Institute of Directors

116 Pall Mall

London

SW1Y 5ED

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JUSTIN MADDERS MP

Collective Redundancy, Employment Rights Directorate

Department for Business and Trade

Old Admiralty Building

Admiralty Place

London

SW1A 2DY

Dear Minister,

IoD response to Make Work Pay: Consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire

About the IoD

The IoD is an independent, non-party political organisation representing approximately 20,000 company directors, senior business leaders, and entrepreneurs. It is the UK's longest-running organisation for professional leaders, having been founded in 1903 and incorporated by Royal Charter in 1906. Its aim is to promote good governance and ensure high levels of skills and integrity among directors of organisations. It campaigns on issues of importance to its members and to the wider business community with the aim of fostering a climate favourable to entrepreneurial activity in the UK.

The IoD welcomes the opportunity to respond to this consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire. Striking an appropriate balance between worker protections and labour market flexibility is of considerable interest to the IoD and its membership, and we are therefore pleased to present our views.

In the first section, we provide a summary of our key perspectives on the proposals. We then offer more detailed views in respect of the specific questions posed in the consultation.

Summary of the IoD view

There is significant support within the business community for the government's aims to reduce the use of dismissal and re-engagement and to ensure that, where an employer is undertaking a collective redundancy exercise, meaningful employee consultation is undertaken. In an IoD survey of over 712 business leaders in April 2024, almost two thirds (61%) agreed with the proposal to outlaw fire and rehire practices completely (Appendix: Figure 1).

However, it is important to understand that the majority of employers engaging in collective redundancies and dismissal and re-engagement exercises are doing so to preserve their long-term sustainability, and with that, their continued existence as employers of other staff. They are often responding to sudden alterations in market conditions and attempting to innovate in order to stay competitive.

The proposals in this consultation are particularly concerning given the other changes to collective redundancy and fire and rehire law being implemented as part of the *Make Work Pay* package. Substantially increasing the penalties for non-compliance at the same time as making said compliance significantly more complex and costly is a source of major concern.

These proposals also come at a time when the government's wider employment reforms – most notably in hiking employers' National Insurance contributions and increasing the National Living Wage above inflation – are making the employment of staff a considerably more expensive and risky process. For some employers these reforms will engender a need to restructure and change employment patterns in the coming years; to make such a process inherently riskier, expensive, and time consuming is problematic.

Specific questions

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?

The cap on the protective award should not be increased. The few cases of employers deliberately avoiding their legal requirements vis-à-vis collective redundancy consultation are rightly criticised as poor business practice. At the same time, raising the stakes of getting the process wrong would make the already difficult collective redundancy process even more difficult for employers who are likely experiencing difficult trading conditions.

If the cap were to be reformed, the option of removing the cap entirely would be the least preferable option. Employers undertaking redundancies are typically already operating under difficult circumstances; the threat of an unlimited protective award when there is little evidence of mass non-compliance is therefore a disproportionate policy response. Many cases of collective redundancies involve already insolvent companies, but for those fighting for their survival, large awards arising from inadvertently not complying with consultation requirements could well undermine their continued existence.

The potential outcome of such a measure, when combined with the other reforms on collective redundancies planned by this government, could engender a worrying scenario in which compliance

with collective redundancy rules is not only difficult but carries with it a very high penalty for getting it wrong.

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, to an extent. It is important to note that the vast majority of employers already comply with existing collective redundancy requirements. Among the small minority who do not, a higher protective award would naturally discourage such behaviour.

The question, however, is whether achieving such a minor shift in behaviour among a minority of employers justifies a heavy intervention which will negatively impact the majority of employers trying to navigate an increasingly complex web of duties while experiencing difficult business conditions. Given the lack of evidence of mass non-compliance and the inherently difficult conditions employers undertaking collective redundancies experience, we believe such a policy to be disproportionate.

Furthermore, the evidence base for this change appears to be weak. A better understanding of the reasons for non-compliance are needed. Given the circumstances in which collective redundancies most frequently take place – namely, employer financial distress – it is likely that deliberate non-compliance most commonly stems from either an inability to meet the requirements or an acknowledgement that it can be in the interests of both employer and employee to resolve the matter quickly and without drawing out a consultation process which will ultimately not change the outcome.

It is also unclear that increasing the protective award would meet the stated policy objectives. The small minority of employers undertaking collective redundancies who offer employees more generous terms in comparison to the protective award likely do so because the roles in question are no longer viable and the offer suits both parties. That is, if the policy aim is to ensure that employers considering non-compliance are disincentivised from doing so, then a higher protective award will likely achieve that. However, if the policy intent is to incentivise meaningful dialogue which prevents or reduces redundancies, then the small minority of non-compliant employers being targeted are highly unlikely to be in a position where fulfilling consultation requirements will change the outcome. At the same time, employees may miss the opportunity to receive more generous severance offers.

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

For employers who fall foul of the increasingly complex regulations relating to collective redundancy consultation, a potential doubling of the penalty for non-compliance would increase costs during an already difficult process and at a time they are likely to be experiencing financial distress and/or rapidly changing market conditions. For those non-compliant employers who are not already insolvent, therefore, increased costs related to protective awards would worsen their financial outlook. Medium-sized employers are particularly unlikely to be unable to absorb such costs.

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

Increasing the penalties for non-compliance risks incentivising more burdensome compliance behaviour among compliant employers. For the small minority of employers who are non-compliant, whether deliberately or accidentally, another risk lies in the financial burden it would place on them at a time when they are likely already experiencing financial difficulties. A further risk is that employers would be disincentivised from offering more generous severance packages where they are certain that the roles proposed for redundancy are no longer viable.

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

Yes, to an extent. Again, larger financial penalties are likely to have some impact on the behaviour of the small minority of employers who are deliberately non-compliant. Our concern lies more with the impact of such a change on employers who are not deliberately non-compliant. Not only are we not convinced that tribunals would actually consider employer intentionality as a mitigating factor to a sufficient extent, any reassurances along those lines from government are unlikely to alleviate the concerns which businesses will have about being penalised even where they attempt to meet legal obligations to the best of their ability.

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

The most significant impacts, as with the proposal to double the maximum protective award, would be the more burdensome compliance and financial strain it would place on already struggling employers. However, the removal of the cap would both amplify this risk and add a huge amount of uncertainty to the scenario; the threat of an unlimited protective award being given in cases where an employer has tried but not succeeded to meet its complex legal obligations would worsen what is likely to already be very difficult operational conditions.

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

As with the proposal to double the maximum protective award, the most significant risks lie in the financial and compliance burdens it would place on employers already experiencing financial difficulties and the disincentive to offer employees more generous severance terms where the outcome will not be altered by more extensive consultation. The removal of the cap would make these risks considerably more likely to materialise.

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?

Disagree. First, interim relief has thus far been used in egregious cases of employer bad practice, and it is not clear that a failure to meet complex consultation requirements in a collective redundancy case in itself meets such a threshold.

Secondly, such an approach fails to recognise that collective redundancies most commonly occur where an employer is experiencing financial difficulties; introducing interim relief would exacerbate those challenges.

Thirdly, given that interim relief would be paid until the case is heard by a tribunal, the costs would be incurred for an undefined period of time that is wholly outside the control of the employer. It is widely

acknowledged that the employment tribunal system is already overwhelmed, with cases frequently not being heard for two to three years. Given the significant increase in cases highly likely to result from the government's various employment reforms, and the current lack of convincing vision as to how to reform the tribunal system such that the present situation does not worsen, making employers liable for substantial costs until a creaking tribunal system can hear a case is inappropriate.

Fourthly, the interim relief system is unhelpful in that it does not allow employers to recoup costs paid in cases where the tribunal finds in the employers' favour. Were this to be possible, interim relief awards would be more a more palatable solution.

11. Do you think adding interim relief awards would incentivise business to comply with their collective consultation obligations?

Yes, to an extent. Of the small number of employers who do not comply with these obligations, some of the smaller still proportion who do so deliberately may be less likely to do so if the financial costs of such an approach are higher. However, considering how few employers fall into this category, the risk of burdening struggling employers who have inadvertently fallen foul of complex obligations with additional costs for an undefined period of time is disproportionate to the minor behavioural change which may be achieved.

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

The most significant impact will be to increase the risks and costs associated with the collective redundancy process, which – given that it typically occurs when an employer is facing financial difficulties – is unhelpful. Furthermore, the uncertainty inherent in the requirement to pay interim relief until a case is heard will limit employers' ability to plan.

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

Ultimately, the most significant risk is that employers may face significant financial costs, even before a final determination on the merits of the claim. Interim relief also risks disincentivising early settlement of disputes, leading to increased legal costs and uncertainty for both parties.

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. As with the concept of interim relief for those who bring protective award claims for a breach of collective consultation obligations, interim relief for fire and rehire dismissals would be a disproportionate response.

An IoD poll of 601 business leaders in November 2024 tested the concept of interim relief in fire and rehire cases (Appendix: Figure 2). Of the 440 business leaders who expressed an opinion, a third (35%) agreed, while two thirds (65%) disagreed, with the policy.

Members' concerns with the policy focused on three areas: the inability of the current employment tribunal system to make the policy workable, the increased risk of speculative claims given the absence

of any disincentive on the part of the employee, and the reality that dismissal and re-engagement is almost exclusively used by employers already experiencing financial difficulties:

> "These disputes can take up to three years to reach court/tribunal. This will kill a small business." – Small business, Information and communication, North West England
>
> "The [employment tribunal] process is already utterly broken, together with ACAS. Both need reforming to resolve the existing impacts to claimants from delays, as well as the impact on businesses - particularly with vexatious claims. Adding this to the mix just adds more complexity and delay for, presumably, what's arising from a small number of cases." – Medium-sized business, Other services, London
>
> "Back pay can be awarded if successful. Otherwise win or lose people will bring cases." – Microbusiness, Financial services, East of England
>
> "Employers dismiss people to reduce costs; interim relief would cause more hardship to the company." – Microbusiness, Real estate, South West England

This proposal is more concerning in light of other planned changes to the law concerning dismissal and re-engagement. The government's plans to make dismissal for failing to agree to contractual changes automatically unfair will encompass not only what is commonly understood by the terms 'fire and rehire' and 'fire and replace' but also cases where employers need to make completely reasonable adjustments to employees' terms, such as office location. Taken in their totality, the proposed reforms to dismissal and re-engagement law could therefore mean that an employee dismissed for failing to agree to a new office location a short distance away would be entitled to both interim relief and an award for unfair dismissal. Collectively, these reforms consequently threaten to undermine employers' ability to change contractual terms, even where the change is *not detrimental*, and thus potentially their ability to grow and innovate.

In describing the government's policy aims, the consultation makes specific reference to 'less favourable' and 'unfavourable' contract changes as the target of this legislation. If the government is confident enough in the concept of unfavourable changes to design legislation to combat it, then that legislation should make specific reference to unfavourable changes so that employers do not risk large financial penalties for attempting to change contracts in ways which genuinely benefit both sides. If employment tribunals are considered capable of making subjective judgements in other areas, it is unclear why they cannot in this instance.

Furthermore, the proposed changes to dismissal and re-engagement law are sufficiently vague that few employers will be confident as to whether they meet the criteria for financial distress laid out in the Employment Rights Bill. There is therefore a risk that an employer may proceed with a dismissal and re-engagement strategy in the belief that they meet the criteria only to find that they fall foul of the rules and are liable for both interim relief and unfair dismissal awards.

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

Yes, to an extent. As with the proposed changes to collective redundancy consultation penalties, substantially increased financial penalties for non-compliance are likely to have some degree of impact

on employers considering fire and rehire. Again, however, we are concerned that this potential minor shift in behaviour will come at an unreasonable cost in that employers needing to make any changes to contracts will be faced with the risk of both interim relief awards of an indeterminate length and unfair dismissal claims.

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

Adding interim relief awards to fire and rehire unfair dismissals would make the use of dismissal and re-engagement exceptionally difficult for employers. While we recognise that this is the government's intention, and indeed an impact which would be welcomed by a majority of IoD members (Annex: Figure 1), feedback from members also indicates that a) where fire and rehire is unavailable as a final resort, employers will be more likely to simply dismiss without re-engaging, and b) these changes will bring even innocuous contractual changes into scope.

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

When combined with the wording of the Employment Rights Bill as it currently stands, adding interim relief awards for fire and rehire unfair dismissals risks making it impossible for employers to enact even beneficial contract changes when faced with any employee opposition without risking large financial penalties.

As described above, there is an additional risk that employers who might otherwise have successfully restructured and continued employing staff may deem the risk of non-compliance too high and instead opt for redundancy.

I hope you have found our comments helpful. If you require further information about our views, please do not hesitate to contact us.

With kind regards,

A. Hall-Chen

Alex Hall-Chen

Principal Policy Advisor for Employment

Email: Alexandra.Hall-Chen@iod.com

Appendix

Figure 1: IoD Policy Voice results: April 2024, 712 responses

Labour has pledged to end the practice of 'fire and rehire', whereby employers dismiss employees and rehire them under new, often less favourable, contractual terms. Do you agree that a future UK government should outlaw the practice of 'fire and rehire?'

Strongly agree	30.2%
Agree	31.0%
Neither agree nor disagree	18.5%
Disagree	11.5%
Strongly disagree	7.4%
Don't know	1.3%

Figure 2: IoD Policy Voice results: November 2024, 601 responses

Do you agree or disagree with adding interim relief awards to fire and rehire unfair dismissals?

Strongly agree	5.3%
Agree	19.8%
Neither agree nor disagree	20.0%
Disagree	20.8%
Strongly disagree	27.3%
Don't know	6.8%