TUC
Changing the world of work for good

Strengthening remedies against abuse of rules on collective redundancy and fire and rehire

TUC response to Department for Business and Trade consultation. December 2024.

Protective awards

The Trades Union Congress (TUC) exists to make the working world a better place for everyone. We bring together around 5.5 million working people who make up our 48 member unions. We support unions to grow and thrive, and we stand up for everyone who works for a living.

Collective consultation is a crucial legal protection for workers when employers are proposing to undertake dismissals. Consultation processes enable unions to negotiate alternative proposals and protect jobs. Unions have much experience bringing alternative proposals to the table that save jobs and avoid compulsory redundancies.

There is evidence that collective redundancy consultation can have a significant impact in terms of reducing job losses.[1]

Collective consultation requirements as set out in sections188 to 198B of the Trade Union and Labour Relations (Consolidation) Act 1992 are an essential protection for workers facing the prospect of dismissal due to redundancy.

Section 188(2) of the Act sets out that consultation should be undertaken 'with a view to reaching agreement'.

The duty arises where the employer is proposing to dismiss as redundant 20 or more employees at one 'establishment' within a period of 90 days, although the Employment Rights Bill currently before Parliament proposes to amend this aspect so that the duty applies whenever redundancies are proposed for 20 or more employees.

The key enforcement mechanism is via the imposition of protective awards. If an employer hasn't conducted the necessary collective consultation, a recognised trade union or employee representatives can bring a claim. This can be for up to 90 days' pay for each affected employee. Case law has established that this award is punitive, not compensatory.

However, it has become clear that the imposition of a protective award against employers who fail to comply with the legislation is inadequate. Notably, on 17 March 2022, P&O Ferries implemented mass dismissals and replaced its unionised workforce with non-unionised seafarers employed through an employment agency based in Malta. The seafarers were employed on new and significantly worse contracts.

P&O Ferries breached its collective agreement with unions and neglected several of its statutory duties. This included failing to carry out collective consultation with the

[1] Four out of ten reps responding to a TUC Survey in 2010 reported a reduction in the number of job cuts implemented at the end of the consultation process. TUC (2012) *Collective Redundancy Consultation* www.tuc.org.uk/sites/default/files/tucfiles/callforevidencecollectiveredundancyconsultation.pdf

recognised trade unions RMT and Nautilus International. They stated that this was because "given the fundamental nature of change, no union could accept it". The crucial aspect to this behaviour is that P&O Ferries was in a position to weigh likely future profits against likely costs of legal violations. It could also take advantage of the fact that claims through the tribunal system take a significant length of time to process and so made time-limited financial offers to the seafarers affected.

In response to the consultation questions the TUC therefore advocates the removal of the cap on protective awards (**question 1**) and we recommend that in future payments should be linked to a company's financial status rather than wages.

At present, the maximum protective period in s.189(3) is fixed at 90 days. Raising the cap to 180 days would likely lead to an increase in the size of awards, notably where there is deliberate flouting of the law. This strengthens the incentive for employers who might inadvertently breach the rules to ensure they adhere to them. This should also reduce the incidence of companies flouting the rules deliberately in circumstances where the judgement is marginal as to whether breaking the law will allow for greater financial gains than following it (**questions 2 and 3**). As set out above, if this leads to greater adherence to collective consultation duties, then it will present employees with greater opportunities to engage with employers on the detail of proposed dismissals (**question 4**).

However, these measures would not prevent an employer deciding, nevertheless, that the economic costs of zero consultation, which it would still be able to calculate precisely, are outweighed by the benefits (**question 5**). There is therefore a significant risk that such reform would not achieve its key aim, as set out in the ministerial foreword and introduction of the consultation paper, of ensuring employer compliance with collective consultation requirements.

This could be mitigated to an extent if the government provided for a cap of 180 days but also allowed a tribunal to disapply it or award an extended protective period of no fixed determinate length where a breach was particularly serious. This would make it harder for companies seeking to follow the practices previously used by P&O Ferries to precisely calculate the cost of not complying their obligations.

But the aim of the change should be to ensure that employers comply with their obligations, rather than transgressions are punished slightly more severely.

Therefore, the TUC strongly advocates that the cap on protective awards is removed altogether (**question 6**). Removing the cap would be relatively straightforward. The words 'but shall not exceed 90 days' in s.189(4) could be deleted.

The removal of a cap would make it far more difficult for any employer considering not meeting their statutory obligations to make an accurate assessment of the likely award against them and therefore assess the benefits of taking such a course of action. This would make it far less likely that employers would do so (**question 7**).

This would better allow workers and their trade unions to work with employers to protect jobs as it would allow for a period of consultation during which the union could interrogate the reasoning behind the proposals and discuss alternative arrangements with the employer (**question 8**). It would ensure far higher adherence with collective consultation requirements.

In relation to **question 9**, the main challenge we have identified in taking this approach is that, if there were no maximum to the protective period in s.189(4), tribunals would have little guidance as to the calculation of the protected period, although s. 189 (4) requires awards to be "of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default". This could lead to some inconsistencies in awards although developing case law would likely provide for consistency over time.

One solution to this risk would be an approach similar to the sentencing guidelines, which apply to unlimited fines in areas such as health and safety offences.

We also suggest that the government consider other methodologies for the penalty for breaching collective consultation requirements to be calculated, so that it is as much a deterrent for the wealthy large company as for a smaller one.

We would therefore favour an approach that is based on the financial strength of the employer.. We note that in the Data Protection Act 2018, section 157 provides for a penalty of £17.5 million or 4 per cent of the undertaking's total annual worldwide turnover in the preceding financial year, whichever is higher. This is a useful model to follow.

The argument is sometimes made that a company might opt for insolvency rather than risk an uncertain level of penalty for breaching collective consultation duties. However, we believe that this misunderstands the strong incentive that is in place for trade unions to work with struggling employers to retain jobs. It also overlooks the provisions in s. 189 (6) that provide for "special circumstances which rendered it not reasonably practicable for the employer to comply" with the requirements.

We also believe the government should consider making it the case that exceptional and serious breaches could give rise to criminal liability as well as protective awards. This would be in line with s.194 TULRCA, which currently makes it an offence for an employer to fail to give a notice to the Secretary of State in accordance with s.193. The offence could also provide for personal liability on the part of directors or managers where the offence is committed with their 'consent or connivance' or is attributable to their neglect, just as s.194(3) TULRCA and s.37(1) of the Health and Safety at Work Act 1974 impose potential criminal liability on directors and managers as well as on an employer.

Further, as it stands the time taken to adjudicate on trade unions' claims for protective awards work in favour of the aggressive employer who tables time-limited financial offers to staff. Resolving this would rebalance the power disparity.

Interim relief

The TUC strongly agrees with the government's aim of ending fire and rehire.

In response to the questions under consultation, we agree that putting in place measures that have the effect of halting dismissal processes where an employer has not followed its statutory duties is desirable.

As it stands, an employer intent on dismissing its workforce can do so rapidly by ignoring the legal provisions aimed at facilitating dialogue, such as the collective consultation requirements.

In many situations, by the time that unions are able to formulate a response, workers have lost their jobs. There is therefore little opportunity for unions to press for a better settlement for affected workers, including preservation of some or all roles.

We agree that making interim relief available to those who bring protective award claims for a breach of collective consultation obligations and in the case of unfair dismissal could be a useful tool. (**Questions 10 and 15**).

Any new regime should be operated via the employment tribunal system so that costs do not become prohibitive.

Making interim relief available would provide potential for a worker to be reinstated where a tribunal finds that they are likely to win a claim for unfair dismissal. Combined with the other measures proposed by the government this would provide an additional incentive for employers to meet their collective consultation obligations and would therefore ensure that some employers seeking to undertake unlawful fire and rehire exercises reconsider their approach.

However, this still runs the risk that such an award would come after an employee has already been dismissed and removed from their post without the employer meeting their legal obligations.

The proposals also provide no mechanism for enforcing any reinstatement.

In addition, trade unions find it cumbersome to utilise existing provisions for interim relief, for instance due to dismissal for trade union membership or activities.

Given the above, we urge the government to examine the case to allow unions and workers access to a form of interim injunction that could pause the process of dismissal where an employer has not met their legal obligations.

It is notable that employers have access to extremely swift injunctive relief against trade unions in the event of, for example, balloting irregularities in an industrial action ballot. This contrasts with the absence of any real time protection for workers from an urgent

and immediate attack on their employment and on their employment rights. It is time to rectify that imbalance.

Wider changes (question 15)

Regulation of unilateral variation clauses.

Without action to close the loophole, trade unions are deeply concerned that employers might make greater use of unilateral variation clauses if provisions that seek to limit fire and rehire are introduced as set out in the Employment Rights Bill.

Case law suggests that such clauses can be relied on even for changes that are detrimental to the employee, such as in Bateman v ASDA Stores [2010] IRLR 370 and Wandsworth LBC v D'Silva [1998] IRLR 193.

We strongly urge the government to act against the use of such clauses in order to support the policy intention behind its other actions against fire-and-rehire and fire-and-replace.

This would echo prohibitions on clauses that prevent workers from making protected disclosures in s. 43J of the Employment Rights Act 1996.

We suggest something along the following lines, to be inserted in a new section in the 1996 Act:

(1) Any provision in an agreement to which this section applies is void in so far as it purports to permit the employer unilaterally to vary a contract to the detriment of the worker.

(2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing proceedings under this Act or any proceedings for breach of contract.

There should also be a provision ensuring that an employee must not be subject to a detriment or dismissed because they refuse to agree to a unilateral variation clause. There is an existing statutory model protecting workers who fail to sign workforce agreements under the Working Time Regulations, which could be adopted here: see s.45A(1)(b), (c) (detriment) and s.101A(1)(b), (c) (unfair dismissal) of the Employment Rights Act 1996.

Duty to consult workers

Workers and employees have similar interests in not being dismissed or fired and rehired and therefore limb-b workers should be extended the right to be consulted over dismissals.

This is consistent with the way that case law has served to narrow the distinction between employees and limb-b workers in recent years. This can be seen in Uber v Aslam [2021] ICR 657 which concludes that an employer may have the same obligations to offer a limb-b worker work as it would an employee. See also R (IWGB) v Secretary of State for Work and Pensions [2021] ICR 372 which confirmed workers' access to health and safety protections.

This move would also support the government's wider ambitions, set out in its Plan to Make Work Pay, to "move towards a single status of worker and transition towards a simpler two-part framework for employment status".

Widening the duty in TULRCA s. 188 to embrace 'workers' as well as employees would be a positive step in this direction.

Consultation period

When it comes to collective consultation, many employers are willing to negotiate and agree consultation periods which exceed the statutory minimum periods, even where the legal obligations do not apply.

This period is important in order to allow workers and their unions more time to devise alternative proposals and negotiate with management. In very many cases unions succeed in reducing the number of roles cut.

It would be an extremely significant signal to employers if the government was to reverse the reduction in the collective consultation period set out in s.188(1A) introduced by the Coalition government and reinstate the minimum period of 90 days' consultation if the proposal is to dismiss 100 or more employees. We would also recommend increasing the minimum period which applies where fewer than 100 employees are dismissed to 60 days as this would also provide important additional time to support union negotiations.

Duties of consultation

Currently the duty to consult is triggered when there are proposals for redundancies.

This can be quite late in the process and workers and unions often find that by this point management plans are well developed, views have hardened and proposals are difficult to influence.

Too often employers simply go through the motions when it comes to redundancy consultations.

Although some are willing to hold regular meetings, too often decisions have been taken in advance and the employer is not willing to consider the union's views or proposals.

We propose that the duty should be triggered once an employer is 'contemplating' dismissals.

In some situations this would give unions and employee representatives a longer period to engage with management and consider alternative proposals. It would also bring the UK closer to the European Directive on Redundancies.

Reasons for dismissal

The duty in s.188(2) could make it explicit that the employer should consult about the 'reasons' for the dismissals. While the employer is required to provide information about the reasons for its proposals under s.188(4), there is no express requirement that the consultation should be about this matter and the case law (such as UK Coal Mining v NUM [2008]) isn't categoric.

This would be an important signal to employers about the desirability of genuine consultation.

An addition to the wording in s.188(2) could make this clear by stating that 'The consultation shall include consultation about the reasons for the proposals and consultation about ways of....'

We would also like the government to consider strengthening requirements for employers to provide up-to-date financial information to trade unions. In particular, we would like it to examine whether there is a role for the proposed Fair Work Agency by extending draft powers in Clause 78 of the Employment Rights Bill. This would take the form of requiring up to date financial and other information necessary to assess the financial health of an employer, including any parent companies based overseas, to trade unions undertaking collective consultation.

Notices of dismissal

It undermines the purpose of collective consultation if notices of dismissal can be issued during the course of the process.

The law should be changed so that an employer can only issue notices of dismissal once the minimum periods of consultation in s.188 have expired.

Currently under s.188(1A) the only requirement is that the first of the dismissals does not 'take effect' before the end of the minimum periods, meaning notices can be issued beforehand so long as they do not take effect until after the minimum period has ended.

Making this change would give unions more time for negotiation with management and would send a strong signal to employers that the government expects them to take their consultative duties seriously.

Seafarers

We note that the government has made provision in Clause 24 of the Employment Rights Bill for seafarers to be included within the new collective redundancy provisions. We would urge the government to ensure that these provisions apply to vessels calling at UK ports at least 52 times a year, rather than 120, which we believe is a better indication of a vessels link to this country.

We also urge the government to ensure that seafarers can enjoy all new rights under the bill, and not just those relating to collective redundancy.