EXPLANATORY MEMORANDUM TO

THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992 (AMENDMENT OF SCHEDULE A2) ORDER 2024

2024 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business and Trade and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Declaration

2.1 Justin Madders, Parliamentary Under-Secretary of State at the Department for Business and Trade confirms that this Explanatory Memorandum meets the required standard.

2.2 James Silcox, Deputy Director for Trade Union and Collective Rights at the Department for Business and Trade confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Lucy Allatt at the Department for Business and Trade, email: lucy.allatt@businessandtrade.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument will add the protective award for non-compliance with collective consultation requirements to Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"). This will mean that, where an employment tribunal is making a protective award under section 189 of the 1992 Act, and it appears to the employment tribunal that the employer has unreasonably failed to comply with a relevant Code of Practice, the employment tribunal may increase the employee's award by up to 25%. Conversely, where it is the employee who has unreasonably failed to comply with the relevant Code, their award may be reduced by up to 25%. The Code of Practice on Dismissal and Re-engagement ("the Code") will be a relevant Code of Practice for this purpose, where the proceedings in question relate to a matter to which the Code applies.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales and Scotland.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales and Scotland.

5. Policy Context

What is being done and why?

5.1 Specific cases of dismissal and re-engagement, also known as 'fire and rehire', attracted significant media attention and raised the profile of the practice during the COVID-19 pandemic.

5.2 Concerns were raised about threats of dismissal being used as a pressure tactic in the early stages of discussions around implementing changes to employment contracts.

5.3 The Code clarifies and gives some legal force to accepted standards about how employers should act when seeking to change employees' terms and conditions.

5.4 Its purpose is to ensure that employers take all reasonable steps to explore alternatives to dismissal and re-engagement, and that they engage in meaningful consultation with a view to reaching an agreed outcome with individual employees and/or their representatives. The Code also aims to ensure that employers do not raise the prospect of dismissal unreasonably early or threaten dismissal where this is not, in fact, envisaged.

5.5 A public consultation on the draft Code was issued on 24 January 2023. The consultation was open for 12 weeks, until 18 April 2023, and received 50 responses: 8 responses from individuals and 42 responses from organisations, primarily consisting of trade unions, legal representative groups, and employers.

5.6 A response to the consultation was published on 19 February 2024[1]. The Code came into effect on 18 July 2024.

5.7 Some respondents to the consultation suggested adding the protective award (for non-compliance with the collective consultation requirements in the 1992 Act) to Schedule A2 of the 1992 Act, in order to increase the deterrent effect of the Code

What was the previous policy, how is this different?

5.8 The collective consultation requirements in the 1992 Act apply (among other things) to dismissal and re-engagement scenarios involving 20 or more employees. Adding the protective award to Schedule A2 of the 1992 Act will increase the deterrent effect of the Code by adding a key potential claim in dismissal and re-engagement scenarios to the list of awards that can attract a 25% adjustment for non-compliance with the Code.

5.9 The protective award was not previously capable of adjustment for failure to comply with a relevant Code of Practice

6. Legislative and Legal Context

How has the law changed?

6.1 An employment tribunal may make a protective award under section 189 of the 1992 Act where an employer has failed to comply with one or more of the collective consultation requirements set out in sections 188 and 188A of the 1992 Act. Per section 188(1) of the 1992 Act, the collective consultation requirements apply where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. Section 189(4) of the 1992 Act provides that the protective award can amount to a maximum of 90 days' pay.

[1] The Government response to the consultation on the draft Code is available at: https://www.gov.uk/government/consultations/draft-code-of-practice-on-dismissal-and-re-engagement

6.2 This instrument adds the protective award under section 189 of the 1992 Act to the list of tribunal jurisdictions to which section 207A of the 1992 Act applies. That list is set out in Schedule A2 of the 1992 Act. Where section 207A of the 1992 Act applies, and where it appears to the employment tribunal that a relevant Code of Practice applies and that the employer has unreasonably failed to comply with it, the employment tribunal may increase any award it makes to the employee by no more than 25%. The employee's award may be reduced by no more than 25% where it is the employee who has unreasonably failed to comply with the relevant Code of Practice. Per section 207A(4) of the 1992 Act, a relevant Code of Practice is one which relates exclusively or primarily to procedure for the resolution of disputes.

Why was this approach taken to change the law?

6.3 This is the only possible approach to make the necessary changes.

7. Consultation

Summary of consultation outcome and methodology

7.1 See paragraphs 5.5-5.7 above for a summary of the outcome and methodology of the consultation undertaken on the draft Code.

8. Applicable Guidance

8.1 Guidance on the protective award is available on GOV.UK[2] .

8.2 Guidance on collective consultation requirements is available on GOV.UK[3]

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because there is estimated to be a low level of impact per business. This instrument and the Code operate within the existing legal framework that employers are already required to comply with. Employees may take a claim to an Employment Tribunal for breach of collective consultation requirements and may be awarded a protective award. An employer who is also found to have failed to comply with the Code may be required to pay an uplift of up to 25% to the protective award. We expect the only direct cost to compliant businesses to be some minimal familiarisation cost with the new regulation. Non-compliant businesses would also see a higher cost in the form of increased compensatory awards, which we estimate would likely fall below a maximum of £1.5m a year. This cost to those non-compliant businesses represents a transfer (i.e. a benefit) to workers.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies because employers are already required to comply with collective consultation requirements.

[2] Guidance on the protective award is available at: https://www.gov.uk/government/publications/explaining-your-protective-award/explaining-your-protective-award.

[3] Guidance on collective consultation requirements is available at: https://www.gov.uk/staff-redundant/redundancy-consultations.

9.3 The legislation does impact small businesses but does not impact micro businesses.

9.4 The legislation does impact employers who are dismissing 20 or more employees. This is because the collective consultation requirements in section 188 of the 1992 Act only apply where 20 or more employees are being dismissed.

9.5 There is no, or no significant, impact on the public sector because employers are already required to comply with collective consultation requirements.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring of this legislation is to consider how it changes behaviour in scenarios where employers are considering making changes to employees' terms and conditions and envisaging that they might opt for dismissal and re-engagement in order to effect the changes.

10.2 The instrument does not include a statutory review clause because the annualised net impact on business is expected to be less than £10m.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 This instrument is related to the Code of Practice (Dismissal and Re-engagement) Order 2024. That Order was made under section 204(3) of the 1992 Act in order to bring the Code into effect. The Code of Practice came in to force on 18 July 2024. This instrument will increase the deterrent of the Code by adding a key potential claim in dismissal and re-engagement scenarios to the list of claims that can attract a 25% uplift for non-compliance with the Code. This instrument will come into force on 20 January 2025. From that date, any unreasonable failure to comply with the Code – whether on the part of employers or employees, could affect the level of awards made by employment tribunals.

12. European Convention on Human Rights

12.1 The Parliamentary Under-Secretary of State at the Department for Business and Trade, Justin Madders MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment of Schedule A2) Order 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").