By email to
collectiveredundancy@businessandtrade.gov.uk

Our Ref: redundancy2024
Date: 2 December 2024

Dear Sirs

Consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire

Introduction

This is the ILA's response to the government consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire (the **Consultation**). It has been prepared on behalf of the ILA by members of its Technical Committee (the **Committee**). The views set out in this response do not necessarily reflect the views of all members of the ILA or the Committee itself.

The ILA provides a forum for c.500 full, associate, overseas and academic members who practise insolvency law. The membership comprises a broad representation of regional and City solicitors, barristers and academics, members of the judiciary and overseas lawyers. The Committee is responsible for identifying and reporting to members on key developments in case law and legislative reform in the restructuring and insolvency marketplace, as well as responding on behalf of the ILA to relevant government consultations affecting restructuring and insolvency law.

The Consultation contains three proposals (the "Proposals"):

1. The increase or removal of the cap on Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**) protective awards;
2. Making interim relief available to those who bring protective award claims for a breach of the collective consultation obligations under TULRCA; and
3. Making interim relief available to fire and rehire unfair dismissals under the Employment Rights Bill 2024.

Our response focusses on issues relevant to Proposals 1 and 3 as these are relevant to the ILA's insolvency law focus. We note that, while there is material overlap between employment law and insolvency law when an employer enters insolvency, the ILA does not offer views on employment law outside of the insolvency context.

General Comments

From an insolvency perspective, the Proposals highlight the on-going tension between the protection of employee rights and the business rescue culture. This tension (and some of the potentially damaging consequences of prioritising employee rights over business rescue) is set out in some detail in our response to the Collective Redundancies Consultation in 2012 (Microsoft Word - ILA Collective Redundancies Consultation Response.doc). For similar reasons as those highlighted in our 2012 response, we note that the Proposals' goals of increasing employer compliance with the collective redundancy processes and the fair use of fire and rehire, have the potential to conflict with efforts to restructure and rescue an insolvent company and/or its business, thereby saving the related jobs.

Changes to employment law that may make an insolvent business more difficult to sell or may reduce the proceeds of sale (sometimes to the extent that liquidation and close down is the only option) have the potential to erode the rescue culture in England, and reduce opportunities for preserving jobs. Furthermore, any uncertainty as to the application of the Proposals is not conducive to business rescue. Uncertainty can deter would-be buyers from proceeding with a purchase (impacting rescue) and can cause price reductions (impacting returns to creditors). Uncertainty can also increase redundancies if, as a result, a buyer cannot be found and the only option is liquidation. Our response seeks, therefore, to highlight aspects of the Proposals where this tension is a concern, and to ensure that a balance can be struck between the policy aims of protecting (existing) employee rights and preserving the business rescue culture (resulting in more employees retaining their jobs).

Consultation questions

Increasing or removing the cap on protective awards

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

We note the observation in Paragraph 33 of the Consultation that, if the cap on the protective award is increased or removed, the government does not propose to apply any increase to insolvent companies (the "**Insolvency Exception**"). In general, we welcome that the Insolvency Exception will treat insolvency as a special case. However:

- it is important to understand the precise scope of the Insolvency Exception. We assume that "insolvent companies" would be defined by reference to a formal insolvency process but we would appreciate clarity at the earliest opportunity as to which insolvency proceedings would be covered to avoid uncertainty.

- We also assume that the legislation will not permit liability for an uncapped protective award (for example relating to events occurring pre-insolvency proceedings) to transfer to a buyer of an insolvent business pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI2006/246). If such a transfer of uncapped liability were possible, we would be concerned about the deterrent effect such a potential liability would have. Uncertainty as to whether an uncapped liability carries over to a buyer is likely to reduce the number of willing buyers and/or could be used to negotiate a price reduction to balance that risk. At best such a price reduction would reduce the recoveries payable to creditors of the insolvent company; at worst it may make the business unsaleable, resulting in consequential job losses, which would be counterproductive to the employment protection aims of the legislation. These risks already exist, but the tension between insolvency and employment laws are presently carefully balanced and managed by insolvency practitioners to support rescue. We are concerned to ensure that these proposals do not upset the current status quo to the detriment of business rescue.

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 have some general comments to make on fire and rehire (which are not particularly restricted to the issue of interim relief).

We note the observation in paragraph 40 of the Consultation that Clause 22 of the Employment Rights Bill will make it unfair for an employer to use fire and rehire practices unless it is "facing financial difficulties that threaten their viability, and that changing the employee's contract was unavoidable (for example, it was the only way to avoid insolvency)" (the **Financial Difficulties Exception**).

The exact wording of clause 22 of the Employment Rights Bill is:

> *"(a) the reason for the variation was 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, and*
>
> *(b) in all the circumstances the employer could not reasonably have avoided the need to make the variation."*

We note the similarity with the reference to financial difficulties in section 901A of Part 26A of the Companies Act 2006, which provides a threshold test for a company to be able to propose a restructuring plan. That test is:

> "*…the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern"*

And there is a further condition in that section that:

> "*the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in subsection (2).*"

We make two points:

1. By analogy with the financial difficulties test in Part 26A of the Companies Act 2006, we consider part (a) of the proposed Financial Difficulties Exception in the Employment Rights Bill would likely be broadly construed[1] and consequently may not present a very high bar (although we do acknowledge that part (b) of the test may tighten the criteria). This may be the policy intention, namely, to make fire and rehire relatively accessible to companies that can demonstrate some level of financial difficulties. We do not comment specifically on this policy intention. We do consider, however, that if there are to be two very similarly worded tests referring to financial

[1] See for example *Re Virgin Atlantic Airways Limited [2020] EWHC 2191 (Ch)* and *Re DeepOcean 1 UK Limited* [2020] EWHC 3549 (Ch)

difficulties – one in Part 26A of the Companies Act 2006 and one in the Employment Rights Bill, they should have a similar meaning and be construed consistently. It would create significant uncertainty if the two similarly worded tests were to be construed as creating two different standards of financial difficulties.

2. Fire and rehire, if used appropriately, can be a legitimate restructuring tool that will assist business rescue. We consider that the Financial Difficulties Exception will, therefore, potentially support the business rescue culture in England. Action taken to rescue a business can take place both prior to, and during, a formal insolvency process. The Employment Rights Bill, as well as any legislation implementing the Proposals should clarify whether the Financial Difficulties Exception applies both during the period that the company is trying to avoid entering into a formal insolvency process and when business rescue is being attempted after a formal insolvency process has commenced. For example, as currently drafted, it is unclear whether a purchaser from an administrator might seek to force an administrator to fire and rehire all the transferring employees before a sale with the aim of avoiding greater employee liabilities being transferred pursuant to TUPE. Is the Financial Difficulties Exception intended to be available in these circumstances? The legislation should in any event clarify how it will work in conjunction with TUPE.

We would be happy to meet to discuss any of the above concerns if this would be helpful.

Inga West

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