Downtown In Business

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Consultation on fire and rehire: changes to expenses, benefits and shift patterns

Downtown in Business has teamed up with award-winning HR Consultancy business High Performance Consultancy to respond to the government's consultation on its latest changes to employment law.

Read the views of HPC Managing Director, Victoria Brown and DIB Chief Executive and Group Chair, Frank McKenna here:

We support the government's objective of preventing the misuse of dismissal and re-engagement practices. High-profile cases such as those involving P&O Ferries significantly damaged trust in employment practices and demonstrated the need for reform. There is broad consensus among responsible employers that coercive fire and rehire practices should not be used as a negotiating tactic.

However, it is essential that the regulations achieve proportionality. The legislation should prevent abuse without preventing legitimate and necessary business adaptation. SMEs in particular operate with limited financial resilience and require flexibility to respond to economic pressure in order to protect jobs and ensure long-term sustainability.

This response addresses:

- Section 1: Employment Expenses and Benefits in Kind
- Section 2: Shift Patterns
- The broader issue of financial sustainability and proportionality

The success of these regulations will depend on striking the correct balance between:

- Protecting employees from substantial and detrimental contractual change imposed unilaterally; and
- Allowing responsible employers to adapt to changing economic and operational circumstances.

Many SMEs are currently facing significant cost pressures, including:

- Employer National Insurance increases
- The extension of statutory sick pay from day one
- Inflationary wage pressures
- Continued economic uncertainty following Brexit
- Ongoing supply chain and energy volatility linked to the war in Ukraine

In this environment, the ability to review and recalibrate non-core elements of remuneration is often essential to preserve base pay levels and avoid redundancies.

Overly broad drafting of "restricted variations" risks incentivising redundancies over negotiated contractual change. That would be counterproductive to the stated objective of job security.

Section 1: Employment expenses and benefits in kind

Overarching Principle

Only fixed, guaranteed contractual remuneration should fall within the scope of restricted variations.

Elements of reward that are discretionary, contingent, ancillary, or designed to fluctuate in response to business performance should be excluded from the automatic unfair dismissal regime.

Without clear exclusions, the phrase “any sum payable to an employee in connection with the employment” is extremely broad and risks unintended consequences.

1. Employment Expenses

Genuine employment expenses should be expressly excluded from the scope of restricted variations.

This includes:

- Travel reimbursement
- Subsistence payments
- Mileage allowances
- Temporary accommodation costs
- Training and professional subscription reimbursement

These are cost-recovery mechanisms rather than remuneration. Treating them as restricted variations would create unnecessary litigation risk without advancing employee protection.

Employers must retain the ability to review expense policies in response to cost pressures, fraud prevention concerns, or operational changes.

2. Discretionary and variable remuneration

Discretionary bonuses and variable pay mechanisms should be excluded from restricted variations, including:

- Discretionary annual bonuses
- Profit-related bonuses
- Performance-related incentives
- Commission schemes that are inherently variable
- Non-guaranteed overtime

These forms of remuneration are designed to fluctuate in line with performance and business conditions. Treating them as restricted variations would:

- Freeze incentive design
- Reduce performance alignment
- Discourage employers from offering incentive-based reward structures

The ability to recalibrate incentive schemes is essential for economic responsiveness and productivity.

3. Benefits in Kind

Non-core benefits in kind should also be excluded from the scope of restricted variations, including:

- Private medical insurance
- Company car eligibility tiers
- Gym memberships
- Wellbeing benefits
- Enhanced technology allowances

These benefits are often supplementary and may be introduced or withdrawn depending on business performance.

However, where an allowance functions as direct salary replacement (for example, a fixed contractual car allowance paid as cash), there may be stronger arguments for inclusion within core remuneration protections. Clear guidance on this distinction would be beneficial.

4. Share schemes

Employee share schemes and long-term incentive plans should be excluded from restricted variations, particularly:

- Discretionary LTIPs
- EMI schemes
- SAYE schemes

These arrangements are inherently long-term and performance-linked. Restricting flexibility in their design or continuation may discourage equity participation and undermine alignment between employees and business success.

5. Risk of unintended consequences

If benefits and variable remuneration are treated as restricted variations:

- Employers may avoid introducing enhanced benefits in the first place;

- Reward structures may become more rigid and less innovative;
- Businesses may default to redundancy rather than negotiated variation.

This would not serve the wider objective of job security or economic growth.

Section 2: Shift Patterns

Shift pattern regulation is likely to have the most significant operational impact, particularly for SMEs in retail, care, hospitality, manufacturing and logistics.

Overarching Principle

Only substantial and materially detrimental changes to shift patterns should be treated as restricted variations.

Minor, temporary, or operationally necessary adjustments should not trigger automatic unfair dismissal protections.

1. Changes that may justifiably be restricted

There is a strong case for protection where changes fundamentally alter the nature of working patterns, including:

- Imposition of night work where none previously existed
- Removal of fixed working patterns in favour of unpredictable scheduling
- Significant increase in weekly spread of hours
- Major increase in shift duration (e.g. from 8-hour to 12-hour shifts)
- Removal of long-standing predictable rotas

Such changes can materially affect work-life balance, caring responsibilities and employee wellbeing.

2. Changes that should not be restricted

The following should not be treated as restricted variations:

- Minor adjustments to start or finish times
- Seasonal scheduling adjustments
- Short-term operational changes
- Adjustments made within existing contractual flexibility clauses
- Changes required for regulatory, safety or business continuity reasons

If minor operational adjustments trigger automatic unfair dismissal risk, employers may:

- Reduce use of fixed shifts entirely;

- Avoid offering predictable patterns;
- Resort more quickly to redundancy.

That outcome would undermine both flexibility and employee security.

3. Recommendation: Introduce a material detriment threshold

Regulations should incorporate a threshold such as:

- “Substantial and material change to working pattern”; or
- “Change causing significant detriment to the employee.”

This would prevent technical or minor changes from falling within the automatic unfair dismissal regime.

Financial Sustainability and the “Severe Financial Difficulty” Threshold

Although not the primary focus of this consultation, the interaction between restricted variations and the statutory defence of “severe financial difficulty” is highly relevant.

The current formulation appears to set an extremely high threshold, potentially requiring businesses to approach insolvency before being able to rely on the defence.

For SMEs, this presents serious concerns:

- Businesses often need to act before reaching crisis point;
- Early intervention may prevent redundancies and insolvency;
- Waiting until “severe” difficulty arises reduces available options.

Consideration should be given to whether a broader test, such as “genuine business necessity” or “reasonable requirement for financial sustainability”, would better achieve proportionality while still preventing abuse.

If the threshold is set too high, employers may be forced to implement redundancies rather than pursue negotiated contractual change, which would be contrary to the objective of job preservation.

The prevention of coercive fire and rehire practices is an important and necessary reform. Responsible employers support measures that prevent abuse and promote fair competition.

However, the regulations must be carefully calibrated to ensure that:

- Core contractual pay is protected;
- Ancillary and discretionary benefits remain adaptable;
- Minor or temporary shift adjustments do not trigger automatic unfair dismissal;

- SMEs retain the ability to act proactively to preserve long-term viability.

The objective should be to prohibit coercive practice, not to remove the ability of responsible employers to restructure in order to protect jobs.

A proportionate, clearly defined and economically realistic framework will best serve employees, employers and the wider economy.

Response prepared by **Victoria Brown**: Managing Director of award-winning HR business **High Performance Consultancy**, advising over 500 small and medium-sized UK enterprises (SMEs) operating across sectors including retail, hospitality, care, manufacturing, logistics and professional services and **Frank McKenna** the CEO and Group Chair of **Downtown in Business,** a business advocacy organisation and public affairs consultancy that represents over 300 companies across the country in the real estate, property, hospitality, retail, manufacturing, and professional services sectors.