

Resolving Workplace Disputes: A Consultation



The Response of Cloisters Chambers

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Cloisters barristers' chambers consists of some 50 barristers, the majority of whom specialise in employment law (see www.cloisters.com). We appear in almost all major employment litigation and are recognised as leading experts on equality and discrimination issues. Our award-winning employment team includes both the Chair of the Employment Law Bar Association and the Chair of the Industrial Law Society, as well as the immediate past Chair of the Discrimination Law Association.

We represent individuals from school kitchen assistants to premiership football players and employers ranging from the biggest multinationals to small and medium sized enterprises. We advise across all industry sectors ranging from media to financial services and public sector bodies and regulators from the Fire Service to the FSA.

We appear daily in Employment Tribunals, across the UK, and very frequently in the Employment Appeal Tribunal, Court of Appeal and further appellate courts.

We have decided to submit a response to this Consultation since the issues raised are ones with which we are very familiar from our knowledge of Tribunal practice and procedure gained over more than 40 years. We are also very well aware that such changes will have a significant impact upon our clients.

PART 1 Mediation, Early conciliation, Tackling weaker cases Mediation
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1. To what extent is early workplace mediation used?

1.1. Workplace mediation is rarely used unless and until an employee has issued a claim. Employers typically rely on their internal grievance procedures to deal with workplace disputes in circumstances where a claim has not been issued.

Once a claim has been issued, mediation is used far more often where the claimant is still employed by the employer and/or where the claim is likely to be high value (or high profile) and/or involves allegations of discrimination or whistle-blowing (i.e., where compensation is uncapped).

Anecdotal evidence amongst barristers in Cloisters chambers, suggests that mediation is used quite frequently in higher value / more complex cases (in 25% of cases) and is used rarely in smaller value / simpler cases (less than 3%).

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

2.1. Mediation is helpful in cases where:

- (a) The claim is potentially of high value.
- (b) The claimant is still employed by the respondent.
- (c) The claim involves allegations of discrimination or whistle-blowing.
- (d) The employer wants to avoid adverse publicity.

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

3.1. Other than judicial mediation, the costs of mediation (i.e. the cost of the mediator) are between £1000 and £3000 per day (and rarely last more than 1 day). The costs of representatives in preparing for a mediation in a complex case can however be substantial, especially when there is no overlap with a brief fee.

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

4.1. Mediation provides a non-adversarial and confidential forum in which parties can air their grievances, feel that those grievances are being considered by the other party, and put forward proposals for resolving disputes which may not be possible outcomes in litigation.

4.2. Mediation is particularly advantageous if a continuing employment relationship is envisaged as neither side should feel like they have “won” or “lost”.

4.3. Mediation does not generally look in great detail at the relative merits or demerits of a claim or defence to a claim. It concentrates on the overall picture. This should assist settlement.

4.4. Nevertheless a mediator can help “test” the issues in a case without loss of face – e.g., a party may be able to give credence to a particular issue/assertion in the context of a mediation which they would not be able to do without making a concession (i.e., in litigation).

4.5. Whilst the costs of a mediation may be met by the employer, it can require some or even equal contribution from the employee. This may discourage the employee from participating.

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

5.1. Upfront costs (for an employee) may serve to discourage them from mediating.

5.2. Seeking to agree on the identity of the mediator can be problematic. If one or other party feels a particular mediator is being imposed on them by the other party, this can lead to a perception that the mediator will not be independent.

5.3. If an employer is convinced that the claim is weak, it may be difficult to persuade the employer to enter into mediation (certainly early on in the litigation process, before legal costs have begun to mount) as there will be no appetite for a financial settlement.

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

6.1. The mediations in which members of Cloisters are most often involved use barrister mediators.

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

7.1. We have rarely come across any in-house mediation schemes.

7.2. The employee's perception may be that an in-house scheme favours the employer because it is administered by the employer. The mediation is less likely to be successful if the parties do not consider that the mediator is wholly independent.

Compromise agreements

8. To what extent are compromise agreements used?

8.3. Where settlement is reached between the parties prior to a tribunal hearing, Compromise Agreements are used in the vast majority of cases. From our perspective where at least one side is legally represented they are used far more often than ACAS conciliated COT3s. It may well be that in much smaller cases ACAS settlement is very much the norm.

8.4. Compromise Agreements are routinely used as part of the “Exit Strategy” for employees being dismissed by reason of redundancy where enhanced redundancy payments are made. In other types of dismissal, Compromise Agreements are used less often in a routine way, although an increased use has been observed in capability dismissals.

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)

9.1. In many cases where Compromise Agreements are routinely used (e.g., redundancy situations) where no claim has been issued by an employee, HR professionals merely amend standard template Compromise Agreements so little cost is involved, other than a contribution towards the employee’s legal costs (between £250 and £600). This is necessary and appropriate since a certificate of legal advice is necessary to make such a compromise legally certain and effective.

9.2. In cases where an individually drafted Compromise Agreement is used (with solicitors being instructed on each side), the cost will typically average £2000 to £3000 (including £300 - £600 for the employee’s legal costs). This will include drafting the Agreement and some (but not much) negotiation. If a lot of negotiation is required, then the Agreement will be much more costly.

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

10.1. The advantage for an employer is the certainty and finality of an agreement which compromises the most likely claims which an employee might issue.

10.2. The cost of a Compromise Agreement is much less than the cost of fighting a claim in the employment tribunal. It is also much quicker and uses far less management time. There is also no need to involve the number of individuals who would, by necessity, be involved in any tribunal claim which might arise.

10.3. A Compromise Agreement also enables an employer to negotiate an exit strategy with an employee in a way which vastly reduces the risk of that employee then bringing claims which are outstanding on or arise out of the termination of that employee’s employment.

10.4. The advantage for an employee is the early resolution of potential disputes with his/her employer and the greater likelihood of obtaining a financial settlement from the employer. In other words, employers are keener to pay sums under a Compromise Agreement to “buy” the certainty and finality which such an agreement affords the parties.

10.5. The disadvantage for employers is that, where handled badly, a discussion with an employee seeking to terminate his/her employment (by way of a Compromise Agreement) could result in that employee resigning and claiming constructive unfair dismissal.

10.6. The disadvantage in cases where an employee (who remains in employment) has already alleged discrimination is that a proposal by an employer to enter into a Compromise Agreement (i.e., where it is proposed that the employment relationship is terminated), could be used by the employee to claim victimisation [see the case of *Mezzotero v Banque Nationale de Paris*]. We have observed that employers are more tentative about proposing the use of a Compromise Agreement in circumstances where employees have already alleged discrimination against them. Such employers need clear advice on the proper operation of the rule of law which enables “without prejudice” communications to attract legal privilege.

10.7. Some employers consider that Compromise Agreements (and any form of settlement) set an unwanted precedent – i.e., they are concerned that if “word gets round” all their employees will seek a Compromise Agreement when they wish to leave their employment.

10.8. In respect of certain public bodies including NHS Trusts, there is a requirement to obtain treasury approval for all settlements involving the payment of sums of money – this has greatly reduced the use of Compromise Agreements (and other dispute resolution mechanisms which involve financial settlement). Instead, many respondent Trusts are being required to fight cases all the way to Full Hearing in the tribunal simply because of the practical difficulties in obtaining treasury approval. Overall entering a compromise agreement requires a positive decision. Sometimes there is no-one willing to do that.

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

11.1. Many employers are concerned that an approach to an employee to “compromise” the termination of that employee’s employment will, in and of itself, lead to the employee resigning and claiming constructive unfair dismissal and other statutory claims, including discrimination and victimisation. Proper advice on how to present the terms of a compromise agreement is clearly necessary and beneficial to both employers and employees.

Early Conciliation

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.

12.1. No, we are not convinced that pre-claim conciliation (PCC) will significantly reduce the number of disputes reaching the employment tribunal.

12.2. When post-claim conciliation was made obligatory in certain types of claim, our experience was that this did not greatly reduce the number of claims which continued on past the conciliation stage.

12.3. Nevertheless, any notable decrease in tribunal claims is clearly desirable, provided it is not at the price of restricting reasonable access to justice. It has to be recalled always that ETs were set up to help avoid wildcat strikes. If access to justice is made too difficult they will return.

12.4. The analysis of the pre-claim conciliation pilot conducted by the Institute for Employment Studies does seem to indicate that PCC may be effective in fairly straightforward claims (such as unfair dismissal and unlawful deduction from wages claims). However, very few of the PCC referrals involved discrimination claims and, therefore, there is little data on which the success of PCC can properly be evaluated.

12.5. Our main concern about PCC is that it formalises a dispute at an early stage and may entrench parties and/or cause an irretrievable breakdown in the employment relationship.

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.

12.6. Yes – PCC is most likely to be useful in straightforward claims (e.g., unfair dismissal and unlawful deduction from wages). This is because such claims are often less emotive, the merits and demerits of any particular case is more likely to be ascertainable early on (i.e., prior to disclosure of evidence) and loss is much easier to quantify.

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

12.7. In the absence of a duty, the take-up of PCC is likely to remain fairly small. If a one month statutory period to attempt conciliation is adopted, then PCC will not greatly lengthen the litigation process.

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

12.8. As a matter of logic, if PCC becomes mandatory for all claims, then there is little (if any) purpose served in also requiring post-claim conciliation.

12.9. If pre-claim conciliation is not mandatory (i.e., ACAS has a power but not a duty to offer pre-claim conciliation), then post-claim conciliation could remain mandatory (or, also, be changed to a power rather than a duty).

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 we agree

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

17.1. We believe that it is in the interests of both parties for a potential claimant to provide certain information to ACAS and to the potential respondent in order to assist with the mediation process.

17.2. We consider that the information provided should include:

- (a) Dates of employment
- (b) Date of dismissal (if applicable)
- (c) Job Title
- (d) Nature of dispute (including dates of any alleged incidents and individuals involved in those incidents)
- (e) Outcome sought, including an estimate of loss (if any)

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

17.3. Whilst completing a form clearly imposes a degree of formality on the mediation process, it is clearly in the interests of all parties (including the mediator) that certain information is furnished at the outset.

17.4. The form allows all those involved in the mediation process to understand in a general way the nature of the dispute between the parties and what outcome is being sought by the potential claimant.

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*

17.5. We do not consider that completion of a PCC form will impact significantly on the success of PCC.

17.6. The fact of being referred for pre-claim conciliation in itself formalises a dispute and may entrench parties in their respective positions (or – at worst – cause an irretrievable breakdown in the employment relationship).

17.7. Therefore, the completion of a short form setting out the general nature of the dispute and the outcomes sought is no more or less likely to undermine the success of conciliation than the very fact of seeking conciliation. We anticipate that the introduction of the short PCC form would give rise to a ground swell of satellite litigation about whether the contents of the eventual Claim Form are properly foreshadowed, as happened with the statutory grievance procedures.

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

18.1. The key factor affecting the likely success of PCC in complex claims is the expertise of the ACAS appointed conciliator and his/her ability to give appropriate advice (and time) to the parties in the conciliation. This will depend on his/her access to information about the dispute.

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

18.2. The conciliator needs to have access to sufficient information to be able properly to advise the parties.

18.3. In complex claims, it is unlikely that this information will be obtainable at this early stage (i.e., in discrimination claims, this information is often only available once disclosure has taken place and/or once the employer has responded to any discrimination questionnaire).

18.4. If the employee has not yet served a questionnaire, perhaps the ACAS conciliator can be empowered to advise the employee to do so.

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

18.5. Yes. We consider that more complex cases are less likely to succeed at PCC because:

- (a) The merits / demerits of any potential claim are less likely to be ascertainable / obvious at this early stage because disclosure of documents will not have occurred (and, indeed, the employer's "defence" will not even have been set out).
- (b) The likely losses are harder to quantify.
- (c) Complex claims involving allegations of discrimination are more emotive which can make them harder to conciliate at an early stage.

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.

19.1. One calendar month should be sufficient either to resolve the potential claim or for the parties to be in a position to know whether conciliation is likely to be achieved.

19.2. We consider that, if a longer period is desired by the parties (with the approval of the ACAS conciliator), then ACAS should be empowered – when certifying that PCC has been conducted – to extend the time for conciliation without adversely affecting jurisdiction issues (i.e., the time limits for presenting the ET1).

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

Part 2: Modernising our Tribunals

Part A : Tackling weaker cases - *power to strike out*

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?

21.1. Striking out a claim or response involves the determination of a party's civil rights and obligations and, as such, any process which involves the power to strike out must comply with Article 6 of the ECHR. The requirements contained within Article 6 include the right to a public hearing which is why striking out a claim or response has only taken place at a PHR (or at a full Hearing).

21.2. We consider that Article 6 can still be complied with if the decision to strike out a claim or response is reviewable as of right (such that the party who is adversely affected by the order to strike out can seek to have the order revoked).

21.3. The key consideration must be that the process by which a claim or response is struck out will involve consideration of any representations by the parties.

21.4. We consider that the power to strike out should be exercisable either at a hearing (but that this could include a CMD) or on paper but only so long as the parties have had an opportunity to make representations.

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?

22.1. There is clearly a cost and administrative benefit in allowing the tribunal to strike out a claim or response without considering the parties' representations. However, such benefit is far outweighed by the unfairness and injustice which would result (even if a decision so made was reviewable).

22.2. We, therefore, consider that a tribunal judge should only be empowered to strike out a claim or response either having heard the parties or having given the parties the opportunity to make representations. Where the parties have only had the opportunity to make written representations, then a decision to strike out a claim or response should be reviewable (under Rule 34).

22.3. There is no benefit in conferring a power to strike out a claim or response without giving the parties the opportunity to make representations (either at a hearing or by way of written representations) – fairness and justice dictates that a party should not be prevented from claiming or responding to a claim without first being allowed to make representations.

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?

23.1. We consider that the power to strike out should only be exercisable after hearing the parties or having given the parties the opportunity to make representations. Where the parties have only had the opportunity to make representations in writing, the decision to strike out should be reviewable.

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*

24.1. Claim forms frequently lack sufficient information, particularly where claimants are unrepresented.

24.2. Nevertheless, we consider that the current ability of respondents to seek further information after completing the ET3 is sufficient.

24.3. Many claimants will not be in a position to provide the detail desired by respondents, certainly not in the early stages of litigation.

24.4. Making formal provision to enable respondents to request further information from claimants is likely to further complicate the tribunal process (and may well increase costs for respondents as Solicitors acting for respondents are likely to use/abuse such a process to request further information as a matter of course in order to deter claimants from pursuing their claims).

24 a. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able to request the provision of further information before completing the ET3 fully. We would welcome views on: *the type/nature of the information which is frequently found to be lacking*

24.5. Claim forms frequently lack proper particulars of discrimination / prohibited conduct.

24b. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able to request the provision of further information before completing the ET3 fully. We would welcome views on: *the proposal that “unless orders” might be a suitable vehicle for obtaining this information*

24.6. See above – we consider that the current process is satisfactory and the use of unless orders for this purpose would be disproportionate.

24c. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able to request the provision of further information before completing the ET3 fully. We would welcome views on: *the potential benefits of adopting this process* see above.

24d. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able to request the provision of further information before completing the ET3 fully. We would welcome views on: *the disadvantages of adopting this process* See above – answer to 24.

Furthermore, such a proposal is likely to become a standard delaying tactic used by Respondents in every case: they will buy time by arguing that additional information is required. This will lead to cases taking longer to resolve, and making the institution of claims even more costly for Claimants (who usually have less financial resources than Respondents). Moreover, what if the Claimant provides some further information but not sufficient to satisfy the Respondents? Answer – more delay, more expense, and presumably further use of judicial resources in deciding these kinds of preliminary applications. Introducing this procedure would therefore be to invite delay, expense and complication.

24e. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able to request the provision of further information before completing the ET3 fully. We would welcome views on: *what safeguards should be built in to the tribunal process to ensure that respondents do not abuse the process*

24.7. If the ET rules are changed to make formal provision to enable respondents to request the provision of information prior to completion of the ET3, claimants who fail to provide the information requested (or who provide some but not sufficient information) and whose claims are then struck out should be entitled to have the decision to strike out reviewed, as of right.

24.8. We consider that, in practice, wasted costs orders are unlikely to be used more widely by tribunal judges in relation to respondents who appear to have abused the process. This is because it will almost always be open to a

respondent to argue that a claim form was insufficiently particularised (thereby justifying the request for further information).

24f. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able to request the provision of further information before completing the ET3 fully. We would welcome views on: *what safeguards/sanctions should be available to ensure respondents do not abuse the process?* See above.

Part A : Tackling weaker cases – *deposit orders*

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. Yes.

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.

26.1. Yes – but only after giving the affected party the opportunity to make representations in writing (and with the safeguard of a right to review by the affected party if a Deposit Order is made).

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?

27.1. The test should not be amended but guidance should be given in the form of a Practice Direction as to how the test should be applied and what criteria should be considered (i.e., the success of the claim is possible but improbable – which is similar to the test applied by a judge in civil proceedings in respect of a Conditional Order under Part 24 of the CPR).

27.2. We do not consider that it is appropriate for a judge to have regard to the number of claims previously issued by a claimant when deciding whether to make a Deposit Order as there is already a process to address vexatious litigants.

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.

28.1. Yes with the caveat that the judge will continue to have regard to the ability of the affected party to pay the deposit.

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

29.1. Yes. In fact, it is easier to determine whether an appeal to the EAT has little reasonable prospect of success, as compared with a claim or response at tribunal level because appeals only involve questions of law.

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

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.

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.

31.1. Regrettably, members of chambers have seen the oppressive use of costs threats by some respondents or their representatives.

31.2. In our experience, there is little that can be done through formal tribunal procedure to deal with such tactics where a claimant bows to undue threats of costs by withdrawing his/her claim as the tribunal will often have little or no idea of the reason behind such a claimant's withdrawal. Regulatory action by the SRA etc is dependent upon a complaint being made by the affected individual (which is rare).

31.3 If a claimant does not bow to an oppressive and unreasonable threat of costs and continues to pursue his/her claim, then the tribunal has costs sanctions at its disposal (i.e., in respect of the unreasonable conduct of proceedings by a party or a party's representative). In our experience, costs sanctions are rarely used in such circumstances. One sanction already used is in a "worm turns" situation, where a party makes aggressive costs threats in proceedings and subsequently itself faces a costs application. That party's previous readiness to make threats may count against it in the exercise of the tribunal's discretion. See *Sims Ltd v McKee* UKEAT/0518/05. This approach might be used more widely or formalised in some way

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*

32.1. Costs sanctions are already available to the tribunal but are only ever likely to be deployed by a tribunal where a claimant has not withdrawn his/her claim and then makes a costs application on the basis of unreasonable conduct of the proceedings by the respondent (or its representative). Whilst members of Cloisters are aware of such costs orders being made, they are extremely rare and are only ever made where a claimant succeeds in his/her claim.

32.2. Other than costs sanctions, we consider that a tribunal should consider exercising its power to strike out a response (or part thereof) in circumstances where a respondent uses a threat of costs in bad faith. However, again, such power could only be exercised where the affected claimant informs the tribunal of the respondent's conduct and seeks strike out (or costs) in respect of "unreasonable conduct".

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* -See above.

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.* See above.

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.

33.1. No, as this would entail a seismic and unwarranted shift in the principles upon which courts and tribunals are operated

33.2. The mischief against which the wasted costs jurisdiction is aimed is "the causing of loss and expense to *litigants* by the unjustifiable conduct of litigation by their or the other side's lawyers [see *Ridehalgh v Horsefield* [1994] Ch 205 at 231E].

33.3. A new principle based upon the causing of expense to the tribunal itself (i.e., by the unjustifiable conduct of litigation) is undesirable and unwarranted. Further if such a principle was initiated, it would only be appropriate to allow litigants to claim from Tribunal funds their wasted costs incurred as a result of the frequent last minute postponements of cases. Presumably this additional burden upon the Tribunal service is not currently under consideration.

PART 2 Encouraging settlements

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?*

34.1. Yes. The benefit is that in some cases the respondent will have a clearer idea of what compensation the claimant is seeking at an early stage

and the claimant, having had to consider what his/her losses are, might in some cases start thinking about the case in a more commercial way at an earlier stage.

34.2. However, the benefits should not be overestimated for the following reasons:

- (a) in many cases the Claimant's losses are yet to crystallise and the Claimant will not be in a position to give any accurate estimate of what his/her losses will be;
- (b) in many cases it should be obvious to the Respondent what the losses are;
- (c) there are some losses which the Claimant cannot reasonably be expected to quantify during the short limitation period within which the ET1 must be lodged

34.3. In our experience, in a very high proportion of cases, the main and most valuable head of loss is compensation for loss of earnings. It is rarely possible to put a figure on this as at the date of lodging the ET1. The ET1 must usually be lodged within a very short (three month) time frame, during which time most claimants have not found fresh employment. In those circumstances the Claimant can state the loss to date and indicate that the losses are ongoing, but the Respondent could easily work that out without a schedule of loss.

34.4. In many cases, such as those relating to deductions from wages, the Respondent will be able to work out the sum which the Claimant is claiming from the nature of the complaint being made. Many heads of loss follow simple formulae and can be easily worked out by the Respondent, such as redundancy payments.

The quantification of some heads of loss are, within certain parameters, at the tribunal's discretion (e.g. the amount of a protective award, damages for injury to feelings or injury to health, aggravated damages). Given the adversarial nature of litigation, the Claimant is bound to put his/her claim at or towards the top end of what a tribunal might award, and the Respondent will do the opposite. If the Claimant does this at an early stage the Respondent does not thereby learn anything of any particular value.

34.5. There are some losses which we consider it would not be appropriate to require particularisation of within the three month limitation period. For example, pension loss, where the loss relates to a defined benefit scheme, can be very complicated to calculate. The calculation also depends upon information which will not necessarily be or become available to the Claimant within the three month limitation period. In any event, it is too much to ask of claimants, in our opinion, to produce detailed pension calculations within the three month limitation period. It should suffice to indicate that pension loss is claimed.

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

36.1. No. Firstly, the benefits of a statement of loss are insufficiently great to justify this, particularly as our experience is that in most cases case management orders are made fairly swiftly and within a few months of the claim being accepted a schedule of loss must be produced. Secondly, limitation periods in employment law are among the very shortest known in English Law and are very demanding of claimants indeed (three months is not a long time to consider one's position, take advice, draft a claim and lodge it). It would be quite wrong in our view to make it any harder for Claimants to present a tribunal claim within the limitation period than it already is.

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

Perhaps an indication of the party's readiness to mediate / engage in post-issue ADR of some other form could also be asked of Claimant and Respondent in the ET1 and ET3. This might even be requested in a schedule to the application and reply forms that is not seen by the Tribunal at trial.

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

38.1. Currently the form ET1 asks the Claimant to state whether or not fresh employment has been found, when and for details of remuneration. We consider that an additional question along the lines of 'Have you made any efforts to find new employment? If not, why not? If so please indicate what those efforts are' would be useful. For those who have made efforts to find new employment there could then follow a list of typical steps that can be taken to find fresh employment with 'tick-boxes' next to them (e.g. joined recruitment agency; registered at Jobcentre; applied for job(s) etc.) and an 'if other, please give details' space.

38.2. We consider that this would be a useful exercise:

- firstly it should help focus the claimant's mind on the duty to take steps to mitigate loss and the fact that this will be of relevance to the tribunal;
- secondly it should give the Respondent some idea of whether or not the claimant is complying with the duty to mitigate loss.

39. Do you agree that this proposal (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, backed by a scheme of penalties and rewards), if introduced, will lead to an increase in the number of reasonable settlement offers being made?

39.1. There are three limbs to this proposal, and we consider that only one of them actually offers anything substantial beyond the existing state of affairs.

39.2. *Limb 1* is the introduction of a formal procedure for making an offer of settlement. We consider that formalising the offer to settle in the manner suggested will add very little to a party's right currently to write a formal without prejudice letter to the other party making an offer of settlement in writing – thus evidencing the fact of the offer. Parties, currently, can also make offers of settlement through ACAS. We do not see that there is any real benefit in having a third mechanism for making an offer of settlement which is so similar to writing a without prejudice letter, but which would under the proposal have different consequences to writing a without prejudice letter.

39.3. *Limb 2* is to entitle the tribunal to take into account the refusal of a 'reasonable' offer of settlement when assessing whether or not a party has conducted proceedings "vexatious, abusively, disruptively or otherwise unreasonably" or in a way that is "misconceived" with a view to making a costs order. Tribunals already can do this and in fact do so in appropriate cases.

39.4. *Limb 3* is to introduce some sort of scheme for uplifting / decreasing awards. We consider that this, the key limb of the proposal, would be unworkable in practice. In our experience offers of settlement are made in a very high proportion of employment tribunal cases. In almost all such cases which do not settle, arguments will be raised about the 'reasonableness' of offers which were not accepted. A great deal of judicial resource and inquiry will be required to determine whether or not an offer was 'reasonable' or not, and more to the point, whether it was unreasonably refused. Regard will have to be had to what was known to the parties respectively at the time of the offer (what disclosure there had been, where *inter partes* correspondence had got to at the time, whether legal advice had been taken and if not why not, how long the offer was open for, etc.) and a judgment then made as to 'reasonableness'. Bearing in mind that in many cases there are multiple offers to settle made at different stages of proceedings, this will inevitably be a very time consuming process and in order to deal with it fairly may require, in many cases, documents and witness evidence to be produced. It will also inevitably lead to satellite litigation in the appellate courts: appeals against tribunals' finding in relation to reasonableness of offers. This proved to be the case in relation to the increase/decrease of awards provided for by the much maligned Employment Act 2002 (see s.31 of that act). Any question of reasonableness etc would need to take express account of the importance to the individual (and to the public) in litigating certain claims, e.g. discrimination claims or whistleblowing claims, where such claims are brought in good faith.

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?

40.1. Perhaps, but only a limited decrease and for the reason given about, any saving of resources in that regard will be more than lost by a wholly inevitable by-product of the proposed system: argument, evidence and judgment in relation to 'reasonableness'.

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?

41.1. It should apply to everyone or no-one. The substance of the law should be the same for everybody (although it is of course important for things to be explained in a way that enables litigants in person to understand them and for the tribunal environment to be one in which the litigant in person feels reasonably comfortable).

41.2. It would be a nonsense if an intelligent litigant in person who understood the proposed scheme were deprived of the right to put costs pressure on a represented opponent.

41.3. There are different degrees of legal representation which would leave a two-tier system in which the proposal only applied to represented parties, open to abuse. A litigant may well be paying for, or otherwise have, sound legal advice without the adviser being on record.

41.4. If there is a two tier system thought will need to be given to what happens if a litigant is not represented at the time of an offer but subsequently is and vice-versa. If there is some test of reasonableness and/or some discretion to be applied by the Tribunal then whether or not a party has been represented, and at what stages, is usually going to be taken into account in any event, as already happens in costs applications.

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?

42.1. No, we are not convinced that any power to uplift or decrease compensation would effectively do justice to the case and to the conduct of the parties. The extent of the inquiry that would be required in order to do justice to the parties would make the process very time consuming and would without doubt drive up legal costs by creating new avenues of litigation and new issues to which evidence argument must be deployed. These considerations significantly outweigh the benefits of the proposal.

43. What constitutes a reasonable offer of settlement, particularly in cases which do not centre on monetary awards?

43.1. Firstly, the question should be whether or not it was unreasonable to refuse the offer, rather than whether or not it would have been reasonable to accept the offer. There are many offers which it would be perfectly reasonable to accept, but also perfectly reasonable to refuse. For example, a party might make an apparently high offer before disclosure. As such it could be

reasonable to accept that offer. However, it might also be perfectly reasonable to refuse the offer and await disclosure. Disclosure may or may not vindicate the decision to refuse the offer; in either event the decision was reasonable at the time it was made.

43.2. The range of possible factual scenarios and causes of action make this an incredibly difficult question to answer. It is intractably difficult, and will be so for any tribunal dealing with the issue. Reasonable offers might include, in addition to financial sums:

- admission of liability or partial admission;
- apology;
- statement of regret;
- agreement to give reference / do so in a particular form;
- suggesting a reasonable return to work plan;
- agreeing to make particular reasonable adjustments;
- undertaking to do X (e.g. change a particular policy or practice);
- offer of re-engagement/reinstatement on particular terms.
-

43.3. Consideration would have to be given to the precise facts of the case and what the state of play was at the time that the offer was made / refused.

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.

44.1. No. The judicial tender model adds next to nothing to writing a formal letter and sending it to the other side, but would involve significant administration costs. We would also be against a 'payment into court' model which would be far too costly to set up and administer. Please note contrary to the narrative of the consultation document, the Part 36 approach in England and Wales no longer involves making a payment into court, but simply requires the offer to be made in writing and to include some simple formalities such as stating that it is a Part 36 offer; and this works perfectly well in practice.

PART 3 Shortening tribunal hearings

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.

45.1. It is certainly the case that tribunal hearings take longer if witnesses read out their witness statements. The question of whether this 'unnecessarily' prolongs a hearing depends on the type of hearing, and also,

of course, the view taken as to the advantages and disadvantages of taking statements as read.

45.2. In those employment tribunal hearings where the witness statements are short, the time taken up by reading through a statement is not overly significant compared to the time provided for the whole hearing.

45.3. However longer statements are produced, in complex discrimination or whistleblowing claims where the complaint covers a lengthy period of time. In such cases, whilst allowing the claimant to read out his/her witness statement undoubtedly adds to the time taken to hear the case, it can in our view help the Tribunal to understand the claimant's case. Sometimes a claimant reading her or his statement will help to focus attention on the parts that are most important to him/her, and the matters which are likely to be most important for the Tribunal. Further, particularly where the claimant is unrepresented (in relation to which, see below), it gives the Tribunal an opportunity to clarify, at the relevant time, any areas in which the statement may require elucidation or amplification. If the Tribunal has to read through the full statement and then ask any questions later, and only gain familiarity with relevant documents outside the statement's narrative sequence, there will be much greater potential for misunderstandings, which can permeate the whole case – and thus for unfairness to the relevant party.

45.4. Hearings are unnecessarily prolonged by the reading of witness statements in cases where Respondent witnesses (typically the individual carrying out an investigation into conduct leading to dismissal and the dismissing officer) duplicate evidence given to the Tribunal. Giving the same evidence twice is generally pointless, and the problem is compounded if the evidence is read aloud rather than being taken as read. However, the real issue in such cases is inefficient preparation by solicitors, not the practice of allowing witness statements to be read aloud.

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

46.1. It appears from the consultation paper that the proposal is to produce a rule where there is a presumption that statements should be taken as read, unless an employment judge directs otherwise (this is strengthened by the reference to the CPR). If this is indeed the proposal, we think there are pros and cons on both sides and on balance suggest that judges address this point at the beginning of cases, rather than leaving it up to practitioners to suggest that a particular statement is read or not read out.

46.2. For the reasons discussed in response to question 45, the question of whether it will be appropriate to take witness statements as read is extremely fact-sensitive. A rule which sets down, or implies, a presumption that statements should be taken as read may run the risk of placing excessive pressure on Employment Tribunals not to allow witnesses, and particularly

claimants, to read their witness statements aloud. We would suggest instead that the matter be left entirely at the discretion of the Employment Tribunal hearing the case – as, indeed, appears to be the import of the comments of the EAT in *Mehta v Child Support Agency* : [2011] IRLR 305. In our view, the guidance provided in that case is likely to lead to a fairer and more sensitive handling of this issue than the proposed presumptive rule:

“(1) We do not believe that it is a requirement of fairness in every case that the statements of every witness be read aloud in full, or indeed at all. In very many cases the process of 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. This will particularly, perhaps, be the case when the statements in question are lawyer-drafted and where they traverse masses of detailed material.

(2) On the other hand, there may in particular cases and circumstances be good reason for a witness statement, perhaps particularly of a claimant and even more particularly of an unrepresented claimant, being read aloud either in whole or in part. One such reason may be to enable the claimant to feel that he or she has had their say. Another might be where the statement is confused or inadequate, and it is important to take the witness through it so that it can be elucidated or (so far as proper) amplified. That process may also be valuable if the material is very technical. Another legitimate consideration is that it can be unfair to a witness to be exposed to hostile cross-examination without some opportunity to settle themselves by answering some friendly or at least neutral questions. None of these considerations, we emphasise, necessarily means that any part of a witness statement must be read aloud: they are simply matters to be taken into account.

(3) We emphasise that it 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 (e.g. to deal with queries raised at an earlier stage in the hearing). Sometimes where a lawyer drafted witness statement covers a factual episode of particular importance, a tribunal may wish to hear the witness give the evidence of that episode in chief in his or her own words. A different alternative, in a case where the statement of an unrepresented party has been taken as read, might be for the Judge to offer a short summary in order to reassure the party that his or her case has indeed been understood and to confirm that it has been understood correctly.

(4) Deciding what course to take in any particular case must be a matter for the tribunal in the exercise of its case management powers, whether exercised by an employment judge at a case management discussion or subsequently at the hearing. We understand that some guidance is given to employment judges, though we are not aware of its detailed terms; and we are also aware of variations in practice between different regions. We do not wish to be prescriptive, and different judges may legitimately have different

preferences; but we would say that, if there are indeed regions in which the practice is that the witness statements of all witnesses are routinely read aloud whatever the circumstances, we think that that should be reconsidered.

(5) In exercising its choice in any particular case we would expect a tribunal to proceed so far as possible by agreement. In cases where lawyers are instructed on both sides this should not normally be difficult. In cases where one or both parties are unrepresented the tribunal should bear in mind what we have already said about the responsibility of an employment judge to ensure that an unrepresented party understands the course to which they are being asked to agree. If it proves necessary to make a direction about the way in which witness statements are handled, we would expect tribunals to be sensitive to concerns of the kind articulated by Mr Ohringer – and in particular, having regard to the circumstances of this case, to the perception that different parties are being treated differently. That does not mean that the witness statements of all witnesses on either side must always be treated in the same way; there may be good reasons for a difference in treatment. One point which was made in the course of argument was that in a case of some length as the case proceeds and the tribunal's understanding of the background develops, it may well be more helpful to it to read witness statements to itself even if it has not done so in the earlier stages. But if a course is taken for those or other reasons which involves the witnesses of one party being dealt with in a different way from the witnesses of another, that must be very fully explained and so far as possible any perception of unfairness defused.

(6) It is of course a requirement that any hearing be in public. We have not heard submissions on whether it follows from that that any witness statement which is taken as read should be made available to members of the public attending the hearing. We understand that to be the practice in at least some regions, if not generally.”

46.3. Should this suggestion not be accepted, we would suggest that, at the very least, litigants in person (whether claimants or respondents), and their witnesses, if their statements have not been prepared in conjunction with a qualified legal adviser, should be exempt from the proposed presumption that statements will be taken as read. Witness statements prepared by unqualified individuals without assistance are very likely to require elucidation and clarification which will, in our view, almost always be best achieved at the time the witness statement is being read and digested. If there is a presumption in place to the effect that witness statement should be taken as read, it is our view that Employment Tribunals may feel pressured to apply this presumption even where it may not be appropriate, particularly in view of the targets they are required to reach in relation to listing cases. Such a situation could well lead to unfairness to unrepresented litigants; the very individuals who were intended to be able to use the tribunal system without assistance.

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

47.1. Principally time savings for already-pressed tribunals, and cost savings for the state and all parties.

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

48.1. In some cases there may be no disadvantages of taking statements as read. However, this will be a highly fact-sensitive question, and the tribunal hearing the case should have full discretion to determine the answer. Potential disadvantages that may arise are referred to above, but in summary include:

- Losing the opportunity fully to elucidate statements which are not clear, particularly when such statements have been drafted by litigants in person.
- Forcing witnesses to move straight into hostile cross-examination – particularly witnesses who are unused to the formality of tribunal proceedings.
- Losing the opportunity to listen to a claimant (in particular) reading out his/her evidence which is likely to focus attention on the most important aspects of his/her case.
- As a result of all of the above, potential unfairness to litigants.

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.

49.1. We are not entirely clear, from the wording of the consultation paper, precisely what the proposal in this respect is. The suggestion in the question is that the principle of entitlement to expenses in the civil courts should apply in ETs too.

49.2. However, in the civil courts, a costs regime exists. Hence CPR 27.14(2)(d) and (e), which deal with costs in small claims and are referred to in the paper, provide that one party may be required to pay costs in respect of reasonable travel and accommodation expenses, and loss of earnings/loss of annual leave, incurred by the *other* party's witnesses. In general, the losing party will pay the winning party's costs, including expenses incurred by witnesses.

49.3. There is no similar costs regime in operation in the Employment Tribunal. The consultation paper does not suggest that such a costs regime should be introduced, and in our view it should not (we do not propose to set out our full reasons for this view here as this does not form the subject of the present consultation paper). Without a costs regime similar to that in the civil courts, it is difficult to see how the civil court expenses system would work in the Tribunal. In Employment Tribunals, costs will only be awarded against a party if that party, or his/her representative has in conducting the proceedings acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been

misconceived. So would witness expenses be paid by the other party only in such rare and exceptional circumstances?

49.4. In reality, it appears that the proposal is that all parties will be responsible for the costs and expenses of their own witnesses; see at the top of page 42 “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.”

49.5. In our view, that is likely to lead to a significant imbalance between the parties. Whilst the witnesses called by most Respondents will be their own employees, who will therefore be paid for their attendance, claimants’ witnesses will either be employees of the Respondent, who may face pressure not to attend and will have to take holiday to do so, or perhaps family members who are employed elsewhere, and will equally have to take leave. In such circumstances, it is likely to be almost exclusively claimants who will be penalised by the proposal to withdraw state funding for witness expenses. For these reasons, we do not consider the proposal to be properly thought out, or workable in its current form.

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

50.1. In our view, there is more of a case for requiring parties to bear their own expenses than there is for requiring parties, particularly claimants, to bear the expenses of their witnesses, for the reasons we have already explained above.

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.

51.1. Overall, we think the reduction in duration of hearings produced by this measure is likely to be limited. This is because in our experience, it is the Respondent who tends to attend with a large number of witnesses, and Respondents do not (again in our experience) usually take advantage of the expenses offered by the Tribunals Service. The removal of expenses provision is therefore unlikely to reduce the number of Respondent witnesses attending hearings.

51.2. Claimants may well be put off bringing witnesses to the Tribunal if they know that they will be required to pay each witness’s costs. In general, in our experience, claimants do not bring large numbers of witnesses to tribunal hearings. A small number of unrepresented claimants do sometimes attempt to call a long list of witnesses, but in the vast majority of cases, careful case management by Employment Judges can avoid such difficulties.

51.3. In short, a decision not to pay expenses to witnesses in particular is likely to have a disproportionate adverse impact on claimants, for relatively little gain in terms of reducing hearing duration.

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.

52.1. We strongly disagree with this proposal.

52.2. Unfair dismissal cases are the paradigm example of cases which should be heard by the 'industrial jury'. The question at the heart of any unfair dismissal case is not whether a dismissal is "reasonable" as is suggested at p. 44 of the consultation paper. It is whether dismissal (and indeed the procedure leading up to the dismissal) falls within the "range of reasonable responses". In determining that range of reasonable responses, the input of lay members, who have industrial and management experience, is crucial. (See **A v B** [2003] IRLR 405 at [59].) To create a presumption that such decisions should normally be placed in the hands of a Judge alone – when many judges have no experience of either employment or management – would be likely to significantly undermine, rather than bolster, public confidence in the Tribunal system.

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.

53.1. We can see that this proposition is more attractive, and more logical, than the proposal to remove wing members from unfair dismissal cases in the ET. We nevertheless disagree with it, albeit less strongly than we disagree with the proposal set out at question 52.

53.2. As was pointed out by the House of Lords in *Lawal v Northern Spirit* [2003] ICR 856 at paragraph 12:

"What may amount to a question of law in this context is not narrowly circumscribed. For example, the question whether there was evidence on which an employment tribunal could have come to a certain conclusion may, depending on the setting, be a question of law: *Harvey on Industrial Relations and Employment Law*, vol 5, para T [1630]. On all matters which may properly come before it the appeal tribunal acts by a majority: the judge may be outvoted by the two lay members on the question of law involved."

53.3. Another example is that of unfair dismissal claims, already discussed above. A consideration of whether a Tribunal applied the correct 'range of reasonable responses' test will inevitably, to some degree, involve consideration of the facts of the case. It is not sufficient for a Tribunal simply to say that it has applied the test; the EAT has to consider whether, looking at

the factual background, the Tribunal applied the test in substance. In dealing with this type of enquiry, the experience of lay members who have worked in industrial relations will be invaluable.

53.4. In such circumstances, we disagree that the presumption should be that EAT judges should sit alone.

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?

54.1. None.

PART 4

Introducing fee charging mechanisms in employment tribunals, review of the formula for calculating employment tribunal awards and statutory redundancy payment limits

Introducing fee charging mechanisms in employment tribunals and the Employment Appeal Tribunal

55.1. The consultation paper proposes to consult in the Spring on how best to implement a fees mechanism, once options have been developed more fully. However, during the course of the wider consultation on Resolving Workplace Disputes, the government plans to talk to those with an interest about its proposed approach.

55.2. The employment tribunals accepted 236,100 claims during 2009/2010. Of these 50,900 were unfair dismissal claims. Of those claims, 5,200 were successful in tribunal. The median compensation awarded was £4,903 and the mean average £9,120. 22,400 unfair dismissal cases were settled through ACAS. 12,200 were withdrawn (presumably including cases withdrawn after settlement had been agreed).

55.3. In respect of those claims that were the subject of judicial determination, the damages awarded would – if current civil court fees were used - have required issue fees of £120 for claims of up to £5,000 and £245 for claims of between £5,000.01 and £15,000.

55.4. If fees at an equivalent level were introduced in employment tribunals, people with meritorious claims would be deterred from proceeding. As a class, it may be less easy to charge a substantial fee for unfair dismissal claims as, by definition (in virtually all cases); the claimant will have lost his or her job within the preceding 3 months.

55.5. Time limits for employment tribunal proceedings are short. Claimants are often acting in person. Claims are frequently presented late or towards the end of the ordinary time limit for presentation. For claimants who are

unable to afford issue fees, any system of dispensation which does not allow for an extension of the time limits for presenting complaints runs the risk of imposing a further barrier to presenting complaints promptly.

55.6. A difficulty in unfair dismissal claims (and indeed in other claims) is that a table of costs based on the value of the claim may be difficult to produce and police. The value can be uncertain and not purely financial. ET claims (even unfair dismissal claims) can be for a declaration alone. The value of an unfair dismissal claim may be subject to: reductions for contributory fault or because an unfairly dismissed employee would probably have been dismissed anyway (a *Polkey* reduction), whether an order for reinstatement or re-engagement is made and uplifts or reductions for failure to follow a relevant ACAS code. Litigants in person may have no idea of the value of their claim at the time of issue. The value of the claim may change over the course of the litigation if the claimant leaves employment, becomes so unwell that s/he cannot work or finds a job. Claimants may under-state the value of their claim if a value-based issue fee is introduced or they may under-state through ignorance. Consideration will need to be given to what happens if a claim subsequently appears to be of higher (or lower) value.

55.7. The current civil court fees are discounted where HM Courts and Tribunals Service's online claim service is used (the equivalents to the above amounts would be £100 and £210). If fees were introduced, an equivalent discount could be applied to online employment tribunal claims as well.

The responsibility for issue fees if a claimant wins or loses: costs

56.1. If an issue fee is introduced, the costs regime should make it easier for a claimant to recover that fee without having to show that the respondent's behaviour (in defending the proceedings) falls within one of the bases for awarding costs currently set out in rule 40(3), *Employment Tribunals Constitution and Rules of Procedure 2004*. However, there may nonetheless be bases for not awarding a claimant an issue fee if his or her conduct of the proceedings does not warrant reimbursement. This will however mean that, in a greater number of cases, the question of costs will need to be considered by employment tribunals, with the additional burden on tribunal time and the prospect of appeals against costs determinations.

Class actions

57.1. The current ET system does not allow for class or representative actions. It can be the case that a number of workers bring a claim arising from identical facts. The number of claims brought may not in fact reflect their burden to the Tribunal Service. There may be economies of scale. There is an argument for allowing for class or representative actions to be brought so as to ensure that the system is not prohibitively expensive for employee or employer. Nevertheless there are additional costs in class actions, and conflicts can easily arise leading to satellite litigation. In practice using lead

cases to give strong indicative answers as to how other similar cases will be treated has worked well.

Resubmitting claims

58.1. In some instances, for a variety of reasons, claims may be resubmitted, either because of uncertainty about a time limit, or because new matters come to light (even if changes could be made by way of amendment), or because there is a continuing course of conduct (for example, in unlawful deduction from wages complaints, claimants can commonly issue claims every three months to catch ongoing deductions by their employers pending a hearing). Consideration will need to be given to whether a new fee should be chargeable each time such a new claim is issued, given that there is less additional burden to the Tribunals Service. As part of this, consideration could be given to clarifying the rules on amendment of complaints and the principles which govern enforcement of complaints for unlawful deductions from wages where there is an ongoing series of deductions which post-date the presentation of an original complaint.

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

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

59.1. For as long as inflation is economically significant (and automatic uprating was introduced when inflation was lower than it is now), a system for ensuring that the buying power of awards remains broadly constant should be retained. This need not necessarily be automatic, but the guiding principle should be that the buying power of awards remains constant. Changes which lead to any material decrease or increase in the level of tribunal awards should be subject to proper legislative scrutiny.

Should the up-rating continue to be annual?

60.1. The current system works reasonably well. There is a fixed date which practitioners know well. However, there is a degree of arbitrariness in the application of the current system between, for example, employee A, dismissed on 31 January in any year and employee B, dismissed on 1 February in the same year. An alternative would be, say, to align changes twice yearly with the October and April BIS dates for introduction of new employment legislation. Currently the focal date is the date of the effective date of termination. An alternative would be to base calculations on rates applicable at the date of the hearing of a complaint. This would have the advantage of not disadvantaging claimants whose cases take a long time to come to trial, and it would allow for more frequent adjustments to the basis amounts without the potential for confusion and error that remembering a series of figures for termination dates spanning several years would cause.

Should up-rating continue to be rounded up to the nearest 10p, £10 and £100?

61.1. There are good arguments for rounding up to a lower figure, since, otherwise, the levels of tribunal awards gradually increase by substantially more than inflation. Rounding up the nearest pound would not make calculation difficult.

61.2. However, consideration should be given more generally to the level of the statutory cap on damages for unfair dismissal. A dismissed employee's losses often substantially exceed the level of the statutory cap. There are several effective forensic controls of the level of an employee's compensatory award, including the ability to make reductions for contributory fault, principles relating to mitigation of loss, the *Polkey* principle that allows for damages to be reduced if there would have been a fair dismissal in any event. It is not uncommon for employees with sound unfair dismissal claims to bring claims in which the statutory cap is removed (e.g., whistle blowing claims) partly because of the absence of the cap. This can be abusive, but is borne of the desire to be properly compensated for a substantial loss of earnings. High-earning employees may be just as, if not more disadvantaged by an unfair dismissal, may suffer a greater loss and may have no other basis for claiming against an employer. The principles which exist apart from the statutory cap for keeping compensatory awards in check should be trusted to provide a complete safeguard. Employment tribunals have considerable experience of handling high-value cases. The statutory cap for compensation in unfair dismissal cases should be removed.

Should up-rating be based on the Consumer Prices Index rather than, as at present, the Retail Prices Index?

62.1. The Retail prices Index records consistently higher rates of inflation than the Consumer Prices Index (although there was a period of negative inflation in spring 2009). The Government began using the CPI rather than the RPI for measuring inflation from December 2003.

PART 5 Extending the qualification period for unfair dismissal

“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”

“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?”

Summary

63.1. We believe that the proposed increase of the qualifying period for unfair dismissal will disadvantage both employees and employers.

The impact will be greater on employees for the obvious reason that 2.9 million employees will be denied the protection of the law, and it can only encourage employers to consider it permissible to deny basic fairness to employees. It has to be recognised that this will provoke some employees to seek alternative routes to remedies through wildcat strikes etc.

There are other substantial disadvantages for employers and for the Employment Tribunal service. The proposal will encourage employees with short service to bring artificially constructed complaints of discrimination or automatic unfair dismissal which will necessarily be more complex, expensive and time-consuming than a simple unfair dismissal claim. Additionally for employers an adverse finding in a discrimination or whistleblowing claim causes more reputational damage than a finding of unfair dismissal.

63.2. The right not to be unfairly dismissed is core to our system of employment rights. It provides a level of protection which is both basic and fundamental. No other significant cause of action in employment law is premised on general principles of fairness. For that reason we consider it to be of vital importance that unfair dismissal rights are available as widely as possible and that the current level of protection is not reduced.

The objectives of the proposal

64.1. One stated objective of the proposal is that it will “encourag[e] growth through giving businesses more confidence when they consider taking on people”. We consider this to be a wholly inadequate and unsatisfactory objective. The consultation paper states further: “we do not see this as a charter for businesses to sack people unfairly”. We consider it to be precisely that.

We note that the paper does not go so far as to suggest that the proposal will actually result in an increase in jobs. It appears to be proposed in the rather vague hope that it will encourage employers to feel more able to take on new employees. This is not a legitimate aim unless in fact it leads to more jobs. The case of *R. v. Secretary of State ex parte Seymour-Smith* looked closely at the question whether a two-year rule actually led to any new jobs. There was no evidence that it did. So there is little reason to suppose it would now. Some do not think that a sustainable programme of job creation is likely to be assisted by giving employers confidence that they may without consequence treat a greater number of employees in a manner which falls below generally accepted standards of fairness.

64.2. There is no explanation in the paper of the statement that the proposal would not “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”. That basic principle will plainly be affected because it will not be enforceable by those with short service, save for the very limited right to bring a claim for breach of contract where internal disciplinary or dismissal procedures are not followed. Breach of contract cases are generally only worth bringing if the employee has been dismissed summarily or with

short notice, and the damages are limited to notice pay. That of course does not compare favourably to the compensation available for unfair dismissal, which is designed accurately to reflect the loss caused to the employee by the unfairness that he or she has been subjected to.

64.3. The consultation paper also states that the proposal will give “more time for the relationship to get established and work well for everyone”. We do not understand this comment. The employment relationship is a legal relationship. The protection of the law is not regarded as a disincentive to forming effective legal relationships in any other area of life. It is and should be an essential safeguard against abuse of the relationship by the party who wields more power.

Equality impact assessment

65.1. We are extremely concerned about the effect of the proposal on minority groups.

65.2. The impact assessment shows that whilst the impact on women is likely to recede over time, there is a substantial impact on part-time, young, non-white and disabled employees. Surely no government would want that impact?

65.3. We do not understand how the figures given in the impact assessment have led to the conclusion that “the proposed changes are unlikely to create any barriers to equality in terms of gender, race and disability”. The stated explanation for this conclusion is that “the proposed changes reflect a broad policy and are designed to have an impact on all employees regardless of their gender, race or disability”. The fact that the proposal is *designed* to impact on all employees regardless of status does not mean that it will operate effectively to do so, and it appears to us that the statistics directly contradict that conclusion.

Likely consequences for employees

66.1. The reasons why the proposal will impact adversely on employees are self-evident and are largely set out above.

66.2. In addition, we are extremely concerned about the disproportionate difference between the cost to employees of £15.8m – £20.1m in compensation each year and the estimated saving to the ET service of £1.5m – £2m each year.

We think that if up to £20.1m is awarded each year to Claimants with 12–24 months service, that is a clear indication of how many well founded claims there are amongst this group and how many employees with short service are already treated poorly by their employers. That situation can only be worsened by the proposal. It is worth noting in this context that unfair dismissal claims brought by employees with short service are usually relatively low in value, so we consider that the figure of up to £20.1m in compensation per year is likely to mean that a large number of cases are upheld (see the figures under question 55 above).

66.3. We note that the impact assessment states that there is “some risk around employee protection, but in practice where there are severe problems employees will have recourse to other jurisdictions”. This is not understood. No other jurisdiction provides the same or comparable protection against basic unfairness. As set out below, the only other recourse that employees have is discrimination / whistleblowing claims (or other species of automatically unfair dismissal), which are fundamentally different to ordinary unfair dismissal. We do not think that it is helpful to actively encourage such claims to be brought where the real problem is unfairness and not discrimination.

Likely consequences for employers and the ET service

67.1. It is our view that the proposal if implemented will simply result in a further rise in the increasingly prevalent tendency of employees to shoe-horn an otherwise sensible unfair dismissal claim into an alternative cause of action. The qualifying period for unfair dismissal rights was reduced from two years to one year in 1999. It is our experience that at that time the tendency to pair unfair dismissal claims with other causes of action such as discrimination claims was not as prevalent as it is now.

67.2. Most importantly, the whistleblowing provisions were not in force during the period when the qualifying period for unfair dismissal was two years. It is of considerable importance that the potential scope of whistleblowing claims has been expanded in case law (see *Parkins v Sodexho* and *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38). It is now possible for employees to bring whistleblowing complaints in which they point to a private grievance or other communication made in the course of work alleging any sort of mistreatment which is capable of constituting a breach of the implied term of trust and confidence (which has very wide application) and argue that this was the reason for their ultimate dismissal.

67.3. In light of these observations, which we consider to be quite obvious and yet do not appear in the paper, it seems to us that the impact of the proposal on both employers and the ET service has not been properly analysed.

One of the overriding objectives in the consultation paper is that the reforms should “Ensure that where parties do need to go to employment tribunal, cases are dealt with more swiftly and efficiently to reduce the costs borne by all parties”. The impact assessment says that the proposal will mean that “each hearing is likely to cost less in time”.

67.4. We do not think that this will be the outcome of the proposal. Employment Tribunals are well accustomed to dealing with simple unfair dismissal claims in a proportionate and economical way. They are heard by more junior Employment Judges usually in one or two days without a prior case management discussion. Discrimination and whistleblowing claims are inevitably more complex, longer and harder to manage. They are only heard by more experienced Employment Judges and usually require at least one

case management discussion. Where such a claim has been artificially constructed and accordingly has poor merits, there is likely to be more time taken up in case management, and there is an increased prospect of a pre hearing review to deal with a strike-out application or an application for a deposit order. Moreover such claims are more expensive to defend and, if lost, are more stigmatising for employers.

Conclusion

68.1. We are opposed to the proposal. We consider that the qualifying period should remain at its present level of one year.

PART 6 Financial Penalties

“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.”

69.1. We do not believe that the automatic financial penalty upon losing a case will necessarily encourage employers to uphold employment rights. The cases which go to a full hearing are in our experience either those which are finely balanced and which require a employment tribunal to adjudicate on the facts, or those where the claimant wants his or her day in court to the extent that s/he will not participate in any or any sensible settlement discussions. However sometimes the employer simply refuses to settle through a sense that they are in the right or through a policy of simply not settling cases (perhaps unless they are overwhelmingly strong).

69.2. This measure may lead to fewer workplace disputes by deterring employers from contesting full hearings, but for the wrong reasons.

69.3. The Government should not be penalizing litigants from going to court where the outcome is difficult to predict. It would be far more just to have a part 36 procedure or a Calderbank system in place as in the civil courts, where either side can make sensible attempts to avoid lengthy and costly hearings.

69.4. Therefore to suggest that: “good employers will have nothing to fear” from the proposal misses the point. (The same point can be made with respect to employers of those with 12-24 months’ service, in that “good employers will have nothing to fear” from unfair dismissal claims.)

69.5. The Government’s desire to reduce the number of tribunal claims is cost driven. But penalising the loser upon defeat, as opposed to compensating the victor, is not a just method of managing or coping with a impecunious system. Further there is no suggestion that the financial penalties would go directly back to the Tribunal system or even to ACAS.

Should the system of financial penalties become law, it is vital that any monies recouped go back into this particular court.

69.6. We have considered whether a penalty should only be incurred where it was unreasonable to defend a claim – i.e. where costs are awardable, or whether it would be appropriate to include a discretion to award the levy and its amount, dependant upon the breach in question. But we have arrived at a decision that the most appropriate way lessening the burden on the Tribunal is by publicizing the existing means of so doing: by applications for strike outs, deposit orders and costs. Most Claimants are not aware that they are able to utilize rule 20 to attempt to persuade an employment judge or Tribunal that the contentions put forward by the Respondent in relation to any matter to be determined by a Tribunal have little reasonable prospect of success.

“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.”

70.1. The problem with the automatic fixed penalty, wholly dependent upon the compensatory payment awarded to the successful claimant, is that it takes no account either of the extent of the employer’s breach or its means. The lack of discretion may mean that the proposed system risks breaching Article 6 of the ECHR.

70.2. Perhaps the “exceptional circumstances” has been inserted by Government to avoid contravention of Article 6, but would this be useful for the Respondent who wished to argue that it was required to fight damaging allegations where the outcome was finely balanced but eventually went against it?

70.3. The Government has said that the financial penalty will be automatic in all breaches, but mentioned proportionality when determining that the penalty will be half the size of the Tribunal’s award. Determining proportionality without any regard to the type of wrongdoing or the way the defence was advanced is clearly problematic.

70.4. Similarly the suggestion that “Where a non-financial award has been made by an ET for a breach, we envisage that a tribunal would ascribe a monetary value and so the appropriate financial penalty can be made” is overwhelmingly likely to lead to a myriad of appeals thus achieving the converse of the Government’s intention of reducing the burden on the Tribunal system.

70.5. Punishing the employer for the mere use of the employment tribunal system, quite regardless of whether this is a case which should have been compromised or not, will not enhance faith in the system and is contrary to the long-standing emphasis on compensation: for example in s123 ERA the tribunal’s consideration of what is just and equitable compensation is guided

by the extent of the complainant's loss, not the objective of punishing the employer.

70.6. Should the Government wish to proceed with the financial levy we would propose a series of threshold test which every Tribunal must consider before imposing the penalty:

- Did the dispute concern finely balanced issues of fact?
- Did the Respondent attempt to settle the case in advance but the Claimant refuse to engage in discussions?
- Has the Respondent has unreasonably contested points of law?
- Did the Respondent refuse to mediate?

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