Law Society of Scotland

Consultation Response

Making Work Pay: Consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire

December 2024

Photo: Perth and the River Tay

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the UK Government's Making Work Pay: Consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire.[1] The sub-committee has the following comments to put forward for consideration.

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

Consultation Questions

Section one: collective consultation obligations

1.Do you think the cap on the protective award should:

- be increased from 90 to 180 days?
- be removed entirely?
- be increased by another amount?
- not be increased?

Please explain your answer

The consultation paper acknowledges that most employers comply with their collective consultation obligations. It notes that there have been some rare, egregious cases where employers have chosen not to follow their obligations.

However, cases of employers deliberately and knowingly opting not to comply with their obligations are uncommon.

To increase or remove the cap on the protective award with a view to targeting the rare egregious cases in which a minority of employers ignore or opt out of their obligations would potentially have the effect of penalising compliant employers who have sought to comply with their obligations, but have inadvertently breached these.

We understand that one of the purposes of the protective award would be to deter employers from undertaking a commercial calculation in relation to non-compliance, with a view to potentially 'buying out' of the consultation process by making payments of around the maximum compensation, or at least setting aside funds to meet this cost. In our view Companies with this mindset may not be deterred from non-compliance even if the compensation were to be increased. In our view, the 90 day cap at actual pay is likely to act as a sufficient deterrent for non-compliance in respect of the vast majority of companies .

Another purpose of the protective award is to compensate the employees, including taking into account the time it would have otherwise taken to meaningfully consult. A 90 day cap is likely to be sufficient for this purpose in the majority of cases.

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?

- Yes

- No
- Don't Know

Please explain why and note any other benefits

See answer above. Increasing the cap may act as an 'additional' incentive to comply. However, the existing 90 day is likely to be sufficient incentive in any event.

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

This would be a greater financial consequence of either deliberately or accidentally getting the process wrong.

For smaller employers, who are facing financial difficulties which have led to the redundancy situation, an increased protective award at the increased level could ultimately be fatal.

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

A small minority of employees might receive higher protective awards, or higher settlement offers, where their employer deliberately chooses not to comply with collective consultation obligations.

An increased financial award could create a financial incentive to support the bringing of a claim, and/or could place pressure on trade union representatives to do so on behalf of their members.

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

As above, there could be increased litigation in relation to the collective consultation process.

Employers may seek to stagger redundancies in order to avoid triggering collective consultation.

Removing the protective award cap

6. Do you think that removing the cap will incentivise businesses to comply with existing collective redundancy consultation requirements?

- Yes
- No
- Don't Know

Please explain why and note any other benefits?

Whether or not, in the longer term, removing the cap will incentivise businesses to comply will ultimately depend on the trend of awards made by Tribunals and whether this is higher or lower than the current position.

Something akin to aggravated damages for those who deliberately and knowingly flout the rules would be more targeted and more appropriate, rather than changing the rules that apply to all employers.

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

The consultation paper acknowledges at paragraph 31 that an uncapped award would cause uncertainty for business. It would create greater uncertainty for employers in planning a redundancy exercise and makes it more difficult for them to assess risk. Therefore, it could encourage a more cautious approach to consultation. However, in our experience, most employers are mindful of the risk of non-compliance in any event and make reasonable efforts to comply.

This could have implications in relation to business transfers, as purchasers would also have less certainty as to the potential liability they may be facing in respect of a pre- or post- transfer redundancy exercise. Buyers and investors would not be able to quantify the financial risk of a claim for failure to collective consult as accurately as they currently can.

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

There would also be a loss of certainty as to the award. If this is left entirely to Tribunal discretion, there is also a risk that over time, awards on average could decrease potentially. If average awards were to increase over time, this could create an incentive to litigate.

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

As 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?

- Agree
- Disagree
- Don't Know

Please explain your answer

If the aim is to prevent employers from bypassing collective consultation obligations, then interim relief may, on its face, be an effective means of achieving this aim, in particular, in circumstances in which there has been no consultation (or virtually no consultation) with the workforce prior to dismissals taking effect. However, it is difficult to see how interim relief could be used effectively in respect of claims for a failure to collectively consult involving multiple claimants where there has been some consultation / consultation of varying degrees.

Normally interim relief is applied for at the point at which the claimant brings an unfair dismissal claim against their employer. At that point, they must demonstrate that it is likely that they were dismissed for a protected reason. It is difficult to see how this concept could apply to a claim for a failure to collectively consult. There are several reasons for this, including:

- These claims are typically brought by trade unions/employee representatives, not individual employees.
- Such claims are brought on behalf of a group, often a large group, of employees.
- Unlike the assessment of whether or not a claimant has been dismissed for a protected reason (e.g. that they made a protected disclosure), the assessment of whether an employer has complied with its collective consultation obligations is it not a binary yes/no assessment. The range of breaches can be significant. At one end of the spectrum, an employer may have entirely ignored its obligations and not taken any steps to inform or consult representatives or employees. At the other end of the spectrum, an employer may have committed a small technical breach (perhaps failing to provide some of the information required in the Section 188 letter) which did not impact on the meaningfulness of the consultation. Both examples could amount to a breach of collective consultation obligations but one breach is far more serious than another. It would be disproportionate for a claimant to be re-instated/re-engaged or to have their salary and benefits paid up to a final hearing if a claimant can show that they are 'likely' to succeed in their claim for a protective award due to a relatively minor breach by the respondent of the collective consultation obligations.

- The categories of case in which interim relief is currently available are all automatic unfair dismissal cases which focus on the reason for the dismissal, not on the process followed.

It is also relevant that the time between issuing a claim and getting to a full hearing can already be very significant – often in the region of 12 to 18 months, or even longer.

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.

- Yes
- No
- Don't Know

Please explain your answer

Broadly, yes.

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

Increased legal costs dealing with applications.

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

It may provide an interim resolution and potentially puts them in a position where they are looking for a new role while in employment, rather than from unemployment, which may be viewed more favourably by a prospective employer.

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

Increased litigation costs for both parties.

Further questions

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

If the government wishes to revise the scope of collective redundancy consultation, to avoid a situation in which the existence of separate

establishments can be utilised to avoid meeting collective consultation requirements, it may wish to consider:

- limiting the consultation to establishments which are affected by the same business proposals / redundancy exercise. This would avoid a situation in which employees are expected to participate in a consultation to discuss a business rationale which does not affect their role, as their redundancy is for a different business reason;
- consider alternative ways to include remote workers in collective redundancy consultations without entirely removing 'at one establishment', including as set out immediately above;
- revise the definition of establishment to include a statutory definition akin to a business unit or division, defined broadly;
- remove the requirement for the redundancies to be 'at one establishment' but also increase the number of redundancies that would trigger collective consultation requirements;
- retain the requirement for the redundancies to be 'at one establishment' but reduce the timescale within which the dismissals take place from 90 days; and greater clarity may be welcomed in relation to the position in relation to employees based overseas but employed by a UK group company, if the reference to 'at 1 establishment' is to be removed.

We understand that the government is also considering extending the minimum period of consultation from 45 day to 90 days (for 100+ proposed dismissals). In our experience, it is usually possible to complete meaningful consultation within the 45 day period and therefore to extend this to 90 days may not be necessary (and could create an expectation that consultation will continue until the end of the 90 day period).

Section two: 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.

We can foresee practical issues in having interim relief as a remedy, for example where an employee is reinstated on legacy terms where all other employees have moved onto new terms, making it difficult or impossible for the legacy terms to be continued.

We note that the government is also proposing to provide automatic unfair dismissal remedies in relation to those who refuse to agree to a variation or who are re-engaged (or replaced by someone) on substantially the same terms. Given that the only defence is that the employer is otherwise financially unviable as a

whole, this provides very very limited circumstances in which this defence can be used. We have the following observations:

- this may cause employers to look to restructure their operations to alleviate financial pressures resulting in making redundancies, and to reduce their headcount, rather than amending working terms or practices (but retaining employees);
- this means there is far greater power in the hands of employees and their representatives when negotiating to agree changes to terms, to the extent that employers may be potentially held to ransom when trying to make contractual variations
- it will be far more difficult for employers to create equality of terms and to harmonise terms across their business.

The government may wish to consider the following points:

- whether or not automatic unfair dismissal should be a remedy in circumstances in which the variation/s are, in all material respects and taken as a whole, no less favourable.
- whether or not the employer defence could be broader, while still achieving the overall aims of the government, for example to apply in circumstances in which the change is for an 'economic, technical or organisational reason'.

17.Do you think adding interim relief awards would incentivise employers to comply with the law on fire and rehire dismissals?

- Agree
- Disagree
- Don't Know

Please explain why

We consider that it may be an incentive to comply with the law on fire and rehire dismissals. However, the introduction of automatic unfair dismissal as a remedy would also achieve this.

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

- Yes
- No
- Don't Know
-

Please explain why and note any other benefits

As above. This may make it more difficult to harmonise terms across the workforce.

Also, one possible consequence of strengthening protections for employees (including adding interim relief proposals) may be that employers hold back salary increases etc. to use these are incentives for achieving employee consent to less favourable contractual changes. As a result, this could affect employer behaviour to the detriment of employees.

If automatically unfair dismissal is introduced for fire and re-hire, then employees with less than 2 years' service will be able to plead such claims *and* therefore able to apply for interim relief – adding significantly to the load for the Tribunal.

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

This could provide employees with an additional avenue to enforce their existing terms. We understand that this may be used where the employee has been dismissed (allegedly unfairly) and requires relief pending the Tribunal hearing.

Greater clarity may be needed to confirm whether interim relief could apply if the employee has not yet been dismissed e.g. is working under protest either before or after a change has been implemented. We note that employees currently have the option of bringing a breach of contract claim or an unfair dismissal claim, depending on the circumstances.

As set out above, the introduction of additional protections relating to fire and rehire could affect employer behaviour to the detriment of employees.

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

Adding interim relief could obstruct meaningful consultation and discussion in relation to proposed changes if position become entrenched in interim litigation.

This could also create a greater burden on the Tribunal system and increased litigation costs for parties.

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?

No comments.

Equality impact

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.

- Yes
- No
- Do not Know

Please explain your answer.

26.Where you have identified potential negative impacts, can you propose ways to mitigate these?

- Yes
- No
- Do not know
- Not applicable (no impacts identified)

Please suggest mitigations

For further information, please contact:

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