Department for Business, Innovation and Skills
Resolving workplace disputes – a consultation
Response from Thompsons Solicitors

April 2011

About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Executive summary

- Support reforms to promote fair and effective resolution of workplace disputes.
- Proposed reforms driven by anecdote and obsession with reducing ET claims, not by fairness or genuine need.
- No statistical evidence for claim of dramatic increase in employment tribunal claims.
- Existing provisions of ET system deal with many perceived problems.
- Extending unfair dismissal qualification will increase the number of claims pursued under one or more jurisdictions.

Introduction

Thompsons' experience of representing employees through the Employment Tribunal (ET) system convinces us that there are reforms that will more effectively promote the fair and effective resolution of workplace disputes.

We are concerned however that the impetus for the changes being proposed is an obsession with reducing the number of ET claims and not with creating a fairer system overall.

We are also alarmed by the amount of anecdotal evidence being produced in support of these proposals, including of the need to reduce the number of claims, when there is no statistical evidence.

Reports produced by business organisations to lobby for employment deregulation are being used as evidence of the need for that reform without proper and objective consideration of the merits of the arguments and views they put forward and any evidence they offer.

We also fail to detect any thorough analysis of the consequences, intended or otherwise, of the proposals for reform. We trust that the consequences highlighted in the responses to the consultation by those involved in the resolution of workplace disputes will be properly considered.

Where's the evidence?

The review claims that there has been a "dramatic" increase in ET claims in recent years. It states that claims rose by 56% from 151,000 in 2008-9 to 236,100 in 2009-2010.

The consultation fails however to analyse what the available empirical data shows to be the reason for the increase in tribunal applications, or indeed if there really has been an increase in claims.

The Quarterly Statistics published by the Ministry of Justice and the Tribunals Service for the quarter October-December 2010 show that claims in the employment tribunal were down 51% in the period October-December 2010 compared to the same period in the previous year. This included an 11% fall in individual claims and a 62% reduction in multiple claims[1].

It appears that these statistics have been overlooked by BIS.

The Employment Tribunal and EAT Statistics (ETS) 2009-2010 (GB) reveal that the 85,000 increase in case numbers between 2008 and 2010 cited by the consultation was accounted for by an increase in "single" claims of 8,900 and an increase in "multiples" of 76,100[2].

The substantial increase in "multiples" was mainly due to the increase in Working Time Directive claims from 24,000 to 95,200. As the ETS points out, this was due mainly to the mass working time claims lodged by airline industry workers.

For jurisdictional reasons, these have to be re-lodged every three months. The effect is that the number of claims appears to be increasing significantly when in fact there is no increase.

The tribunal President has the power to direct that such claims do not have to be continually re-lodged, but it is a power that is rarely used.

There is no acknowledgement of this issue in the consultation paper and we wonder if BIS is aware of the rules on issuing multiple claims. The distortion of statistics which it creates could easily be remedied by enabling the clock to be stopped when such claims are issued. We would be happy to discuss further with BIS officials how this could be achieved.

The Acas response to this consultation, while also not referring to the fourth quarter 2010 statistics, provides further insight into the "rise" in ET claims and the impact of multiple claims on the statistics.

It says that statistics for "single claimant cases" are seldom quoted, even though they are a far better barometer of workplace disputes generally. It points out that the rise of 14% of single claimant cases between 2008/9 and 2009/10 can be largely attributed to the economic climate, but that in 2009/20 there were fewer single claimant cases that in 2000/01[3].

As per our point above, Acas explains that if large equal pay multiple claims were excluded from the statistics then the number of ET cases referred to it for conciliation in the 12 months to the end of February this year was 14% lower than in the previous 12 months.

This would seem to be consistent with the fourth quarter Tribunal Service statistics for 2010. We do not understand why the government appears to be overlooking these facts and statistics, preferring instead to argue that there has been a dramatic increase in claims, many of which are weak. There is simply no evidence of this, but plenty to the contrary.

In any event, like Acas, we suggest that the government should be mindful of what Michael Gibbons described in his 2007 report as the "low rate of employment litigation" in Great Britain. In 2002, 1.5% of the working population in Germany, and 0.7% of the working population in France,

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[1] Ministry of Justice *Quarterly Statistics for the Tribunals Service, 3rd quarter 2010-11 1 October 2010 to 31 December 2010*

[2] Ministry of Justice *Tribunals Service Employment Tribunal and EAT statistics 2009-10 (GB) 1 April 2009 to 31 March 2010*

[3] Acas response to *Resolving Workplace Disputes* (April 2011) page 30

submitted an employment claim. The figure for Great Britain was just 0.4%[4].

No evidence from the business lobby

The consultation paper also cites reports from and concerns expressed by a number of business representatives:

- The British Chambers of Commerce (BCC), in their report "Employment Regulation: Up to the Job?" (March 2010) claimed that ET cases were too costly and took too much time to be heard, that it was too easy for employees to make unmeritorious claims, and that employers could not balance risk without further information as to the remedy sought by the claimant.
- The CBI report "Making Britain the place to work: An employment agenda for the new government" (2010) said there needed to be greater consistency in tribunal awards and that action needed to be taken to deal with weak and vexatious claims.
- The Federation of Small Businesses' policy paper on tribunal procedures (August 2010) raised concerns about case management, "no win no fee" lawyers and deterring weak claims.
- The Institute of Directors' Business Manifesto 2010 thought that there were too many weak claims, with no incentive for employees and their lawyers not to pursue them.
- The Forum of Private Business' Employment Law Panel (reports issued in February 2010 and September 2010) raised further concerns in relation to weak and vexatious claims, the stress and cost to small businesses and the impact on staff morale.

With the exception of the BCC - and even then only in relation to the time taken for tribunal cases to reach hearings - not one of these reports contains any data as evidential grounds for the concerns expressed. The concerns expressed may be genuinely felt, but they are based exclusively on anecdote and impression.

And yet, rather than looking at the available statistics, the government appears to be treating these business lobby reports as evidence of the so-called dramatic increase in tribunal claims.

Understanding how the ET system operates

As said above, we are concerned that within government there may not be a full understanding of how the ET system operates and what the legal and procedural requirements are. This may explain why the issue of multiple claims and how they must be lodged, and how this distorts the statistics, appears not to have been appreciated.

Another distortion caused by the system but not acknowledged by the government is that low value claims, such as those for unpaid wages which are bound to win, have to go through the whole ET process just to recover a small sum.

A number of the consultation proposals reveal a misunderstanding of the way the system operates, or fail to take into account that the issue which the proposal is seeking to address is already covered by existing rules of procedure.

For example, the consultation seeks views on how to promote the use of compromise agreements as a means of resolving workplace disputes. As we explain in our response to Q8 below, a

[4] DTI Better Dispute Resolution: *Review of employment dispute resolution in Great Britain* by Michael Gibbons (March 2007) paragraph 1.18 page 15.

compromise agreement is not a means of *resolving* a workplace dispute. It is a means of *recording and implementing* an agreement reached for the resolution of a dispute. The proposal is conceptually flawed.

And at Q24, the proposal is that respondents should, if they are of the view that the claim contains insufficient information, be able to request the provision of further information before completing the ET3 fully.

As we point out, respondents already have this ability. Rule 4(4) allows Respondents to apply for en extension of time in which to submit an ET3. They may also seek further information in relation to a claim under rules 10(2)(b), 10(2)(d) and 10(2)(f).

Another example is Q27, where the proposal is to consider whether the test to be met before a deposit order can be made should be amended by the introduction of "clear criteria underneath the current test". We explain that there are already clear criteria underpinning the test.

Overlooked research

We are concerned that not only has the relevant and most recent MoJ and ETS data been apparently overlooked by BIS, but a number of important and well researched reports have also been disregarded.

Michael Gibbons' report in 2007, produced after a lengthy and detailed consultation process, recommended that the ET claim and response forms should be simplified, removing the requirements for unnecessary and legalistic detail, and eliminating the "tick box" approach to specifying claims and encouraging claimants to give a succinct statement or estimate of loss.

In addition, the most recent Survey of Employment Tribunal Applications (SETA) report shows that 58% of employers stated that they would not have been prepared to settle the claim for any sum of money - apparently regardless of what any statement of loss the claim may have contained.

These reports are particularly relevant to Q24 and 34.

One of the assertions made in the CBI report referred to above, that there should be greater consistency in tribunal awards, is directly contradicted by the Employment Tribunal System Steering Group's report on *Consistency within the Employment Tribunals*[5]. [ref] The report found no evidence of widespread inconsistency, only a "perception" of it.

Thompsons would suggest that it is not appropriate to legislate against a "perception".

We also draw attention to the research conducted for BIS in 2009 by Professor Richard Moorhead and Rebecca Cumming. The authors looked at the reasons why claimants make ET claims. They concluded that the claimants they "*were largely motivated by a sense of injustice, rather than more instrumental series of compensation*"[6].

Rather than just accept the anecdotally based views expressed by business organisations, the government should also consider the findings of such research.

The law of unintended consequences

We are concerned that the government has not properly appreciated the consequences of some of its proposals.

We set these out in more detail in our response to the questions below. They include that representatives will be obliged to prepare for the possibility of strike out at every hearing (Q21).

[5] The Employment Tribunal System Steering Board Report on consistency (March 2010).
[6] Employment Relations Research Series No 101 *Something for Nothing? Employment Tribunal claimants' perspectives on legal funding* (June 2009).

This will inevitably increase costs for claimants and respondents.

The proposal that claimants submit "key details" of their dispute to Acas, which will "stop the clock" for the purpose of the time limit, followed by a period for conciliation, followed by submission of a more detailed claim to the ET would, we believe, lead to a re-run of the type of "satellite" procedural litigation seen after the 2004 procedures were introduced (and then abandoned).

And the proposal to increase the qualifying period for unfair dismissal claims from one to two years (Q57) would, in our opinion, simply increase the number of claims pursued under one or more jurisdictions which provide for "day one" rights.

CHAPTER 1 Resolving disputes in the workplace

Mediation

Q1: To what extent is early workplace mediation used?

Thompsons' trade union clients provide support and assistance to their members in the workplace to encourage both the employer and employee, wherever possible, to try and preserve the working relationship.

As a general rule, we only get involved at this stage where the relationship has broken down or the issues in dispute involve complex legal arguments such as discrimination claims, trade union victimisation and whistle blowing cases whereby the issues in dispute are more than an interpersonal conflict between employees and or management.

Q2: Are there particular kinds of issues where mediation is especially helpful or where it is not likely to be helpful?

We agree with Acas's response.

Mediation is helpful in resolving conflicts and workplace relationship breakdowns before they become formal disputes.

It would not work, in our view, in interim relief claims. If an employee goes to a tribunal and asks to be reinstated, compulsory month long mediation would not be appropriate.

Q3: In your experience, what are the costs of mediation?

Thompsons usually uses the mediation services provided by the ETs and Acas, which do not charge for their services.

However we are mindful of the costs that we incur in respect of the preparation leading up to mediation and the costs of attending mediation.

For example:

1 day's preparation	
Average hourly charging rate of £110.00 per hour x 6 hours	£660.00
Attendance at mediation	
Average hourly charging rate of £110.00 per hour x 6 hours	£660.00
TOTAL COSTS	**£1,320.00**

In the handful of cases where private mediators have been used, the one off cost was high albeit it is accepted that the costs vary depending on the mediator. We have encountered daily rates of between £300 to as much as £2,000. In most cases the employer has paid the cost of private mediation.

Q4: What do you consider to be the advantages and disadvantages of mediation?

Advantages

Thompsons' experience of mediation is that it often provides for a speedier and more effective way of resolving disputes than waiting to have the case heard by a full tribunal. Mediation can also focus both parties' minds on the issues in dispute to consider ways of resolving those disputes.

Mediation can often be arranged very quickly and the parties are able to meet with a degree of urgency and this is particularly helpful when the issue in dispute is the length of time it has taken to address internal dispute resolution procedures.

Where mediation can be set up it offers our clients alternative resolutions to what can otherwise be awarded by an ET. For example, where the employment relationship has irretrievably broken down and the employer is unable to return to that work place, mediation can explore the opportunity of agreeing a reference and a form of wording that goes beyond a factual reference.

A letter of apology may also be explored as well as financial compensation.

Mediation can also forge stronger employment relationships enabling the parties to consider alternative resolutions that promote sustained employment, such as opportunities for redeployment.

Where mediation is successful it keeps the employment relationship intact and can also be used by both parties as a learning tool to understand what went wrong, especially in some cases whereby miscommunication between employer and employee has played a large part in weakening the employment relationship.

Mediation can also offer a claimant the opportunity to air their feelings and let the employer know how upsetting the situation has been. It can also provide the opportunity to air a grievance without the need to attend a formal tribunal hearing.

Judicial mediation makes the client feel like they have had their day in court – something which some claimants say they need - because the mediation takes place at the ET and an employment judge is the mediator.

Mediation does save on legal fees and the stress and strain inherent in pursuing an employer or former employer to a tribunal.

Disadvantages

We agree with the Acas response as to the disadvantages of mediation.

Mediation is also expensive and can have the effect of raising hopes and will set the claim back if it fails.

In Thompsons' experience judicial mediation can be frustrating because some judges blur the lines between judging and conciliating a case.

When judicial mediation is granted the judge will allow the parties a whole day to mediate. Our experience is that the first half of a day is not particularly helpful. If judicial mediation was allocated a half day, this would focus the parties much more quickly to address the issues and to explore with one another ways in which to resolve those issues.

Thompsons finds that employers, in particular local authority employers, often attend mediation unprepared to mediate. They may also send representatives who have no authority to mediate a settlement or to go a above a certain sum of money in compensation. For the process to be successful, the parties must prepare in advance and actively correspond with one another before the mediation and the employer must consider in advance of mediation whether or not the resolution sought is achievable.

We suggest that more stringent rules on employers to attend mediation with a person with authority and the ability to make informed decisions both financially and on a more practical level will avoid valuable time being lost and increased costs.

The tribunal should also be given the power to award costs where this has happened and the delay has resulted in it being unable to resolve the dispute at mediation.

In an ideal world, all cases should be capable of reaching an amicable conclusion but we know from experience that this is not realistic and some cases simply cannot be resolved by talking.

For example, in an unfair dismissal case, a claimant may require a declaration of unfair dismissal which may assist them in their search for new employment or with a professional conduct hearing. Only an ET can provide such a remedy.

Q5: What barriers are there to use and what ways are there to overcome them?

Lack of awareness of the services and what they offer

The cost of mediation can be a significant barrier to mediation.

Thompsons is well aware of the support offered by tribunals, Acas and private mediators and passes that knowledge on to our clients so that they can make an informed decision as to whether or not mediation should be considered.

Thompsons would support a more proactive approach. The tribunal should enclose the information and guidance sheet on mediation services with every acknowledgment of claim and form ET3.

Similarly Acas could enclose a fact sheet setting out the mediation services offered to resolve workplace disputes when they send out their first letter confirming which officer has been allocated the case.

Delay

We agree that mediation can often be a quicker route to concluding workplace disputes than proceeding to a final tribunal hearing.

However, with judicial mediation, the due process and procedure that the parties are required to follow in order to get an employment judge to agree to hold mediation can sometimes act as a barrier to using this service.

This is of course something inherent in the judicial process and not a barrier inherent to mediation in itself.

Q6: Which providers of mediation for workplace disputes are you aware of? (We are interested in private/voluntary/social enterprises - please specify)

As a general rule Thompsons will use the mediation services provided by the tribunals and by Acas. However we are aware of organisations such as ADR and CEDR.

Q7: What are your views or experiences of in-house mediation schemes? (We are interested in advantages and disadvantages)

Trade unions settling disputes industrially is far preferable to resorting to law and employers who work with trade unions might find that the saved legal costs are considerable.

Thompsons has little experience of in house mediation schemes. However we are sometimes instructed by unions of behalf of members who have been involved in lengthy and protracted internal disciplinary and or grievance procedures and internal mediation was offered as a resolution to the workplace dispute.

For mediation to work, the employee must be able to have confidence in the independence of the mediator. In our view there is an inherent conflict of interest with in house mediation.

Compromise agreements

Q8. To what extent are compromise agreements used?

Compromise agreements are used widely. But they are not and should not be considered to be a method of resolving disputes in the workplace. Rather, they are a method of recording the terms on which disputes are resolved.

Q9. What are the costs of these agreements? (Note: it would be helpful if you could provide the typical cost of the agreements, highlighting the element that is the employee's legal costs)

In Thompsons' experience, the costs of compromise agreements varies widely. The element that is the employees' legal costs, provided for within most compromise agreements, ordinarily ranges from £250 to in excess of £500, plus VAT.

However, the typical cost of these agreements must also include the parties' time in conducting negotiations, together with the costs of legal advisers.

There is also the element that is respondents' costs, although we are unable to put a figure on that as we do not act for respondents.

Q10. What are the advantages and disadvantages of compromise agreements? Do these vary by type of case and, if so, why?

Compromise agreements protect employers from certain types of claims being brought by an employee. There are therefore advantages only for the employer, not for the employee.

Employees sign away their statutory right to make redundancy claims and unfair and wrongful dismissal and other types of claims. There is a fundamental inequality of arms in the drawing up of a compromise agreement and claimants are often bounced into taking advice and signing.

And for employees, enforcing the terms of a compromise agreement is often through the civil courts and can be difficult.

Q11. What barriers are there to use and what ways are there to overcome them?

The inequality of arms is a barrier for claimants. The extent and detail of the documentation can be daunting and they may feel hurried by their employer into taking legal advice.

Independent legal advice is limited to the fact that the employee is signing away their statutory rights to pursue come claims, rather than analysing the value of what is being signed away.

In addition, the standard fees that an employer will pay are too low to cover that sort of analysis and employers are unprepared to pay more for employees to receive it.

Early Conciliation

Q12. We believe that this proposal for early conciliation will be an effective way of resolving more disputes before they reach an employment tribunal. Do you agree? If not, please explain why and provide alternative suggestions for achieving these objectives.

We agree. We already have a model in pre claims conciliation which suggests that it will work. There are important differences between what exists and what is being proposed but there are sufficient similarities, but the Acas response sets out why the proposal should be effective.

We agree with Acas.

Q13. Do you consider that early conciliation is likely to be more useful in some jurisdictions than others? Please say which you believe these to be and why?

We think the question misses the point. Jurisdictions are not the right place to look.

Early conciliation has the potential to be useful across all jurisdictions, but it depends on the attitude of the parties.

A recent study for BIS found that "claimants appeared to be primarily motivated to claim because their own notions of justice were violated by their employer and/or because of encouragement by their family, peer groups and trade unions."[7] Another study suggested that for 6% of claimants compensation is not the most important issue[8]. In discrimination cases the claimant may seek a recommendation in an attempt to improve the respondent's practises[9] and in terms of settlement the second most common element is a reference[10].

While there is a link between jurisdiction and the attitude of the parties, in that a claimant whose wages have been docked may have less of a sense of injustice than someone who has been racially abused and therefore be more prepared to conciliate, we suggest that the question fails to avoid the confusion between correlation and causation.

Q14. Do you consider ACAS' current power to provide pre-claim conciliation should be changed to a duty? Please explain why?

We agree.

As said by Acas in their response to this consultation, it does not make sense to leave the provision of conciliation service as a discretionary power. Acas must not be obliged to conciliate in inappropriate cases.

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[7] Employment Relations Research Series No. 101 *Something for nothing? Employment Tribunal claimants' perspectives on legal funding* (Moorhead & Cumming, Cardiff University) June 2009, Page iv. A detailed analysis of claimants' motivations is in Chapter 5

[8] *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010), page 84

[9] See s.124(2)(c) *Equality Act 2010*

[10] *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010), page 82

Q15. Do you consider Acas' duty to offer post-claim conciliation should be changed to a power? If not, please explain why?

We agree with Acas that it would not be helpful to do so. It is also unnecessary – Acas wants to conciliate and there is little prospect of it turning claims away.

Q16. Whilst we believe that his proposal for early conciliation will be an effective way of resolving more individual, and small multiple, disputes before they reach an employment tribunal we are not convinced that it will be equally effective in large multiple claims. Do you agree? It not, please explain why.

There are difficulties in any form of conciliation where there are large multiple claims. This is evidenced by the fact that in 2009-2010 only 11% of equal pay claims were settled through Acas[11], which is the lowest settlement rate of all jurisdictions.

However, this is not to say that PCC is not appropriate for multiple claims, despite the logistical issues involved in such a proposal. In large scale multiple claims the logistics of taking instructions from every claimant within a month would be extremely difficult, as would obtaining signatures on COT3s from each claimant once an agreement had been reached.

Our view is that PCC should be offered for all multiple claims and where PCC is not suitable this will be clear from the views of the parties' representatives at the outset. If one or both representatives are of the view that the claim is not suitable for PCC, the claim should proceed immediately through the normal tribunal process.

Q17. We would welcome views on the contents of the shortened form

17a. We would welcome views on the benefits of the shortened form.

17b. We would welcome view on whether the increased formality in having to complete a form will have an effect on the success of early conciliation in complex claims.

We refer to the Acas response.

The shortened form should contain only the names and contact details of the parties and their representatives, the employment start and end dates, the date of the incident that gives rise to the claim and whether the claimant is aware of other claims by colleagues in the same circumstances.

Acas can then make contact with the parties. This approach avoids the battle lines being drawn first on paper and may therefore increase the chances of success of early conciliation.

Q18. We would welcome views on: the factors likely to have an effect on the success of early conciliation

18a. We would welcome views on: whether there are any steps that can be taken to address those factors.

18b. We would welcome views on: whether the complexity of the case is likely to have an effect on the success of early conciliation.

Again, we refer to the Acas response as to the factors likely to have an effect on the success of early conciliation.

As indicated in our response to Q13, the number of jurisdictions involved will not necessarily impact on the conciliation process.

[11] *Employment Tribunal and EAT statistics 2009-2010* (3rd September 2010) page 5

There do not appear to be statistics available to confirm whether or not a claim with multiple jurisdictions is more or less likely to settle than a claim with only one jurisdiction. However, it is true to say that the complexity of cases in terms of the nature of the case rather than the number of jurisdictions involved does not impact on the likelihood of settlement.

The opposite may be true. For example, in 2009-2010, 38% of race discrimination cases and 40% of sexual orientation discrimination cases were conciliated through Acas.[12]

Despite the fact that more complex cases will settle, the statistics do not confirm when these claims settle during the claim process. Therefore we think that conciliation should be available throughout the claim process and that any early conciliation period should be flexible.

If conciliation has commenced in a complex case, but is unlikely to be completed during the one month conciliation process, we propose that Acas is able to extend a it for a further period in order for conciliation to conclude.

Such flexibility we believe would be more likely to result in the early resolution of claims to the benefit of all parties.

19. Do you consider that the period of one calendar month is sufficient to allow early resolution of the potential claim? If not, please explain why.

20. If you think that the statutory period should be longer than one calendar month, what period should that be?

Acas says that the median average for resolving a case is 21 days, or 4 working weeks. Acas would like to be able to extend the statutory period if it believes that progress is being made.

We support this proposal and assume that it would involve the suspension of the limitation clock, and that it remain suspended while progress continues. Too rigid a timescale may force a claimant to launch formal proceedings which would detract from and undermine the process.

However, either party should be able to withdraw at any time.

Q21. What benefits or risks do you see from a power to strike out a claim or response (or part of a claim or response) being exercisable at hearings other than pre-hearing reviews? Please explain your answer.

We understand and accept that the pursuit of patently hopeless, or fundamentally weak cases leads to undue costs and may clog up the Employment Tribunal system. However, we are extremely concerned by the unsubstantiated myriad references within the consultation document to "weak cases imposing unjustifiable burdens on business".

None of the documents cited within the consultation identify any empirical or substantive evidence which underpins the stated "concerns that weak claims are plaguing the system". Despite this serious omission, these concerns of the business community are taken to be based on fact rather than the anecdote and assumption from which they appear to have arisen.

Further, the reports referred to in the consultation paper do not address any notion of what constitutes a weak or vexatious case, other than the suggestion that the respondent is the proper arbiter of this consideration. We are concerned that the assumptions prompting this question are not realistic, founded in good faith or empirically sound.

We consider that focusing on whether a power to strike out is exercised at a hearing called a pre-hearing review or at a hearing called a case management discussion misses the point. The real issue is one of proper process. If a claim or defence is capable of being struck out at any hearing

[12] *Employment Tribunal and EAT statistics 2009-2010* (3rd September 2010) page 5

without prior warning, then representatives will be obliged to prepare for that possibility to avoid being negligent and incurring the potential wrath of the client and tribunal.

This will increase the preparation costs for both parties and thus would directly undermine the consultation's stated purpose of containing costs.[13] In addition, it would further increase the stress of litigation (for claimants and respondents) and would be entirely contrary to the consultation's aim of reducing it.[14]

We are concerned that the spectre of an unexpected strike out situation ushers in a real danger that what should be a considered test of a case's merits becomes a snap test of a party's advocacy. This will place vulnerable or unrepresented parties at particular disadvantage. The most recent SETA survey[15] shows that respondents are represented in 73% of cases, whereas claimants are in just 34%, which in turn suggests the risk of a disproportionate impact upon claimants.

Moreover, a power to strike out a party's case in any hearing is unlikely to reduce the number of weak or vexatious claims to a greater extent than currently exists. Threshold tests will still be required[16], and individual cases will still have to be considered on their merits. For most cases this will require some consideration of the parties' evidence. The Court of Appeal and the House of Lords have both stated that cases are generally unsuited to this type of early determination on merits where the facts are in dispute.[17]

In addition, we believe that the proposed change to the power to strike out would invariably lead to satellite litigation and an increase in the number of appeals and applications for review, consequently increasing the workload and cost to tribunals and parties alike.

We believe that the existing safeguards are adequate. Under the current scheme, parties can apply for a hearing to consider striking out at any time. If they are minded to do so, a respondent can request that a case management discussion be converted to a pre hearing review to consider an application to strike out. An employment judge can then determine whether hearing a strike out application would be in the interests of saving time and costs, and whether it would be suitable in the circumstances of the case at hand.

This means that the parties can avoid wasted costs by having to prepare for a possible strike out at any hearing (which presumably could include case management hearings by telephone and hearings when one or more of the parties is unrepresented).

In our experience, during case management discussions, in keeping with their general power to manage cases,[18] employment judges frequently suggest that parties reconsider particular aspects of their claim or response.

For example, this might occur if one aspect of a claim was clearly out of time. As a result, unmerited claims or responses (or unmerited elements of claims or responses) can be withdrawn upon the invitation of an employment judge at a case management discussion without burdening the parties with further delay and legal costs.

We believe that this practice and the safeguards above offer sufficient protection at present.

We remain unconvinced that there is any cogent or compelling evidence of a real problem to remedy. Ultimately we consider that this proposal would serve no useful purpose if it were to be implemented and as aforementioned directly undermine the consultation's stated purpose of

[13] Page 2 of the Consultation document, and *passim*
[14] Page 96 of the Consultation document
[15] *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010), page 48
[16] Currently contained in the Employment Tribunal Rules, Rule 18(7)(b) for strike outs, and Rule 20(1) for deposit orders
[17] *Anyanwu v South Bank University* [2001] IRLR 305 House of Lords, and *North Glamorgan NHS Trust v Ezsias* [2007] IRLR 603 Court of Appeal
[18] Employment Tribunal Rules, Rule 10

containing costs and reducing the stress of litigation.

If things are as bad as the employer lobby says then why are their representatives not seeking strike outs? Perhaps it is because the problems they claim exist are grossly exaggerated, or simply absent.

Q22. What benefits or risks do you see from a power to strike out a claim or response (or part of a claim or response) being exercisable without hearing the parties or giving them the opportunity to make representations? Please explain your answer.

This power is available in the civil courts. However, that is a very different regime to the employment tribunals system. We consider that it is difficult to envisage many circumstances in which such a power could be reasonably, or safely exercised in an ET context.

To exercise this power in an ET context would be a draconian step. The administration of employment law is marked by being very fact specific, and deals with concepts of reasonableness in the determination of disputes to a degree for which the civil courts have no direct equivalent.

ETs are essentially required to determine "whose account of what is essentially a social encounter is more perceptive and reliable"[19].

We submit that any power to strike out a case in the absence of a hearing and/or of the parties' representations should be limited to very clear circumstances, such as jurisdictional issues e.g. a claim which is patently out of time or a claim for unfair dismissal by a claimant who has not a year's continuous employment.

The current process is that an employment judge will inform the parties that they are considering a strike out, say why, and invite comment. The judge's decision is then informed by the responses they receive. This is not a burdensome process. It often requires no more than a letter from or on behalf of each party, but it does provide a fair opportunity for parties to correct any misunderstandings or misinterpretations. This provides a safeguard which the implementation of this proposal will remove.

The government is yet to release its proposals on a fees regime, but given the stated purpose of fees to "…*disincentivise unreasonable behaviour, like pursuing weak or vexatious claims*"[20] we are uneasy that an application to review a struck out case in these circumstances could attract a fee.

This is a real cause for concern and could represent a substantial burden for a recently unemployed claimant who has just faced a month's delay while Acas was involved[21] and has just paid an issue fee. The current scheme, i.e. the simple process of inviting representations ahead of time, avoids this situation arising. It also gives parties, in particular those who are unrepresented, an opportunity to prepare emotionally for their case potentially coming to an abrupt end.

As outlined in our response to question 21, we are not convinced that there is evidence of a real problem to remedy and strongly disagree with this proposal. We also fear that establishing such a procedure could be a breach of Article 6 of the European Convention on Human Rights as it would be a final determination of a claim without the safeguard of a fact-finding stage.

In addition to our comments above, we do not think that the power proposed would save time or expense. If a claim was struck out in the absence of a proper arbitration of the parties' evidence, it is foreseeable that in the majority of cases where the claimant was represented an application for review would be submitted, which would subsequently have to be dealt with at a hearing.

In this circumstance no time would be saved, and legal expenses would increase directly

[19] *The shape of litigation to come: workplace disputes:* pages 4-6 of ELA Briefing, Volume 18, Number 2, March 2011
[20] Page 50 of the Consultation document
[21] See the proposals at page 21 of the Consultation document

undermine the consultation's stated purpose of containing costs and reducing the stress of litigation.

On the other hand, the proposal would presumably discourage unrepresented claimants from pursuing what may be entirely legitimate claims on the basis that their case appeared to fall at the first hurdle[22] thus denying them their right to attempt to seek redress.

Further, we repeat our comments in response to question 21. We believe that this proposed change to the power to strike out would invariably lead to significant satellite litigation and an increase in the number of appeals, consequently increasing the workload and cost to tribunals and parties alike. As above, it seems to us that the only beneficiaries of this proposed change would be lawyers charging for their professional services.

Consequently we consider that the proposal to extend the power to strike out in this way would be to the detriment of claimants and respondents alike and directly undermine the consultation's stated purpose.

Q23. If you agree that the power to strike out a claim or response (or part of a claim or response) should be exercisable without hearing the parties or giving them the opportunity to make representations, do you agree that the review provisions should be amended as suggested, or in some other way?

We disagree that any further power to strike out is necessary, required or desirable. We believe that the existing safeguards are adequate. We believe that implementing and invoking the power in relation to this proposal could be a breach of Article 6 of the European Convention on Human Rights as it would be a final determination of a claim without the safeguard of a fact-finding stage.

However, if changes are made to the way tribunals can exercise their power to strike out, such changes should be restricted to striking out on jurisdictional grounds.

Even more importantly, it is absolutely essential that tribunals are prohibited from striking out claims on the basis of one party's account of events.

In a just legal system it is critical that an application to strike out is not considered merely because one party disputes the facts as stated by the other. Disputes of fact must continue to be arbitrated properly after hearing the parties' evidence.

[22] *The shape of litigation to come: workplace disputes:* pages 4-6 of ELA Briefing, Volume 18, Number 2, March 2011

Q24. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on:

- **the frequency at which respondents find that there is a lack of information on claim forms**
- **the type/nature of the information which is frequently found to be lacking**
- **the proposal that "unless orders" might be a suitable vehicle for obtaining this information**
- **the potential benefits of adopting this process**
- **the disadvantages of adopting this process**
- **what safeguards, should be built in to the tribunal process to ensure that respondents do not abuse the process, and**
- **what safeguards/sanctions should be available to ensure respondents do not abuse the process?**

Once again, we are not convinced that there is evidence of a real problem to remedy. As above, no statistics or substantive evidence has been provided in favour of the assumptions upon which this proposal is based.

We do of course accept that a respondent cannot defend a claim they do not understand. However, respondents are already permitted to apply for an extension of time in which to lodge an ET3[23], and a respondent is able to seek further and better particulars of a claim by virtue of Rules 10(2)(b), 10(2)(d) and 10(2)(f)[24].

Permission to amend an ET3 after receiving further and better particulars of an ET1 is a common direction ordered by judges in ET proceedings.

Crucially, further particulars of claim should only be ordered when necessary in order to do justice in the case and those particulars should be for the purpose of identifying the issues, not for the production of the evidence. As outlined by Justice Wood, "complicated pleadings battles should not be encouraged"[25].

In our day to day experience, Thompsons continues to experience numerous requests on behalf of respondents for further and better particulars of claims which we do not consider are required for the respondents to understand the issues they face.

Further particulars are all too often made on the apparent dual basis that they shall accrue costs for the firm requesting them and grind down the claimant in what can properly be described as a pleadings battle.

The consultation needs to be aware of this tension when addressing the issue of what amounts to "a lack of information on claim forms" and the asserted frequency of that position.

Current case law dictates that the claimant is not required to disclose much information in the ET1[26] and simply stating the heading will generally constitute compliance[27]. There are many reasons why additional information is not provided, including late and incomplete instructions and clients whose first language is not English.

This issue is particularly relevant in tribunal proceedings given the short limitation periods applicable. Nevertheless, we consider that it can be adequately addressed by the existing provisions.

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[23] Employment Tribunal Rules, Rule 4(4)
[24] Respectively, information, documents and specific questions
[25] *Byrne v Financial Times Ltd* [1991] IRLR 417 at 419
[26] Employment Tribunal Rules, Rule 1(4)
[27] *Grimmer v KLM Cityhopper UK* [2005] IRLR 596, EAT

Where a party is ordered to provide further and better particulars the order will invariably contain the standard warning about the consequences of non-compliance.

An ET has the power to make an "unless order"[28] but case law makes clear that as a general rule this power should only be used where a civil court would use its own equivalent power, i.e. where any judgment otherwise obtained would not be fair between the parties.[29] Therefore a punitive order would only very rarely be justified and certainly should not be handed down as a routine procedural step.

We can see no good reason to make an unless order a routine tool of first resort. This would be an unnecessary, draconian device. As we noted above, these powers already exist. Employment judges should only order further and better particulars where they are genuinely required following the test in *Byrne v Financial Times Ltd* [1991].

If changes are implemented to the effect that respondents are more inclined to ask for further information as a matter of course, respondents will have to be suitably discouraged from making spurious requests when the issues in the case are quite clear, albeit the claimant's claim is not pleaded with the specificity which might be expected in other courts.

We suggest that if changes as suggested in question 24 are implemented, oppressive or unreasonable behaviour by the respondent should routinely be met with a costs order.

A clearly foreseeable problem with the suggestion of using unless orders is that before such an order could be made the tribunal would have to determine whether adequate information had been provided by the allegedly defaulting party. As such, the parties would inevitably seek to provide their views on whether there had been a breach of the unless order.

This would lead to more interlocutory correspondence and more work for parties, representatives and the tribunal (including the judiciary).

We believe this proposal would actually lead to proceedings being drawn out and many of the pointless procedural battles which took place under the disciplinary and grievance provisions of the Employment Act 2002 would be resurrected. The proposed change would undoubtedly lead to significant satellite litigation and an increase in the number of appeals, consequently increasing the workload and costs to all involved. This is entirely contrary to the stated aims of the consultation process.

We also note that if a claimant has had the benefit of ACAS involvement ahead of issuing the claim this perceived issue may be reduced and or remedied in advance, which might save costs (rather than retrospectively and at the significant cost and inconvenience which could arise under the current proposal).

Q27. Do you think that the test to be met before a deposit order can be made should be amended beyond the current "little reasonable prospect of success test"? If yes, in what way should it be amended?

We note the proposal to "consider whether it would be possible to amend the test to be met before deposit orders can be made, either by changing the test itself or introducing clear criteria underneath the present test to assist judges in applying deposit orders more effectively"[30] with some trepidation.

We do not understand the intended meaning of the closing phrase "applying deposit orders more effectively". This is not explained in the consultation paper. If the meaning is to encourage deposit orders in cases which have reasonable prospects of success in order to discourage their progress then this would make proceedings much more onerous for claimants and would be contrary to the

[28] Employment Tribunal Rules, Rule 13(2)
[29] *National Grid Co plc v Virdee* [1992] IRLR 555, EAT
[30] Page 31 of the Consultation document

overriding objective[31].

Further, we do not envisage how the threshold merits test could be sensibly amended. We consider that the next reasonable gradation on the scale of merit (alongside "no reasonable prospect" and "little reasonable prospect") is that the case has "reasonable prospects of success", in which case it should be entitled to proceed without a deposit being arbitrarily imposed upon the claimant.

The test for granting a deposit order currently has clear criteria underpinning it, and the consultation is mistaken to imply otherwise.[32]

As for the suggested criteria, our view is:

- The number of previous claims by the claimant is irrelevant. It is the merits of the claim before the ET that is relevant, and should be tested. It is as meaningless as considering the number of claims that a respondent has lost or settled as a requirement of it continuing its defence.

- The proposal will enable bad employers to argue that they should not have to face the claim because the employee has pursued other claims before, even if those claims were successful.

- If a claim is frivolous - and the claimant is a vexatious, serial litigant – the tribunal is entitled to take these matters into account in granting a deposit order under the present system.

Vexatious litigants are those who either knowingly lodge unmeritorious claims or litigate to harass the respondent, or do so for other reasons which amount to an abuse of process. There is a mechanism by which vexatious litigants can be barred from bringing further claims by the High Court and the names of those barred are publically listed.[33] It remains possible for a vexatious litigant to have a valid case but they would need to persuade a court of that fact in a process akin to a pre-hearing review.

Thompsons considers the number of previous claims to be wholly irrelevant to this issue. The claim before the ET is the relevant one, and its merits should be tested.

There has been no suggestion of a deposit order against a respondent who has been successfully sued in the past or who has settled previous claims. This would presumably (and correctly) be perceived as an unfair and meaningless criterion upon which to determine whether a respondent should be permitted to continue its defence. We suggest that the same rationale should be applied to claimants.

If the claim is unclear then further and better particulars should be requested and/or ordered. A deposit order is not an appropriate or useful means of clarifying issues.

We are confused by the suggestion within the consultation which appears to suggest that potentially expensive litigation can be made less expensive by imposing further expense on a litigant, most likely the claimant. And proportionality is already a consideration in the current system by virtue of the overriding objective[34].

So again, such a criterion is seemingly purposeless beyond any unstated aim of making ETs less

[31] Regulation 3(2), *Employment Tribunals (Constitution & Rules of Procedure) Regulations 2004* (SI 2004/1861)
[32] *Van Rensburg v Royal Borough of Kingston–upon–Thames* [2007] All ER (D) 187 (Nov) EAT
[33] http://www.hmcourts-service.gov.uk/infoabout/vexatious_litigant/index.htm
[34] Regulation 3(2), *Employment Tribunals (Constitution & Rules of Procedure) Regulations 2004* (SI 2004/1861)

accessible to claimants.

Q28. Do you agree with the proposal to increase the current level of the deposit which may be ordered from the current maximum of £500 to £1000? If not, please explain why.

We have a neutral view on this position, subject to the fact that a claimant's ability to pay must be taken into account when assessing the size of the deposit.[35]

We would question whether there is any basis upon which to assume that this mechanism would assist in achieving the stated aims of the consultation.

Q29. Do you agree that the principle of deposit orders should be introduced into the EAT? If not please explain why.

We do not agree that deposit orders should be introduced in the EAT. The ET is a court of first instance which is primarily tasked with establishing the facts of the case. Thereafter it applies the law.

The EAT is a reviewing court and the basis of its decisions is whether the ET got the law wrong. It does not carry out any significant fact-finding exercise.

Because of this key distinction the EAT is able to operate "the sift" in order to weed out cases with either no reasonable grounds for appeal or which are likely to obstruct the just disposal of proceedings[36].

Although usually done on the papers, it can involve the appellant attending a preliminary hearing. If the EAT considers that there are no reasonable prospects of successfully establishing an error of law then the appeal does not clear the sift, and does not proceed. The respondent to the appeal is not involved in this process and incurs no cost during it.

The sift is therefore a threshold test, albeit in a different juridical environment, but one where circumstances allow for a robust early assessment. We consider that the existing process already achieves for the EAT what the consultation considers the deposit should achieve for the ET.

We therefore do not consider that any change is necessary.

Q30. Do you agree with the proposal to increase the current cap on the level of costs that may be awarded from £10,000 to £20,000? If not, please explain why.

Yes. We do not however consider that costs should be awarded more frequently or more arbitrarily against claimants, which we respectfully suggest appears to be a latent aspiration of the consultation.

Q31. Anecdotal evidence suggests that in many cases, where the claimant is unrepresented, respondents or their representatives use the threat of cost sanctions as a means of putting undue pressure on their opponents to withdraw from the tribunal process. We would welcome views on this and any evidence of aggressive litigation.

Thompsons solicitors does not act for unrepresented claimants.

However, we are aware that some firms aggressively threaten costs, without good justification, as a standard litigation strategy. Claimants who are threatened by respondents in these circumstances face enormous pressure.

[35] Employment Tribunal Rules, Rule 20(2)
[36] EAT Rules, Rules 3(7) – 3(10), and EAT Practice Direction paragraph 2.5

There are occasions where a costs warning is perfectly legitimate. However, even then these are often presented in an unduly oppressive way and thus become objectionable.

Q32. Should there be sanctions against organisations which place undue pressure on parties, particularly where they are unrepresented? If yes, we would welcome views on:

- **what evidence will be necessary before those sanctions are applied**
- **what those sanctions should be, and**
- **who should be responsible for imposing them, and for monitoring compliance – for example regulatory bodies like the Solicitors Regulation Authority and the Claims Management Regulator, or employment tribunals themselves.**

Determining an appropriate sanction would require consideration of the individual threat and the factual matrix in which it was made. However, the damage caused by this behaviour is usually done out of the gaze of the public and the ET. For sanctions to have any effect the threatened party needs to bring them to someone's attention.

In addition, a litigant who withdraws following a threat will generally find their claim concluded by that action, either via a COT3, or by a dismissal upon withdrawal order.[37] This means that there are no longer any proceedings in which to make an application for costs. We would welcome a system whereby a threatened party could raise an application for costs based on an unreasonable costs threat after withdrawal or settlement of the claim.

In order for costs threats from respondents not to be worth making, any sanction would need to be an adequate deterrent in all cases, and not just the relatively few occasions when the issue will be pursued (as is the case under the current system).

We would also want to see a summary process for deciding that issue, since the cost of making a sanction application might otherwise exceed the value of any sanction. It would be unfair and unworkable to impose the burden and cost of policing this behaviour upon the victim of it without proper reward.

We consider that the injured party would have to receive the direct benefit of a sanction, and the full cost of securing it, in order to incentivise the policing of the problem.

Any sanctions could only realistically have meaning if administered by the ET.

Q33. Currently employment tribunals can only order that a party pay the wasted costs incurred by another party. It cannot order a party to pay the costs incurred by the tribunal itself. Should these provisions be changed? Please explain why you have adopted the view taken.

We strongly oppose this proposal. We suggest that natural justice dictates that a body should not be permitted to award itself income (particularly without any moderation or appeal mechanisms as seems to be the intention). This proposal risks undermining confidence in justice.

Further, we have experienced countless instances when the parties to proceedings have incurred significant expense due to failures on the part of the tribunal, particularly late postponements due to lack of judges.

Parties should remain unable to seek recompense from the tribunal, or the tribunal from the parties.

[37] Employment Tribunal Rules, Rule 25(4)

Q34. Would respondents and/or their representatives find the provision of an initial statement of loss (albeit that it could be subsequently amended) in the ET1 form of benefit?

Q35. If yes, what would those benefits be?

Q36. Should there be a mandatory requirement for the claimant to provide a statement of loss in the ET1 Claim Form be mandatory?

We note that the final recommendation of the Gibbons report in 2007 was to "simplify the ET claim and response forms, removing requirements for unnecessary and legalistic detail, eliminating the 'tick box' approach to specifying claims and encouraging claimants to give a succinct statement or estimate of loss."[38]

While we agree that early assessment of the value of a claim can be helpful for both parties, we do not consider that a requirement that claimants provide a breakdown of how much they are claiming on the ET1 would be beneficial. We believe this is merely a further attempt to ensure that making a tribunal claim is a more onerous experience for would-be claimants.

Given the unusually short limitation periods in these cases, it would be inappropriate and disproportionate to require significant further information from claimants at the outset. This proposal is particularly worrying when considered alongside the suggestions at question 24 in relation to issuing unless orders on a routine basis.

In addition, we are conscious that for the vast majority of respondents, who are represented, a calculation of the value of the claimant's claim is a straightforward exercise, particularly in claims for unfair dismissal, which form the majority of the cases before ETs.

It is the respondent and not the claimant who generally has access to full details of the claimant's earnings.

If Acas is involved it may be able to assist with valuation, but it has an obligation to avoid partisanship and assisting in this process may be perceived as just that by respondents and thereby undermine Acas in its broader role.

If the parties took advantage of Acas involvement ahead of lodging a claim, and Acas felt able to assist in producing a schedule of loss, then we believe there could be a case for encouraging a schedule of loss to be filed at the same time as the ET1.

However, the provision of a schedule *must not* be used to bar access to the tribunal in the same way as grievances were under the now repealed statutory dispute resolution procedures.[39] We do not think that it should be mandatory, preferring instead Gibbons' approach of encouragement.

We further note that it is usual tribunal practice for directions to be issued upon receipt of the ET3, and that these require a schedule of loss to be provided relatively early during the proceedings. We therefore question whether having it in the ET1 will be of significantly additional utility.

If the result of this consultation is that quantification of losses becomes an essential component in the ET1 (which we oppose), we recommend that a counter schedule must reasonably be required on the ET3. Any sanction for failure to provide a counter schedule must be comparable that any sanction for analogous failure on the ET1.

[38] *Better Dispute Resolution : A Review of Employment Dispute Resolution in Great Britain,* Michael Gibbons (March 2007), recommendation 12 on page 11

[39] Section 32 *Employment Act 2002*

Q37. Are there other types of information or evidence which should be required at the outset of proceedings?

Q38. How could the ET1 Claim Form be amended so as to help claimants provide as helpful information as possible?

There are no other types of information or evidence which should be required at the *outset* of proceedings.

However, we put forward a suggestion in respect of further information/evidence which should be provided at an early stage in the litigation process.

It would be helpful if respondents were obliged/ordered to disclose payslips or an equivalent documentary record of the claimant's earnings (covering at least the final three complete months of the claimant's employment).

It is common for claimants to have limited knowledge of exactly how their wage was calculated, and respondents can invariably access this information with relative ease.

We believe that the provision of documents relating to the claimant's earnings while employed by the respondent should be included as standard in any order for disclosure of documents in cases where the claimant is claiming compensation for loss of employment and/or for any monetary claim relating to his/her wages.

Likewise, claimants could provide documents relating to any social security benefits claimed and any payslips received during employment since their termination.

As stated in response to questions 34 to 36, if claimants are to be obliged to provide a schedule of loss on their ET1, respondents must be obliged to provide a counter schedule within their ET3. A respondent will generally be able to estimate the value of the claim against it. The SETA report shows that respondents are represented on a day-to-day basis in 60% of cases and that 86% of that representation was professionally trained[40].

We reiterate that the short time limits in ET claims must be considered when before requiring claimants to provide further information at the outset of a case. To ignore this very significant hurdle to the provision of further information would be prejudicial toward many would-be claimants with legitimate complaints.

The consultation makes various analogies to civil proceedings, but no thought appears to have been directed at the potentially pivotal issue of the unusually short duration of time limits in the ET.

Q39. Do you agree that this [*quasi-judicial tender*] proposal, if introduced, will lead to an increase in the number of reasonable settlement offers being made?

Q40. Do you agree that the impact of this proposal might lead to a decrease in the number of claims within the system which proceed to hearing?

Q41. Should the procedure be limited only to those cases in which both parties are legally represented, or open to all parties irrespective of the nature of representation? Please explain your answer.

Q42. Should the employment tribunal be either required or empowered to increase or decrease the amount of any financial compensation where a party has made an offer of settlement which has not been reasonably accepted? Please explain your answer.

We believe that the current system offers sufficient protection for parties making reasonable offers

[40] *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010), Figure 5.2 on page 47

and has sufficient power to punish parties who fail to accept them. Therefore we are unconvinced that a greater number of reasonable offers - and consequently less claims proceeding to tribunal - would result from the proposed changes, given that parties in employment litigation already frequently make offers "without prejudice save as to costs" to encourage the other side to seriously consider any reasonable offer.

The consultation proposes an adjustment of the Calderbank principle[41] and suggests that an offer could be considered on any question of costs under Rule 40[42]. However, we do not accept that costs should be routinely awarded against a party who refused an offer which they later failed to exceed at tribunal.

Regular costs awards as a result of the proposed changes would surely result in Calderbank offers being so frequently used that "one would soon be in a regime in which costs would not uncommonly be treated as they are in the High Court and other Courts. Yet it is plain that throughout the life of the Employment Tribunals the legislature has never so provided."[43]

Further, we consider there is a risk that the consultation proposals could in some ways formalise and enable the sort of bullying behaviour that is the subject of questions 31 and 32. We are not convinced that more claims could be settled in an equitable manner under the current proposals, particularly in respect of unrepresented claimants. Although we do not act for unrepresented claimants, we do not think costs penalties of the kind proposed should be imposed upon them.

We stress that in ET proceedings compensation is just one part of the justice package available. The primary remedy in most cases is not the monetary award, but a declaration that the claimant has been unfairly dismissed, discriminated against[44] or otherwise unfairly treated.

The employee is entitled to a finding on that matter and to maintain their claim to the tribunal for that purpose. As mentioned in response to Q13, a study for BIS found that "claimants appeared to be primarily motivated to claim because their own notions of justice were violated.

A claimant should not rightly be prevented from exercising their right to justice as a result of an offer to meet only the monetary part of the claim. If that happened an employer would be able to evade the provisions of the relevant Act by offering to pay the maximum compensation. If employers wish to compromise a claim, they can do so by admitting it in full or in part.

This is extremely rare in our experience.

Notwithstanding our comments above, if any proposal similar to that envisaged under this consultation is introduced, it is essential that the discretion of the tribunal is preserved. In these circumstances clear guidelines about the exercise of that discretion would be of assistance to all concerned.

Contemplation of any costs award following refusal of an offer to settle must take into consideration the non financial terms of the offer; including whether the offer was made with or without an admission of liability, on confidential terms etc.

The non monetary terms contained in an offer can often be as contentious and divisive as the sum of money on offer. For example, in cases involving loss of employment, the provision of an agreed reference is often central to reaching settlement.

There is a suggestion on page 37 of the consultation paper that Acas would not form part of the offer process until a party has made an offer under the proposed new rule, we think this is an ill considered idea. We think this could restrict the involvement of Acas, which is vitally important in assisting in settling ET cases, and might actually discourage parties from making offers.

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[41] Page 36 of the Consultation document
[42] Page 37 of the Consultation document
[43] Per Mr Justice Lindsay, *Monaghan v Close Thornton Solicitors* EAT/3/01 (20th February 2002), unreported, at paragraph 24
[44] See s.124(2)(a) *Equality Act 2010*

Acas should be involved in the litigation process more rather than less. To suggest otherwise would be contrary to the stated aim of increasing the proportion of cases which settle before a final full merits hearing.

We must also point out that the perceived merits of a case can often fluctuate. We would be keen to see safeguards in place to ensure that the reasonableness of an offer is judged not with hindsight, but upon the information reasonably available at the date of the offer.

Formalising offers to settle

Q43. What are your views on the interpretation of what constitutes a 'reasonable' offer of settlement, particularly in cases which do not centre on monetary awards?

A "reasonable" offer of settlement would have to take account of all the claims issued, the value of any potential tribunal awards, based on the statutory formulae, and take account of non-monetary issues such as the provision of a reference, admission of liability, and any undertaking to change working practices.

In our experience, in the vast majority of offers of settlement, an employer is reluctant or refuses to make any admission of liability even when agreeing to pay a claimant money.

Q44. We consider that the adoption of the Scottish Courts judicial tender model meets our needs under this proposal and would welcome views if this should be our preferred approach

Thompsons notes that the consultation proposes an adjustment of the Calderbank principle[45]. The current position on full Calderbank offers was summarised by the former President of the EAT thus:

> *"Moreover we confess to some unease about the consequence of the use of what was, in effect, a Calderbank offer in the Employment Tribunal context. We do not doubt that where a party has obstinately pressed for some unreasonably high award despite its excess being pointed out and despite a warning that costs might be asked against that party if it were persisted in, the Tribunal could in appropriate circumstances take the view that that party had conducted the proceedings unreasonably. … Whilst we would not want to deter the making and the acceptance of sensible offers, if it became a practice such that an applicant who recovered no more than two thirds of the sum offered in a rejected Calderbank offer was, without more, then to be visited with the costs of the remedies hearing or some part of them, Calderbank offers would be so frequently used that one would soon be in a regime in which costs would not uncommonly be treated as they are in the High Court and other Courts. Yet it is plain that throughout the life of the Employment Tribunals the legislature has never so provided. It can only be that that was deliberate."*[46]

Thompsons is of the view that this statement of the law should prevail, and welcomes the clear commitment in the consultation that any change should be "…without compromising what is unique and important about employment tribunals."[47]

We note that the consultation proposes that an offer could be considered on any question of costs

[45] Page 36 of the Consultation document
[46] Per Mr Justice Lindsay, *Monaghan v Close Thornton Solicitors* EAT/3/01 (20th February 2002), unreported, at paragraph 24
[47] Foreword, page 4 of the Consultation document

under Rule 40[48]. As the extract above illustrates however this is already the current practice where offers are made "without prejudice save as to costs", and has been for a long time.[49] This is not sufficient justification of itself for the introduction of the proposed quasi-judicial tender model.

We consider that the process has the potential to increase the number of reasonable offers being made, but only where the offeror has sufficient knowledge and information already to know that it is reasonable. Even then, that is simply leading one's proverbial horse to water. Unless the offeree is possessed of sufficient knowledge and information already to know that the offer is reasonable, the process may not see any increase in settlement overall.

Without that knowledge, or access to advice, the offeree may simply experience enhanced anxiety over costs and losses which are already the second greatest motivation in concluding a claim.[50] That scenario could in some ways formalise and enable the sort of bullying behaviour that is the subject of questions 31 and 32.

The consultation suggests this model would operate outside of a general cost-shifting context. As such it would only be truly effective if it produced more settlements, not more offers. Thompsons has some doubts that this would be achievable equitably where one or more party was unrepresented.

Whilst we would not suggest that litigants in person be deprived of the process should it be found to work, we would not consider any adjustment in awards to fair unless the ET's discretion was preserved. In this respect lessons can be learned from the uplift provisions under the repealed statutory dispute resolution procedures[51]. Thompsons feels however that clear guidelines about the exercise of that discretion would be of assistance to all concerned.

We are conscious that the merits of a case will frequently ebb and flow during its lifetime, and what may be a reasonable offer at one stage of a case, might reasonably be considered to be unreasonable at another. For these reasons we would be keen to see safeguards in place that ensured that the reasonableness of an offer is judged not with hindsight, but upon the information reasonably available at the date of the offer.

We would also wish to stress that in tribunal proceedings compensation is just one part of the justice package available. The primary remedy in most cases is the declaration that the claimant has been unfairly dismissed, discriminated against[52] or otherwise unfairly done by. The position was neatly summarised (in an unfair dismissal context) thus:

> *"An employee has a right … to have a claim of unfair dismissal decided by an Industrial Tribunal. Such a claim is not simply for a monetary award; it is a claim that the dismissal was unfair. The employee is entitled to a finding on that matter and to maintain his claim to the Tribunal for that purpose. He cannot be prevented from exercising that right by an offer to meet only the monetary part of the claim. If that were so an employer would be able to evade the provisions of the Act by offering to pay the maximum compensation. If employers wish to compromise a claim, they can do so by admitting it in full but they cannot do so by conceding only part of it."*[53]

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[48] Page 37 of the Consultation document

[49] Further illustration can be found in *Power v Panasonic (UK) Ltd* UKEAT/0439/04 (9th March 2005) where the claimant sought £180,000, rejected an offer of £25,000, was awarded £5,800 and had to pay costs of £10,000 because of it

[50] *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010), page 84 and Table 9.15 on page 228

[51] The initial uplift was stated in mandatory terms (s.31(2) and 31(3) *Employment Act 2002*) whereas now the uplift is discretionary (s.207A(2) and 207A(3) *Trade Union and Labour Relations (Consolidation) Act 1992*)

[52] See s.124(2)(a) *Equality Act 2010*

[53] *Telephone Information Services Ltd v Wilkinson* [1991] IRLR 148 EAT, paragraph 21. The recent decision of *Nicolson Highland Wear Ltd v Nicolson* UKEATS/0058/09 (23rd June 2010), unreported departed from this decision in relation to unfair dismissal but made no reference to it and must be treated with caution

In addition to the BIS study, another piece of research suggested that for 6% of claimants compensation is not the most important issue[54]. In discrimination cases the claimant may seek a recommendation in an attempt to improve the respondent's practises[55] and in terms of settlement the second most common element is a reference[56].

Thompsons would be keen to ensure that these important elements in the administration of justice are not lost in reforms prompted by fiscal concerns. Whilst we recognise that justice must be delivered to a budget, we must not lose sight of what is just and equitable and why the ET exists in the first place. As the Master of the Rolls noted recently:

> *"In our modern consumer, market-based society, with its multiplicity of laws and rights, and its increasing scope for legal disputes, it is more important than ever that we have effective, accessible institutions of law. If not laws go unenforced. They cease to be rights, but rather become privileges for those select few who can afford them."*[57]

Part C Shortening Tribunal Hearings

Witness statements to be taken as read

Q45. Anecdotal evidence from representatives is that employment tribunal hearings are often unnecessarily prolonged by witnesses having to read out their witness statements. Do you agree with that view? If yes, please provide examples of occasions when you consider that a hearing has been unnecessarily prolonged. If you do not agree, please explain why.

We agree that in many cases hearings are prolonged by witnesses reading out their statements in person. In our experience, cases can end up part-heard if witnesses read their statements and take longer than anticipated to do so.

The time taken to read out statements can also be prolonged by the way in which statements are drafted. Particular problems can arise if witnesses include lengthy extraneous information or quote extensively from documents. The time taken to read this out loud is unnecessary and can cause delays.

However, witness statements will still need to be read and we are not convinced that the time saved by not reading them out loud will be as significant as the consultation implies. It is important that a balance be struck between the need to speed up the process and the need for statements to be read.

Q46. Do you agree with the proposal that, with the appropriate procedural safeguards, witness statements (where provided) should stand as the evidence in chief of the witness and that, in the normal course, they should be taken as read? If not, please explain why.

Thompsons agrees that it is a sensible approach that the default position is that statements are taken as read. However, we believe that there must be adequate safeguards in place to enable evidence to be given in person if appropriate. There needs to be clear procedures enabling both

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[54] *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010), page 84
[55] See s.124(2)(c) *Equality Act 2010*
[56] *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010), page 82
[57] *Swindlers (Including the Master of the Rolls?) Not Wanted : Bentham and Justice Reform* Lord Neuberger of Abbotsbury MR, 2nd March 2011, paragraph 16

the judge to exercise their discretion on this point and the parties to request that certain evidence is given in person if necessary.

We also note that the government's proposals are based on an assumption that all parties and the tribunal will be familiar with the documents and witness statements before the start of the hearing. At present this is not the case. It is normal that the parties will have exchanged statements in advance of the hearing, but that the tribunal does not receive copies of the statements until the day of the hearing itself and standard directions forbid statements being sent to the ET before the final hearing.

If statements are to be taken as read, part of the time allocated for the hearing will need to be set aside as reading time to allow the tribunal the opportunity to read the statements and any key documents. We also believe that there may need to be additional procedures put in place to ensure that the tribunal has received all the evidence in advance of the hearing and has had an opportunity to read the statements.

In our view this can be dealt with under current procedural rules. For example the tribunal could use its case management powers to direct that the parties serve their statements at the tribunal by no later than seven days before the hearing.

Q47. What would you see as the advantages of taking witness statements as read?

This depends on how the process of actually reading them is managed. Judges will still need time to read the witness statements. If a judge is sitting at the ET reading them then no time is saved. If they are reading them in the evening then time will be saved.

Taking statements as read should enable tribunals to manage hearings more effectively. For example, if all parties and the tribunal have read the statements in advance of the hearing the tribunal can more accurately assess how much time needs to be allocated to the cross-examination of various witnesses. It should also be feasible to decide in advance on what day of multi-day hearings certain witnesses are required to attend.

In some cases it may also become apparent that the time set aside for the hearing is incorrect. The tribunal could therefore reduce the length of the hearing at the outset if the hearing has been listed for too long a period of time, thereby freeing up judicial time or, alternatively, relist the hearing for a longer length if insufficient time has been allocated.

This would avoid hearings being postponed on the day or being part-heard.

Q48. What are the disadvantages of taking witness statements as read?

To make the process work, bundles would have to be lodged at same time as the witness statements, in order for the statements make sense. However, there is a real danger here that by doing so, judges will be reading a great many unnecessary documents, material that would normally be filtered out under the current system.

Judges are unlikely to appreciate that.

There cannot be an absolute rule that statements are always taken as read as there will be occasions when this is not appropriate. The tribunal will therefore need to be able to exercise discretion to hear evidence in person when appropriate.

We also refer to our comments in response to question 46 regarding the procedures that would need to be put in place if statements are to be taken as read. At present, the parties exchange statements in advance of the hearing but in general do not provide the statements to the tribunal until the first day of the hearing (in line with directions).

Procedures such as serving statements on the tribunal well in advance of the hearing and setting aside reading time, would need to be introduced in order for this proposal to be effective.

This could pose an additional administrative burden on the parties and tribunal, including where the to store the bundles that would also need to come.

A general risk with taking statements as read is that it could lead to an issue of which party is the better at drafting statements and presenting their evidence in writing. This is contrary to the original purpose of the ET system which was intended to be informal and accessible to unrepresented individuals.

Sometimes written statements are not sufficient to stand as evidence in chief. For example, if parties are unrepresented their statements may be poorly drafted. They may be unclear, follow an illogical structure, be too brief and/or do not cover the relevant issues.

As noted in the consultation paper, the Bristol Tribunal has been taking statements as read for some time. We have had experience of cases at Bristol where the tribunal has decided that they could not accept the respondent's statements as evidence in chief because they were inadequate and did not contain all relevant information.

In that situation, evidence will then need to be given in person by the witness. We foresee situations arising where the hearing had been listed for a set time on the assumption that statements will be read but then need to be relisted in order to allow time for the evidence to be given in person.

There is also a potential risk that taking statements as read could lead to statements being longer. Witnesses may be tempted to include extraneous detail because they are concerned that nothing important is missed out. This in turn could lead to statements being insufficiently clear and tribunals requiring lengthy reading time.

We also believe that there are occasions when it is beneficial for statements to be read aloud by witnesses, either wholly or in part. It is often the case that witnesses will not have given evidence in legal proceedings before and will therefore be nervous. Reading out their evidence can help them find their feet and be better prepared for cross-examination.

For claimants, the process of giving evidence in person can be an important part of tribunal proceedings. It is important for some claimants to be able to explain what has happened to them, put forward their version of events and feel that they have been listened to.

If statements are taken as read the claimant's experience of giving evidence to the tribunal in person is likely to be limited to cross-examination. For these reasons taking statements as read could have a negative impact on the claimant's perception of justice and the tribunal process. They may well feel that they have been denied the opportunity to "have their say".

Expenses of witnesses and parties

Q49. Employment tribunal proceedings are similar to civil court cases, insofar as they are between two sets of private parties. We think that the principle of entitlement to expenses in the civil courts should apply in ETs too. Do you agree? Please explain your answer.

We understand the government's preferred option is that parties initially bear the costs of their own expenses and that of their witnesses. The successful party can then claim their expenses from the other side.

We object to this proposal. It is being presented as a reform that affects claimants and respondents equally, on the basis that both will be responsible for their costs and potentially liable for the other side's costs if they lose.

In our view the consequences will have a greater negative impact on claimants than respondents.

Most respondents are businesses or other profit making organisations. Most will be able to treat their witnesses' expenses, and the costs of reimbursing the claimant if they lose, as a business expense for tax purposes.

Their witnesses are also likely to be employees who are obliged to give evidence during the course of their employment. They would expect to have their expenses paid by their employer rather than paying for their expenses themselves.

However, most claimants are individuals who will pay any costs out of their own money. Due to the nature of ET claims it is likely that many claimants will be out of work when attending the hearing, or in low paid work. It cannot therefore be assumed that claimants will have ready funds to be able to pay both their expenses and those of their witnesses.

They cannot claim back their expenses, or offset them from their own tax liability, in the way that many respondents are able to.

The tribunal system should be neutral in respect of claimants and respondents. The current system is neutral in that any party can claim expenses, including well funded respondents. The current proposals, although on the face of it neutral, are not for the reasons identified above.

As set out in our answer to question 51, we do not believe the removal of expenses is likely to lead to a reduction in the number of witnesses that parties call. If it does, then it is more likely to be claimants who cannot afford the costs. This will have an adverse effect on justice, because it is possible that key witnesses will not be called.

We also oppose the proposal that the winning party should be able to claim their costs from their opponent. This introduces a costs regime into the tribunal system where currently one does not exist. If there is to be any change it should be consistent with the current position which is that both parties bear their own costs unless certain limited circumstances apply.

Finally, the proposals could act as a deterrent to claimants to pursue legitimate claims. We also believe that the threat of claiming expenses could be used by unscrupulous respondents to try and deter claimants from pursuing their claims or to try and force them into accepting an unreasonable settlement.

Q50. Should the decision not to pay expenses to parties apply to all those attending employment tribunal hearings? If not, to whom and in what circumstances should expenses be paid?

Expenses should continue to be paid to all parties. This would ensure a level playing field.

If there is to be a limitation on the payment of expenses, we would suggest that the limitation does not apply to witnesses who are in receipt of state benefits (or certain specified state benefits) and who should be able claim their expenses in any event.

We wonder if the government has considered how ending the payment of expenses would impact on hearings that are held out of their region. It is not unusual for a hearing to have to be moved to another region to avoid conflicts of interest.

We currently act for a claimant who is a wing member at the ET where the claim was listed to be heard. Instead of bringing a judge and wing members from another tribunal, our hearing has been moved to a city 176 miles away.

Apart from the travel expenses that witnesses will incur, the claimant will have no choice but to find accommodation for the duration of the hearing.

Q51. The withdrawal of State-funded expenses should lead to a reduction in the duration of some hearings, as only witnesses that are strictly necessary will be called. Do you agree with this reasoning? Please explain why.

We are unaware of any evidence to support the suggestion that unnecessary witnesses are currently being called, but will not be called as a consequence of this proposal.

Parties call those witnesses who they believe will be able to give relevant evidence in support of their claim/defence. There are other costs to the parties in calling witnesses, over and above the expense of attending the hearing.

For example, statements will need to be prepared in respect of each witness. This takes time to do and in the case of represented parties will incur costs. The ability of witnesses to claim their expenses is therefore very unlikely to be a key factor when parties decide whether to call them to give evidence.

There *may* be a reduction in the number of witnesses called in some cases. The reduction in witnesses will occur when a party cannot afford the costs of witnesses attending hearings. Whether the evidence is important to the case will not necessarily be the deciding factor, it will just be the funds available to the party. This could lead to important evidence not being heard by a tribunal while better funded parties still call witnesses who are not necessary.

There is also a possibility that better funded parties, who are likely to be respondents, may deliberately call more witnesses than necessary and then threaten the opposing party with having to pay their costs as a tactic to persuade a party to withdraw or settle.
Employment judges sitting alone

Q52. We propose that, subject to the existing discretion, unfair dismissal cases should normally be heard by an employment judge sitting alone. Do you agree? If not, please explain why.

We do not agree with this proposal and, in our view, the consultation document fundamentally misunderstands what a tribunal is required to consider in cases of unfair dismissal.

The consultation states that in unfair dismissal claims, there are often questions of fact to be determined but the legal framework is relatively uncomplicated. We do not agree that it is uncomplicated, and this again represents a misunderstanding of the ET process and law by the consultation document.

In our view this is exactly why a panel consisting of a judge and two wing members is appropriate, rather than a judge sitting alone.

In unfair dismissal cases there will often be a dispute regarding the facts of the case. The tribunal will be required to make findings of fact which will then need to be interpreted. The relevant legal tests, which may well be uncomplicated in themselves such as in *British Home Stores v Burchill*, will then need to be applied to those facts.

It is the interpretation of the evidence, the findings of fact and a decision regarding the reasonableness of the employer's decision to dismiss the employee which is to be determined by a tribunal in claims of unfair dismissal. The different views and perspectives of the wing members is vital in enabling the tribunal to come to a fair and just decision in light of the evidence presented.

In our view the make up of the tribunal panel is one of the key features of the system. The issues being considered in unfair dismissal cases often relate to everyday occurrences, for example business decisions that lead to redundancies, or behaviour that is unacceptable in the working environment.

Wing members bring important industrial experience to the tribunal panel – something that a judge is unlikely to have.

The role of wing members enables the tribunal to collectively make a fair and just decision when making findings of fact and interpreting the relevant legal tests. And it reduces the number of witnesses that need to be called to enable the judge to better understand the industrial context of the claim.

In contrast, many of the types of cases which are currently heard by judges sitting alone do not involve substantial dispute regarding the facts of the case, but instead require analysis of the legal position and the interpretation of legislation or case law.

For example, in wages claims it may often be undisputed that a deduction has been made and the facts surrounding the case are generally straightforward. The issue for the tribunal to determine is the legal position and the correct construction of the relevant terms of the contract of employment. Determination on legal points is a matter in which a judge has expertise and in our view the presence of wing members is not necessary.

The proposal also needs to be considered in the context of the suggestion that statements are taken as read. The effect of the two proposals taken together would mean that evidence in chief would be read by one person only. The potential problems with evidence being read, including that a statement does not clearly express what the witness means, would potentially be exacerbated if only a judge considered the case.

Having three people scrutinising the evidence acts as a safeguard in this respect.

We also believe that there would be a number of consequences which could potentially increase the costs to the parties and tribunal if judges were to hear unfair dismissal cases alone. Claimants may feel that their case is not being heard fairly if there is just a judge hearing the case. This could lead to more complex claims being submitted which would then be heard by a full tribunal.

For example a claimant may be more likely to add a weak discrimination claim that they would not have otherwise pursued, or attempt to argue that the claim was for one of a number of automatically unfair reasons such as whistle-blowing. This in turn is likely to lead to longer hearings and more witnesses being called.

Q53. Because appeals go to the EAT on a point of law, rather than with questions of fact to be determined, do you agree that the EAT should be constituted to hear appeals with a judge sitting alone, rather than with a panel, unless a judge orders otherwise? Please give reasons.

We agree that it will generally be appropriate for a judge to consider an appeal alone for the reasons given above. The EAT does not need to make any findings of fact or interpret evidence. It decides points of law and hence there is no obvious need for a full panel.

Q54. What other categories of case, in the employment tribunals or the Employment Appeal Tribunal, would in your view be suitable for a judge to hear alone, subject to the general power to convene a full panel where appropriate?

In addition to the current list we consider that there may be some additional cases that can be heard by a judge alone, such as when the claim is undefended and there is unlikely to be a dispute of fact, or when the respondent is insolvent.

An example of this is a claim for a protective award under s.188 TULRCA when the respondent is insolvent and all employees have been dismissed by the administrators. The purpose of the claim is to obtain a protective award which can then be claimed in part from the Insolvency Service. The case law is well established and the facts are relatively straightforward. Little is gained from the presence of the wing members in such a claim.

Legal Officers

Q55. Do you agree that there is interlocutory work currently undertaken by employment judges that might be delegated elsewhere? If no, please explain why.

We consider that effective case management is key to narrowing the issues in a case and ultimately saving hearing time. The proposal to devolve case management to junior officers may run counter to that aim.

However, we believe that interlocutory work is already delegated by employment judges to ET staff. Employment judges often simply sign off, by way of approval, interlocutory work which is already done elsewhere.

Q56. We have proposed that some of the interlocutory work undertaken by the judiciary might be undertaken by suitably qualified legal officers. We would be grateful for your views on:

- **the qualifications, skills, competences and experience we should seek in a legal officer, and**
- **the type of interlocutory work that might be delegated.**

We consider that a legal officer should be required to have legal qualifications, experience and skill. This would necessitate further training, recruitment and, presumably, expense.

As to the type of interlocutory work that might be delegated, we would suggest:

- uncontested applications for extensions of time
- postponement requests which are either agreed or unopposed and which would not disrupt listing
- responses to letters asking for copies of documents.
- any application which is agreed could be dealt with by a senior clerk.

Q57. What effect, if any, do you think extending the length of the qualifying period for an employee to be able to bring a claim for unfair dismissal from 1 to 2 years would have on:

- **Employers**
- **Employees**

Employers:

According to the consultation extending the length of the qualifying period will deny around 4,000 people a year the right to pursue a claim for unfair dismissal. At a time when employers are looking to make large scale job losses, we suggest that this proposal is an assault on access to justice.

It is also likely to result in affected employees looking to bring more complex claims, such as automatic unfair dismissal for asserting a statutory right, and discrimination claims which do not require a qualifying period and for which there is no cap on compensation.

In our experience, employers are prepared to spend more on defending discrimination claims because the consequences of losing them are significant, not only in terms of the damages awarded, but for the employer's reputation.

It is therefore inevitable, we believe, that employer's legal costs will increase if the qualifying period for unfair dismissal is increased.

Employees:

Increasing the qualifying period for unfair dismissal claims to two years will have a significant impact on access to justice for between 4-5,000 vulnerable employees. They will have no or little statutory protection against potentially unscrupulous employers, leaving them open to be exploited.

Employers will be able to dismiss an employee after 23 months service, without having to provide any explanation (provided they have not been dismissed on the grounds of a protected characteristic), leaving the employee without legal redress unless they are able to pursue a discrimination claim, for example.

Q58. In the experience of employers, how important is the current 1 year qualifying period in weighing up whether to take on someone? Would extending this to 2 years make you more likely to offer employment?

Thompsons considers that that the one year qualifying period makes little or no difference in an employer deciding whether to take someone on. There is no evidence that this is a real issue. We suggest that if an employer who can expand by taking staff on, but does not because they are unsure if they can tell within a year whether that employer is capable, it is they and not the tribunal system that needs to change.

Extending the period to two years will similarly have very little impact, as an employer keen to avoid statutory claims, will still be able to engage someone on a self employed/consultancy or worker basis, therefore avoiding a claim for unfair dismissal all together.

Q59. In the experience of employees, does the 1 year qualifying period lead to early dismissals just before the 1 year deadline where there is no apparent fair reasons or procedures followed?

In our experience, the one year qualifying period results in abuse by employers intent on avoiding future claims. Employees who have satisfactorily completed their probation period, which can last between three and six months, may be dismissed after 11 months with no legal recourse unless there is potential for a discrimination or other more complex claim.

The cases of DWP v Webley (2005) IRLR 288, Court of Appeal and Booth v USA (1999) IRLR 16, EAT demonstrate how many employers deliberately break continuity of service with the imprimatur of the judiciary.

It is not difficult to dismiss an employee on capability grounds. If an employment relationship is not working then the employer would know within a few months. That employees are being dismissed so close to the qualifying period indicates that employers are doing so to avoid unfair dismissal claims.

We do not accept the government's stated aim that extending the qualifying period is to make it easier to hire people. It is instead making it easier to fire people. We query whether the government really wants to create a post-recession society in which there is such little job security.

Extending the qualifying period from one to two years will be a green light to employers to sack employees in their second year of employment.

In our view, the qualifying period should be set according to what is an appropriate period and not how many claims the government thinks it will knock back.

Q60. Do you believe that any minority groups or women are likely to be disproportionately affected if the qualifying period is extended? In what ways and to what extent?

Thompsons considers that increasing the qualifying period from one to two years, will adversely affect the workforce as a whole and will have a greater impact going forward than it does now.

However, it is likely to disadvantage in particular young people entering the job market for the first time and those re-entering the job market such as women returning after having children – although in R v Secretary of State for Employment Ex Parte Seymour-Smith & anor (No.2) 2000 ICR 244 it was found that while the two year qualifying period was indirect sex discrimination, it was objectively justified.

As noted in the impact assessment of this proposal, female part-time employees are more likely to be able to show disadvantage. Part-timers are more likely to have under one year's service and the majority of part-time employees are women.

Ethnic minorities too, as conceded in the impact assessment, are more likely to have less that one

year's service than white employees.

Financial penalties

Q61. We believe that a system of financial penalties for employers found to have breached employment rights will be an effective way of encouraging compliance and, ultimately, reducing the number of tribunal claims. Do you agree? If not, please explain why and provide alternative suggestions for achieving these objectives.

It is not clear if the proposal is for a parallel system to the present tribunal system and how this system of financial penalties will be enforced.

The proposition suggests that there would be a system to determine a breach of employment rights which, presumably, is the current tribunal system. It is difficult to consider the merits of a system of financial penalties in the absence of further information.

That said, a system that would increase the costs to an employer who does not treat their employees' fairly is certainly worth serious consideration. It must be noted that a breach of the Acas guide could result in a discretionary 0 - 25% uplift being applied to awards.

Given that one of the objectives in seeking to reform the ET system is to cut expenditure, it is also not clear if the money recovered as a penalty would go to the Treasury or to the employee. Assuming that the employee would be compensated by the tribunal award, it is likely that the money would go to the Treasury.

If this is the proposal, we question what message is sent to society by the government gaining from the way an employee has been treated by their employer, particularly if the compensation awarded is less than the penalty paid to the government.

Q62. We consider that all employment rights are equally important and have suggested a level of financial penalties based on the total award made by the ET within a range of £100 to £5,000. Do you agree with this approach? If not, please explain and provide alternative suggestions.

Fines or compensation uplifts will only be an effective deterrent if they reflect a genuine value to the respondent. The SETA report shows that in 2008 the mean average cost to an employer of advice and representation in an ET claim was £8,009[58]. A threatening letter that avoids that outlay is clearly attractive.

So if the respondent saves £7,000 by way of putting undue pressure on an employee to withdraw a claim, but the sanction is just £1,000 then the business decision will be to continue the tactic that saves £6,000.

A claimant who withdraws after a threat will generally have their claim concluded by doing so, either via a COT3 or by a dismissal upon withdrawal order.[59]

This means that there are no longer any proceedings to make an application in. Any system of sanction solely via that route is therefore substantially unworkable. Thompsons would welcome a system whereby a threatened party could raise that as an issue, even after withdrawal.

[58] *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010), page 55
[59] Employment Tribunal Rules, Rule 25(4)

We would also want to see the injured party receiving the direct benefit of the sanction on the respondent and the full cost of securing it, in order to incentivise claimants to make sanction applications.

Review of the formula for calculating employment tribunal awards and statutory redundancy payment limits

Q63. Do you agree that an automatic mechanism for up-rating tribunal awards and statutory redundancy payments should be retained? If yes:

- **should the up-rating continue to be annual?**
- **should it continue to be rounded up to the nearest 10p, £10 and £100?**
- **should it be based on the Consumer Prices Index rather than, as at present, the Retail Prices Index?**

Tribunal awards should continue to be up-rated annually. RPI should continue to be used and not the CPI, which excludes housing costs and mortgage interests payments.

We urge the government to use this review as an opportunity to also review the statutory cap on compensation for unfair dismissal claims. Under the current rules, a claimant who succeeds in proving that their dismissal was unfair can only recover losses up to the statutory cap which is currently £68,400.

In contrast, a claimant who succeeds in a claim for discrimination is not subject to a statutory cap. Therefore a claimant who has been in a final salary pension scheme for a long period of time is unlikely to recoup all their losses.

This cap would not apply to a claimant whose dismissal was also discriminatory and the difference between the two can be substantial. It is difficult to explain to claimants who have been unfairly dismissed that they are unable to recover all their losses unless they also have a successful claim for discrimination.

Whether the pension loss is treated separately without a cap being applied to that aspect of the claimants' loss should be considered. Removing this bar may encourage employers to comply with the law.

In addition, the compensation for loss of statutory rights has been awarded at a rate between £250 and £300. This should also be addressed in this review along with the upper limit of £25k for breach of contract claim which has remained at this level for some time.

Q64. If you disagree, how should these amounts be up-rated in future?

Please see above.

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