of businesses already in financial difficulty. If it is intended to be an individual claim, brought on an individual basis, as a matter of individual choice, it is unclear how this would sit alongside the role of the reps. Depending on the point in time that applications can be made, there is also the possibility that individuals put in an application for interim relief to try to avoid their personal selection for redundancy.

Interim relief claims are also, by their nature, urgent applications. It's unclear that employees and their reps will be able to mobilise quickly enough to put in coordinated applications for interim relief within the tight timescales.

11. *Do you think adding interim relief awards would incentivise business to comply with their collective consultation obligations? Please explain why and note any other benefits.*
    a. *Yes*
    b. *No*
    c. *Don't know*

    Please explain your answer.

C – Don't know – see answer to question 2

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

See above. It is important to stress that employees are generally redundant because there is not enough work for them to do. Adding the possibility of interim relief applications to the existing set of remedies will mean that employers are over-resourced pending the final hearing. The resulting additional costs will potentially detract from investment in growth areas and potentially even threaten the survival of the business.

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

See above.

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

See above.

Further questions

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

Yes.

The framework needs clarifying in relation to the issue of successive batches of redundancies. This was a grey area under UK law which was thrown into further confusion by the ECJ decision in *Marclean*. The status of *Marclean* is unresolved following the REUL Act but Tribunals are still trying to apply it. The questions which need answering through legislative reform are:

- When counting the number of proposed redundancies, must employers look backwards as well as forwards as per the ECJ ruling in *Marclean*? What impact does this have on earlier batches of redundancies if a later batch is proposed?
- For example, suppose an employer plans 5 redundancies in Team A then unexpectedly loses a major contract and now plans an additional 15 new redundancies in Team B which will be completed within the same 90 day window. Has it now crossed the threshold for collective consultation? Does it matter if Team B proposals were not intended when Team A redundancies were proposed?
- In section 188(3) of TULRCA 1992 (earlier numbers disregarded if consultation has already begun) – what does consultation mean? Does it include individual consultation? Does it include collective consultation outside of the statutory regime? In the example above, the employer will not have started any statutory collective consultation with Team A because the numbers involved were too small. Does this mean the employer must pause the Team A redundancies to go through a statutory collective consultation exercise with both Team A and Team B? What if the Team A redundancies are very advanced? What if they have already left the business?

This issue of successive batches of redundancies will become more pressing if the "establishment" test is removed from the legislation as currently proposed. For the largest employers, the aggregating of unconnected successive batches of redundancies across sites could put them into a near constant cycle of collective consultation. To improve legal certainty, reduce the scope for disputes and reduce costs of expensive legal advice, we would like to see the government introducing clear and workable rules about what happens with earlier batches of redundancies when a later batch of redundancies is proposed and a system for dealing with constantly evolving numbers when filing Form HR1.

If the "establishment" test is removed, the framework would also ideally address the question of territorial jurisdiction, since this is currently tied to the establishment (Seahorse Maritime v Nautilus International).

While we realise this is not the focus of this consultation, in our view the government should re-think the plan to remove the "establishment" test altogether and consider other ways to avoid a repeat of what happened in the Woolworths case. For example, retaining the establishment test but introducing a requirement for collective consultation if either 20 or more redundancies are proposed at that

establishment or (as an additional new trigger) if more than a specified percentage of employees at that establishment are being made redundant. Or removing the establishment test for centrally-planned redundancy exercises but retaining a more local test for unconnected, locally-planned redundancies. In addition (and irrespective of whether any other amendments are made) we suggest that the Bill be amended to allow more flexible workforce agreements to be negotiated by trade union and other worker reps at a local level.

Section 2: fire and rehire

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

Disagree.

Our main concern here is the additional strain the increase in applications for interim relief is likely to place on the ET system, which is already under significant pressure - see answer to question 10.

17. *Do you think adding interim relief awards would incentivise employers to comply with the law on fire and rehire dismissals?*
    a. *Agree*
    b. *Disagree*
    c. *Don't know*

    Please explain why.

C – Don't know

Overall, we agree that adding interim relief awards would act as an incentive to employers to ensure they are complying with the law on fire and rehire dismissals. But the unintended consequences also need to be considered – see below.

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

We think adding interim relief awards to fire and rehire unfair dismissals could have the opposite effect to the one desired, and increase the number of redundancies made by employers in financial trouble, because they are 'tipped over the edge' by successful applications for interim relief.

A business might use fire and rehire in the 'right' circumstances (where it is not viable as a going concern) but lose an application for interim relief on a procedural issue.

In more extreme cases, interim relief applications could even lead to businesses becoming insolvent (leading to even more job losses) and being unable to pay outstanding money owed at all (including to employees).

An increase in the number of claims (even if they are unlikely to succeed) will put pressure on employers and result in additional costs.

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

The introduction of interim relief could potentially encourage employees to withhold agreement to contractual changes they might have considered previously. This is not necessarily a good thing as it may ultimately lead to job losses if the changes were intended to secure the long term profitability of the business.

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

    See above.

21. *What is your view on whether any adjustments to the current approach to interim relief would be needed to ensure that interim relief for fire and rehire cases can work effectively and be determined promptly by the tribunal?*

It is clear that adjustments will need to be made to ensure that interim relief for fire and rehire cases can work effectively and be dealt with promptly. As it stands, applications for interim relief are rare in practice and reserved for use in limited circumstances. Making it available as a remedy in fire and rehire cases will have an inevitable effect on the tribunal (who will be under pressure from the need to deal with such cases swiftly) and will likely result in the need for more resources. Please see our answer to question 10 above for more detail on these concerns.

Respondent consultation questions

<u>About you</u>

22. Please indicate whether you are responding as:
    a. An academic
    b. An employer
    c. An employee/ worker/ individual
    d. A legal representative
    e. A business representative organisation / trade body
    f. A trade union or staff association
    g. Other (please specify)

23. What sector/industry do you operate in?
    a. Manufacturing
    b. Construction
    c. Wholesale, retail & repair of motor vehicles
    d. Transport & storage
    e. Accommodation & food services
    f. Information & communication
    g. Financial, insurance & real estate activities
    h. Professional, scientific & technical activities
    i. Administrative & support services
    j. Public admin & defence; social security
    k. Education
    l. Human health & social work activities
    m. Other services
    n. Do not know
    o. Prefer not to say

24. If responding as an employer, business, business owner, business representative, what is the size of your business? If responding as an individual or worker, what size workplace are you employed in?
    a. Micro (fewer than 10 staff)
    b. Small (11 to 50 staff)
    c. Medium (51 to 250 staff)
    d. Large (250+ staff)
    e. Do not know
    f. Not applicable

<u>Equality impact</u>

25. Do you believe that our proposals to increase the protective award will have an impact (either positive or negative) on a specific protected characteristic under the Equality Act 2010?

Protected characteristics under the Act are disability, gender reassignment, age, pregnancy and maternity, race, marriage and civil partnership, sex, sexual orientation and religion or belief.

a. Yes
b. No
c. Don't know

Please explain your answer

26. Where you have identified potential negative impacts, can you propose ways to mitigate these?
    a. Yes
    b. No
    c. Do not know
    d. Not applicable (no impacts identified)

    Please suggest mitigations

27. If responding as an employee/ worker/ individual, what is your sex?
    a. Female
    b. Male
    c. Prefer not to say
    d. Not applicable

28. If responding as an employee/worker/individual, what is your ethnic group?
    a. Arab
    b. Asian/Asian British
    c. Black / African / Caribbean / Black British
    d. Mixed/Multiple ethnic groups
    e. White
    f. Other ethnic group
    g. Prefer not to say
    h. Not applicable

29. If responding as an employee/worker/individual, what is your religion?
    a. No religion
    b. Christian
    c. Buddhist
    d. Hindu
    e. Jewish
    f. Muslim
    g. Sikh
    h. Any other religion
    i. Prefer not to say
    j. Not applicable

30. If responding as an employee/worker/individual, do you have any physical or mental health conditions or illnesses lasting or expected to last 12 months or more?
    a. Yes
    b. No
    c. Prefer not to day
    d. Not applicable

31. If responding as an employee/worker/individual, which of the following age brackets do you fit into?
    a. 15 or below

b. 16-17
c. 18-24
d. 25-34
e. 35-44
f. 45-54
g. 55-64
h. 65-74
i. 75+
j. Prefer not to say
k. Not applicable