**date:** 18 April 2011

# Resolving workplace disputes

TUC response to Government consultation

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Section one

# Introduction

The Trades Union Congress (TUC) has 58 affiliated unions with approximately 6 million members who work in a wide range of services, industries and occupations across the UK.

The TUC remains firmly committed to the principle that the most effective means of resolving employment disputes is through the use of internal workplace procedures. Where they are recognised, unions will seek to negotiate effective procedures with employers, increasing transparency and trust in the workplace. Tackling problems at work at an early stage can prevent disputes from escalating and promote good employment relations. Timely resolution of disputes can help individuals to remain in employment and assists employers in retaining skilled staff and institutional knowledge and in reducing recruitment and training costs.

Trade unions lead the way in resolving disputes at work using their bargaining strength and rights to accompany members in grievance and disciplinary procedures. Trade unions recognise that litigation should always be a matter of last resort. However where it is not possible to resolve a problem in the workplace or where employers refuse to comply with legal standards, trade unions will support their members in making Employment Tribunal (ET) claims.

Trade union reps, legal officers and solicitors firms are very experienced in representing individuals before ETs and some trade union members serve as lay members on Employment Tribunal panels. The TUC also plays an active role in the Employment Tribunal National User Group and on the former Employment Tribunal Service Steering Board.

In preparing this response, the TUC has consulted with affiliated unions, including union legal officers and individuals who are lay members of the Employment Tribunals. The TUC has also commissioned research on findings from the 2008 Survey of Employment Tribunal Applicants (SETA 2008). This research has been conducted

by Paul Latreille, Franz Buscha and Peter Urwin who are three leading experts on dispute resolution and the Employment Tribunals. Findings from this research have been integrated into this response.

## Overview

The TUC appreciates the opportunity to participate in the consultation on resolving workplace disputes. We hope that the review will lead to the delivery of more effective resolution of employment disputes and administration of justice. We are concerned however that the review aims to do this by reducing employment rights; limiting access to justice and making savings by reducing the number of Employment Tribunal claims, regardless of their merit.

## Executive summary

The TUC's principle views and concerns on the Government's proposals for reform of employment law and Employment Tribunal procedures can be summarised as follows:

- The TUC is firmly opposed to the extension of qualifying periods for unfair dismissal claims. This will increase job insecurity, encourage unfair treatment in the workplace and discourage employers from managing performance effectively. There is no evidence to support the assertion that changes to unfair dismissal law will act as a driver for growth or job creation or will reduce the overall workload for Employment Tribunals.
- The proposal is likely to be discriminatory against younger workers, black workers and those from ethnic minority communities and against female part-time workers.
- The TUC is firmly opposed to the introduction of fees for Employment Tribunals. Fees would price working people out of access to justice; seriously deter individuals from enforcing their rights; and impact disproportionately on low paid and disadvantaged groups, including women, black and minority ethnic communities, and disabled workers.
- The TUC calls on the Government to carry out a fuller Equality Impact Assessment on the proposals contained in the consultation document and in particular those

relating to the extension of the qualifying period for unfair dismissal and proposals to introduce fees for Employment Tribunal users.

- The TUC supports the principle of extending Acas pre-claim conciliation (PCC) services. However, there is a serious risk that PCC proposals as currently framed could damage the impartiality of Acas by requiring conciliators to advise on the merits of a claim and on complex jurisdictional issues including employment status.
- The TUC recognises that it takes too long for many Employment Tribunal claims to reach a hearing. In our view, the Tribunal System is under-resourced to deal with its current workload and there is a shortage of Tribunal Chairs who are specialists in employment law.
- Steps could be taken to improve the efficiency of the Tribunal process including by extending the role for Case Management Discussions (CMDs).
- The TUC would also welcome improvements in the enforcement of multiple equal pay cases, for example through the use of the CAC to determine claims.
- However, the TUC is seriously concerned that many of the Government's proposals for reforming Employment Tribunal procedures are heavily weighted in favour of employers and are likely to restrict access to justice.
  - The proposed increases in the caps for deposit orders and costs awards will be used by employers to deter individuals from enforcing their rights.
  - Extended powers for Tribunal Chairs to strike out applications, without the need for a hearing or the opportunity for parties to make representations, threaten natural justice.
  - The TUC is also firmly opposed to proposals for Tribunal Chairs to sit alone in unfair dismissal cases.
- The TUC supports proposals for the imposition of automatic penalties for employers who breach an individual's employment rights. However the increased sanctions should be paid directly to claimants rather than to the Exchequer. Penalties should also be automatic in all circumstances.
- The TUC does not support proposals for linking annual increases for compensation or statutory redundancy pay (SRP limits) to CPI rather RPI which will reduce the

value of these benefits in real terms over time.

Section two

# Resolving disputes in the workplace

## Introduction

The TUC remains firmly committed to the principle that it is best for employees and employers to seek to resolve employment disputes in the workplace. Using the right to be accompanied and their bargaining influence, trade union reps play a central role in resolving workplace disputes and ensuring compliance with employment law. Workplaces where unions are recognised are more likely than non-unionised workplaces to have well-developed grievance, capability and disciplinary procedures and workplace policies for handling bullying and harassment at work. Collectively bargained terms and conditions will often provide enhanced benefits for workers, exceeding the statutory minimum.

While litigation should always be a matter of last resort, trade unions use the ET system where necessary to protect members' terms and conditions. Trade unions will use litigation strategically in order to establish new points of law. They also support individual cases to establish precedents before Employment Tribunals which are then applied to the wider workforce through collective bargaining. This approach addresses systemic breaches of employment law in workplaces and also reduces the overall number of Employment Tribunal claims. Trade union reps are also very experienced in filtering out claims which have limited or no prospect of success and in seeking to resolve the issue in the workplace without resort to the law.

Throughout the disputes resolution consultations in 2002 and 2008 and the consultation on the Acas Code of Practice and the Gibbons Review in 2007, the TUC consistently argued there was a need for a legal framework which promoted effective dispute resolution. In general, the TUC believes that the Employment Act 2008

and the revised Acas Code of Practice have worked well. It is therefore welcome that dispute resolution legislation and the Acas Code have not been included within the current consultation and review.

However, given the clear added value which trade union reps make to workplace dispute resolution[1], the TUC believes that more should be done to promote and support collective bargaining in the workplace and the representative role for union reps.

## Detailed responses to consultation

## Mediation at work

**1. To what extent is early workplace mediation used?**

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

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

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

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

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

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

**Responses to questions 1 to 7**

The TUC recognises that mediation has a role to play in resolving employment disputes. In recent years, mediation has increasingly been used in unionised workplaces. Research undertaken by Acas suggests that mediation is more commonplace in the public sector, where

[1] Cite Acas research and joint statement on value of union reps

union presence is higher, than in the private sector.[2] A 2007 CIPD survey also confirmed a greater use of mediation in the public sector.

Mediation may be particularly well suited in situations where relationships have broken down between team members or between a manager and a member of staff. It may also be helpful in some instances of bullying, harassment or discrimination subject to the facts of the case.

However mediation is not a panacea and its use will not be appropriate in some circumstances:

- Mediation must always be voluntary. No individual should be pressurised into agreeing to mediation.
- It is essential that mediation is not used as a means of undermining or by-passing union representation or formal workplace procedures. Such practices would not only conflict with the requirements of the Acas Code of Practice but are also likely to undermine the effectiveness of the scheme.
- Mediation is not appropriate where a decision about right or wrong is required for example in relation to an underpayment of wages or instances of serious criminal activity.
- Mediation will not be appropriate in discrimination or bullying cases where there is a need for the issue to be investigated or the affected individual requests that it should be investigated. In such cases formal procedures should be used.
- Unions are also unlikely to support the use of individual mediation where a number of workers face the same mistreatment in the workplace. Due to the confidentiality of the process, it will not be possible to establish a precedent which can be applied to the wider workforce.
- Mediation should only be used where the parties involved have the power and authority to resolve the issue.

The TUC believes that there are some essential components for successful workplace mediation.

The TUC believes that the success of workplace mediation has often been dependent on schemes having been negotiated and agreed with trade unions rather than

[2] Acas response to the Resolving workplace disputes consultation 2011

imposed by employers. Reaching agreement achieves buy-in from staff and reduces mistrust. Union reps should be involved in the development and delivery of the mediation scheme. In some instances union reps will volunteer to be trained as workplace mediators.

Secondly, it is essential that mediators act in an impartial manner and are seen to be independent of management. In some instances this can be achieved through the use of in-house mediators with both employees and managers being trained. Where in-house mediation is developed it will be important that a range of mediators are appointed giving regard to their seniority, race, gender, age, officers and departments and their roles within the organisation, including trade union representatives. Employee mediators must be provided with paid time off, cover and training to perform their role. Where external mediators are used, their appointment should be agreed by management and a recognised trade union or workplace representatives.

Thirdly, mediation should only be provided by individuals who are trained and have expertise in employment law and workplace relations. While Acas mediators and some professional consultants provide an expert service, there are growing numbers of consultants offering mediation services who have very limited knowledge of employment relations. Their involvement in mediation can lead to individuals losing out on their rights or to an escalation of disputes.

The TUC believes that a national accreditation scheme should be established for workplace mediators incorporating a formal complaints procedure. The accreditation scheme and accompanying training should be provided by Acas.

## Use of Compromise Agreements

**8. To what extent are compromise agreements used?**

**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)**

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

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

**Responses to Questions 8 to 11**

The TUC would not support proposals aimed at weakening the protection provided to workers when considering whether to sign a compromise agreement. Before an individual compromises their statutory and contractual rights it is essential that the requirements of section 203(3) of the Employment Rights Act 1996 (ERA 1996) are complied with in full. In particular, an employee must receive independent legal advice beforehand.

The TUC would not support any extension of the categories of relevant independent advisers who are permitted to advise on compromise agreements. The CIPD has in the past called for the inclusion of HR professionals in the prescribed statutory list. The TUC does not support this view. Unlike solicitors they are not subject to professional regulation. It is not possible to guarantee that HR professionals are independent of employers who pay for their services. Consequently there is a concern that including HR professionals could give rise to conflicts of interest.

In recent years the TUC suspects there has been an increase in the use of compromise agreements in workplaces across the UK. 52% of employers responding to the CIPD *Conflict management* Survey Report (March 2011) reported an increased use in compromise agreements in the last two years. Similarly in the XpertHR *Managing employee departures* survey 2010[3], 33% of respondent employers reported an increased use of compromise agreements.

Trade unions report that the use of compromise agreements is commonplace in redundancy situations. Unions have also reported circumstances where employers have sought to use compromise agreements as a means of by-passing collective redundancies consultations and individual

[3] http://www.xperthr.co.uk/article/105447/.aspx

redundancy consultation. Such tactics can seriously damage employment relations and can have detrimental impact on the morale of remaining staff who are not made redundant.

The CIPD and XpertHR surveys also suggest that employers are increasingly using compromise agreements in performance related cases. 38.9% of employers responding to the CIPD survey stated they used compromise agreements to remove an employee on grounds of poor performance or misconduct; whilst 52% of employers responding to the XpertHR survey used a compromise agreement to remove an employee who underperformed in the last two years. Although the findings from these surveys must be treated as anecdotal due to their small sample size, they point to a worrying trend.

The TUC would be concerned if the current review led to an increased use of compromise agreements in place of good performance management. This practice would undermine employment relations and organisational effectiveness.

The TUC believes that employers should, as a norm, be expected to pay for independent legal advice for individuals who are being asked to compromise their employment rights and to forfeit the right to take a claim to an ET.

On a separate but important issue, the TUC would welcome clarification of the status of compromise agreements under section 147 of the Equality Act 2010.

## Acas Pre-Claim Conciliation

**12. We believe that this proposal for early conciliation will be an effective way of resolving more disputes before they reach an employment tribunal. Do you agree? If not, please explain why and provide alternative suggestions for achieving these objectives.**

**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.**

**Responses to Questions 12 & 13**

## Overview

Acas conciliation services have always played a central role in the early resolution of employment disputes. Acas has successfully conciliated settlements in between a quarter and a third of all claims filed with the Employment Tribunal Service.[4] Early resolution of disputes means that parties avoid the stress and costs associated with proceeding to a full tribunal hearing. Acas conciliation also reduces workloads for Tribunals and costs to the Exchequer.

The TUC applauds the success of Acas's Pre-Claim Conciliation service which was launched in April 2009. By the end of October 2010 over 19,000 potential employment tribunal claims had been referred for PCC. Of the 12,394 PCC cases completed between April 2009 and August 2010 only 3,406 – less than one third – went on to become an ET claim.[5] Acas has estimated when staff time and legal costs are factored in businesses save on average £5,200 by reaching a settlement through PCC as compared to resolving a dispute once an employment tribunal claim has been made. Acas research also suggests the PCC service can bring lasting benefits to workplaces. Over a quarter of employers reported that Acas conciliators had provided them with information and advice which would help them to avoid having to deal with a similar dispute in the future.[6]

The TUC therefore supports the principle of extending the PCC service. However we have serious concerns about the detail of the Government's proposals as framed in the consultation document.

## PCC: a mandatory stage

It is widely recognised that conciliation is only effective if it is voluntary and both parties agree to engage. The TUC is concerned that the consultation proposals would introduce a mandatory element to PCC. All claimants would be required to submit their claim in the first instance to Acas, before subsequently filing it with an ET. In practice, therefore, Acas would become the gateway to the Employment Tribunal system. Even

[4] Employment Tribunal and EAT statistics
[5] http://www.acas.org.uk/index.aspx?articleid=3193
[6] http://www.acas.org.uk/index.aspx?articleid=3193

where one or both parties decide not to accept the offer of PCC, Acas will be expected to provide advice relating to the claim, including on median awards for the types of claim, and the expected of length of time it will take the ET to determine the issue.

These proposals will create an additional and unwarranted hurdle for individuals seeking to make a claim to an ET but for whom PCC is not an option. The consultation does not specify how long it should take for Acas to process such claims. However the proposal will inevitably create delay. This will particularly disadvantage low paid workers who are seeking to recover unpaid wages or holiday pay from an employer who refuses to participate in PCC.

**Impact on Acas impartiality**

The TUC believes that proposals relating to PPC need to be substantially revised to protect the impartiality and confidentiality of Acas services.

The consultation document suggests that alongside offering pre-claim conciliation, Acas will be expected to provide information and advice on the potential merits of a claim. This will include information about the likely level of award which may be made, based on median awards, and the length of time it will take for an ET to determine the claim. Acas conciliators will also be expected to advise on jurisdictional issues, including the qualifying period for claims and the individual's employment status. These issues can involve highly complex legal issues and Acas will not necessarily have all the relevant facts to hand to determine them.

Acas conciliators currently make an assessment of claims in order to be able to conciliate. However, requiring Acas to give a formal view on the merits of a claim will undermine Acas' perceived impartiality. It will give the impression that the conciliator is taking sides. This will change the dynamics of the conciliation and is likely to undermine the effectiveness of the PCC. Formalising Acas advice could also expose the service to litigation from parties who rely on Acas advice but subsequently lose before an ET.

The TUC is also concerned that discussions held at Acas about potential settlements and advice provided by Acas conciliators could be taken into account by a Tribunal when determining whether to increase or decrease compensation levels – see proposals for formalising offers to settle in Chapter II B of the consultation document. The TUC cannot support this proposal as it would breach the confidentiality and independence of Acas services.

**Information on ET claim forms**

On a separate but related issue, the TUC does not agree with the Government's proposals to include information on an ET claim and response forms relating to the median awards or average length of time it takes for ETs to determine claims under different jurisdictions. Such information is likely to be misleading to parties. The length of time it takes for cases to be processed will be determined by a range of factors which will vary in each case. These include the facts of the case, the range of evidence which must be considered, the numbers of witnesses to be called, whether a claim includes a single or multiple jurisdictions, the workload of any given region at a given time, and the availability of the judiciary to hear cases. Similarly, the awards made in different claims vary substantially depending on the earnings of the claimant, the ability of the claimant to mitigate loss, the time period over which the right has been breached, etc. The TUC therefore believes this proposal should be dropped.

**Effect on time-limits**

When the Government consulted on PCC in 2007, the TUC argued that time limit rules for ET claims should be adjusted in order to ensure that all workers would be able to use the service. In workplaces with more developed grievance and disciplinary procedures it is often not possible to complete all stages of the procedure **and** participate in PCC with the normal 3 month time limit for filing an ET claim.

The TUC agrees that ET time limits should be frozen where a claim is lodged with Acas for PCC. However the TUC has serious concerns about the potential impact of the Government's proposals. This is in part due to lack of

detail or precision within the consultation document. The document makes clear that where an individual files a claim with Acas in the first instance, Acas will stamp it with the date of receipt and the ET time limit will be frozen. Acas will then be provided with a specified statutory period – currently one month – to conciliate the issue.

However no information has been provided on what happens to the time limit once Acas certifies that PCC has not been successful or has been rejected by either or both parties. It is unclear whether the time limit will be unfrozen at this point.

The TUC is concerned that under the Government's proposals individuals who engage fully with the PCC process could be inadvertently barred from making a subsequent ET claim if conciliation fails. It is not uncommon for claimants to decide to proceed to an ET at the last minute, often on the last day of the time limit. If the time limit was unfrozen when Acas certifies PCC is over, an individual would not have time to complete a fuller claim form, attach a detailed schedule of loss and submit the claim to the Tribunal service before the time limit expires. Such individuals would therefore be seriously disadvantaged.

There is also concern that any complex rules on time limits would become the focus of satellite litigation, incurring costs for the parties and the Tribunal Service and delaying access to remedies for claimants. The statutory dispute resolution procedures introduced in 2004, which incorporated complex rules on time limits, were the subject of endless satellite litigation up until the point that the procedures were repealed in 2009. The TUC is concerned that the current review should not replicate such problems. It is essential therefore that rules on time limits are clear, precise and do not restrict access to justice.

The TUC would propose that where a claim has been filed with Acas within the relevant time period for the individual claim, the claim should be deemed by a subsequent ET as having met time limit requirements.

**Resources for Acas**

While the TUC is generally supportive of proposals to extend the use of PCC to resolve employment disputes, in our view the scheme will only be successful if it is adequately resourced. The proposed changes to services are being proposed against the backdrop of 20% budget cuts for Acas over a three year period.

The TUC accepts the assumption that frontloading conciliation services before claims are filed with an Employment Tribunal may reduce some demand for post claim conciliation. However, in our view Acas will not be able to resource the enhanced PCC scheme through relevant savings in this area. It is likely that many parties will continue to decline the offer of PPC and therefore post claim conciliation will still be required.

In addition, the Government's proposals would require Acas to take a wide range of new responsibilities including administering and advising on **most** ET claims (excluding only multiple claims). This will create very substantial increased workloads for Acas for which they have no current extra resource.

The TUC therefore concludes that the viability of all the proposals on early conciliation will depend wholly on the Government's willingness to increase funding for Acas to meet any new work requirements.

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

The TUC agrees that where parties agree to the use of PCC, Acas should be under a duty to provide such conciliation and should be properly resourced to do so. The use of PCC should however not be mandatory and claimants who refuse this service should not be subsequently penalised by an ET.

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

The TUC does not agree that Acas duty to offer post-claim conciliation should be changed to a power. Both the Gibbons review and the 2007 dispute resolution consultation concluded that fixed period conciliation by Acas introduced in 2004 was not a success because both

employers and employees are often only willing to settle a claim at the door of the ET.

Many employers are keen to draw out the process in order to deter employees from proceeding with their claim. Similarly some employees only decide at the last minute to accept an offer from the employer in order to avoid the stress of an ET hearing.

The TUC therefore believes that in order to ensure that as many disputes as possible are willingly resolved without the need for a Tribunal hearing, Acas must continue to have a duty to provide post-claim conciliation.

**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.**

The TUC agrees that early pre-claim conciliation would not usually be appropriate for large multiple claimant disputes. This includes equal value claims, claims related to insolvency and claims for protective awards in TUPE or collective redundancy cases.

The offer of PCC should be made available to the parties in multiple claims, however there should be no compulsion on parties to use it.

**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**

The TUC does not agree with proposals for the duplication of forms for the PCC process and ET process. Such duplication is likely to confuse workers, particularly those who are unrepresented and could limit access to justice. Unrepresented claimants may not be aware of the requirement to fill in another form following the PCC process and could subsequently be debarred from an ET for failing to use the correct form. There is also a risk

that unrepresented claimants will not transfer all relevant information from one form to another, which could give rise to satellite litigation on the genuine basis of the claim. This would prolong ET proceedings, incur unwarranted additional costs for the Tribunal Service and add to the red tape involved in ET procedures.

The TUC recognises that Acas may want to confirm the basis of a claim before PCC. However in our view there should not be a prescribed form and employees should not be penalised if they fail to put their claim in writing before PCC.

**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**

Acas commissioned research[7] suggests that PCC can work well in all forms of claims. Analysis of PCC outcomes for April to December 2010 suggests that the following proportion of claims were resolved through PCC:

- Just over 52% of fast track issues (including monetary based and time off claims)
- 48.5% of standard track claims – mostly unfair dismissal claims
- 45.2% of open track cases – mostly discrimination claims

In more straight forward claims, for example those relating to unfair deductions from pay, non-payment of the NMW and of holiday pay, Acas conciliators may be to achieve early settlement simply by drawing employer's attention to their legal duties.

PCC can also work well in some cases where relationships have broken down within teams or between a line manager and individual and in discrimination claims. However

[7] Acas response to the Resolving workplace disputes consultation 2011

more complex discrimination cases may need to proceed to a formal Tribunal process.

The TUC also recognises that PCC may play a positive role in unfair dismissals claims. If conciliation can take place soon after a decision to dismiss is made, this may increase the prospect of staff being reinstated, where employers accept a dismissal was unfair.

In cases where the claimant is seeking interim relief from an Employment Tribunal (for example where a union rep has been dismissed for union activities), the use of pre-claim conciliation may not be appropriate.

**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.**

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

The TUC recognises that while an appropriate period needs to be provided for pre-claim conciliation to take place, this should not be used to delay claims where PCC is rejected by one or both parties or where the conciliation fails at an early stage. Such claims should be able to proceed direct to ET even though one calendar month has not passed. It is also important that where PCC has not been successful Acas continues to offer post-claim conciliation.

Section three

# Reforming employment tribunals

## Introduction

The Government's consultation document '*Resolving workplace disputes*' proposes substantial changes to Employment Tribunal procedures.

The proposals are designed to respond to two claims from employers' organisations: firstly that the numbers of Employment Tribunal claims have reached an unacceptable level and that the UK is suffering from the 'litigation culture' and secondly that there is a need to strengthen the measures for dealing with weak or vexatious claims in order to improve the efficiency of the Employment Tribunal system.

The TUC does not agree with these underlying assumptions. Rather we are concerned that the Government's proposals will limit access to justice and deter meritorious claims.

### 1) Levels of employment tribunal claims

The TUC recognises that in 2009/10 the number of ET claims filed with Employment Tribunals increased by 56% as compared with 2008/09 figures. However as the Employment Tribunal and EAT Statistics for 2009/10 make clear this the increase in claims is largely due to the rise in multiple claims.

In 2009/10 the number of multiple claims rose by nearly 90% as compared with 2008/09. This was due to on-going equal pay litigation in public services which continues to account for more than 37,000 claims each year. A high proportion of the 95,200 working time claims filed in 2009/10 also arose from one industrial dispute within the airline industry.

The current economic climate has also clearly contributed to the increased Tribunal workload. As in all previous

recessions, the number of unfair dismissal claims has risen. For example in 1993 the number of unfair dismissal claims rose to nearly 45,000, up from approximately 24,000 in 1990.[8] Similarly, in 2009/10, there were 57,400 unfair dismissal related claims, an increase of 9% on 2008/09 figures and a 40% increase as compared with 2007/08. There has also been a significant rise in redundancy pay and breach of contract claims.[9] It appears that ET claims, other than multiples, have already started going down.

### 2) Tackling weak and vexatious claims

Central to the Government's proposals for reforming Tribunals are a range of measures aimed at filtering out weak claims, including extended powers for Tribunals to strike out claims and increased caps for deposit orders and costs awards. Both the consultation document and the accompanying Impact Assessment acknowledge that these measures are being introduced to address the *concerns* amongst employers that weak and so called vexatious claims are 'plaguing' the Employment Tribunals[10] and *perceptions* amongst employers' representatives that existing powers for handling weak claims are being under-utilised or applied inconsistently.[11] However, neither document from BIS contains any empirical evidence that a substantial proportion of employees currently use the Tribunal system to pursue unmerited cases.

The TUC suspects that some employers are expressing concern with Employment Tribunal procedures due to their dissatisfaction with the outcome of Tribunal cases in which they have been involved. This view is supported by the recently published findings from the Survey of Employment Tribunal Applications 2008 Report (Employment Relations Research Series No. 107) which conclude:

> '*The outcome of the case drove satisfaction with the ET system for employers, with employers involved in cases in which the claimant was unsuccessful at the tribunal were more likely to be*

[8] Acas Annual reports 1990-1993
[9] In 2009/10 there were 19,000 redundancy pay claims, an increase of 76% on 2008/09 figures, whilst breach of contract claims rose from 32,800 claims to 42,400 an increase of 29%.
[10] BIS *Resolving workplace disputes: A consultation*, p27
[11] BIS *Resolving workplace disputes: A consultation – Impact Assessment*, p71

*satisfied with the ET system in general (79 per cent) than those in which the claimant was successful at the hearing (61 per cent).'*

The TUC believes current Tribunal procedures create substantial disincentives for employees to file weak or vexatious claims. In 2007, the Gibbons review acknowledged that ET claims are already costly for claimants, both in terms of financial and administrative burden of preparing a case, the stress and anxiety involved and possible damage to future career prospects. Given such high stakes, the vast majority of claimants are extremely unlikely to be making frivolous or vexatious claims.

Interviews with ET claimants conducted by researchers at Coventry Business School, Coventry University in 2004[12] also found evidence that the stress of pursuing a claim was significant and this included worries about the financial as well as the non-financial costs of pursuing a claim: *'Worries about legal costs were cited, alongside fears of getting in to debt should they lose and have costs awarded against them, in one case it had led to an applicant withdrawing her claim.'*

The TUC believes that Employment Tribunals' existing case management powers are more than adequate to deal with any weak or vexatious claims which may nevertheless end up in the Employment Tribunal system. In our view the measures proposed in the consultation document are unnecessary and represent a disproportionate response to the anecdotal evidence provided by employers. A more proportionate response to employers' concerns at any lack of consistency in the use of case management powers would have been to recommend that Tribunal Presidents issue practice directions encouraging a common approach to the using of deposit orders or cost awards.

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[12] Hammersley, Geraldine and Jane Johnson (2004) *The Experiences and Perceptions of Applicants Who Pursue Claims at Employment Tribunals*, paper presented at Work Employment and Society Conference, UMIST, 1-3 September 2004, cited in: Department for Business Innovation and Skills Employment Relations Research Series No 101 *Something for nothing? Employment Tribunal claimants' perspectives on legal funding.* Richard Moorhead, Cardiff Law School, Cardiff University and Rebecca Cumming, Cardiff Law School, Cardiff University. URN 09/813 June 2009.

## Proposals for improving the efficiency of the Tribunal system

The TUC acknowledges that it can take too long for claims to reach a hearing. Findings from SETA 2008 claimant data suggest that the median average duration of time for claims is 96 days (or more than three months) and those which go to a hearing, 124 days (or 4 months) . The mean average for unfair dismissal claims proceeding to a hearing is 176 days (or nearly 6 months). For discrimination claims this time period rises to 251.5 days (or more than 8 months).

Waiting for long periods for a claim to reach a hearing is problematic for employees who remain in employment with the same employer, who are seeking new work or have started a new job. It also means that employers can incur substantial costs particularly where claims are repeatedly postponed and relisted.

The TUC would support measures aimed at improving the efficiency of the Tribunal service. In our view, Employment Tribunals are not adequately resourced for their current workload. In particular, there is a need for additional 'sitting time' for Employment Judges and the provision of additional hearing centres in order to reduce number of hearings which are postponed and relisted.

In addition, the TUC would support the following measures which we believe would improve the efficiency of the Tribunal system without limiting access to justice:

- The TUC believes that **more effective use should be made of Case Management Discussions (CMDs).** At CMDs, Employment Judges can agree with the parties what are the key legal issues which need to be decided by the Tribunal in any claim. The documentation which should be included within the bundles can also be agreed, as can the relevant witness statements which should be read at the hearing. Such discussions can effectively to reduce the time which needs to be scheduled for hearings.
- In our view, **CMDs should take place within 6 weeks of the claim being filed.**
- Where a CMD is appropriate in a case (e.g. in unfair dismissal and discrimination cases) **the date for CMD should be issued as soon as the ET3 claim is received**

**by the Tribunal**. In more straightforward monetary based claims, **cases should be ideally listed for a hearing at the point at which the ET3 claim form is received**. These practices are already used within some ET regions and the TUC believes it would be helpful for them to be applied consistently across the ET network.

- The TUC also supports recent pilots **involving Acas conciliators in the CMD process** where the parties agree. The presence and availability of Acas conciliators at CMDs is likely to encourage the earlier resolution of disputes.
- The TUC has previously recommended to Government various ways in which multiple equal pay claims could be expedited. Our proposals included using the CAC to determine claims.
- **More time should be provided for ET lay members to read papers in advance of Tribunals hearings**. Currently, lay members are only paid to attend Tribunals from 10 am on the morning of a hearing. Paying members to attend from 9am would provide them with more time to read the bundle and familiarise themselves with the facts of the claim in advance of the hearing. The starting times for hearings could also be pushed back in order to provide additional preparation time for lay members. This proposal is likely to reduce the time it takes for cases to be heard.
- The TUC also believes that **lay members should also be issued with copies of IDS Employment Law guides and booklets**. This will assist lay members to remain abreast of recent legal developments and reduce the time needed for Employment Judges to advise on points of law.

## Detailed responses to consultation questions:

### Extended 'strike out' powers

**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.**

**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.**

**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?**

**Reponses to Questions 21 to 23**

The TUC does not agree with the Government's proposals for extending the powers for Employment Judges to strike out claims.

Employment Judges can already strike out claims at a pre-hearing review (PHR) where they conclude the Tribunal does not have jurisdiction to determine the case, for example because an individual does not have the requisite continuous service to qualify for a right. A claim can also be struck out at a hearing on the grounds that it is scandalous, vexatious or has no reasonable prospect of success, providing parties have been given notice in advance. Judges also have extensive powers to strike out a claim where any rule, practice direction or order has not been complied with. The TUC believes these powers are sufficient to deal with potentially weak or vexatious claims.

The TUC believes that proposals to permit an Employment Judge to strike out a claim without giving notice to the parties or without providing an opportunity for workers and employers to make representations conflicts with the principles of natural justice.

The fact that such powers exist within the Civil Courts does not mean they are appropriate in the context of Employment Tribunals where parties often represent themselves. The TUC is concerned that there is a risk that decisions to strike out would be taken merely on basis that the evidence provided on an ET1 claim form was flawed or inadequate. This would particularly disadvantage unrepresented claimants who may not have defined their claim in precise legal terms or may have provided insufficient detail on their claim form.

The TUC is also not convinced that the right to request that a decision is reviewed provides an adequate safeguard for claimants. The review process is likely to be confusing and legalistic for unrepresented claimants. It is also likely to prolong the litigation and increase costs for the worker, employer and the Tribunal service.

## 'Unless orders'

**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?**

The TUC believes that proposals relating to the use of 'unless orders' are heavily weighted in favour of employers.

Our principle concern is that these would permit Judges to strike out a potentially meritorious claim on the basis that inadequate information was provided on a claim form. Parties would also not necessarily have the opportunity to make representations before a decision to strike out was taken. As a result individuals who made an administrative error or who did not have the capability to fill in a claim form would lose out on the ability to enforce their rights. This proposal could disadvantage some disabled claimants, those with learning

difficulties and ethnic minorities for whom English is not their first language.

The TUC recognises that in some instances employees do not provide adequate information on their ET1 form. It is important to recognise that employers also regularly fail to provide complete information on their ET3 forms. In our view such omissions or problems can be best dealt with at a CMD. CMDs provide the opportunity for the Employment Judge to ask questions and to explain to claimants where additional information is required. This particularly assists individuals who are more effective in oral rather than written communication.

It is also not uncommon for employers to submit ET3 forms containing limited information and then to request the right to submit additional information once fuller details have been provided by the claimant. Employment Judges also have the power to request additional information is provided. The TUC believes that these existing practices ensure that Employment Tribunal claims can be processed effectively and in a way which is fair to both parties. New measures are not required.

The TUC is also concerned that employers are likely to request the proposed 'unless orders' in order to delay proceedings and to try to deter workers from pursing their claims. We do not believe that the proposed sanctions of wasted costs orders or other costs orders are an adequate sanction or safeguard where employers abuse the system. The TUC believes that the Government should not proceed with its proposals for unless orders. If they are introduced, employers who abuse the process should be required to pay an automatic penalty which is related to the nature of claim being brought by a claimant and costs awards.

## Deposit orders

**25. Do you agree that employment judges should have the power to make deposit orders at hearings other than pre-hearing reviews? If not, please explain why.**

**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.**

**Responses to questions 25 and 26**

The TUC does not agree with the Government's proposals in relation to deposit orders. In our view, these proposals will act as a significant deterrent to potential ET claims and will seriously disadvantage low paid claimants.

Employment judges already have the power to order a party to pay a deposit of up to £500 as a condition of the individual being able to proceed with their claim.

In our view these arrangements should remain unchanged. Deposit orders should only be issued at a PHR where an Employment Judges assesses the overall merits of a claim. We do not agree that Judges should be able to issue deposit orders without a hearing for reasons of natural justice. It would also not be appropriate for Employment Judges to issue deposit orders at a CMD, as it is at this point that Employment Judge will notify claimant of the need to provide additional information. It would be unfair to impose deposits at this stage.

**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?**

In our view the tests which are applied by Employment Judges when determining whether to issue a deposit order should not be amended. Currently deposits can be required where it appears that a case has 'little prospect of success.' The circumstances in which deposits can be awarded were extended in 2004. Previously deposits could only be awarded where there was 'no reasonable prospect of success.'

The TUC would be opposed to any broadening of this test as it is likely to impede individuals' rights to a fair trial under Article 6 of the Human Rights Act 1998. The TUC is particularly concerned by the suggestion in the consultation document that Employment Judges should be required to balance the importance or value of a claim against the cost of litigation when deciding whether to impose a deposit.

Such a test will negatively affect low paid workers who are making a claim for unfair deductions or holiday pay

from their employer. In such cases, individuals will not only have not received their wages but could also risk a deposit of up to a £1000 for seeking to enforce their rights. Claimants who are seeking a non-monetary award, for example a declaration of unfair dismissal or of discrimination or harassment, will also be detrimentally affected.

The TUC is seriously concerned that this proposal if implemented would create a major deterrent to low paid workers and disadvantaged groups from using the Employment Tribunal system.

**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.**

The TUC is firmly opposed to the proposal to raise the cap for deposit orders from £500 to £1000. A deposit order of up to £1,000 is excessive and will penalise low paid claimants. Evidence from SETA 2008 suggests that a substantial majority of ET claimants earn average or below average wages (i.e. £25,000 per annum or less). A deposit order of £1000 would therefore well exceed a typical individual's net weekly earnings and could equate to a claimant's entire earnings for month, or a large proportion of them.

Deposit orders are currently imposed in a tiny minority of cases[13] as a result of Employment Judges finding that the vast majority of claims have some prospect of success. Nevertheless, the TUC is concerned the threat of a £1,000 deposit will be used by employers to deter individuals from enforcing their employment rights.

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

The TUC does not agree that deposit orders should be introduced for the Employment Appeal Tribunal (EAT). In our view the existing sifting mechanism within the EAT is sufficient to ensure that weak cases do not proceed to appeal.

[13] Table 2.2 in the Impact Assessment estimates that approximately 208 deposit orders are issued by Tribunals on average per year.

## Costs

**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.**

The TUC is opposed to proposals to increase the current cap on level of costs that can be awarded by an Employment Tribunal from £10,000 to £20,000. We can see no clear policy justifications for this measure and are concerned that the proposed increase will act as a serious deterrent for potential ET claimants, particularly those on low incomes. Given that the average award in an unfair dismissal claim was £4,903 in 2009/10, it is likely that the possibility of a £20,000 costs award would deter individuals from enforcing their employment rights.

The use of costs awards has never been a central feature of the Employment Tribunal system. Both worker representatives and employers have always strongly resisted the adoption of a full costs regime in Employment Tribunals as this would fundamentally change the nature of the system.

Tribunals can currently make costs orders to legally represented claimants of up to £10,000. This is a significant increase on the previous limit of £500 which applied until July 2001. Since 2004, Tribunals have also been able to award preparation time orders to non-legally represented parties, subject to a maximum of £29 per hour up to £10,000. Wasted cost orders can also be made against a representative as a result of any 'improper, unreasonable or negligent act or omission by the representative'.

Costs awards are currently only imposed in a minority of cases.[14] Table 2.2 of the Impact assessment shows that 438 costs awards were made over the past three years. Of these 315 were awarded against the claimant and 123 against the respondent. The median award of costs in 2009/10 was £1,000. In 2009/10, costs of more than £8000 were only awarded in 32 out of 214 claims.[15] The TUC believes that there is no evidence that the current cap for costs is not set at a high enough level. It is

[14] BIS Resolving workplace disputes: A consultation – Impact Assessment, p70
15 In one claim costs of £13,942 were awarded against two respondents

also important to recall that costs over the £10,000 limit can be pursued through the County Court. Trade union lawyers however report that such applications are exceptional. There is therefore no justification for raising the £10,000 cap.

The TUC believes that existing arrangements for cost awards are sufficiently robust to deter frivolous applications. A DTI Employment Relations Research Series paper published in 2004[16] looked specifically at the impact of the costs regime introduced in 2001. The report found that 'eighteen per cent of those who privately settled and 24 per cent of those who settled through Acas said that the risk of having to pay costs had made them more likely to do so. Of those who withdrew (applicants only) 41% said that this risk had had a bearing on their decision.'

As outlined below the TUC is concerned that cost awards limits are used by unscrupulous employers as a threat to deter into not pursing a claim.

**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.**

**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.**

16 DTI Employment Relations Research Series No 33. 'Findings from the survey of employment tribunal applications 2003' Bruce Hayward, Mark Peters et al BMRB Social Research (2004) (URN 04/1071) pp67-68

**Responses to Questions 31 and 32**

It is welcome that the consultation paper recognises that the threat of costs awards can be used by employers to deter individuals from enforcing employment rights.

In the case of *Gee v Shell UK Ltd* 2003 IRLR both the Employment Tribunal, the EAT and Court of Appeal found that the use of costs warnings by an employer to have been unfair and oppressive.

The Citizens' Advice report: *'The intimidatory use of cost threats by employers' legal representatives'* also contained practical examples of how employer legal representatives were using the threat of costs to pressure claimants into withdrawing their claim. Unions reps have also reported that it is common practice for employers or their solicitors to use the prospect of a costs award to try convince employees not to proceed with ET claims.

The TUC agrees that sanctions should be introduced for employers who use the threat of costs orders to place undue pressure on individuals. Employment Tribunals should have the power to award a penalty **and** costs against any employer who is found to have used threats of costs awards with a view to deterring individuals from enforcing their employment rights. Such sanctions should apply regardless of whether the individual is represented.

The TUC believes that the Solicitors Regulation Authority (SRA) is unlikely to prioritise the regulation of such practices. Any regulatory function for SRA should only complement enforcement by the Employment Tribunal.

**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.**

The TUC does not agree that the costs regime should be adjusted to take account of the costs incurred by the Tribunal. Such revisions could significantly increase the level of costs awards and would therefore create an even greater deterrent effect for potential claimants.

## Statement of loss and claim forms

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

**35. If yes, what would those benefits be?**

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

**37. Are there other types of information or evidence which should be required 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?**

**39. Do you agree that this proposal, if introduced, will lead to an increase in the number of reasonable settlement offers being made?**

**40. Do you agree that the impact of this proposal might lead to a decrease in the number of claims within the system which proceed to hearing**

**41. Should the procedure be limited only to those cases in which both parties are legally represented, or open to all parties irrespective of the nature of representation? Please explain your answer.**

**Responses to questions 34 to 41**

The TUC believes that the requirement to prepare and attach a full claim schedule to an ET1 claim form will substantially increase administrative burdens for ET claimants and will disadvantage unrepresented applicants, particularly those with disabilities or learning difficulties.

The TUC is not convinced that the completion of a schedule of loss will assist in resolving or settling claims. Claimants will often have unrealistic

expectations of the nature of their claim and may be overly optimistic in their calculations. Unrepresented claimants may not be aware of the mechanisms which Tribunals use to assess the value of claims and the circumstances in which claims can be adjusted. Where a claimant submits an overly ambitious claim, this might antagonise the employer, who then becomes less willing to settle.

The TUC would also be concerned if the schedule of loss was taken into account by Tribunals when deciding whether the applicant had unreasonably rejected an offer to settle prior to a tribunal hearing. Claimants will often only seek legal advice after they have submitted their ET1 claim form. In the absence of advice they are likely to under-estimate or over-estimate the potential value of their claim.

The TUC therefore does not agree with the introduction of a requirement on claimants to attach a schedule of loss to their claim forms.

The existing ET1 form is very long and complex covering 13 pages. This can deter some claimants from making a claim. Prior to 2004, the claim form was only 2 pages in length. Nevertheless, ETs were able to administer justice effectively. The TUC would be concerned should the existing claim form be extended or require claimants to provide additional information. CMDs should continue to play a key role in dealing with claims where there are omissions on the ET1 or ET3 claim forms.

## Formalising offers of settlements

**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.**

**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?**

**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.**

**Responses to questions 42 to 44**

The TUC does not agree that ETs should be required or empowered to increase or decrease financial compensation awards where a party has received an offer of settlement which has not been reasonably accepted.

The TUC recognises that it is quite common for employers to make final settlement offers and that in some instances this can increase the likelihood that a settlement will be reached without the need for a hearing. However we do not agree that mechanisms for formalising offers of settlements should be introduced. Such a process could place undue pressure on employees to accept a settlement rather than to proceed to an ET hearing.

The TUC recognises that in the case of *G4S Security Services (UK) v Rondeau* UKEAT/0207/09/DA, the EAT ruled that a costs award could be made against a claimant who unreasonably refused an offer of settlement. However we do not agree that compensation awards should be adjusted by a Tribunal where an offer of settlement was not accepted. Claimants will often not have realitist expectations of the value of their claims and therefore may be unwilling at the outset of the ET process to accept a lower offer made by the employer. It is often only once a claim reaches the remedies stage that the individual may be informed of the circumstances which will lead to their claim being adjusted or reduced. It would be unfair to penalise an individual in terms of reduced compensation due to their lack of knowledge of Tribunal processes. The TUC also believes it will often be difficult for an employee to quantify some aspects of their claim.

Tribunal procedures should also accommodate the fact that for some claimants a declaration from an Employment Tribunal that they have been unfairly dismissed or discriminated against is of greater value than compensation awards. Such declarations can assist individuals in finding future employment. Settlements

made at Acas or through private solicitors will often include a confidentiality clause which prevents employees from disclosing the outcome of a settlement. Individuals who decide to exercise their legal right to proceed to a full Tribunal hearing rather than accept a settlement should not be penalised.

## Witness statements taken as read

**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.**

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

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

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

**Responses to questions 45 to 48**

The TUC does not agree that witness statements should be taken as read unless this been agreed by the parties at or before a hearing. This principle is particularly important where at least one party is not represented. However it should be open to the parties to agree with the Tribunal that statements will not be read.

Taking witness statements as read is likely to advantage the employer. Employers will often be more experienced, confident and capable of responding to cross examination before having had the opportunity to read their statement. In contrast employees may be intimidated by cross examination. Allowing a worker to read their witness statement will often enable them to settle in to the Tribunal hearing.

The reading of witness statements also enables Tribunal members to assess the merits of a claim and the credibility of the witness. It is not uncommon for solicitors to draft witness statements on behalf of their clients. Requiring statements to be read enables Tribunals to determine if the statement is genuine and accurate.

As suggested above the TUC believes there is scope for CMDs to be used more extensively to identify the issues which need to be legally determined by a Tribunal and to marshal the relevant witness statements prior to the hearing.

## Expenses

**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.**

**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?**

**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.**

**Responses to questions 49 to 51**

The TUC does not agree that state funded expenses should be withdrawn from Employment Tribunal hearings. Union representatives and legal officers report that it is often difficult to encourage individuals to act as witnesses, particularly in cases against their own employer. In most instances, individuals will lose income and incur significant transport costs. The removal of expenses is likely to discourage individuals from agreeing to act as a witness, which will have a detrimental impact on the administration of justice.

The TUC also does not agree that Employment Tribunals are the same as civil courts. There is a distinct difference between two parties meeting in a court in a dispute over a boundary fence and employment disputes where individuals are often seeking to recover pay for work done or to protect their livelihoods.

## Judges sitting alone

**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.**

**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.**

**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?**

**Responses to questions 52 to 54**

The TUC does not support the proposed extension of the circumstances in which employment judges can sit alone in unfair dismissal cases. The TUC believes that it is important to retain the tripartite nature of both the ETs and the EAT in order to maintain the confidence of both sides of industry in the system for adjudicating employment disputes.

The TUC is concerned that the proposal for reducing the role for lay members is based on a desire to reduce costs rather to maintain or improve the administration of justice and the effectiveness of the Tribunal system.

According to the Impact Assessment 'cases could be dealt with faster, without compromising fairness and access to justice, by a judge sitting alone instead of by a full tripartite panel.' The TUC questions this assumption.

It is not necessarily the case that 'listing cases for hearing is easier in front of a judge, rather than a panel of three members.' However it is often the lack of availability of an Employment Judge that results in unfair dismissal hearings being postponed. The TUC understands that lay members are often 'stood down' the day before a hearing is due to commence or even on the day itself. We therefore question that the lack of Lay Member availability results in delays.

It is assumed that hearing times would be shorter where a judge sits alone and that taking one employment judge through the issues of a 'relatively' simple case will take less time than taking a panel of three through the same issues. The rationale for this assertion is not clear. A three member panel hearing a case will hear all the evidence at the same time and questions are only asked to clarify facts relevant to the issues to be determined. As noted above however, the TUC believes that the hearing time for unfair dismissal cases could be reduced if more paid reading time was made available for lay members prior to the start of a hearing.

The TUC believes there is a strong case for the continued involvement of members in unfair dismissal cases. Many unfair dismissal cases are also not straightforward, and involve multi-jurisdictional claims and requiring disputed facts to be established before the case can be determined. Lay members' experience of workplaces and employment relations practice is invaluable in determining unfair dismissal cases and in discrimination claims. Members are appointed on the basis of their workplace experience and expertise, either in a HR or industrial relations capacity. This experience particularly assists lay members in determining whether a dismissal is either substantively or procedurally unfair. Members are therefore experienced in conducting workplace grievance and disciplinary procedures or representing employees at such hearings. They are well aware of good practice standards such as ACAS codes and have practical experience of applying these and this experience is vital to determining whether a dismissal is procedurally fair.

Member knowledge and experience of workplace practice and procedures can also be invaluable in applying the 'band of reasonable responses' test and in establishing whether the employer acted reasonably having regard to their size

and administrative resources and equity considerations. Insights from lay members are also important when considering appropriate remedy to be applied. Deciding appropriate compensation entails looking at mitigation, how long likely loss would continue etc and member knowledge of the labour market can be valuable.

The TUC believes that the retention of lay members in unfair dismissal cases is important in order to maintain the trust and confidence of workers and employers in the employment tribunal system. Parties will no longer have a sense of 'a trial by their peers'. While members may not be fully representative of the ET client base, they are drawn from a wide range of backgrounds and are more likely to be alert to the pressures parties feel in presenting their case to the tribunal and to how intimidating the process can appear to parties.

If members are removed from the decision making process, employment judges are more likely to base decisions on their knowledge of the law only, not wider employment relations knowledge and experience. The TUC also believes that the removal of lay members from unfair dismissal could result in a higher number of appeals.

The TUC does not agree that the role of lay members should be reduced in the EAT. Although the EAT primarily determines appeals from Employment Tribunals on points of law, the TUC nevertheless believes that the industrial and workplace experience is invaluable to decision making in the EAT. For example, lay members can play a key role in informing decisions on how the contract of employment or contracts for services should be construed and how interpretation methods may differ from other commercial contracts. They will inform decisions on implied terms within the contract of employment and what constitutes reasonable behaviour on behalf of employers. The retention of such skills, experience and insights will become increasingly critical as cross ticketing for Judges becomes more commonplace.

## Legal officers

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

**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.**

**Responses to questions 55 and 56**

The TUC does not object to the appointment of legal officers to undertake some of the work for the judiciary. In our view appointees should be legally qualified and should only be able to undertake work which does not require the exercise of judicial discretion. The TUC has reservations about some of the possible interlocutory work[17] which legal officers might be expected to carry out. For example, we do not agree that legal officers should be able to amend pleadings. In addition, legal officers should only be able to adjourn or postpone hearings if delegated to do so by an Employment Judge. Parties should also have the right to appeal to the Employment Judge in relation to any decision taken by a legal officer.

[17] BIS *Resolving workplace disputes: A consultation*, p 6

Section four

# Charging fees

The Government has indicated that it plans to introduce fees for Employment Tribunals following a consultation in the spring. The TUC looks forward to responding in greater detail to this consultation.

The TUC is fundamentally opposed to the introduction of fees or charges for Employment Tribunal claims which we believe will limit access to justice by pricing many workers out of the Tribunal System. It will seriously deter meritorious claims and make it difficult for low paid workers to enforce their employment rights and recover unpaid wages from employers.

The introduction of fees will also reduce the incentives on unscrupulous employers to comply with employment law, due to the reduced risk of enforcement. This in turn will create unfair competition for good employers.

The TUC is seriously concerned the Government is considering using fees as price mechanism to control the numbers of claims reaching an Employment Tribunal system. The consultation document states that

> *'the charging of fees has the potential to play a central role in our strategy to modernise and streamline the employment dispute resolution system helping to safeguard the provision of services, at an acceptable level, that are so important to the maintenance of access to justice.'*

The Government has argued that the introduction of fees will bring the Employment Tribunals into line with other parts of the courts system. The TUC believes that there is a fundamental difference between the courts service and the Employment Tribunal system – not least the ability of parties to represent themselves and the absence of legal aid. The TUC believes that workers should be able to enforce their employment rights, and in particular to recover unpaid wages without the requirement to pay for access to justice.

## Charging fees

The Government states that they will seek to protect the ability of vulnerable workers to access justice if they introduce fees.

However the findings from the 2008 Survey of Employment Tribunal Applications show that compared with the employed population generally, employment tribunal claimants are more likely to come from disadvantaged and minority groups and to have lower incomes:

- A high proportion of ET users earning average or below average earnings. According to findings from SETA 2008 claimant count:
  - 69.37% of all ET claimants[18] earned average or below average earnings at the time of making an application (i.e. their gross pay was less than £25,000 per annum)
  - 35.36% of all applicants had gross earnings of less than £15,000 at the time of making an application
  - 79.59% of applicants seeking to recover unpaid wages earned average or below average earnings; whilst 36.73% earned less than £15,000
  - 66.85% of those claiming unfair dismissal earned average or below average earnings; whereas 33.2% had gross annual earnings of less than £15,000.
- Black workers are overrepresented amongst employment tribunal claimants, 5% of ET claimants are black, as compared to 1% of all GB employees (according to LFS statistics). Unsurprisingly black and Asian claimants were overrepresented in the discrimination jurisdictions, 8% discrimination claims were from black workers and 11% from Asian workers. Black workers were also overrepresented in the unfair dismissal jurisdiction.
- Older workers are also overrepresented. Employment tribunal claims are most likely to be submitted by claimants aged 45 or over; 47% of ET claimants were aged 45 or more, compared with 38% of all employees according to Labour Force Survey figures. Workers aged 45+ were noticeably overrepresented in the unfair dismissal jurisdiction as well as amongst breach of contract claimants.
- Employment Tribunal claims are also more likely to come from workers that have a long-standing illness,

[18] Excluding those with missing data (don't knows etc).

disability or infirmity that limited their activities in some way (15% claimants to ET compared with 10% in the workforce as a whole).

- ET claimants are significantly more likely to not have any qualifications at the time of their employment claim; 24% ET claimants were reported as having no qualifications, compared with only 8% among the employed population generally. The proportion of claimants without any qualifications was highest amongst breach of contract (26%) and unfair dismissal (25%) claims.
- ET claimants are more likely to be male (60% of employment tribunal claimants were male and 40% female), 65% of unfair dismissal applications involve men and 35% women. Women were however, overrepresented in the discrimination jurisdictions (accounting for 54% of claims compared with 46% for men). Unsurprisingly, 82% of sex discrimination cases were brought by women.

In the light of this evidence the TUC calls on the Government not to introduce fees for submitting claims to Employment Tribunals.

Section five

# Changes to employment law

## Introduction

The TUC is fundamentally opposed to the Government's proposal to remove unfair dismissal protection for some 3 million people in the UK.[19] This change would increase job insecurity and encourage bad employment practices and mistreatment at work. The proposal is also likely to be discriminatory against ethnic minorities, younger workers and women, particularly those in part-time employment, who tend to have shorter employment tenure.

The Government that argues the extension of the time limit for unfair dismissal claims from 12 months to 2 years will act as a driver for growth and job creation and will promote better employment relationships. The TUC firmly believes these arguments are a myth as they are not substantiated by independent evidence.

**Driver for growth – a myth**

The Government argues that the weakening of unfair dismissal rights will act as a driver for job creation by giving employers more confidence to employ more staff.

The recruitment decisions of businesses are however complex and reflect many factors, not least the economic climate; nature of the markets they operate in; difficulties accessing finance; the levels of demand and of consumer confidence; taxation levels and costs of energy and supplies.

A survey of SME businesses carried out for BIS in February 2010[20] found that when asked about the business environment, the state of the economy was cited as the main obstacle for success for SME employers (39%) followed by cashflow (11%) competition, obtaining finance and taxation (all 9%). Late payments and difficulty obtaining finance were significantly more of a problem

[19] BIS *Resolving workplace disputes: A consultation*, p 51
[20] *SME Business Barometer February 2010*

than in earlier survey in 2007/08. The impact of employment legislation did not appear to be a key concern on the part of SMEs as an obstacle to growth or success.

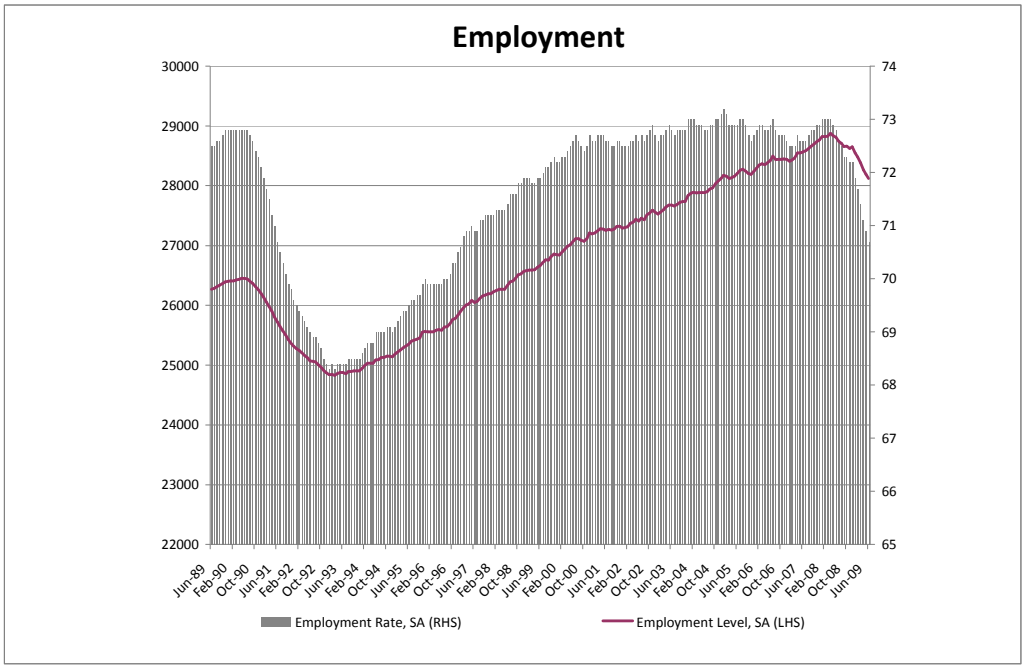
Operational needs are far more likely to influence recruitment decisions rather than levels of employment protection legislation and any unspecified risk of potential Employment Tribunal applications.

Independent research conducted by the OECD shows that while the relationship between employment protection legislation and labour market performance is complex there is no correlation between levels of employment protection legislation (such as dismissal protection) and employment levels.[21] Indeed there is evidence that other EU countries such as Germany and in Scandinavia enjoy both greater employment protection levels than the UK and better labour market performance.[22]

In the UK, unfair dismissal time limits have fluctuated over time. However evidence from the UK's labour market also confirms that wider coverage for unfair dismissal protection has not had a detrimental impact on employment levels.

[21] OECD (2004) OECD Employment Outlook 2004 Employment Protection Legislation and Labour Market Performance. Paris: OECD.

[22] *The Red Tape Delusion: Why deregulation won't solve the jobs crisis* by Stewart Lansley and Howard Reed Touchstone paper




Indeed the last reduction in the time limit in 1999 was accompanied by a period of strong job creation. The modest re-regulation of the British labour market in the last decade has been achieved without detriment to employment creation. Indeed, the impact of the 2008-09 recession on UK unemployment – which has risen by much less than in the early 1980s and 1990s recessions – suggests that the slightly more regulated labour market of the last decade has been working well.[23]

The Government's suggestion that the proposed cut in employment protection will be a driver for growth and job creation appears therefore to be a myth. Rather this policy would simply increase job insecurity for more than 3 million working people.

**Improving employment relationships – a myth**

The Government is also attempting to argue that the weakening of unfair dismissal rights will provide more time for employers to improve employment relationships and avoid disputes. The TUC believes such assertions are a myth as they are not supported by independent evidence.

The suggestion that employers need two years to assess an individual's performance or decide they are suited to

[23] http://www.touchstoneblog.org.uk/2010/03/tackling-the-red-tape-delusion/

that organisation lacks credibility. Most employers integrate probation periods of between 3 and 6 months into contracts of employment providing an opportunity for employers to assess an individual's capabilities and to identify appropriate levels of support. The TUC is concerned that the approach adopted by the Government in the consultation document will encourage poor performance management techniques by employers.

This is likely to lead to employers relying on the extended qualifying period to dismiss individuals within two years rather than engaging in difficult conversations or effective performance management. Such approaches are likely to lead to an increase in unfair treatment in the workplace and will result in increased recruitment and training costs of employers. Organisations adopting this approach are also less likely to invest in or develop staff capabilities. Such strategies are therefore likely to damage organisational effectiveness and productivity.

Far from improving the employment relationship, the Government's proposal is likely to have the opposite effect by reducing the incentives on employers to comply with employment law and to adopt good employment practice.
A key finding from the SETA 2008 suggest that when employers were asked about changes they had made as a result of Employment Tribunal cases, 54% of employers defending a claim of unfair dismissal said that they now made sure that correct procedures were followed, 26% said they had introduced or reviewed formal disciplinary and grievance procedures and 31% said that they now sought professional advice prior to taking disciplinary action. Such positive employment relations outcomes arising from unfair dismissal claims are likely to be reduced in the future if this proposal goes ahead.

The argument that weakening employment protection for some 3 million people in the UK labour market will improve employment relations is simply a myth. Rather it will mean employees have fewer rights to challenge decisions to dismiss them without good cause.

**Weakening unfair dismissal protection – a false economy**

The Government has estimated that the extension of the qualifying period for unfair dismissal cases may reduce

the number of claims to an employment tribunal by between 3,700 to 4,700 a year. It is by no means certain that the policy will achieve its expected outcome in terms of Tribunal workload or potential cost savings. It may simply force claimants to consider bringing a claim under another jurisdiction for example discrimination or Public Interest Disclosure Act (PDA) claims which are not subject to a period of qualifying service. Claims brought under the Equality Act 2010 and PIDA are likely to be more complex, time consuming and therefore costly. Findings from SETA 2008 suggest that the mean average duration of time for claims which go to a hearing is far longer in discrimination style claims than for unfair dismissal cases to be heard and determined.

## Detailed responses to consultation questions

**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 and employees**

Clearly, the principal losers under the Government's proposals will be employees. The Government has estimated that awards received by claimants will fall by £15.8 – £20.1 million per annum as a result of proposed changes to unfair dismissal qualifying periods.

The Government has also estimated that unfair dismissal protection would no longer apply to nearly 3 million individuals in the UK who have between 12 and 24 months services with their current employment. Overall, more than 7 million individuals in the UK will not have the requisite two years service to qualify for unfair dismissal rights. These individuals would therefore not be able to legally challenge arbitrary dismissal decisions unless they were able to establish discrimination. They will also not have ability to challenge unfair treatment or bullying in the workplace by bringing a claim for constructive dismissal.

For claimants who have been dismissed on spurious conduct or capability grounds, with no fair investigation into the circumstances, having lost their job can have devastating consequences – on the morale and confidence of the employee, and on their future employment prospects. Such an individual may find it hard to find

alternative employment as a result of being dismissed and remain unemployed. This has cost implications both for the individual and their family, including any dependent children but also for the exchequer in the form of unemployment related benefits. According to SETA 2008 data, just over a third (36%) of those bringing a claim for unfair dismissal had dependent children and 15% were caring for family members of friends with a long-term illness or problems relating to old age at the time of their claim.

The proposed policy change will also have a detrimental effect on employers. As noted above, weakening unfair dismissal laws and changes to Employment Tribunal procedures will reduce the incentives on employers to compliance with basic employment standards. The Government's proposals are likely to have a 'levelling down' effect on employment relations – bad employers will undercut good – and there will be less incentive for all employers to abide by decent minimum standards if bad practice cannot be challenged.

The policy changes may also have a negative effective on labour market mobility. The two year qualifying period may deter employees from moving from one employer to another due to the loss of employment protection. This potential barrier to labour market mobility is a cause for concern if it acts to prevent the best fit between workers and jobs being achieved.

**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?**

**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?**

The TUC is aware of unscrupulous employers in all sectors who will seek to lay off staff just before they qualify for unfair dismissal rights.

**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?**

The TUC believes that the proposal for extending the qualifying period is likely to discriminate against ethnic minorities, younger workers and women workers, in particular those employed in part-time work.

According to ONS Labour Force Survey Findings for Autumn 2010:

- **Younger workers** are much less likely to qualify for unfair dismissal rights than other workers:
  - 59.2% of employees aged 24 and under have less than 2 years service with their current employer
  - 29.7% of employees aged 25 to 34 have less than 2 years service
  - 19% of employees aged 35 to 44 have less than 2 years service
  - 14.3% of 45 to 54 years have worked for their employer for fewer than 2 years
  - 12% of 55-64 years olds would also not qualify for unfair dismissal protection due the proposed 2 year qualifying period
- **Ethnic minorities**: A higher proportion of non-white employees have been employed for less than two years than white employees.
  - 24.3% of white employees have less than 2 years service as compared to 30.1% of ethnic minority employees.
- **Women** are slightly more likely to have less than 2 years service than men (25.2% of women employees as compared with 24.4% of men)
- **Part-time employees** are more likely than full-time employees to have less than two years service:
  - 32.4% of all part time employees have worked for the same employer for less than 2 years as compared with 22% of full time employees
  - Currently, a higher proportion of male part time employees (45%) have less than 2 years service with their current employer than female part- time employees (28%). This is in large part due to the growth in male part time employment since the

recession.

- Due to the high proportion of female part-time workers, under the Government's proposals 1.5 million female part-time workers would fail to qualify for unfair dismissal due to a lack of 2 years continuous service (553,626 of whom have worked for between 12 months and 1 year). This compares with nearly 700,000 male part-time workers.

The TUC does not consider that the Government has conducted an adequate equality impact assessment on the proposal to extend the qualifying period for unfair dismissal cases. A more detailed analysis should be undertaken to ensure that the Government is complying with its equality duties and that this policy could not be subject to challenge on grounds of direct or indirect discrimination.

**Impact on social mobility**

The TUC is also concerned that the proposed extension in the qualifying period for unfair dismissal cases will have a detrimental impact on social mobility, particularly for younger workers.

As evidence from the LFS above demonstrates, younger workers are more to be employed in short term employment and therefore will be disproportionately be affected by the extended qualifying period for unfair dismissal claims. The latest official statistics show youth unemployment standing at over 18% and young black men in particular facing a bleak jobs future. Between 2007 and 2010 there has been a 68% increase in the unemployment rate for black young men.[24] The extension of the qualifying period for unfair dismissal is likely to increase the churn effect with younger workers moving in and out of employment, as unscrupulous employers take advantages of the longer qualifying period. As research by the OECD 2002 Employment Outlook report demonstrates, more temporary forms of employment tend to have a detrimental impact on pay and career progression.

*'Temporary employment is associated with a wage penalty, even after using regression techniques to control for differences in individual and job characteristics….up to one-fourth of temporary workers are unemployed two years*

[24] http://www.tuc.org.uk/equality/tuc-19457-f0.cfm

*later – indicating a far greater risk of unemployment than is observed for workers in permanent jobs – and an even larger share are still in temporary jobs. Since employers provide less training to temporary than to permanent workers, persons spending an extended period of time in temporary jobs may be compromising their long-run career prospects.'*

The TUC therefore calls on the Government to not proceed with the proposal to extend the qualifying period for unfair dismissal cases.

Section six

# Penalties, awards and redundancy pay

## Introduction

The TUC welcomes the Government's decision to review the current system for penalties and awards in the Employment Tribunal system. Effective enforcement systems and penalties are essential for encouraging compliance with employment law.

Alongside the proposals discussed below the TUC believes that there is an urgent need for the Government to address the on-going problem of the failure of employers to comply with Employment Tribunal awards. Too often individuals 'overcome the gauntlet' of the Tribunal system and are successful in their claim, only to discover that their employer fails to pay them their award. The last Government introduced measures aimed at supporting individuals who apply to the County Court to enforce Employment Tribunal awards. Although these measures were welcome it appears they may not have succeeded in practice. The TUC would therefore urge the Government to consider extending the powers of Employment Tribunals to enable them to enforce their own awards where employers fail to pay.

There is also a case for extending the range of remedies available to Tribunals when determining cases. For example, when claimants in the 2003 SETA survey were asked how they could have been made more satisfied with the outcome of their case, 24% mentioned wanting an apology. A further 29% mentioned reinstatement. While Tribunals theoretically have the power to order reinstatement following a successful unfair dismissal such awards are only issued in a tiny minority of cases. In unfair dismissal cases, many employees simply want a reference from their employer. While it is not uncommon for private settlements and Acas conciliation to provide for the provision of a reference, Employment Tribunals do

not have the power to order this. The TUC therefore believes that Employment Tribunal powers to make recommendations should be extended to all jurisdictions. Existing powers to award reinstatement should also be strengthened.

## Detailed responses to consultation questions

**61. We believe that a system of financial penalties for employers found to have breached employment rights will be an effective way of encouraging compliance and, ultimately, reducing the number of tribunal claims. Do you agree? If not, please explain why and provide alternative suggestions for achieving these objectives.**

The TUC believes that the remedies awarded by Employment Tribunals should not simply compensate individuals for losses incurred as a result of the breach of their rights. They should promote compliance with the law by creating a sufficient incentive to deter employers from future or repeated breaches of the law. The TUC welcomes proposals for the automatic penalties on employers who have found to have breached an individual's employment rights.

The TUC however does not agree that the new sanctions should be levied by the State. In our view, the payments should be made direct to the affected workers.

The TUC believes that the additional sanctions should apply in all circumstances. In our view, Employment Tribunals should not be given the discretion to take into account the size of an organisation before imposing the penalties. This approach could be tantamount to an exemption for small firms. The Impact Assessment for this review reveals that ET cases continue to be disproportionately found in workplaces with less than 25 employees. Findings from the SETA employer survey also reveal that 44% of cases in the SETA employer survey originate from organisations with less than 25 employees. Exempting small firms from the increased sanctions would mean that the proposal would only have a limited effect in terms of promoting increased compliance with employment law and reducing ET workload. The TUC also believes that staff working in small firms should be entitled to the same level of protection from breaches of employment law as those working in large firms.

**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.**

The TUC does not agree that any new automatic sanctions should be subject to an upper ceiling of £5,000. In our view the sanction should always reflect the original award by the Employment Tribunal regardless of the level the award.

**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?**
- **should it continue to be rounded up to the nearest 10p, £10 and £100?**
- **should it be based on the Consumer Prices Index rather than, as at present, the Retail Prices Index?**

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

The TUC agrees that the statutory limits should continue to be up-rated on an annual basis. This will help to maintain some form of relationship between ET compensation awards and statutory redundancy payments (SRP) and at least the cost of living. The TUC also agrees that compensation awards and SRP should not be reduced where RPI fall below minus.

The TUC however is disappointed that the Government is considering not continuing to round up the statutory limits for compensation awards and SRP to the nearest 10p, £10 or £100 and more significantly proposes that future annual uplifts should be linked to the Consumer Prices Index (CPI) rather than the Retail Process Index (RPI).

The proposals will undermine and potentially reverse progress made in recent years to bring statutory redundancy payments into line with average earnings. In April 2005, the statutory limit of £280 represented 66% of mean gross weekly pay for all employees (£440.10).

**Conclusion**

In 2010, the statutory limit of £380 represented 78% of mean gross weekly pay for all employees (£487.60). Over the longer term these proposals will mean that the value of ET compensation awards and statutory pay will fall in real terms.

The TUC is surprised that the Government is considering such reductions in statutory redundancy pay at this time. Historically Governments of all persuasions have increased SRP in recessionary times, recognising the need to provide additional financial support for individuals who are required to seek new employment and to pay for training to make necessary labour market transitions. In contrast the TUC believes that statutory payments should be increased substantially to bring them in line with earnings and to ensure that all workers who face redundancies receive appropriate compensation to reflect the loss of income.

Linking annual uplifts in SRP limits is also unlikely to have a significant cost implication for many employers. Evidence suggests that employers, particularly in larger organisations, already tend to pay in excess of the statutory minimum. The 2002 Survey on redundancy by the CIPD found that 72% of employers paid redundancy payments above the statutory minimum. Research conducted for the DTI by IFF Research Ltd in 2001 found that 48% of employers provided redundancy payments which exceed the statutory minimum.[25] Maintaining statutory limits will help to ensure that these employers do not face unfair competition from other businesses during an economic downturn.

[25] DTI Partial Regulatory Impact Assessment on Statutory Redundancy Pay published in July 2005.

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