IoD response to the consultation document – Employment Tribunal rules: Review by Mr Justice Underhill

The IoD welcomes this opportunity to respond to the consultation document Employment Tribunal rules: Review by Mr Justice Underhill issued by the Department for Business, Innovation & Skills.

About the IoD

The IoD was founded in 1903 and obtained a Royal Charter in 1906. It is an independent, non-party political organisation of approximately 45,000 individual members. Its aim is to serve, support, represent and set standards for directors to enable them to fulfil their leadership responsibilities in creating wealth for the benefit of business and society as a whole. The membership is drawn from right across the business spectrum. 80% of FTSE 100 companies and 60% of FTSE 350 companies have IoD members on their boards, but the majority of members, some 72%, comprise directors of small and medium-sized enterprises (SMEs), ranging from long-established businesses to start-up companies. IoD members' organisations are entrepreneurial and resolutely growth orientated. More than two-fifths export. They are at the forefront of flexible working practices and are fully committed to the skills agenda.

General comments

Policy relating to employment law is of the highest interest to the IoD and its members. Our surveys of members regularly show that excessive and burdensome employment regulations are one of their greatest concerns, and the area most in need of reform. Annual surveys of IoD members show that the regulatory burden is a top three issue for them (alongside tax and skills shortages) with employment regulation the area cited by the highest proportion of members (70%).

IoD surveyed its members in 2011 on their opinions and experience of employment tribunals and related issues, in order to inform its response to the consultation document *Resolving workplace disputes.* Over 1100 members responded to the survey. Of these 96% employed at least one person; 39% employed 1-10 people; 24% employed 11-49 people; 18% employed 50-249 people; and 16% employed 250 or more people. 90 respondents each employed more than 1000 people. The survey results showed that around 35% (400 members) had had a tribunal claim against them, but of those just 9% were won by the claimant. In 30% of cases the employer won, while in 13% the claim was withdrawn. In 40% of cases it was settled without a tribunal ruling. These figures lend further support to concerns expressed repeatedly by employers that many complaints are without merit, but that very often employers will choose to settle rather than face the time, expense and stress involved in defending a claim at tribunal.

The overwhelming criticism from IoD members who responded to the survey was that there is no risk for the claimant in bringing a claim – it is in effect a "one way bet". For the employer on the other hand there is always considerable cost and time incurred. The greatest cost comes from using lawyers to defend the case - the complexity of employment law today demands this. Other criticisms of the system include the lack of information provided on the ET1 form making it difficult to respond to claims, inconsistency between tribunals in different parts of the country, a feeling that

tribunals see their role as defending the employee, and a lack of understanding on the part of tribunal members, including tribunal chairs, of the reality and pressures of commercial life.

For these reasons, whilst we support the review of the ET rules conducted by Mr Justice Underhill, we believe:

- changes to the rules need to go further, especially in relation to striking out weak and vexatious claims, and making deposit orders;
- more information should be required on the ET1 form about the allegations being made;
- More transparency is needed through publication of more statistics on how cases are dealt with and disposes, broken down by individual tribunals; and
- Greater use should be made of Presidential guidance, aimed at tribunals (not at parties to a claim).

Our comments in response to questions in the consultation document are below.

Question 1: Are the new rules less complex and easier for non-lawyers to understand? Do you think that the drafting style could be further improved and if so how?

We warmly welcome the overhaul of the rules, which is long overdue, and the fact that they have been reduced to half the current length. Can the Government undertake a similar exercise in other areas of employment law? We have no suggestions for improving the drafting style, which is admirable.

Question 2: Do you think Presidential guidance will provide all parties with clearer expectations about the employment tribunal system and ensure consistency in case management and decision making?

Do you have any comments on the draft example guidance on postponements and default judgments provided at Annex B?

Presidential guidance has the potential to improve consistency of procedures and decision-making by employment tribunals, but more will need to be done, particularly as regards consistency of substantive decisions. And we would question whether Presidential guidance is the best format for helping the parties, given its somewhat legalistic language.

On the issue of consistency of decisions, it was instructive to see the statistics for the proportion of claims won by claimants at individual employment tribunals over the past 3 years, deposited in the House of Commons Library by the Ministry of Justice earlier this year (copy attached). They showed that:

- Certain tribunals consistently find in favour of the claimant/employee, well above the average overall, as well as for unfair dismissal and discrimination claims, in particular – Dundee, Bury St.Edmunds and Leicester.

- Certain tribunals are at the opposite end of the spectrum, consistently well below the average overall, and for unfair dismissal and discrimination claims, in particular – London Central, London South and Watford.

- For unfair dismissal claims, employees are much more likely to win in Bury St.Edmunds, Leicester, Liverpool, Leeds, Liverpool, Newcastle and Dundee than they are in Watford, London Central, London South, Reading, Birmingham or Ashford.

- For discrimination claims, employees are much more likely to win in Dundee, Leicester, Leeds, Nottingham, Bury St.Edmunds, Liverpool and Newcastle, than they are in Aberdeen, London South, London Central, Watford and Reading. The differences are most marked with discrimination claims – employees are twice as likely to win in Dundee and Leicester as in London South, London Central, and Watford.

One trend is clear – an employee is much more likely to win at a tribunal away from the south-east of England.

As far as we know these statistics are only available in the House of Commons Library, and not widely known. We would like to see such statistics published annually so as to bring much greater transparency to decision-making by tribunals, and so help promote greater consistency in decision-making.

We would like to see the Government taking further steps to enhance the quality of employment tribunal judges and lay members, and the consistency of decision-making, for example by reviewing and improving the training provided to tribunal members (not least to engender a greater understanding of the reality and pressures of commercial life), and by seeking to source judges from a wider pool – at present they tend to be drawn mainly from academics and lawyers.

With regard to the draft example guidance given in the consultation document, we are not convinced it is suitable for parties to a tribunal claim. The language is quite legalistic, some of the sentences are very long and rather complex. For example:

> "Rule [20] provides that where the time limit provided for under Rule [15] has expired and there has been no response presented, or any response received has been rejected, and no application for a reconsideration is outstanding or where the Respondent has stated that no part of the claim is contested then an Employment Judge will consider whether a determination can properly be made (a default judgment) and make detailed provisions to that effect."

Presidential guidance is much better directed at employment tribunals themselves. Parties need a more user-friendly format in plain English.

We would like to see Presidential guidance on striking out weak/vexatious cases and on the use of the power to make cost orders and deposit orders.

Question 3: Will the recommendations for new rules on the initial paper sift and strike out powers lead to better case management early in the tribunal process?

The recommendations should lead to better case management earlier in the process, but we doubt that the very small changes in strike out powers would by themselves make any significant difference. We would like to see:

(1) the strike out powers, and the power to make deposit orders, made more robust by adopting the language used in Rule 70 in relation to cost orders, ie

> Rule 34 - Striking Out – "At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out (i.e. dismiss), and must consider whether to do so, all or part of any claim or response on any of the following grounds....."
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> Rule 36 - *Deposit orders* – "(1) If at a preliminary hearing the Tribunal considers that any complaint has little reasonable prospect of success, it may make an order, and must consider whether to do so, requiring that party ("the paying party") to pay a deposit not exceeding £1,000 ...."

This would also have the merit of making the rules on striking out, deposit orders and cost orders more consistent with each other.

(2) Greater transparency in the process by publishing annually the proportion of claims that are struck out by individual tribunals, and the proportion of cases in which a cost order and/or a deposit order is made (also for each tribunal).

(3) Presidential guidance to employment tribunals on striking out weak/vexatious cases.

Question 4: Are there any practical problems with combining pre-hearing reviews and case management discussions into a single preliminary hearing?

Not that we are aware of.

Question 5: Will a stand alone rule help to encourage parties to consider alternative such as independent mediation to resolving their workplace disputes?

It could marginally, and we support it.

Question 6: Do you agree that a respondent should not be required to apply to the tribunal to have their case formally dismissed when the claimant has chosen to withdraw? Are there any disadvantages to this approach?

We strongly support this, given the proposal in relation to fees – which we oppose – to charge a fee to apply for a case to be dismissed following withdrawal. Even without the proposal on fees, this is the sensible approach.

Question 7: Should judges, where appropriate, limit oral evidence and questioning of witnesses and submissions in the interests of better case management?

In the interests of speeding up the process, yes.

Question 8: Do you agree with the recommended approach to make the privacy and restricted reporting regime more flexible?

Yes we agree.

Question 9: Is there a need for a lead case mechanism for dealing with multiple claims? What are the potential impacts of this approach?

We support this in the interests of simplifying the handling of multiple claims.

Question 10: Do you agree that written reasons should be provided, where requested to parties, but in a manner which is proportionate to the matter concerned?

Yes we agree.

Question 11: Are there any disadvantages to removing the £20,000 cap for awards before they are referred to the county or sheriff court (please provide examples where possible)?

Not that we are aware of.

Question 12: Are there other measures that can be taken to ensure greater use of the costs regime?

As stated earlier, we would like to see greater transparency in the process by publishing annually, and for each tribunal, the proportion of cases in which a cost order and/or a deposit order is made. At present, we believe this information is only published on an aggregated basis.
We would also like to see Presidential guidance on the use of the power to make cost orders.

Question 13: How should the tribunal calculate awards for costs for lay representatives?

We agree that those who use lay representatives should not be disadvantaged compared with those who use a lawyer.

Question 14: Are there any disadvantages to allowing those who choose to represent themselves be able to claim both for preparation time and witness expenses (as part of a claim for costs)

Not that we are aware of.

Question 15: Do you agree that employment judges should be able to require deposit orders on a weak part of a claim or response as a condition of it continuing through the tribunal process?

We strongly support this proposal in the interests of discouraging weak and vexatious claims. We would also like to see Presidential guidance on using the power to make deposit orders.

Question 16: Do you have any comments on the ET1 and ET3 forms attached separately (including the provision for multiple claims)?

We would like to see the ET1 form improved significantly, going well beyond the cosmetic changes that have been proposed. IoD surveyed its members in 2011 to help inform its response to the consultation document *Resolving workplace disputes*. One of the strong criticisms of the present tribunal system was the lack of information provided on the ET1 form making it difficult for employers to respond to claims.

Typical criticisms included that the form allowed employees to bring unsubstantiated and unfounded claims, without any evidence required, that the current free form (Section 5.2) allowed very little to be said, and that the basis for the complaint could change even at the last moment or on the advice/instruction of the Employment Judge. The lack of information required to be given is one of the mains causes of spurious, weak and vexatious claims that waste so much management time and money.

By requiring more information, evidence, reasons and a statement of loss/remedy sought, the employer will be in a much better position to assess whether and how to defend the claim, or whether to seek to settle, and if so at what level of compensation.

Our strong view is that the ET1 form should be amended to require the complainant:

- To give specific information on the incidents etc that give rise to the complaint;
- To state the reasons why they think the dismissal was unfair, or there was discrimination etc;
- To state whether the they have engaged in ACAS pre-claim conciliation or have been offered mediation by the employer and engaged in it, and their view as to why it failed;
- To give a statement of loss and a statement of the compensation or remedy sought.

In addition, there is a real problem with the fact that it is possible to change the basis of the complaint. Two comments from *IoD members illustrate this:*

> *"The problem in our case was that the chair of the tribunal virtually instructed our employee to completely change tack mid tribunal and to raise different allegations. We therefore had to ask for an adjournment in order to prepare the case. On reflection we decided to settle and our calculation was based entirely on our additional cost of working if we had defended again. If the ET1 had been the final document from our employee then that would have been reasonable."*

> *"The process allowed the claimant to change his submission continually, right up to the night before the hearing (even though the rules are supposed to prevent this) making it impossible to respond."*

We assume, and expect, that the Government's plans in relation to pre-claim conciliation will put a stop to such behaviour, since a claim may not be brought unless it has first been notified to ACAS. Will believe this may well require a further change to the Tribunal Rules.

Question 17: Do you agree that any power to deploy legal officers in employment tribunals in relation to interlocutory functions should be modelled on the wider tribunals' template under the Tribunals Courts & Enforcement Act?

This seems sensible.

Question 18: What changes should be made to the EAT rules to ensure consistency with the new rules of procedure for employment tribunals?

We leave this to the Government to work out. It deserves its own consultation on the detail, even if an informal one.

Question 19: Do you agree that the introduction of a time limit of 14 days for the payment of awards, (with interest also accruing from this date), will encourage more prompt payments from parties?

14 days is too short. For a small business in particular, a tribunal award could be a very significant sum of money, and time may be needed to find the money. In the consultation document the Government says it needs to make sure that it fully understands the nature of the problem before bringing forward further proposals, and that more evidence is needed to understand why some respondents are not paying. We suggest the Government needs to carry out this work – and to understand the impact that a 14 day period could have - before deciding to impose any deadline, let alon one as short as 14 days.

Question 20: What, in your view, are the main reasons for non payment of awards? What more can be done within the current employment tribunal system to better enforce these awards?

The Government needs to carry out targeted research focusing on actual cases where awards have not been paid.

We hope you find these comments helpful. For further details please do not hesitate to contact me.

Regards,

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