

Department for Business, Energy and Industrial
Strategy & Ministry of Justice

Reforming the Employment Tribunal System

Thompsons Solicitors' Response
January 2017



Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 21 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

Thompsons Solicitors:

- Believes in a simpler, more efficient service which uses technology to make Employment Tribunals (ET) and the Employment Appeal Tribunal (EAT) more accessible for those who need it most.
- Considers the biggest barrier to a just, accessible and proportionate ET and EAT, is the requirement to pay employment tribunal fees.
- Argues that's Employment Tribunals remain unique to the UK to the extent that they derive from the industrial relations landscape and in that respect cannot be compared with other tribunals.
- Is concerned that this consultation is taking place when the outcome of earlier consultations, which could impact on responses to this consultation, have not been published on digitalisation and panel composition.¹

Introduction

Thompsons welcomes the opportunity to respond to the consultation and agrees that digitalisation can improve access to justice. Our experience of representing workers through the ET and EAT system means that we are not opposed to reforms provided that they meet the fundamental principles set out in the foreword to the consultation to “modernise and upgrade our justice system so that it works even better for everyone, from judges and legal professionals, to witnesses, litigants and the vulnerable...”. These principles are in-keeping with the vision set out by the Lord Chancellor, the Lord Chief Justice and the Senior President of the Tribunals in “Transforming Our Justice System”, dated September 2016².

Ultimately the greatest barrier to achieving a fair and just ET and EAT service is the requirement to pay tribunal fees. It is well recognised that since the introduction of fees, the number of ET claims has fallen by approximately 70%³. However, there has not been a corresponding increase in the success rates of claims brought before an ET⁴. The pernicious effect of fees on a claimant can be illustrated by an example of a basic claim for unlawful deduction of wages. A prospective claimant, who has suffered an unlawful deduction from wages, has to pay an issue fee of £160 and a hearing fee of £250. This is equivalent to 70% of the median full time gross weekly wage⁵. Unless and until ET fees are either removed or radically overhauled, we do not consider that the principles outlined in the consultation for reform can be achieved.

¹ <https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/> ; <https://consult.justice.gov.uk/digital-communications/panel-composition-in-tribunals/>

² Transforming our Justice System by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals

³ See Ministry of Justice Tribunals and Gender Recognition Certificate Quarterly Statistics for April to June 2016 published on 8 September 2016

⁴ Ibid table ET.3

⁵ The median full time gross hourly weekly wages is £350 based from the annual survey of hours and earnings available for 2016 for elementary occupations, caring, leisure and other service occupations, sales and customer service occupations

In addition, we believe that the recommendations of the Royal Commission on Trade Unions and Employer's Associations (the Donovan Commission) in the 1960's set out a vision for tribunals which, in many respects, is still to be achieved and which is recognised in part by the fundamental principles espoused in the consultation. However, it has to be recognised that, against the vision of tribunals to provide "facilities for the speedy informal resolution of disputes"⁶, it is important to also recognise that employment law has grown exponentially and tribunals have jurisdiction to determine more than 70 different types of claim⁷.

The need to improve the ET service, is clear and unobjectionable. However what is objectionable is that the driving force behind the current proposals for reform is the desire to make financial savings at any cost. The Impact Assessment estimates some total savings of £18 million with total judicial savings estimated to be around £10 million. Coming on the back of fees which have had a devastating effect on access to justice, at a time when workers' rights are under attack with the prospect of Brexit and employers looking to cut costs, it is fundamental that any reforms of the ET and EAT service retain legal expertise to ensure claimants' are able to access justice and that their right to a fair hearing⁸ is protected, and not eroded any further.

The consultation glosses over the significant role of ACAS in ETs and although it has been separated from Government control since 1974, it is a statutory body whose role is significantly affected by Government policy. Provisions for early conciliation which the Government states would not change are provided under the Employment Tribunals Act 1996.⁹ Moreover ACAS must be consulted before a particular practice direction is made¹⁰.

Answers to Questions

I Question 1: Do you agree that with the right system in place the specific needs of users of Employment Tribunals and the Employment Appeal Tribunal can be accommodated in a more digitally based system?

- I.1 We consider that a more digitally based system presents an opportunity to make ETs more accessible for some claimants. For many claimants an ET may well be their first encounter with a legal service and the majority of claimants find giving evidence at a hearing daunting.
- I.2 However, this also has to be balanced with ensuring access to justice. In a technologically driven world we must ensure that the pendulum does not swing too far in the other direction to "digitalising the whole claims process" so that access to justice can only be achieved through digital means.
- I.3 In order to properly consider what the "right system" should be it is important to take into account our experience of representing claimants in tribunal claims and the online application process that has been in place for 3 ½ years¹¹. As the consultation rightly points out, "Employment Tribunals and the Employment Appeal Tribunal are well developed in terms of digitally enabled services in comparison with the other tribunals, and already make extensive use of online applications" with around 90% of claims being lodged online.

⁶ Royal Commission on Trade Unions and employers Associations 1965-1968 page 155

⁷ This is recognised in the consultation at page 10

⁸ Article 6 of the European Convention on Human Rights

⁹ S.18, 18A s. 18 B Employment Tribunals Act 1996 ('ETA')

¹⁰ S. 7 ETA 1996

¹¹ On line applications were introduced with effect from 29 July 2013

Current experience

Types of claims

- 1.4 Since the requirement to pay a fee, workers' access to justice against unscrupulous employers has been denied. That is particularly the case for those who have not been paid wages or notice pay. As our clients are trade union members, it is rare for us to see these types of claims. Indeed where a union is recognised the union will usually secure the wages owed simply by raising the matter with the employer on the worker's behalf. However, where there is no union in the workplace, the worker is unlikely to recover the monies no matter how easy or simple the process because the amount of the fees which need to be paid in order to pursue a claim for unlawful deduction from wages is generally in excess of the amount of wages owed to the worker. £160 is simply too much money for a prospective claimant to pay out in advance. Workers who have been prudent enough to make savings in order to protect themselves in the event of such unfortunate circumstances will not qualify for remission from fees. It cannot be right that a claimant who has been prudent enough to save is then put off from pursuing a claim against an employer who is taking advantage of a system which, due to its funding, deters workers from pursuing wage claims in the first place.
- 1.5 The majority of unlawful deduction from wages claims Thompsons deals with raise complex issues of law. For example, holiday pay claims which raise issues of European Law arising from the Working Time Directive and cases which arise under the National Minimum Wage Act 1998. These often involve significant documents including volumes of payslips and excel spreadsheets. They also tend to be for large multiple claimants.
- 1.6 The range of cases we deal with covers unfair dismissal, all forms of discrimination related to a protected characteristic including pregnancy discrimination and disability, TUPE, collective consultation, trade union detriment and breach of contract. These all involve complex legal tests and are not what can be considered to be fast track type cases¹². Even claims which may appear straightforward often involve complex legal principles. For example, in the case of unfair dismissal a point increasingly in issue is as to whether the tribunal has jurisdiction to hear the claim because employment status is disputed. Most workers who get paid do not understand that there is a distinction between employment and worker status. In a claim for breach of contract the contractual term is frequently based on custom and practice which is more often than not dependent on witness evidence than a written document.

Digitalisation

- 1.7 There are currently three separate online processes which are required to be completed by a prospective claimant before they can progress a claim to an ET:
- i. An online ACAS early conciliation notification form
 - ii. An online employment tribunal claim form (ET1)
 - iii. An online remission form (also now known as "help with fees form").
- 1.8 An ET1 cannot be progressed unless early conciliation has been commenced and completed and the early certification certificate number inserted on the ET. Early conciliation applies to most ET claims with the exception of a very few¹³. Similarly an ET1 will not be processed unless either a fee has been paid or an application for fee remission has been made. The ability to submit an online fee remission form has only been introduced very recently. Similarly, a requirement to provide evidence in support of a fee remission application has only recently been relaxed.

¹² In the impact Assessment Rapid Resolution Service IA No: BIS0346 page 21 outlines a number of fast track jurisdictions breach of contract; failure to pay suspension pay for health and safety reasons and on mat leave failure to pay a protected award, time off for trade union duties and ante natal care, failure to pay a guarantee payment, failure to pay whilst suspended for medical reasons

¹³ S. 18A of the Employment Tribunals Act 1996 sets out the relevant proceedings to which early conciliation applies. EC does not apply to claims for Interim relief; where a term in a collective agreement is void; employer contract claims; various other claims relating to appeals against improvement notices and training levy's as well as references in respect of payments out of the National Insurance fund; and where the claim is against the Security Service, the Secret Intelligence Service or GCHQ

- 1.9 The three online processes are not integrated meaning some claimants are denied access to justice. In *Sterling vs United Learning Trust* EAT 0439/14 the ETI contained the incorrect early conciliation number (two digits had been omitted) and the claimant's claim was rejected by both the ET and the EAT. The latter commented that although the fault was not great, it was the claimant's responsibility to ensure her claim form was correct. A properly integrated system would have ensured that the ACAS EC certificate number appeared automatically in the ETI form at the relevant point.
- 1.10 There are no reminders or warnings at appropriate stages of the online ETI. Again the consequence is to deny a prospective claimant access to justice. In particular in *Cranwell –v– Cullen* EAT 0046/14 the EAT rejected a claim where the claimant had not completed the early conciliation procedure believing it did not apply in her case. In that case, the claim involved allegations of sexual harassment and she was fearful of notifying her employer because of the alleged harassment she had been subjected to. When completing the online early conciliation form the prospective claimant has to confirm that they have read and understood the "Individual Claimants page" which although is online it is via a separate link which then has further links to more specific guidance. There is no guidance at all for completing the ETI. There is separate guidance for completing the online remission form but this is complex and runs to some 19 pages. Furthermore, the online ETI is time limited for completion but there is no warning to this effect nor is there a reminder if time is about to expire.
- 1.11 In relation to the fee remission form, the claimant is required to have to hand a significant volume of information regarding, not only their earnings and entitlement to benefits, but also those of their partner. This means that the information is often not to hand at the time the ET claim form is completed. A declaration has to be signed which prevents the claimant's representative being able to complete the remission form on line at the same time. This means that where a claimant is represented, the claimant's claim cannot progress until the remission application is completed within 7 days of the application being lodged. As the remission form has a separate acknowledgment number, we have experienced delays in remission applications being dealt with and linked with the ET claim.
- 1.12 A telephone and text phone number is provided for assistance with the ETI and fee remission and there is a telephone number provided for ACAS for assistance with early conciliation. However, unless claimants are represented by those familiar with the system, there is often some confusion and frustration as to which telephone number to ring. This can lead to a feeling of "passing the buck". The advice being given can also vary. In one case a claimant was advised to cease early conciliation and restart the process for the same claim.
- 1.13 The online ETI is not available in other accessible formats such as Braille and there is no specified service for those with a hearing impairment and who may not have a textphone.
- 1.14 There are inevitable technical issues with an online claim form. However, some of these are significant and we think it worthwhile to point them out here so that lessons can be learned from experience:
- 1.14.1 In relation to early conciliation the online system is not geared for multiple claims. There is a limit to the number of multiple claimants that can be included in a claim online and there is not enough room in the online ETI to insert more than one EC Certificate number.
- 1.14.2 As recently as December 2016 the ETI online claim form automatically generated a claim for a protective award for all claims lodged online even if the claim was specified to be for disability discrimination only.

- 1.143 Where a claim for “other” is selected, the on-line ETI defaults to a fee of £160. However, this is not always the correct fee, for example, where the claimant claims they have been subject to a detriment on trade union grounds. As a consequence, the ETI is not progressed and remains within the centralised system until the correct fee is paid. This requires the Employment Tribunal Service (ETS) issuing an Unless Notice requiring payment of the fee. The notice states that unless the fee is paid, the claim will be rejected. This letter is generated automatically since Rule 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the ET Rules) provides that “11(1) The Tribunal *shall* (our emphasis) reject a claim if it is not accompanied by a tribunal fee or a remission application.”
- 1.144 The online ETI only provides for a limited number of documents to be attached which must be in a specific format (i.e. RTF format). Spreadsheets for large numbers of multiple claimants can be attached but they too have to be in a specific format (csv format) and can cause technical problems.
- 1.145 There is no procedure in place which enables errors to be raised directly with those who can rectify them within a short period of time. We are advised to contact by email at the ‘gethelpwithfees’ address. In this regard, we wrote to the Employment Tribunal Service in August 2016 notifying them of the problem regarding the default fee of £160 in trade union detriment claims and despite chasing for a response, some 5 months later, we have still not received a response nor has the problem been rectified.
- 1.15 In many cases we experience a difficulty in obtaining even the most basic documents such as contracts of employment and payslips which are increasingly being held digitally. Where an employee is dismissed they cannot gain access to their payslips unless they print off historical copies before leaving the employment. Increasingly evidence is now in the form of emails which involve lengthy email trails running to numerous pages.
- 1.16 Most case management hearings which determine the legal issues to be decided in the case as well as a timetable for preparation are now conducted by telephone. Even in more complex cases of unfair dismissal and discrimination, these are usually completed within an hour where the parties are represented.
- 1.17 We have experienced delay in receiving ET Judgments and it is a constant source of frustration that these are not available online even though they are public documents. Similarly, we have experienced delays in receiving Case Management Orders and responses to Case Management Applications for example where an application is made for a stay of the hearing following settlement negotiations.
- 1.18 In terms of alternative arrangements for hearings we have had experience of witnesses attending by telephone. In that case the witness was unable to attend due to inclement weather. This required additional time to ensure security of the hearing and made cross examination difficult where the claimant was referred to documents in a bundle where there had been last minute additions. We have not had the benefit of video conferencing or of Skype but can see it may have advantages for those with a disability who are otherwise denied access to a tribunal. Although we remain concerned that this will not be appropriate in those cases where the claimant’s disability is disputed. Similarly where there are factual disputes which rely on witness evidence, video or Skype is unlikely to be appropriate. In those cases witness evidence is best tested in person.
- 1.19 We believe that unless there is a properly implemented and resourced, digitally based system in place with the issues we have highlighted first rectified, then no amount of digitalisation will improve access or indeed trust in the system. Staff will also need to be trained and the system monitored to ensure consistent advice and support is provided across the various systems.

Suggestions for the Right System

- 1.20 There are two aspects to digitalisation: one which would lead to claims being digitalised on a whole claim basis and one which uses online systems as part of the process (which we shall call partial digitalisation).
- 1.21 Considering digitalisation on a whole claims basis first, based on our experience, we consider that the only claims suitable are straightforward unpaid wages claims and only then if there is no requirement to pay a fee. By straightforward unpaid wages claims we mean where the claim is for wages worked but for which the worker has not been paid. This could include claims for notice pay but are unlikely to include claims for a redundancy payment since entitlement to a redundancy payment is often disputed. In such straightforward cases, the system would need to be a simple and straightforward claim on-line. This could include a requirement for the claimant to insert their contact details, the details of the employer against whom they are claiming, the date of the underpayment and the amount of wages due, there might also be a simple template pleading so that only what is owed and how that has been calculated are included. However unless there is no requirement to pay a fee we do not believe that access to justice would be improved for the many workers who are not being paid their wages but who find the current system too costly to pursue. We note that, since the introduction of fees, the number of claims for unlawful deduction from wages claims has more than halved¹⁴, while there has been an increase in the number of jobs where people have been underpaid the national minimum wage¹⁵. In any event the fee to pursue a claim for unlawful deduction from wages compares unfavourably with a civil court money on-line claim where a fee of £70 is payable for sums claimed of between £1,000.01 and £1,500.
- 1.22 As a general principle, where a claim involves a complex legal principle such as claims for unfair dismissal, automatic unfair dismissal, constructive dismissal, discrimination related to all nine protected characteristics, trade union detriment and dismissal, disputed collective consultation claims including those under the Transfer of Undertakings (Protection of Employment) Regulations 2006 then they should not be considered suitable for a “digitalised whole claim”. We do not consider that claims for unlawful deduction from wages, in relation to holiday pay, brought under the National Minimum Wage Act 1998¹⁶ are suitable either because these are much more complex. For example, holiday pay claims which require a consideration of European law as to the correct calculation of holiday pay and claims under the National Minimum Wage Regulations 1998 are often multiple claims and rely on an interpretation of complicated legal principles. These, we consider, could not be dealt with as a digitalised whole claim. In light of this we consider an estimate of 66% of fast track cases being dealt with on line is an over estimate, as are the savings of £1 million¹⁷.
- 1.23 In relation to partial digitalisation we consider only those cases where the claimant has all the relevant documents in support are suitable and subject to the difficulties we have identified above with the current technology and policy¹⁸ being overcome. However, in most cases the documents are not held by the claimant. We are therefore of the view that for any partial digitalisation to be compliant with the fundamental principles of ensuring ET’s are accessible there should be a specific provision for pre-action disclosure prior to an ET I being lodged. Similarly we consider that discrimination questionnaires¹⁹ would assist in the preparation of discrimination cases for the benefit of all parties in ET’s and the EAT.
- 1.24 We suggest that there be a pilot of e-filing in one of the regions²⁰ and the results shared so that the issues which arose when the ET I went online can be addressed before being rolled out, in particular how this complies with the Data Protection Act 1998 and is protected from security breaches.

¹⁴ Ibid footnote 3 See table T.3

¹⁵ <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/jobspaidbelowminimumwagebycategory>

¹⁶ This also includes claims pursuant to the National Minimum Wage Regulations 2015

¹⁷ Page 18 of the Impact Assessment BIS019(C)-16-LM

¹⁸ *Majekodunmi v City Facilities Management UK Ltd* UKEATPA/0157/15/DJ

¹⁹ S.138 of the Equality Act 2010 now repealed

²⁰ E-filing is to be tested in the North West see the ET User group minutes for 7 December 2016

- 1.25 Similarly we would welcome an online platform which enables the parties to view progress of the case, for example as to listing. Again, in order to protect against potential security breaches we would suggest any such online platform be subject to a pilot and review involving all stakeholders and the Information Commissioner before being rolled out nationally (learning the lessons from the failure to run a pilot of the online ETI before rolling out nationally).
- 1.26 Although the Protocol²¹ provides that “the Tribunals Service will seek to improve links with ACAS through use of some shared IT applications and the creation of joint performance indicators,” as our above experience shows that remains an issue some 6 years after the introduction of the protocol and nearly 3 years after mandatory early conciliation was introduced. We consider the requirement for mandatory early conciliation before a claim is lodged should be abolished given the unlikely prospect of a more digitally based system being able to address the problems we have outlined above. In our experience few employers actually engage with early conciliation and it is common for early conciliation certificates to be issued after the 4 week period and for a claim to be lodged. Neither has early conciliation resulted in more claims being settled than under the previous voluntary pre-claim conciliation. Instead, it has just resulted in satellite litigation at the EAT²². This is the very antithesis as to what was anticipated following the consultation on early conciliation²³.
- 1.27 The on-line claim form should include on-line guidance taking the prospective claimant step by step through each stage of the ETI and include warnings where information is mandatory and an explanation of what is needed in order to progress the form to the next page. Similarly there should be warnings as to when the session will time out. However, this by itself will not address problems where connections are lost or there is a problem with the host computer. Careful consideration of the outcomes of the consultation referred to at paragraph 24²⁴ should be referred to all respondents who should have an opportunity to put forward their views on any conclusions reached.
- 1.28 Even where a claim is straightforward not everywhere in the country has broadband and not everyone has access to a computer²⁵. Where access to justice is denied because a prospective claimant is not able to make an online application and in secure surroundings, prospective claimants should be given alternative conventional options i.e. completion of the claim face to face or on paper by post. This should be managed by those experienced in ET claims within HMCTS. It should not be outsourced to private sector companies as that would undermine an integrated service and compromise confidentiality and security.

2.0 Question 2: What issues do you think need to be considered when deciding whether a claim would be suitable for on-line consideration? Please give reasons.

- 2.1 See response to Question 1 above.
- 2.2 In support of the reasons set out in the answer to question 1 above we consider that if the answer is yes to any of the following then the claim is not suitable for online consideration:
- i. Is there a legal claim which is not a claim for unlawful deduction from wages?
 - ii. Is the claim for holiday pay?
 - iii. Is the claim pursuant to the National Minimum Wage Act 1998/National Minimum Wage Regulations 2015?
 - iv. Are documents missing which support the claim? For example, payslips, the contract of employment, grievance and dismissal documents (such as hearing notes and outcome letters), policies and procedures
 - v. Are there more than 20 pages of documents (not including the ETI) which support the claim?

²¹ The Protocol Regarding the Transfer of the ETS to a Tribunals Service in LCD – agreement between the Lord Chancellor and the Secretary of State for Trade and Industry

²² See paragraphs 1.9 and 1.10 above

²³ See the Government’s response to the consultation on proposal for implementation of early conciliation

²⁴ Transforming our justice system summary of reforms and consultation link <https://consult.justice.gov.uk/digital-communications/transforming-our-courts>

²⁵ The ONS statistics for 2016 show that 40% of households have access to a computer

3.0 Question 3: What factors do you think should be taken into consideration when creating the scope to allow increased flexibility to delegate judicial functions to case workers in Employment Tribunals and the Employment Appeal Tribunal? Please give reasons.

- 3.1 This question was first posed in the consultation on Mr Justice Underhill's review of Employment Tribunal Rules of Procedure in 2012. In the Department for Business, Innovation and Skills' response dated March 2013²⁶, the Government recognised the need for those responding to the consultation to be provided with more detailed proposals on exactly how legal officers would be used in the ET context before commenting further. The Government decided not to pursue the proposal to use legal officers to perform interlocutory functions in ETs until it had time to assess how effectively they are being utilised in other jurisdictions.
- 3.2 At that time, tribunals such as the First-tier Tribunal, Tax Chamber and Health, Education and Social Care Chamber – Mental Health Tribunal used legal officers to perform tasks such as case management functions including varying time limits, granting permission to amend documents and adjourning or postponing hearings²⁷.
- 3.3 The current consultation now refers to the role of Tribunal Case Workers and no mention is made of legal officers. We understand that there are different approaches which apply in different Tribunals. For example, in some cases the role of Tribunal Case Workers are set out in Practice Statements²⁸. As an example, First-tier Tax Tribunal Case Workers are authorised to consolidate proceedings, make an order for costs including determining the amount, and determine applications to amend documents and postponements. We note that in the aforementioned practice statement for First-tier Tax Tribunal Case Workers there is provision for the party to apply within 14 days to the Tribunal for the decision to be considered afresh by a judge.
- 3.4 We note that First-tier Tax Tribunal Case Workers have been in post for less than a year. In our view the consultation is no further forward than the consultation on Mr Justice Underhill's proposals on legal officers and the Government's position should be the same i.e. that it should not pursue a proposal to use tribunal case workers in the ET or EAT.
- 3.5 In other cases we understand that legally trained registrars are used²⁹ but that they do not make judicial decisions and are limited to, for example, obtaining records and writing to claimants to help manage the smooth running of a claimant's appeal.
- 3.6 We are aware that, in practice, case management orders which are issued following receipt of the employer's response to an ET claim are generally issued by staff and endorsed by an Employment Judge. However, we have grave concerns that any worker other than one who is legally qualified should be carrying out any functions of a "judicial nature" even where this is permitted by an Employment Judge.

²⁶ The predecessor to the Department for Business, Energy and Industrial Strategy

²⁷ Page 23 of the Government Response to Mr Justice Underhill's review of employment tribunal rules of procedure March 2013

²⁸ See for an example Practice Statement First Tier Tribunal (Tax) Delegation of Functions to Tribunal Case Workers

²⁹ See Practice Statement 8 July 2016 First tier Tribunal Health Education and Social Care Chamber (Mental Health)

- 3.7 We have no objections to tribunal case workers issuing letters confirming case management orders, where these have been determined or endorsed by a Judge³⁰, nor do we object to the regional manager considering applications to postpone payment of the hearing fee. However, we do not consider it appropriate for tribunal case workers to make decisions where either party makes an application in relation to typical case management in an employment matter which includes:
- a. Initial assessment of the claim
 - b. Applications for reconsideration
 - c. Default judgments (Rule 21)
 - d. Applications to amend an ET1 to add or remove a claim
 - e. Applications to add a Respondent
 - f. Applications to determine the correct respondent (in School and Tupe cases)
 - g. Applications for a postponement of a hearing
 - h. Applications for a stay
 - i. An application to withdraw a claim
- 3.8 Typically case management orders in an ET will set the timetable for preparation of the case including the date for exchange of witness statements, documents, and the provision of a schedule of loss. Where case management requires the parties to “identify the issues, provide a chronology, statement of facts and request for further information”, we consider it appropriate that an Employment Judge determine these issues.
- 3.9 The importance of an Employment Judge determining the issues to be considered at the case management stage is emphasised in *Tucker v Partnership in Care Ltd*. In this case the ET did not consider a freestanding claim for a failure to make a reasonable adjustment in relation to any other detriment because the issue had not been identified at the case management hearing as an issue. The EAT rejected the claimant’s appeal against the ET decision. Determining the issue is a crucial part of case management and is a judicial function which cannot and should not be delegated.
- 3.10 In relation to Rule 21 judgments the ET Rules stipulate that these must be made by an Employment Judge and again cannot therefore be delegated.
- 3.11 In relation to the functions outlined in the consultation which, it is suggested, would be appropriate for tribunal case workers to undertake, we do not agree. In relation to timeliness of appeals, given that a decision made by a tribunal case worker could debar the claimant from pursuing the claim, or indeed a respondent from defending a claim, we consider these to be matters of a judicial nature which could only be determined by an Employment Judge in order to comply with Article 6 of the European Convention on Human Rights as provided for under the Human Rights Act 1998 and Article 47 of the Charter of Fundamental Rights of the EU, that “everyone has the right to an effective remedy before a tribunal”.
- 3.12 In relation to applications for a postponement the Court of Appeal established in *Teinaz –v– London Borough of Wandsworth* [2002] ICR 1471 that any application for a postponement or adjournment must be exercised judicially. Mr Justice Langstaffe in *Pye –v– Queen Mary University of London* EAT 0374/11, further established that the discretion in deciding whether to order a postponement or an adjournment must be exercised “with due regard to reason, relevance and fairness” and subject to the overriding objectives provided for under Rule 2. Furthermore, Rule 38 provides that where a party is granted a late postponement, the Tribunals are under an obligation to propose a costs or preparation time order in accordance with new rule 76(1)(e). Given the legal issues which arise where an application for a postponement or adjournment is being made and the right to a fair hearing under Article 6, we do not consider it is appropriate for a decision to be made by a tribunal case worker.

³⁰ This would not include claims for automatic unfair dismissal on grounds of trade union activities etc. [insert the provision of the ERA]

- 3.13 In relation to amendments, we take the view that amendments have consequences of a judicial nature and should not be made by a tribunal case worker. In particular in *Cocking –v– Fandhurst (Stationers) Limited* and *anor 1974 ICR 650*, Sir John Donaldson laid down a procedure for tribunals to follow when deciding whether to allow amendments which involved changing the basis of the claim or adding or substituting a respondent, the key principle being that tribunals must have regard to all the circumstances and in particular any injustice or hardship which would result from amendment or refusal to make an amendment. These principles have subsequently been enumerated in *Selkent Bus Co Limited –v– Moore [1996] ICR 836* and endorsed by the Court of Appeal in *Ali –v– Office of National Statistics [2005] IRLR 2001*. We do not therefore consider it appropriate in the ET for tribunal case workers to undertake the functions suggested in paragraph 27 of the consultation.
- 3.14 We do not consider that a provision which would enable a party unhappy with a decision taken under the delegated provision to apply to an Employment Judge is a sufficient safeguard. In any event it will only lead to delay which is not consistent with the overriding objectives set out in Regulation 2 (d) and (e) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Nor for that matter is it consistent with the principles outlined in the consultation. We consider any delay is unjust, is likely to be disproportionate and makes the ET less accessible.
- 3.15 In relation to the EAT, as an appeal to the EAT can only be taken on a point of law, we consider it inappropriate for any tribunal case worker to undertake functions of a judicial nature save for confirming acceptance or receipt of the notice of appeal or response to the notice.
- 3.16 Given the adversarial nature of ETs, once a claim is lodged the parties' focus is on the legal claim which inevitably requires judicial determination. This is what makes ETs distinct from other tribunals where the focus is on processes and where there may be a role for tribunal case workers. Prospective claimants in ETs for whom we act, being trade union members, have the benefit of access to experienced trade union officers who are able in many cases to resolve issues before they become a legal claim. Proposals outside of this consultation will significantly impact on the ability of trade unions to continue to provide this service. Similarly cuts to the CAB service mean that unrepresented workers do not have the same access to good quality advice. The ET service should properly recognise the benefits of, and invest in, these forms of – what is essentially – a pre-claim advice service taking into account that this is not a service which ACAS can provide.
- 4.0 Question 4: Are there any specialist skills that a case worker dealing with the Employment Tribunals and the Employment Appeal Tribunal would need, distinct and different from those required for carrying out case work in other tribunals? Please give reasons.**
- 4.1 We refer to our answer to question 3 above. We consider the savings indicated in the Impact Assessment to be overestimated and that there would be a corresponding increase in the costs of introducing the proposals outlined, which are not proportionate for the reasons set out in our answers to question 3.
- 5.0 Question 5: Are there any specific issues relating to Employment Tribunals and the Employment Appeal Tribunal that need to be taken into consideration in relation to making changes to the law regarding panel composition? Please give reasons.**
- 5.1 We do not believe the provisions of Section 2(3) of the Tribunal, Courts and Enforcement Act 2007 provide sufficient safeguards which are comparable with those set out in Section 4(5) of the Employment Tribunals Act 1996. In particular, the Donovan Commission envisaged that tribunals would be more accessible than ordinary courts and less formal. Moreover, tribunals would be more expeditious than ordinary courts by having panel members who could bring their industrial experience to what is in effect an industrial court.

- 5.2 The particular relationship between the employee and employer is not comparable with the other administrative tribunals since proceedings may be lodged where the relationship continues. Section 4 (5) of the ETA 1996 provides for the particular circumstances an Employment Judge must take into account when determining if a panel member is appropriate. This ensures the claimant's right to a fair hearing in accordance with Article 6 of the European Convention of Human Rights. For example, either party may make an application to the Employment Judge for a claim of unfair dismissal to be heard before a panel where there is a significant dispute on facts or law where it would be desirable if the proceedings were to be heard before a panel.
- 5.3 Claims of discrimination very much benefit from panel members. In *Aylott –v– Stockton-on-Tees Borough Council*, a disability discrimination case, Lord Justice Mummery described lay members as “indispensable for the actual experience of industrial relations and day to day life in the workplace that they bring to [a tribunal] decision”.
- 5.4 It will be for Employment Judges in particular cases to determine whether or not it is appropriate that the case be heard alone or if the matter should be considered before a panel. We consider the Senior President of the Tribunals ought not to be involved in the case management of employment matters, which should be left to the expertise of qualified Employment Judges who are experienced in employment cases.
- 5.5 We do not consider that the Senior President of Tribunals should have any involvement in determining panel members. Any intervention at this level would, we believe, usurp the expertise of the ETs. In order to ensure a fair hearing and an effective remedy for employment matters consistent with fundamental European principles³¹, it is essential that the parties retain the ability to apply to the tribunal in claims of unfair dismissal and for that application to be considered by an Employment Judge experienced in employment matters in accordance with Rule 4(5) of the Employment Tribunals Act 1996. This is in accordance with the overriding objectives set out in regulation 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 which requires avoiding unnecessary formality and seeking flexibility in the proceedings.
- 5.6 There is a wealth of expertise already available from experienced panel members in employment, industrial relations and discrimination matters which have an important role when determining employment cases. For example, in *McCafferty v Royal Mail Group Ltd EATS 002/12* the EAT commented on the importance of panel members when determining the key legal principle of whether the employer could have a reasonable belief.
- 6.0 Question 6: What criteria should be used to determine the appointment of the new employment practitioner member of the tribunal procedure commit? Please give reasons.**
- 6.1 We are concerned that on the one hand, the consultation appears to recognise the distinct role of ETs (see for example paragraph 16) but then seeks to propose ETs and EATs be part of the unified tribunals in order to dilute the particular expertise of an ET as set out in our answer to question 4 above.
- 6.2 Furthermore, the consultation fails to take into account the fact that the ET rules and procedures have been under considerable review and have been expertly simplified following Mr Justice Underhill's review of the Employment Tribunal Rules and Procedure. Indeed, as is recognised as part of the consultation, ETs have led the way in relation to digitalisation with the on-line claim form. The Employment Tribunal Act 1996 is “restrictive” only to the extent that the Government considers it is so. We believe that the consultation appears to undermine the principles of ETs and EATs, namely in relation to the role of the non-judicial wing members in administering justice which is proportionate and which makes ETs and the EAT more accessible for workers and employees. In this regard ETs are facing particular challenges in the face of a “gig” economy and the increasing number of workers on zero hours contracts which challenge fundamental employment law principles and which benefit from the practical experience of panel members from both sides of industry.

³¹ See paragraph 3.8 above

- 6.3 Our preference would be that the ETs and EATs maintain their current position. However, were ETs and EATs to become part of the unified Tribunal Process, we maintain that the ET and EAT must retain their independent nature. We do not consider that the rules which apply to First Tier Tax and Asylum are appropriate for the distinct role that the ETs and EATs have in governing the employment relationship and that of industrial relations generally.
- 6.4 Whilst we have no objection to the Tribunal Procedure Committee having governance over the ET Rules, that is subject to the Tribunal committee having three panel committee members with expertise in employment, discrimination and industrial relations matters which we suggest be two practitioners in the employment/IR and discrimination field together with the President of the EAT.
- 7.0 Question 7: Do you agree that the proposed legislative changes will provide sufficient flexibility to make sure that the specific features of Employment Tribunals and the Employment Appeal Tribunal can be appropriately recognised in the reform justice system? Please give reasons.**
- 7.1 We refer to our answers above.
- 8.0 Question 8: Do you anticipate the impacts of the proposed reform to be disproportionately large for small or micro sized businesses? Please explain your answer, referring to evidence as necessary.**
- 8.1 As we are not a small or micro sized business we are unable to comment.
- 9.0 Question 9: Do you agree that we have correctly identified the range of equalities impacts, as set out in the accompanying equalities impact assessment, resulting from these proposals? Please give reasons.**
- 9.1 The key impacts of the proposals which will have a significant impact on equality and which are not correctly identified are:

The significant reduction in panel members

- 9.1.1 The equality analysis shows that the majority of salaried judges are white male. This compares with higher proportions of non-legal members, who are more likely to be women and those of a BAME background. The proposals will result in a significant reduction in non-legal panel members which will have an equally significant impact on the diversity of tribunals not only in terms of their constitution but in respect of the determination of employment claims. The more diverse the panel the more experience of different workplaces which are so crucial for the determination of ET and EAT cases. It is the panel members which have meant tribunals lead the way in diversity.

The impact on claimants

- 9.1.2 There is evidence that people with long term disability will be adversely affected by the digitalisation. However, the analysis does not take into account that, as a result of cuts to funding in the voluntary sector, there are fewer alternatives available which will adversely impact on access to justice for disabled workers. The same applies to older and lower paid workers.

- 9.1.3 There is no analysis of the impact of a less diverse employment tribunal service on the types of claims which may be brought and determined in the ET. Again not only in relation to the impact in discrimination cases but in relation to any of the other 70 potential claims which benefit from more a diverse workplace experience than those traditionally followed by white men.

The absence of any justification for resultant indirect discrimination

- 9.1.4 The equality impact assessment identifies the potential indirect discrimination caused by the reduction in the numbers of non-legal members particularly those who hold a religious belief, but then boldly states, without any evidence, that the discrimination is justified.

10.0 Conclusion

- 10.1 There are a number of points not addressed in the consultation but which are impacted by it. It is clear to us that the underlying influence of this reform is to cut costs and it is in that context we suggest the following be considered:
- 10.1.1 Extend the time limits for lodging claims in the tribunals from three months to twelve months to allow time to resolve issues without claimants feeling under pressure to lodge claims.
- 10.1.2 Recognise and promote the benefits of collective bargaining in resolving workplace disputes instead of adopting an old fashioned adversarial view of the role of trade unions and employment law.
- 10.1.3 Transfer responsibility for dealing with unpaid wages and NMW cases to HMRC and use the increased income from fines to fund the service.

For more information:

Rakesh Patel and Jo Seery
Thompsons Solicitors
Congress House
Great Russell Street
London
WC1B 3LW

RakeshPatel@thompsons.law.co.uk
JoSeery@thompsons.law.co.uk