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Dear Chris,

Thank you for your recent comments during the Employment Rights Bill's ('the Bill') Committee Stage on 12 December. I committed to writing to you on the issues you raised as we debated Amendments 160 and 161 on fire and rehire measures within the Bill.

Clause 22 of the Bill will end unscrupulous fire and rehire tactics that leave workers at the mercy of bullying threats. Employers will only be able to use the practice where they genuinely have no alternative, where they are in financial difficulties which threaten their business. This means that employers will be able to use the practice where absolutely necessary to save jobs and prevent redundancies.

Subsection (4) of new section 104I of the Employment Rights Act 1996, inserted by clause 22 of the Bill, sets a high bar for the use of fire and rehire, to eliminate the practice where employers do not need to use it, whilst allowing an employer in financial difficulties to use the practice as a last resort.

The government's view is that Employment Tribunals will interpret the word "likely" in the context of the financial difficulties exemption as a whole, and would see that the intention is clearly for this exemption to set a high bar. Subsection (4) uses the wording "likely in the immediate future." The Employment Tribunal would therefore have to consider the word "likely" in this context and consider whether it is likely that the financial difficulties in the immediate future were going to affect the employer's ability to carry on as a going concern. It would not be enough for there to just be a vague possibility of this happening or as a justification for general restructuring. As this will be fact specific, the government expects that the Employment Tribunal will assess this on a case-by-case basis, and they will have to decide how it is applied in particular circumstances.

The exemption also requires the employer to show that “in all the circumstances the employer could not reasonably have avoided the need to make the variation”. It is therefore not enough for the employer to demonstrate the reason for the variation was to address the financial difficulties that were, or were likely in the immediate future, to affect the employer’s ability to carry on the business as a going concern, but they must also show that they could not have reasonably avoided the need to make the variation.

I hope this letter provides clarity around the policy and practical intent of this clause, and I am placing a copy of this letter in the Library of the House.

Yours sincerely,

JUSTIN MADDERS MP
Minister for Employment Rights, Competition and Markets
Department for Business and Trade