

RESOLVING DISPUTES IN THE WORKPLACE

RESPONSE OF CITY OF WESTMINSTER AND HOLBORN LAW SOCIETY TO CONSULTATION BY THE DEPARTMENT OF TRADE AND INDUSTRY

JUNE 2007

Question 1

Should the statutory dispute resolution procedures be repealed?

Yes. This should include both grievance and DDP. We believe the procedures merely lead to delay in formulating claims to Tribunal; embarrassment to claimants; and seldom resolve the problem. However we feel the DDP should continue to provide a pre-dismissal hearing, but no appeals thereafter.

Question 2

Would repealing the procedures have unintended consequences that the Government should address, in legislation or otherwise?

WE feel this unlikely, save for an initial increase in claims reaching the Tribunal earlier than as now.

Question 3

Should the Government offer new guidelines on resolving disputes?

Yes. A grievance letter-being a form of letter before action- should precede all Tribunal applications, whether in cases of unfair dismissal or other grievance, to provide the employer a chance to redress matters. A 28(or perhaps 21 only) day pause before application, as now would be appropriate to avoid premature application.

Question 4

Should there be a mechanism to encourage parties to follow such guidelines?

Yes. A grievance letter-being a form of letter before action- should precede all Tribunal applications, whether in cases of unfair dismissal or other grievance, to provide the employer a chance to redress matters. A 28(or perhaps 21 only) day pause before application, as now would be appropriate to avoid premature application.

Question 5

Should encouragement take the form of a power for employment tribunals to impose penalties on those who have made wholly

inadequate attempts to resolve their dispute?

No. Where the Tribunal decides one party has been wholly unreasonable in relation to the validity of the claim, but not in relation to attempts to settle, or the lack of them, then, and only then, costs should follow

Question 6

What form should such penalties take?

Costs against the unreasonable party. Any attempt to fix a fine/penalty/or fee would be treated as a stealth tax.

Question 7

If the statutory dispute resolution procedures were repealed, should the law relating to procedural fairness in unfair dismissal:

Revert to the pre-2004 position

Be reviewed in order to assess whether it should be restated entirely

No view

Review may be required to reduce the procedure as suggested in 3 above.

Question 8

Should the Government invite the CBI, TUC and other representative organisations to produce guidelines aimed at encouraging and promoting early resolution?

Yes. It would be helpful for all stakeholders to have input into the final composite guidelines.

Question 9

Should the Government develop a new advice service (on dispute resolution including an enhanced telephone and internet helpline) with the structure and functions suggested?

No. While such a service is clearly desirable, it can be adequately met by existing organisations, like ACAS CABx Law Centres and Unions. Better funding for such organisations would increase their availability.

Question 10

Should the Government redesign the employment tribunal application process, so that potential claimants access the system through a new advice service, and receive advice on alternatives when doing so?

Not for this reason. If advice is not enforceable it tends merely to delay matters; if it is enforceable there is no need for the Tribunal. While advice is always useful it is not felt that an additional body for the purpose will achieve anything the bodies referred to in 9 above do not already do.

Question 11

Should there be a new, swift approach for dealing with straightforward claims without the need for employment tribunal hearings?

Yes. Many claims for unpaid money/holidays etc could be resolved by a judgement without a formal hearing on the basis of the ET1/ET3-or its absence.

Question 12

Should additional Acas dispute resolution services be made available to the parties in potential tribunal claims, in the period before a claim is made?

Yes. This would be helpful but should not be compulsory.

Question 13

If it is necessary to target these new services, should the Government set criteria to guide Acas to prioritise particular types of dispute?

Maybe. Dismissal and discrimination cases when contested should be prioritised for hearing, in view of their larger consequences to the claimant. Experience may also reveal a need for other priorities, and should be monitored.

Question 14

If these new services are to be targeted, then in the current circumstances, would it be appropriate for the Government to guide Acas to prioritise the following types of dispute?

Yes as to the first only. Indeed the last would seem to raise questions of discrimination!

Question 15

Should the fixed conciliation periods which place time limits on Acas' duty to conciliate employment tribunal claims be removed?

Yes. Negotiation at all stages can only be helpful

Question 16

Should the Government simplify employment tribunal forms?

Maybe. The simpler the better, but only so far as consistent with the ET1 and ET3 being able to set out all relevant facts, to enable our suggestion in 11 above to be adopted

Question 17

Should claimants be asked to provide an estimate or statement of loss when making a claim?

Yes. This helps the parties to assess the limit of their liability, and to set this against the cost of continuance. It should be entirely without prejudice to the final decision of the Tribunal, however, as many claimants are not capable of assessing the quantum of their claim, and limiting it to loss actually recoverable, on the one hand, or valuing it on the other.

Question 18

Would simplifying the current time limits regime through harmonisation be a helpful additional reform, whether or not the statutory dispute resolution procedures are repealed?

Yes. On balance we tend to favour a fixed 6 month limitation, but in cases involving a course of conduct, like discrimination, time should run from the last act, but the claim encompass all previous acts within the course of conduct regardless of age.

Question 19

If so, should the harmonised limit be three months, six months or another time period?

6 months. The current 3 months plus an extension following grievance is little understood by the unrepresented and if the proposal in 4 above is adopted, the extension becomes obligatory- though extended for dismissal cases.

Question 20

Would total or partial harmonisation of the grounds for extension (to the extent possible subject to legal constraints) be a helpful additional reform?

Yes. We feel the Tribunal should always have discretion to ignore time limits if just cause is shown by the claimant. It may be necessary to impose in the interests of justice to the employer a cap on the discretionary time; if so we do not see a reason to limit this to any less than a normal claim in contract.

Question 21

If so, what should the harmonised grounds for extension be in respect of the relevant jurisdictions?

Clearly there should be guidelines as to the extent of "just cause" but while there will always be complaints as to consistency and uncertainty in any discretionary system, we prefer to leave the final decision to the good sense of the Tribunal members.

Question 22

Do you have views on specific ways in which employment tribunal procedures and case management could be improved?

It is difficult to summarise a response to so wide a request. In two particular areas we feel a change would be helpful. Witness statements should be renamed, to ensure the claimant is aware that a statement from him is also required.

Secondly we feel that, at least in cases where the party is unrepresented, failure to comply with orders for such statements or lists of documents etc, should not lead to striking out, but rather it should be made clear that the Tribunal has the discretionary power-but not the obligation- to refuse to allow such missing items to be referred to in the hearing, where it is satisfied that the failure is wilful or otherwise reprehensible in the circumstances.

Question 23

Would it be helpful to change the case management powers available to employment tribunals in respect of multiple-claimant claims?

Yes. We strongly favour the introduction of suitable powers.

Question 24

Do employment tribunals provide the most appropriate way of resolving multiple-claimant claims, or could other mechanisms better serve the interests of all the parties involved?

WE are unable to conceive alternative mechanisms for such cases.

Question 25

Are the existing powers of employment tribunals sufficient to deal with weak and vexatious claims?

Yes, but we feel they should be more widely used in cases as suggested in 5 & 6 above. We feel they need to be promoted and advertised widely.

Question 26**Do you have views on when chairs should sit alone to hear cases?**

We have no objections to Chairmen sitting alone, but it is probably seen as better to sit as a panel.

Question 27**Do you have views on how best to structure employment tribunals panels and use lay members more efficiently?**

WE believe that mostly tribunals work well. Inevitably this depends on the dynamics of each tribunal and the efficient and effective use of its Chairman and members- which they can promote.

Question 28**Should the Government aim to promote employers' compliance with discrimination law through better advice and guidance, rather than by widening the powers of employment tribunals to make recommendations in discrimination cases?**

[No comment offered]