



The Bar Council

Bar Council response to the Department for Business and Trade Consultation on fire and rehire – changes to expenses, benefits, and shift patterns

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business and Trade consultation on fire and rehire – changes to expenses, benefits, and shift patterns.¹

2. The Bar Council is the voice of the barrister profession in England and Wales. Our 18,000 + members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

3. To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

¹ [Make Work Pay: fire and rehire – changes to expenses, benefits, and shift patterns](#)

4. As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

Question 1 – Which of the following options regarding expenses and benefits in kind protections do you agree with?

5. Option 1: All expenses and benefits in kind should be excluded from the restricted variation of sums payable to an employee in connection with the employment (and therefore not be subject to higher protections from fire and rehire).

6. It is more likely that an employer will have a fair and legitimate reason for needing to vary the contract more frequently as regards the payment of expenses and benefits in kind and the new regime under section 104I Employment Rights Act 2025 is likely to be unduly onerous in respect of the same. It is simpler and principled to carve out all expenses and benefits from the scope of restricted variations and core benefits such as pension entitlement / schemes are protected elsewhere in any event. Where the non-payment of expenses or benefits in kind gives rise to a breach of contract / unlawful deduction of wages, the remedy is to be found elsewhere in the provisions of the Employment Rights Act 1996 and could still be referred to in a claim for ordinary unfair dismissal, which is a more proportionate approach to take.

Question 2 – If the government were to pursue option 2, which expenses and benefits in kind should be protected (and therefore subject to higher protections from fire and rehire)?

7. We do not support a fragmented approach to this issue given the already complex legislative landscape of the new ‘fire and rehire’ provisions and the difference in treatment of public and private sector employers and local authorities in particular. This may also have a chilling effect on employment.

Question 3 – If share schemes were to be protected, which types should be in scope of the restricted variation of sums payable for these purposes (and therefore subject to higher protections from fire and rehire)?

8. We do not support a fragmented approach to this issue given the already complex legislative landscape of the new ‘fire and rehire’ provisions and the difference in treatment of public and private sector employers and local authorities in particular. This may also have a chilling effect on employment.

Question 4 – In your view, how common is it for expenses and benefits in kind to be part of core contractual terms (without a contract variation clause that would allow the employer to change these terms)?

9. Occasionally. This is an area in which employers and employees are likely to be able to provide a better evidence based, but from the experience of employment law barristers these are usually expressed to be non-contractual provisions so as to allow for the necessary flexibility in amending them. We acknowledge there may be differences between public and private sector employers in this regard, with it being more likely that public sector employers will have core contractual terms in this regard in for example collectively agreed terms and conditions.

Question 5 – In your view, which expenses and benefits in kind are commonly part of core contractual terms (not including those which can be changed via a contract variation clause that would allow the employer to change these terms)?

10. No answer.

Question 6 – In your view, how important are expenses and benefits in kind, which are granted in employment contracts to employees?

11. Important. Employees typically want to know what their net monthly pay will be after they have worked and travelled for work as necessary and to budget accordingly. Benefits in kind can be a significant incentive for employees ranging from a simple gym membership pass to complex share schemes. In every case it is all part of the work-wage bargain and hence important to both parties.

Question 7 – In your view, how common is it, specifically, for share schemes to be part of contractual terms without a contract variation clause that would allow the employer to change these terms?

12. Rarely. In private sector contracts of employment it is not common for share schemes to be part of the contractual terms without a contract variation clause. We do not comment on public sector employers as we have less collective experience in litigating such issues which come up much less frequently in public sector disputes of this nature.

Question 8 – In your view, how important are share schemes, where these form part of the employment contract, to employees?

13. Important. The type of contract which features a contractual share scheme is typically one of a highly paid individual in an industry in which the share package is a significant incentive for their recruitment and work.

Question 9 – In your opinion, what would be the impact on employees of excluding all expenses and benefits in kind from the automatic unfair dismissal protections of the fire and rehire measure?

This would mean that employers would be able to dismiss employees to remove contractual entitlements to expenses and benefits in kind, without triggering an automatic unfair dismissal. However, ordinary unfair dismissal protections would still apply, as explained in the consultation document.

14. Please see answer to Question 1.

Question 10 – In your opinion, what would be the impact on employers of including travel expenses, accommodation expenses and share scheme expenses in scope of the restricted variation for sums payable (and therefore subject to higher protections from fire and rehire)?

15. Please see answer to Question 1. This may have a chilling effect on employment.

Question 11 – Do you believe that the proposals discussed in this consultation relating to expenses and benefits in kind will have an impact on individuals with a 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.

16. Don't know. The real question is whether there will be an unlawful and disproportionate impact on individuals with particular protected characteristics and this may well vary according to industry, sector and pay profile. This is all apt for a careful equality impact assessment.

Question 12 – Where you have identified potential negative impacts in your response to question 11, are there ways to mitigate these?

17. –

Question 13 – Is there anything else you would like to share your reflections on, that was not covered by the previous questions (e.g. broader risks or alternative options)?

18. –

Question 14 – Which of the following options regarding shift changes do you agree with?

19. Option 2 - No types of shift pattern changes are in scope of the restricted variation of the timing or duration of a shift.

20. We consider that this is disproportionately onerous especially for start-ups and small businesses and are not aware of an evidence base that suggests there have been abusive practices in 'fire and rehire' which relate to shift patterns and changes thereof. The protection of ordinary unfair dismissal, bearing in mind the reduction in qualifying service needed to six months from two years, is proportionate to guard against the potential mischief in question.

Question 15 – Do you agree with the proposed definition of night-time working (any time 11pm-6am)?

21. Yes.

Question 16 – If answered no, don't know or other to question 15, what do you think the definition of night-time working should be?

22. –

Question 17 – Do you agree that changes from weekday to weekend and weekend to weekday shifts should be included in this list of protected shift changes?

23. Neither. We consider that this is disproportionately onerous especially for start-ups and small businesses and are not aware of an evidence base that suggests there have been abusive practices in 'fire and rehire' which relate to shift patterns and changes thereof. The protection of ordinary unfair dismissal, bearing in mind the reduction in qualifying service needed to six months from two years, is proportionate to guard against the potential mischief in question.

Question 18 – Do you agree that changes from day to night and night to day shifts should be included in this list of protected shift changes?

24. Neither. We consider that this is disproportionately onerous especially for start-ups and small businesses and are not aware of an evidence base that suggests there have been abusive practices in 'fire and rehire' which relate to shift patterns and changes thereof. The protection of ordinary unfair dismissal, bearing in mind the reduction in qualifying service needed to six months from two years, is proportionate to guard against the potential mischief in question.

Our current understanding (subject to change based on consultation feedback) is that some employment contracts do not include fixed shift patterns i.e. on what days and at what times the employee will work their hours, but instead set out availability windows i.e. a period during which an employee must contractually be available to work and whose shift will be scheduled during this period however it will not provide the exact timing of the shifts.

Question 19 – Do you think that the government should consider whether there are certain kinds of changes to contractual availability windows which should be protected from being changed through fire and rehire?

25. No. This is an inherently flexible working arrangement to which the parties have signed up and there is no evidence base of which we are aware of abusive practice in this regard.

Question 20 – If you answered yes to question 19, which changes to contractual availability windows should be protected?

26. –

Question 21 – In your opinion, how common is it for shift patterns (specific days and times) to be specified in employment contracts or as a contractual term?

27. Very common.

Question 22 – In your opinion, how common is it for there to be a flexibility clause in an employment contract that would allow the employer to change an employee's shift patterns without the employee's agreement?

28. Occasionally. It is more common to see clauses which allow for variation after notice and / or consultation with the employee. It depends on the industry and sector concerned.

Question 23 – What would the impact on employees be of only protecting the proposed narrow list of shift changes (day-night, night-day, weekday-weekend and weekend-weekday)?

29. They would still have the protection of ordinary unfair dismissal as regards variations that are not restricted in the new provisions inserted into ERA 1996 by ERA 2025.

Question 24 – What would be the impact on employers of only protecting the proposed narrow list of shift changes (day-night, night-day, weekday-weekend and weekend-weekday)?

30. This may have a chilling effect on employment, but less than if a wider set of restricted variations were to be introduced. Much will depend on the industry and sector concerned.

Question 25 – In your opinion, are there any concerns or risks you think should be considered with protecting the proposed narrow list of shift changes (day-night, night-day, weekday-weekend and weekend-weekday)?

31. Prefer not to say.

Question 26 – Do you believe that the proposals discussed in this consultation relating to shift changes will have an impact on individuals with a 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.

32. Don't know. The real question is whether there will be an unlawful and disproportionate impact on individuals with particular protected characteristics and this may well vary according to industry, sector and pay profile. This is all apt for a careful equality impact assessment. It is well known that women still bear proportionately more caring responsibilities than men in the workforce (though that is an evolving picture societally) and it is obvious that changes to shifts / working time may bear differently on people with disabilities and / or differently aged workers.

Question 27 – Where you have identified potential negative impacts in your response to question 26, are there ways to mitigate these?

33. –

Question 28 – Is there anything else you would like to share your reflections on, that was not covered by the previous questions (e.g. broader risks or alternative options)?

34. –

Bar Council
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For further information please contact:

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