EMPLOYMENT AND TRADE UNION RIGHTS (DISMISSAL AND RE-ENGAGEMENT) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Employment and Trade Union Rights (Dismissal and Re-engagement) Bill as introduced in the House of Commons on 16 June 2021 (Bill 16).

- These Explanatory Notes have been prepared by the Member in Charge of the Bill, Barry Gardiner MP, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice, provide background information on the development of policy and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

1 This Bill would amend the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") and the Employment Relations Act 1996 ("the 1996 Act") to place obligations on employers and provide safeguards for employees in relation to dismissal, or the threat of dismissal, for the purpose of re-engagement on inferior terms and conditions.

2 That practice has become known colloquially as "fire and rehire". The tactic is typically used when it has not been possible for the employer to vary the terms of the contract by agreement with the employee or their representative.

Policy and legal background

Employment contracts

3 The relationship between an employer and an employee is principally governed by the contract of employment. There are a number of different ways in which an employer can seek to vary the terms and conditions of the employment contract. Some contracts will contain a clause that allows an employer to unilaterally vary certain terms. If there is no such clause, an employer could vary the contract with the consent of the employee or the consent of a union for collective agreements.

4 If an employer is unable to reach an agreement with an employee on changes to the contract, they may decide to dismiss the employee by notice and then offer to re-employ them on new terms. This is currently lawful, subject to the risk, in some cases, of claims for unfair or wrongful dismissal, discrimination or obligations to consult over collective redundancies.

5 The Advisory, Conciliation and Arbitration Service (ACAS) guidance, Changing an employment contract, provides a detailed overview of the different ways in which a contract of employment can be changed. The ACAS guidance summarises:

> "If you're an employer considering this option, first think about:
>
> - whether you've done everything you can to reach agreement
> - whether the changes are absolutely necessary
> - the risk to employee engagement and morale
> - the risk of legal action
>
> If deciding to dismiss and rehire, the employer should:
>
> - follow a fair dismissal procedure
> - give the employee enough notice (statutory notice or what's in the contract – whichever is longest)
> - offer the employee a right of appeal against their dismissal
>
> Changes should not take place until the employee has been fairly dismissed and then rehired under the new contract."

Prevalence of fire and rehire and the Covid-19 pandemic

6 Fire and rehire is not a new tactic, and it has been used for decades (often under different names). However, an ACAS evidence review, published in June 2021, found that "there was a shared sense among some participants that the practice has become increasingly prevalent both in recent years and during the pandemic".

7 During the pandemic there have been a number of high-profile disputes about the use of fire and rehire tactics, including by some large and highly profitable employers. The exact number of workers affected by fire and rehire is unknown.

8 A report of a poll of 2,231 individuals in England and Wales by Britain Thinks, published by the Trades Union Congress in January 2021, estimated that 9% of workers had been told to re-apply for jobs on worse terms since March 2020, with higher rates among young and BME workers.

9 ACAS also reported a further survey by the Chartered Institute of Personnel and Development (CIPD) in February 2021, in which 379 CIPD members responded to questions about changes they had made to their employee terms and conditions over the previous 12 months. The responses showed that 3% of respondents had made changes in terms and conditions through dismissing staff and rehiring them on new terms. 8% claimed to have made the changes not through consultation, negotiation or voluntary agreement, but "by other means", and of the 34% who said they had made changes to employees' terms and conditions by negotiation and voluntary agreement, there was no breakdown of how many had used the threat of fire and rehire in order to secure the agreement.

10 The Stop Fire and Rehire campaign has prepared the following visual representation of recent employment disputes relating to fire and rehire:

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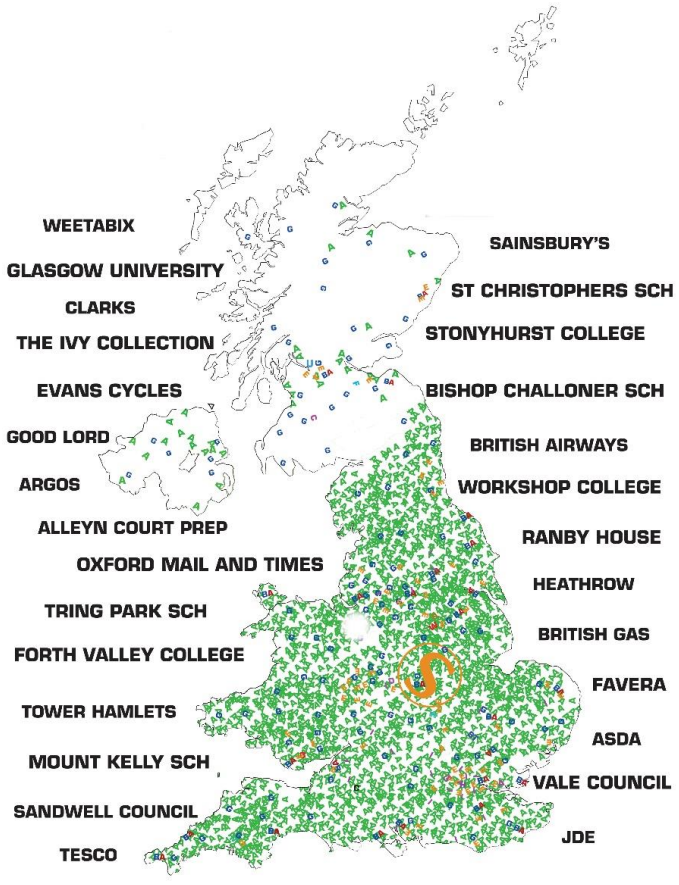

Calls for reform

12 The use of fire and rehire tactics during the course of the COVID-19 pandemic has been widely condemned. The Prime Minister has said that firing and rehiring is "unacceptable as a negotiating tactic". Concerns have also been expressed by the Leader of the Opposition, the First Minister of

Scotland, the First Minister of Wales and others.[1]

13 Professor Alan Bogg, a Professor of Law at the University of Bristol, argued that under the current law the balance of power lies too much with the employer:

> "In short, a determined employer with the right legal advice can achieve its goal of reducing terms and conditions with relative ease. English law provides the signposts to navigate the way, abetted by a wide scope for legally compliant business reorganization dismissals. In other words, the contractual bargain is sacrosanct in English law except when it runs up against the employer's powers of dismissal, the totemic managerial prerogative of the English common law."[2]

14 During an Opposition Day debate on 25 January 2021 the Secretary of State for Business, Energy and Industrial Strategy, Kwasi Kwarteng, told the House of Commons that the Government had asked ACAS to conduct a review of fire and rehire:

> "As I was saying, we have been very clear that this practice is unacceptable and the Under-Secretary of State for Business, Energy and Industrial Strategy, my hon. Friend the Member for Sutton and Cheam (Paul Scully), who is the Minister responsible for labour markets, has condemned the practice in the strongest terms on many occasions in this House. We have engaged ACAS to investigate the issue and it is already talking to business and employee representatives to gather evidence of how fire and rehire has been used. ACAS officials are expected to share their findings with my Department next month and we will fully consider the evidence that they supply."[3]

ACAS was not asked to present recommendations to Government.[4]

15 The ACAS paper, Dismissal and re-engagement (fire-and-rehire): a fact-finding exercise, was published on 8 June 2021. It found "some concerns that the prospect of fire-and-rehire has been used increasingly as a tactic at an early stage of negotiation processes".

16 Responding to the review, Minister Paul Scully said that it is "unacceptable and, frankly, immoral to use the threat of fire and rehire as a negotiating tactic to force through changes to people's employment contracts, or for employers to turn to dismissal and rehiring too hastily, rather than continue to engage in meaningful negotiation". He announced that the Government had asked ACAS to "to produce better, more comprehensive, clearer guidance to help employers explore all the options before considering fire and rehire, and encourage good employment relations practice".[5]

Variation of employment contracts

17 The accepted principles of the law of contract mean that the terms of a contract of employment are, like any other contract, binding on the parties to it. If one party wishes to change the agreed

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[1] See, for example, BBC New Online, Fire-and-rehire: What is it and why is it controversial?, 2 July 2021

[2] Alan Bogg, Firing and Rehiring: An agenda for reform, Institute for Employment Rights, 9 October 2020.

[3] HC Deb 25 January 2021 c88

[4] https://www.acas.org.uk/fire-and-rehire-report/html

[5] HC Deb 8 June 2021 c821

terms, change can be achieved in one of three ways:

a. First, the method favoured by ACAS guidance, is by mutual agreement between employer and employee to vary the existing terms. This may be done on an individual basis or, where a union is recognised by the employer for the purposes of collective bargaining, by means of a collective agreement between the employer and the union. Where the agreement to vary is affected, it is called 'mutual variation'.

b. The second route is by one party terminating the contract after giving notice to do so (either the notice stipulated in the contract or the minimum period stipulated by legislation, whichever is the longer) and the parties then agreeing a new contract on different terms and conditions. This is not, in fact, a variation of contract since it involves terminating the existing contract and creating a new contract on new terms. This is the mechanism by which 'fire and rehire' works: the employer gives (or threatens to give) notice to terminate existing contracts accompanied by an offer to re-engage on new (inferior) terms. Where the employee accedes to the threat, the new terms may be achieved by a mutual (if possibly grudging) variation of the existing contract thus avoiding the process of actually firing and rehiring. Sometimes the workers are actually fired and all or some of them then re-engaged on the inferior terms on offer.

c. The third route is relatively rare and arises where a pre-existing clause in the current contract reserves to the employer the right to vary the contract at its discretion without mutual agreement. Such clauses have been regarded with distaste by the courts and may have been agreed to by employees in ignorance or as a reflection of an imbalance in bargaining power. In other areas of contract law, such as consumer contracts, equivalent clauses are void. But such reserved contractual powers in employment law are currently lawful: see *Bateman v ASDA [2010] IRLR 370 EAT*.

18 In addressing the practice of fire and rehire, this Bill intends to place an obligation on employers to follow good practice by informing and consulting with the affected workforce to improve cooperation and resolve genuine difficulties facing the business. It also seeks to both discourage bad practice and give enhanced protection to workers who are adversely affected by it.

Territorial extent and application

19 Employment is a reserved matter in relation to Scotland and Wales. This Bill both extends and applies to England, Wales and Scotland in keeping with the existing laws it amends.

Commentary on provisions of Bill

Clause 1

20 Clause 1 introduces a new procedure for handling dismissal and re-engagement. It amends the 1992 Act to require employers to provide information to, and to consult, workplace representatives with a view to reaching agreement with affected employees in undertakings or establishments with 50 or more employees.

21 These duties to inform and consult arise where there is a real threat to continued employment within the undertaking, and one or both of the following matters apply—

a. decisions may have to be taken to terminate the contracts of 15 or more employees for reasons other than conduct or capability, or

b. anticipatory measures are envisaged which are likely to lead to substantial changes in work organisation or in contractual relations affecting 15 or more employees.

The purpose of the consultation is to try to reach agreement to avoid such terminations or changes.

22 The nature of the information to be disclosed is defined as that which is in the employer's possession, or that of an associated employer, and is information—

a. without which the appropriate representatives would be to a material extent impeded in carrying on consultation with the employer, and

b. which it would be in accordance with good industrial relations practice that the employer should disclose to them for the purposes of the consultation.

23 The requirements regarding the appointment of workplace representatives to inform and consult where there is no recognised trade union are the same as for collective redundancies under s.188 of the 1992 Act.

24 The Clause provides that the workplace representatives may make an application to the Central Arbitration Committee (CAC) if they think that the provision of information or consultation by the employer does not meet the requirements of the Bill.

25 Where information might be prejudicial or seriously harmful to the continuation of the enterprise it is open to the CAC to impose terms and conditions in relation to whom the information may be disclosed or how it may be used.

26 The CAC may refer the matter to ACAS if it thinks conciliation might settle the dispute or, assuming it considers the application well founded, may issue a declaration (with reasons) identifying any failures on the part of the employer and any remedial steps which ought to be taken and by when.

27 The representatives may then seek an injunction from the Court to enforce any such declaration and to preserve the status quo until the remedial steps are taken.

28 Where the employer has failed in its obligations to inform and consult, or has dismissed or proposed to dismiss an employee for reasons other than conduct or capability, or made a substantial change in his or her work organisation or contractual relations, Clause 1 gives the employee the right to apply to an employment tribunal. If the tribunal finds the complaint well-founded, it may make an award of compensation.

29 The Clause requires the employer must give notice to the Secretary of State where there are 50 or more employees in the enterprise and where the employer has a duty to consult under the procedure for handing dismissal and re-engagement. These sections closely mimic the provisions relating to collective redundancy in section 193 and 194 of the 1992 Act.

Clause 2

30 Clause 2 introduces amendments to the 1996 Act to enhance the protection of workers who are subject to fire and re-hire. It makes it automatically unfair to dismiss an employee for refusal to agree to a variation of the employee's contract, or where the employer has failed to carry out steps specified in a CAC declaration, or has failed to comply with a collective agreement, unless the good practice requirements set out in Clause 1 of the Bill have been adhered to.

31 The primary remedy for unfair dismissal will be reinstatement or re-engagement. The impracticability of reinstatement or re-engagement will only be a defence if the employer can show that it would be likely to become insolvent within three months if it did comply.

32 As is presently the case (under s.117(4) of the 1996 Act), if an employer fails to comply with a reinstatement or re-engagement order, the tribunal can order compensation instead and may make an additional award. The tribunal will have a discretion to refuse an order of additional compensation if the employer can show that it was not practicable to comply with such an order.

33 The Clause also makes a change in a contract of employment void if the employee's agreement to it was obtained by a threat of dismissal and the change is less favourable (a term determined by 'the perception of a reasonable employee in the position of the affected employee'). This is the equivalent protection for the employee who is not dismissed but accedes to the threat of fire and re-hire, as that protection for the employee who is dismissed for not acceding to it. Where the change is brought about by agreement after information and consultation these protections will only be required by those who find the solution unacceptable.

34 Clause 2 aims to bring employment law in line with other areas of contract law, such as consumer contracts, by preventing employers evading their obligations to inform and consult under the Bill. Employers would be unable to rely on a pre-existing provision in a contract which purports to grant to them the right to unilaterally vary the contract in a way that is less favourable to the employee.

Clause 3

35 Clause 3 is intended to enable employees to take prompt action to protect their rights in circumstances where an employer proposes to vary terms and conditions of employment through the threat of dismissal contrary to the good practice requirements of the Bill. The Clause amends section 219 of the 1992 Act to disregard subsection (4), which places limited obligations on trade unions in the organisation of industrial action, in such circumstances.

Commencement

36 Under Clause 4(2), the Bill will come into force 90 days after the day on which it is given Royal Assent.

Financial implications of the Bill

37 The Bill does not require a Money Resolution as it does not require substantial distinct expenditure from the public purse.

38 The Bill does not need a Ways and Means Resolution because it does not authorise new taxation or similar charges on the people.

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Ordered by the House of Commons to be printed, 16 June 2021

PUBLISHED BY AUTHORITY OF THE HOUSE OF COMMONS