



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 Making Work Pay: consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire.<sup>1</sup>

2. The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 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

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<sup>1</sup> [Consultation](#)

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.

3. 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: Do you think the cap on the protective award should:**

- **be increased from 90 to 180 days?**
- **be removed entirely?**
- **be increased by another amount?**
- **not be increased? Please explain your answer**

4. We recognise that the consultation is seeking views (as set out in paragraph 32) as to which of the options presented would best achieve the government's objective of ensuring that employers fulfil their collective consultation obligations in law in a proportionate way. We therefore consider that the cap should be removed altogether in view of the fact that it remains for the Employment Tribunal to determine what is an appropriate protected period under s.189(4)(b) Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA'). As the purpose of the award is dually deterrence and punishment, this would in our view achieve the government's objective whilst enabling the "baked in" proportionality within the legislation itself to work as intended. We note also the proposed amendment TULRCA in the form of the draft amendment to Schedule A2 which would enable an Employment Tribunal to apply an uplift to a protective award of up to 25% but are bound to observe that if the award itself is uncapped this may be considered to be excessive and / or unnecessary. Plainly, if the government wishes to give employers certainty in their business dealings, and the ability to calculate for themselves the financial circumstances of a worst-case scenario in breaching the collective consultation obligations which apply, then an increase to a fixed maximum would be desirable, but we offer no specific view on this as we recognise that this is better understood, by those consulting with stakeholders, by reference to empirical data on protective awards.

### **Increasing the protective award cap**

**Question 2. Do you think that increasing the maximum protective award period to 180 days will incentivise businesses to comply with existing collective redundancy consultation requirements?**

- Yes
- No
- Don't Know

#### **RESPONSE**

5. We do not know. The government notes that the majority of employers seek to comply with their legal obligations to consult collectively. As they are presumably already incentivised to comply knowing there is a 90-day cap on a protective award, an increase will not affect this cohort. As to those the government considers to be bad actors, the increase may affect them if the overall cost to the business of a successful claim and protective award exceeds the costs saving / benefits otherwise contemplated in breaching the legislation, but much will depend on the size, economic resilience and strategy of the employer in question. For some the increase to 180 days may make little or no difference at all, especially larger employers. For others, a protective award of this order may have catastrophic consequences and would indeed have a deterrent

**Question 3. What do you consider the impacts will be on employers of increasing the maximum protective award period from 90 to 180 days?**

#### **RESPONSE**

6. Please see above in respect of question 2.

**Question 4. What do you consider the impacts will be on employees of increasing the maximum protective award period from 90 to 180 days?**

#### **RESPONSE**

7. There will of course be a financial benefit to employees which may embolden them and, more saliently, their unions in any negotiations with employers. However, given the current delays across many of the Employment Tribunals in the jurisdiction, by the time such an award is made, such employees may already have experienced financial hardship and incurred debt and other detriments arising from the employer's breach.

**Question 5. What do you consider to be the risks of increasing the maximum protective award period from 90 to 180 days?**

#### **RESPONSE**

8. As with any award made against an employer, there is the possibility that it renders the business financially inviable or pushes a business into insolvency which results in further

job losses. An increase may also made pre-litigation negotiations to settle a dispute harder to resolve with unions looking for a higher settlement figure and employers minded to simply take their chances in an Employment Tribunal.

### **Removing the protective award cap**

**Question 6. Do you think that removing the cap will incentivise businesses to comply with existing collective redundancy consultation requirements?**

- Yes
- No
- Don't Know

### **RESPONSE**

9. Generally, yes, but see our answer to question 2 above.

**Question 7. What do you consider to be the impacts on employers of removing the cap on the protective award?**

### **RESPONSE**

10. Having no maximum to a protective award creates uncertainty for employers in (a) deciding if and how to comply with their obligations having regard to the potential financial consequences and (b) creates greater uncertainty in negotiations where a claim is made. However, over time we would expect to see a body of case law emerging which assists employers, especially those who access legal advice, in understanding what the likely award in a given case may be in much the same way as cases of discrimination brought under Equality Act 2010 for which there is no cap on compensation. If the government is concerned that whilst this body of case law builds up there is a risk of parties being unrealistic in the sums sought, then it is open to the government to provide within the Bill for ACAS to draft a statutory Code of Practice that will provide for factors to be taken into account when deciding on the amount of any award.

**Question 8. What do you consider the impacts will be on employees of removing the cap on the protective award?**

11. This may in some cases allow an Employment Tribunal to compensate employees to the full extent considered to be just and equitable in the circumstances whereas a cap may impede this in some cases. Please see also the answer to question 4.

**Question 9. What do you consider to be the risks of removing the cap on the protective award?**

**RESPONSE**

12. Please see response to questions 5 and 7.

**Interim relief**

**Question 10. Do you agree or disagree with making interim relief available to those who bring protective award claims for a breach of collective consultation obligations?**

- Agree
- Disagree
- Don't Know

**RESPONSE**

13. We agree in principle with making interim relief available in such cases but note that the Employment Tribunal is not currently well resourced enough to be able to deal with the additional workload this would likely create for short notice hearings.

14. A further factor is that interim relief is rarely awarded in the Employment Tribunal given the high evidential threshold set at an early stage (e.g. see s.128-129 Employment Rights Act 1996 and the associated case law which requires that an applicant must apply within 7 days of dismissal and must show that he or she has a "pretty good" chance of succeeding) recognises that where interim relief is granted and this is proved to be the wrong decision at the final hearing, the employer does not have any mechanism to recover financial losses arising from the applicant.

15. The sums involved in a protective award for multiple employees may be far greater in context and the stakes are likely therefore to be very high for ordering the continuation in employment of a group of employees rather than in a s.128 case one individual. That said, if the applicant can show a "pretty good" chance then we do not see why, in principle, interim relief may not be extended to this category of case.

**Question 11. Do you think adding interim relief awards would incentivise business to comply with their collective consultation obligations? Please explain why and note any other benefits.**

- Yes

- No
- Don't Know

### **RESPONSE**

16. Yes. Defending interim relief applications is usually expensive and constitutes front-loaded and usually irrecoverable costs for an employer. Given the consequences set out in our answer to question 10, we consider it more likely than not that the possibility of an interim relief application and award will have a deterrent effect on those employers which are not already looking to comply or substantially comply with the duty to consult.

**Question 12. What do you consider the impacts will be on employers of adding interim relief awards to collective consultation obligations?**

### **RESPONSE**

17. Please see previous answers in this section.

**Question 13. What do you consider the impacts will be on employees of adding interim relief awards to collective consultation obligations?**

### **RESPONSE**

18. Please see previous answers in this section.

**Question 14. What do you consider to be the risks of adding interim relief awards to collective consultation obligations?**

### **RESPONSE**

19. Please see previous answers in this section.

### **Further questions**

**Question 15. Are there any wider changes to the collective redundancy framework you would you want to see the government make?**

20. No response.

**Bar Council<sup>2</sup>**

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<sup>2</sup> Prepared by members of the Law Reform Committee

For further information please contact:

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