



BIRMINGHAM LAW SOCIETY

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**Response to
Government Consultation on Fire and Rehire**

April 2026

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RESPONSE TO GOVERNMENT CONSULTATION ON FIRE AND REHIRE

This response is submitted on behalf of the Employment Committee of Birmingham Law Society. Birmingham Law Society is one of the largest regional law societies in England and Wales, representing the interests of lawyers and law firms across Birmingham and the West Midlands. The Employment Committee comprises practising employment lawyers drawn from across the region, including solicitors in private practice and in-house counsel, with expertise spanning both contentious and non-contentious employment law. The Committee's response reflects the practical experience of its members in advising employers and employees on the full range of employment law matters, including contractual variation, dismissal and re-engagement.

Executive Summary

The Employment Committee's response addresses two of the areas covered by the Government's consultation on fire and rehire legislation: the treatment of expenses, benefits in kind and share schemes under the proposed framework of restricted variations; and the protection of certain shift pattern changes.

Expenses, benefits in kind and share schemes (Questions 1–13)

The Committee's overarching position is that expenses and benefits in kind should be excluded from the category of restricted variations (Option 1, Question 1). The Committee notes that such arrangements are rarely drafted as fixed contractual entitlements without accompanying employer discretion to vary; they are structurally distinct from core pay and do not warrant the same level of enhanced protection. Existing ordinary unfair dismissal rights — shortly to be extended to employees with six months' service from January 2027 — provide an adequate and proportionate safeguard.

Where Option 2 is under consideration, the Committee identifies serious practical concerns about definitional uncertainty, particularly in relation to share schemes and long-term accommodation benefits. The Committee considers that the legislative complexity generated by any attempt to carve out specific benefits would likely result in disproportionate costs and satellite litigation, without a commensurate improvement in employee protection.

On share schemes specifically, the Committee draws a distinction between schemes that confer automatic entitlements upon completion of service, which may justify a degree of additional protection, and schemes that merely offer employees the opportunity to invest — which are more akin to flexible remuneration arrangements and should not attract enhanced protection.

Shift patterns (Questions 14–28)

The Committee's position is that no category of shift pattern change should fall within the scope of restricted variations (Option 2, Question 14). Employers require operational flexibility to adjust shift arrangements in response to staffing, demand and commercial pressures, and the existing framework of unfair dismissal law — assessed by reference to the reasonableness of the employer's conduct — provides employees with appropriate protection. The Committee expresses concern that imposing automatic unfair dismissal consequences for certain shift changes may encourage employers to achieve the same outcomes through other means.

The Committee agrees that, if the Government proceeds with a protected list of shift changes, changes to night working and weekend working are likely to have the greatest practical impact on employees, including a disproportionate effect on employees with childcare responsibilities, who are more likely to be women. The Committee supports the proposed definition of night-time working as consistent with the Working Time Regulations 1998.

Section1: Expenses and benefits or payments in kind

Question 1: Which of the following options regarding expenses and benefits in kind protections do you agree with?

- **Option 1:** All expenses and benefits in kind should be excluded from the restricted variation of sums payable to an employee in connection with the employment (and therefore not be subject to higher protections from fire and rehire)
- **Option 2:** Certain expenses and benefits in kind (should be protected from the restricted variation of sums payable to an employee in connection with the employment (and therefore subject to higher protections from fire and rehire) – *share schemes, travel expenses and accommodation*
- **None of the above**
- **Don't know**
- **Other (please expand below)**
- **Prefer not to say**

Option 1. Contracts are rarely drafted in a way that prescriptively sets out expenses and benefits in kind as fixed contractual entitlements without allowing the employer some discretion to amend or withdraw them.

Expenses are a policy issue and are about the repayment of out-of-pocket costs usually on an agreed scale, for example, the level of hotel or train fares etc. Employers should be able to change the expense level.

Many share schemes will have some reserved right to vary.

In the limited circumstances where expenses or benefits in kind are contractual, they do not justify a higher level of protection for employees. Changes to these provisions are generally (certainly for all but the most senior employees) less significant than changes to core pay, which is provided directly in exchange for work. Excluding these terms from the restricted variation category would give employers flexibility to amend them via fire and rehire as a last resort and when there is perceived to be a business reason to do so. This flexibility is important, as employers need to be able to adjust arrangements in response to factors such as rising costs, supplier changes, or other operational demands, and whilst recognizing that some benefits (for example, share schemes) can be of significant value, the balance is achieved because the employee will be able to challenge the sufficiency of the rationale via the increased protections available within the 'ordinary' unfair dismissal context.

Option 1 is also preferable to Option 2 because of the potential for definitional difficulties that arises in attempting to 'carve out' certain specified benefits.

Question 2: If the government were to pursue option 2, which expenses and benefits in kind should be protected (and therefore subject to higher protections from fire and rehire)?

- Mileage
- Other travel expenses incurred in performance of duties, not including commuting
- Accommodation expenses incurred in performance of duties
- Long term accommodation offered as a benefit in kind
- Share scheme and ownership arrangements
- Other expenses and benefits in kind should be protected (please expand below)
- Don't know
- Prefer not to say

If option 2 were adopted, then long-term accommodation provided as a benefit in kind may justify greater protection from fire and rehire practices. Employees in this specific situation could face hardship if their employer made substantial changes to their long-term accommodation arrangements. However, businesses may need to make changes due to external factors beyond their control and so this operational reality would need to be considered if this option were pursued. Share scheme/ownership arrangements should also be considered because of their potential (in some circumstances) to amount to significant value/remuneration.

However, within any such carve out: the legislation may well run into serious definitional difficulties – as demonstrated, perhaps, by the penultimate paragraph of ‘Option 2’. Given (for example) that share schemes come in all shapes and sizes (and values) and given that there may be disagreement on what constitutes ‘long-term’ accommodation provision: how easy is it to come up with a definition that ‘clearly delimits’ benefits that have ‘an equivalent character to pay’? Significant time/money will possibly be incurred by claimants, respondents and tribunals in arguments as to whether a benefit satisfies the legislative definition of those benefits attracting the enhanced protection.

Question 3: If share schemes were to be protected, which types should be in scope of the restricted variation of sums payable for these purposes (and therefore subject to higher protections from fire and rehire)?

- Direct share allocations
- Participation in schemes allowing employees to buy shares from a company reserve
- None
- Don't know

- Other
- Prefer not to say

Participation in schemes allowing employees to buy shares from a company reserve should attract higher protections from fire and rehire in certain circumstances. Share schemes, particularly for long-term employees, often constitute a significant part of total remuneration, meaning their removal directly impacts an employee's livelihood.

- **Life-Structuring Decisions:** Employees may make long-term financial decisions based on the expectation of these shares, making the loss through fire and rehire highly detrimental.
- **Preventing Abuse:** Higher protection prevents employers from using restructuring as an excuse to remove lucrative, agreed-upon equity benefits.

By contrast, schemes that merely grant employees the option to invest if they choose to do so are different in nature. These schemes simply offer flexibility over how an employee spends the remuneration they would have received in any event. An investment opportunity of this kind is less akin to 'pay' than shares awarded automatically in return for completed service, and so should not attract the same level of protection.

Question 4: In your view, how common is it for expenses and benefits in kind to be part of core contractual terms (without a contract variation clause that would allow the employer to change these terms)?

- Very common
- Common
- Occasionally
- Rarely
- Very Rarely
- Never
- Don't know
- Other (please expand below)
- Prefer not to say

It is rare for expenses or benefits in kind to form part of core contractual terms without an accompanying variation clause. In most contracts, these provisions are set out in a separate policy, and employers reserve the right to alter, replace or withdraw all or any of the schemes or benefits.

Question 5: In your view, which expenses and benefits in kind are commonly part of core contractual terms (not including those which can be changed via a contract variation clause that would allow the employer to change these terms)?

Senior employees often have a contractual entitlement to a company car, or a car allowance from which they can fix their external level of expenditure on a PCP contract or similar. They are typically still subject to certain conditions. There is usually an accompanying policy that sets out the rules governing its use, including circumstances in which the car may be withdrawn, such as if the employee loses their license. Senior employees may also have a contractual entitlement to certain health benefits, such as private medical insurance. However, the employer will typically retain discretion to amend elements of the benefit, including changing the provider if necessary. Performance related bonus and share schemes are, in relation to the most senior employees, often a means of attracting and/or retaining those directing the business and responsible for its success. Depending on the performance of the business, such schemes can result in very substantial additional remuneration, and the possibility/prospect of such gains may be at the heart of why an offer of employment is accepted.

Question 6: In your view, how important are expenses and benefits in kind, which are granted in employment contracts to employees?

- Very important
- Important
- Moderately important
- Slightly important
- Not important
- Don't know
- Other (please expand below)
- Prefer not to say

Expenses and benefits in kind in general are important. While the primary element of value for employees is the salary they receive for performing their role, benefits can be an important part of the overall package an employee receives. Employers often use benefits to stand out from competitors and attract or retain talent. However, it remains essential that employers retain sufficient flexibility to adjust or restructure benefits and expenses when operational needs change – for example, due to supplier costs or budget constraints.

Question 7: In your view, how common is it, specifically, for share schemes to be part of contractual terms without a contract variation clause that would allow the employer to change these terms?

- Very common
- Common
- Occasionally
- Rarely
- Very Rarely
- Never
- Don't know
- Other (please expand below)
- Prefer not to say

It is in an employer's interest to avoid creating contractual obligations in this area because they may not be able to guarantee future participation – for example, if the scheme needs to change or the business is sold. For this reason, it is usually advisable and generally the practice for employers to take care to avoid drafting wording that could inadvertently create an express contractual right to participate. Where a plan is referenced in the contract, the clause is often drafted broadly to make clear that participation is discretionary and does not give rise to a contractual entitlement. The only real exception to this general practice is in relation to the most senior employees who are essentially 'head-hunted' for the role and negotiate bespoke agreements.

Question 8: In your view, how important are share schemes, where these form part of the employment contract, to employees?

- Very important
- Important
- Moderately important
- Slightly important
- Not important
- Don't know
- Other (please expand below)
- Prefer not to say

The importance of a share scheme likely depends on the employee's role, seniority and the expectations within their industry. For junior employees, participation in a share scheme is unlikely to be expected at that stage in their career. In contrast, for senior employees - particularly in certain sectors - share schemes can often represent a more valued component of their total reward.

Question 9: In your opinion, what would be the impact on employees of excluding all expenses and benefits in kind from the automatic unfair dismissal protections of the fire and rehire measure?

This would mean that employers would be able to dismiss employees to remove contractual entitlements to expenses and benefits in kind, without triggering an automatic unfair dismissal. However, ordinary unfair dismissal protections would still apply, as explained in the consultation document

Employers will usually want to retain discretion over expenses and benefits in kind. Given that this is typically the status quo, employees may accept that these arrangements may change and evolve over time as business needs change. Even if an employee will not accept the change, and it escalates to a fire and rehire situation, employees have the right to bring an ordinary unfair dismissal claim where a tribunal would assess whether the employer acted reasonably in seeking to implement the change. With the right to claim unfair dismissal being extended to employees with six months' service from 1 January 2027, an even greater proportion of the workforce will have access to this protection. This

provides an adequate safeguard without including expenses and benefits in kind as restricted variations.

Question 10: In your opinion, what would be the impact on employers of including travel expenses, accommodation expenses and share schemes in scope of the restricted variation for sums payable (and therefore subject to higher protections from fire and rehire)?

Employers will typically want to retain discretion when it comes to travel expenses, accommodation expenses, and share schemes, so that they can amend or withdraw as operational needs or external factors impact them. However, if they are contractual and are brought within the scope of restricted variations, employers would be impacted because they would not be able to react to operational, financial, and commercial pressures. They could find themselves locked into arrangements that are no longer financially viable or operationally appropriate. This highlights the flaw in the new legislation because you are left only with redundancy as an option or dismissal, settlement of claims and the re-hire.

Question 11: Do you believe that the proposals discussed in this consultation relating to expenses and benefits in kind will have an impact on individuals with a 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

No.

Question 12: Where you have identified potential negative impacts in your response to question 11, are there ways to mitigate these?

N/A

Question 13: Is there anything else you would like to share your reflections on, that was not covered by the previous questions (e.g. broader risks or alternative options)?

Overly restrictive legislation may produce outcomes that are contrary to its purpose. Where employers face genuine operational or financial pressures but are prevented from implementing necessary contractual changes through a lawful, if last-resort, process, experience suggests they may seek to achieve the same outcome by other means. This could include constructive management of performance or conduct, making roles structurally untenable, or pursuing redundancy where variation would have been a more proportionate and transparent outcome for the employee. In each of these scenarios, the employee's position may in practice be no better — and potentially worse — than it would

have been under a carefully regulated fire and rehire process, since the legislative trigger for automatic unfair dismissal will not have been engaged.

The Committee therefore urges the Government to ensure that the framework, as a whole, does not inadvertently incentivise employers to avoid the transparency that fire and rehire, by its nature, provides. A framework that is workable in practice — and that preserves a lawful route for genuine business-driven change — is more likely to protect employees effectively than one that removes the route entirely and drives the same conduct underground.

Section 2: Shift Patterns

Question 14: Which of the following options regarding shift changes do you agree with?

Option 1 - Only include the proposed narrow list of shift changes (day-night, night-day, weekday-weekend, and weekend-weekday)?

Option 2 - No types of shift pattern changes are in scope of the restricted variation of the timing or duration of a shift.

Other types of shift pattern changes should be protected as a restricted variation

None of the above

Don't know

Other (please expand below)

Prefer not to say

Option 2 so that no type of shift pattern changes are in scope of the restricted variation of the timing or duration of a shift. Employers may need to adjust shift patterns in response to operational requirements, staffing levels, customer demand, and wider business pressures. Employees are protected through existing unfair dismissal rights, which will be extended to more employees once the qualifying service requirement is reduced from two years to six months from 1 January 2027. If an ordinary unfair dismissal claim is brought, a tribunal will assess whether an employer has acted reasonably, so employees are protected that way.

That said, changes to night work or weekend working can be particularly significant. For some employees, such changes may determine whether they can continue doing the job at all. In practice, employers may respond by recruiting new staff to cover the new working hours on reduced-hour contracts. However, that may not always be possible.

If tribunals are required to decide whether the business needs to operate at certain times outweighs an employee's ability to continue working because they cannot work those hours, tribunals are placed in a difficult position. They are being asked to choose between two reasonable positions.

However, there is the risk that, if dismissals to bring about these changes are made automatically unfair, employers who genuinely need to change shift patterns may look for other ways to achieve the same outcome. That could include making the employees' position untenable in practice.

Question 15: Do you agree with the proposed definition of night-time working (any time 11pm-6am)?

Yes

No

Don't know

- Other (please expand below)
- Prefer not to say

Yes, this is in line with regulation 2(1) Working Time Regulations 1998 which states that 'night time' means a period which is no less than seven hours, and which includes the period between midnight and 5am. In the absence of any other agreement, it is the period between 11pm and 6am.

Question 16: If answered no, don't know or other to question 15, what do you think the definition of night-time working should be?

N/A

Question 17: Do you agree that changes from weekday to weekend and weekend to weekday shifts should be included in this list of protected shift changes?

- Yes both
- Weekday to weekend only
- Weekend to weekday only
- Neither
- Don't know
- Other (please expand below)
- Prefer not to say

Neither. No types of shift pattern changes should be in scope of the restricted variation of the timing or duration of a shift.

Question 18: Do you agree that changes from day to night and night to day shifts should be included in this list of protected shift changes?

- Yes both
- Day to night only
- Night to day only
- Neither
- Don't know
- Other (please expand below)
- Prefer not to say

Suggested answer 18: Neither. No types of shift pattern changes should be in scope of the restricted variation of the timing or duration of a shift.

Question 19: Our current understanding (subject to change based on consultation feedback) is that some employment contracts do not include fixed shift patterns i.e. on what days and at what times the employee will work their hours, but instead set out availability windows i.e. a period during which an employee must contractually be available to work and whose shift will be scheduled during this period however it will not provide the exact timing of the shifts.

Do you think that the government should consider whether there are certain kinds of changes to contractual availability windows which should be protected from being changed through fire and rehire? Should changes to availability windows be protected?

- Yes
- No
- Don't know
- Other (please expand below)
- Prefer not to say

No types of shift pattern changes should be in scope of the restricted variation of the timing or duration of a shift.

Question 20: If you answered yes to question 19, which changes to contractual availability windows should be protected?

N/A

Question 21: In your opinion, how common is it for shift patterns (specific days and times) to be specified in employment contracts or as a contractual term?

- Very common
- Common
- Occasionally
- Rarely
- Very Rarely
- Never
- Don't know
- Other (please expand below)
- Prefer not to say

Given there are many different types of shifts that can be used, the specific clause will depend on the type of shift system used. Employees will often have some information in their contract about when they will be required to work, for example, it may state that the employee could be required to work between certain hours on certain days. Given the

nature of the work that shifts are usually used for, some employers may not be able to be overly specific. Although in the fire and police services employees have designated time and shifts set often months, if not years in advance. It will therefore depend on the industry and the role.

Question 22: In your opinion, how common is it for there to be a flexibility clause in an employment contract that would allow the employer to change an employee's shift patterns without the employee's agreement?

- Very common**
- Common**
- Occasionally**
- Rarely**
- Very Rarely**
- Never**
- Don't know**
- Other (please expand below)**
- Prefer not to say**

Quite common.

Question 23: What would the impact on employees be of only protecting the proposed narrow list of shift changes (day-night, night-day, weekday-weekend and weekend-weekday)?

If the government decides to introduce shift patterns as restricted variations, these are likely to be the ones with the greatest impact on employees. Employees would therefore benefit from knowing that if their shifts are changed in this way, any dismissal for refusing the change would be automatically unfair.

Question 24: What would be the impact on employers of only protecting the proposed narrow list of shift changes (day-night, night-day, weekday-weekend and weekend-weekday)?

Employers may need to adjust shift patterns in response to operational requirements, staffing levels, customer demand, and wider business pressures. If they are restricted from doing so, then this could in some circumstances impact on the business' functionality and its ability to service certain clients.

Question 25: In your opinion, are there any concerns or risks you think should be considered with protecting the proposed narrow list of shift changes (day-night, night-day, weekday-weekend and weekend-weekday)?

This could restrict an employer's ability to meet client needs. Employers may need to adjust shift patterns in response to fluctuating demand or to comply with third-party requirements that are outside their control. Some employers may have a need to ensure that all shifts are covered by full-time employees, meaning that their ability to cover 'new' shifts at weekends or at night by part-time employees is limited. Limiting their ability to use fire and rehire to implement such changes, even where there are legitimate business reasons for doing so, could in some cases have knock-on effects for the business to service certain clients.

Question 26: – Do you believe that the proposals discussed in this consultation relating to shift changes will have an impact on individuals with a 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
- Don't know
- Other (please expand below)
- Prefer not to say

This could strengthen protections for employees with childcare responsibilities – that tend to be women – by ensuring that, for example, those who work daytime shifts have added safeguards against being required to move to night shifts.

Question 27: Where you have identified potential negative impacts in your response to question 26, are there ways to mitigate these?

N/A

Question 28: Is there anything else you would like to share your reflections on, that was not covered by the previous question (e.g. broader risks or alternative options)?

N/A

Birmingham Law Society Employment Law Committee

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