UCEA response to Making Work Pay: Consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire

Introduction

This is the response from the Universities and Colleges Employers Association (UCEA).

UCEA represents the views of higher education institutions (HEIs)[1] across the UK in their capacity as employers. UCEA is a membership body funded by subscriptions from 169 HEIs in the UK. Our purpose is to support our member Higher Education (HE) employers in delivering excellent and world-leading higher education and research by representing their interests as employers and facilitating their work in delivering effective employment and workforce strategies.

HEIs are independent employers and determine their own employment policies, usually in consultation with recognised trade unions; therefore, there are a variety of HR practices in place in the sector.

Our response is based on views provided by our member HE employers.

Summary comments

It is important, at the outset, to set out the context in which our response to this consultation is based given the financial implications of the changes proposed to collective redundancy and fire and rehire legislation. It is well understood that universities are currently facing considerable financial pressures which are threatening their sustainability.[2] This is due to multiple factors including a real-terms fall in the value of the domestic fee cap, inflationary pressures causing increasing operating costs, and variable international student demand. The forecast continues to be challenging and is forcing our members to seek cost reducing measures. Whilst acknowledging the diversity of the sector and the capability of individual institutions to respond, we consider these financial constraints and risks will require all universities to undertake cost-reducing measures. These are necessary to ensure financially stable operating models which do not adversely affect the student experience or quality of provision. In terms of employment, it may be necessary to implement redundancy programmes and introduce contractual changes.

Against this context, we find it concerning that high profile examples of poor employment practice have been used to drive the legislative reform that is the subject of this consultation.

[1] The terms 'HEI(s)' (Higher Education Institution(s)) and 'university/universities' are used interchangeably throughout to describe UCEA's membership which consists of Higher Education providers which are active in teaching, research and scholarship including universities, colleges, and conservatoires, and associated organisations.

[2] 'Bold and transformative action' needed to address financial sustainability – OfS - Office for Students

Consultation questions

Section one: collective consultation obligations

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

The cap on the protective award should not be increased.

HEIs take decisions relating to redundancy and consultation obligations seriously and practice in the sector is to comply with collective redundancy law. This is an area where HE employers are unlikely to take a "considered risk" or "abuse rules"; they are more likely to be faced with claims because this is a technical area of law, with further changes proposed by the government in the near future.

Maintaining the current cap on the protective award would provide a proportionate approach that protects employees while taking into account the financial circumstances of HE sector employers, highlighted above. It ensures a level of deterrence and compensation without imposing excessive financial burdens, particularly given that there would normally be claims from multiple employees. It would therefore seem counterproductive to increase the level of protective awards which would add to these burdens. We have no evidence to suggest that increasing or removing the cap will be a factor influencing employer behaviour.

The basis for increasing the cap on a maximum protective award, from 90 to 180 days or removing it entirely, (left to the determination of the employment tribunal) is unclear. Such reforms will potentially have significant financial consequences and, if enacted, should be reserved for the most egregious of breaches, and with clear guidance, that takes into account the conduct of all parties' engagement in meaningful consultation with a view to reaching agreement, and aligns with any losses the employee may have suffered through redundancy. We understand that under the present system, an employment tribunal uses the 90-day cap to benchmark or assess the level of the Protective Award that the employee receives following a claim. Removal of the cap would remove this benchmark. The "formula" for deciding the amount of an award will become more complex and may lead to greater inconsistency in awards.

Instead of increasing or removing the cap, which are punitive measures, the government's efforts should be directed towards ensuring legislation and codes of practice encourage fair and transparent redundancy processes which limit disputes, make it as straightforward and simple as possible for the employer to understand and comply with their legal responsibilities, and offer appropriate support to employees with this difficult process.

Increasing the protective award cap

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

Please explain why and note any other benefits?

See Q1 above.

Increasing the maximum protective award to180 days, instead of 90 days will not incentivise employers in the HE sector to comply with existing collective redundancy consultation requirements to a greater extent than it already does. Employers who understand the need for collective consultation and the current arrangements for protective awards will, under normal circumstances, act in a manner that avoids claims for protective awards (given that an award period of 90 days is already a significant cost). Responsible businesses will either comply or will not. We do not agree that the amount of the protective award is a factor influencing the behaviour of HE sector employers, and instead, will be disproportionately punitive. The primary factors for complying with existing legislation will be unchanged: to support employees, to maintain good employment relations and to fulfil legal obligations.

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

See Q1 above.

Employers would face substantially higher costs if they fail to comply with collective consultation requirements. It may also lead to an increase in speculative claims for protective awards, and employers will be faced with the associated costs, including legal costs for defending claims which are prohibitive, particularly for smaller employers. More expensive protective awards may lead employers in financial difficulty to seek to make further efficiencies, including redundancies, which would be counterproductive to the original business aim of reducing costs.

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

Clearly, employees would receive higher compensation, potentially providing greater financial security. This may reduce the stress and uncertainty about their financial future following redundancy and provide a higher financial buffer while they seek new employment opportunities.

<u>However</u>, we assume that the aim of the government's proposal is to improve collective consultation processes and reduce the number of protective award claims rather than addressing any issues with the level of compensation employees are receiving. In addition, the increased protective award period might lead to longer dispute resolution processes, as employers might contest claims more vigorously given the higher costs. This could delay the receipt of compensation for employees. Some employees may be more interested in receiving their redundancy payment sooner where there is greater certainty that

redundancy will be the outcome of the consultation process e.g. where a university is closing its campus in a particular geographic location or where an academic discipline, requiring specific subject knowledge, is not being continued and opportunities for redeployment are less realistic. While the intention is to protect employees, the removal of the cap might create a more adversarial relationship between employers and employees. This could lead to a less collaborative work environment and increased tension during consultations and at the expense of meaningful consultation aimed at reaching agreement.

Finally, as noted above, more expensive protective awards may lead employers in financial difficulty to seek to make further efficiencies to the detriment of employees, including, for example, redundancies. We have no evidence that this reform will lead to improved job security for employees.

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

See Q1-4 above.

Removing the protective award cap

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

- Yes
- **No**
- Don't Know

Please explain why and note any other benefits?

See Q1. above.

Removing the cap will not incentivise businesses to comply with existing redundancy consultation requirements to a greater extent than they currently do. As stated in the questions above, employers who understand the need for collective consultation and the current arrangements for protective awards will act in a manner that avoids a protective award. Removing the cap will mean that Employment Tribunals would have no benchmark to use in calculating the award, as this is currently assessed in relation to the 90-day cap and may lead to inconsistencies in awards.

7. What do you consider to be the impacts on <u>employers</u> of removing the cap on the protective award?

See Q3. above.

8. What do you consider the impacts will be on <u>employees</u> of removing the cap on the protective award?

See Q 4. above.

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

See Q 1-5. above.

Interim relief

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

Please explain your answer

The proposal to introduce interim relief, for a protective award is concerning and disproportionate. The time in which it takes a claim to reach a hearing at an employment tribunal, at around one to two years also needs to be taken into consideration, and it is unclear whether a cap would be introduced restricting the number of days for which the interim relief is payable. Adding interim relief into an employment tribunal system which is already facing capacity issues will not help to clear the backlog.

While making interim relief available could provide benefits in terms of employee protection and compliance incentives, it also introduces risks that need to be carefully managed. Protective award claims usually arise as a consequence of a business being in financial difficulty and attempting to achieve efficiencies. The possibility of engaging in litigation about interim relief and thereafter about a protective award will not change employer behaviour but could be damaging to businesses. Balancing these factors is crucial to ensure that such a measure supports fair and effective industrial relations without imposing undue burdens on employers.

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

Please explain your answer

Employers who understand the need for collective consultation and the current arrangements for protective awards will act in a manner that avoids a protective award due to its punitive nature. We have no evidence that introducing the possibility of interim relief will change employer behaviour.

12. What do you consider the impacts will be on <u>employers</u> of adding interim relief awards to collective consultation obligations?

See Q 10. above.

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

Overall, while adding interim relief awards aims to provide better protection and financial support for employees, it also requires careful implementation to ensure it does not lead to prolonged disputes or unintended consequences. Balancing these factors is crucial to maintaining a fair and effective industrial relations framework. The provision of interim relief, particularly at a time when an employer is trying to realise efficiencies, is likely to lead to further efficiencies and potential redundancies.

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

See Q 10-13 above.

Further questions

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

Redundancy on a scale that requires collective consultation, where 100 or more redundancies are proposed and the consultation must start at least 45 days before any dismissals take effect, tends to be considered by employers in the HE sector only when there are severe financial issues or significant organisational changes. It is therefore important to allow institutions to be able to implement cost-reducing and other change measures that do not impact on the student experience (or limit the impact on student experience as far as possible), the quality of provision, or sustainability, where they need to do so, and in a timely way.

Section two: fire and rehire

16. Do you agree or disagree with adding interim relief awards to fire and rehire unfair dismissals? Please explain your reasoning behind your agreement or disagreement.

We disagree.

Our reasoning is fundamentally linked to the proposed introduction of the provision which makes it automatically unfair to dismiss someone for refusing to agree to new terms and conditions, or in order to replace them with someone (or rehire the same person) doing substantially the same work but on different terms and conditions, unless they are facing financial difficulties that threatened their viability. We await further clarification on how an employment tribunal will assess whether this higher legal threshold has been met.

We note the government's reform is aimed at "unscrupulous 'fire and rehire' and 'fire and replace' practices" and proposes remedies in instances where employers "abuse" these rules. However, dismissal and re-engagement in the HE sector is rare and only used where it is imperative to make a change to terms and conditions that cannot be agreed through consultation and negotiation, and where the case for retaining existing terms and conditions is outweighed. It is a last resort when all other practicable avenues have been explored and exhausted.

The Bill's proposals assume the only reasons an employer might seek to impose a contract variation would be "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 in the immediate future to affect, the employer's ability to carry on the business as a going concern or otherwise to carry on the activities constituting the business". All other reasons would be deemed automatically unfair, and under this proposal, attract the payment of interim relief. However, in the HE sector, reasons for needing to make a change are not restricted to situations where employers are in immediate financial difficulty; indeed, this will often not be the case – for example, changes might be necessary to patterns of work for academic delivery purposes or a university's operating hours to improve student experience. It could also have an indirect and costly impact in the context of outsourced service provision, for example, where a university needs to change its operating hours, but service contracts have fixed shift patterns. In that scenario, how could a university require a contract provider to change shift patterns, where a financial collapse in the immediate future is not relevant but another important factor is. Another example would be where an institution wishes to change library opening hours as a response to National Student Survey feedback. These are strong reasons for seeking to change an employee's terms and conditions, and yet would not, in isolation, ensure the organisation's viability.

Our view is that this is too narrow an application of the practice of dismissal and re-engagement for the HE sector. A sensible amendment would be to add 'technical or organisational reasons', as well as severe financial circumstances to the exception. It is recognised, of course, that there should be parameters to this which should be proportionate.

Where the practice of "fire and rehire" does have a financial basis, having a system where costs do not reduce whilst an appeal is underway is likely to be to the financial detriment of employers. This may have the unintended consequence of forcing employers to look to make savings in other ways such as redundancies. This proposal is particularly concerning given the high backlog of claims that are being handled by Employment Tribunals. In addition, the circumstances of such claims are unlikely to be straightforward enough to anticipate an outcome with a high level of accuracy; any application process would need to be sufficiently sophisticated to determine which claims have a high chance of success and which do not. There is nothing in the proposal which suggests that the interim relief would be repaid to employers if the case was found in their favour – we seek clarification of this point.

There is a risk that interim relief awards could be misused by employees who might claim unfair dismissal without sufficient grounds, leading to unnecessary financial burdens on employers. Implementing and managing interim relief awards would add to the administrative burden on employment tribunals and courts, potentially slowing down the resolution of cases. The financial impact of interim relief awards could be significant, potentially affecting an employer's operations and sustainability, particularly where Employment Tribunal hearings can take up to two years to be scheduled.

The government acknowledges that most employers do not unscrupulously use fire and rehire and fire and replace practices and there is limited evidence of the prevalence of fire and rehire – "most employers do their best to ensure that they are going through the process

properly and reach or exceed the standard expected." It is our view, therefore, that these measures are disproportionate and overly punitive to employers who seek to abide by the law.

17. Do you think adding interim relief awards would incentivise employers to comply with the law on fire and rehire dismissals?

- Agree
- **Disagree**
- Don't Know

Please explain why.

We disagree – see our comprehensive response to Q 16 above.

In the HE sector, employers would use this practice where there is no realistic alternative – they do not require incentivising to comply with the law. In the wider economy, we have no evidence to suggest that employers who engage in fire and rehire practices in an unscrupulous manner are likely to change their approach with the introduction of interim relief awards.

18. What do you consider the impacts will be on <u>employers</u> of adding interim relief awards to fire and re-hire unfair dismissals?

See Q 16. above.

If the government introduces the provision that it will be automatically unfair to dismiss an employee if they refuse to agree to a variation of their contract unless the employer can show that they were facing financial difficulties which threatened their viability, HE employers will be forced not to make a very necessary change to an employee's contract rather than fall foul of their legal obligations. This could have the unintended consequences for a responsible employer of restricting sound business decisions and agility, thereby adversely impacting their overall performance; and it may force other measures such as redundancies which could have been avoided.

If interim relief awards are introduced, employers will need to allocate more funds to cover potential legal risks which could affect their overall financial planning and investment in other areas. Managing the process of interim relief awards could add to the administrative workload for employers, requiring more time and resources to handle legal disputes and compliance issues.

19. What do you consider the impacts will be on <u>employees</u> of adding interim relief awards to fire and re-hire unfair dismissals?

Interim relief awards can, at a practical level, provide immediate financial assistance to employees who have been genuinely unfairly dismissed for reasons related to fire and re-hire, helping them cover their living expenses while they seek new employment. This would help to reduce any stress and anxiety they may have suffered due to the loss of employment. **<u>However</u>**, as detailed above, we anticipate such cases to be very rare in the HE sector.

20. What do you consider to be the risks of adding interim relief awards for fire and rehire unfair dismissals?

See Q.16 above.

Adding interim relief may lead to an increase in speculative claims from employees and less inclination to engage with meaningful discussion regarding contract variations. Employees may also use the threat of interim relief awards to negotiate enhanced severance packages, even in cases where the dismissal would be deemed fair. Indeed, the potential for interim relief awards might strain relationships between employers and employees, leading to a more adversarial atmosphere in the workplace. Unfounded claims would burden the tribunal system and increase costs for the employer. As mentioned above, this is particularly concerning in light of the fact that such claims are unlikely to be as straightforward as unfair dismissal claims that are currently eligible for interim relief applications such as whistleblowing.

As mentioned in response to Q.16 above, interim relief for fire and rehire cannot be considered in isolation to any other proposed changes to fire and rehire. The government's proposal to limit fire and rehire to businesses in serious financial difficulty appears to be in conflict with the proposal to introduce interim relief awards. It is likely that businesses trying to continue as a going concern may otherwise fail on the basis of interim relief claims which may not, once heard, be substantiated.

21. What is your view on whether any adjustments to the current approach to interim relief would be needed to ensure that interim relief for fire and rehire cases can work effectively and be determined promptly by the tribunal?

- The application process will need to strike a balance between ensuring those claims which have a high chance of success without a full hearing can be identified clearly, and be simple enough to be dealt with quickly to avoid delays. Robust verification mechanisms to assess the validity of claims would help to prevent abuse of the system. Introducing penalties for frivolous or unfounded claims can deter misuse and ensure that the system is used appropriately.
- Establishing clear guidelines and criteria for granting interim relief can help tribunals make consistent and timely decisions. New guidance based on the changes in law would be needed and should be prescriptive on what constitutes a breach, together with Employment Tribunal hearings being held at a faster pace. Allocating more resources and staff to Employment Tribunals can help manage the increased workload and ensure cases are expedited.
- Conducting regular reviews of the interim relief process can help identify areas for improvement and ensure that the system remains effective and fair. Gathering feedback from employees, employers, and legal professionals can provide valuable insights into how the process can be refined and improved.

Respondent consultation questions

About you

22. Please indicate whether you are responding as:

- An academic
- An employer
- An employee/worker/individual
- A Legal representative
- **A Business representative organisation/trade body**
- A trade union or staff association
- Other (please specify)

23. What sector/industry do you operate in?

- Manufacturing
- Construction
- Wholesale, retail & repair of motor vehicles
- Transport & storage
- Accommodation & food services
- Information & communication
- Financial, insurance & real estate activities
- Professional, scientific & technical activities
- Administrative & support services
- Public admin & defence; social security
- **Education**
- Human health & social work activities
- Other services
- Do not know
- Prefer not to say

24. If responding as an employer, business, business owner, business representative, what is the size of your business? If responding as an individual or worker, what size workplace are you employed in?

- Micro (fewer than 10 staff)
- Small (11 to 50 staff)
- Medium (51 to 250 staff)
- Large (250+ staff)
- Do not know
- **Not applicable**

Equality impact

25. Do you believe that our proposals to increase the protective award will have an impact (either positive or negative) on a specific 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.

- Yes
- No
- **Do not Know**

We have no specific evidence that a specific group of employees with protected characteristics would be impacted by increasing the protective award.

Please explain your answer.

26. Where you have identified potential negative impacts, can you propose ways to mitigate these?

- Yes
- No
- Do not know
- **Not applicable (no impacts identified)**

Please suggest mitigations

27. If responding as an employee/worker/individual, what is your sex?

- Female
- Male
- Prefer not to say
- **Not applicable**

28. If responding as an employee/worker/individual, what is your ethnic group?

- Arab
- Asian/Asian British
- Black / African / Caribbean / Black British
- Mixed/Multiple ethnic groups
- White
- Other ethnic group
- Prefer not to say
- Not applicable
- If responding as an employee/worker/individual, what is your religion?
- No religion
- Christian
- Buddhist
- Hindu
- Jewish

- Muslim
- Sikh
- Any other religion
- Prefer not to say
- **Not applicable**

29. If responding as an employee/worker/individual, do you have any physical or mental health conditions or illnesses lasting or expected to last 12 months or more?

- Yes
- No
- Prefer not to say
- **Not applicable**

30. If responding as an employee/worker/individual, which of the following age brackets do you fit into?

- 15 or below
- 16-17
- 18-24
- 25-34
- 35-44
- 45-54
- 55-64
- 65-74
- 75+
- Prefer not to say

Not applicable.