

Resolving workplace disputes: A consultation

JANUARY 2011

| | |
|---|----|
| Purpose of the Consultation | 2 |
| Foreword | 3 |
| Executive Summary | 5 |
| Summary of Questions | 7 |
| How to respond | 13 |
| Context | 15 |
| Chapter I. Resolving disputes in the workplace | 19 |
| Mediation | 19 |
| Compromise Agreements | 20 |
| Early Conciliation | 21 |
| Chapter II. Modernising our tribunals | 27 |
| Part A: Tackling weaker cases | 27 |
| The power to strike out | 28 |
| Deposit orders | 31 |
| The costs regime | 33 |
| Part B: Encouraging settlements | 35 |
| The provision of information | 35 |
| Formalising offers to settle | 36 |
| Part C: Shortening tribunal hearings | 39 |
| Witness statements being taken as read | 39 |
| Expenses of witnesses and parties | 41 |
| Employment Judges sitting alone | 43 |
| Part D: Maximising proportionality | 46 |
| Legal Officers | 46 |
| The overriding objective | 47 |
| Chapter III. Resourcing the system effectively – charging fees | 49 |
| Chapter IV. Businesses taking on staff and meeting obligations | 51 |
| Extending the qualification period for unfair dismissal | 51 |
| Financial Penalties | 52 |
| Review of the formula for calculating employment tribunal awards and statutory redundancy payment limits | 54 |
| What happens next? | 56 |
| ANNEX A: Consultation Response Form | 57 |
| ANNEX B: The Consultation Code of Practice Criteria | 83 |
| ANNEX C: Table of proposed limits | 84 |
| ANNEX D: List of individuals/organisations consulted | 87 |

Resolving Workplace Disputes

Purpose of the Consultation

The Government launched its Growth Review¹ on 29 November 2010. In it, Government set out its long term vision for creating the right conditions for future economic prosperity, including the need to remove barriers to growth and job creation. The UK has one of the world's most flexible labour markets, but we know that business sees both the stock of existing regulations and the flow of new ones as barriers to growth, particularly in the area of employment regulation.

The Government wants the UK to be the best place to start and grow a business, and to remove barriers to recruitment so that businesses have the incentive and ability to expand, ensure they provide maximum flexibility and promote competition without compromising fairness. This consultation is a significant first step in taking forward the Government's review of employment laws, which will make a major contribution to achieving these objectives.

We believe that more needs to be done to support and encourage parties to resolve disputes earlier – where possible, in the workplace - to try and preserve the working relationship between employer and employee, keeping the employee in their job and enabling the employer to continue to benefit from the investment they have made in the individual. But, where the relationship is broken, we want to enable parties to bring matters to a close in the quickest and least painful way; where that is through an employment tribunal, we want cases to move more swiftly to conclusion, so as to contain costs for employers, employees and the taxpayer.

We also want to ensure businesses feel more confident about hiring people. One of the regulatory changes we believe may help is to extend the qualifying period for employees before they can bring a case to an employment tribunal for unfair dismissal from the current one year to two years. This would provide more time for employers and employees to resolve difficulties, give employers greater confidence in taking on people and ease the burden on the employment tribunal process.

This consultation sets out our proposals for achieving these objectives.

Views are sought from businesses and social enterprises, individuals, trade unions, representative bodies, and other interested parties on these possible measures. The consultation will close on 20 April 2011.

This consultation relates to England, Wales and Scotland.

¹ <http://www.bis.gov.uk/assets/biscore/corporate/docs/p/10-1296-path-to-strong-sustainable-and-balanced-growth.pdf>

Foreword

Disputes in the workplace cost time and money. For individuals, the potential for personal distress is considerable. Moreover, disputes can affect morale, reduce productivity and ultimately undermine economic growth. Concerns about ending up in an employment tribunal can be a significant barrier that prevents employers, particularly small firms, from taking on staff in the first place.

As a Government, we need to encourage employers and employees to work together to resolve disagreements that arise in the workplace. We want to help people to help themselves. It makes good sense to preserve the working relationship where possible, and to achieve a swift resolution where it's not.

Achieving lasting economic growth is our core priority in the years ahead. It is incumbent on us to lay the foundations to allow businesses to thrive. This is at the heart of the Growth Review that we launched in November. It is also at the heart of our review of employment laws, which looks to ensure maximum flexibility while protecting fairness and providing the competitive environment required for enterprise and growth. This consultation is a significant milestone in our review and an important step towards providing a framework that enables businesses and individuals to develop ways of working that best suit their needs and that supports sustainable growth.

In an ideal world, there would not be any workplace disagreements and therefore no need for employment tribunals. But we recognise that workplace disputes can and do happen. The proposals we have set out here are designed to help employers and employees deal with these problems themselves, giving them the information, support and incentives to reach a solution together, rather than looking to others – particularly employment tribunals – to do it for them. Not only can this help to keep many relationships intact, but it will save all concerned the cost and stress inherent in any formalised process.

Of course, there will always be some cases that cannot be resolved through discussion and dialogue. In these circumstances, our tribunal system must work as effectively as possible. In this paper, we have sought to address concerns raised by business about the existing system and reduce the burden on the taxpayer, while ensuring that the system continues to protect the principles of fairness and access to justice for all parties. This is the balance we must achieve.

In making these proposals, we are conscious that this area has been subject to much recent reform already. The changes that were made in 2009, following Michael Gibbons' review² were a positive step forward. They recognised that the focus of dispute resolution had shifted from resolving the

² <http://www.berr.gov.uk/files/file38516.pdf>

problem to completing process – it had become a “tick-box” exercise. The repeal of the statutory 3-step procedure and other measures began to redress the balance and demonstrated that providing parties with advice and guidance, and the opportunity to engage in early dispute resolution, could prevent disagreements from becoming tribunal claims.

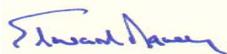
We want to build on that momentum. And we want to ensure consistency with our approach to access to justice reforms more widely in the courts and tribunals system. The proposals in this consultation do just that. In particular, we see providing all potential claimants with access to pre-claim conciliation by Acas - free of charge to all those who want it - as the critical next step in empowering individuals and their employers to take responsibility for working out a solution that is right for them.

Managing expectations will also be key. We want potential claimants to have a clear understanding of what they might expect from a tribunal. Importantly, this covers issues like how long a case might take, and what a tribunal might award. We will ask Acas to provide such advice as part of their pre-claim conciliation conversations with claimants. We also want to ensure that information is set out more fully when the formal tribunal process is engaged. Claimants should not begin this process with unrealistic expectations of receiving large amounts of money.

Alongside this, BIS is developing a progressive vision of the modern workplace that transforms the traditional but distinct, workplace interventions in employment relations and skills into a more long-term, positive, co-ordinated approach. A key element of this “joining –up” is the focus on improving leadership and management skills. We want to see a reduction of workplace disputes as a result of line managers being able to manage conflict successfully.

Modernising and streamlining the tribunals system is also essential. There are opportunities to learn from the practice and procedures used in other parts of the justice system. The trick is to heed those lessons without compromising what is unique and important about employment tribunals.

We are keen to use the consultation process now ahead of us to discuss any concerns about our proposals. But we are clear that action is needed to encourage parties into early dispute resolution, with all the benefits that that brings; and to ensure that the system more widely operates as efficiently and effectively as possible. We believe that the proposals in this document provide a way of achieving these objectives and we look forward to hearing your views. We encourage you to participate fully.



| | |
|---------------------|--------------------------|
| EDWARD DAVEY | JONATHAN DJANOGLY |
|---------------------|--------------------------|

Executive Summary

The Government is seeking views on measures to:

- achieve more early resolution of workplace disputes so that parties can resolve their own problems, in a way that is fair and equitable for both sides, without having to go to an employment tribunal;
- ensure that, where parties do need to come to an employment tribunal, the process is as swift, user friendly and effective as possible;
- help business feel more confident about hiring people.

The consultation aims to identify measures to encourage parties to use early dispute resolution, including increased awareness of mediation and realistic expectations of what employment tribunals can award; it puts forward legislative proposals to simplify the employment tribunal process, encouraging earlier settlement of claims where possible and more efficient handling of claims; and it considers the qualifying period for employees before they can bring a case to an employment tribunal (ET) for unfair dismissal.

The proposals set out in this consultation cover:

Mediation – Government is considering how we might enable greater use of alternative dispute resolution tools such as mediation. The consultation seeks to obtain more information about current use, costs and benefits, and barriers.

Early conciliation – to require all claims to be submitted to Acas (the Advisory, Conciliation and Arbitration Service) in the first instance, rather than the Tribunals Service. This would allow Acas a specified period (up to 1 month) to offer pre-claim conciliation in all cases.

Tackling weaker cases – by making the power to strike out more flexible; allowing a judge to be able to issue a deposit order at any stage of the proceedings, to make the deposit order test more flexible and for the Employment Appeal Tribunal (EAT) to be able to make deposit orders; and increasing the deposit and cost limits for weak & vexatious claims from £500 and £10,000 to £1,000 and £20,000 respectively.

Encouraging settlements

- **Provision of information** – to provide for additional information about the nature of the claim being made and to include a statement of loss as required information for claims involving monetary compensation.
- **Formalising offers to settle** - to develop a process for allowing offers of settlement to be “paid in” to the ET if they are rejected. In the event that the ET subsequently makes a less favourable award, then there is a mechanism for recognising the additional costs incurred by the other party in proceeding to hearing.

Shortening tribunal hearings

- **Witness statements to be taken as read** in all hearings, resulting in shorter hearings and therefore saved costs for the system and business.
- **Withdraw the payment of expenses** in tribunal hearings, encouraging parties to settle earlier; and to think more carefully about the number of witnesses they call, so potentially reducing length of hearings.
- **Extend the jurisdictions where judges can sit alone** in ETs to include unfair dismissal, and to remove the general requirement for tripartite panels in the EAT, allowing more efficient use of lay member resource.
- **Introduce the use of Legal officers** to deal with certain case management functions freeing up (more costly) judicial time to concentrate on matters requiring judicial expertise

Introduce fee charging mechanisms in employment tribunals, for example where claimants lodge claims (and respondents choose to counter-claim), and/or for parties in claims that proceed to full hearing.

Increase qualification periods for unfair dismissal from one to two years, which would result in some 3,700-4,700 fewer claims being made to tribunal.

Introduce financial penalties for employers found to have breached rights, to encourage greater compliance.

Review of the formula for calculating employment tribunal awards and statutory redundancy payment limits. This is to correct for anomalous effects on the level of increase each year and to provide discretion to prevent possible decreases should Ministers deem it appropriate.

An Impact Assessment has been prepared, and is published alongside this consultation document. We would welcome comments on the Impact Assessment, in particular on our analysis of costs and benefits and whether you consider there are any unintended consequences or other implications of the proposals which have not been properly identified.

Summary of Questions

1. To what extent is early workplace mediation used?
2. Are there particular kinds of issues where mediation is especially helpful or where it is not likely to be helpful?
3. In your experience, what are the costs of mediation?
4. What do you consider to be the advantages and disadvantages of mediation?
5. What barriers are there to use and what ways are there to overcome them?
6. Which providers of mediation for workplace disputes are you aware of? (We are interested in private/voluntary/social enterprises – please specify)
7. What are your views or experiences of in-house mediation schemes? (We are interested in advantages and disadvantages)
8. To what extent are compromise agreements used?
9. 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)
10. What are the advantages and disadvantages of compromise agreements? Do these vary by type of case and, if so, why?
11. What barriers are there to use and what ways are there to overcome them?
12. 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.
13. 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.
14. Do you consider Acas' current power to provide pre-claim conciliation should be changed to a duty? Please explain why?
15. Do you consider Acas duty to offer post-claim conciliation should be changed to a power? If not, please explain why.
16. Whilst we believe that this 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

as effective in large multiple claims. Do you agree? If not, please explain why.

17. We would welcome views on:

- the content of the shortened form
- the benefits of the shortened form
- whether the increased formality in having to complete a form will have an impact upon the success of early conciliation

18. We would welcome views on:

- the factors likely to have an effect on the success of early conciliation
- whether there are any steps that can be taken to address those factors
- whether the complexity of the case is likely to have an effect on the success of early conciliation

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 should that period be?

21. 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.

22. 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.

23. 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?

24. 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?

25. Do you agree that employment judges should have the power to make deposit orders at hearings other than pre-hearing reviews? If not, please explain why.

26. Do you agree that employment judges should have the power to make deposit orders otherwise than at a hearing? If not, please explain why.

27. 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?

28. 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.

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

30. 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.

31. 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.

32. 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.

33. 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.

34. 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?

35. If yes, what would those benefits be?

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

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

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

39. Do you agree that this proposal, if introduced, will lead to an increase in the number of reasonable settlement offers being made?

40. 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?

41. 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.

42. 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.

43. 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?

44. 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.

45. 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.
46. Do you agree with the proposal that, with the appropriate procedural safeguards, witness statements (where provided) should stand as the evidence of chief of the witness and that, in the normal course, they should be taken as read? If not, please explain why.
47. What would you see as the advantages of taking witness statements as read?
48. What are the disadvantages of taking witness statements as read?
49. 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.
50. 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?
51. 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.
52. 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.
53. 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.
54. 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?
55. Do you agree that there is interlocutory work currently undertaken by employment judges that might be delegated elsewhere? If no, please explain why.
56. 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.

57. 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 one to two years would have on:

- employers
- employees

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

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

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

61. 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.

62. 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.

63. 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?

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

How to respond

The Department for Business, Innovation and Skills invites views on all the policy issues discussed in this consultation document. We particularly welcome responses to the specific questions which are raised at the end of each section, and are collected together on pages [7-12]. It is not necessary to respond to all the questions; respondents are welcome to provide answers only to those issues of most interest or relevance to them.

This consultation will close on 20 April 2011. A copy of the consultation response form is enclosed, or is available electronically at this link: [response form](#). If you decide to respond in this way, the form can be submitted by letter, fax or email to:

Rowena Robson
Senior Policy Adviser
Dispute Resolution Policy Team
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 0207 215 5700
Fax: 0207 215 6414
Email: RWDconsultation@bis.gsi.gov.uk

To complete the response form online, please go to <http://tinyurl.com/34u7rr5>.

When responding, please state whether you are responding as an individual, or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

A copy of the consultation response form is enclosed at Annex A. The Department will also be able to arrange for other languages or copies in Braille to be provided if required. Further copies of the electronic consultation document and the response form can be obtained from the BIS website at www.bis.gov.uk/consultations. You may make copies of this document without seeking permission. Further printed copies of the consultation documents can be obtained from the address above.

Queries

Queries on the issues raised in the consultation should be addressed to the Dispute Resolution Policy Team at the contact address above.

Confidentiality & Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental

Information Regulations 2004. If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Complaints

If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

Tunde Idowu
Department for Business, Innovation and Skills
Consultation Co-ordinator
1 Victoria Street London SW1H 0ET
Tel: 020 7215 0412
Email: Babatunde.Idowu@bis.gsi.gov.uk

A copy of the Code of Practice on consultation is attached at Annex B.

Context

The changes that were made to the dispute resolution system in 2008, following Michael Gibbons's review in 2007, most notably the repeal of the statutory 3-step procedure for dealing with discipline and grievance (D&G) cases, and the introduction of the new Acas pre-claim conciliation service, have helped parties to avoid resorting to an employment tribunal (ET) to resolve a dispute, and have delivered significant savings to business. This Government believes that those changes were a step in the right direction and, while we do not intend to make changes to the formal processes for handling D&G matters in the workplace, we believe that there is more we can do to help parties resolve workplace disputes in a way that takes out costs to business and the taxpayer while preserving individuals' rights to access to justice.

The economic challenges faced by the country over the past two years have meant difficult choices for employers and individuals, including in many cases the need to change, or end, employment relationships. Undoubtedly, a significant number of these cases were resolved between employers and employees, but many were not and, as result, we have seen a dramatic increase in the number of claims submitted to ETs. Between 2008-09 and 2009-10, the number of claims rose by 56%, from 151,000 to 236,100, a record number³. While both the Tribunals Service (TS) and Acas have sought to minimise the impact of such an increase on the services they offer, and have done so well, it is unfortunate that many cases have taken longer to resolve than we would have liked. This is not good, either for business, individuals or for taxpayers who fund the system. In recent months, this has led to many calls for a review of how the system operates.

There have been concerns expressed by a number of business representative bodies, including:

- The British Chambers of Commerce raised a number of concerns in their report "Employment Regulation: Up to the Job" (March 2010)⁴, such as cases being too costly and taking too much time to be heard; that it is too easy for employees to make unmeritorious claims; that there are few restrictions on reporting; and that without immediate knowledge of what remedy the claimant is seeking, employers cannot balance risk.
- The CBI Report (June 2010) "Making Britain the place to work: An employment agenda for the new government"⁵ commented that more must be done to ensure greater consistency in awards and in how tribunals process claims with action needed 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.

³ <http://www.justice.gov.uk/publications/docs/tribs-et-eat-annual-stats-april09-march10.pdf>

⁴ [British Chambers of Commerce | Publications](#)

⁵ [CBI Brief: Making Britain a place to work](#)

- The Institute of Directors' Business Manifesto 2010⁶ thought that too many weak claims are being made by employees because there is no incentive for employees and their lawyers not to bring weak cases to tribunals.
- The Forum of Private Business' Employment Law Panel (reports issued in February 2010 and September 2010)⁷ has raised concerns in a number of areas: it believes the balance of employer and employee rights is in favour of employees; action is needed to deter and deal with weak and vexatious claims; and that dealing with ET claims increases the stress and cost to small businesses (staff time and financial costs), as well as the impact on staff morale in very small organisations, of dealing with ET claims.
- The TUC has raised concerns over the length of time it can take for claims to reach a hearing.

Some of these concerns have been considered and, to an extent at least, addressed in recent months. The former Employment Tribunal System Steering Board (ETSSB) produced a report on perceived inconsistencies within the system. We publish that report alongside this consultation paper⁸ and we think much of what it says can be of value when looking to address recent concerns. Some of the recommendations made by the ETSSB feature in the package of proposals made here. **We would welcome comment on the recommendations made, as part of this consultation exercise.**

Further, there have been pilot projects led by the Tribunals Service aimed at achieving greater consistency across the piece. For example, employment judges in certain offices in England and Wales have trialled 'standardised' agendas for Case Management Discussion hearings. The pilot attempted to make the content of CMDs and, so far as possible, their outcomes, more predictable⁹.

However, while important, consistency is only one of the issues we must now address. More centrally, we also want to develop new and better ways for parties to resolve workplace disputes and ensure that all users of the system can have confidence in it.

This is in keeping with the Government's proposals on reform to the justice system more generally. In separate consultations, the Government has set out specific proposals relating to the wider civil justice system. This consultation on the employment dispute resolution system is grounded on the same principles as those separate consultations.

⁶https://www.iod.com/MainWebSite/Resources/Document/business_manifesto_2010.pdf

⁷ www.fpb.org/page/608/Research.htm; www.fpb.org/page/608/Research.htm

⁸ Available on: www.bis.gov.uk URN 11/510

⁹ Further pilots have been run by the Tribunals Service in an attempt to improve and streamline services, and to increase efficiency and flexibility. For example, evening sittings have been trialled in England & Wales and in Scotland. Also, Acas and the Tribunals Service have recently collaborated to trial the use of conciliators in Case Management Discussion hearings, which is designed to help parties to settle cases at an early stage in the process.

For example, the Government's proposals on reform to the Legal Aid system in England & Wales¹⁰ are premised in part on targeting limited resources at those who need it most and to complement the wider programme of reform to move towards a simpler justice system: one which is more responsive to public needs, which allows people to resolve their issues out of court, using simpler, more informal, remedies where they are appropriate, and which encourages more efficient resolution of contested cases where necessary.

The recently published proposals on reform of civil litigation funding and costs in England & Wales¹¹ are another example of our common approach here. The consultation on those proposals seeks to strike the right balance between access to justice for those who need it, with ensuring that costs are proportionate and that unnecessary or frivolous cases are deterred. As that paper says, access to justice is not just about allowing claimants to bring reasonable actions. It is also about ensuring that those against whom claims are brought are able to resist them wherever they should not succeed without accruing disproportionate costs. And it is about facilitating earlier resolution of any disputes between the parties wherever that is possible.

In the employment context, the Government believes that more disputes would be resolved at an early stage if employers had clear HR procedures, which ensured that employees know what is expected of them, the consequences of not meeting these expectations, and how they will be evaluated; and if such procedures were operated effectively by managers and supervisors, supported by appropriate training. If an employer has reasonable procedures, and these are followed, there is every chance that fewer disputes will arise in the first place, and therefore that fewer employees will reach the point where they contemplate embarking on the ET process. But, where a claim is made to an ET, it is unlikely that the tribunal would find against a respondent who had followed their internal HR procedures. We are already looking, through the employment law review, at what more can be done to support employers and individuals in this area and we are looking at developing a vision for the modern workplace that transforms the traditional, but distinct, workplace interventions on employment relations and skills into a more long-term, positive and co-ordinated approach. This should allow us to identify areas where we could secure extra value from joining-up on particular interventions.

In addition, we are committed to improving the skills of first line managers. It is clear that many more problems could be prevented from escalating into disputes if line managers were better able to manage conflict, i.e. through the ability and confidence to have what are often termed "difficult conversations". Issues raised at an early stage, by either party, are more likely to be able to

¹⁰ Proposals for the Reform of Legal Aid in England and Wales. Ministry of Justice Consultation Paper (CP12/10), November 2010: <http://www.justice.gov.uk/consultations/legal-aid-reform-151110.htm>

¹¹ Proposals for Reform of Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations. Ministry of Justice Consultation Paper (CP 13/10). November 2010: <http://www.justice.gov.uk/consultations/jackson-review-151110.htm>

be resolved before they become full-blown discipline or grievance matters. This early resolution brings with it real benefits, not only in terms of financial savings through the avoidance of formal procedures, and potentially an ET claim, but also in terms of continued productivity, enhanced morale and greater employee engagement.

However, the Government recognises that not all problems will be capable of resolution by a discussion between the individuals involved and that disputes will arise, whether formal or otherwise. We have considered what can be done to help parties when this happens so that they do not see it as inevitable that the dispute will end up as an ET claim. We want to do more to encourage the use of early dispute resolution, and are seeking views of respondents on the use of mediation and compromise agreements. We have also considered how and when Acas interventions might be made more effective in supporting earlier resolution, and have developed a proposal that would allow conciliation to be offered to all parties before a claim is lodged with an ET.

For those cases, though, that do need to be determined by a Tribunal, the Government understands concerns at the length of time it can take to proceed through the system and wants to look at ways of changing processes to reduce time and, ultimately, cost to parties and the taxpayer.

The Government believes that taking forward the work outlined in this consultation document will help more cases settle without going to an employment tribunal, while filtering out weaker and non-meritorious ones, delivering significant benefits to all parties. For those cases that proceed to full hearing, the changes will help to reduce the time, and cost, of the process. We welcome views from all interested parties on these measures.

Chapter I. Resolving disputes in the workplace

Research from the CIPD¹² indicates that UK workers spend on average 1.8 hours per week dealing with conflict. The annual cost of this to the UK economy (in 2008) was estimated at £24billion¹³. This is significant at any time, but particularly at a time when we want business to focus on growth.

Mediation

The Government believes that there is significant scope for encouraging parties to resolve workplace disputes at the earliest opportunity. There is evidence to show that where a problem has arisen that could not be resolved by discussion between the parties (and that should always be the first step), inviting a mediator – an independent and impartial third party – to work with the two people involved can bring about a swift resolution of the issue.

Mediation is a process that delivers a solution developed and agreed by both parties, a “win-win” outcome that benefits parties not only in terms of the direct savings from avoiding the tribunal route, but also in terms of preserving the employment relationship, maintaining productivity, reducing sick absence and increasing employee engagement. Figures show that while the cost of resolving a dispute through a claim to an employment tribunal can cost an average of £3,800 for business, and £1,500 for a claimant, with many taking at least 26 weeks to reach determination, mediation is often completed in a day, usually at a cost of around £1,200 if parties act quickly, when a problem first arises.

However, while it appears, on the face of it, that mediation offers a faster, cheaper means of dispute resolution, the Government would like to understand the current extent to which mediation is used to resolve a dispute before it escalates into a claim to an employment tribunal. We know that a low percentage of ET claims went to non-statutory mediation (9% of claimants and 7% of respondents in 2008¹⁴) before a claim was lodged, but we have little information on the extent to which mediation has been successfully used, i.e. where the dispute does not result in a tribunal claim.

We would also like to know what interested parties see as the costs and benefits of using mediation, and what barriers might be preventing employers and employees from using it as a way to agree a solution to a dispute. For example, is mediation likely to be more helpful in some kinds of case than others and, if so, which? In addition, we would like to learn the extent to which the voluntary sector provides mediation services for employment disputes, and whether there may be scope to enhance this provision.

¹² http://www.opp.eu.com/SiteCollectionDocuments/pdfs/fight_flight_or_face_it.pdf

¹³ http://www.cipd.co.uk/news/_articles/poor-conflict-management-skills-cost-uk-plc-billions.htm

¹⁴ www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008.pdf

Questions

- 1. To what extent is early workplace mediation used?**
- 2. Are there particular kinds of issues where mediation is especially helpful or where it is not likely to be helpful?**
- 3. In your experience, what are the costs of mediation?**
- 4. What do you consider to be the advantages and disadvantages of mediation?**
- 5. What barriers are there to use and what ways are there to overcome them?**

It would also be helpful if you could help us understand current mediation provision by responding to the following questions, if they are relevant to you:

- 6. Which providers of mediation for workplace disputes are you aware of? (We are interested in private/voluntary/social enterprises – please specify)**
- 7. What are your views or experiences of in-house mediation schemes? (We are interested in advantages and disadvantages)**

Compromise Agreements

The Government recognises, however, that sometimes mediation will not be the answer. There will be occasions where relationships between employers and employees break down irretrievably and ending the employment seems to be the only solution. In such cases, a Compromise Agreement might be appropriate. They can speed up the process of the 'parting of the ways' and if such agreements comply with the conditions set out in legislation¹⁵, a key feature of which is the requirement for the employee to have independent legal advice, then they are legally binding and give certainty that the matters covered will not be the subject of a claim at tribunal.

While there is some cost involved in using compromise agreements – legal costs are generally met by the employer, including those of the employee – again, they can present a cheaper, more effective solution to the resolution of a dispute. It is clear from the number of claims to an employment tribunal that there are a significant number of cases where such agreements may potentially have been used but have not been, and we are keen to understand more clearly the reasons for this. The Government recognises that for all

¹⁵[Employment Rights Act 1996](#)

employers there will be claims where it would be inappropriate to use a compromise agreement, particularly in terms of sending the wrong message to other employees. However, we want to know whether there are other factors affecting the use of compromise agreements.

Questions

8. To what extent are compromise agreements used?

9. 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)

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

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

Early Conciliation

For those relationships which have broken down, and the individual has acquired rights (either from day one such as discrimination, or they have worked longer than the qualification period) which it has not been possible to address via an alternative route, an employee may start thinking about going to a tribunal. Where this happens, Government wants to ensure that parties understand what is involved and are prepared for the demands that the process will place on them.

Evidence suggests that claimants and employers tend to be over-confident about the likelihood of their success and potential value of a claim. We will therefore make sure that clear, accessible information is available to enable claimants to make a judgement about the value of pursuing a claim, and the likelihood of a successful outcome. Specifically, we will include information relating to the likely value of awards, and the average length of time a claim takes to complete the tribunal process, as part of the ET1 claim form and accompanying guidance. We will also ensure that employers, too, understand what award a tribunal is likely to make in particular circumstances so that, where they believe that the claim against them is unjust, they can take an informed decision about defending the claim.

We believe that, in addition to providing clearer guidance to achieve this objective there is scope, through altering the current system, to make it possible for Acas to provide impartial advice and information to parties before a claim is lodged. Currently, only around a fifth of those individuals who make an ET claim will have spoken to Acas. But we know, from analysis of the first year of their pre-claim conciliation (PCC) service, that following contact with Acas conciliators, fewer than a third of those identified as likely to lodge a

claim went on to do so. We believe that there is a strong case, therefore, to require all claims to be submitted to Acas before they can be lodged with the ET. We estimate that this will lead to a reduction of approximately 12,000 ET claims being lodged.

The **proposal** envisages that claimants will submit key details of their dispute (using what will amount to a shortened version of the ET1 claim form) to Acas within the relevant time limit (i.e. usually 3 or 6 months). Acas will have no role in determining whether the claim is in time or not; they will, however, date-stamp the form on receipt, and that will subsequently allow TS to decide whether to accept or reject the claim on these grounds subsequently. The clock for the time limit applicable will stop once the claim is received by Acas and there will then be a statutory period of time for Acas to attempt to conciliate the dispute; we propose that this should be a period of one calendar month.

While submitting a claim to Acas in the first instance will be a requirement, it will not be mandatory for parties to engage in PCC. We believe, however, that even where one or both parties reject PCC, this approach provides the opportunity for Acas to provide advice relating to the claim, including how tribunal awards in the jurisdiction(s) concerned are calculated, information on the factors that create uncertainty (e.g. variation in level of award for failure to follow the Acas Code of Practice¹⁶), median values of awards in relevant jurisdictions and average length of time for cases to proceed to determination. This will allow parties to make a more informed decision about going forward.

Where PCC is successful, Acas will arrange for a COT3 (a legally binding settlement) to be signed by both parties meaning that no claim could then be brought. If PCC is declined, or unsuccessful within the statutory period, Acas will write to the claimant certifying that the PCC stage had been completed and that a claim could be lodged with TS. The clock will start running again from this point. The claimant would then be able to submit an ET1 to the Tribunals Service, together with a copy of the certification for their claim to be considered.

While we expect that Acas would, as part of their PCC offering, be able to identify certain claims which appeared to be invalid i.e. insufficient qualifying service, no employee status etc, it is not envisaged that they will be given any legal power to vet claims for acceptance/rejection. Acas will be able to explain to potential claimants the need to meet minimum requirements to bring a claim. However, it will be a matter for individuals whether to heed that advice and it is therefore likely that some claims that reach TS will then be rejected. We set out proposals to assist tribunals to deal more effectively with such claims in Chapter I, Part A.

We recognise that, as a consequence of this proposal, those claims submitted to TS will already have been the subject of an unsuccessful attempt at conciliation. We are therefore considering whether there is merit in continuing

¹⁶ <http://www.acas.org.uk/CHttpHandler.ashx?id=1047>

to require Acas to offer post-claim conciliation (known as individual conciliation, or IC) to parties and are considering whether to change the current duty to conciliate to a power, thereby allowing Acas to provide further conciliation only where they consider it is likely to be beneficial. We would welcome views on this matter.

Government also recognises that there will be an increased demand on Acas resource which will, although off-set to some extent by a reduction in the number of cases that they will be required to conciliate post-claim, require additional funding and this will be a matter for further consideration.

QUESTIONS

12. 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.

13. 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.

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

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

Multiples

From a tribunal perspective, a multiple claim is two or more claims arising out of the same or a similar set of circumstances against the same respondent or respondents. Multiple claims, as with single claims, are issued, in the majority of cases, in the office with jurisdiction for the respondent postcode. There are two exceptions. Currently all NHS equal pay claims in England and Wales are dealt with in Newcastle ETO. In Scotland, all NHS and the majority of local authority equal pay claims are dealt with in Glasgow ETO.

Although, with the exception of the cases listed above, all claims are issued in the office with jurisdiction for the respondent post code, the Presidents may issue directions that for administrative and case management purposes the claims will be dealt with in a particular office.

Although no external research has been conducted into the number and effect of multiple claims in the ET system, figures provided by TS (which have not been statistically verified) show that at 31 March 2010 there were 1470 multiple claims within the system where the number of claims in each of the multiples

exceeded 10. The total number of individual claims in those multiples was c375,000.

Whilst it is possible for economists and statisticians to provide reasonably accurate estimates of the number of individual claims likely to be received in a given period through the use of historical trends and modelling it has not been possible to forecast meaningful activity insofar as multiple claims are concerned.

Acas define multiple cases as those where it involves two or more claims arising out of the same set of circumstances against the same respondent where the claimants share a common representative. While a number of multiple claims may raise complex legal issues, involve large sums or are the subject of collective conciliation (provided by Acas), many involve disputes that may be suitable for early conciliation. While we question whether there is likely to be the commitment of parties and representatives to work towards an early resolution of the claim at a time when they may be involved in collective bargaining, we consider that many smaller multiple claims might be suitable for early conciliation.

QUESTIONS

16. Whilst we believe that this 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 as effective in large multiple claims. Do you agree? If not, please explain why.

Forms

The proposal envisages that claimants will submit key details of their dispute to Acas, using what will amount to a shortened version of the ET1 claim form. We believe that the benefit of this approach is that it will maintain the less formal nature of PCC which contributes to its success.

QUESTIONS

17. We would welcome views on:

- ***the content of the shortened form***
- ***the benefits of the shortened form***
- ***whether the increased formality in having to complete a form will have an impact upon the success of early conciliation***

Complex Claims

Complex claims can involve a number of elements, covering two or more different jurisdictions (e.g. unfair dismissal and unlawful deduction of wages). The annual statistics published by TS in September show that for 2009-10 the average number of jurisdictional complaints per claim was 1.7 (as opposed to 1.8 in 2008-09). It is known that a large number of multiple claims (for example the airline working time regulation claims which were issued quarterly in 2009-10) contain only one jurisdictional complaint. It has not been possible to determine, if these claims and other single jurisdictional complaints are removed from the calculation, what the average number of complaints per claim is for cases involving more than one complaint. Anecdotal evidence suggests that it is around 2.1 to 2.3 complaints per claim. Whilst it is accepted that the fact that a claim contains more than one jurisdictional complaint does not necessarily make it more complex, it does raise the issue of whether the complexity of the case limits the opportunity for its resolution within a short timescale.

QUESTIONS

18. We would welcome views on:

- ***the factors likely to have an effect on the success of early conciliation***
- ***whether there are any steps that can be taken to address those factors***
- ***whether the complexity of the case is likely to have an effect on the success of early conciliation***

“Stop-the-clock” mechanisms

The proposal envisages that the clock for the relevant time limit will stop once the claim is received by Acas and that there will then be a statutory period of time for Acas to attempt to conciliate the dispute. We propose that this should be a period of one calendar month. If early conciliation is declined, or unsuccessful within that period, Acas will write to the claimant certifying that the PCC stage had been completed and that a claim could be lodged with TS. The claimant would then be able to submit an ET1 to the Tribunals Service together with a copy of the Acas certification for their claim to be considered.

QUESTIONS

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 should that period be?

Chapter II. Modernising our tribunals

The Government's key focus is, as the previous chapter shows, on ensuring employers and workers are helped as much as possible to resolve disputes as early, as amicably and as effectively as possible. That means a focus on the end-to-end employment dispute resolution system – and in particular on the system before employment tribunals are engaged.

But it is a fact that, whether we like it or not, some workplace disputes will inevitably need to be referred to (and ultimately determined by) the judicial system.

All formal litigation, whether in a court or tribunal, can be daunting and time-consuming for the people involved. We are acutely aware of that fact.

We can never combat the problem in its entirety: an independent and objective legal forum must have formal processes to ensure all parties are treated fairly. Justice must be done, and be seen to be done. However, where parties need to come to an employment tribunal, our aim is to ensure that the process they face is as swift, user-friendly and effective as possible. Avoiding undue cost and stress will be central.

The proposals set out in this chapter, and that which follows, are designed to meet those objectives. We want:

- to address concerns that weak (and even 'vexatious') claims are plaguing the system;
- to encourage earlier and effective settlement between the parties in the many cases that are legitimate;
- to ensure hearings, where they are necessary, give each party the opportunity to present his or her case at a fair and public hearing – but we want to avoid undue length;
- to embed still further the principle of proportionality within the system; and
- to ensure that the system is resourced to meet the needs of the economic climate with which we are all faced.

Part A: Tackling weaker cases

Much has been said and written in recent times about weak cases imposing unjustifiable burdens on business¹⁷. While some of the criticisms levelled against the system are, we think, unfair, we also recognise that employers

¹⁷ See Context chapter: concerns raised by business representative bodies, p17-18

have some legitimate concerns. We therefore want to consider how we can prevent poorly conceived claims from progressing through the system, wasting time and cost for all. The early conciliation proposal set out above will allow Acas to offer guidance and information to claimants on the merits or otherwise of the claim they are intending to bring. But we believe that we should introduce other measures to reassure respondents and allow ETs to identify and manage those weaker cases, where they are in fact lodged.

One of the most prominent criticisms made of employment tribunals is that they do not 'vet' claims robustly enough. This means that, even where weak, cases sometimes progress through the system too far. Accordingly, employers incur costs fighting claims (obtaining advice, completing forms and attending hearings) which in the end amount to nothing. Alternatively, many employers are said to be settling cases – or 'buying-off' claimants, even when claims have no merit – just to avoid navigating the system.

Employment tribunals already have case management powers – exercised by the independent judiciary – designed (at least in part) to combat this problem. Many of those powers can be exercised by the tribunals on their own initiative, or at the invitation of one of the parties. So, for example, employers can ask for weak cases to be struck out – and where judges agree that the request is appropriate, such an order can be made. But it has been suggested that these powers could be made more flexible and robust.

The power to strike out

Of course, striking out a claim brought before an employment tribunal in good faith is a draconian step. But in some instances it can be necessary – for example where procedural rules or directions have been flouted¹⁸, or where the claim is scandalous, vexatious or has no reasonable prospect of success¹⁹.

There is, however, one important limit to the flexible utilisation of these strike-out provisions. Under Rule 18(6) and Rule 19, these powers can only be exercised when appropriate notice has been issued to any parties affected. The notice must give the parties the opportunity to request that the order proposed be considered at a hearing and if such a request is made, no order can be made otherwise than at a hearing - usually a pre-hearing review²⁰. Unlike in the civil courts in England and Wales²¹, therefore, no judge has the power to strike out a claim on paper (i.e. without needing to list the matter for a hearing or to invite representations from the parties). Employment judges

¹⁸ Rule 13(1)(b) of the Employment Tribunal Rules 2004

¹⁹ Rule 18(7)(b). Also see Rules 18(7) (c) to (f) for other 'strike-out' powers.

²⁰ A pre-hearing review (PHR) is an interim hearing that can be convened at any time before the substantive hearing of the case, either on the judge's own initiative or following an application by one of the parties. A PHR must take place in public and will normally be heard by a judge sitting alone.

²¹ See Civil Procedure Rules 1998, Rule 3.4 and Rule 3.3(4). Also see Rule 24.2, which concerns the award of summary judgment.

cannot even strike out a claim at a Case Management Discussion²² where both parties are present before him/her.

We think that the strike out provisions should be available to employment tribunals in a more flexible range of circumstances. Therefore we **propose** that the power to strike out a claim, or any part of that claim (or, indeed, response), on grounds that it has no reasonable prospect of success, should be exercisable by an employment tribunal (including by an employment judge sitting alone, and whether on its own initiative or at the invitation of a party) either –

- (a) at any hearing rather than exclusively pre-hearing reviews; or
- (b) without hearing the parties or giving them the opportunity to make representations.

However, procedural safeguards will be required to ensure fairness. In the civil courts in England and Wales, wherever a strike-out order is made without a hearing, any party affected by the order and who was not given the opportunity to make representations has the right to apply to have that order set aside, varied or stayed. In the employment tribunals, we think that the Review mechanism under Rules 34-36 of the ET Rules is relevant here.

We therefore **propose** to introduce an amendment to the review provisions, so as to make clear that parties affected by a strike-out order made in the absence of their representations can apply to have the judgment or order set aside, varied or stayed.

We also **propose** to make it easier for Respondent employers to request that an employment judge considers a claim form right at the outset, in light of their proposed new strike out powers. In effect, the process change would allow an employer to submit an ET3 ‘response’ form to the employment tribunal, but rather than completing it fully, instead to suggest that insufficient information has been provided to justify the claim continuing, and asking the tribunal either:

- (a) to order the claimant to provide more information, before a full ET3 form needs to be submitted. We envisage that ‘unless orders’ would be appropriate in these circumstances – i.e. an order that, *unless* the claimant furnishes the tribunal with the further information required by a certain date, then that claim (or any relevant part of it) will stand as struck out; or
- (b) to strike out the claim on the grounds that it has no reasonable prospect of success (or under any other appropriate and relevant ground).

²² A case management discussion (CMD) is a hearing intended to deal solely with case management issues and must be conducted by a judge sitting alone. A judge may, at a CMD, issue pre-trial orders and directions.

If the claim is struck out, or no suitable further information is provided, the employer will then not need to complete the response form more fully, thus saving time and money. Alternatively, if the further information is provided, showing that the claim is at least arguable and so deserving of consideration, all sides can proceed through the usual and proper process (i.e. employer completing a full response, and the claim being case managed to a final hearing, unless the parties can resolve the issues between themselves sooner).

Again, procedural safeguards must be built in. Without them, an employer acting in bad faith could simply make a request for strike-out or further information in order to string out the tribunal proceedings, in the hope of putting the claimant off pursuing his/her claim. Therefore, employment judges should have sanctions available to them where such requests are made. We consider that the powers currently available in relation to wasted costs orders, and costs orders more widely, will prove sufficient in this regard. However, we would welcome comment on this issue.

QUESTIONS

21. 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.

22. 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.

23. 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?

24. 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?*

Deposit orders

Deposit orders can currently be made by employment tribunals under Rule 20 of the ET Rules 2004. In effect, they are orders which require a party (either claimant or respondent) to pay a sum of up to £500 as a condition of being permitted to continue to pursue all, or any part, of their respective claim/response. So, where a judge considers that any contentions put forward by a party have little reasonable prospect of success, the requirement to pay a deposit (which may²³ be lost if the contentions were ultimately not successful) can act as an incentive for the withdrawal of any particularly weak cases. Before making such an order, a judge must take reasonable steps to ascertain the ability of the party against whom the order would be made to comply with it and, in determining the size of any deposit, a judge is obliged to take into account any information ascertained about the party's ability to pay.

This is a helpful procedural device. But, again, it has certain limitations. First, a judge is only empowered to make a deposit order at a pre-hearing review. Second, the test that must be met before a deposit order can be made is very similar to the strike-out test – i.e. “*little* reasonable prospect of success”, as opposed to “*no* reasonable prospect of success”.

We think these limitations can act to prevent the making of deposit orders and therefore need to be addressed. Accordingly, we **propose**:

- (a) employment judges should have the power to make deposit orders otherwise than at a hearing, or at hearings other than pre-hearing reviews. As with the strike-out provisions, such decisions would of course be subject to the usual review procedures (as we propose to amend them);

²³ The deposit paid by a party is fully refundable at the end of the substantive hearing except where rule 47 applies. Under that rule, if the tribunal goes on to decide against that party at a full hearing but makes no other award of costs against him or her, it must go on to consider whether to award costs or expenses on the basis that the party conducting the proceedings unreasonably in persisting in having the matter determined by a tribunal. It can only do so where it is of the opinion that the reasons that caused it to find against the party at the full hearing were substantially the same as the Employment Judge's reasons for taking the view at the PHR that the party had little reasonable prospect of success.

- (b) 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 (e.g. consideration of the number of claims previously issued by the party; clarity and strength of claims pleaded; the likely costs to the parties of continuing to litigate against the value/importance of the claim) to assist judges in applying deposit orders more effectively; and
- (c) to increase the maximum level of the deposit order that can be made, from £500 per matter (i.e. claim/response or part thereof) to £1000. This would increase the disincentive effect of the deposit regime, and so help to make it a more robust feature of the 'vetting' system.

Unlike the employment tribunal, the Employment Appeal Tribunal has no powers to require a financial deposit from a party as a condition of being allowed to pursue a matter as part of their appeal/response, or the case as a whole if the Judge is satisfied that the party has "little reasonable prospect of success". There seems no good reason for this anomaly. And weaker cases are found at the appellate level, just as they can be found in employment tribunals. We also **propose** therefore, to introduce equivalent powers for the EAT to levy deposit orders.

QUESTIONS

25. Do you agree that employment judges should have the power to make deposit orders at hearings other than pre-hearing reviews? If not, please explain why.

26. Do you agree that employment judges should have the power to make deposit orders otherwise than at a hearing? If not, please explain why.

27. 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?

28. 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.

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

The costs regime

It is a feature of the civil and administrative justice system that procedural rules can be complicated. Sometimes, this is unavoidable: legal process demands some formality. But there are few instances where procedural rules are as complicated as in relation to the costs of proceedings.

In the employment tribunals, applications for costs (in Scotland, expenses) can be made at any time during the proceedings. There are three types of award – a costs award, a preparation time order and a wasted costs order:

- a **costs award** covers the “fees, charges, disbursements or expenses incurred by or on behalf of a party, in relation to the proceedings.” A costs order can only be made in favour of a party who was legally represented at the hearing or, if the proceedings are determined without a hearing, was legally represented at the time the proceedings were determined;
- a **preparation time order** can be made in favour of a party who has not been legally represented at a hearing or, where there has been no hearing, when the case was determined; and
- a **wasted costs order** can be made against a representative as a result of the representative’s conduct. In making a wasted costs order, a tribunal or employment judge, may order a party’s representative to meet the whole or part of any wasted costs of any *party* (although not the *tribunal* itself) including costs already paid to the representative by his or her own client.

The maximum sum that tribunals have the power to award under the first two types of order is currently £10,000²⁴. There is currently no cap in respect of wasted costs orders.

We want to say at the outset that it is not our intention to move towards a general costs-recovery policy. However, we do think that certain changes are appropriate. In particular, we think that the £10,000 cap on costs that can be awarded by an employment tribunal is too low. Where costs are likely to exceed that cap, and an employment tribunal wants to ensure such costs are awarded, it is currently necessary to transfer the matter to a civil court for consideration. Such transfers can be cumbersome and time-consuming.

We therefore **propose** to double the current cap on costs awards from £10,000 to £20,000. We envisage that this, together with the other measures outlined, will encourage parties who pursue weak claims/responses to think carefully before initiating tribunal proceedings.

²⁴ See Rule 41(1)(a) in respect of costs awards; and Rule 45(2) in respect of preparation of time orders.

However, we accept that there is a risk that parties could use this costs cap increase to put undue pressure on their opponents to withdraw from the tribunal process. Aggressive litigation – threatening costs sanctions, particularly against an unrepresented party - could stand as a barrier to access to justice for legitimate cases. We would therefore be interested in views on the steps that can be taken to mitigate this risk, whether through formal tribunal procedure, or through regulatory action taken by the relevant bodies, or otherwise.

QUESTIONS

30. 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.

31. 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.

32. 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.**

33. 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.

Part B: Encouraging settlements

For the greater number of the cases that come to an employment tribunal, there is a genuine claim that requires proper and thorough consideration. In a sense, however, those claims are no different from the original disputes that occur in workplaces. We believe that by far the best way of resolving these disputes is to settle them fairly and amicably between the parties, and we want to support and encourage parties to pursue settlement wherever and whenever that can be achieved, rather than believing that once a claim is lodged, the only option is determination by tribunal.

The provision of information

A charge sometimes levelled against the tribunal system, in particular by employers and their representative bodies, is that businesses often lack the relevant information required to determine whether to fight or settle a case. Or, at least, they lack that information at the earliest stages of the case.

This means employers have to incur cost in defending a claim, only to find that it can be settled by mutual consent (or struck out because it is without merit), so some or all of the formal tribunal work they have been put to was needless. We think this deserves urgent attention.

We talk above (see section on ‘tackling weaker cases’) about powers to tackle unmeritorious claims and proposed mechanisms to seek the provision of further information to enable tribunals to determine whether to allow such claims to proceed. But the large majority of the claims in the system do deserve proper consideration. However, we believe that many of them could be settled before they reach a hearing if both parties understood the detail of the claim. So it is essential that all sides know as early as possible what it is they are dealing with.

We therefore **propose** that the rules (and the underlying tribunal form) are amended so as to mandate the provision of additional information about the nature of the claim being made. Specifically, we think that, wherever a claim for monetary compensation is made – or a compensation award is the most likely result if the claim is successful, a Statement (or Schedule) of Loss should be incorporated into the ET1 claim form.

In order to assist claimants – particularly those that are not represented – the Tribunal Service will ensure that guidance notes setting out how a Statement of Loss should be prepared are made available to all claimants. We will develop this in conjunction with the judiciary and others.

We think that these guidance notes should be relatively simple to follow. And we think that the Statement, when supplied to the respondent employer, will assist greatly in helping that employer to understand the nature of the claim against them. Accordingly, it should be easier for employers to make the

decision about whether to fight the claim, or to try and resolve the matter through conciliation or by making an offer of settlement.

QUESTIONS

34. 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?

35. If yes, what would those benefits be?

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

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

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

Formalising offers to settle

In some other parts of the justice system, courts have procedures for incentivising and encouraging formal settlement offers to be made (and, where reasonable, to be accepted) during proceedings. In Scotland, the Sheriff Courts have the Judicial Tender mechanism. In England and Wales, the civil courts have Part 36 of the Civil Procedure Rules. Broadly speaking, both processes are variants of what litigation professions understand as ‘Calderbank’ offers to settle²⁵.

As was recently noted in Lord Justice Jackson’s Review of Civil Litigation Costs²⁶:

“because of the costs regime, there [is] no equivalent to CPR Part 36 in relation to employment tribunals. This meant that there [is] less pressure on parties to accept reasonable settlement offers”²⁷.

²⁵ So called after the English Court of Appeal case of *Calderbank v Calderbank* [1976] Fam 93.

²⁶ See Final Report, in particular Chapter 41 (from page 420):
<http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>

²⁷ See Interim Report, Volume 1, Chapter 10, para 4.3:
<http://www.judiciary.gov.uk/NR/rdonlyres/D2C93C92-1CA6-48FC-86BD-99DDF4796377/0/jacksonvol1low.pdf>. Given its proven success in the English civil courts, the Part 36 regime is a particular focus of the current Jackson consultation issued by the Ministry of Justice: see above

We want to address that, ensuring the civil and administrative justice system (at least insofar as party v party disputes is concerned) is more consistent and coherent.

Accordingly, we **propose** to introduce a Rule whereby either party can make a formal settlement offer to the other party or parties as part of formal employment tribunal proceedings. This procedure would be backed by a scheme of penalties and rewards, in order to encourage the making – and acceptance - of reasonable settlement offers.

However, the process we introduce has to be fit for the employment tribunal context. As we have made clear, we do not intend to introduce a general cost-shifting regime. Nor do we intend these settlement offers to create undue work for tribunals in assessing costs matters.

Instead, we envisage a scheme requiring or empowering an employment tribunal to increase or decrease the amount of any financial compensation which is ultimately awarded where parties have made an offer of settlement which has not reasonably been accepted. Wherever no award is made (i.e. the claim is lost), and a reasonable offer of settlement has been made to the claimant we envisage that such a fact could be used by a tribunal in considering whether the claimant had pursued the case “vexatiously, abusively, disruptively or otherwise unreasonably”, or in a way that was “misconceived”²⁸.

Further, rather than adopting a model like Part 36 of the Civil Procedure Rules (which includes a formal ‘payment into court’ mechanism), we propose to adopt a procedure more akin to the Scottish courts’ judicial tender model. Here, instead of paying the sum of money offered into court, written details of the offer are lodged formally with the court office, and communicated directly to the other side.

We see that approach working well in employment tribunals. A party could simply make a formal offer by lodging a TS form with the relevant Tribunal office, and sending a copy of that form to the other party. As with the courts, there would need to be a clear procedure for keeping the offer confidential from the ET panel and only to reveal the offer once the Tribunal had reached its decision and assessed, if appropriate, the level of compensation to be awarded. This would avoid the added bureaucracy of administering the monies paid into Tribunal.

Importantly, Acas settlement discussions would not form part of the formal offer process, unless and until one or other of the parties sought to make an offer under the new Rule – i.e. by lodging the appropriate form with the tribunal. This means that the independence and confidentiality of Acas would

²⁸ If this criterion was satisfied, and assuming the party to whom it applied was represented, the current costs and expenses rules (see Rule 40(3)) could be applied. This would be made clear in the accompanying guidance. However, we anticipate the number of formal settlement offers made in proceedings which are ultimately lost to be small.

not be compromised; nor would there be any dispute about whether (and, if so, in what terms) a relevant offer had been made.

Alongside the proposal above to increase the amount of information available to the parties at the outset of proceedings, we think this package represents a strong incentive to increase reasonable settlement offers being made and then accepted. Accordingly, pressures will be reduced on the parties and on the tribunal system.

QUESTIONS

39. Do you agree that this proposal, if introduced, will lead to an increase in the number of reasonable settlement offers being made?

40. 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

41. 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.

42. 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.

43. 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?

44. 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.

Part C: Shortening tribunal hearings

Another common criticism of employment tribunals is that cases take too long to hear. Of course, employment cases can be complicated – they can involve questions of law which take time to consider, or involve a lot of facts which have to be heard. In such cases, it is important that the tribunal hears the case properly and that all parties get a fair chance to put their arguments.

However, we accept that there are ways in which to strike a better balance. Our core objective here, then, is to reduce the time spent hearing individual tribunal cases where possible, while preserving the fairness and effectiveness of those hearings at all times.

Witness statements being taken as read

A feature of most if not all employment tribunal cases is that evidence needs to be taken and heard from witnesses. This witness ‘testimony’ helps the tribunal to understand the facts in the case, and ultimately to draw its conclusions about what actually happened between the parties.

In England and Wales²⁹, the testimony to be given by witnesses in employment tribunal proceedings is usually written down in a Witness Statement. This statement sets out the witness’s version of events relevant to the case.

Copies of the statements are sent to the tribunal and exchanged between the parties at a relatively early stage of the tribunal process. This helps each party to understand their opponent’s case – which as we have discussed above is useful in helping parties to narrow the issues in dispute and, hopefully, might help them to settle the case between themselves.

However, if the case is not settled, at the final hearing of the case the testimony in those witness statements becomes part of the evidence presented by the respective parties before the tribunal. In the civil courts in England and Wales, the written statements are accepted as the evidence of the witness making the statement – which is called their “evidence in chief”³⁰. In other words, the statement is “taken as read”. The witness can then be asked questions about the statement by the other party (or their representative) – this is called cross examination.

In most employment tribunals, the written statements are not treated in this way³¹. Instead, witnesses are asked to read the content of their statement out

²⁹ In Scotland, witness statements are not used, unless (which is rare) directed by an employment judge. This follows the wider practice of the Scottish courts.

³⁰ See CPR Rule 32.5, and in particular Rule 32.5(2): “Where a witness is called to give oral evidence... his witness statement shall stand as his evidence in chief unless the court orders otherwise”.

³¹ Employment tribunals in the Bristol region do tend to operate a policy of taking witness statements ‘as read’. Otherwise, witness statements do tend to be read out in full at hearings.

loud, so that the tribunal can see and hear the evidence presented orally. Cross examination can then follow. In some cases it can take the tribunal many hours to hear the evidence. This can add considerably to the costs of a hearing, not only for the taxpayer, but for the parties involved, especially where they are legally represented.

There are two issues here. First, the inconsistent practice across England and Wales, where some tribunals do take witness statements as read, while others (probably the majority) do not. Second, we agree with the Employment Appeal Tribunal in the case of *Mehta*³² that “reading aloud a document which the Tribunal can more efficiently and more effectively read out of court achieves nothing of value and is contrary to the overriding objective inasmuch as it wastes the time of the Tribunal and the parties”³³.

Accordingly, we **propose** to introduce a rule to encourage a consistent approach with the civil courts. Unless an employment judge directs otherwise, a witness statement would stand as the evidence in chief of the witness concerned and would no longer be read out in its entirety. The provision to be introduced would be modelled on the provisions of the Civil Procedure Rules and the guidance given in the case of *Mehta* – although making clear that Scotland (with its general policy of not using witness statements) would fall outwith the default provision.

Again, procedural safeguards may be required to ensure fairness is not compromised. This was covered at some length in the EAT judgment in the *Mehta* case. So we **propose** affording employment judges and tribunals the discretion exceptionally to vary the default rule, for example, in circumstances where:

- a party or witness would benefit from reading some or all of their statement, in advance of being cross examined, either to settle them into the formality of the hearing, to ensure that an unrepresented party is not compromised by having to rely on written testimony without further clarification, or for some other reason;
- the Employment Judge or Tribunal feel that evidence in chief should be read out, in whole or in part³⁴, to assess the weight and merit of the evidence being given; and/or
- it would assist the tribunal for the witness to give a brief summary of the witness statement, for either of the above reasons or otherwise.

³² *Mehta v. Child Support Agency* (2010). For full judgment, see:

http://www.employmentappeals.gov.uk/Public/Upload/10_0127fhwwSBCEA.doc

³³ *Mehta v. Child Support Agency* (2010), paragraph 16(1), *per* Underhill P.

³⁴ The EAT emphasised in the case of *Mehta* that the operation of the rule “need not be all or nothing. It may make sense for only part of a statement to be read aloud or for a witness to be “walked through” his or her statement by counsel, summarising parts and pausing for the key points to be read out and/or elucidated or amplified...”. See paragraph 16(3) of the judgment.

In exercising their discretion, we would expect employment tribunals to follow the clear and sensible guidance handed down by the Employment Appeal Tribunal President in the *Mehta* case.

From our provisional analysis³⁵, we think that treating more witness statements as “being taken as read” would help to save time that is currently spent in hearings. Accordingly, this would help to save the parties and the tribunal time and expense. But the procedural fairness issues listed above will be important in helping to establish an effective balance.

QUESTIONS

45. 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.

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

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

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

Expenses of witnesses and parties

In certain circumstances, it is currently possible for parties, their witnesses and any voluntary representatives to apply to an employment tribunal to recover some of the travelling costs and other expenses associated with attending a hearing to give evidence³⁶. The justification for this State-funded benefit now needs to be scrutinised, given the approach adopted in analogous parts of our justice system; and given the present financial climate.

In the civil courts, there is no equivalent facility for expenses to be reimbursed by the State. Ordinarily, it is considered the civic duty of relevant witnesses to give evidence in legal proceedings. Wherever a witness summons is issued,

³⁵ See “The impact assessment: consultation on resolving workplace disputes” on www.bis.gov.uk, URN 11/512

³⁶ S.5(3) of the Employment Tribunals Act 1996 provides that “(3) The Secretary of State may pay to any other persons such allowances as he may with the consent of the Treasury determine for the purposes of, or in connection with, their attendance at employment tribunals.” See Tribunals Service guidance at: <http://www.employmenttribunals.gov.uk/Documents/Publications/ExpensesAllowances.pdf>

expenses can be sought. But it is the responsibility of the party calling a witness to offer/pay any costs associated with travelling to and from the hearing, and any loss of earnings. Among other things, it is the party who calls the witness who benefits, not the taxpayer. Therefore, we see little reason for the burden of the cost to fall on the Exchequer, as opposed to those individual parties.

Further, the fact that there is a cost associated with calling witnesses may encourage greater discipline when doing so – thus potentially reducing the number of witnesses called, and so reducing the cost to all of attendance because of the shorter hearings that result.

Accordingly, we **propose** to withdraw the payments currently available from the Tribunals Service to parties and witnesses in employment tribunal proceedings. Instead, as in the civil courts, we would expect parties and witnesses to cover their own expenses. Where any witness summons needs to be issued, it would be for the parties to offer and pay a reasonable sum to witnesses called to give evidence on their behalf. Such payments could be based on the scales set for witnesses called to give evidence in county court trials in England and Wales, for example³⁷.

QUESTIONS

49. 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.

50. 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?

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

³⁷ For small claims, witnesses can get reasonable travel expenses (CPR 27.14(2)(d)) and loss of earnings (CPR 27.14(2)(e)) which is limited to £50/day (CPR PD27, 7.3(1)).

Otherwise, where a witness is the subject of witness summons, they are entitled to reasonable travel expenses and a sum for loss of earnings for which the Crown Court rates apply (CPR PD 34A, 3.1).

For criminal matters, there are set expenses for travel and loss of earnings (www.cps.gov.uk/legal/assets/uploads/files/Attachment%201.pdf)

Employment Judges sitting alone

Employment tribunals usually sit with three members hearing a case. One of the three members is an Employment Judge. Alongside the judge, two other members make up the balance of the tribunal bench (one drawn from a panel of people appointed after consultation with organisations representative of employees, and one drawn from a panel of people appointed after similar consultation with organisations representative of employers).

Establishing panels in this way helps to maintain what has become in effect an industrial jury system. When deciding cases, panels tend to look broadly at two types of question: '*legal*' ones (like what does a particular statute mean, or what criteria must a party meet to win their claim) and '*factual*' ones (like whether a particular event happened in the way that a party suggested or not).

Where there are questions of fact to be assessed by the tribunal, recent experience of industry (as opposed to expertise in the law) can be valuable. However, where sitting as a panel, the three members have an equal voice in all decisions to be made. So legal questions do not fall exclusively to the employment judges, and factual issues are not for the 'wing members' alone. The panel acts as one, although the constituent parts of that panel can clearly bring relevant expertise and experience in relation to certain issues before them.

In certain circumstances, the general rule is varied and an employment judge can sit alone – i.e. without the 'wing members'. Cases about (for example) unpaid wages, holiday or redundancy payments, and interim relief applications, can be heard by an employment judge alone, without the need for a full panel. Cases in other jurisdictions, where all parties consent to the judge sitting alone, are also permitted to run in that way³⁸.

The provisions which allow an employment judge to sit alone bring significant advantages for all concerned:

- listing cases for hearing is easier in front of a judge, rather than a panel of three members. This is particularly so in respect of member availability where a case runs across different days, or needs to be considered again by the same panel in a part-heard or Review hearing at a later stage; and
- requiring the parties to take one employment judge through the issues of a less complex case generally takes less time at a hearing, given their experience and knowledge of employment law, than taking a panel of three through those facts.

³⁸ For the full list of claims in which an Employment Judge can sit alone, see Section 4(3) of the Employment Tribunals Act 1996.

So hearing times are shorter where a judge sits alone. Consequently, parties are tied up for less time, and the tribunal resources can be used more effectively (more cases can be dealt with; and wing members can be deployed more effectively to deal with cases more deserving of their expertise).

While the majority of the claims in jurisdictions reserved for judges sitting alone can be dealt with effectively in this way, some are better suited to a complete panel of three members. The regulations therefore empower an employment judge to direct that a claim which is permitted to be heard by a single judge should nonetheless be dealt with by a full tripartite panel of members³⁹. This discretion helps to ensure more of a balance between maximising efficient use of resources and ensuring justice in individual cases.

We think, however, that employment judges should be permitted to sit alone in a wider number of cases, so helping to capture the benefits outlined above across a broader range of tribunal business. In particular, we think that where cases give rise to questions that are relatively straightforward – for example where questions of fact can be analysed within a framework of law that is relatively uncomplicated or settled – then judges should be able to sit alone wherever it is considered appropriate.

We think that unfair dismissal claims are a good example of cases where employment judges may be able to sit alone, but where the rules do not currently allow it. Insofar as any employment tribunal case can be, many of them can be relatively straight forward. For example, such cases can turn on a determination as to whether a dismissal was reasonable or not. An assessment of reasonableness in given circumstances is something that often falls to a judge to determine right across the justice system.

We **propose**, therefore, that employment judges should be permitted to sit alone in cases concerning unfair dismissal, and that the list of cases in Section 4(3) of the Employment Tribunals Act 1996 be amended accordingly.

That is not to say that all unfair dismissal cases should be dealt with by a lone judge. Some cases will be appropriate for a full panel of three – for example where the issues are complex, there is a lot of factual evidence to sift, or the parties express a clear desire for a tripartite panel. So the existing discretion would apply here, as it applies to other categories of case where a judge can currently sit alone.

Separately, we would be interested in views as to other categories of cases that might be appropriate for an employment judge to hear alone – subject to the necessary discretion to sit with wing members.

In particular, we are interested in views on the use of Members at the appellate level, i.e. in the Employment Appeal Tribunal.

³⁹ Section 4(5) of the Employment Tribunals Act 1996

Currently appeals heard in the EAT are dealt with by a tribunal with a composition identical to that of the employment tribunal from which the appeal has come. In other words, an appeal against a judgment or order of an employment judge sitting alone will be heard in the EAT by a judge sitting alone; and an appeal heard in the tribunal by a full panel will be heard in the EAT in the same manner.

However, unlike employment tribunals, the EAT has no fact finding remit and deals with appeals on points of law. Indeed, the EAT can *only* deal with appeals that raise a point of law.

Judges are the experts in matters of law. The rationale for using Members in the employment tribunals – where issues of fact are considered and decided upon – cannot therefore wholly be carried across to the EAT. We would welcome views on this point; and on any other categories of work which might be suitable for a judge to hear alone.

QUESTIONS

52. 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.

53. 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.

54. 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?

Part D: Maximising proportionality

Along side the proposals we have outlined above, we think that there are other measures that could be taken to increase the efficiency and effectiveness of the employment tribunals. In particular, given the backdrop of the economy and the public spending disciplines we face, we think we can make the system more responsive and more proportionate. We outline two further proposals here that we believe will contribute to those aims.

Legal Officers

The employment tribunal has general powers to manage proceedings. This power is set out at Rule 10 of the Employment Tribunals Regulations.

The exercise of Rule 10 powers rests exclusively with employment judges. With a limited number of exceptions (such as the rejection of the ET1 and ET3 when the claim or response has not been made on the prescribed form) correspondence from parties must also be referred to the judiciary for consideration and direction.

We think that salaried employment judges spend roughly up to a quarter of their time undertaking interlocutory work, like paper work referred by administrative staff in local Employment Tribunal Offices. Some of this time is spent looking at cases in which they have personal case management responsibility – but not all of the work is necessary to be reserved to one particular judge. This means that some judicial time is spent undertaking ‘general’ interlocutory work, which could be undertaken by any competent person. Currently, only employment judges are deemed competent. We think that there is scope for some of the work to be delegated, thus freeing up employment judges to concentrate on tasks that do require their particular expertise.

In broad terms, we see three potential options for delegating work from judiciary: namely delegating that work to experienced administrative officers; to qualified lawyers employed as registrars or legal assistants; or to a ‘junior’ rank of judge or judicial officer.

Each of these options provides different scope in terms of the nature and/or volume of tasks that could be delegated. Specially trained administrative staff might not, for example, be capable of doing the work of a qualified lawyer or a junior judicial officer.

We therefore **propose** that the general interlocutory work currently administered by the judiciary should be delegated to a suitably qualified legal officer. This would free up more judicial time which could potentially be used to hear more claims, resulting in faster progression of cases. By way of example, interlocutory work in this context could include matters relating to the provision of further information, adjourning or postponing hearings, exchanging documents (e.g. witness statements), amending pleadings, the

provision of expert evidence and/or the listing of cases for hearing. We would be grateful for views on the type of work that would be suitable to delegate; and to the competence of the persons to whom that work could be delegated.

QUESTIONS

55. Do you agree that there is interlocutory work currently undertaken by employment judges that might be delegated elsewhere? If not, please explain why.

56. 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.**

The overriding objective

The overriding objective of the employment tribunals' constitution and rules is to enable tribunals and their judiciary to deal with cases justly⁴⁰.

The statutory framework overarching the employment tribunals explains that dealing with a case justly can include:

- ensuring the parties are on an equal footing;
- dealing with the case in ways which are proportionate to the complexity or importance of the issues;
- ensuring that it is dealt with expeditiously and fairly; and
- saving expense.

This provision – which it is the duty of tribunals and parties to observe and further – is of central importance to the employment tribunal process. It summarises the essence of why the tribunals exist.

However, unlike the overriding objective in the England and Wales civil courts⁴¹, the employment tribunals' overriding objective has one significant omission as it currently stands. In the courts the overriding objective (which is also to deal with cases justly) lists criteria explicitly aimed at looking at the cases in the system as a whole, as well as each individual case, when

⁴⁰ See Regulation 3 of the ET(Constitution & Rules etc) Regulations 2004, SI 1861

⁴¹ Civil Procedure Rules 1998, Rule 1

seeking to understand and further the objective. The employment tribunal regulations do not. Instead, they refer to the concept of proportionality which, while important, does not highlight the need to look from a broader perspective than just that single case.

Accordingly, we **propose** to add the text, drawn from the Civil Procedure Rules⁴², about the importance of “allotting to [each case] an appropriate share of the [tribunal’s] resources, while taking into account the need to allot resources to other cases”.

This is a largely symbolic amendment. But the symbol is important. Proportionality must pervade the management of the system. In that light, any clarification that proportionality must look at the system as a whole, as well as the individual cases within it, will prove helpful.

⁴² See CPR Rule 1(1)(e).

Chapter III. Resourcing the system effectively – charging fees

The volume of claims brought in employment tribunals has increased steadily in recent years⁴³. The current caseload is high – and shows no sign of dissipating to any significant extent⁴⁴. Given this pressure, it is vital that we ensure the system is resourced adequately to meet its challenges.

Currently, the cost burden of running employment tribunals falls in its entirety on tax payers. Unlike the civil and family courts, where users of the services contribute to the associated costs, funding for the employment tribunals and the Employment Appeal Tribunal comes from the budget allocated by the Treasury to the Ministry of Justice (MOJ) and, in turn, to the Tribunals Service.

As part of the recent spending review, the overall MOJ budget settlement was reduced by 23% over the next four years. This requires the MOJ to make £2bn of savings. The cost of providing the range of ‘justice’ services, including across all courts and tribunals, needs to be scrutinised. The circa £80m⁴⁵ annual budget allocated to the running of the employment tribunal system is no exception.

Various groups and organisations have made recent public recommendations about a fee-charging mechanism being necessary for employment tribunal cases and appeals⁴⁶. Given the context of high workload and pressure on funding, introducing such a fee-charging mechanism is one option available to us so as to ensure the system as a whole can be appropriately funded.

Accordingly, we think that service users should be asked to contribute towards the cost of running employment tribunals, and the Employment Appeal Tribunal, by paying fees. However, we intend to consult on the detail of our proposals in the Spring, to allow us to develop a model that is as fair and effective as possible for all users.

The policy case for fees?

It is general Government policy that services provided by the State and used by a particular segment of the population should attract a fee to cover the cost of providing that service. This approach helps allocate use of goods or services in a rational way because it prevents waste through excessive or badly targeted consumption.

⁴³ The number of cases accepted by the employment tribunals in 2009/10 was 236,100, and increase of 56% on the previous year. In 2005/06, only 115,000 cases were accepted, less than half the figure five years later.

⁴⁴ At the end of 2010/11, the Tribunals Service anticipates a live caseload in employment tribunals of around 440,000 cases.

⁴⁵ In 2008/09, the total cost of administering the employment tribunals system was, broadly, £77.8m. In 2009/10, that figure had increased to £82.1m. Source: *Tribunals Service*.

⁴⁶ For example, see the British Chambers of Commerce report: “Employment Tribunals – Up to the job?” Citation at footnote 4, *ante*.

Providing access to justice is not the same as providing other ‘goods’ or ‘services’. But charging fees for tribunal cases and appeals has the potential to play a central role in our strategy to modernise and streamline the employment dispute resolution system, helping to safeguard the provision of services, at an acceptable level, that are so important to the maintenance of access to justice.

Firstly, a fees mechanism will help to transfer some of the cost burden from general taxpayers to those that use the system, or cause the system to be used. That is fair, particularly if the burden is shouldered by the party who causes the system to be used.

Secondly, a price mechanism could help to incentivise earlier settlements, and to disincentivise unreasonable behaviour, like pursuing weak or vexatious claims. In turns, this helps to improve the overall effectiveness and efficiency of the system.

Thirdly, and more generally, the courts have for some time charged fees for family and civil disputes. We see no fundamental difference between the courts and the employment tribunals in the sense that both consider cases between individuals (party v party disputes). Therefore, introducing a fees system will bring the Employment Tribunal and Employment Appeal Tribunal into line with other similar parts of justice system.

Consulting on the detail

We have concluded that it is right to ask service users to contribute to the costs of running of the system. But there is a lot of work we need to do to design a mechanism that is as fair as we can make it – in particular to vulnerable workers whose access to justice must be protected.

Accordingly, we **propose** to consult on how best to implement a fees mechanism in the Spring, once we have developed options more fully, and considered the likely impacts, both on the system overall and on specific categories of tribunal users.

We also plan to talk to those with an interest, during the course of the wider consultation on this document, about our proposed approach in respect of fees. Those early conversations will help to inform the proposals that we will consult on in due course.

Chapter IV. Businesses taking on staff and meeting obligations

Government is committed to ensuring that the burden of employment legislation is reduced for employers. Through the Employment Law Review, we will be looking at ways of simplifying complex legislation to make it easier for business to take on staff, and understand their obligations to their employees.

Extending the qualification period for unfair dismissal

One measure we propose is to extend the qualification period for employees to bring a claim of unfair dismissal from one to two years. We believe this will contribute to our overriding objectives of encouraging growth through giving businesses more confidence when they consider taking on people. Alongside the other measures proposed in this consultation document, we believe it may also help improve the employment relationship, giving more time to get the relationship right and, in a modest way, reduce the number of disputes that go to employment tribunals.

This proposed measure would not affect the existing so-called “day one rights” of people when they start work to bring a case for unfair dismissal, for example where they believe gender, race or some other form of discrimination has taken place or where someone is dismissed for exercising their legal rights, such as asking for a written statement or to be paid the National Minimum Wage. Nor would it change the basic principle that an employer must have a fair reason for dismissal and follow a fair process, such as the company’s dismissal procedures. Where these separate “day one” rights are not an issue, however, an employee would only be able to bring a case after two years, rather than one year as at present.

Business have told us of their concerns that the existing legislation is too weighted against employers when it comes to the decision to take on people – making it feel a riskier step than some are prepared to take. There may also be a risk that the current one year period is too short for employers and employees to resolve differences they may have – and that the one year qualifying period acts as an incentive to some employers to bring the relationship to an end earlier than is in everyone’s interests.

Although there are around 2.9 million workers who have been with their employer for between 12 and 24 months, we consider this change is likely to have a relatively modest direct impact. We estimate that the change will reduce the number of claims to an employment tribunal by between 3,700 to 4,700 a year. This estimate is based on length of service data from the Labour Force Survey and Survey of Employment Tribunal Applications (SETA) 2008.

More important is likely to be the indirect effects of enhancing the confidence of businesses that are considering taking on people – that there is more time

for the relationship to get established and work well for everyone. We do not see this as a charter for businesses to sack people unfairly.

QUESTIONS

57. 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 one to two years would have on:

- **employers**
- **employees**

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

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

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

Financial Penalties

The Government believes employers should take appropriate steps to ensure that they meet their obligations in respect of their employees. We therefore propose to introduce the power for ETs to impose financial penalties on those employers found to have breached an individual's rights. While we recognise that business will be opposed to such a proposal, we take the view that it will encourage employers to have greater regard to what is required of them in law and, ultimately, will lead to fewer workplace disputes and employment tribunal claims. Good employers will have nothing to fear, while their competitors, who gain advantage by treating their employees unfairly, will properly be held to account.

Currently, where ETs find in favour of a claimant, they have powers to make an award in favour of the individual with the aim of returning the individual to the position they would have been in had the breach not occurred. With limited exceptions (e.g. in discrimination cases) they do not have powers to make an award for injury to feelings etc. The tribunal may vary the award up or down by up to 25% where they regard either party to have failed unreasonably to comply with the Acas Statutory Code of Practice on Disciplinary and Grievance Procedures. There are, however, no powers available to the tribunal to penalise an employer for the original breach. Introducing such powers would allow the tribunal to send a clear message to an employer, and employers more generally, that they must ensure that they comply with their employment law obligations. Over time, we would expect to

see a fall in the number of ET claims as employers became better informed of these obligations, and so breaches will occur less often or not at all.

We propose to introduce a provision for the tribunal to levy financial penalties on employers found to have breached the relevant rights, to encourage greater compliance. Penalties would be payable to the Exchequer, rather than the claimant, providing some element of recompense for the costs incurred to the system through the employer's failure to comply with their obligations, and avoiding an incentive for employees to bring speculative claims.

We intend that a financial penalty will be automatic in all breaches, where the ET is acting at first instance, regardless of the jurisdiction involved, unless the ET determines there are exceptional circumstances (such as the size of the organisation or where there is a large multiple claim against one employer).

Our consideration of the level of the financial penalty that should be imposed has been influenced by the civil penalty regime already in place for breach of NMW rights and to ensure any ET regime complies with Article 6 of the European Convention on Human Rights (ECHR).

We therefore propose a system of financial penalties is put in place as follows:

- The financial penalty should be based on the total amount of the award made by the ET.
- It should be half the amount of the total award so that the level of financial penalty is proportionate to the award.
- There should be a minimum threshold of £100.
- There should be an upper ceiling of £5,000.
- Where a non-financial award has been made by ET for a breach, we envisage that a tribunal would ascribe a monetary value and so the appropriate financial penalty can be made.

By way of comparison, TS statistics for 2009/2010, show median awards as follows: unfair dismissal £4,903; race discrimination £5,392; sex discrimination £6,275; disability discrimination £8,553; religious and sexual orientation discrimination both £5,000; age discrimination £5,868.

We believe that it is important that there should be an incentive for any penalty to be paid quickly. We therefore propose that the penalty should be reduced if there is prompt payment, and suggest that this is set at a 50% reduction if payment is made within 21 days.

Transitional arrangements would need to be considered and we propose that any system of financial penalties would only be commenced for claims lodged at least 6 months after the relevant legislation was introduced to ensure employers have sufficient time to take measures to ensure they are compliant, if they have not already done so.

We will want to avoid significant additional or duplicated administrative costs in the process for collection of financial penalties, and will consider how this can be achieved in the light of consultation responses to this proposal.

QUESTIONS

61. 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.

62. 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.

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

We are also considering some changes to the way in which certain employment tribunal awards and other payments under employment rights legislation are revised each year. This is to correct for anomalous effects on the level of increase each year, and to provide for action to be taken to prevent decreases in the event Ministers determine it appropriate.

The Employment Relations Act 1999 (Section 34) stipulates that the limits on various awards and payments under employment legislation must be adjusted each year to reflect changes in the Retail Prices Index (RPI), measured over the year from September to September. The full list is in the table at Annex C showing the levels and how they have been calculated for the next up-rating, due to take effect from February 2011. The most significant of these concern the cap, or limit, on the award an employment tribunal can impose on an employer in compensation for unfair dismissal or redundancy, and certain payments made by the Secretary of State out of the National Insurance Fund where an employer is insolvent.

There are two particular features of the current legislation that we believe should be addressed. First, the legislation requires that the limits are rounded up to the nearest 10p, £10 or £100 as the case may be. In recent years, with the RPI at relatively low levels, this has produced increases significantly above the RPI increases. For example, in 2006, the limit on a week's pay used to calculate statutory redundancy pay was £290 and inflation was 3.6%. The RPI increase gave a figure of £300.44 which then had to be rounded up to £310, almost doubling the level of increase. In recent years the limit has gone up by 6-7% each year more than the average earnings or RPI in the applicable period. As the value of each £10 band gets progressively smaller in percentage terms, 'double increases' closer to £20 and £200 are more likely. There is therefore a need to avoid this inbuilt and un-intended above-

inflation effect. We would welcome suggestions on options to simplify and correct for this effect.

Secondly, the legislation is such that the formula must be followed regardless of whether there is an increase or decrease in the RPI. In September 2009 the RPI was minus 1.4% which would have resulted in a reduction in three of the limits, whilst others remained unchanged. In the case of the maximum weekly amount used to calculate redundancy and unfair dismissal awards, and other sensitive payments, a once only measure was used (under the Work and Families Act 2006) to make a one-off increase. The fact that such an exceptional change had to be made highlights the complexity and unintended consequences that can arise from a rigidly prescribed formula. We therefore wish to consider whether it would be appropriate to provide for greater discretion in the use of any formula in order that prevailing economic or employment conditions can be taken into account, such as when a decrease to limits would otherwise occur.

Finally, one additional feature we want to consider is whether the RPI should continue to be used as the basis for any up-rating. An alternative would be the Consumer Prices Index (CPI). This is the measure used for the Government's inflation target and from April 2011 will also be used for the price indexation of benefits and tax credits. There may be some benefits in terms of consistency.

QUESTIONS

63. 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?***

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

What happens next?

This consultation will close on 20 April 2011. The Government will consider the responses to the consultation and then publish a Government response, setting out how it intends to proceed. Some of the measures set out in this consultation document would require primary legislation to implement, and if the Government decides to take these forward, it will do so when Parliamentary time allows. Other measures could be taken forward under existing powers to make secondary legislation or rules, subject to further consultation where appropriate.

In preparing this consultation, initial discussions have been held with a number of organisations, including employer and employee representatives, trade union, voluntary and legal bodies. To help the consultation process, the Government intends to hold further discussions with a wide range of interested parties.

ANNEX A: Consultation Response Form

Resolving Workplace Disputes - A Consultation - response form
You can complete this response form online through Survey Monkey:

<http://tinyurl.com/34u7rr5>

Alternatively, you can email, post or fax completed response forms to the
Dispute Resolution policy team at the Department for Business, Innovation
and Skills (BIS)

Email: RWDconsultation@bis.gsi.gov.uk

Postal address:

Dispute Resolution policy team
Employment Relations
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

Fax: 0207 215 6414

The Department may, in accordance with the Code of Practice on Access to
Government Information, make available, on public request, individual
responses.

Name:

Organisation (if applicable):

Address:

Please state if you are responding as an individual or representing the views
of an organisation, by selecting the appropriate group. If responding on behalf
of a company or an organisation, please make it clear who the organisation
represents and, where applicable, how the views of the members were
assembled. Please tick the box below that best describes you as a
respondent to this consultation:

| | |
|--|---|
| | Business representative organisation/trade body |
| | Central government |
| | Charity or social enterprise |
| | Individual |
| | Large business (over 250 staff) |
| | Legal representative |
| | Local government |
| | Medium business (50 to 250 staff) |
| | Micro business (up to 9 staff) |
| | Small business (10 to 49 staff) |
| | Trade union or staff association |
| | Other (please describe): |

CHAPTER I: Resolving disputes in the workplace

Mediation

Q 1. To what extent is early workplace mediation used?

Q 2. Are there particular kinds of issues where mediation is especially helpful or where it is not likely to be helpful?

Q 3. In your experience, what are the costs of mediation?

Q 4. What do you consider to be the advantages and disadvantages of mediation?

Q 5. What barriers are there to use and what ways are there to overcome them?

Q 6. Which providers of mediation for workplace disputes are you aware of? (We are interested in private/voluntary/social enterprises – please specify)

Q 7. What are your views or experiences of in-house mediation schemes? (We are interested in advantages and disadvantages)

Compromise agreements

Q 8. To what extent are compromise agreements used?

Q 9. 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)

Q 10. What are the advantages and disadvantages of compromise agreements? Do these vary by type of case and, if so, why?

Q 11. What barriers are there to use and what ways are there to overcome them?

Early Conciliation

Q 12. 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.

Yes [] No []

If “No”, please explain why:

Q 13. 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.

Q 14. Do you consider Acas’ current power to provide pre-claim conciliation should be changed to a duty? Please explain why?

Q 15. Do you consider Acas duty to offer post-claim conciliation should be changed to a power? If not, please explain why.

Yes [] No []

If “No”, please explain why:

Q 16. Whilst we believe that this 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 as effective in large multiple claims. Do you agree? If not, please explain why.

Yes [] No []

If “No”, please explain why:

Q 17. We would welcome views on: *the contents of the shortened form*

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

Q 17b. We would welcome views on: *whether the increased formality in having to complete a form will have an impact upon the success of early conciliation*

Q 18. We would welcome views on: *the factors likely to have an effect on the success of early conciliation in complex claims*

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

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

Q 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.

Yes [] No []

If “No”, please explain why:

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

CHAPTER II: Modernising our Tribunals
Part A : Tackling weaker cases - *power to strike out*

Q 21. 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.

Q 22. 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.

Q 23. 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?

Q 24. 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*

Q 24 a. 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 type/nature of the information which is frequently found to be lacking*

Q 24b. 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 proposal that “unless orders” might be a suitable vehicle for obtaining this information*

Q 24c. 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 potential benefits of adopting this process*

Q 24d. 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 disadvantages of adopting this process*

Q 24e. 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: *what safeguards, should be built in to the tribunal process to ensure that respondents do not abuse the process, and*

Q 24f. 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: *what safeguards/sanctions should be available to ensure respondents do not abuse the process?*

Part A : Tackling weaker cases – *deposit orders*

Q 25. Do you agree that employment judges should have the power to make deposit orders at hearings other than pre-hearing reviews? If not, please explain why.

Q 26. Do you agree that employment judges should have the power to make deposit orders otherwise than at a hearing? If not, please explain why.

Q 27. 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?

Q 28. 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.

Q 29. Do you agree that the principle of deposit orders should be introduced into the EAT? If not please explain why.

Part A : Tackling weaker cases – *the costs regime*

Q 30. 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 [] No []

If “No”, please explain why:

Q 31. 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.

Q 32. 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*

Yes [] No []

If “Yes”, please explain why:

Q 32a. 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 those sanctions should be, and*

Yes [] No []

If “Yes”, please explain why:

Q 32b. Should there be sanctions against organisations which place undue pressure on parties, particularly where they are unrepresented? If yes, we would welcome views on: *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.*

Yes [] No []

If “Yes”, please explain why:

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

Yes [] No []

If “No”, please explain why:

Part B : Encouraging settlements – *Provision of information*

Q 34. 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?

Yes [] No []

Q 35. If yes, what would those benefits be?

Q 36. Should there be a mandatory requirement for the claimant to provide a statement of loss in the ET1 be mandatory?

Yes [] No []

Q 37. Are there other types of information or evidence which should be required at the outset of proceedings?

Q 38. How could the ET1 Claim Form be amended so as to help claimants provide as helpful information as possible?

Part B : Encouraging settlements - *Formalising offers to settle*

Q 39. Do you agree that this proposal, if introduced, will lead to an increase in the number of reasonable settlement offers being made?

Yes [] No []

Q 40. 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

Q 41. 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.

Q 42. 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.

Q 43. 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?

Q 44. 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.

Part C : Shortening tribunal hearings – ***Witness statements taken as read***

Q 45. 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.

Yes [] No []

If "No", please explain why:

Q 46. Do you agree with the proposal that, with the appropriate procedural safeguards, witness statements (where provided) should stand as the evidence of chief of the witness and that, in the normal course, they should be taken as read? If not, please explain why.

Yes [] No []

If “No”, please explain why:

Q 47. What would you see as the advantages of taking witness statements as read?

Q 48. What are the disadvantages of taking witness statements as read?

Part C : Shortening tribunal hearings – *Expenses of witnesses and parties*

Q 49. 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.

Yes [] No []

If “Yes”, please explain why:

Q 50. 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?

Yes [] No []

If “No”, please explain why:

Q 51. The withdrawal of State-funded expenses should lead to a reduction in the duration of some hearings, as only witness that are strictly necessary will be called. Do you agree with this reasoning? Please explain why.

Yes [] No []

If “Yes”, please explain why:

Part C : Shortening tribunal hearings – *Employment Judges sitting alone*

Q 52. 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.

Yes [] No []

If “No”, please explain why:

Q 53. 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.

Q 54. 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?

Part D : Maximising proportionality – *Legal officers*

Q 55. Do you agree that there is interlocutory work currently undertaken by employment judges that might be delegated elsewhere? If no, please explain why.

Yes [] No []

If “No”, please explain why:

Q 56. 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*

Q 56a. 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 type of interlocutory work that might be delegated.*

CHAPTER IV : Business taking on staff and meeting obligations

Extending the qualification period for unfair dismissal

Q 57. 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 one to two years would have on: *employers*

Q 57a. 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 one to two years would have on: *employees*

Q 58. In the experience of employers, how important is the current one year qualifying period in weighing up whether to take on someone? Would extending this to two years make you more likely to offer employment?

Q 59. In the experience of employees, does the one year qualifying period lead to early dismissals just before the one year deadline where there are no apparent fair reasons or procedures followed?

Q 60. Do you believe that any minority groups or women likely to be disproportionately affected if the qualifying period is extended? In what ways and to what extent?

CHAPTER IV : Business taking on staff and meeting obligations
Financial Penalties

Q 61. 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.

Yes [] No []

If “No”, please explain why:

Q 62. 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.

Yes [] No []

If “No”, please explain why:

Q 63. 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?

Yes [] No []

Q 63a. Do you agree that an automatic mechanism for up-rating tribunal awards and statutory redundancy payments should be retained? If yes: should it continue to be rounded up to the nearest 10p, £10 and £100?

Yes [] No []

Q 63b. Do you agree that an automatic mechanism for up-rating tribunal awards and statutory redundancy payments should be retained? If yes: should it be based on the Consumer Prices Index rather than, as at present, the Retail Prices Index?

Yes [] No []

Q 64. If you disagree, how should these amounts be up-rated in future?

If you wish to make any other comments on the consultation, please note them in the box below:

ANNEX B: The Consultation Code of Practice Criteria

- Formal consultation should take place at a stage when there is scope to influence policy outcome.
- Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Tunde Idowu
Department for Business, Innovation and Skills
Consultation Co-ordinator
1 Victoria Street London SW1H 0ET

Telephone: 020 7215 0412
Email: Babatunde.Idowu@bis.gsi.gov.uk

ANNEX C: Table of proposed limits

| <i>Relevant statutory limits</i> | <i>Subject of provision</i> | <i>Old limits</i> | <i>New limits</i> | Notes |
|----------------------------------|--|-------------------|-------------------|---|
| Section 145E(3) of the 1992 Act | <i>Amount of award for unlawful inducement relating to trade union membership or activities or for unlawful inducement relating to collective bargaining.</i> | £3,100 | £3,300 | 3100 x (4.6%) = 142.6 Round up to the nearest £100 |
| Section 156(1) of the 1992 Act | <i>Minimum amount of basic award of compensation where dismissal is unfair by virtue of section 152(1) or 153 of the 1992 Act</i> | £4,700 | £5,000 | 4700 x (4.6%) = 216.2 Round up to nearest £100 |
| Section 176(6A) of the 1992 Act | <i>Minimum amount of compensation where individual excluded or expelled from union in contravention of section 174 of the 1992 Act and not admitted or re-admitted by date of tribunal application</i> | £7,200 | £7,600 | 7200 x (4.6%) = 331.2 Round up to nearest £100 |
| Section 31(1) of the 1996 Act | <i>Limit on amount of guarantee payment payable to an employee in respect of any day.</i> | £21.20 | £22.20 | 21.20 x (4.6%) = 0.9752 |

| | | | | |
|--|---|---------|---------|---|
| | | | | Round up to nearest 10p |
| Section 120(1) of the 1996 Act | <i>Minimum amount of basic award of compensation where dismissal is unfair by virtue of section 100(1)(a) and (b), 101A(d), 102(1) or 103 of the 1996 Act.</i> | £4,700 | £5,000 | 4700 x (4.6%) = 216.2 Round up to nearest £100 |
| Section 124(1) of the 1996 Act. | <i>Limit on amount of compensatory award for unfair dismissal.</i> | £65,300 | £68,400 | 65 300 x (4.6%) = 3 003.8 Round up to nearest £100 |
| Paragraphs (a) and (b) of section 186(1) of the 1996 Act | <i>Limit on amount in respect of any one week payable to an employee in respect of a debt to which Part XII of the 1996 Act applies and which is referable to a period of time.</i> | £380 | £400 | 380 x (4.6%) = 17.48 Round up to the nearest £10 |
| Section 227(1) of the 1996 Act | <i>Maximum amount of "a week's pay" for the purpose of calculating a redundancy payment or for various awards including the basic or additional award of compensation for unfair dismissal.</i> | £380 | £400 | 380 x (4.6%) = 17.48 Round up to the nearest £10 |

In the above table:

- (1) “the 1992 Act” means the Trade Union and Labour Relations (Consolidation) Act 1992; and**
- (2) “the 1996 Act” means the Employment Rights Act 1996**

ANNEX D: List of individuals/organisations consulted

This consultation document has been sent to the following individuals and organisations:

Accenture
Acas Council
Administrative Justice & Tribunals Council
Association of British Insurers
Association of Chartered Certified Accountants
Association of Chief Executives of Voluntary Organisations
Association of Colleges
Association of Convenience Stores
Association of Optometrists
Association of Recruitment Consultancies
Association of School and College Leavers
Baker Tilly
Ian Barr
Biggart Baillie LLP
Bond Pearce LLP
Breachin Tindal Oatts LLP
British Chambers of Commerce
British Dyslexia Association
British Retail Consortium
Business Services Association
Central Arbitration Committee
Centre for Effective Dispute Resolution
Chartered Institute of Personnel and Development
Citizens Advice
Citizens Advice Scotland
Civil Mediation Council
Claims Management Regulator
Nita Clarke
Confederation of British Wool Textiles
Confederation of Business Industry
Confederation of Passenger Transport
Construction Confederation
Council for Employment Tribunal Members Associations
Council of Employment Tribunal Judges
Deloitte
DLA Piper
Employers Forum on Age
Employers in Voluntary Housing
Employment Appeal Tribunal
Employment Appeal Tribunal Lay Members
Employment Law Bar Association
Employment Lawyers Association
Employment Tribunal President for England & Wales
Employment Tribunal President for Scotland
Engineering Employers' Federation

Equality and Human Rights Commission
Ernst & Young
Ethnic Minorities Law Centre
Eversheds LLP
Fawcett Society
FDA
Federation of Small Businesses
Forum of Private Business
Free Representation Unit
Michael Gibbons
GMB
Immigration Service Union
Improving Dispute Resolution Advisory Service
Insolvency Service
Institute of Chartered Accountants in England & Wales
Institute of Chartered Accountants of Scotland
Institute of Directors
Kingston Smith LLP
KPMG
Dr. Paul Latrielle
Lawford Kidd
Law Society
Law Society Scotland
Legal Services Commission
Leonard Cheshire Disability
Local Government Association
Local Government Employers
Low Pay Commission
David Macleod
Maclay Murray & Spens LLP
MBM Commercial LLP
MIND
Miller Samuel LLP
Morton Fraser LLP
Brian Napier QC
NASUWT
National Hairdressers Federation
National Homeworking Group
National Pharmacy Association
National Union of Teachers
PCS
Peninsula Business Services
Pinsent Masons LLP
PricewaterhouseCoopers
Professional and Business Services Group
Road Haulage Association
Ross Harper
Royal Association for Disability Rights
Royal National Institute for the Deaf
Royal National Institute for the Blind

Scope
Scottish Committee of the Administrative Justice & Tribunals Council
Scottish Engineering
Scottish Mediation Network
Scottish Trade Unions Congress
Social Enterprise Coalition
Society of Motor Manufacturers and Traders
Stephen Levinson
Stonewall
Stonewall Scotland
TGWU
Thompsons LLP
Towers Watson
Trade Association Forum
Trades Union Congress
Union of Construction, Allied Trades and Technicians
Union of Finance Staff
Unite
Union of Shop, Distributive and Allied Workers
Universities UK
Xact Group

© Crown copyright 2011

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or e-mail: psi@nationalarchives.gsi.gov.uk.

This publication is also available on our website at <http://www.bis.gov.uk>

Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

URN 11/511