

IER EMPLOYMENT LAW UPDATE

The ERB - Fire and rehire & collective
redundancies

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ABOUT US

- Our firm was established in 1882 and we've worked with trade unions and associations for over 70 years
- We act for over 30 trade unions and associations
- We act for people, not companies



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Agenda

- Roadmap to implementation
- Fire and rehire – proposed legislation
- Collective redundancies – proposed legislation
- How might important caselaw decisions be different?
- Practical impact and planning for the changes

The Employment Rights Bill - Where are we?

- 15 September 25 – Commons considered Lords proposed amendments
- 28 October 25 - Lords sitting to consider Commons amendments and/or reasons
- Roadmap for changes to fire and rehire and collective consultation
 - Autumn 2025: consultation on fire and rehire
 - Winter/early 2026: consultation on collective redundancy
 - April 2026: collective redundancy protective award doubled
 - October 2026: fire and rehire
 - 2027: collective redundancy – thresholds

Fire and rehire - Proposed legislation

Automatic unfair dismissal: restricted variations

New s104I(1) and (2) ERA 1996

Employee will be automatically unfairly dismissed where the reason, or principal reason, for their dismissal is either of the following:

- The employer sought to make a "restricted variation" and the employee did not agree to it.
- The employer sought to make more than one variation and the employee did not agree to several variations that included the restricted variation.

Restricted variations include pay and performance, working time and time off and variation clauses.

Automatic unfair dismissal: rehire or replace

New s10 4 I(3), ERA 1996

Employee will be automatically unfairly dismissed where the reason, or principal reason, for their dismissal is to employ another person, or to re-engage the employee, under a varied contract of employment to carry out the same duties, or substantially the same duties, as were carried out before dismissal.

A "varied contract of employment" = terms are not the same and one or more of the differences between them constitute a restricted variation.

Also new s10 4 K ERA 1996 to address replacing employees with non-employees. Automatic unfair dismissal will arise where the reason (or principal reason) for the employee's dismissal was to enable the employer to replace the employee with an individual who is not an employee of the employer and there is no redundancy situation.

Financial Difficulties exception

Dismissal is not automatically unfair if the employer shows both of the following:

- The reason for the restricted variation or replacement was to eliminate, prevent or significantly reduce, or significantly 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 the business as a going concern; or
 - where the employer is a public sector employer (other than a local authority), the financial sustainability of carrying out the employer's statutory functions.

AND

- In all the circumstances, the employer could not reasonably have avoided the need to make the variation or replace the employee.

If the financial difficulties exception applies, dismissal won't be automatically unfair, however, an ET will need to determine if dismissal was "ordinarily" unfair.

Ordinary unfair dismissal factors

Include...

- Any consultation carried out in relation to the variation
- Any consultation carried out with recognised trade unions
- (Where no recognised union) any consultation carried out with any other person representing the employee's interests who had authority to receive information and to be consulted about the dismissal on the employee's behalf.
- Anything offered to the employee by the employer in return for agreeing to the variation.
- Any other matters specified for these purposes in regulations.

Variations that are not restricted

If an employer wishes to vary a contract of employment by dismissal and re-engagement and the variation isn't a restricted variation, then it won't be automatically unfair.

However, an ET will need to assess ordinary unfairness in line with the factors referenced in the previous slide.

Statutory Code of Practice

Important...

The Statutory Code of Practice on dismissal and re-engagement came into force
18 July 2024.

A 25% uplift to compensation applies for failure to comply with the Code.



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Collective redundancies - proposed legislation

New s188(A1) of TULRCA 1992

The obligation to collectively consult over redundancies is triggered where an employer is proposing to dismiss as redundant within a period of 90 days or less either:

- 20 or more employees at one establishment; or
- at least the "threshold number of employees", as defined in a new s195A of TULRCA 1992.

If the trigger is met, collective consultation must begin at least 30 days before the first dismissal takes effect. Where the employer is proposing to dismiss as redundant 100 or more employees, collective consultation must begin at least 45 days before the first dismissal takes effect.

The threshold number may be either a specified number, a number defined by a specified percentage of employees, or determined in another way specified in the regulations. However, it must not be lower than 20.

Consultation Obligations continued

New s188(2A) of TULRCA 1992

Obligations to consult under s188 will not require an employer to consult all appropriate representatives together, nor to undertake consultation with a view to reaching the same agreement with all the appropriate representatives.

If employees are not all at one establishment, a new s188(4)(ca) of TULRCA 1992 will require employers to disclose in writing to the appropriate representatives the total number of employees it is proposing to dismiss and details of the establishments in which they are employed.

Increase to protective award

S189(4)(b) of TULRCA 1992 will be amended to increase the maximum protective award from 90 days' to 180 days' pay.

Amount is uncapped.

Since 20 January 2025 ET may increase a protective award by up to 25% for failure to comply with the ACAS Code on dismissal and re-engagement or any other Code.

Expected to be in force by April 2026.



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Case law – a different outcome under the new ERB rules?

Catamaran Cruisers Ltd v Williams and others [1994]?

Glasgow City Council v Deans and others EATS/0061/05?

Tesco Stores Ltd v USDAW [2024]?

P&O Ferries?

Would new automatic unfair dismissal rules and greater financial penalties have made a difference?

Practical impact and planning for the changes

- ETs will have to make findings as to whether the financial difficulties exception has been met, as opposed to just “sound business reasons”
- Push hard for evidence of alleged financial difficulties, if raised, and challenge it. The financial difficulties exception is very limited in scope
- Ensure you have evidence that all other options have been considered
- Enforce the provisions of the Statutory Code of Practice and remind employers of the 25% uplift for failure to comply
- Remind employers of the greater financial penalties for failing to collectively inform and consult – it applies to redundancy and fire and rehire scenarios
- Emphasis will be on reaching agreement through proper consultation. Ensure such consultation starts early
- Watch out for attempts by employers to make changes now, before the new rules apply

ANY QUESTIONS?

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