Department for Business, Innovation & Skills

Consultation on Amendments to Employment Tribunals Postponement Procedures

Response by Thompsons Solicitors

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THOMPSONS SOLICITORS

STANDING UP FOR YOU

QUESTION 1: Is a limit of 2 successful postponement applications per party, per case, appropriate?

No.

Given that the number of postponement applications are statistically very small (see below) and that the concept was introduced in a Bill that got its first reading in June 2014 and is currently at Report Stage in the House of Lords, this whole consultation seems to be a very delayed sledgehammer to crack a very small nut. A 'consultation' at this stage makes a mockery of the concept.

No evidence of a problem

The consultation says that in the two years up to 31st March 2013 there were about 67,750 postponements, and, of those that were successful, 80% were made by claimants.

Given that over the same period there were 126,055 new cases at the Employment Tribunal, the number of postponements per case is an average of 0.54. We note the absence of any information about the number of unsuccessful postponement applications or why the successful postponement applications were granted.

Whilst the statistics provided in the consultation are interesting, we cannot see any compelling justification for why this is a problem that would require legislative change.

Existing restrictions

The Employment Tribunal is obliged by Rule 2 to consider applications for postponement according to the overriding objective, which balances all parties' positions in the interests of justice.

In addition there is Presidential Guidance on seeking the postponement of a hearing (issued 4 December 2013) which imposes tight restrictions. There is also extensive case law about it.

Given the current restrictions above, the fact that a postponement application was successful should be prima facie evidence that it was justified and, as such, it is hard to see why the government is looking to restrict them.

One size does not fit all

The proposed new Rule 30A will apply to all Employment Tribunal cases from the small wages claim to the very extensive and long running equal pay (equal value) multiple.

The former is often resolved shortly after the ET3 is lodged. The latter, on the other hand, may have several thousand claimants, numerous factual and legal issues to resolve, and rely on an independent expert. There will be in-built at least a Stage 1 equal value hearing, a Stage 2 equal value hearing and a final hearing, all of which are typically spread over a time frame measured in years. A limit to postponements in complex cases is neither realistic nor fair and it is absurd to treat all cases identically on this issue.

Mistaking source for cause

A key error these proposals make is to assume that the party applying is the cause of the delay. In Thompsons' experience most applications for postponement are down to the other side's default – e.g. late discovery. These proposals make no attempt to identify blame.

As proposed, there is the very real risk that despite the other party being the cause of repeated postponements, the party behaving properly loses or jeopardises their limited number of applications. The consequence will be a reduction in co-operation between the parties.

And what of the situation where the parties agree that a postponement is desirable and make a joint application? Are both to use up a one of their two chances to apply, or just the party who lodges the joint application?

'Efficiency' versus 'justice'

In its quest to treat courts and tribunals as a business, and not as bodies who administer justice, the government applies certain concepts inappropriately. One example is where this consultation talks on page 7 about Tribunals proceeding 'as efficiently as possible.'

Whilst we welcome efficiency, it is not 'efficient' to force parties to proceed where they cannot because of an arbitrary limit. It can only lead to injustice and appeals and undermines public confidence in the justice system. It will also lead to evasion behaviour as parties seek to work around its blunt and draconian impact.

There is no consideration of the impact of a postponement in these proposals. There is a significant difference between an application several months prior to the hearing date which causes a slight delay, and one immediately before a hearing which puts the other parties (and their witnesses) to significant inconvenience and them at delay in getting relisted. To refuse the former on the basis of an arbitrary limit is a nonsense.

There is a risk that the limit would be used by a respondent to effectively blackmail a claimant into accepting an offer at a significant undervalue. We fear a situation where a claimant cannot proceed for a good but prosaic reason, and, having used up their two application limit, the respondent adopts a tactic of threatening costs to secure a drop hands settlement despite the claim having merits. This would be a serious abuse that would not even be brought to the Tribunal's attention.

The overriding objective enables Tribunals to deal with cases fairly and justly. This includes, so far as practicable: ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense. A Tribunal shall seek to give effect to the overriding objective when exercising any power given to it by the Rules, or when interpreting them (including postponements). This allows for a nuanced application of Rules and judicial discretion.

When is a postponement not a postponement?

For the purposes of section 30A(5) there will only be a postponement where an application: "…*results in the relevant hearing being rescheduled to a future date or dates.*"

This has the effect that only if a hearing is actually relisted is it actually a postponement. A party who has used up their two application 'chances' could in theory make an application for another postponement which may well take time to list even though they know it wouldn't succeed.

QUESTION 2: Is a deadline for postponement applications of 'no less than 7 days before the Employment Tribunal hearing' reasonable?

No.

Whether an application to postpone is reasonable depends on why it was made at the time that it was.

An Employment Tribunal is only obliged to give 14 days' notice of the listing of a hearing[1] and, by the time the notice has arrived in the post, the 7 days before the hearing to revert to the Employment Tribunal may have gone.

QUESTION 3: Do you agree with the two specified exemptions to the new rules on postponements?

There are three exceptions, not two:

1. Where there are 'exceptional circumstances'
2. Where the application was necessitated by an act or omission of another party or the tribunal; and
3. Where the parties and tribunal agree that a postponement is desirable to give time to negotiate a settlement.

We will, however, focus on the latter two.

Necessitated by an act or omission of another party or the Tribunal

Clearly there should be no restriction where the postponement is caused by the Tribunal.

'Party' is a phrase commonly understood to refer to the claimant and respondent. However, it could be anyone. And, in this context, it needs to be the respondent if it is to make any sense at all. In that way it will encompass experts and witnesses becoming suddenly unavailable.

The focus upon an act or omission does not deal with the situation where a postponement is a normal, sensible, or indeed required, step to take. And for instance, it would seem that a stay would cause a problem.

Under Rule 30A(5) a postponement is defined as any adjournment or postponement which results in the relevant hearing being rescheduled to a future date. A stay meets that definition. However the cause of a stay may not be due to a party's act or omission, e.g. where an appellate decision in unconnected litigation is expected to resolve some or all of the issued claim.

Arguably too if the parties attend the first day of a multi-day hearing and suggest it be treated as a reading day, with the case starting properly in the morning, that would appear to be a postponement under the definition. Is agreeing with the parties' suggestion an 'act' by the tribunal? Or exceptional?

Universal agreement for settlement purposes

This provision is clearly drafted with the situation of one claimant and one respondent in mind, and where all the issues in the case are between them alone. It does not consider multiple parties and jurisdictions.

[1] Rule 54 for preliminary hearings, and Rule 58 for final hearings

Thompsons is currently engaged in a major piece of Employment Tribunal litigation where there are 1600 legally represented claimants backed by three different unions, five litigants in person, and two different respondents. What if everyone but a single litigant in person wishes a postponement to explore settlement? Settlement negotiations are hardly 'exceptional circumstances' for Rule 30A(3) and, prima facie, the Employment Judge would be obliged to refuse a postponement because of a single individual's right of veto. Also, getting instructions about consenting to a postponement from large numbers of individuals is practically impossible which means that this exception is potentially of no use to (and therefore discriminates against) parties in large scale claims.

It is easy to see that on a smaller scale: imagine a TUPE situation where unfair dismissal claims are against the transferor and failure to consult claims are against the transferee. These are distinct and separate jurisdictions arising from common facts, but settlement could be vetoed by a party without any interest in the outcome of that settlement.

QUESTION 4: Do you agree that a postponement or adjournment granted less than 7 days before the Tribunal hearing should be regarded as 'late' for the purposes of considering a Costs Order or Preparation Time Order?

No, not necessarily. See our answer to Question 3.

QUESTION 5: Do you agree with the basis of the cost elements that have been identified due to a postponement?

No. It is a pointless addition which is covered by the Rules already.

Rule 76(2) says: "A Tribunal may also make such an [*costs or preparation time*] order … where a hearing has been postponed or adjourned on the application of a party."

The suggested addition therefore effectively has the Rule saying that costs may be awarded where either the hearing was postponed, or where it was postponed within seven days of that hearing. It adds nothing at all to the existing rule.

QUESTION 6: Do you have any evidence to clarify whether the cost of a postponement to any party changes if two or more postponements have already been granted?

The fact this question is being asked is evidence that this proposal has simply not been thought through.

The proposed Rule 30A treats the postponement of a five minute representative-only telephone preliminary hearing to list another hearing in the same way as the postponement of a four week discrimination hearing with counsel and multiple witnesses. To talk of 'the cost of a postponement' is therefore absurd.

In the former, the cost is simply a rescheduling in the diary, and is negligible. In the latter, brief fees may have been incurred, a day's pay forgone or holiday entitlement used up, and the trouble and expense of contacting parties and witnesses, and relisting, may be considerable.

Costs are even more significant where the application is made at the hearing itself. By that point legal representatives have attended and costs have been incurred.

It is important to remember that work done to prepare for a hearing is, on the whole, not wasted; it is simply used another day. No witness statements need redrafting, the documents in the bundle are the same; and the cross-examination preparation remains the same.

This brings us to the 'conservative estimate' of the benefit to business due to a reduction in postponements in Annex C. This is said to be 'an average of £590' per request which is, with respect, a nonsense.

The calculation is achieved by taking the average cost of a Tribunal case in total, from the 2008 survey of Employment Tribunal applications (£2,952.96), then taking the number of days the survey found that employers spend dealing with a case (five) and dividing one by the other. There is then an unspoken assumption that a whole day's time is lost.

The key, and most obvious flaw with this methodology, is that this assumes that the cost of a postponement is the same as the cost of a hearing. It is not. All the time listed in Annex C is spent whether the hearing proceeds or not. It is the time engaged in giving instructions, drafting the witness statement, discovery etc. It is not incurred because of the postponement. The lack of any causal relationship therefore renders this £590 figure utterly misleading.

This approach also ignores the claimant's costs where a postponement is forced upon them.

QUESTION 7: Do you have any evidence to clarify whether the cost of a postponement to any party changes if the postponement is requested less than 7 days prior to a hearing?

See our answer to Question 6.

QUESTION 8: Do you believe that setting the deadline for postponements at 7 days prior to hearing (unless there are exceptional circumstances) will cause any party to incur additional costs?

Not of itself, no.

QUESTION 9: Can you identify any particular impacts that the proposed changes to the Rules of Procedure for postponements would have, on people with Protected Characteristics as defined in the Equality Act 2010?

We note that it is official government policy that: "Impact assessments are generally required for all government interventions of a regulatory nature that affect the private sector, civil society organisations or public services."[2]

That same guidance says that they are required (i.e. mandatory) where the proposals will reduce costs on business. An impact assessment for the *Small Business, Enterprise and Employment Bill* asserts an "Estimated benefit to business of £0.96 million each year."

We note however that that there is no impact assessment either with this consultation or for what is currently Clause 146 of the *Small Business, Enterprise and Employment Bill* which enables it. We do not think that asking this question and encouraging anecdotal evidence is an adequate substitute.

The Protected group most likely to see an impact will be the disabled. Those who seek adjournments because of their disability, or the unavailability of a helper etc, will come up against this limit problem.

[2] Paragraph 13.4, *Guide to Making Legislation,* Cabinet Office, July 2014

QUESTION 10: Can you identify any additional costs associated with a Tribunal postponement that would be incurred by people with Protected Characteristics?

Not particularly, though there may be some where they rely on a third party for assistance.

We can envisage a situation where the stress of facing these limits will be a cost to the health of some disabled claimants. Similarly we can envisage situations arising where a disabled claimant needs to choose between proceeding when they are not up to it medically or withdrawing the claim; or of having to abandon a claim because the hearing date clashes with treatment. We would hope that an Employment Judge would see these as exceptional circumstances and grant an application, but the limit on the number of applications raises the stakes in a wholly unnecessary way.

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