RESOLVING WORKPLACE DISPUTES: A CONSULTATION

THE RESPONSE OF THE EMPLOYMENT LAW COMMITTEE OF THE CITY OF LONDON LAW SOCIETY

INTRODUCTION

The Employment Law Committee of the City of London Law Society is made up of solicitors practising employment law in the City of London.

Members of the Committee act for both employers and employees in employment disputes in which large sums of money are often at stake, and on which the parties may often spend substantial sums in legal costs. Three members of the Committee are part-time fee paid Chairman of Employment Tribunals, and are able to bring additional insight into our discussions of the matters which form the subject matter of present Consultation.

Much of our members' work is also involved in resolving potential disputes at a very early stage by use of Compromise Agreements and other forms of agreement. Some members are trained mediators.

Last minute adjournment of Employment Tribunal Hearings

The problem with the Employment Tribunal Service which has been the subject of most discussion and which in our recent experience has caused most profound concern among our clients, is not the subject of this Consultation at all. This is the last minute adjournment of hearings by Tribunals with no or with virtually no notice. We can offer a formidable body of anecdotal evidence about multi-day hearings, arranged for several months in advance and for which parties and witnesses have cleared their diaries and made travel and accommodation arrangements, only to be informed at 4pm on the afternoon before the hearing is due to start that the case will be adjourned due to lack of judges, courtrooms or both. Usually this will result in the hearing having to be relisted many weeks or months ahead.

We recognise that this phenomenon is not unique to the Employment Tribunal Service and that these are also occasions when other types of dispute are subject to last minute adjournment in the Civil Courts. However, it is our strong impression, based on our recent experience of Employment Tribunal offices throughout England that:

- there is an over aggressive overlisting policy which is the main cause of the problem;

- the recent recruitment of more Employment Judges has not (yet, at any rate) had a significant impact on this problem;

- our clients, whether they be Claimants or Respondents (many of which are international businesses) find the late adjournment of cases to be costly, stressful and incomprehensible. It brings the Employment Tribunal Service into disrepute.

In our view, there is no more urgent problem which the Government and the Employment Tribunal Service should be seeking to address.

As one of the first steps, we suggest that the Employment Tribunal Service should gather and publish details of the number of hearings which are adjourned 48 hours or less before the date on which they

have been listed to begin, and that it should be made clear by the Government to the Employment Tribunal Service that the reduction of such occurrences should be an urgent priority.

RESPONSE

1. To what extent is early workplace mediation used?

It is common for employers to seek to resolve workplace problems by informal discussion and intervention akin to mediation. However, there are few examples of where mediation features as part of a contractual or non contractual route to follow to resolve disputes enshrined in employers' grievance and disciplinary procedures. Employers are increasingly training managers to provide them with mediation skills. These skills can be used whenever conflict arises but are less likely to be used when the problem has become litigious when external mediators are more likely to be involved.

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

The issues that mediation is especially helpful to resolve are disputes that concern relationship breakdown (particularly between colleagues), bullying and harassment, and some discrimination complaints. These are situations where the claimant's primary motive may be to retain their job and mediation can deliver this outcome by helping resolve the problem that has caused the complaint to be made.

The issues where it is unlikely to be helpful are disputes that relate to disciplinary issues.

Where complaints of discrimination arise these may require an investigation for example issues that arise during the course of mediation may need to be dealt with in a formal way.

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

Mediation of employment disputes normally takes a full day, some may take 2-3 days.

The total cost to both parties of a mediation hearing lasting one day is normally in the range of £1,000 to £10,000, depending whether the parties to the mediation engage their own legal advisors to be present. It can sometimes be significantly higher.

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

<u>Advantages</u>

We agree with Judge Goolam Meeran, president of the employment tribunals, who wrote that mediation has 'greater potential to tackle some of the underlying issues which affect the dynamics of the workplace', but as he also pointed out that a judicial determination remains an 'important safeguard for the rights and duties of both employees and employers'.

We consider the following are advantages of mediation

- The process is confidential so bad publicity and reputational damage can be avoided for both employee and employer.

- Both parties may trust that the process is unbiased as they have both chosen to mediate and the mediator.

- As the process is voluntary, the parties are committed to go to mediation to find a solution to the problem and to devote a set period of time to finding a solution it is likely that a positive solution is found.

- It provides the parties with an opportunity to settle the dispute at an early stage before they become locked into an adversarial position where what has been said by way of exchange can often lead to a polarisation of views so making some solutions impossible to resolve. This can mean that the employment relationship can be sustained.

- The parties are in control of the process and the mediation process is less stressful than going to an employment tribunal.

- Mediation is usually a cheaper option than going to an employment tribunal.

- Given the time delays now being experienced by parties involved in cases before employment tribunals' mediation can provide a quicker solution of the dispute

- It provides the parties with a wider range of outcomes than can be delivered by an employment tribunal eg the provision of a reference. These outcomes can be recorded in a binding agreement at the end of the mediation.

Disadvantages

- Employees distrust a process that is not well known and it may be difficult to persuade them that in can be in their best interests to mediate the issue in dispute.

- Employees feel that they are compelled to mediate if the employer proposes it, as if they remain in employment, they may feel that their refusal to participate may be seen as a negative act on their part

- Some employment disputes need the employment tribunal to make a clear finding concerning the individual employee's rights.

- As it is a confidential process the parties can choose to limit the publication of the outcome reached even though the outcome may be one that would be of benefit for other employees.

- Employers will not wish to mediate weak claims brought by employees as this could lead to settlements that do not reflect the merits of the claim.

- The more claims that are mediated the fewer opportunities exist for legal issues to be considered and resolved by legal outcomes.

We have also considered whether this power should be exercisable by a Chairman at the Case Management Discussion, which is held in private (and increasingly often by telephone conference). On balance we think not; nor do we think that Case Management Discussions should be held in public. The possible advantage of doing so, to enable the Chairman to exercise the power to strike out, would be outweighed by the disadvantage of losing the opportunity to have a frank discussion about the merits of the case and case management matters, which a hearing held in public would tend to inhibit.

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

Barriers

Claimants believe that mediation has been proposed to deny them a fair hearing of their complaint and that the employer's motives for proposing mediation is prompted by a desire to protect the business and or senior management from adverse comment.

Claimants have a lack of understanding that mediation can deliver a solution that the claimant will find satisfactory.

Cost is a barrier for claimants if the employer is not willing to bear the full cost of retaining the mediator and accordingly claimants may consider that the employment tribunal process delivers them a cheaper solution

How to overcome the barriers

Continue to promote the advantages of mediation as a method of resolving workplace disputes and consider requiring the parties to an employment tribunal to indicate that they have considered mediation as a way of resolving the dispute.

6. Which providers of mediation for workplace disputes are you aware of?

- ACAS;

- Members of accredited mediation organisations offering the service such as CEDR;

- The Bar and Solicitors who have secured accredited mediation qualifications and who offer mediation services.

7. What are your views or experiences of in house mediation schemes?

Insufficient knowledge to be able to comment. However, we consider that employees are concerned as to mediators employed by their employer can be truly seen as independent. Delivery of an effective mediation service requires the organisation to commit to a high level of training for the mediators to have good mediation skills and for senior management to support the process.

8. To what extent are compromise agreements used?

Compromise agreements are used extensively to settle employment disputes, including disputes where no Employment Tribunal claim has been brought. It is very common for employers to ask the employee to enter into a compromise agreement once an employment dispute has been resolved. Many employers also require employees to sign a compromise agreement whenever payments are made over and above the minimum statutory entitlement – for example, where the employer pays enhanced redundancy pay above the statutory redundancy pay entitlement.

Where a dispute which has resulted in an Employment Tribunal claim is settled, the parties will typically sign either a compromise agreement or a COT3 settlement agreement negotiated through ACAS.

Compromise agreements are also used by employers in the City where changes to terms and conditions of employment are made, for example, where a bonus scheme is varied or where changes to terms and conditions are made following a business transfer, which would not otherwise be possible because of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

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).

The costs associated with compromise agreements vary according to how extensively the terms of the agreement are negotiated, how long negotiations take and the complexity of the issues. It is common for employers to offer to pay between £250 and £1,000 towards the employee's legal fees. In some cases this range would go very close to covering the employee's legal fees. In other cases, the employee's legal fees may exceed £10,000 and it would be a matter for commercial negotiation as to what extent this cost is borne by the employee or employer. An employer which contributes to the employee's legal fees cannot recover the VAT on the fees.

Typically, an employer's legal fees associated with a simple compromise agreement might range from £1,000 to £5,000, again depending on the extent to which it is negotiated, how long negotiations take and the complexity of the issues. A compromise agreement that is extensively negotiated and contains complex tax, share, share-option or bonus issues could cost well in excess of this. If these sorts of complex issues are involved, similar costs would apply regardless of whether the settlement is recorded in a compromise agreement or a COT3 settlement agreement negotiated through ACAS.

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

The advantages of compromise agreements for employers include:

- providing for a "clean break" with the knowledge that the business will not face further claims or demands from the employee;

- protection of the employer's reputation, by avoiding the publicity of an Employment Tribunal hearing and by obliging the employee not to disclose the circumstances of the case or make any derogatory statements about the company;

- protection of the employer's business interests, by confirming any contractual post-termination restrictions or imposing new ones on the employee;

- saving the management time and legal fees associated with proceeding to an Employment Tribunal hearing.

The advantages for employees include:

- either being able to ask for more money or accepting less money on the basis that it will paid much faster and will come with much more certainty than if the matter went to a Tribunal hearing;

- protection of the employee's reputation by being able to oblige the employer not to disclose the facts and circumstances of the dismissal or employment dispute;

- assisting the employee to find alternative employment where the employer provides funding for outplacement services and agrees the terms of a reference to be provided to prospective employers; and

- getting results not offered by litigation (e.g. reference, outplacement, non-derogatory statements).

The primary disadvantage of compromise agreements is that they can be long and complicated documents, which are not easily understood by lay persons. The requirement for employees to seek independent legal advice before entering into a compromise agreement largely alleviates against this.

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

The main barriers to the use of compromise agreements are, in reality, the same as barriers to reaching settlement generally. Once an agreed settlement has been reached, the parties are generally happy to record this in a compromise agreement (or an ACAS-conciliated COT3).

The main barriers therefore include:

- the employee being unwilling to settle for personal reasons, eg they feel they have been particularly aggrieved and want "their day in court"

- the employee having unrealistic expectations of how much money they should receive;

- the employer being unwilling to pay an appropriate level of compensation to the employee;

- the employer being unwilling to settle for commercial reasons, eg sending a message to other potential claimants or wanting to defend the claim as a matter of principle.

The size and complexity of compromise agreements can also operate as a barrier to the use of compromise agreements in some circumstances. In practice, an employer has to have a legal adviser in order to enter into a valid compromise agreement given the strict legal requirements involved. Similarly, if a claimant is unrepresented the parties are more likely to use a COT3 settlement agreement, as a compromise agreement may be seen as overkill. For individuals, the requirement for independent legal advice on the terms and effect of the agreement effectively overcomes this barrier in most cases.

By contrast, there are some cases where the very requirement for the individual to seek independent legal advice might operate as a barrier, particularly where the parties are looking to do a quick deal. In such circumstances, the parties might opt instead for a COT 3 agreement if this is possible. Whilst this might be a barrier in the small minority of cases, the requirement for independent legal advice is an important protection for individuals which should remain.

Another potential barrier to the use of compromise agreements is the requirement for the agreement to "relate to the particular proceedings". This has been interpreted to mean that a compromise agreement can only settle claims which are specifically identified in the agreement and the claims must be referred to by either a generic description or a reference to the particular section of the relevant statute. In practice, compromise agreements can contain a long list of claims with appropriate statutory references, meaning the agreement can become unwieldy.

Sometimes the label "compromise agreement" can itself operate as a barrier to reaching agreement, as the parties either do not believe they are making a "compromise" or do not want to be seen as making a compromise.

The fact that compromise agreements cannot be used to settle claims arising from the failure to consult about collective redundancies under s.188 of TULRCA is another potential barrier to their use, particularly in situations involving collective redundancies.

A recent issue with settling discrimination claims under compromise agreements has arisen under the Equality Act 2010. One of the conditions of a qualifying compromise agreement under the Act is that the complainant must have received independent advice from an independent adviser. Section 147(5) states that certain persons cannot be an independent adviser, including a person who is party to the contract or the complaint, or someone who is acting for that person in relation to the contract or the complaint. On one reading this effectively rules out anyone who is advising the employee about a possible claim and/or the terms of a compromise agreement. The Government's stated intention when enacting s.147 was simply to replace "provisions in previous legislation which had the same purpose". This apparent drafting error has created uncertainty for those settling discrimination claims, particularly high value claims. In some situations parties have resorted to using ACAS COT3 settlement agreements in the place of a compromise agreement.

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.

We believe that in some cases early conciliation will be of assistance in resolving disputes. Consequently we support this proposal. However, there will be some cases where a Tribunal Claim has been submitted where negotiations have already taken place, but have failed to produce a resolution. In those cases, there could be a shortened process that allows for a review of the position that the parties have reached.

We agree with the suggestion that it is beneficial to focus the resources that ACAS has at the early stages of a dispute. However, we would not support a proposal whereby ACAS would not have a role in conciliation after the end of the one month period. Cases can develop and new facts can come to light in the course of litigation, which could lead the parties to explore conciliation again at a later stage.

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

Our view is that early conciliation is likely to be most effective where an employment relationship is still continuing, or where there are cases which involve disputes around things such as long term sickness or poor performance.

In cases where the employment relationship is still continuing, the ability to discuss terms for resolution which go beyond the powers of an Employment Tribunal can be helpful in bringing about a positive solution. In addition, tackling the issues at as early a stage as possible can assist in preventing positions from becoming entrenched which will make any ultimate return to work easier.

With cases such as long term sickness or poor performance, the intervention of a third party to help the parties to the claim analyse the factual matters in dispute can be very helpful. It can encourage the parties to view what has happened from an alternative perspective at an early stage, which is often a pre-requisite to agreeing a resolution.

More generally in terms of resolution, it will be of assistance to the parties in seeking to resolve disputes if a without prejudice conversation can take place at the earliest possible stage. There can often be disputes as to whether particular conversations are in fact without prejudice, on the basis that a dispute has not strictly arisen at the time that a conversation takes place. This can prevent early settlement discussions. As part of looking at conciliation, it may be worth reconsidering the way in which the rules on without prejudice conversations apply.

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

We do not think that ACAS' current power to provide pre-claim conciliation should be changed to a duty. Until a claim has commenced, it will be very difficult for ACAS to identify who the potential parties are and to make contact with them. ACAS can only become involved where they are contacted and in those circumstances its existing power is probably sufficient.

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

We have no strong views on this question. We doubt whether such a change would make any significant difference.

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.

We agree that early conciliation can be an effective way of resolving individual and small multiple disputes. We also agree that it is unlikely to be as effective in large multiple claims, because of the greater complexity of the issues and the potential differences in the positions of the parties.

17. We would welcome views on:

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

Our view is that it is beneficial to have as short a form as possible and that this should be made as simple for Applicants as it can be. Consequently, we welcome any steps that are taken to shorten the form, but beyond that we do not think that the content of the form or the increased formality are particularly important factors.

18. We would welcome views on:

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

As previously indicated, if an employment relationship is still continuing, we believe that is a factor that is relevant in introducing conciliation at as early a stage as possible. Where the relationship between the parties has not broken down or terminated, conciliation can play a particularly useful role. Consequently, we believe that ACAS should concentrate on those cases.

As for other factors, complexity is clearly relevant. We believe that simpler cases and those of lower value are particularly appropriate for conciliation. Consequently, ACAS could seek to identify certain categories of case, such as deductions from wages as a priority.

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.

We think that it is to the benefit of all parties to concentrate efforts to bring about a resolution at the early stages in any litigation. Generally we feel that a period of one month should be sufficient to explore and identify whether conciliation is likely to be successful. Where conciliation is ongoing, the period of one month can be extended, but we would not apply a longer period at the outset.

Whatever period is used, we think it is important that the process for dealing with a case should not be delayed. Delay is already a serious issue in Employment Tribunals and our concern would be that a party could seek to use conciliation to delay things further.

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

See the answer to question 19.

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

By way of an initial observation, we note that these questions assume that there is no pre-existing power for an Employment Tribunal to strike out a claim or response (or a part thereof) without hearing the parties. In fact this power already exists under Rule 13(2) of the ET Rules, and can be invoked, for example, when a party breaches an “unless order”.

Although the power to strike out already exists, even at pre-hearing reviews it is seldom exercised. We suggest that Employment Tribunals should exercise this power in a more robust manner with regard to both meritless claims and responses. That said, decisions must be made bearing in mind the need to comply with the overriding objective and so as to avoid a proliferation of applications for appeal or review, with no net benefit in terms of savings in cost or time. Care would also be needed before exercising these to ensure no injustice, particularly to unrepresented claimants.

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

See the answer to question 21.

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?

In Sodexho Ltd v Gibbons [2005] ICR 1647, the EAT confirmed that an order striking out a claim (in this instance, because of the claimant's failure to comply with an order to pay a deposit) is a "judgment" under rule 28(1)(a) of the ET Rules and, as such, can be reviewed by the tribunal. It is

therefore arguably unnecessary to amend the Rules as suggested because under Rule 36(3)an Employment Judge can already confirm, vary or revoke a decision. However if a strike out decision was made without the parties making representations, the review mechanism itself does not allow for a hearing, so that the original decision and the review process could be conducted without the tribunal actually hearing the party against whom the order was made. This may lead to judges either being reluctant to use the power in the first place, or to be more inclined to revoke the strike out order. Consequently, we think that an opportunity should be given for representations to be made.

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

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

This power already exists within the Rules, which give Employment Judges very wide scope to mange cases in accordance with the overriding objective. It is common practice for Respondents in any event to file their responses whilst reserving the right to amend their response in light of requests for additional information or clarification of the claim.

The type and nature of information that is lacking varies enormously. In cases where the Claimant is represented, it is likely that the claim will be adequately pleaded and in some cases it will be pleaded with great care. In the case of unrepresented Claimants (of which there is likely to be increasing number given the cutbacks in the provision of advice services), there is a spectrum of possibilities ranging from claims that are very clear to those that are sketchy, incoherent, rambling and difficult to comprehend. Accordingly, there is no particular type of information that is lacking.

We feel that overall the current system operates sufficiently well, as respondents can make applications for further information during CMDs. Introducing requests for further information before the submission of the ET3 would, in our opinion, be superfluous, and could potentially burden the tribunal system.

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.

We welcome the proposal to give employment judges the power to make deposit orders at hearings other than at pre-hearing reviews, including CMD's. A deposit order is less draconian than a strike out order which is why we make the distinction that we are not in favour of a strike out order being made

at a hearing that is not held in public but a deposit order may be. However, we think that employment judges should have the power to make deposit order against both claimants and respondents.

We are not in favour of deposit orders being made other than at hearings. The question of the likelihood of success is often not clear cut and cannot be assessed until the evidence – or at least the relevant parts of it - can be assessed. Even in an apparently straightforward unfair dismissal case establishing, for example, whether the procedure was fair will involve looking at the evidence. What might therefore be an unmeritorious claim on the substantive issue may not be unmeritorious on all counts and there is a danger of injustice, particularly to unrepresented parties, if deposit orders can be made otherwise than at hearings.

Care will also need to be taken as to how the deposit power would operate side by side with any introduction of fees for bringing claims.

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.

See the answer to question 25.

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?

We do not think that the current test should be amended.

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

We agree with the proposed increase up to a maximum of £1000.

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

The existing sift system serves to weed out weak cases, and thus we think that there is no need to introduce deposit orders. However, we do think that the effectiveness of the sift system should be addressed.

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.

We agree with this proposal, the purpose of which is wholly unclear. although we believe that its practical effect of discouraging unreasonable behaviour will be marginal.

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.

We are not aware of evidence which points to respondents representatives putting undue pressure on unrepresented claimants to withdraw their claims through the threat of costs sanctions.

It is more often the case that an unrepresented party, rather than an represented one, has unrealistic expectations of their case's prospect of success and as to the amount of compensation they expect to achieve. Unrepresented parties are also more likely to fail to comply with Tribunal Orders. Whilst Tribunals will often afford extra leeway to an unrepresented party, and this is to be encouraged, in our experience, a cost warning is a fair mechanism open to a respondent's representative to encourage the unrepresented party to look at their case objectively in assessing whether there is a prospect of success and to take legal advice. Cost warnings exist to be used by representatives in appropriate circumstances. A reputable representative will write a balanced cost warning letter which makes it clear that an award of costs against an unrepresented party is at the sole discretion of the Tribunal, and that costs do not automatically "follow the event".

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

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

There is no need for additional sanctions against parties who place undue pressure on an unrepresented party. The procedures which are currently in place adequately deal with this problem. If the Tribunal believes a representative has acted unreasonably and has caused costs to be incurred, even if only in responding to an inappropriate costs warning letter, a wasted costs order against them is sufficient penalty. In practice, represented parties will fear the reaction of the Tribunal, and the loss of sympathy, if the respondent is too aggressive in its treatment of any unrepresented claimant.

Unrepresented parties need to be made aware of the tribunal's powers regarding costs so they can assess the risk and make informed choices. Frequently, unrepresented parties have unrealistic expectations as to compensation available to them and the merits of their case. They are often not aware or appear not to be aware that the Tribunal could potentially make a cost order against them if their claim is unsuccessful.

Calderbank letters are a normal part of litigation and do not necessarily amount to unreasonable behaviour. Indeed, they should be encouraged, to facilitate settlement. Should further sanctions be available for misuse of Calderbank offers, spiralling satellite litigation could occur, to decide whether the offer, and its terms amounted to improper pressure. To avoid a multiplicity of actions, it is suggested that a statutory or industry standard document by ACAS could be produced which summarises the tribunal's powers to award costs. Representatives could send this standard document to unrepresented parties as a means of objectively informing them of the costs regime. This would save representatives explaining the position each time and avoid the statutory information about costs powers being explained construed or portrayed in a biased or aggressive manner.

Such a standard form would also encourage the other party to consider what is said about costs more carefully because it could not be dismissed as scaremongering by the representative of the other party. It could be made a condition for a valid Calderbank letter that the costs summary form is sent, where a party is not represented, or it could be made a condition generally for a valid Calderbank letter, to avoid distinctions being drawn about whether or not a party is represented.

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

We disagree with this proposal the purpose of which is wholly unclear. To allow tribunals to order that a party pay in respect of the Tribunal's wasted costs would require the Tribunal to make a decision in which it has a vested interest and therefore could not be decided objectively. There is also the question as to how such costs would be measured. There would be the obvious problem of perceived bias if an award was made during ongoing litigation. A wasted costs award at the end of the hearing would simply result in further claims pursued before the tribunal, using up further court time and incurring expense.

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

Yes. It would be very helpful for both parties to know at an early stage exactly what they are dealing with.

35. If yes, what would those benefits be?

At the moment, there is no obligation on a claimant to state in the ET1 Claim Form what they are trying to achieve by bringing a claim. It is often very difficult for respondents to know whether to fight the claim or engage in settlement discussions, as there is no indication of how much money the claimant is seeking or whether they have got another job. Often, respondents are reluctant to make an initial settlement offer where they have no idea of what the claimant is expecting.

Requiring claimants to provide an initial statement of loss would help prompt settlement discussions at a much earlier stage in the proceedings. It would help employers understand the case against them and help them to weigh the potential costs and risks associated with defending the claim.

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

Yes. Requiring all claimants in all cases to provide an initial statement of loss would create greater transparency with claims and contribute to more claims being settled early. We agree that claimants should not be bound by the initial statement and should be allowed to amend it, if necessary, as the case progresses.

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

No. Apart from an initial statement of loss and details of any new employment, it would be too onerous to require the claimant to provide other additional evidence or information at the outset of proceedings.

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

Section 6 of the ET1 Claim Form, which asks what compensation or remedy the claimant is seeking is optional. Ideally completion of this section should be compulsory in all cases, for the reasons listed above.

Sections 4.5 to 4.9 of the ET1 Claim Form ask claimants for details of any other jobs they have had since leaving employment. Claimants are only asked to complete this if the claim is "about unfair or constructive dismissal". This should be compulsory for all claimants where the claim involves any dismissal or constructive dismissal, so as to include cases of wrongful dismissal and discrimination cases where dismissal forms part of the alleged discrimination.

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

In our view, Tribunals should have discretion to adjust compensation where a claimant is awarded compensation but either party has previously turned down a reasonable settlement offer from the respondent. Enforcing a penalty even where a case is successful, may encourage parties to settle earlier on in the process avoiding court time and additional costs for both parties.

As is the case where there is a failure to follow the ACAS code, tribunals could have discretion to reduce compensation awards by up to 25% or make an assessment as to the amount by looking at the difference in values of the amount awarded by the tribunal, the settlement offered and the additional costs incurred by the parties since the date of the offer.

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

A formula or a series of factors for the Tribunal to take into considering should be developed to assist the Tribunal to assess whether a settlement offer is "reasonable".

In cases involving monetary awards, the Tribunal could look at the percentage difference between the amount offered and the amount of compensation awarded by the tribunal. The percentage could correspond to the amount to be deducted from the compensatory award.

For cases which do not centre on monetary awards, the offer could be assessed in line with a number of factors such as the merits of the case, the costs incurred by the parties following the date of the offer, whether the offer was considered, whether a reasonable employee have accepted the offer, at what stage in the proceedings the offer was made etc.

Guidance should be provided whether a claimant is entitled to turn down an otherwise reasonable offer which does not contain an admission of liability. In general terms, settlements are reached on the basis of no admissions as to liability. This facilitates settlement. A Tribunal's powers to adjust compensation against claimants will be severely limited if a party can reject a otherwise reasonable offer, purely to have a finding of liability.

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.

We agree that the Scottish Courts judicial tender model would provide a suitable mechanism for formally lodging settlement offers with the tribunal. Appropriate safeguards will need to be implemented to prevent the Tribunal panel from becoming aware of any offers prior to the outcome of the case and the compensation assessment. This could easily be done through case workers allocating such letters to private folders. Having an easy to use system may encourage more offers to be made and will avoid any confusion or argument as to the terms of any offer made.

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.

In our experience, Tribunals are more likely than not to take witness statements as read and having witness statements read out loud in full is the exception rather than the norm. On that basis, we do not agree with the statement. However, in cases with complex factual matrices, where witness statements can easily extend to 50 or more pages long, making witnesses read the statements out can certainly prolong proceedings. Given the time pressures on employment tribunals, this is clearly not desirable.

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.

We agree that, in the normal course, witness statements should be taken as read, subject to the following caveats:

(a) the risk in taking witness statements as read is that the Tribunal may not have the opportunity properly to read the papers prior to the witness being cross examined. If witness statements are taken as read as a matter of course, the panel must be allowed sufficient time (and must be required) to read all statements and supporting documents in advance. This could be done either by allowing the panel some dedicated paid preparation time before the hearing starts (for example, a reading day, provided this is scheduled at a date sufficiently close to the hearing to ensure the details are fresh in the panel's mind) or allocating the first few hours (depending on the number of witnesses/documents) of every hearing to reading time for the Tribunal.

(b) Tribunals should be granted a discretion to vary the position should they wish to do so in particular circumstances. For example, allowing a nervous witness to read out part or all of their own statement may help settle the witness and allow them to become more familiar with proceedings and the Tribunal before cross examination. Clearly, consistency within each case is key here – if one witness is required to read out his statement, all witnesses should be so required, save where there are exceptional circumstances in which case the Tribunal should explain any difference in treatment to avoid a perception of unfairness (as suggested in Mehta v Child Support Agency UKEAT/0127/10). A Tribunal could also choose to ask witnesses to read out key sections of a statement or sections dealing with a particular part of the claim rather than the statement in its entirety.

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

Taking witness statements as read would speed up Tribunal proceedings and shorten substantive hearings. In addition, each witness would need to spend less time in the witness stand.

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

Witnesses would have no time to settle into the process before being cross examined on their evidence. The details of the witness statement may not be entirely fresh in the witness' mind, particularly if the witness is on late in the day and has not had a chance to re-read the statement immediately prior to giving evidence.

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

Yes. We see no justification in principle or in practice for treating parties to tribunal proceedings more favourably than any other litigants in civil court cases. There is no reason to suppose that the risk of abuse of expenses would be any greater or less.

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

Yes. If there are special or unusual reasons why expenses need to be met, these should be dealt with by the parties themselves.

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.

Although the reasoning itself is hard to fault, we suspect that it will not play out in practice. In particular, unrepresented parties may have a limited appreciation of which witnesses may be "strictly necessary". In practice these should be matters discussed and explored by a Chairman at a Case Management Discussion. We doubt whether many parties who have rightly or wrongly decided to call a witness will be deterred by the lack of availability of State-funded expenses.

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.

We do not think that unfair dismissal cases should normally be heard by an employment judge sitting alone.

Employment Tribunal claims can be factually very intensive; thus the non-legal members of the panel currently serve to assist the judge with an often complex task. The panel system has also been largely responsible for the good reputation that Employment Tribunals enjoy with regard to fact-finding. Removing lay members from the panel might, in some cases, make the judge's fact-finding task more difficult, and potentially diminish the quality of the fact-finding exercise.

Allowing the judge to sit alone brings into question why there is a separate forum in which to hear employment cases at all and why they cannot be heard, for example, in the County Court.

In the round, we consider that to have unfair dismissal cases usually heard by an employment judge would ultimately lead to minimal savings as only a relatively low proportion of claims are brought solely for unfair dismissal.

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.

Providing that the relevant EAT judge has sufficient experience of employment law, in principle we agree that the EAT could be constituted of a single judge sitting 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?

We do not think that there are other categories of case that would be suitable for an employment judge to hear alone.

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

If the driver for this is cost savings, we have reservations that these would be achieved and would wish to see a Regulatory Impact Analysis. However, we are very much in favour of reforms that will result in Employment Tribunal cases being heard more quickly as the current delays in the system are not acceptable.

We strongly consider that any such person making interlocutory decisions should be a trained lawyer with at least some experience of employment law. It is for this reason that we question the cost savings that will be achieved.

We also believe that there is confidence in the current system, and that delegating interlocutory work elsewhere could lead to increased bureaucracy and an increase in the number of appeals and applications for review.

In addressing how interlocutory matters could be streamlined more efficiently in order to ensure cases proceed more efficiently, we question whether there could be part time employment judges appointed only to focus on interlocutory work and that they would each cover a number of regions. They could work remotely and therefore the commitment of becoming a part time employment judge may not be as great as those who hear cases. This could be attractive to practicing solicitors and barristers. It would also have the benefit of reducing the currently undesirable feature of different regional tribunals having different practices on procedural matters.

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

• the qualifications, skills, competences and experience we should seek in a legal officer, and

• the type of interlocutory work that might be delegated.

We believe that any such person should ideally have experience of employment law, or at least some procedural experience, such as in tribunals or the county courts.

We are concerned about the scope of the interlocutory work to be delegated, as some of the suggested work appears to be of a relatively high level. It is for this reason we consider an experienced lawyer will be needed to fulfil the function.

We also consider that a process should be put in place for challenging interlocutory decisions made by a legal officer. If so, the increase in potential challenges to decisions of the legal officer needs to be weighed against any cost savings.

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**

Employers

It is our view that, extending the length of the qualifying period for unfair dismissal claims from one to two years would have very little impact on employers and is unlikely to encourage the creation of more jobs. 12 months is normally sufficient for a business to assess whether an employee is the right fit for the organisation. If a business makes this assessment only once 12 months have passed, that is usually due to poor management rather than issues with the employee only just surfacing. We have encountered cases where terminations are triggered by the existence of the twelve month limit and employment might have continued for longer but for that time limit, but these are very exceptional cases.

The increased period will result in more cases being shoehorned through the tribunal under the guise of claims which do not require a qualifying period e.g. discrimination or whistle blowing. We see this with claims brought by claimants with less than 12 months service. Such claims, by their nature, tend to take much longer to determine, with significantly fewer opportunities to strike out weak cases. It also promotes a drift away from a claimant being able to ask a tribunal to determine the true grievance, since there would be no remedy for a simple unfair dismissal.

Employees

From an employees' point of view, the increased qualifying period may tempt employers to act inconsistently with good employment practices as the risk of an unfair dismissal claim against them is reduced. This could result in dissatisfaction among the workforce and therefore an increased number of employees seeking legal advice. Solicitors will look for increasingly creative ways to bring a tribunal claim to circumvent the required qualifying period.

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

In our view, extending the qualifying period to two years will not significantly encourage employers to take on more employees. See answer to Question 57.

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

See answer to question 57.

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?

It is arguable that women could be disproportionately affected if the qualifying period was to be extended as, statistically, women are more likely to have shorter continuous periods of employment than men. It is possible that employees in particular age groups may be disproportionately affected.

In the ECJ case of R. v Secretary of State for Employment, ex parte Seymour-Smith and Perez the dismissed employees challenged the then two year unfair dismissal qualifying period. Their argument was that the rule discriminated against women and they relied on statistics to demonstrate that the proportion of women with two years' employment was lower than the proportion of men satisfying the requirement. The case was referred back to the House of Lords where it ultimately failed. The case centred on statistics from 1991 and therefore if the qualifying period were to be increased again, the gates could be once again opened for a challenge by women based on the statistics of today should they also show that women are less likely than men to have two years continuous service. We do not anticipate that the statistics will have altered significantly, since the impact of childbirth on women's working lives is still likely to mean that more women are impacted by a requirement to have two years continuous service.

It is possible that other minority groups who have in some cases struggled to achieve the same levels of employment as the majority grouping may also be over represented amongst short-term workers. Accordingly, it would be necessary to review any statistical evidence carefully, before introducing the change to the legislation, given our views on the marginal benefits for employers of raising the length of the qualifying period.

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 no, please explain why and provide alternative suggestions for achieving these objectives.

We do not agree, for the following reasons:

- The proposal would essentially introduce a new tax on employers who are already struggling to comply with a mass of complex and frequently changing employment legislation. There is an implied assumption in the question that employers set out to deliberately flout their obligations which is very often not the case.

- There is already a mechanism for employers to be penalised for failure to comply with proper procedures in the form of a potential uplift on awards for employers who have not followed the ACAS Code of Conduct. An additional financial penalty seems unduly onerous.

- Many findings against employers in employment tribunals are based on either small and often unintentional errors made during a particular process or because the case is borderline and the decision taken by the employer is found to fall just on the wrong side of the border. It does not seem to us just and equitable to impose a penalty on employers in those circumstances. In so far as additional penalties are to be introduced at all it would be more appropriate to introduce such penalties only in cases of a substantial and deliberate breach by an employer; a finding of liability should not automatically trigger a penalty, however small.

- The risk of a penalty being imposed may well increase the number and size of undeserved settlements being achieved by Claimants. It is already very common for employers faced with the disruption and largely irrecoverable costs of contesting unmeritorious claims to settle those claims. The threat of an additional penalty being imposed will be used by Claimants to secure such settlements.

An alternative to financial penalties might be a "name and shame system" along similar lines to that used by the Financial Services Authority. However, such a system may well lead to a greater number of appeals being brought by employers anxious to defend their reputations thereby creating an

additional burden on the system. For this reason and the practical difficulty of identifying what level of fault by the employer would justify publication we do not think such a system is practical or appropriate.

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.

We do not agree with this approach for the following reasons:

- As identified in the consultation paper, most Tribunal awards are based on a claimant's actual and potential financial loss, rather than on the severity of the employer's breach. This means that even extremely minor breaches can lead to significant awards being granted to claimants (subject to any deductions for contributory conduct). In those circumstances, it is disproportionate to base the level of a financial penalty on the size of the award made to a claimant.

- If financial penalties are to be introduced, it would be more just to link the level of such penalties to the severity of a particular breach by an employer. Whilst this would inevitably involve a discretion being exercised by the Tribunal in relation to each case, there is significant precedent for Tribunals successfully taking on such responsibility – for example, in relation to protective awards, uplifts for failure to comply with the ACAS Code, injury to feelings awards in discrimination cases. The assessment, imposition and collection of penalties will create additional work for an already over-burdened system and we think it unlikely that it will deter employees or affect their behaviour, or that the benefits of the proposal would outweigh the identified disadvantages.

Additional Comments

The Consultation Paper refers to the proposed penalties "providing some element of recompense for the costs incurred to the system" for the employer's breach. To reflect this sentiment any penalties recovered by the Exchequer should be used solely in the funding of Employment Tribunals and the EAT.

The Consultation Paper proposes an incentive system for quick payment in the form of a 50% reduction for payment within 21 days. It is not clear how this would sit with the longer time limits for appeals to the EAT nor what rights of recovery there will be in the event of a successful appeal. If these penalties are introduced both of these points must be addressed.

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

- **should the up-rating continue to be annual?**

The limits for tribunal compensation and statutory redundancy payments should be reviewed each year. However, any up-rating should not be automatic. They should be reviewed against market conditions and an appropriate level set, much like is the case with the national minimum wage under the Fair Pay Commission.

- **should it continue to be rounded up to the nearest 10p, £10 and £100?**

If the limits are to be up-rated annually, then they should not continue to be rounded up to the nearest £10 or £100, but should instead be rounded to the nearest £5 as this would produce less extreme results.

- **should it be based on the Consumer Prices Index rather than, as at present, the Retail Prices Index?**

If the limits are to be up-rated annually, it seems fairer to link any increase or decrease to the RPI (as at present). The RPI is more commonly used for salary increases so it therefore makes most sense to continue using this for tribunal awards. However, this should be kept under review. If, in the future, it becomes market practice to link salaries to CPI, for example, then it would make sense for the annual up-rating of Tribunal awards also to be linked to CPI.

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

Please see above.