CIPD
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Reforming the Employment Tribunal System

Submission to the Department for Business, Energy and Industrial Strategy & the Ministry of Justice

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Background

The CIPD is the professional body for HR and people development. The not-for-profit organisation champions better work and working lives and has been setting the benchmark for excellence in people and organisation development for more than 100 years. It has over 140,000 members across the world, provides thought leadership through independent research on the world of work, and offers professional training and accreditation for those working in HR and learning and development.

Our membership base is wide, with 60% of our members working in private sector services and manufacturing, 33% working in the public sector and 7% in the not-for-profit sector. In addition, 76% of the FTSE 100 companies have CIPD members at director level.

Public policy at the CIPD draws on our extensive research and thought leadership, practical advice and guidance, along with the experience and expertise of our diverse membership, to inform and shape debate, government policy and legislation for the benefit of employees and employers, to improve best practice in the workplace, to promote high standards of work and to represent the interests of our members at the highest level.

Our response

Our response does not answer each question set out in the consultation document in turn. Rather, we have discussed a number of topics identified in the document. These are:

- Panel composition
- A more digitally based system
- Delegation of judicial decisions to caseworkers

General comments

Firstly, we concur with the joint reform aims of the Ministry of Justice (MoJ) and Department for Business, Energy and Industrial Strategy (BEIS) to develop a just, proportionate and accessible system. It is in the interests of all users of the Employment Tribunal system that any reforms contribute to achieving an efficient and effective service. We particularly welcome the intentions set out in paragraph 5 of the consultation document and the continued availability of free conciliation and advice from Acas.

We also note the commitment set out by MoJ and BEIS officials at the stakeholder roundtable event on 9 January 2017 to continue engagement with organisations, such as CIPD, and build a wider group of interested stakeholders to help inform the design and

processes associated with the reforms of the Employment Tribunal system going forward, and we welcome the opportunity to be involved in any future consultation.

Question 7 of the consultation document asks whether we agree that *the proposed legislative changes will provide sufficient flexibility to make sure that the specific features of Employment Tribunals and the Employment Appeal Tribunal can be appropriately recognised in the reformed justice system?* While the consultation document highlights the uniqueness of the Employment Tribunals, which we support, we hope that the potential impact of some of the proposed reforms will continue to adequately accommodate the distinct nature of Employment Tribunals [ETs] and the Employment Appeal Tribunal [EAT], not least because of the impact that individual employment disputes can have on the wider employment relations climate in workplaces. While we respect the desire to 'bring all the tribunals in line', the unique identity (and 'current strengths', as the document acknowledges) of ETs and the EAT in considering disputes between two parties and not one party versus the state means that this goal may not be fully realisable in all aspects.

For example, we note the proposed transfer of responsibility for procedural rules in ETs and the EAT to the independent Tribunal Procedure Committee. Although the consultation document says that the MoJ will consult with BEIS 'as the department responsible for employment law policy before making any changes to the rules in Employment Tribunals', we feel that there is no compelling rationale for the transfer of the rules away from BEIS. We feel this could entail a detachment from that Department's in-depth understanding of employment relations by virtue of its strong, crucial relationships with stakeholders who are rooted in workplace practice and dispute resolution on a day-to-day basis. Such a transfer would also, in effect, distance the rule-making process for ETs and EATs away from Acas and its early conciliation service, as Acas is an executive non-departmental public body within BEIS.

Furthermore, we believe that any reform of the Employment Tribunal system needs to be approached in a holistic way, and in the context of other planned or already implemented reforms, such as the introduction of the fee structure in 2013. We note that this consultation document says the Government's post-implementation review of the impact of ET fees will be published in due course, but we would have welcomed publication of that review before responding to these proposals for wider ET reform. Both sets of reforms could have unintended implications for people's access to justice and cannot be considered wholly in isolation from each other.

We note that the House of Commons Justice Committee's own report on changes to fees for court users in the civil and family courts and tribunals in June 2016 noted that the 'clear majority of the decline' in employment tribunal cases is attributable to fees.[1] Our own survey of over 500 senior HR professionals on their views and experiences of employment

regulation in autumn 2016 found that a minority believe the present fees structure should be left as it is [34%], with 15% saying it should be abolished, 11% saying it should be reduced substantially, 19% of the view that a single £50 fee should apply to all claims and 5% reporting that the remission system should be made more generous.[2]

Our response

Panel composition

Paragraph 33 of the consultation document states that the changes will allow the Senior President of Tribunals to determine panel composition only on the needs of the modern reformed tribunal system and its users 'rather than basing decisions on the historic needs of those tribunals'. We agree that a key consideration for the panel composition of Employment Tribunals is that it should be based on the needs of its users, but consider that this does not equate with a further reduction in the use of non-legal members on panels. Nor do we believe that this view runs counter to the Government's overarching approach to reviewing the justice system based on whether the current approach to panel composition is proportionate and effective.

When the then 'industrial' tribunals were set up 50 years ago as a form of tripartite adjudication to determine employment disputes, at their heart was their composition of lay membership, and we need to carefully assess the potential implications for further reducing the involvement of non-legal members within this context. While the work of Employment Tribunals has evolved considerably over the decades (including the substantial increase in the type of employment-related claims to over 70 and their increasingly legalistic nature), at their core, Employment Tribunals and the Employment Appeal Tribunal continue to play fundamentally the same role in hearing workplace disputes. The rationale for having non-legal members on their panel, therefore, remains relevant, providing that their selection is based on a high level of competence and quality.

Lay members bring important insight and in-depth knowledge of the workplace from both sides of industry that builds a crucial perception of fairness and credibility for claimant and respondent alike. Research led by University of Greenwich in 2010-11 provided empirical evidence on the positive contribution that lay members make to the adjudicatory process; it found that lay members' main contribution 'derived from their provision of workplace experience, which the professional judges did not have, and their injection of a practitioner perspective which balanced judges' legal perspective.'[3]

The presence of lay members can also be an important reassuring presence for unrepresented parties. In the University of Greenwich research, respondents broadly

agreed that a three-person tribunal was likely to have greater legitimacy for the parties than a judge alone. It is vital that there continues to be confidence in the justice process for all, and panel composition and the involvement of non-legal members can be particularly important for claimants in cases involving discrimination and sexual harassment. It is worth noting that, at a time when the Scottish courts have recognised that a Sheriff on their own might benefit from external advice in discrimination issues (and is therefore seeking to appoint Equality Assessors), the ET is seeking to make provision for discrimination claims in an employment situation being heard by judges sitting alone.

The industry experience of non-legal members, which Employment Judges typically cannot be expected to have, can also contribute significantly to the consideration of whether a party behaved reasonably, which fundamentally underpins the decision making process in the complex arena of employment law. We agree with the view of the Employment Lawyers Association [ELA] [in its response to the Government's *Proposals for Transforming our Justice System: Panel Composition in Tribunals]* that '*generally, where the facts are in dispute in an Employment Tribunal claim, it is considered that the quality of decision-making is higher, and the appearance of justice being done is greater, when lay members are present.'*[4]

We recognise that, since 2012, many ET cases are heard by an Employment Judge who sits alone, including for most unfair dismissal claims, but the current situation allows for the Judge's discretion in deciding that that a full panel be convened to hear a particular case in some circumstances, including the wishes of the two parties. We believe that there is merit in retaining this approach. For more complex cases, particularly discrimination cases (and, we would contend, many unfair dismissal cases), lay members can bring valuable industry insight to help inform the decision-making process. The consultation document says that the 'right approach is one where non-legal members are deployed where circumstances require it, and their expertise is relevant to the outcome of the case' – but what are these circumstances likely to be, what is the criteria against which decisions will be judged, and from what pool of industry experts will lay members be drawn? Also, under these proposals, if it is deemed necessary to draw on the expertise of non-legal members in a particular case, would it be the case that two lay members would be drawn from both sides of industry and sit on an equal footing with the Employment Judge as in the present system?

Further, as mentioned above, issues dealt with in an ET can have far wider implications for employment relations in an organisation, and the involvement and expertise of non-legal panel members can be pivotal in not only helping to resolve the claim at hand, but in helping to build the wider employment relations climate in some cases – a consideration that no other type of tribunal can claim. Lay membership typically comprises a panel member drawn from the trade union side and another drawn from the employer side who is often a HR specialist – as such they can, therefore, add an additional perspective of

good employment practice to the consideration of cases that can be of wider benefit to employment relations within organisations in the UK.

Modernising the handling of Employment Tribunal claims: a more digitally based system

The CIPD welcomes developments to modernise the handling of Employment Tribunal claims and any increased efficiency and streamlining of cases that can be achieved for users through greater use of technology. As the consultation document makes clear, the majority of ET claims are already lodged online and we can appreciate the further potential benefits that could lead to swifter resolution if essential information can be shared more quickly via a 'common digital portal'.

However, as discussed at the stakeholder roundtable on 9 January 2017, the ability of people to access a digital system of justice can be affected by both practical issues – such as lack of availability of high speed broadband connection which is still a significant barrier for significant parts of the country – as well as equality issues where there may be a disproportionate impact, including for some low-income individuals who do not own a computer and/or have internet access. This demographic includes older workers who may not be as 'internet savvy' and people with a disability such as a mental health condition or learning disability who may experience communication barriers.

Both types of accessibility issue need to be taken into account, and we take assurance from the response of officials at the roundtable that users of the system will continue to be able to engage with the system in the same format as now (e.g. paper) if required. We would hope that this conventional route would continue to be available as an alternative safety net to digital systems on an on-demand, ongoing basis for any applicant who expresses a preference for a paper-based channel for access to justice

We welcome the Government's consideration of responses to its earlier consultation on Assisted Digital Strategy, and its recognition 'that appropriate targeted support will be required to ensure that those with limited or no digital capability are not disadvantaged.' We are pleased that the Government intends to use a range of different communication channels to support a digitally enhanced system, including face-to-face assistance, a telephone help service, web chat and access to paper channels for those who require it (paragraph 24). Further, while we welcome the combination of channels that the Government plans to introduce, we urge the Government to carefully consider critical success factors such as the level of training given to staff and the user's journey through the telephone advice service, and the adequate resourcing and staffing of telephone and web chat services.

However, while we understand the Government's aim to enhance flexibility in how claims are handled, we do have some reservations if firmer plans emerge to move towards a system of online determination for claims. We, therefore, welcome the Government's agreement with some responses from legal representative groups to the interim Briggs report that complex claims such as discrimination would be 'wholly unsuitable for online determinations'.[5] However, even seemingly more straightforward claims can develop more complexity than is obvious on first sight, and most types of claim can require a broader understanding of the employment situation, meaning that it could be hard to capture online. We understand from the discussion at the roundtable on 9 January that any decision to introduce online determination of claims would be on a consent basis from the parties involved, but unrepresented parties in particular may not always be in a fully informed position to make the best decision in respect of any wider potential implications.

A physical hearing enables the Employment Judge to develop an in-depth understanding of the case by questioning the parties involved first-hand, and directing the parties to consideration of the appropriate issues. This helps to ensure that there is a fair outcome, particularly where the parties are unrepresented, and it's difficult to see how this process could be replicated online, and also ensure that some individuals are afforded the environment to be able to express their case effectively and provide the necessary paperwork. Given that most claims are successfully resolved following conciliation by Acas, and only proceed to a hearing where positions are entrenched and relationships likely to be compromised significantly, it's also hard to envisage how a more remote, online process will be more effective in handling these types of dispute that are likely to be the most antagonistic.

Delegation of judicial decisions to caseworkers

We note that there's already delegation of judicial functions to legally qualified or trained HM Courts & Tribunals Service staff, under judicial supervision, across the civil and family courts and tribunal systems, as well as the commitment set out in the roundtable on 9 January by officials that delegation to case workers for the employment tribunals would not mark a return to the previous 'rapid resolution' framework or the determination of final substantial decisions.

We would welcome more clarification of the caseworker role and the postholder's expected remit. For example, **paragraph 27** of the consultation document states that the duties of caseworkers in other tribunals are 'mainly procedural', giving the example of consideration of the timeliness of appeals. However, this is one example where the demarcation between what represents an administrative as opposed to a judicial activity in the area of employment law may not be as straightforward to determine as assumed. Currently, employment judges have the scope to bring their judicial judgment to bear on

decisions about timelines and matters that may be out of time. Cases heard by the ET are, by their nature, highly adversarial, and matters that may seem procedural, such as requests for postponements, could be a challenging and highly controversial issue for a caseworker to handle.

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References

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