Reforming the Employment Tribunal System Consultation

DLA response

Questions

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

☒ Yes
☐ No

Comment: The phrase “a more digitally-based system” is ambiguous. We are very concerned that a move towards a digital process rather than a face to face process will severely disadvantage many claimants who have discrimination claims, and will have particular adverse impact on unrepresented claimants. Anecdotal evidence from our members suggests that many claimants receive either very poor advice about discrimination or receive no advice about discrimination prior to making a claim, and that the face to face hearing at an early stage is crucial in defining and identifying both protected acts and protected characteristics. Discrimination is a social ill and a human rights violation, and it it vital that changes to our legal system do not disadvantage those who seek to bring these claims. We remain concerned that the suggested changes to the process of determination of claims is being driven by a desire to cut costs alone, and that the fundamental need for justice to be not only done, but seen to be done, and to be accessible and available to all are not being given sufficient or any weight. Whilst we do not consider that digitalisation of the employment tribunal system is necessarily incompatible with the provision of justice, the emphasis must be to ensure that the “right system” is in place. We cannot over-emphasise that digital administration is not the same as digital access; how the system is used by case workers does not necessarily need to be replicated for users. In fact, given the lack of resources of some claimants, there are good reasons why far more care needs to be taken in ensuring that users are not prevented from accessing the system because of a lack of digital resources.

For example, emailing the parties copies of case management orders or written reasons is sensible when both parties are represented, but there needs to be suitable alternatives where the parties either do not have email, or may not be using it with the same frequency as professional representatives.

One possible development in terms of digital administration would be something similar to the case tracker system used in the Court of the Appeal, so that the parties can check what documents have been received by the tribunal, and any listings for forthcoming hearings.

Care needs to be taken about applying digital reform to all areas though, and in particular to some types of case management or hearing – it is not clear what is meant by the online involvement of lay judges, and what consideration has been given to how evidence could be assessed (or other judicial functions discharged) online.

In our experience discrimination cases will often be entirely unsuitable for such procedures

The Consultation also mentions “web chat to guide people through online processes”; a mechanism that assumes everyone has internet access, when in fact large proportions of the population (11% of all households) do not have access (ONS, 2016). A key aspect to the face-to-face, telephone and paper-based services will be how well they are resourced, how they are publicised, and how available they are to individuals who do not have online access. We are concerned that any greater use of digital process needs to build sufficient safeguards to ensure that claimants, and in particular unrepresented claimants are never disadvantaged because they cannot or do not fully understand the systems in place. Any developments in the administration of justice should aim to improves access to justice for the most vulnerable and the unrepresented and we urge and expect that a thorough and detailed assessment of impact on all current and future user groups will be carried out at all stages.

2. What issues do you think need to be considered when deciding whether a claim would be suitable for online consideration? Please give reasons.

Comment:

(1) do the parties have online access?
(2) are there any disputed issues of fact?
(3) are the parties legally represented?
(4) would the hearing last a day or less?
(5) can the claim can be determined by an Employment Judge alone?
(6) is there any expert evidence?
(7) does the claim involve a pleaded case of discrimination, or might the allegations give rise to a claim of discrimination?

Many of these factors essentially go to the complexity of the case, on the basis that it will only be the simpler cases that are suitable for online consideration. We note that many unrepresented litigants will not be able to identify the correct legal label for their complaint, for example.

3. What factors do you think should be taken into consideration when creating the scope to delegate judicial functions in Employment Tribunals and the Employment Appeal Tribunal? Please give reasons.

Comment**:** Delegation should be to qualified lawyers, rather than administrators.

The parties’ ability to challenge any delegated judicial function will be key, along with the decision about which functions can be delegated being made by senior Employment Judges. Assuming those measures are in place, the relevant factors will be the amount of discretion involved in making a determination, and how easily the process can be reduced to a formula that can be applied in the majority of situations.

The most important factor however, is likely to be knowledge of employment law discrimination law and the employment tribunal system. These are unlikely to be decisions that could be taken by caseworkers who do not have the relevant background knowledge.

4. Are there any specialist skills that a caseworker dealing with Employment Tribunals and the Employment Appeal Tribunal would need, distinct and different from those required for carrying our casework in other tribunals? Please give details

Comment: See the answer to question 3 above: knowledge of employment law and discrimination law and the employment tribunal system. This may include (for example) specialist knowledge of the different types of protected act and protected characteristics under the Equality Act 2010; knowledge of trade unions and their operation, use of independent experts in equal pay cases, management of group claims (which do not exist in other tribunals). We also think that discrimination experience would be useful, so that potential issues can be correctly identified and labelled (disability discrimination may be indirect, or a failure to make reasonable adjustments, for example).

5. Are there specific issues relating to Employment Tribunals and the Employment Appeal Tribunal that need to be taken into consideration in relation to making changes to the law regarding panel composition? Please give details

Comment: The nature of the jurisdiction: any claim involving “reasonableness” as a key criterion, such as unfair dismissal, should highlight the role for lay assessors. Claims where there are issues about credibility of witnesses or the burden of proof in discrimination cases, or where there would be the duty to make reasonable adjustments (section 20 Equality Act 2010). The concept of the “industrial jury” means that lay members should be the expectation (rather than the exception) in most claims.

6. What criteria should be used to determine the appointment of the new employment practitioner member of the Tribunal Procedure Committee? Please give reasons.

Comment: Senior practitioner in employment tribunals (over ten years), with experience of most major types of claim (a wide range of discrimination covering most protected characteristics and acts ; whistle blowing; unfair dismissal; holiday pay; unlawful deductions; TUPE, equal pay). Experience of acting for both claimants and respondents, and knowledge of multi-party claims.

7. Do you agree that the proposed legislative changes will provide sufficient flexibility to make sure that the specific features of Employment Tribunals and the Employment Appeal Tribunal can be appropriately recognised in the reformed justice system?

☐ Yes
☒ No

Please give reasons.

Comment: No safeguards have been provided to ensure there is sufficient employment and discrimination law experience. The Employment Tribunal is not a "brand" (as referred to in paragraph 47), but a means of providing justice. Accordingly, its aim is not to ensure recognition and awareness amongst users, but to provide a just outcome for employees and employers. Users of the system do need to be consulted, but there needs to be appropriate measures taken to ensure that the both employees' and employer's views are given equal weight. The DLA has no issue with change to procedure rules being made by The Tribunal Procedure Committee, provided that there is some guarantee that this would be undertaken with the appropriate degree of relevant experience.

8. Do you anticipate the impacts of the proposed reform to be disproportionately large for small or micro sized businesses? Please explain your answer, referring to evidence as necessary?

Comment: An equal concern and relevant question must be, will the impact of these proposed reforms be disproportionate for members of disadvantaged groups, to which we would say yes. We have expressed concerns about unrepresented claimants in particular.

Digitalisation may be beneficial for small and micro-sized businesses, and changes to the procedure for making Tribunal rules should be neutral – it will depend on the rules themselves as to what impact is had on particular sized employers. The important consideration is that if an employer is large enough to benefit from having a workforce, then they are large enough to be subjected to the same regulation as other employers.

9. Do you agree that we have correctly identified the range of equalities impacts, as set out in the accompanying Equalities Impact Assessment, resulting from these proposals? Please give reasons.

☒ Yes
☐ No

Comment: The range of equalities impacts are largely defined by the protected characteristics contained within the Equality Act 2010, but the critical point is noted at paragraph 6: "it should be noted that recent fee changes may have had an impact on the profile of Employment Tribunal users". In effect, the introduction of fees has meant that fewer people have been able to use the employment tribunal, which may have an impact of the demographic of current users. We also note that although the disproportionate impact on different groups was considered amongst the Employment Tribunal administration staff, a different approach was taken for claimants (where it was repeatedly stated that HMCTS will "continue to engage with accessibility groups / external stakeholder groups" (see paragraphs 16 and 21).

On a related note, we remain concerned that employment has been removed from the scope of legal help and urge the department to support us in seeking its reintroduction in the light of this consultation. We are aware that early legal advice is beneficial to claimants in ET claims, and consider that the changes being proposed warrant a reconsideration of the public funding of front line employment advice. We do not understand that a "web chat" (or similar) will aim to provide this.