

Fire and Rehire

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Introduction

In its 2024 Plan to Make Work Pay, Labour committed to “end the scourge of fire and rehire” by modifying the existing law that allows an employer to justify dismissal and re-engagement on less favourable terms where there is a “sound business reason” to do so. However, whilst the first draft of the Employment Rights Bill proposed making any dismissal to rehire an existing worker on less favourable terms automatically unfair, the ambit of the protections has been narrowed following consultation. The fire and rehire protections in the Employment Rights Act 2025 (‘ERA’), due to come into force in January 2027, will instead only substantively protect workers against the imposition of a limited list of “restricted variations”.

What does the Act say?

- The ERA introduces a new section 104I to the Employment Rights Act 1996, creating new rights for employees to claim automatic unfair dismissal in fire and rehire situations.
- Employees who refuse a “restricted variation” to their contract and are then fired in order to re-engage them on less favourable terms can claim automatic unfair dismissal. So too can those who are dismissed when the employer intends to employ someone else on substantively the same basis with altered terms which include changes to “restricted variations”. The “someone else” can be an employee of another organisation but also someone self-employed or an agency worker.
- “Restricted variations” comprise variations relating to pay, working hours, shift times and length, time off, and pension rights.
- The introduction of a unilateral variation clause into an existing contract to vary a “restricted variation”, will also trigger an automatically unfair dismissal if the employee refuses to agree to it or dismisses someone with the intention of employing “someone else” with such a clause in their contract.
- Employers can avoid an automatic unfair dismissal claim through a “financial difficulties exemption” (to be construed narrowly), which requires them to show that the reason for the variation “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 to affect in the immediate future” the ability of the employer to carry on the business. There is a parallel exemption test that applies to public sector bodies and local authorities.
- Where a dismissal is not automatically unfair, as for example, it relates to a non-restricted variation, it can still be unfair

under revised principles. The ERA sets out various relevant factors that must be considered when assessing the fairness of such dismissals, such as whether there was appropriate consultation with the employee and their representatives, and whether the employee was offered anything in return for agreeing to the variation.

What are the defects?

- The ERA does not ban fire and rehire outright. It may in certain circumstances still be permissible to fire and rehire to impose variations that are not “restricted variations” or where the financial difficulties exemption applies.
- The government has consulted on further narrowing the available protections. In February 2026, the government set out a proposal to limit two forms of restricted variations: (1) Employment expenses and benefits in kind: the government suggests excluding from protection all variations to expenses and benefits in kind so they would no longer be “restricted variations”. (2) Shift patterns: the government suggests limiting protection to provide that only a narrow list of more extreme shift changes (e.g., day to night work, or weekday to weekend work) would be restricted variations.
- The government stated that the purpose of its proposed changes is to allow employers to maintain operational flexibility. However, the proposal would further limit workers’ protections against the unilateral variation of core terms. Consultation closed in April 2026 and the government is currently preparing its response.

What needs to be done?

- *It remains important for unions to oppose attempts by employers to introduce variation clauses into existing contracts before the new legislation comes into force.*
- *Unions should oppose attempts to carve out any further exemptions to the “restricted variations” as they stand.*
- *If Regulations are introduced following the Government consultation in line with its proposal on expenses and benefits, then unions will need to guard carefully against attempts by employers to restructure remuneration packages as part of any future pay deal, such that employers seek to improve these terms rather than core pay in the knowledge they can be eroded at a later date without fear of making automatic unfair dismissals.*



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