Employment Tribunals and Justice

Post 2011 Government Consultation/Implementation

"Resolving Work Place Disputes"

Introduction

The following are the views of C [illegible], one of the longest serving Members of the Judiciary in the Employment Tribunal. Much of this information will be unknown or not understood by those whom it directly affects both litigants and their advisors

Since 2012 justice has been denied to Claimants by the Tribunal system but can be changed with ease at little cost and if this action is taken will give substantial justice credibility to this Conservative Government, and to use the Prime Minister's words *"to protect the powerless against the powerful"*.

Since 1981 I have sat as a part-time non-legally qualified Judge Member in one of the largest Employment Tribunals in the UK, Manchester.

1. In 1971, following on from Barbara Castle's "In Place of Strife" initiative, the Industrial Tribunal, a three person tribunal acting as an industrial jury in an industrial court, was established by legislation and has stood the test of time. The two non-legally qualified judge members with the experience of the work place had the weighted vote to determine the judgement. The legally qualified judge member gave the legal perspective, but this did not necessarily determine the outcome.

2. The Employment Tribunals Act 1996 allowed legally qualified judge members to 'choose' to sit alone on minor uncontentious cases, such as unlawful deduction of wages, redundancy calculations and simple contractual issues. Sitting alone does not apply when "*...there is a likelihood of a dispute arising on the facts*", the legislative test (a very low bar)

3. From 1996 to 2012 approximately 90% of Tribunal cases were heard by a full three judge member Tribunal of which approximately 60% of cases were unfair dismissal and 30% of cases discrimination.

4. In 2011 Vince Cable, Secretary of State for Business, Innovation and Skills, consulted on how to "resolve workplace disputes" which included legally qualified judge members sitting alone on unfair dismissal proceedings and the introduction of fee charges for bringing a claim. With this consultation an

impact assessment was produced in which mention was made of the risk to justice as a "*Key assumption*".

> *"There is a risk that parties may see the introduction of this proposal as a diminution of their right to a trial by their peers …"*
>
> *"There is also a risk that the outcomes for parties could be (or perceived to be) worse or problems arise in relation to access to justice."*

5. Arising out of the 2011 Consultation, by secondary legislation in 2012, Statutory Instrument No 988 *The Employment Tribunals Act 1996 (Tribunal Composition) Order 2012,* was implemented. Unfair dismissal was added to the list of 'minor uncontentious issues' which a legally qualified judge member could 'exclusively choose' to hear the proceedings sitting alone where there is '*"no likelihood of a dispute arising on the facts",* (a very low bar). This in my view is an unlikely situation in cases of unfair dismissal. ***The term "unfair dismissal" itself indicates the "likelihood of a dispute arising on the facts."***

6. A consequence of the introduction of this Statutory Instrument is that since 2012 a significant number if not all unfair dismissal cases are now heard by a legally qualified judge member sitting alone as judge and jury with no jurisdiction to do so. The concept of an 'industrial jury' having been eliminated with the non-legally qualified judge members who had the weighted vote to determine the judgment outcome removed.

7. All judge members, whether legally qualified or not, take the same judicial oath however the non-legally qualified judges are now prevented from satisfying the terms of their judicial oath and duty when the legally qualified judges sit alone on judicial issues. Members of the judiciary can only be removed from making judgements by the Lord Chief Justice and not arbitrarily by the legally qualified judiciary. This must be corrected.

8. The Judicial Oath taken by all members of the Judiciary is:-

   "I ……., do swear by Almighty God that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of ……., and I will do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill will."

9. Throughout my 30+ years of tribunal judicial experience the vast majority of tribunal judgements were unanimous determined following deliberations in chambers when often the influence of the of the non-legally qualified judge

members *'using their common sense and experience'* (Lady Smith) were paramount in achieving this. Occasionally there were split judgements, mostly with the non-legally qualified members in the majority and the legally qualified in the minority.

10. The Honourable Lady Smith (a High Court Judge in Scotland) in the case of Thomas McCafferty v Royal Mail Group UKEATS/0002/12/BI at paragraph 37 giving observations on the role of Lay Member Judges in Unfair Dismissal cases said:- *"We would make one final observation. It will not have escaped notice that this case in an example of lay members of an Employment Tribunal reaching a different conclusion on the case – drawing in part on their valuable "common sense" and knowledge of what an employee would be expected to know from that of the Employment Judge. Had the claim been one to which the new* ***Employment Tribunals Act 1996 (Tribunal Composition) Order 2012*** *SI 2012/988 applied, it seems likely that it would have been heard and determined by an Employment Judge sitting alone, in which case the result would evidently have been rather different. Some may consider that to be a sobering thought. It certainly seems supportive of the arguments advanced in response to and against the proposal last year that Employment Judges be able to sit alone in unfair dismissal cases…"*

11. Paragraph 4 of the Employment Tribunals Act 1996 **"Composition of a tribunal."** states:-
    a. *(5)(a) whether there is a likelihood of a dispute arising on the facts which makes it desirable for the proceedings to be heard in accordance with subsection (1)* (a full 3 person tribunal).

    b. However since the introduction of the 2012 Statutory Instrument the word 'desirable' is seen by the legally qualified members who have the statutory right to determine who sits to hear cases as their passport to sit alone as judge and jury on unfair dismissal cases which represents over 60% of all Tribunal proceedings. This interpretation of "desirable" is not statutorily correct. What has to be determined by scrutiny of the case papers is whether there is "a likelihood" (a very low bar) of a dispute arising on the facts which then makes it 'desirable' to establish a full three person tribunal and not the **desire** of the legally qualified judge to sit alone otherwise the statute would say so.

12. To correct the situation I propose that a normal three person Tribunal (2 non-legally qualified judge members and 1 legally qualified judge member) should be set up to asses all cases *"on the likelihood of a dispute arising on the facts"*, (a very low bar) to decide which proceedings are appropriate to be heard by a legally qualified judge sitting alone. This will result in almost all unfair dismissal cases being heard by a full tribunal thus complying with the

"overriding objective" *"...to deal with cases fairly and justly."* as required by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

13. This suggested 'vetting tribunal' should consider all other proceedings referred to the tribunal such as unlawful deduction of wages, considered as minor and uncontentious, which on scrutiny there may be a "likelihood" of a dispute arising on the facts then a full tribunal would be required to determine these issues. For example many TUPE (Transfer of Undertakings (Protection of Employment) Regulations 2006) cases are now heard by a judge sitting alone but should all be heard by a three person tribunal as there is always a "likelihood" of a dispute arising on the facts following the transfer of employee terms and conditions from one undertaking to another.

14. The current position is that almost all unfair dismissal cases, together with others considered to be 'minor uncontentious issues', are heard by a judge sitting alone even where there is a clear "likelihood of a dispute arising on the facts" giving no possibility of input from non-legally qualified members who have the experience of the workplace, which is their judicial statutory role. This is a travesty of what was intended by the Government consultation of 2011. The Government had not anticipated the misuse of the law by the legally qualified judiciary to take advantage of this situation by removing the non-legally qualified judiciary from making judgements with no statutory right to do so. Unfair dismissal cannot be considered a 'minor uncontentious issue'.

15. Discrimination cases are still heard by a full three person Tribunal with the non-legally qualified judge members drawn from a panel with direct experience of the type of discrimination being determined or have received specific training. However there is a move by the legally qualified judiciary to have these cases determined by a judge sitting alone, a situation which must also be prevented. Discrimination is not a category that can be heard by a judge sitting alone even where there is no 'likelihood of a dispute arising on the facts' as discrimination is an excluded category, as was unfair dismissal prior to the 2012 Regulations from the list contained in the 1996 Act of those categories which could be heard by a judge sitting alone.

Fee Charging

16. Despite the introduction of fees being opposed during the 2011 consultation they were introduced in 2013 and are the subject to an ongoing Judicial Review brought by UNISON to be heard in the Supreme Court on 27th and 28th March 2017.

17. To bring a claim to the Employment Tribunal the situation changed from no fee for unfair dismissal and discrimination applications to a charge of £1,200. To take an appeal to Employment Appeal Tribunal this changed from no fee to a charge of £1,600. This charging of fees has reduced the case load of tribunal hearings by almost 90%. ACAS now say they cannot achieve agreed settlements between employers and former employees who have lost their job along their income, as some employers make no offers to settle believing their former employee cannot afford to pay the £1,200 fee to bring a claim.

18. The main purpose for the 2011 consultation of "resolving work place disputes" (reducing Tribunal Hearings) has succeeded by access to justice being denied to employees with a legitimate grievance. Does your Government wish to be associated with such denial of justice?.

19. Those who are dismissed and can afford the £1,200 fee to bring a claim for unfair dismissal now suffer a "double unjust whammy" not only having to pay a large fee but also with the likelihood that their case will be heard by a judge sitting alone as judge and jury to determine the outcome without jurisdiction to do so.

20. The Scottish Government has stated that once Employment Legislation is fully devolved to Scotland these charges will be removed. This has been confirmed to me by letter dated 19th November 2015 stating *"The Scottish Government will abolish fees for Employment Tribunals insuring that employees have a fair opportunity to have their case heard once we have the power to do so."*

Further Issues

21. There are further issues contained in the 2011 Consultation Document which also have a direct effect on justice but if reversed would give considerable "plus points" to your Conservative Government.

22. **Removing expenses from the claimant and their witnesses** – many of whom are on low incomes and are often having to take a day off to appear and thus loosing a day's pay and incurring travel costs and for the claimant (who is also a witness) adding significant additional expenses to their £1,200 fee.

23. **Reading of Witness Statements**: When I first started in the tribunal witness statements were not allowed, not even scraps of paper to use as an aide-memoire. Over the years this has changed in order to insure that the full facts of the case are brought to the attention of the tribunal through the production of detailed witness statements for both sides (not in Scotland). These were read out in full at the hearing. The reading of these statements gave an

opportunity for the tribunal to fully understand the facts of the case. It also gave the witnesses an opportunity to emphasise, verbally and by their demeanour significant relevant points or issues which were of importance to them. The 2011 consultation proposal accepted that these statements be 'taken as read', a practice in the Civil Courts and not suitable for an Industrial Court. This was proposed by the legally qualified judiciary following a Court of Appeal case where guidelines were given but not a change to the law. This decision by the legally qualified judiciary had little or no input from the non-legally qualified judiciary or the claimants themselves.

24. Legally qualified tribunal members and legally qualified respondents representatives barristers and solicitors are used to practicing in civil courts and therefore used to taking these statements 'as read'.

25. The employment tribunal is an industrial court inquisitorial in style and not a criminal or civil court, which are by their nature adversarial. By taking witness statements as read the claimant is also put at significant disadvantage not exclusively but in particular when unrepresented as litigants in person as the respondent's legal representative can immediately cross examine them 'cold' on their Witness Statement before the claimant has had a chance to get into the context and detail of their case. The tribunal is also put at a distinct disadvantage and again from my experience I was not often able to fully appreciate the nuances of the case unless the witness statement was read out enabling me to make contemporaneous notes on the statement as it unfolded thus enabling me to ask further and crucial questions later in the proceedings, the answers to which were often determinate of the judgement. Again justice is being denied.

Role of ACAS

26. One of the good proposals in the 2011 consultation was the role of ACAS and giving them new responsibilities to vet all applications before they go to the tribunal. However as a consequence of this new responsibility ACAS did not fully carry out their role as they should have to "resolve work place disputes" i.e. settling employment tribunal claims before they come to tribunal as was the intention.

27. The Advisory Conciliation and Arbitration Service, ACAS, was established in the 1970's primarily to give advice to individuals on the efficacy of their case and to conciliate in industrial disputes. As far as advice is concerned ACAS no longer give claimants or respondents any indication of the likely success or otherwise of a tribunal application with quantum. In September 2013 I wrote to the Chief Executive of ACAS Anne Sharp raising this matter and she confirmed my views by letter dated 19th September 2013. The final part this response states:-

a. *"ACAS needs to remain open minded and to keep abreast of developments in thinking. As you may know, the Department for Employment and Learning, in Northern Ireland is consulting on the possibility of providing a neutral assessment of the potential outcome of ET cases. Policy on such issues in Great Britain is a matter for the Department of Business, Innovation and Skills, but we will be following developments in Northern Ireland through our contacts with the Labour Relations Agency."*

28. What employers and claimants need to know is, are they likely to win or lose their cases and how much are they likely to receive or have to pay out as compensation. The concept of a neutral assessment is a good one which will resolve "work place disputes" by helping both claimants and respondents to see the full picture, often resulting in the withdrawal of the claim. (I also do this regularly, on a pro bono basis). The introduction of this neutral assessment including quantum should remove any requirement for any fee charging as many cases would be withdrawn or settled by ACAS and vexatious cases or similar sifted out by ACAS at the newly established initial scrutiny stage. This should satisfy the main complainants the employers' associations such as the CBI, and the FSB who successfully lobbied during the 2011 consultation and was the main reason for the introduction of fees. A Government decision now to remove fees would negate the requirement for the Judicial Review scheduled to be heard in the Supreme Court in March 2017 and would give significant kudos.

In your first speech from Downing Street as Prime Minister you stated that *"we will forge a bold, new, positive role for ourselves in the world, and we will make Britain a country that works not for a privileged few, but for every one of us. That will be the mission of the Government I lead. And together, we will build a better Britain.*

When addressing the Conservative Party Conference you said *"come with me, let's seize the day and change the life of ordinary working class people."* You also reiterated these same sentiments in your New Year's speech.

To summarise:-

- Reverse the 2012 legislation (see Lady Smith paragraph 10)
- Reverse the 2013 legislation
- Restore the payment of expenses
- Restore the reading of witness statements
- Strengthen Accas
- Introduce a Vetting Tribunal

The implementation of all the above would will give credence to your stated intention *"to protect the powerless against the powerful."* *(Continued page 8……)*

To follow the principles of justice I would be pleased to talk this through with you, a delegated minister and/or with Matthew Taylor who you have engaged to carry out a review of workers' rights. With my significant experience in employment matters both as a small employer, Personnel Director of large companies and also a non-legally qualified judge in the Employment Tribunal I can give Matthew Taylor my views on self-employment viz. 'worker' or 'employee' status and Zero Hours Contracts.

Tuesday 21st February 2017