Dismissal and re-engagement (fire-and-rehire) a fact-finding exercise

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This is not intended as guidance from Acas about fire-and-rehire practices.

Executive summary

Over the course of 2020, public attention increased on the use of 'fire-and-rehire' practices during the COVID-19 pandemic. These practices include where employers dismiss then re-employ workers on changed terms and conditions, or where the prospect of doing so is put to workers during negotiations about changing their terms and conditions.

The pandemic has required many employers to take a radical look at their business operating models. Reports have suggested that some employers have used fire-and-rehire practices in these circumstances. There have been concerns that some employers are using the pandemic as a pretext to diminish workers' terms and conditions and using fire-and-rehire as a tactic to undermine or bypass genuine workplace dialogue on change.

Ongoing parliamentary scrutiny of such practices has seen some cross-party support emerge for a Private Members' Bill seeking to reform the law on unfair dismissal to curb their use. Concerns have been expressed across the political spectrum, including by the Prime Minister, the Secretary of State for BEIS, the Labour Party leader, Scotland First Minister, Wales First Minister and others.

In October 2020, officials at the Department for Business, Energy and Industrial Strategy (BEIS) invited Acas officials to carry out an independent and impartial fact-finding exercise with stakeholders to inform BEIS's policy thinking on this issue. Acas was not asked to present recommendations to government.

Acas engaged with stakeholders from: employer bodies; trade unions; professional bodies and networks with advisory contact with employers, covering employment lawyers, accountants, HR and payroll services; academics; and Acas senior advisers.

Evidence gathered was largely qualitative in nature, exploring participants' experiences and views on themes of interest to BEIS, including whether the practice is new, its apparent prevalence, the contexts in which it is used, and whether policy interventions may be needed to address the issue.

Acas was not able to identify any large-scale surveys or quantitative data on the prevalence or trends of the practice; participants were not aware of any historic systematic data collection on the issue, nor of any academic studies that had been conducted concerning the practice.

Findings do not necessarily present a representative picture of either the prevalence or the full range of circumstances of use of fire-and-rehire practices across the economy, but do provide valuable insight into the research participants' understanding of this issue.

Key findings are summarised below.

Patterns of use of fire-and-rehire practices

Participants reported that fire-and-rehire is not a new phenomenon, with observed use of the practice predating the COVID-19 pandemic by many years.

There was a shared sense among some participants that the practice has become increasingly prevalent both in recent years and during the pandemic.

There were some concerns that the prospect of fire-and-rehire has been used increasingly as a tactic at an early stage of negotiation processes. Others suggested such use may be linked to the nature of the urgent business challenges thrown up by the COVID crisis, where the timescale available to reach agreed solutions may be shorter than at other times.

While media reports on the use of fire-and-rehire have focused on a small number of cases involving disputes between large employers and trade unions, participants had observed more widespread use of the practice across a wide range of industries and sectors; in small, medium and large organisation sizes; and in both unionised and non-unionised workplaces.

There was a shared anticipation that a further increase in use of the practice might be expected at such time as the government's furlough and COVID-related business support initiatives are wound down, especially if the economic recovery is slow.

Workplace circumstances in which fire-and-rehire is used

Participants reported fire-and-rehire being used in a wide range of workplace circumstances, both prior to and during the COVID-19 pandemic. These included:

- redundancy scenarios (in connection with both minimising redundancies, and maximising overall headcount reduction by making relevant changes to remaining staff contracts)
- harmonising terms and conditions (in relation to both business transfers and other contexts)
- introducing temporary or permanent flexibility into contracts in terms of working hours, shift patterns, payment entitlements and security of hours or employment
- interrupting continuity of service
- negotiations around organisational responses to changes in consumer behaviour, sectoral change or changing operational needs

Perspectives on the use of fire-and-rehire

Participants of all types emphasised the significance and scale of the business challenges presented by the COVID-19 pandemic, in terms of both immediate business survival and long-term sustainability. It was emphasised that fire-and-rehire is by no means a universal approach being taken by employers during the pandemic, and that the crisis has also seen widespread examples of good practice in collaborative working between employers and workers in finding suitable adaptations at this time.

However, some participants pointed to examples of what they regarded as employers using the crisis opportunistically as a "smokescreen" to diminish workers' terms and conditions; and the use of fire-and-rehire as a negotiation tactic to undermine or bypass genuine workplace dialogue on change.

A related recurring theme was the use of fire-and-rehire in the context of longer-standing negotiations that are now being revisited during the COVID-19 pandemic. There were differing views as to whether its use in such circumstances provide examples of

opportunism or rather is being driven by the need for significant, rapid and long-term re-shaping of business operating models at this time.

A wide range of views were expressed about the perceived reasonableness or otherwise of the use of fire-and-rehire where it occurs in different scenarios. It was not possible to identify a single shared perspective on when the practice may be viewed as unreasonable or not:

- some regarded its use in any circumstance as unreasonable
- others expressed concern about the imbalance that fire-and-rehire brings to negotiations when 'threatened' as a negotiation tactic
- a further perspective was that the practice can be reasonable only if used an option of genuine last resort
- others felt its use was not necessarily contentious provided it is driven by a genuine business need and is preceded by negotiations attempting in good faith to reach agreement on proposed changes

Perspectives on the current legal framework

There are a number of existing legal protections and obligations that employers may need to comply with if considering fire-and-rehire, depending on the specific circumstances.

Participants expressed differing views about perceived strengths and gaps in the existing protections for workers. These ranged from those who felt strongly that the current level of protection for employees clearly falls short, to others who felt the current balance of protections is broadly about right.

Views about the need for solutions and potential measures to address fire-and-rehire

There were mixed views on the need for measures to address the issue of fire-and-rehire. Some questioned the need for solutions at this time; others felt more needs to be done to ensure the balance is right between protecting business flexibility and protecting employees' power to negotiate a fair bargain.

A range of potential legal reforms and other interventions were suggested to either prohibit or to more strongly disincentivise the practice; while some urged caution in considering whether any particular remedy might create a worse problem than the one it is intended to address, for instance by driving more redundancies or business failures.

Suggested legislative options included: tightening up the law around unfair dismissal; enhancing the requirement and capacity for employment tribunals to scrutinise business' rationale for change in relevant cases; protecting continuity of employment in fire-and-rehire-scenarios; and strengthening employers' consultation obligations around proposed dismissals.

Suggested non-legislative options included: improved guidance for employers on relevant legal obligations and good practice; using data on fire-and-rehire to inform decisions around public procurement and access to government funding; and publishing 'name and shame' data on employers' use of fire-and-rehire practices on a government website.

Views were also expressed about the relevance of a number of wider policy considerations, ranging across:

- extending government funding for sectors where fire-and-rehire is particularly prevalent
- considering the value of providing longer-term information about the future of the furlough and related business support schemes, to help facilitate workplace negotiations based on a shared understanding between employers and their workers about this aspect of their organisation's future context
- improving access to remedies at the employment tribunal by alleviating the strain on the employment tribunal system at this time
- considering the broader question of improving channels for communication and consultation in non-unionised workplaces

Background

Recent concerns around the use of fire-and-rehire practices

1. The practice of 'dismissal and re-engagement', known as 'fire-and-rehire', is one option that may be available to an employer seeking to effect changes in the terms of employees' contracts. It involves dismissing employees and re-engaging them on a new contract with new terms, in circumstances where the employees' agreement to the changes has not been obtained. The term is also used to refer to employers holding out the prospect of dismissal and re-engagement to workers or their representatives during negotiations about changing terms and conditions.

2. Over the course of 2020, public attention increased on the use of fire-and-rehire practices in the context of the COVID-19 pandemic. This included prominent media attention on instances of industrial unrest associated with the use or prospective use of fire-and-rehire by a number of large employers in Britain. The pandemic has required many employers to take a radical look at their business operating models, both in adapting rapidly to immediate pressures and in considering their longer-term sustainability. Reports have suggested that some employers have used fire-and-rehire practices in these circumstances. There have also been concerns that some employers are using the pandemic as a pretext to diminish workers' terms and conditions and using fire-and-rehire as a tactic to undermine or bypass genuine workplace dialogue on change. Fire-and-rehire proposals have led to strongly supported strike ballots in a number of cases, with large-scale strike action being taken at British Gas/Centrica.

3. Increasing parliamentary scrutiny of the practice has included a report by the Transport Committee on the impact of COVID-19 on the aviation sector, which wrote in strongly disapproving terms about prospective use of fire-and-rehire at British Airways last year, and recent scrutiny of the issue by the BEIS Select Committee. Parliamentary questions about fire-and-rehire have been raised on a number of occasions in recent months and concerns expressed across the political spectrum, including by the Prime Minister, Secretary of State for BEIS, Treasury Minister Steve Barclay, Business Minister Paul Scully, as well as Labour leader Keir Starmer, Scotland First Minister Nicola Sturgeon and Wales First Minister Mark Drakeford.

4. A Private Members' Bill (the Employment (Dismissal and Re-employment) Bill 2019-21) was introduced to Parliament in June 2020 with the aim of making a dismissal unfair if the purpose of the dismissal was to re-employ the employee on less favourable terms. This has attracted some cross-party support.

5. The issue is anticipated to continue to attract parliamentary and media scrutiny as businesses across the economy look to respond to the ongoing disruption associated with the COVID-19 pandemic.

Request for Acas to conduct a fact-finding exercise

6. In October 2020, policy officials at the Department for Business, Energy and Industrial Strategy (BEIS) invited Acas, in its capacity as an independent and impartial non-departmental body with expertise in industrial relations, to host a roundtable with relevant stakeholders on the use of fire-and-rehire practices. In particular, BEIS officials were interested to establish evidence to help them consider whether interventions are needed to address this issue, including more clarity around:

- whether fire-and-rehire is a new practice – has it emerged or increased as a response to the COVID-19 pandemic; was it seen as part of the response to the 2008 recession?
- its prevalence – is it limited to the examples reported in the media; to a small number of large organisations in certain sectors; or is it more widespread?
- the contexts in which fire-and-rehire is used – for instance, is it used as an unavoidable last resort, as a heavy-handed negotiation tactic, or in other ways?
- stakeholder insights and views on the practice and on whether policy interventions are needed from government and/or others to address the issue

7. During Acas officials' initial discussions with stakeholders, it became clear that one-to-one discussions would be more conducive than a roundtable to participants sharing frank and honest viewpoints and evidence on this issue. It was therefore agreed with BEIS officials that Acas would instead hold a series of fact-finding discussions with stakeholders.

8. In conducting this exercise, participants from 15 organisations were invited to contribute; interviews were held with participants from 10 of these (15 interviewees in total) and written comments received from 6. Some limited new survey data on prevalence of fire-and-rehire was provided by 2 participants. Participants represented a range of stakeholders, including: employer bodies; trade unions; professional bodies and networks with advisory contact with employers, covering employment lawyers, accountants, HR and payroll services; academics; and Acas senior advisers. A small amount of desk-based research related to the specific questions posed by BEIS was also carried out.

(Note - One body of representatives of the legal profession was both interviewed and later provided written comments. The interviewee group comprised 4 interviewees while the written comments were provided by an expanded group of 8 individuals. Comments from the interview with this body are referenced in this briefing as being from 'interviewee(s) from the legal profession' and their written comments referenced as being from 'representatives of the legal profession'.)

9. This briefing outlines findings from the exercise and is intended for use by BEIS policy officials to inform their policy thinking on the issue of fire-and-rehire. Acas was not asked to present recommendations to government.

Note on the data gathered by this exercise

10. The evidence is largely qualitative in nature, exploring themes associated with the practice and context surrounding use of fire-and-rehire, as well as views on whether solutions are needed and potential interventions. **Findings cannot be treated as a representative picture of either the prevalence or the full range of circumstances of the use of this practice**, however they do provide valuable insight into the research participants' understanding of this issue.

11. Discussions with all participants were held on a strictly confidential basis, and largely in one-to-one conversations, with a view to encouraging frank and honest discussions. Respondents were offered assurance that their identity would not be disclosed in the final briefing (although those who provided quantitative data agreed to be cited in that regard). It was also emphasised to participants that the exercise was being carried out on an entirely separate basis from Acas's impartial conciliation services in any ongoing or future industrial disputes around the use of fire-and-rehire practices.

12. During this exercise Acas was not able to identify any large-scale surveys or quantitative data on the trends or prevalence of the practice of fire-and-rehire; none of the participants were aware of any historic systematic data collection on the issue, nor of any academic studies that had been conducted concerning the practice. Some limited new survey data on prevalence of the practice across sectors was provided by 2 participants; these are set out in the Annex.

13. Not all participants had equal visibility of the issue in terms of having observed examples of its use. Some employer representative bodies which participated were less able to comment directly on the use of the practice, observing that their members tend not to approach them regarding matters of local negotiations between their organisations and their workforces. Employer insights and perspectives were more readily available, however, from those participants providing legal, HR and other advisory services to employers.

14. The findings included some participants' reflections derived from particular cases they were aware of, but the research did not seek to develop a detailed understanding of individual cases.

Patterns of use of fire-and-rehire practices

Historical use prior to the COVID-19 pandemic

15. The practice of fire-and-rehire was described as a longstanding, and certainly a pre-COVID, phenomenon. Various observations about its historical use were expressed. For example:

- Representatives of the legal profession observed that the process has “always” been available and that while, in their experience, it is not used as a matter of routine, it can be employed when circumstances are “challenging” for employers. One interviewee from the legal profession described it, however, as a “run of the mill conversation” that legal advisers will have with employers at a time when negotiations around changing terms and conditions fail to reach agreement.
- One academic participant noted that the practice has always been around and fairly commonplace, commenting that "there was quite a bit in late 1980s and 1990s".
- An employer body which provides legal advisory services to its members said it was "certainly something we’ve seen, not only during COVID but also before".
- One union representative noted more frequent use of fire-and-rehire from "around 8 or 9 years ago".

16. When asked whether use of fire-and-rehire had featured among employers’ responses to the 2008 recession, none of the participants was able to express certainty about this. There was some shared sense that any use at that time had been at a lower frequency than is currently being seen. One union participant observed that fire-and-rehire had seen significant use in schools around that time, in connection with transferring school support staff onto term-time-only contracts.

17. There was a shared sense among some that the practice has been becoming increasingly prevalent in recent years, in a trend predating the COVID-19 pandemic. Some interviewees from the legal profession commented further that, as well as increasing in frequency, “it also feels like it’s become a bit slicker; it’s known how to do it as it were,” with the relevant case law having been settled for some time (see further paragraphs 62ff).

Observed use during the COVID-19 pandemic

18. A number of trade union, legal representatives and employer adviser participants identified a growth in enquiries and/or use of the practice post-March 2020:

- Some were strongly of the view that an increase in the practice was happening across “all adversely affected sectors” (see paragraphs 25 to 26). This was attributed to a range of factors (see paragraphs 31 to 43) as well as speculation that a rise in queries could potentially have been prompted by media reports raising employer awareness of the practice.
- One employer body which provides legal advisory services to its members confirmed that some its advisers had seen an increase which appeared to be affecting "especially those with less than 2 years’ service", given the lower legal risk of dismissing such employees.
- Another employer advisory body expressed caution that the perceived increase reported by its advisers may have been influenced by a spike in queries during the same period around the wider topics of furlough and redundancy.

19. A shared perspective among trade union participants was that the practice has not only been increasing during the pandemic, but that it has also been used "in a different way to past occurrences". One participant explained that, previously, the prospect of fire-and-rehire would typically be introduced part-way through a negotiation when employers were attempting "to force a breakthrough"; but more recently, the practice has tended to be introduced as a "tactic" earlier in the process and in seeking to "bypass" established negotiation processes (see further paragraph 48).

20. Increasing use of fire-and-rehire at earlier stages of negotiation processes was not, however, a feature observed by all participants. One employer advisory body commented that, in its experience, the practice is generally being used as a last resort after genuine attempts at reaching agreement have failed and that it had “rarely” seen it used as a threat at an earlier stage of negotiations.

21. From an employer perspective, it was also recurrently emphasised that the use of fire-and-rehire at this time must be viewed in the context of the significant challenges that businesses of all kinds are facing in terms of both immediate survival and long-term sustainability. One feature of this was noted to be the short timescales businesses feel they have to respond to the economic shock

caused by the pandemic, which some suggested is the reason why the prospect of fire-and-rehire has been introduced at an earlier stage of negotiations (see further paragraph 49).

22. There was a broadly shared view that the repeated extensions to the government's furlough scheme and related business support initiatives had helped lessen the potential need for employers to make the kinds of changes in the immediate term that might lead to them considering a fire-and-rehire approach. There was equally a shared anticipation that a further increase in use of the practice might be expected when the furlough and related initiatives are wound down, especially if the economic recovery is slow, as businesses become more exposed to the challenging economic environment.

23. A wide range of views were expressed about the perceived reasonableness or otherwise of the use of fire-and-rehire where it is occurring in the context of the pandemic; these views are explored below at paragraphs 44 to 57.

Where is fire-and-rehire occurring?

24. Media reports on the use of fire-and-rehire have focused on a small number of cases, most notably in the aviation sector (including at British Airways, Heathrow Airport Ltd, and catering firm Dnata Catering UK) as well as at British Gas (Centrica), Sheffield University and Tesco. Each of these instances has involved disputes between large employers and trade unions. However, when asked about their experiences of the practice, most participants viewed it as more widespread than the cases cited in the media.

Industries and sectors

25. One participant provided poll data on the use of fire-and-rehire which is in the public domain, together with a further unpublished breakdown of findings by sector. While sample sizes at a sector level were small, these poll findings indicate some use of the practice across a wide range of sectors. See the Annex for further details.

26. As noted above (paragraph 18), there was a shared sense among some participants that fire-and-rehire has been seen as a feature across "all" industries and sectors adversely affected by the COVID-19 pandemic. In some sectors, such as aviation, there was said to be an additional context of revisiting previous negotiations around longer-term structural change in the sector (see further paragraphs 54-55). Beyond this data, there was no single position on the incidence of the use of fire-and-rehire practices by industry:

- Representatives of the legal profession noted that while, in their experience, enquiries from employers about fire-and-rehire over the last year have commonly been related to the effects of the pandemic on their businesses, it did not appear that such requests for advice were more or less prevalent in particular industries.
- Some union participants pointed to a "widespread" use of fire-and-rehire in the hospitality sector, in particular since the onset of the pandemic but also increasingly over recent years. From their perspective, use of the practice was "being led by big industry in this sector" with specific reference made to recent use of the practice by large multinational hotel chains and restaurant chains. One union participant expressed concern that this might have a "trickle-down effect" towards increased use of the practice by smaller employers, noting that the historical model in this sector is that "practices initiated by the global chains do filter down to smaller operations over time." One interviewee from the legal profession noted that they had already seen use of the practice during the pandemic by "a lot of" small employers in hospitality and tourism.
- Historical use of fire-and-rehire in the retail sector was referenced by some union participants, with specific examples being given of its use by large high-street supermarket chains and their associated companies. It was noted, however, that the practice had not been seen so much in this sector during the COVID-19 pandemic, with one participant observing that some retail operations had been extremely busy trying to meet consumer needs at this time. There was an anticipation, however, that the practice may be observed here again once the immediate impacts of the pandemic reduce.
- Other industries and sectors where participants had observed examples of use of fire-and-rehire were transport, manufacturing, arts and entertainment, public services catering and cleaning, leisure, housing, local government, schools, freight, logistics, and care sectors.

Organisation size

27. Interviewees from the legal profession were clear that, in their experience, fire-and-rehire is an option that is considered and used by smaller employers as well as larger ones. One said emphatically: "This isn't about huge employers like British Airways, it's small to medium employers doing this". A union participant echoed this, commenting that the use of the practice is not confined to particular sizes of employers: "The number of workers affected ranges from relatively small employers to the [many thousands of] BA workers who were threatened with fire-and-rehire".

28. There was no suggestion from any participant, however, that the practice is prevalent among microbusinesses. Interviewees from the legal profession reflected that their conversations were, in the main, with organisations with 20+ employees, for whom collective consultation obligations would apply (see paragraphs 61 and 72). Participants who provided other advisory services to microbusinesses also said they had not experienced calls from them to discuss fire-and-rehire, either before or during the pandemic. These participants had, however, seen an increase in microbusiness owners considering making significant changes to terms and conditions and making staff redundant since the start of the pandemic. By way of explanation, one of these participants suggested that, as microbusiness owners will often not have a detailed understanding of their available contractual and legal options, they "in general probably take a much more informal approach than fire-and-rehire, which is a formal, legally-informed option".

Unionised and non-unionised settings

29. While media reports about fire-and-rehire have focused on disputes between employers and trade unions, various participants' contributions made it clear that use of the practice is not limited to organisations with recognised trade unions. For example:

- An employer body commented that, in its experience of providing legal advisory services to its members, it was not aware of any difference in prevalence of the practice between unionised and non-unionised settings and that it had experience of both.
- Some interviewees from the legal profession confirmed they had seen use of the practice by, for instance, small non-unionised employers in the hospitality and tourism sector.
- An Acas adviser told of being called in recently to advise an organisation with no recognised trade union or other elected worker representatives, which "had a dismissal/re-engagement letter ready to go" with a view to changing contracts of over 100 employees.

30. One participant speculated that fire-and-rehire practices might differ significantly according to union presence in sectors – for instance, potential differences in terms of frequency and/or the nature of the changes being achieved by use of the practice – although they were not aware of any direct evidence of such variation.

Workplace circumstances in which fire-and-rehire is used

31. Participants identified a range of workplace circumstances in which fire-and-rehire has been used both prior to and during the COVID-19 pandemic.

Redundancy

32. A range of participants were aware of fire-and-rehire having been used in relation to avoiding or minimising redundancies, both historically and during the pandemic. As one interviewee from the legal profession commented, "It's considered in part with a view to 'avoiding the dreaded 'R' word', to save jobs." Part of its potential attraction in this regard was said to be that a fire-and-rehire approach can enable employers to reduce costs while, assuming the new contracts are accepted, largely retaining the knowledge and skillset of their workforce with a view to a future upturn in business; whereas in contrast, redundancies tend to shed staff (notwithstanding that in some redundancy situations some employees may be offered alternative roles).

33. The specific circumstances and employer motivations that may lead to the use of fire-and-rehire in redundancy scenarios were said to vary significantly. Observed use ranged from situations where there was the objective was to minimise overall redundancies, to

situations where it was not clear or agreed that a genuine risk of redundancy existed:

- An Acas adviser had seen fire-and-rehire being used by employers as “an alternative to a ‘nuclear’ redundancy approach”. In such cases, an employer "will open up a few posts to redundancy and separately seek to vary the contract of others … [ultimately] by the fire-and-rehire process if agreement is not obtained. This can mean fewer outright redundancies."
- In contrast, a union participant had seen the practice used, not to minimise redundancies, but rather to effect changes in the working patterns of some staff with the objective of maximising an overall reduction in headcount.
- Another union participant cited an example of a large, nationwide, employer that, prior to the pandemic, had proposed a fire-and-rehire approach to reduce a range of terms and conditions for its workforce. Its rationale was that, if changes were not made now, they envisaged redundancies would have to happen in 5 years. In the participant’s view, "it was in reality just a cost-cutting exercise."

Changing terms and conditions for other reasons

34. Participants noted that fire-and-rehire can also be used in a much wider set of circumstances than redundancy, essentially wherever employers may wish to vary existing terms and conditions without agreement. For example, representatives of the legal profession commented that, in their experience, "whenever negotiations on changing terms and conditions break down, then the question as to the tactics to be adopted by the employer falls into issue", and the option of fire-and-rehire is an option that will be considered at that point.

35. As with redundancy, participants had seen examples of such use, both historically and during the COVID-19 pandemic, in a range of contexts; these are outlined in paragraphs 36 to 43.

Harmonising terms and conditions

36. One such context of use, observed by various participants, involves employers wishing to rationalise or ‘streamline’ disparities in staff contracts on matters such as pay, hours, shifts, job titles and so on. Participants had seen fire-and-rehire used for such purposes in the context of both business transfers and in other situations.

37. In connection with business transfers, participants had observed instances of employers wishing to harmonise ‘inherited’ contractual terms with existing contracts in their business, either because they felt the more favourable inherited terms could not be sustained financially, or because parity between contracts was desired for other reasons to do with organisational culture. One participant expressed the view that such instances should be seen in light of the long-term effects of the TUPE regulations being a "mushrooming" of different terms and conditions in some sectors, driven by employees coming from different previous service providers.

38. While the TUPE regulations provide protection against dismissals and changes to contractual terms in such circumstances, it was observed by some participants that the extent to which COVID-19 may be considered by tribunals as a justifiable reason for change under TUPE still remained, to their knowledge, to be tested (see further paragraphs 61 and 73):

- An Acas adviser described a recent example where an employer, after acquiring a transport company, had issued notices to dismiss and re-engage the inherited workers on new contracts with "less favourable T&Cs and more demanding shift patterns". The employer had cited the COVID-19 pandemic as one reason why they could not honour the terms that the drivers had worked under prior to the transfer.

39. Fire-and-rehire had also been observed in connection with streamlining terms and conditions in situations other than business transfers, meaning where the objective was to address disparities between existing contracts within an organisation:

- Another Acas adviser described a recent example where an employer had carried out an assessment of a particular role within its organisation and found a 30 per cent discrepancy in pay for the role with no clear indication as to the reason behind this:

"They've decided that the 'fair' pay for the role is around the lower end of the pay differential and are looking to put everyone on to that. Their reasoning was partly financial and partly cultural as they currently have some people earning more than their managers."

Introducing flexibility into contracts

40. Another observed context for fire-and-rehire was the introduction of more flexibility into longstanding workers' contracts. Participants had observed a range of reasons for employers wishing to do so, including harmonising legacy contracts as above, and more widely where there is a perceived need to change working patterns and/or associated payment entitlements – for instance, in response to changes in consumer behaviour, other sectoral change, or changing operational needs.

- An employer body cited an example of the latter in which an employer had secured a new supply contract which required it to provide employees on-call; after consultation with the employees to introduce this change, the majority accepted the new terms but those who did not were dismissed and re-engaged on new contracts.

41. Other specific examples given of employers introducing flexibility by use of fire-and-rehire included:

- facilitating the introduction of new shift systems by moving staff to shorter-hours contracts while reviewing associated overtime pay entitlements and/or historic bonus entitlements
- changing contractual working hours from a 5-day to a 7-day working week; and conversely (in the context of reduced business opening times during the pandemic) from a 7-day to a 5-day week
- seeking to minimise the risk of future redundancies by varying contracts to allow for greater flexibility in terms of lay-offs and short-time working

Continuity of service

42. As noted above (paragraph 18), one employer body reported that it had found length of service to be a factor in the use of fire-and-rehire during the COVID-19 pandemic, its advisers having observed that employers' use of the practice had tended to be in relation to employees with less than the 2 years' qualifying service required to make most unfair dismissal complaints.

43. A further observed motivation for fire-and-rehire was specifically to interrupt the continuity of service built up by staff by dismissing them from permanent contracts and offering them new, insecure ones:

- As one Acas adviser described: "I had a conversation a couple of weeks ago with an exasperated HR manager who had been told to give all 18 permanent employees a month's notice on their full-time contracts and re-hire them, after a break in continuity, on zero hours [contracts]. She was aware of the risks but said the owner was determined to do it anyway. The owner was keen to break continuity of employment as they all had 18-20 months service."

Perspectives on the use of fire-and-rehire

44. It was not possible to identify a single shared perspective on when the use of fire-and-rehire may be regarded as reasonable or not. A wide range of views were expressed on this issue in connection with use of the practice in different circumstances; these are considered under the sub-headings below.

Use of fire-and-rehire as a last resort

45. Some participants felt the use of fire-and-rehire could be regarded as reasonable when used a genuine option of last resort – for example, where a negotiated solution cannot be reached, and the severity of the situation is such that the only alternative left would be the insolvency of the business itself and the consequent redundancy of its entire workforce:

- One union participant reflected that obtaining worker agreement to contractual changes even in such circumstances is not always possible, as even where a recognised trade union shares the employer's view on the need for urgent change, a workforce ballot on proposed contractual changes may not find in favour of the union's recommendation.

46. Others, though, were sceptical about whether agreement with workers would genuinely not be achievable in such circumstances other than where honest, transparent and trusting employment relations are lacking. These participants were therefore opposed to the use of fire-and-rehire even as an ostensible 'last resort', regarding its availability as something which undermines the value of building and maintaining good relations between employers and their workforces:

- As another union participant commented: "No-one wants to see an employer go out of business. If the employer has an honest and trusting understanding with the union, I'd be shocked if a union couldn't convince the workers in that situation. And if an employer is open and honest with their workforce about their situation, they can carry their workers with them whether there's a union there or not."

Use in circumstances other than as a last resort

47. Regarding its use in other circumstances, scenarios in which fire-and-rehire was seen to be a particularly controversial option included those where:

- the employer's rationale for change is not genuine (for example, there is no genuine risk of redundancy or unsustainable cost as a backdrop to proposed changes – see for example paragraph 33)
- the rationale for change is mutually recognised as genuine but the proposed changes are seen as excessive (for example, where permanent contractual changes are unreasonably proposed instead of temporary ones, or where wider changes are proposed than are seen to be necessary – see for example paragraph 55)
- the employer draws a line under negotiations when workers or worker representatives feel there is still reasonable scope for further negotiation and agreement
- the employer is not genuinely attempting to seek agreement but rather 'going through the motions' to satisfy legal procedural obligations around consultation

The prospect of fire-and-rehire as a factor in a negotiation process

48. Some participants observed that, since fire-and-rehire can be put forward as a prospect even early on in a negotiation process, there is scope for it to be used unreasonably as 'threat' or negotiation 'tactic' to try to ensure that negotiations proceed within certain parameters set by an employer. As noted at paragraph 17, there was a shared perspective among trade union participants that its use as such a tactic has become increasingly frequent in recent years:

- One union participant described how, in their experience, some employers "simply issue Section 188 notices right at the start of the process. Before even getting into negotiations with the union, they set out a pre-conceived package of changes that they want to implement, along with notice of intention to dismiss if agreement can't be reached, and say, 'now let's talk about this'. They're not trying to enter into meaningful negotiations." (See paragraph 61 on the statutory requirement to issue a 'Section 188 notice' in certain scenarios where collective dismissals are proposed by an employer.)
- Another cited a recent example where "the Section 188 notice was delivered just two weeks after the employer's restructure proposal was announced and before substantive negotiations had even begun". This participant reported that "our members have described it as being akin to having a gun to their heads" and that its use in this way "made it harder for both sides to reach a negotiated solution".

49. A contrasting employer-side perspective was that, at least in the context of the COVID-19 pandemic, earlier use of Section 188 notices is not necessarily indicative of an unreasonable, heavy-handed tactic, but rather may be driven by the shorter timescales available to agree solutions at this time:

- An employer body observed that the severity of the situation facing some employers during the pandemic is such that there may not always be time to first go through an initial period of negotiation about changing terms and conditions, then to issue a Section 188 notice if agreement cannot be reached, followed by a further statutory negotiation period. This participant argued that it is for this reason that some employers feel a “responsibility” to issue a Section 188 notice early in the process, to ensure that necessarily rapid negotiations are undertaken transparently in full knowledge of one potential outcome.
- Another employer body expressed the view that, more generally, use of fire-and-rehire as a negotiation tactic would not necessarily be unreasonable so long as the proposed changes are due to a genuine business need and the negotiations genuinely aimed at attempting to reach agreement.

50. Some union participants were firmly of the view, however, that, whatever an employer’s motivation in doing so, introducing the prospect of fire-and-rehire during negotiations – and especially at an early stage – brings “significant imbalance” to the negotiation process:

- As one observed, "The converse would be a union threatening industrial action, but the law makes it far more difficult for a union to actually carry that threat than it does for an employer to go through with fire-and-rehire. So, it’s not a level playing field."
- Another added that, where the prospect of fire-and-rehire is introduced as a negotiation tactic, "there’s no longer any balance in the relationship, even where there’s a strong union."

(Note: While not a participant in this exercise, a recent public statement by Fair Work Scotland closely echoed these participants’ views, stating the availability of fire-and-rehire "undermines the need for constructive dialogue within workplaces as well as good workplace relationships, and may well undermine employee trust and commitment long beyond its immediate use, harming businesses along the way.")

51. An alternative view on the ‘tactical’ use of fire-and-rehire, put forward by an employer representative body, was that it may in some cases be used by employers as a pragmatic tactic to encourage the recommencement of stalled negotiations about proposals that have been, in the employer’s view, unreasonably rejected. In this participant’s understanding, instances of fire-and-rehire being reported in the media were examples of this type, and they speculated further that the issue of fire-and-rehire might be concentrated around certain unions resisting "necessary change” in their sectors. Union participants took a contrasting view, with one noting that “we’re seeing fire-and-rehire used a lot in hospitality, but there’s not so many unions in that sector. So, it’s not all about unions unreasonably refusing to talk to employers."

Use of fire-and-rehire in connection with responding to COVID-19 pandemic

52. As noted at paragraph 21, a recurrent theme from employer-side participants was that the use of fire-and-rehire practices at the current time must be viewed in the context of the very challenging business environment and difficult decisions having to be taken by employers. The significance and scale of these challenges was also recognised by employee-side participants, who emphasised that fire-and-rehire was by no means a universal approach being taken by employers during the pandemic. Several pointed to what they saw as widespread examples of good practice in collaborative working and consultation between employers and trade unions at this time:

- As one union participant observed, "In many cases employers are facing a genuine problem and the union recognises that the core problem is real and is willing to discuss change. The problem we’ve found is not that kind of situation, we’re always supportive of employers who are in genuine difficulty."

53. However, a number of participants also pointed to examples of what they regarded as employers using the pandemic opportunistically as a 'smokescreen' to fire-and-rehire staff on reduced terms:

- One union participant commented that this type of use had been observed in the hospitality sector, citing one example of a large multinational employer which made over 500 workers redundant last year on the basis that certain premises would be

closed until Spring 2021; however, "3 weeks after these employees' contracts were terminated, the premises re-opened their doors with staff hired on lesser terms." This was said to be one "among many other examples" where fire-and-rehire has been used in that sector to "whittle away secure work, moving towards short-time and zero hours contracts".

- An interviewee from the legal profession said they had seen "a lot of activity ostensibly around redundancy" where fire-and-rehire was being used "to reduce terms and conditions like annual leave, sick leave, sick pay and other pay provisions".
- Another union participant had observed that use of the practice was not limited to companies facing adversity due to the pandemic: "We've even seen companies in [sectors] that have been doing very well during the pandemic and whose profit lines are looking very nice, issuing Section 188 notices to change terms and conditions. That's just opportunistic."

54. A further recurring theme across participants was the use of fire-and-rehire in the context of longer-standing negotiations that are now being revisited during the COVID-19 pandemic:

- An employer representative body commented: "it's important to see there's 2 conversations here": one, a response to the immediate challenges thrown up by the COVID pandemic; and also the question of responding to longer-term changes related to structural change that was happening in some sectors pre-COVID. In those situations, this participant observed, "employers are now thinking 'post-crisis we know we can't simply go back to the way things were, so we need to discuss change with our unions'." In this participant's view, the cases featured in national media coverage over recent months were to be viewed in this context.

55. Other participants were of the view, however, that in some such cases the COVID pandemic is being used opportunistically, as a pretext for "forcing through" employers' longer-standing plans for change at a time when workers are more vulnerable and less able to challenge detrimental changes to their terms and conditions. Features of such use were said to include: employers proposing permanent changes to terms and conditions at this time, instead of temporary ones with review mechanisms linked to the pandemic; and employers proposing a wider set of changes than is needed to respond to the immediate challenges of the pandemic:

- One union participant observed that some employers are "throwing things on the table that are completely unnecessary to tackle the actual difficulties being faced. They're adding in a 'wish list' bundle of changes that the employer has wanted for a long time. We've even seen pension schemes rolled into the bundle."
- An interviewee from the legal profession confirmed that they had personally been involved in cases where the pandemic had been viewed as an "appropriate time" to re-present longer-standing plans as part of a new restructuring exercise or measures to avoid redundancy. As they explained, "these cases come to employment lawyers when it gets to a dispute stage and [employers are] asking 'what buttons can we push here?' In that context, since March [2020] the mood music has changed in terms of presenting restructuring options."

56. However, not all participants had observed such use:

- One employer body commented that it had no awareness, through its legal advisory service to its members, of employers exploiting the pandemic opportunistically like this.
- Another employer body commented that, in some of the recent examples it was aware of, the question of whether temporary or permanent structural changes were required was a matter of reasonable debate rather than one of obvious opportunism: "how far into the future does your forecast of disruption need to go before it can reasonably be said to be a permanent rather than temporary situation? If the forecast for sectoral disruption is, say, 5 years or more, is it likely that it'll be appropriate for temporary changes to simply revert to the original contracts that far in the future?"

57. Asked how widespread any opportunistic use of fire-and-rehire may be, participants felt this was more difficult to determine:

- One trade union participant noted that use of fire-and-rehire in non-unionised workplaces is extremely difficult to observe or to estimate, perhaps especially where there are less than 20 affected employees so that statutory Section 188 notices are not required.
- An interviewee from the legal profession observed further that, "it's not necessarily black and white as it's difficult in some cases to say whether or not it's cynical" as the economic context is unprecedented and "many sectors are certainly facing a

bleak long-term outlook".

Perspectives on the current legal framework

58. Participants expressed a range of views about perceived strengths and gaps in the protections offered by the current legal framework, and what some saw as the potential attractions of fire-and-rehire as a legal risk-strategy for employers, as well as potential legal reforms. A brief overview of the current legal framework is first given below by way of background to those comments.

Brief overview of existing law relevant to fire-and-rehire

59. The valid variation of contractually binding terms and conditions usually depends upon mutual agreement between the employer and worker as parties to the contract. A worker's agreement to a variation may be either express or implied and there are a number of ways by which it may be given:

- the employment contract itself may contain a clause expressly allowing the variation (such clauses are usually limited to permitting variations in specific circumstances and they tend to be interpreted narrowly by courts and tribunals)
- the agreement of individual workers may be sought directly through consultation
- a trade union may agree the changes where the relevant contractual terms are covered by a collective agreement (unions will usually seek to obtain their members' approval before agreeing to changes that diminish contractual terms and conditions).

60. Where agreement is not reached, an employer may seek to force a contractual variation by either:

- unilaterally imposing the change and relying on implied worker consent (which may be implied, for example, by their continuing to work under the new terms without protest)
- a fire-and-rehire process (terminating the existing worker contracts, following fair dismissal procedures and giving required notice, and offering to rehire the workers on new terms)

61. Where an employer is considering making contractual variations without agreement, there are a number of legal obligations and protections which they may need to comply with depending on the circumstances. In brief:

- **Wrongful dismissal** – employers need to provide the relevant statutory or contractual notice period to lawfully terminate a contract.
- **Breach of contract / constructive dismissal** – where a less favourable change is imposed unilaterally (without dismissing) this will constitute a breach of contract unless the worker agrees to the change through express or implied consent. This may be actionable as a breach of contract claim in the civil courts or, where there is financial deficit, as an unlawful deduction claim in the employment tribunal. Attempting to impose significantly less favourable terms in this way may constitute a repudiatory breach of contract, in which case qualifying employees (for example, those with 2 years' service) might resign and claim constructive unfair dismissal.
- **Unfair dismissal** – if dismissed from their original contracts, qualifying employees may bring an unfair dismissal claim. Employers then need to show they had a fair reason for dismissal and that they acted reasonably in deciding to dismiss for that reason. There are generally 2 potentially fair reasons that may apply in fire-and-rehire cases, with associated 'tests' at tribunal:
    - redundancy, broadly speaking if the dismissal was related to less work being available
    - or some other substantial reason (SOSR), if there was some other sound business reason for the change
- **Collective redundancy consultation requirements** – Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) provides that where there is a proposal to dismiss 20 or more employees at one establishment within a 90-day period (for reasons not related to the individuals concerned) certain collective consultation obligations will apply. These require an employer to provide certain statutory information to, and engage in discussions with a view to reaching agreement with, either trade union representatives (where there is a recognised trade union) or other elected employee

representatives. The employer must also notify BEIS at least 30 days before the first of those dismissals takes effect, or 45 days where the proposal relates to 100 or more employees.

- **Inducements relating to collective bargaining** – where there is a recognised trade union, Section 145B TULRCA prohibits employers making offers to workers with the 'sole or main purpose' that any terms of their employment will not, or will no longer be, determined by a collective agreement with the union. Employment tribunals may make an inference that the employer has such a prohibited purpose where, for instance, they do not engage in arrangements agreed with the union for collective bargaining (s.145D).
- **TUPE** – the Transfer of Undertakings (Protection of Employment) Regulations provide protections against dismissal and variation of contractual terms in the context of a business transfer. For instance, dismissals will be unfair and contractual changes void if the sole or principal reason for them is the transfer itself (e.g. simply to harmonise terms and conditions with existing workers), or if they are made for a reason that is not an 'economic, technical or organisational reason' (ETO) entailing changes in the workforce. Changes that are made for ETO reasons can be valid if agreed by the affected workers or their representatives.

Views about the protections offered by the current legal framework

62. As one employer representative participant commented, in addition to understanding the prevalence of fire-and-rehire, it is important to ask: "are the tests we have the right ones, and are they working" for both employers and workers? Not every participant felt able to express a view on this, but a range of observations and concerns were expressed by some in this regard.

63. One employer body which provides legal advisory services to its members expressed the view that the current balance of protections between employers and employees is "probably about right", adding that the scope for employers to fire-and-rehire is "fairly wide, but still an employer has to think very carefully about doing it as it's not without risk".

64. There was a shared view among some others, however, that notwithstanding the various legal protections that may apply, a fire-and-rehire exercise can present a relatively attractive option to an employer determined to see through contractual changes without agreement. Potential attractions were said to include that fire-and-rehire can in some cases be a less costly and quicker option (see paragraphs 65 and 66), and one that may present less legal risks for an employer than available alternatives (see paragraphs 67 to 68).

65. In terms of costs, as already noted (paragraph 32) some participants commented that a fire-and-rehire approach can be a relatively less costly option for employers, in that it can help retain the knowledge and skills of affected staff which would otherwise be lost through making them redundant. It was observed that redundancy exercises can also be costly in that businesses that make mistakes may face expensive claims and pay-outs at the employment tribunal, while the legal risks associated with fire-and-rehire were perceived by some to be lower (see below).

66. As for speed, one union participant reflected that negotiating and reaching agreement with workers and representatives can be a time-consuming process and, even when agreement is reached in principle with union representatives, these may be rejected when the workforce is balloted. This participant observed that engaging fully in this process can therefore present an unattractive option to an employer seeking a speedy solution, notwithstanding the legal risks involved in fire-and-rehire.

67. Regarding the legal risks associated with fire-and-rehire, trade union participants and some interviewees from the legal profession expressed the view that it presents a "relatively low risk strategy" for well-advised employers. In comparing the risks of alternative options, it was observed, for instance, that unilaterally imposing contractual changes without dismissing workers is possibly "the riskiest option of all" as the employer will then be acting in breach of contract and reliant on obtaining the express or implied consent of workers to the changes. As case law shows that such consent will not always be implied even where workers continue to work for the employer after the imposition of reduced terms, it was observed that this approach can carry a higher degree of uncertainty than fire-and-rehire about the outcome of a subsequent challenge at an employment tribunal.

68. One employer body emphasised, however, that fire-and-rehire is “certainly not a risk-free approach” and that “employers need to make sure they tick every box” in terms of having a sound business reason and having first made genuine attempts to reach agreement on the proposed changes. However, some interviewees from the legal profession commented that, while fire-and-rehire is not without its own risks, it is “a well-trodden path” which can provide a “relatively certain” pathway to changing terms and conditions without the agreement of workers if handled with care and steered by sound legal advice.

(Note - in a recent case brought by the trade union USDAW in the Court of Session in Scotland, a temporary interdict was granted against Tesco preventing it dismissing workers at its site in Livingston in order to re-engage them on new terms. USDAW had argued that, in proposing to do so, "Tesco moved to renege on a long-standing collective agreement made in good faith." The final judgement in this case remains to be determined. See 'Tesco loses 'fire-and-rehire' court battle' on the BBC website.)

Views about specific legal protections

69. A number of observations were made by participants about how various specific legal protections may apply in the context of fire-and-rehire, and the latitude that some felt these can afford well-advised employers; these are outlined in paragraphs 70 to 73.

70. **Wrongful dismissal** – in practice, if workers are allowed to work their full notice period under the old terms, or are paid in lieu of notice where permitted by the contract, this will negate the risk of claims for wrongful dismissal.

71. **Unfair dismissal** – while employers have to legally justify any dismissal as fair, some participants felt the scope for dismissals to be found fair on the basis of business reorganisation needs is nevertheless quite broad, given the currently settled case law on ‘some other substantial reason’ (SOSR) dismissals:

- In such cases, it was observed that employment tribunals do not require an employer to demonstrate that a dismissal was a ‘necessity’ in view of the relevant ‘substantial reason’. The view was also expressed that tribunals do not tend to inquire in any great detail into an employer’s financial situation and business rationale, with the focus being mainly on whether fair procedures for consultation then dismissal have been followed, alongside other factors such as how many workers accepted the changes (Catamaran Cruisers Ltd v Williams).
- Accordingly, interviewees from the legal profession commented that: “from an employer perspective, so long as you follow your consultation process you’re OK. If it gets to a tribunal, no judge looks [very closely] behind to the reasons why an employer is doing it, it’s all about procedure. In that respect, the employee perhaps isn’t so well protected.”
- An employer representative body provided an alternative interpretation of the approach taken at employment tribunals, noting that it had heard from employers that factors taken into consideration included whether the impacts of cost cutting were borne fairly across the business rather than concentrated on a particular group, so that approaches taken by employers had, for instance, included restructuring management before considering front line changes.
- Other participants observed that what they regarded as a relative lack of scrutiny at tribunal of an employer’s business and financial situation opens the door to opportunistic use of fire-and-rehire in economically challenging times. In comparison, the tribunals’ approach to redundancy dismissals was seen as setting a relatively higher bar for employers to meet.
- However, another employer body commented that, while the case law on SOSR means employers do have “fairly wide discretion” to fire-and-rehire, “it’s not accurate to say there’s no scrutiny at all at tribunal,” as there is always an expectation that employers should have at least consulted staff and given consideration to potential alternatives.

72. **Collective redundancy consultation requirements**:

- Participants noted that the consultation obligations relating to proposed dismissals (including fire-and-rehire) of 20 or more employees at one establishment over a 90-day period are quite detailed (see paragraph 61), with potentially costly claims and penalties attached if not carried out correctly, including a ‘protective award’ of up to 90 days’ full pay for each employee affected plus any additional unfair dismissal liabilities.
- Some interviewees from trade unions and the legal profession expressed a view, however, that these consultation requirements are largely procedural in nature and can, in practice, be met fairly easily by a well-advised employer; and that, as

such, they do not necessarily provide a major protection against a fire-and-rehire strategy.

73. **TUPE** – along similar lines to the comments made around SOSR (paragraph 71), some participants noted that the degree of scrutiny at an employment tribunal of an employer's business and financial rationale tends to be quite limited in complaints under the TUPE legislation. Therefore, while the law does provide some protection against dismissals and changes to contractual terms in the context of business transfers, these participants reflected that citing economic pressures in the context of the COVID-19 pandemic may be sufficient to constitute an economic, technical or organisational (ETO) reason (see paragraph 61) in many cases, although this remained untested to these participants' knowledge.

Potential measures to address fire-and-rehire

74. As outlined below, participants expressed a range of views about whether solutions are needed to address the issue of fire-and-rehire and what form of intervention they felt might be appropriate.

Participants' views about the need for solutions

75. A view among some participants was that fire-and-rehire is rarely, if ever, justifiable and that any use of the practice, including its use as a negotiation tactic, should therefore be prohibited or much more strongly disincentivised by law. A range of potential measures for achieving this were suggested which focused on tightening the law around unfair dismissal (see paragraph 84).

76. An alternative view was that use of the practice should be permitted when it is a genuine and unavoidable option last resort, but that more could be done to prevent or disincentivise unreasonable use in other circumstances – including addressing its use as an "aggressive" negotiation tactic, as well as strengthening protections against use of the practice where employers have not explored all reasonable alternatives. A number of approaches were suggested to address this (paragraphs 77 and 78).

77. Some participants felt that there is a need to increase the scope for effective independent scrutiny of an employer's rationale for using fire-and-rehire – for example, to increase scrutiny at an employment tribunal of how far it may be reasonable to rely on a business' economic challenges to change terms and conditions without agreement:

- Participants in favour of this approach commented that this might be achieved by amending legislation to require greater such scrutiny at tribunal in relevant dismissals.
- Other participants, while acknowledging the rationale for greater tribunal scrutiny, questioned how this might be achievable in practice. As one observed, "tribunals are not economists" and employment judges often have "little expertise either in running a business or in the particular industry at issue", especially as they now sit alone in most unfair dismissal cases without the benefit of wing members; consequently, their capacity to review an employer's business decisions in detail may be limited and such a requirement "may introduce undesired complexity".
- Another reflected that raising the level of scrutiny at tribunal might amount to their "interfering in business decisions", which this participant felt would "probably be too onerous" a prospect for employers to have to consider when dismissing staff for business-related reasons.

78. Reports of fire-and-rehire being used specifically to break continuity of service were commented upon disapprovingly by participants representing both employer and employee perspectives; there was also a view that interventions may be needed to address the issue of employers firing and rehiring specifically those with less than 2 years' service given the lower risk of tribunal claims from such employees (see paragraphs 18 and 42 to 43). Suggested approaches to address these issues were to reduce the qualifying period of service for making an unfair dismissal complaint; to extend protection against unfair dismissal to all employees and workers affected by fire-and-rehire; and/or to protect continuity of employment in fire-and-rehire scenarios.

79. Some participants expressed the view that the current protections against misuse of fire-and-rehire can lack practicable enforceability:

- It was noted that, especially in times of recession, employees' alternative employment options are often limited, lowering the likelihood of them refusing an offer of re-engagement and/or bringing an unfair dismissal claim, even if they feel unfairly treated. As one union participant commented, "the currently available remedies – constructive dismissal, unlawful deductions, and so on – are effectively meaningless in the context of the pandemic, where workers are first and foremost just worried about keeping their jobs and looking after their families."
- A related view was that the remedies even for successful claims are not necessarily very attractive to employees: "even if a dismissal is found to be unfair, it's not often that a tribunal will order re-instatement, so the outcome for the employee is usually just some modest monetary compensation."
- It was further observed that the employment tribunal system itself is currently under enormous strain, limiting effective access to available remedies.

80. Most participants, both those in favour of legislative reform and others, felt that more could be done through non-legislative measures aimed at both discouraging use of the practice and encouraging good employment relations practices. Several suggested that non-statutory guidance, reflecting the case law position on SOSR dismissals and employers' consultation obligations, would be helpful for those employers without ready access to professional legal advice. Others noted that Acas already has quite extensive guidance on the law and good practice around varying terms and conditions, and that employers who engage in fire-and-rehire are often those are already well-advised about the law, so that more guidance could not be expected to achieve any particularly great impact in terms of changing behaviours overall.

81. Some union participants commented that greater encouragement of collective bargaining and constructive workplace dialogue would help to reduce instances of fire-and-rehire and were in favour of legislative measures to achieve this. One commented that a reinstatement of Acas' statutory duty to promote collective bargaining would help in this regard.

82. A number of participants commented that they were not in a position to express a definitive view on the need for solutions but did, along with other participants, offer views on relevant issues for consideration in exploring this question. These considerations included that:

- The need for legal reform depends on whether the balance is currently right between protecting business flexibility and protecting employees' power to negotiate a fair bargain. In this respect, one participant referred to the Supreme Court's observation, in its 2017 decision on the judicial review of the employment tribunal fees regime, that: "Relationships between employers and employees are generally characterised by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, Parliament has long intervened in those relationships so as to confer statutory rights on employees, rather than leaving their rights to be determined by freedom of contract." (Source: Judgment R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) (PDF, 350KB, 42 pages).) It was suggested that the question of regulation of fire-and-rehire must be considered within the framework of addressing that imbalance of power.
- The use of fire-and-rehire to break continuity of service suggests that the availability of the practice is in some cases subverting Parliament's intention that certain statutory employment rights should accrue dependent on a certain length of service with an employer.
- The potential for the use of fire-and-rehire practices to contribute to an increase in short-hours contracts and other insecure forms of employment should be considered in the context of the government's broader policy positioning around insecure work, including, for instance, its recent consultation considering the use of exclusivity clauses in such contracts, and the wider objectives of its Good Work Plan.
- The need for business flexibility to change terms and conditions must be recognised in the interests of protecting jobs and livelihoods during the COVID-19 crisis; while, in commenting on this perspective, some participants noted that not all uses of fire-and-rehire are necessarily motivated towards the interests of the workforce in terms of protecting jobs and livelihoods.
- Greater restrictions on fire-and-rehire might result in some employers becoming risk-averse to re-employing dismissed staff in the event that their business takes an upturn (for example, by securing a new business contract) shortly after letting those workers go. Some participants felt this could have a negative effect, not only on employers' capacity to recruit skilled workers,

but also potentially on the employees themselves. As one commented, “it’s worth remembering that restrictions on fire-and-rehire might lead to fire-and-don’t-rehire, rather than retain-and-don’t-fire”.

- Any potential reform must be balanced against the possibility of the remedy creating a worse problem than the one it is intended to address. In this regard, it was observed that if fire-and-rehire were not available as an option in any situation this might drive more businesses towards making redundancies; or, in situations where redundancy is not an option because work is still available but costs savings need to be made, could lead to more cases of business failure and insolvency.

83. Two participants questioned whether solutions were needed at this time. One employer body, while emphasising that it had little insight into use of the practice, speculated whether its use might reduce of itself in time once the “rapidly changing and somewhat panicky business environment” has abated. Representatives of the legal profession suggested the issue might be kept under review, with the question of solutions perhaps only needing to be addressed in the event of heightened concern and “more examples of the British Airways/British Gas type”.

84. A summary of the various legislative and non-legislative options for reform suggested by participants, as well as some wider policy considerations put forward as relevant by some participants, is given below.

Note – the following is a summary of options and considerations that were brought to Acas’s attention during this exercise; these are not recommendations by Acas.

Options for legislative reform

Reform the law on unfair dismissal – a range of suggestions were made to amend the Employment Rights Act 1996 to:

- specify that dismissals can be challenged as unfair where the employer dismisses employees and subsequently re-employs them for the purpose of diminishing the terms and conditions of employment.
- provide that dismissals for the purpose of re-engaging employees on less favourable terms and conditions are automatically unfair, giving rise to a ‘day 1’ right to make a complaint to an employment tribunal; put the burden of proof on the employer to show that this was not the reason for dismissal; and make ‘interim relief’ available in such cases pending a full hearing on the merits.
- specify that redundancy and ‘some other substantial reason’ (SOSR) dismissals are unfair where the employer had reasonable economic alternatives open to it such that it could have avoided taking that approach. Legislation might also specify factors that may be relevant to the fairness determination at tribunal, for example: that the employer can demonstrate that it has consulted with worker representatives and that they were supportive of the employer’s proposed course of action; and that the tribunal should consider the ‘equity’ of the diminished terms and conditions in determining the overall reasonableness of the employer’s conduct in dismissing the employees.
- provide that the primary remedy where fire-and-rehire dismissals are found to be unfair should be reinstatement based on the ‘old’ contract, though with scope for fair flexible adjustment of work organisation.

Strengthen employment tribunals’ requirement to scrutinise the business reasons advanced by employers in fire-and-rehire dismissals; and improve their capacity to carry out such scrutiny, for instance with the assistance of lay panel members with relevant expertise.

Reform collective consultation obligations – extend the obligations under Section 188 TULRCA to ‘workers’ as well as ‘employees’; reduce the numerical thresholds for triggering consultation obligations; and state explicitly in legislation that no notices of dismissal can be given until the consultation process is completed. A further option could be to incorporate a wider requirement to consult with unions in such circumstances, i.e. beyond the requirements of Section 188 – for example, a requirement of “good faith” to deal with circumstances where employers deliberately seek to avoid dealing with a trade union.

Strengthen employer’s obligations around adherence to procedures under collective agreements – tighten Section 145B TULRCA (inducements related to collective bargaining) to further narrow the scope for employers to make direct contractual ‘offers’ to

workers where there is a recognised trade union, by making it clearer that the employer must honour its agreed procedural commitments under a collective agreement. This might be done by modifying Section 145D to give rise to a presumption at tribunal that, where agreed procedures are not followed, the employer had a 'prohibited purpose' that the workers' terms of employment will no longer be determined by collective agreement.

Prohibit use of wide contractual variation clauses – prohibit the use of wide contractual powers that enable employers to vary terms and conditions unilaterally, so that new restrictions around fire-and-rehire do not lead to greater use of such clauses.

Protect continuity of employment – legislate to protect the continuity of service of employees and workers who are fired-and-rehired.

Make breach of contract claims actionable in employment tribunals – while a reduction in terms and conditions is currently actionable as a breach of contract claim in the civil courts, or as an unlawful deduction claim in the employment tribunal where there is financial deficit, all such claims might be more accessible to workers if they were actionable in employment tribunals.

Non-legislative options

Non-statutory guidance for employers – guidance by Acas and/or others on the law and good practice around varying terms and conditions with agreement, including consultation obligations and guidance reflecting the case law on fire-and-rehire.

Public messaging statement or campaign – seek to build on the joint statement last year by Acas, CBI and TUC on handling redundancies to encourage employers to engage in constructive dialogue with trade unions and other employee representatives around business change, and to emphasise the value of building trust and employee commitment. (It was noted that consensus around messaging on fire-and-rehire may be more difficult to achieve.)

Use public procurement and access to government funding to disincentivise fire-and-rehire – collect data on the use of fire-and-rehire and use this to inform decisions around public procurement and access to government business support schemes.

Name and shame – publish data on fire-and-rehire dismissals on a government website.

Further inquiry – a public consultation by government to help gather wider evidence and views on the practice and on options for addressing the issues. For example, to seek to develop a more granular understanding of potential variation in use of the practice across sectors, organisation size, and settings where employees do or do not have trade union representation.

Wider policy options

Extend government funding for sectors – as an indirect solution, greater government support for sectors affected by the pandemic may lessen the perceived need for fire-and-rehire among employers in those sectors.

Consider the value of providing longer-term information about the future of the furlough and related business support schemes – set out a longer-term plan regarding when and how the various COVID-related government support schemes will be wound down, to help to facilitate workplace negotiations based on a shared understanding between employers and their workers about this aspect of their organisations' future context. (It was noted that more certainty on this might not necessarily reduce instances of fire-and-rehire as it could drive different behaviours – in some instances, perhaps increasing business confidence in the short-term, hence reducing perceived need to consider firing-and-rehiring; while in other instances, perhaps serving to provide a more pressing deadline for considering the need for business change, including fire-and-rehire, where some may have been hoping for longer-term extensions of support.)

Improve access to remedies at the employment tribunal – consider the wider question of improving access to employment tribunals for workers affected by fire-and-rehire, including tackling the current backlog of cases and easing the significant strain on the tribunal system at this time.

Improve channels for communication and consultation in non-unionised workplaces – the issue of fire-and-rehire highlights the broader issue of the need for employers and workforces of all kinds to communicate and work together in adapting to the COVID-19 pandemic. This prompts the wider policy question of how structures for information and consultation might be more widely encouraged and made more effective, and whether the government's 2020 changes to the Information and Consultation of Employees (ICE) Regulations go far enough towards achieving that objective.

Annex: Survey data provided to Acas on the prevalence of fire-and-rehire

Some recent quantitative data on the prevalence of fire-and-rehire was provided to Acas during this exercise by the TUC and the CIPD. Details of each are set out below.

TUC poll data

On 25 January 2021 the TUC published findings from an online poll of 2,231 individuals in England and Wales, conducted by BritainThinks between 19 November and 29 November 2020.

All respondents were either in work, on furlough, or recently made redundant. Survey data was weighted to be representative of the working population in England and Wales by age, gender, socioeconomic grade, working hours and security of work in line with ONS Labour Force survey data.???

The survey found that that:

- nearly 1 in 10 (9%) workers had been told to re-apply for their jobs on worse terms and conditions since the first lockdown in March 2020
- nearly a fifth of (18%) of 18- to 24-year-olds said their employer had tried to re-hire them on inferior terms during the pandemic.
- working-class people (12%) were nearly twice as likely than those from higher socio-economic groups (7%) to have been told to re-apply for their jobs under worse terms and conditions.?
- BME workers (15%) had been faced with 'fire-and-rehire' at nearly twice the rate of white workers (8%)

The TUC also provided a further analysis of this poll data from BritainThinks looking at sectoral prevalence. The relatively small sample size means that it is not possible to do a sector by sector comparison of prevalence, but the data is useful in so far as it indicates a spread across each of the reported sectors in relation to both variables:

- 'The terms on which I work or was working have got worse since the start of the Coronavirus pandemic'
- 'I have been told by an employer that I need to reapply for my job under worse terms and conditions, or that my job may be at risk if I do not accept these conditions'

See the TUC poll data for Acas for more detail.

CIPD poll data

During the week commencing 1 February 2021, the Chartered Institute of Personnel and Development (CIPD) included a poll question in its weekly newsletter. The CIPD Update goes out to over 160,000 people and its audience is a mix of mainly CIPD members and a much smaller proportion of non-members.

The poll asked whether/how respondents' organisations had made changes to employees' terms and conditions of employment over the last 12 months. There were 379 responses. Findings have not been published to date but were shared with Acas for inclusion in this briefing.

Table showing responses to the CIPD poll

How has your organisation made changes to employees' terms and conditions of employment over the last 12 months? (select all that apply)

Answer choices	Responses as %	Responses
Yes, through consultation, negotiation and voluntary agreement	33.51%	127
Yes, through dismissing staff and rehiring on new terms	2.90%	11
Yes, by other means	8.18%	31
No, we have not changed employees' terms and conditions	59.37%	225
Total respondents: 379		

The data in this small poll can only be treated as indicative of the views of the HR professional population. It found 2.90% of respondents said that changes had been made through dismissing and re-engaging staff. 33.51% of respondents said that they had made changes to employees' terms and conditions "through consultation, negotiation and voluntary agreement". It is possible that a proportion of these latter respondents' organisations may have reached agreement on changes by holding out the **prospect** of fire-and-rehire during the consultation and negotiation process. It was not possible to break the data down further as there were no other questions asked beyond the one above.

The CIPD has indicated to Acas that it would be willing to further explore the use of fire-and-rehire as a means of obtaining employees' agreement to contractual changes in its next Labour Market Outlook (LMO) employer survey, which would provide further data by May.