WRITTEN EVIDENCE SUBMITTED

by

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1. BACKGROUND

1.1 I, David Cabrelli, LLB (Hons), DipLP, Solicitor (non-practising), am the Professor of Labour Law at the University of Edinburgh. Details of my professional credentials and qualifications are shown in the Appendix. This submission is from myself in a personal/individual capacity rather than on behalf of my employer (the University of Edinburgh) or any other organisation (e.g. I am a member of the Legislative & Policy Committee of the Employment lawyers' Association and the Equalities Law Sub-Committee of the Law Society of Scotland, both of which have submitted written evidence under separate cover).

1.2 I am submitting this written evidence in an individual capacity as someone with a profound interest in, and passion for, the subject of employment law. I should also advise that this written submission is limited to commentary on clause 22 of the Employment Rights Bill ("ERB"), which represents the UK Government's attempt to "ban" the managerial practices of "fire & rehire" and/or "fire & replace".

1.3 The principal purpose of this written evidence is to underscore the points that the "ban" amounts to nothing of the sort, and that if enacted, clause 22 is likely to produce nothing more than a Pyrrhic victory for "successful" employees owing to the existing rules on the mitigation of loss set out in section 123(4) of the Employment Rights Act 1996 ("ERA"). In providing commentary on the terms of clause 22 of the ERB, I leave to the side the questions of the desirability of (1) interim relief awards[1] and (2) the exception adumbrated in clause 22(4) and (5) which, if enacted, would enable employers to fire & rehire or fire & replace without falling foul of the proposed rule that the dismissal of an employee will be automatically unfair.

2. EXECUTIVE SUMMARY

2.1 There are five main points that I intend to make in this written submission, as follows:

2.1.1 The terms of clause 22 of the ERB do not amount to a "ban" on fire & rehire and/or fire & replace: a true "ban" would result in the dismissal (that has been followed by the offer to rehire or replace) being treated by the law as a nullity and void. The technical legal consequence of rendering the dismissal a nullity and void would be that the employee would never be removed from their job/position in the first place;

2.1.2 An employer can easily evade the protections provided by clause 22 of the ERB when an employee rejects variations that the employer has proposed; the employer can simply fire (i.e. without offering to rehire, or replacing, the employee) the employee, which would obviously result in a dismissal which

[1] See "Making Work Pay" Consultation Paper at Consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire.

would not be treated as one that is automatically unfair. This is something of an obvious loophole in the proposed legislation;

2.1.3 The remedy of reinstatement in section 114 of the ERA should be the only remedy for a breach of clause 22 of the ERB and a finding of an automatically unfair dismissal; employment tribunals and courts should be given the power to dismiss arguments raised by employers that reinstatement is not an appropriate remedy because they have lost all trust and confidence in the employee;

2.1.4 If the recommendation made immediately above at paragraph 2.1.3 is rejected, and it is determined that a basic and compensatory award is the most appropriate remedy for a finding of an automatically unfair dismissal for a breach of clause 22 of the ERB, then

2.1.4.1 the ERB should provide for a minimum basic award, along the same lines as that prescribed by section 120 of the ERA and section 156 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"); and

2.1.4.2 the rules on the compensatory award in section 123 of the ERA should be revisited and modified by the ERB so that the failure of the successful employee to accept the employer's "rehire" offer is not taken as a failure to mitigate their loss (and hence, a breach of their duty to mitigate under section 123(4) of the ERA).

3. "**BAN" ON FIRE & REHIRE: AUTOMATICALLY UNFAIR DISMISSAL**

3.1 Prior to the general election, the proposal of the Labour Party to "ban" the practices of "fire & rehire" and/or "fire & replace" was widely reported in the media. Clause 22 of the ERB is the legislative incarnation of that proposal. It directs that if an employer dismisses an employee and offers to rehire (or replaces) that employee in response to the employee's rejection of a variation proposed by the employer, this will entitle the employee to treat him/herself as automatically unfairly dismissed. Now in office, it should be stressed that the Labour Government's proposed statutory vehicle - clause 22 of the ERB - does not provide for a "ban" at all. Instead, it makes the dismissal (i.e. the "fire"), when accompanied by an offer to re-engage the employee (i.e. the "rehire" offer) or the subsequent replacement of the fired employee A with another employee B (i.e. the "replace"), one that will be treated as automatically unfair. This means that there will be no burden imposed on the employee to establish that the dismissal was ordinarily "unfair" in terms of the statutory criteria in Part X of the Employment Rights Act 1996 ("ERA") (in particular, see sections 95 and 98 of the ERA).

3.2 However, the wording of clause 22 of the ERB prescribes that the dismissal of the employee will still stand as a matter of law. As such, it is misleading to speak of the proposed statutory provision as establishing any form of "ban" on fire & rehire and/or fire & replace. Instead, a true "ban" enshrined in statute would treat the dismissal as a nullity. In such a case, the dismissal would be invalid and treated by the law as if it never happened at all, i.e. it would be void and the dismissed employee would be immediately reinstated to their position with their statutory continuity of employment left intact and unbroken. Policy-makers ought to question why the nullity of the dismissal is not reflected in the clause 22 of the ERB, as such a route would be much more faithful to the policy intention of implementing a "ban".

3.3 A second concern with the wording of clause 22 is that it only renders a dismissal automatically unfair if it is subsequently followed by an offer to rehire and/or the replacement of the dismissed employee A by another employee B. As such, if an employee rejects a proposed variation of the terms and conditions of his/her contract of employment and the employer simply fires him/her without making an offer to re-engage him/her or replace him/her, the dismissal would not be automatically unfair. Instead, the employee would need to establish that the dismissal was ordinarily "unfair" in terms of the statutory criteria in Part X of the Employment Rights Act 1996 ("ERA") (in particular, see sections 95 and 98 of the ERA) in the usual fashion. This is something of an obvious loophole in the proposed legislation.

4. "BAN" ON FIRE & REHIRE: REINSTATEMENT ORDERS AND MINIMUM BASIC AWARD

4.1 As noted above, a true "ban" on fire & rehire or fire and replace would treat the dismissal/fire as a nullity and void, with the order of reinstatement under section 114 of the ERA treated as the exclusive remedy available in respect of a breach of clause 22 of the ERB. The technical legal consequence of rendering the dismissal a nullity and void would be that the employee would never be removed from their position in the first place, i.e. reinstatement would be the principal remedy. However, there is no suggestion of this in the ERB and policymakers ought to question why that is not the case.

4.2 Under the current law, the employment tribunals and courts will generally refuse to make an order of reinstatement if the employer establishes that it has lost all trust and

confidence in the dismissed employee.[2] If it is accepted that the ERB ought to be modified to provide that a reinstatement order is the exclusive or sole remedy for a breach of clause 22, it is suggested that statutory provision will be needed to say that this argument – the "breakdown in trust and confidence" claim – should not be treated by the employment tribunals and courts as a permissible basis on which to rule out a reinstatement order.

4.3 However, if policymakers are not minded to amend the ERB to provide for reinstatement as the sole competent order for a breach of clause 22 of the ERB, and it is determined that the standard basic and compensatory award ought to be the most appropriate remedy for a finding of an automatically unfair dismissal, then the ERB should be amended to provide for a minimum basic award, along the same lines as that provided for in section 120 of the ERA and section 156 of TULRCA.

4.4 Section 120 of the ERA provides for a minimum basic award of £8,533 in certain cases where the law has provided that the dismissal is automatically unfair. In particular, in the event that an employee is dismissed for the reason that he/she acted as (a) a health and safety representative (section 100 of the ERA), (b) a representative appointed under the Working Time Regulations 1998[3] (section 101A of the ERA) or for the purposes of consultation on proposed collective redundancies or a transfer of an undertaking (section 103 of the ERA), or (c) as an occupational pension trustee (section 102(1) of the ERA). It should be stressed that the minimum basic award of £8,533 is index-linked, so it increases annually to take into account inflation.

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[2] See *Enessy Co. SA (t/a The Tulchan Estate) v Minoprio and Minoprio* [1978] IRLR 489, *Cold Drawn Tubes Ltd v Middleton* [1992] ICR 318 and *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680.

[3] SI 1998/1833.

4.5 Meanwhile, a minimum basic award of £8,533 is also provided for under section 156 of the TULRCA where the dismissal of the employee is automatically unfair because it is on trade union grounds under section 152 of the TULRCA or it amounts to a redundancy on grounds related to trade union membership or activities under section 153 of the TULRCA. A similar provision for a basic minimum award exists in section 102(1C) of the ERA in relation to the blacklisting of workers by employers in contravention of section 104F of the ERA. However, the latter provision, "curiously",[4] is lower than the standard sum of £8,533 and is fixed at £5,000 and is not index-linked.

4.6 In light of the above and the policy intention of the UK Government to "ban" fire & rehire and fire and replace as viable managerial practices in the workplace, it is strongly recommended that clause 22 of the ERB be revised to provide for a minimum basic award of at least £8,533 – on an index-linked basis – to mirror the terms of section 120 of the ERA and section 156 of the TULRCA.

5. "BAN" ON FIRE & REHIRE: RULES GOVERNING THE CALCULATION OF THE COMPENSATORY AWARD FOR AN AUTOMATICALLY UNFAIR DISMISSAL: THE "PYRRHIC VICTORY"

5.1 Section 124 sets out the rules on the calculation of the compensatory award that is paid to a successful employee who establishes an automatically unfair dismissal for the purposes of a breach of clause 22 of the ERB. In particular, section 123(4) of the ERA stipulates that '[i]n ascertaining the loss referred to in [section 123(1) of the ERA]

[4] For commentary, see A. C. L. Davies, *Valuing Employment Rights* (Oxford, Bloomsbury/Hart, 2024) 210-213.

the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland'.

5.2 This obligation translates into a requirement that the employee must take reasonable steps to minimise any losses sustained and a failure of the employee to do so will be held against them. For example, if an employee successfully establishes that when they were fired and rehired or replaced and the dismissal constituted an automatically unfair dismissal, they will be under a duty to mitigate their loss and this will be taken into account in working out the extent of the compensatory award.

5.3 Although "logic [might] suggest… that [if the employer offers to rehire, this] is not [an] appropriate mitigation",[5] this is not the law in the UK. Instead, the case law directs that the employee's rejection of the employer's offer to rehire (albeit on less favourable terms and conditions of employment) leaves them wide open to the charge that they failed to mitigate their loss. In *Wilding v BT plc*,[6] the employee presented a complaint of disability discrimination and unfair dismissal to the employment tribunal. Prior to the employment tribunal hearing, the employer made an offer to re-engage the employee on a part-time working basis. However, the employee rejected that offer on the basis that he felt it was a sham. When the employee went on to succeed in his unfair dismissal claim, the Court of Appeal ruled that the employee's rejection of the employer's rehire offer was unreasonable and amounted to a failure to mitigate loss. This radically reduced the compensatory award awarded. In that way, it is possible

[5] M. Pittard and K. Ewing, "'Fire & Rehire': Four Lessons from Australia" (2024) 53 *Industrial Law Journal* 331, 354, available at 'Fire and Rehire': Four Lessons from Australia | Industrial Law Journal | Oxford Academic.

[6] [2002] IRLR 524.

and not uncommon for such reductions to be so extensive as to pare down compensation to a nil award. In that way, without any modification of the terms of section 123(4) of the ERA on the rules governing the obligation of employees to mitigate their loss, any future success under clause 22 of the ERB is likely to be a “Pyrrhic victory” for the employee.

5.4 Of course, another technical route to take out some of “the sting” and/or offset (rather than avoid, since the basic and compensatory awards are calculated differently and the mitigation rules apply to the latter, but not the former) such large reductions in compensation would be to amend clause 22 of the ERB to introduce a minimum basic award along the lines suggested in paragraphs 4.3 to 4.6 above. As noted, this could mirror the terms of section 120 of the ERA and section 156 of the TULRCA which provide for a minimum basic award of £8,533 in other particular cases where the law has provided that the dismissal is automatically unfair.

APPENDIX

QUALIFICATIONS

(1) Professor of Labour Law at the University of Edinburgh since August 2018;

(2) Articles and books cited with approval by Lords Hope, Wilson and Sumption in the UK Supreme Court in *Société Générale (London Branch) v Geys*,[7] as well as by the Hong Kong High Court, the Federal Court of Australia, the Law Commission, the Scottish Law Commission, the UK House of Commons Library and the International Labour Organization.

(3) Author of one of the leading textbooks on UK Labour Law, namely *Employment Law in Context*, 5th edition (Oxford, OUP, 2025) (see Employment Law in Context - Oxford University Press) and *VSI: Employment Law* (Oxford, OUP, 2022) (now published into Korean and Japanese) (see Employment Law - David Cabrelli - Oxford University Press); and

(4) Regular contributor of op-ed pieces to the Times, Financial Times, IAI and the Raconteur; and

(5) Practised as a solicitor in employment and corporate law during the period from 1997 to 2003 at Messrs Shepherd & Wedderburn, MacRoberts and Thorntons WS.

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[7] [2012] UKSC 63; [2013] 1 AC 523.