



The Law Society

# **How should Employment Tribunals operate in the future?**

A consultation

December 2014



The Law Society's Employment Law Committee has embarked on a project to look at the future of Employment Tribunals. This consultation paper explains our three work streams and poses the questions that we are considering.

## **Background**

This is a turbulent time in Employment Law. We have recently seen three major changes:

- the introduction of fees in order to proceed with a claim in the Employment Tribunal, one consequence of which has been a major reduction in the use of judicial mediation;
- the mandatory requirement to go through Early Conciliation before being able to lodge a claim in the Employment Tribunal; and
- a complete redrafting of the Employment Tribunal Rules.

This is also a turbulent time in general for law administration. The Ministry of Justice's budget will have shrunk by close to 25% during this Parliamentary term. Every part of the legal system is being looked at to see if it can work more efficiently.

The convergence of these factors suggest that this is a once in a generation opportunity to review and reform the employment tribunal system.

People need an employment law system that allows everyone to protect their rights. For those few disputes that cannot be resolved in the workplace, there should be straightforward ways in which employers and employees can get justice.

A system is needed that allows everyone to access justice. This may mean that different employment matters are dealt with in different ways, depending on their complexity and the financial stakes. We will consider whether it is desirable – and possible – to have different procedural considerations according to the level and complexity of the case. In broad terms, there could be very simple procedures for handling unpaid wages claims, slightly more sophisticated procedures for unfair dismissal, and more sophisticated procedures for handling discrimination.

We hope to put forward a well thought through proposal for reform, one that balances the needs of all those who take part in the system. By telling us what you think you can help improve our final recommendations.

## **Strands of work**

### Alternative Dispute Resolution (ADR)

The Government is looking to encourage ADR across the legal sector. In employment law this is has most obvious manifested itself in forcing all parties to consider Early Conciliation. It would be interesting to get views on how this is working. We will explore whether there is room for other ADR methods, such as mediation and arbitration, in resolving disputes.

- How can parties be encouraged to use ADR?
- What stops people from using ADR?

- Are there any types of ADR that should be used more in employment disputes? For example arbitration. If so, how could these forms of ADR be encouraged?
- How has Early Conciliation been working? Can it be improved?
- Do some employers have practices or rules which discourage ADR? If so, what are they and should they be changed?
- Should judicial mediation be revived? If so, how?

### Decision Making in Employment Tribunals (ETs)

We will look at whether ETs should become flexible in how they resolve disputes. In such a system the choice of how to have a dispute judged would seem to broadly depend on the complexity of the case and the resources available to the parties. We will investigate whether this approach is practical.

There are various levers used in different justice systems to instil responsibility on the parties. One such lever is costs. We will look at whether bringing in a costs regime would have benefits. Such a regime could be linked to the length and complexity of a hearing.

- Are there any areas of law, or business sectors, where people cannot enforce their employment rights? If so, what is the reason for this?
- How can cases be better managed?
- Would disclosure earlier than at present be of assistance? If so, in what way?
- Should lay members be retained, and if so, in what form?
- Should employment judges become more inquisitorial?
- Is there a place for early neutral evaluation?
- Is there a place for making a decision on papers only?
- Should a costs regime be brought into employment law cases? If so how would this work?
- What role should Acas have in the process?

### Jurisdiction

The Employment Tribunal system holds a unique position in the justice system – it is neither part of the civil court or first tier tribunal system. This was the right position for it in the past. Now is a good time to consider whether this is the right structure for the future.

We will look at how to best to use the resources in the system. For example, in initial conversations it has been suggested that the Employment Appeal Tribunal should have first instance jurisdiction for higher value and more complex cases.

Part of what this sub-group will be considering is whether to import some civil litigation principles into the Employment Tribunal. This is a move away from the principles underpinning the creation of the industrial tribunal system, but many feel that in practice the Tribunal system has already travelled from this way of operating.

- Should the Employment Tribunal hear some cases currently heard in the civil courts or other tribunals? If so, which cases?
- Should there be a single employment court system dealing with all employment-related claims? If so, what should be the extent of its jurisdiction?
- Would it be beneficial to have different procedural considerations according to the level and complexity of a case? Please explain your answer.
- Should the Employment Appeal Tribunal have first instance jurisdiction for certain complex and high worth cases?
- Should the fees system be reformed? If so, how?

### **How to respond**

We are interested to hear about what you think is important. If we have not raised a matter that you think is important we will happily consider it (including any substantive changes to employment law that would promote dispute resolution, and any suggestions for non-legal routes to resolution of employment disputes).

Please can you submit any responses by **Friday 20 February 2015**. You can do this by emailing [nick.denys@lawsociety.org.uk](mailto:nick.denys@lawsociety.org.uk). All responses will be treated as being confidential unless you state otherwise.

We will publish an interim report by the end of March, and the final report in June.

The Terms of Reference of the project can be found in annex A. A note on David Latham's thought leadership speech on the future of ETs can be found in annex B.

### **Terms of Reference**

Since their creation in 1971 Employment Tribunals (ET) have changed dramatically. There are a number of drivers which suggest that this change seems set to continue. These drivers are:

- The dramatic fall in the number of ET cases;
- The introduction of fees in order to proceed with a claim in the ET;
- the mandatory requirement to go through early conciliation before being able to lodge a claim in the ET;
- the policy push towards promoting alternative dispute resolution;
- cuts to public funding which has reduced assistance from voluntary advice centres;
- pressure to lower the administrative cost of courts and tribunals; and
- the increased access to information people have - mainly through the internet.

Given these pressures the Employment Law Committee of the Law Society of England & Wales believes now is a good time to investigate what society needs and wants in terms of employment dispute resolution.

## A summary of David Latham's thought leadership speech on the future for Employment Tribunals?

June 2014

### INTRODUCTION

Employment Tribunals have changed dramatically since their creation in 1971. Given that Employment Tribunals are a creature of statute they have been, and continue to be, heavily influenced by politics. In looking at the history and development of the Employment Tribunals David Latham also highlighted particular features that are unique to the Tribunal system. Chief amongst these was the large growth in multiple claims, a unique feature of Employment Tribunals. Another feature of multiple claims is that they are mostly to do with equal pay, which almost entirely emanate from the public sector - notably the NHS, local authority and central government, or are insolvency based.

There have been three recent major procedural changes:

- the introduction of fees in order to proceed with a claim in the Employment Tribunal;
- the mandatory requirement to go through early conciliation before being able to lodge a claim in the Employment Tribunal; and
- a complete redrafting of the Employment Tribunal Rules.

The redrafting of the Employment Tribunal Rules is significant in that for the first time was a completely judicial led process. From the perspective of tribunal users the simpler language and the concepts used should be easier to navigate. The new rules contain conceptual changes that provide greater scope for the case management of claims. We are already seeing an increase in the number of preliminary hearings and this trend is set to continue as increasing pressure grows to resolve major claims.

The case management of some individual cases has become harder because of the reduction in assistance available from voluntary advice centres whose services have shrunk due to legal aid cuts. This is then seen on a practical level in the Employment Tribunal in how some claims are not properly framed, with the result of consuming greater judicial resources.

The current Tribunal statistics show a significant drop in the number of claims being lodged in the Tribunal system. Detailed data analysis will be required to establish the longer term trend and implications.

Employment law remains complex and Employment Tribunals are equipped with specialist judges. The purpose of the Employment Tribunal system remains to provide a service to the public who need redress in respect of their statutory rights.

The backdrop to this continues to be the huge pressure on the public funds required to pay for a Tribunal system. **Given this pressure, it is appropriate to address what a modern society needs and wants in terms of modern dispute resolution.**

**We also need to consider whether the current framework needs to be redesigned to meet the needs of modern society.**

## **ALTERNATE DISPUTE RESOLUTION (ADR)**

ADR is in vogue. The Government is trying to spread ADR across many jurisdictions. There are a number of ways in which dispute resolution for employment matters can be expanded.

It should be noted that ADR has now been formally built into the new Employment Tribunal Rules and gives Employment Tribunals the power, wherever practicable and appropriate, to encourage the use of the services of Acas, judicial or other mediation, or other means of resolving their disputes by agreement. As yet this power is little used. There is further scope for alternative dispute resolution through the initial consideration process that was also introduced in the new Employment Tribunal Rules.

It was suggested that an ADR process could attach to various stages of the Employment Tribunal process. It might be at the initial consideration stage of a claim as outlined above. It might involve having Acas present at a preliminary hearing dealing with case management issues and then using the opportunity of having both parties present to seek to conciliate. In this regard, a pilot scheme operated by Acas in London was considered to have been successful. A further pilot is being held in Leeds.

**One option might involve an employment judge making a decision by considering the papers.** This would be a quick and cheap way of getting a resolution. However, the nature of employment disputes means that there will often be inequality in position and as such appropriate safeguards would need to be put in place. Further, such a process could only take place with the express agreement of both parties.

Another route might be through the use of **early neutral evaluation (ENE)**. This would enable the judge at an early stage to state, on the basis of the evidence heard to that point, what they believe the likely outcome of the case would be. By receiving an objective evaluation parties may decide to move away from unrealistic positions, or to focus on the issues that are to be central to the determination of their case. The success of ENE would very much depend upon the parties' faith in the fairness and objectivity of the judge, plus both parties must be willing to compromise.

A variant of ENE would be for judges to give an "early indication" as to what they think the outcome would be in a case. However, such an intervention would require particular care and express agreement from the parties otherwise there is a risk of an accusation of bias, which could potentially compromise the entire proceedings.

All of these ADR ideas could be incorporated into a "one stop shop" court designed for all matters under its jurisdiction. In broad terms there would be a very informal process at "ground floor", with the option for a user to opt for a more involved determination process if they went higher up the "floors" with the process at the top being the most formal, used for full-blown litigation. Users would make their choice depending on finance and the complexity - both legally and emotionally - of the case. Subject to appropriate safeguards being in place, the general concept would be to create a mechanism for justice that allows parties to choose in what form it was delivered and at what speed.

In such a system Judges would no longer be able to restrict themselves simply to determining disputes. The notion of judges “rolling up their sleeves” and becoming involved in the type of dispute resolution the users had elected to use was put forward as a solution. It was recognised that to take forward this type of concept there would need to be engagement from both Department of Business Innovation and Skills (BIS) and the Ministry of Justice (MoJ) given that BIS currently has responsibility for the Employment Tribunal Rules whereas the MoJ have responsibility for the operation of the Employment Tribunals, including the issue of fees.

**In broader terms the concept set out above could be applied in the whole civil justice system, having a single starting point with referrals on to specialist jurisdictions, or alternative forms of dispute resolution.** In such a system the possibility of a much wider remit for ACAS across all areas of civil dispute resolution was canvassed.

## **REASONS FOR BRINGING ALL EMPLOYMENT CLAIMS INTO ONE COURT**

Another potential area of reform is to **draw upon the huge expertise in the Employment Tribunal system by ensuring that employment types of claims are dealt with in a single Employment and Equalities Court.** This would see the end of breach of contract and discrimination claims also being heard in the County Court and the High Court. It would also enable breach of employment contract claims in the Employment Tribunal to be properly dealt with rather than being limited to claims of £25,000. There is no basis for imposing such a limit given that Employment Judges can make unlimited awards in complex discrimination cases. Further, the new Employment Tribunal rules now provide for Employment Judges to carry out costs assessments. In addition, this court could also deal with employer’s liability for personal injury claims.

Logistically the Employment and Equalities Court could operate in a similar way to the newly formed single Family Court. The Family Court exercises jurisdiction in all family proceedings, so there no longer exists separate family jurisdiction in the magistrates’ courts and county courts. This means users do not have to work out whether to make an application to the county court or magistrates’ court. The Family Court is a national court thus able to sit anywhere. Logically the remit of such a court could also include equality claims relating to goods and services.

## **CHANGE THE LEGAL TEST IN EQUAL PAY CLAIMS**

The structure for the determination of equal pay claims has barely changed since the legislation was enacted in 1970. **A strong view was expressed that this is an area of the law that is simply not working.**

Equal pay legislation is too technical. These cases involve too many detailed separate rules and often require an overly lengthy “expert” procedure. Where specialist job evaluation advice was needed by the tribunal, this could be provided by a job evaluation expert sitting as an assessor with an Employment Judge.

It was proposed that **the special contractual and procedural rules relating to equal pay could be abolished. Instead such matters could be classified only as a form of sex discrimination.** The view was also expressed that European law did not preclude equal pay from being treated as a type of sex discrimination.



The merits of adopting such an approach would be that it would dispense with the automatic need for independent experts. Equal pay disputes should be dealt with as an aspect of sex discrimination.

### **CREATE A PANEL OF LAY MEMBERS WITH SPECIALIST INDUSTRY EXPERTISE**

When employment tribunals were first established it was envisaged that they would act as an industrial jury with the panel made up of a legally qualified judge, and two lay “wing” members, with one representing industry and the other from a union background. In reality this is now no longer the case.

**Indeed the normal position now is for a judge alone to determine an unfair dismissal claim. The evidence indicates that this has led to a speedier resolution of claims.** The question of how the skills of lay members could be better used within the Tribunal system in a more cost effective way that also gives added value to the judicial process was posed.

It should be noted that the value of lay members on complex discrimination matters was not questioned. Rather the proposition was whether there was merit in redefining lay members into specialists and then grouping them in accordance with their industry expertise and/or particular specialist sector knowledge. In these circumstances, it would enable a judge to have a lay member on a case where, for example, a medical background and/or with a background in financial services might be of particular assistance in understanding the issues.

### **TRIBUNAL AWARDS AND STATE ENFORCEMENT**

The enforcement of tribunal awards has been a long-term problem. Reference was made to the fact that we already have state enforcement for the National Minimum Wage. There might also be a case for implementing a state enforcement mechanism for Employment Tribunal awards. It was noted that “penalty awards” for breach of employment rights by an employer that are paid to the State are collected immediately by the State.

The proposition that employment tribunal awards should be treated as preferential debts in the event of an insolvency was put forward. This would have the added benefit of saving money that would otherwise have to be claimed from the National Insurance Fund. The rules on insolvency are unhelpful because many unpaid awards are against insolvent businesses. There is a particular issue when an award is made against an employer that results in “phoenix companies”. Some felt that the responsibility to pay should stay with the directors and owners when they begin to trade again through another company.

The possibility of whether there might be a case for giving Employment Tribunals the power to make personal awards against directors and owners of phoenix companies, which would then facilitate a state enforcement mechanism, was canvassed. Arguably such a mechanism would then make the collection of such awards easier and more cost efficient.