

An IER response to the
Law Society consultation:
*How Should Employment Tribunals
Operate in the Future?*

By
**Nicole Busby
Michael Ford
Morag McDermont &
David Renton**

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The Institute of Employment Rights
4TH Floor
Jack Jones House
1 Islington
Liverpool
L3 8EG
0151 207 5265
www.ier.org.uk

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Carolyn Jones

Director, Institute of Employment Rights

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cad@ier.org.uk

07941 076245

Nicole Busby, Chair of Labour Law at the University of Strathclyde

Michael Ford, Barrister at Old Square Chambers

Morag McDermont, Professor of Socio-Legal Studies at the University of Bristol

David Renton, Barrister at Garden Court Chambers

Introduction

This response is written against the background, as the Law Society document notes, of the requirement since July 2013 to pay a fee in order to bring a claim in the employment tribunal (ET) or employment appeal tribunal (EAT).¹ The IER is extremely concerned that in practice fees often present an insurmountable barrier to access to justice. It is wrong in principle that claimants, who already face a very substantial risk of non-recovery of tribunal awards even if successful, should have to pay for the public good of resolving disputes at work. Without reform of fees and guarantees of real access to justice, debates about other changes to the system resemble arguments about angels on pin-heads.

We set out in the next three sections our responses to the specific questions raised by the Law Society, and in the final section some additional issues that the IER believes requires consideration in the context of the consultation.

1. Alternative Dispute Resolution

How can parties be encouraged to use ADR?

The term 'ADR' is used to refer to a range of distinct practices (arbitration, conciliation and mediation). The success of the range of ADR techniques depends on their use as voluntary processes. Accordingly, the use of ADR should not, in our view, be encouraged in *all* employment dispute contexts but should coexist alongside free access to the ET which will remain the only viable option in many cases. In addition, ADR is not an alternative to independent legal advice which will still be a necessary component of any process as a means of assisting parties to make informed decisions and which, in our view, should be available without charge to those workers who are unable to pay.

Against this backdrop, the IER has reservations about the Government's current approach which assumes that certain ADR techniques and processes are always suitable alternatives to the Employment Tribunal (ET). Recent government initiatives, such as the introduction of Acas's mandatory early conciliation scheme, are aimed at promoting mediation and conciliation (with less focus on arbitration) as alternatives to the ET. However, judicial determination differs substantially from these methods of dispute resolution. In contrast to litigation, conciliation and mediation are neutral processes aimed at the facilitation of agreement between the parties. As such, they are not concerned with the quality of the outcome or settlement reached and the measure of success is that both parties agree on the outcome rather than on the justness of the agreement. An underlying assumption is that the parties know their legal rights and understand the implications of the settlement. The Government's desire to keep disputes out of the ET assumes that potential claimants, rather than being the victims of injustices, are merely involved in disagreements with their employers. In fact, the circumstances which are likely to lead to an ET claim make it more probable that an employee will be seeking to assert legal rights rather than to reach a compromise with his or her employer. Individual decisions regarding whether to go to the ET are often driven by the notion that the dispute can only be remedied by a full hearing before an impartial judge. Mediation and/or conciliation are unlikely to be viable options in such cases.

¹ See the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013.

Setting these reservations aside, there are still many circumstances in which ADR processes such as conciliation and mediation may be used effectively to broker agreements in workplace disputes at an early stage (i.e. before they become too contentious and entrenched and certainly prior to the relationship irretrievably breaking down). In such circumstances the use of ADR is more likely to be accepted by the parties and, thus more likely to succeed, if it can be kept within the confines of the workplace with a primary aim being to preserve the employment relationship. Greater engagement with trade unions and other forms of employee representation on the part of employers is crucial here. In addition, targeted research involving cost-benefit analysis may be an effective means of promoting the use of ADR in such circumstances.

What stops people from using ADR?

One of the main barriers (for both parties) to engaging in ADR is a lack of trust in each other as well as in the process itself.² On the part of the worker, this is likely to be linked to the need and desire to achieve a specific remedy in relation to an injustice perpetrated by the employer such as the recovery of unpaid wages or a compensatory award, often by the assertion of a statutory right. The issue of timing (discussed above) can be crucial in determining whether ADR is a viable means of resolution with entrenched disputes which last beyond termination of employment and are unlikely to be suitable targets for conciliation and mediation.

Another identified barrier is a lack of awareness of such options on the part of both parties, although the introduction of mandatory early conciliation through Acas means that this is unlikely to be the case any longer at least in relation to those who are considering an ET claim. The cost of mediation can also prevent its use.

Ironically, some recent government policies aimed at promoting the use of ADR may have had the opposite effect. The dramatic reduction in ET claims following the introduction of fees has not led to a corresponding rise in the use of ADR. This suggests that many employers have no incentive to engage in any form of dispute resolution since the threat of an ET claim has been removed. Referring to the pre-fees era, Dickens suggested that the fact that conciliation took place 'in the shadow of the ET' influenced parties' decision-making encouraging them to engage with alternative resolution processes as a means of settling disputes.³ In that context conciliators were able to contrast the current process with what might happen in the ET including references to success rates, the strength of legal arguments, available and likely remedies and costs (financial and other costs including negative publicity). The lack of access to the ET caused by the introduction of fees means that this is no longer the case.

Are there any types of ADR that should be used more in employment disputes? For example arbitration. If so, how could these forms of ADR be encouraged?

² Acas (2005) *Making More of Alternative Dispute Resolution*.

³ L. Dickens 'The Role of Conciliation in the Employment Tribunal System' in *Access to Justice in Employment Disputes: Surveying the Terrain* (eds N. Busby, M. McDermont, E. Rose and A. Sales), IER 2013.

In contrast to the neutrality of mediation and conciliation, arbitration adopts an adjudication-centred approach which might enhance its appeal in certain circumstances. For example, the judicial nature of the process and outcome might satisfy those seeking a formal approach and may also overcome the lack of concern for a just outcome in mediation and conciliation outlined above. Arbitration may offer certain benefits over the ET for both parties: case management can be more efficient and flexible and the parties can retain a degree of autonomy not always possible in litigation, for example in relation to the choice of jurisdiction. However, it is not necessarily cheaper than the ET with the free arbitration service offered by Acas only available for disputes concerning flexible work requests and dismissal. Furthermore, where arbitration is used as an alternative to the ET, it is important that every effort should be made to protect the worker's interests. The confidential nature of proceedings and awards means that there is a lack of transparency and external scrutiny and prevents the sharing of legal arguments and outcomes that have wider benefits for the development of the law. Without a system of open justice, it is not possible to ensure that the imbalance of power between worker and employer is addressed. The binding nature of arbitration and lack of an appeals process mean that it is often not a viable alternative to the ET for the worker. If its use is to be encouraged in the employment context, we would stress the need for free independent legal advice and representation to be made available to all workers who are unable to afford such services.

How has Early Conciliation been working? Can it be improved?

The statistics covering the first six months (April – September 2014, for the first month of which the scheme was voluntary) of the Early Conciliation (EC) scheme⁴ show that Acas was contacted over 37,000 times with 36,162 employee notifications and 1,242 employer notifications. Following notification, only about 10% refused conciliation. The Acas data shows outcomes for the 17,162 cases for which notifications were made between April and June: 18% of the contacts resulted in a COT3 settlement; 24% went on to become ET claims by the end of October; and 58% did not result in either outcome. Despite the time lag in respect of some cases which may not have been presented as ET claims at the time the statistics were compiled, it is clear that the majority of cases are not settling and nor are they going to ET. One possible explanation might be that that, following the initial engagement with Acas and taking into account the employer's response, employees deduce that their claim is unlikely to succeed in the ET and decide not to proceed. An alternative and more likely explanation is that, having decided that conciliation is not a suitable means of resolving the dispute would-be claimants are confronted with the next barrier to accessing justice in the form of the ET fees.

Pre-fees, submission of the ET1 was a way of procuring certain information through the ET3 response. However, with the introduction of an issue fee and the repeal of the discrimination and equal pay questionnaire procedure, it is increasingly difficult for some workers to access any information which is relevant to their case.

The statistics tell us that, although EC can be used effectively in some disputes, it is not a suitable alternative to the ET in the majority of cases which, in the post-fees

⁴ <http://www.acas.org.uk/index.aspx?articleid=5069>

era, are simply not resolved by any means. Improvements to the EC scheme are unlikely to have a substantial impact on the number of COT3 settlements but some improvements could be made for those unrepresented workers whose claims could and should proceed to the ET. Firstly, the timing of the notification is critical. The dispute might persist beyond the point at which the Acas notification has been made, for example if victimisation occurs as a result of the notification. In such circumstances is the employee required to make a separate, later notification to Acas? The answer to this question is currently unclear. Likewise, in constructive dismissal cases the dismissal will not be deemed to have occurred until the employee has resigned and so the Acas notification should not be made until after that point. Further difficulties might arise in relation to the identification of the employer which is not always as straightforward as it should be, particularly for agency workers. These examples demonstrate the EC can be a minefield for those who cannot afford to pay for legal advice and/or ET fees.

Do some employers have practices or rules which discourage ADR? If so, what are they and should they be changed?

The IER is not in a position to advise specifically on this. However, as outlined above, the introduction of ET fees are likely to have served as a disincentive for some employers to engage in any form of dispute resolution.

Should judicial mediation be revived? If so, how?

Following its introduction judicial mediation (JM) was seen as a suitable means of resolving certain types of dispute. It retains the independence of a court-like process but without the formality, expense and timing issues of the ET and, due to its non-adversarial nature, enables the parties to retain autonomy and flexibility in the process. Parties also benefit from the confidential nature of JM in certain circumstances, particularly where the employment relationship is ongoing. As a free process, JM enjoyed a high success rate with 65% of cases reaching settlement on the day of the mediation.⁵ However, JM is not necessarily a cheaper alternative to the ET and so the introduction of a fee of £600 payable by the respondent has largely diminished its use. If it is to be revived, the fee should be substantially reduced or removed. As in all of the other ADR processes outlined above, the IER firmly believes that workers entering judicial mediation should have access to independent legal advice which should be provided free of charge to those who cannot afford it.

2. Decision Making in Employment Tribunals

Of the Law Society's questions under this heading the first - on the actual enforcement of legal rights - is fundamental. Effective access to justice is a fundamental right, recognised as such by the common law⁶ and international human

⁵ <http://hmctsformfinder.justice.gov.uk/courtfinder/forms/t612-eng.pdf>

⁶ This common law right was described by Laws LJ as 'as near to an absolute right as any which I can envisage': see **R v Lord Chancellor ex parte Witham** [1998] QB 575.

rights instruments,⁷ which is currently being denied by the tribunal system. It substitutes a race to the bottom for any notion of justice at work. The IER is already concerned about a legal framework which excludes many people from legal rights even in theory - for example, the notionally self-employed⁸ or those with insufficient qualifying service to bring claims of unfair dismissal. But it assumes that these issues are beyond the scope of the Law Society's consultation, so that its comments are addressed to the difficulty of enforcing existing legal rights.

Areas of law or sectors where people cannot enforce their rights.

There is limited empirical evidence on which legal rights are not enforced and in which sectors - perhaps because it is hard to capture information about why potential claims are not brought. The tribunal system is largely blind to this population, who may not even know they have a potential claim. But the IER considers the employment sphere was already characterised by the systemic non-enforcement of legal rights in many sectors before fees; now, with fees, the infection has spread.

Certain sectors, typically those involving low-paid, non-unionised workers, are greatly under-represented among tribunal claimants; examples are many service industries and small employers. It is a remarkable fact that few race discrimination claims have been brought, for example, in the construction sector or the hotel industry. A significant gender pay gap has been a persistent feature of the labour market⁹ yet it was only recently that claims succeeded in challenging persistent and blatant pay discrimination, and then only in the public sector. In other areas, regulations designed to promote fairness are probably irrelevant in practice because almost no claims are in fact brought: the Agency Worker Regulations 2010, designed to protect agency workers against discriminatory treatment, are probably a recent example.

There are no doubt many reasons for this, most of which are for sociologists not lawyers. They include ignorance of legal rights, fear of the legal process, and the complexity of the law; the routine absence of legal advice - advice from CABs is limited, and many are unwilling or unable to provide it owing to the level of expertise or resources required;¹⁰ the increasingly formal and legalised nature of tribunal claims, and the absence of affordable legal representation for claimants; fear of sanctions, especially for those in employment; the difficulties of obtaining evidence or proving a case in areas such as discrimination;¹¹ the small value of many claims (e.g. unpaid wages, redundancy payments, unpaid holiday); the low awards

⁷ See Article 6 ECHR and, in the context of EU-backed rights, Article 47 of the Charter of Fundamental Rights of the EU, stating that 'everyone has the right to an effective remedy before a tribunal'.

⁸ An issue which has arisen in the recent collapse of Citylink, because many of its drivers were 'employed' by companies, set up by Citylink, which then contracted with Citylink to provide delivery services to it - an attempt to avoid any employment relationship at all.

⁹ See e.g. the Equality and Human Rights Commission's triennial review, *How Fair is Britain?* (2010).

¹⁰ <http://www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/>

¹¹ Reflected in rules on the burden of proof.

of compensation made by tribunals;¹² the practical irrelevance of orders of reinstatement and re-engagement; and the difficulty of returning to a workplace in which relationships have been damaged by an adversarial process.

An additional significant factor, which demonstrates the systemic failure of the state to enforce even legal rights which *have* been vindicated (itself a potential breach of Article 6 of the ECHR¹³), is the woefully inadequate enforcement regime. Recent research by BIS¹⁴ confirmed the dismal record under the previous enforcement regime,¹⁵ concluding in stark terms that “there is an even chance that individuals who receive a monetary award at an employment tribunal will not receive payment of their award without the use of enforcement”. Even *after* initiating enforcement action - in the County Court - the BIS research found that only 49% of claimants were paid in full, with a further 16% paid in part, meaning that 35% received no money at all. There is no evidence to suggest *any* improvement in this system, which has been largely overlooked in the debate on fees.

The existing difficulties which claimants face have now been greatly exacerbated by the fees regime. Comparing the nine-month period since October 2013 with the same period prior to the introduction of fees shows an 81% drop in the number of claims received and a 76% average decline across all jurisdictions (see Appendix 1).¹⁶ Moreover, these figures only show the effect of the *issue* fee, and it is obvious that the need to pay the substantially higher hearing fee¹⁷ at a later stage will have a further powerful deterrent effect.¹⁸ The grossly unfair result is that even a successful claimant bears the risk of not recovering the tribunal award or an order for payment of the fee - said to be a “particular concern” in the BIS research on enforcement,¹⁹ only to be addressed in Panglossian terms by the government in the fees

¹² See the *Tribunals Statistics Quarterly* (March 2014), showing median awards in 2012-13 of e.g. £4,832 for unfair dismissal, £4,831 for race discrimination, £5,900 for sex discrimination and £7,536 for disability discrimination.

¹³ See **Apostol v Georgia**, Application No. 40765/02.

¹⁴ See Department for Business Innovation and Skills, *Payment of Tribunal Awards: 2013 Study* (IFF Research).

¹⁵ See above p 5. The early research by the Ministry of Justice, *Research into Enforcement of Employment Tribunal Awards in England and Wales* (2009), similarly found that between four months and a year after a tribunal judgment, about a half of claimants (53%) had been paid in full.

¹⁶ See the attached spreadsheet, derived from the Ministry of Justice *Tribunals Statistics Quarterly*.

¹⁷ For a “Type A” claim the issue fee is £160 and the hearing fee is £230; for a Type B the corresponding amounts are £250 (issue) and £950 (hearing).

¹⁸ There are no reliable statistics for how many claims are dismissed because a claimant could not pay a hearing fee. The latest official statistics simply record how many claims were dismissed under rule 40(1) for non-payment of a fee, which could include on issue or at a hearing (and a claim may be withdrawn without reaching that stage). However, the figure is still high: between July and September 2014, 8% of all disposals were under rule 40: see *Tribunal Statistics Quarterly, July to September 2014* at p 12.

¹⁹ See note 10 above p 5.

consultation.²⁰ Claimants, not the state, are in effect the guarantors of the fee system: the financial burden has been placed on those parties least able to support it.

The remission system has not in practice produced any significant mitigation of the impact of fees. Between July 2013 and June 2014, a total of 3,913 remissions were granted²¹ of which 2,178 were single fee remissions.²² From 1 July 2014 until the end of December 2014, a total of 3,459 single claim remissions were granted.²³ Prior to the introduction of fees, for the year ending April 2013, 54,701 single claims were received,²⁴ extrapolated to about 82,000 for an eighteen-month period. Even ignoring the element of double counting in the figures on remissions,²⁵ it seems clear that less than 10 per cent of the previous population of claimants obtain remission.²⁶

There are obvious reasons for this. Quite apart from the complexity of the criteria and the amount of information required - a particular problem given the short limitation periods in the ET- anyone with a household disposable capital exceeding £3000 is ineligible *tout court*. For this purpose, a partner's resources, redundancy and notice payments, and the value of resources which could be sold on the market (save for household effects) less 10%, are all included.²⁷ Thereafter there are strict gross monthly income limits, which again include a partner's income.²⁸ What rational economic agent, recently made unemployed, would bet their (and their family's) redundancy and notice payments and pay a fee for e.g. an unfair dismissal or wages claim, knowing that the likely award will be low and that the prospects of ultimate enforcement are extremely poor?

Against that background, the IER believes that we have reached the point in which the actual enforcement of employment rights has become the exception, not the norm, restricted to those few highly-paid individuals for whom legal costs and fees are not a significant burden, those claimants who are fortunate enough to be

²⁰ The IER made this point in the consultation on fees. The response of the government was to state that 'we expect all parties to abide by the decision of the tribunal and pay awards and fees as ordered' (*Charging Fees in the Employment Tribunals and the EAT: Response to Consultation*, p 26).

²¹ See answer in Parliament by Mr Shailesh Vara, Minister for Courts and Legal Aid, on 15 October 2014 at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2014-07-15/206019/>.

²² Evidence in the latest fees judicial review.

²³ See answer in Parliament by Mike Penning for Ministry of Justice on 26 January 2015.

²⁴ See *Tribunals Statistics Quarterly* (September 2014), Table 1.2.

²⁵ See the Hard Labour Blog, *At Remission Control, the Lights are on but Nobody's Home*, at <http://hardlabourblog.com/2015/01/28/vara-remission/>.

²⁶ Between July 2013 and December 2014 the total is 5,637 single remissions. This is less than 7% of the estimated 82,000 claims.

²⁷ See Schedule 3 to the Fees Order, paras 4-10, and the summary by the High Court in **R(UNISON) (No.2) v Lord Chancellor (Equality and Human Rights Commission intervening)** [2015] IRLR 99 at paras 19-22.

²⁸ See Fees Order, Schedule 3 at paras 11-14.

supported by a union, or those forming part of a significant multiple action. There is no evidence that fees have deterred weak or vexatious claims;²⁹ instead, they have deterred all types of claims, but especially those important claims for low amounts or which are hard to prove.³⁰

This penalisation of claimants is not matched by any equivalent burden on employers. Employers do not have to pay a fee to defend a claim; even if a claimant is successful, they may not be awarded the full fee;³¹ even if a fee is awarded to a claimant at the conclusion of a hearing, the hopeless enforcement regime means it will often be unpaid. The recent ill-thought out provision by which tribunals may order an employer to pay a penalty if the breach of workers' rights has "aggravating" features has, to date, resulted in precisely *zero* penalties.³²

The IER proposes that, as a first and fundamental step, it is essential that the fees regime is abolished. Owing to fees, the role of the law in modifying and improving employment relations and business practice, such as in the realm of discrimination, is at risk of disappearance. Access to justice has become illusory, and the rule of law itself is undermined.

If fees are retained by a new government, still the system needs radical reform. We set out our proposals in the third section.

How can cases be better managed?

The IER believes that cases continue to be plagued by an over-legalistic approach, in which an adversarial system diverts too much money into lawyers' pockets and gives too much advantage to the side which can pay for the best representation. It believes fundamental changes are needed to the system to ensure that access to justice is a reality. We believe that the tribunal should play an increasingly interventionist role, should be less dependent on the evidence presented by the parties and should occupy a hybrid role between mediation and judicial determination – perhaps along the lines of the Central Arbitration Committee.

Changes to case management should include:

- (1) Tribunals taking a more inquisitorial role, including tribunals owing an active duty to investigate the issues themselves, to order disclosure of what

²⁹ See the latest tribunal statistics, *Tribunals and Gender Recognition Statistics Quarterly* (December 2014) at Table 2.3, showing no discernible increase in success rate of claims at hearing since fees were introduced.

³⁰ See e.g. the 78% decline in wages claims since fees were introduced (see attached Excel spreadsheet) - claims which tend to be good claims but for low amounts.

³¹ The tribunal retains a discretion in rule 76(4); and see the summary of the EAT case-law in **R(UNISON) (No.2)** at paras 17-18.

³² See s.16 of the Enterprise and Regulatory Reform Act 2013, inserting a new s.12A in the Employment Rights Act 1996, and written answer of Jo Swinson to question from Ian Murray in Parliament on 16 December 2014.

they consider to be relevant documents, to ask written questions and to order the attendance of witnesses.

(2) Case management taking place on the phone as much as possible, to avoid additional cost or inconvenience.

(3) Attempts at early speedy mediation to see if disputes can be resolved quickly enough to enable e.g. an employee to return to work or before significant legal costs are incurred.

(§) A reduction in the reliance on written pleadings and written witness statements, which inevitably favour the party with the best drafters, and instead a greater power on the part of the tribunal to call and ask questions of witnesses.

Would disclosure earlier than at present be of assistance? If so, in what way?

Once more, the fees regime presents a particular problem. A claimant may, for example, have a perfectly proper basis for bringing a claim based on the limited information in his or her possession, only to discover after paying an issue and/or hearing fee that various documents demonstrate the claim is weak. If the claimant then properly tries to withdraw the claim, this is likely to be met by a threat of costs and any fee paid not recoverable. The *Catch 22* means a claimant is often better off litigating a weak claim than withdrawing it.

Late disclosure is a particular problem in discrimination cases, in which the difficulties of proof have long been recognised by the courts.³³ For this reason, the EU Directives, the European Court of Human Rights³⁴ and the domestic rules³⁵ all recognise that a claimant need only show apparent evidence of discrimination, at which point the burden passes to the employer to explain the reason for the treatment.³⁶ This most clearly arises in areas such as equal pay, indirect discrimination, reasonable adjustments in disability discrimination or cases based on non-selection for posts, when the relevant knowledge of the reasons for the decision is uniquely held by the employer. In tension with these rules, a claimant with a good *prima facie* case must now pay a fee simply to discover if the claim in fact has reasonable prospects of success.

Domestic law used to include a questionnaire procedure, allowing a claimant to make inquiries of an employer in discrimination cases, which was re-enacted in s.138

³³ See e.g. Lord Browne-Wilkinson in **Glasgow CC v Zafar** [1998] ICR 120 [A26] at 125C-126C, citing Neill LJ in **King v Great Britain China Centre** [1992] ICR 516.

³⁴ See the Grand Chamber in **DH v Czech Republic** (2008) 47 EHRR 3.

³⁵ See Article 19 of the Equal Treatment Directive, Article 8 of the Race Directive 2000/43/EC and Article 10 of the Framework Directive 2000/78/EC, implemented domestically (now) by s.136 of Equality Act 2010.

³⁶ See the recitals to the original Burden of Proof Directive 97/80.

of the Equality Act 2010.³⁷ Despite the almost universal opposition of consultees, this provision was repealed.³⁸ The problem of claimants not being able properly to assess the prospects of success in discrimination claims without disclosure was noted by the Divisional Court in the first fees judicial review, but its exhortation that tribunals “encourage” disclosure before a hearing fee is payable does not reflect the ET rules or practice.³⁹

The IER believes again that early disclosure is essential - and should take place before a claim is even issued (especially if a fee is payable). It considers that: (i) the statutory questionnaire procedure in s.138 EqA should be re-enacted; (ii) there should be a power for a claimant, in an appropriate case, to seek pre-action disclosure of the sort which is permitted in the civil courts;⁴⁰ (iii) as set out below, tribunals should adopt a more inquisitorial role and, once alerted to a dispute, should themselves owe a duty to consider what documents may be relevant, to order production of documents, to ask written questions and to try and mediate disputes;. A failure to comply with disclosure orders or to answer appropriate questions should lead to appropriate sanctions, stronger than the duty in (former) s.138 of the Equality Act by which a tribunal could draw an inference from a late or evasive reply.

If fees are retained - to which the IER is completely opposed - there *must* be a procedure for pre-action disclosure (perhaps modelled on the personal injury protocols) and disclosure and exchange of witness statements *must* take place in sufficient time before any hearing fee is due to enable a proper assessment of the evidence. If, following disclosure, a claimant withdraws a claim with reasonable promptness, any fees paid should be reimbursed.

Should lay members be retained and if so in what form?

The IER strongly believes that it is essential that lay members are retained for final hearings if the system is to retain any legitimacy in the eyes of the public and parties. A legally qualified chair has almost no relevant expertise to bring to bear on whether a dismissal is within the range of reasonable responses for the purpose of unfair dismissal, for example. The current rules,⁴¹ requiring lay members in cases such as discrimination, but excluding them in areas of legal or factual complexity or where their expertise is most needed (such as working time, breach of contract, or unfair dismissal) appear arbitrary and badly thought-out. Lay members play a central role in shaping the fairness of the tribunal hearing itself - they tend to curb the worst excesses of poor EJs - as well as in legitimating the outcomes. The more the tribunal process and hearing is in hands of an EJ alone, the more it is likely to resemble the

³⁷ See s.138 of the EqA 2010 by which a person could ask for information, and a failure to answer or an evasive or equivocal reply could be relevant: see s.138(4)

³⁸ See s.166 of the Enterprise and Regulatory Reform Act 2013.

³⁹ See **R(UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening)** [2014] ICR 498 at paras 26-27.

⁴⁰ See e.g. the Pre-Action Protocol for Personal Injury Claims.

⁴¹ See s.4 of the Employment Tribunals Act 1996

formalised procedures of the civil courts, the greater the need for lawyers on each side, and the less likely are any mediated solutions.

Should employment judges become more inquisitorial?

As discussed above, the highly formalised, legalised way in which Employment Tribunals have developed effectively excludes many workers from being able to pursue their rights in an independent legal forum. The adversarial nature of ETs creates an enormous power imbalance between the unrepresented claimant and the employer with a team of legal experts which unrepresented claimants often experience as bullying. Most critically, if a claimant is unaware of the legal issues they should be raising, the case cannot be effectively heard due to the adversarial process.

If employment judges were to become inquisitorial this would go some way towards shifting the power imbalance. Such a system would mean that the judge rather than the party would drive the investigation. The judge (or perhaps a registrar acting under the instruction of the judge) would take an active role in collecting evidence and interrogating witnesses prior to the hearing. The hearing would then become a process in which the evidence (which has been made available equally to all in advance) is set out, with the judge questioning witnesses, the claimant and the respondent. If judges were provided with appropriate training they would be able to conduct the hearing in such a way that the unrepresented claimant was able to tell their own story, rather than having to respond to aggressive questioning by the employer's legal team. Hearings would become less formal, enabling the claimant back in to the process. Under such a system hearings would most likely be shorter as much of the investigation had been carried out beforehand.

However, an inquisitorial system should not be seen as justice on the cheap. For such a system to allow for a fair investigation of the issues the tribunal must be sufficiently resourced.

Is there a place for early neutral evaluation?

The current judicial "sift" in rules 26-28 is not objectionable in principle. But the IER considers that this sift should be accompanied by more active inquisitorial powers. At present, if the claim or response is allowed to proceed following the sift, the EJ simply makes a case management order.⁴² Often these are simply standard in form, and based on the sorts of orders in an adversarial trial in the civil courts - ordering, for example, disclosure of documents, the production of a bundle, and exchange of witness statements as well as listing the case for hearing. In effect they simply leave, in almost all cases, the parties and their advisors to sort out the hearing, with the tribunal only stepping in as referee if the parties request them.

This whole process needs to be rethought. If both sides are legally represented, the costs are high; if one side is, they are likely to have a great advantage; if neither side is, both are likely to have difficulty understanding the process. Experience shows that few lay parties, for example, understand which documents should or should not be disclosed, what narrative should be included in a statement, how evidence-in-

⁴² See rule 27(4) and 28(4).

chief or cross-examination should be conducted, or the distinction between law and facts.

The IER believes that the least worst means of redressing this is for the tribunal itself to be much more actively involved in the process - it should take a central role in identifying the issues, requesting relevant documents, deciding on witnesses and even taking evidence. A process to a degree along these lines it taken by the Certification Officer, when the complaint is against a trade union.⁴³ A hybrid of judicial determination and mediation is illustrated by the Central Arbitration Committee. Such a procedure is more demanding in tribunal time but *should* mean lawyers are less essential - their use could be actively discouraged - with reduced social costs; and it begins to redress the unfairness inherent in a system in which the party who pays the most obtains the best representation. It is time to abandon the pretence that an adversarial system is fair in a relationship characterised by gross inequality in resources, and adopt a more radical alternative.

Is there a place for making a decision on papers only?

There is certainly a need to find more appropriate ways of dealing with the large number of relatively small-value claims (such as unpaid wages or holiday pay). However, these claims, whilst low in value, can still involve legal complexities (for example, the identity of the employer) requiring that decision-makers have the required expertise. We would suggest that alternative mechanisms, more regulatory in nature be considered for such matters (e.g. look to Minimum Wage enforcement mechanisms), and extending the powers of existing regulators such as HMRC.

Should a costs regime be brought into the employment law cases? If so, how would this work?

The IER is strongly opposed to costs in the employment tribunal. They are likely to present a further insurmountable barrier to access to justice for many deserving claims.

The IER is very concerned, however, that a covert form of costs regime is creeping into the tribunal system. Although the ET rules 2013 include the same provisions on when costs orders may be made as previous versions of the rules,⁴⁴ the practice of employment tribunals has changed. Threats of cost applications and applications for costs are much more frequently made - there is little incentive on a successful party not to make such an application - and ordered. Although the appellate cases stress that an award of costs is exceptional,⁴⁵ they also treat the matter as a discretionary matter for an employment judge, leaving a large freedom for the judge and generating a high level of uncertainty when such orders will be made. The problem of unpredictable decisions is more acute now that an EJ may assess costs in excess of

⁴³ See e.g. s.108A of the Trade Union and Labour Relations (Consolidation) Act 1992.

⁴⁴ See rule 76.

⁴⁵ See e.g. **Lodwick v Southwark LBC** [2004] ICR 892 per Pill LJ at para 23; **Yerrakalva v Barnsley MBC** [2012] ICR 422 per Mummery LJ at para 7.

£20,000.⁴⁶ Because EJs are recruited from solicitors or barristers, their personal viewpoint is to see the level of legal costs as reasonable, rather than whether it is reasonable that someone should pay them. The net result is that parties are at the mercy of individual EJs. This is especially a problem in areas where the outcome of proceedings is itself hard to predict - as e.g. in many discrimination claims. Conversely, where a claimant has a strong case and can bring a claim in the County Court - for example, for underpaid wages - it may be preferable for them to do so.

Thus, from the claimant's viewpoint, the tribunal system is currently combining the worst of both worlds. There is an increasing but unpredictable risk of costs against an unsuccessful party, but no guarantee that a claimant with a strong case will receive costs. In many ways, claimants would be better off with a full costs regime, since then it would be easier for them to obtain legal representation: lawyers could then act, knowing that if successful they would recover their legal costs. But if this is to happen, the logic is to abandon the tribunal system altogether.

Once more, the IER considers that radical reform is needed. Employment tribunals should return to their original function of providing quick and accessible justice at no cost and, so far as practicable, with minimal involvement of lawyers. The criteria for making costs orders should be made *much* stricter. They should be restricted to where a party has in bringing or conducting the proceedings acted frivolously, vexatiously or unreasonably, without the added element of a claim having "no reasonable prospect of success", which too readily allows an EJ to make their own assessment with hindsight of how strong the claim was. This was the case in earlier incarnations of the rules.⁴⁷ Second, there should be strict limits on the maximum amount to be recovered, based on the length of the hearing. In all cases it should be a requirement to take account of the paying party's means. Third, there should be guidance to Tribunals emphasising how exceptional is the power to award costs.

What role should Acas have in the process?

The most important role that Acas can play is in promoting good industrial relations in the workplace, supporting employers and trades unions to develop robust workplace negotiating machinery. Many disputes that reach ETs would not do so if appropriate processes for the collective agreement of rights in the workplace were in place. By the time disputes are at the point of an ET1 application the relationship has often broken down and conciliation is not possible. Research tells us that many claimants referred to Acas having submitted an ET1 do not understand the role of Acas. Particularly claimants without representation, experience the neutral stance taken by the Acas conciliator as being on the side of the employer.⁴⁸ As discussed in the first section, the IER believes that there is a place for conciliation, but that workers will require legal support and advice in order that they can play an equal role in the conciliation process. We therefore recommend that the duty on Acas to encourage the extension of collective bargaining and the development of collective

⁴⁶ See rule 78.

⁴⁷ See e.g. rule 11 of the Industrial Tribunal Rules in 1985, SI 1985 No.16.

⁴⁸ Busby, N. and McDermont, M. (2012) 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings', *ILJ*, 41(2), 166-183

bargaining machinery, abolished in 1993, should be restored.

3. Jurisdiction

ETs hearing cases currently heard in the civil courts/single employment court system for all employment claims.

We do not see any benefit in moving ordinary civil cases with a workplace dimension into the employment tribunal. One potential candidate for an extension of jurisdiction would be personal injuries in the workplace, but this does not seem appropriate to us as conceptually these sorts of cases are far closer to non-workplace PI claims than they are to tribunal cases. We doubt that tribunals possess the expertise to decide interim injunction applications in the context of e.g. strikes or restrictive covenants.

The ETs should, however, have an increased jurisdiction in three respects. First, the cap on damages for breach of contract, fixed at £25,000 since tribunals were given jurisdiction to hear breach of contract disputes,⁴⁹ should be removed. It is absurd that a claimant may have to bring two sets of claims to recover such damages. Second, the restriction of jurisdiction to such claims arising or outstanding on termination should be removed. Given that a claimant may bring a wages claim during employment, it makes no sense to prevent a parallel claim for breach of contract, which gives rise to many of the same issues. Reform is especially necessary now that the government has passed, without any consultation with unions or organisations representing claimants, the Deduction from Wages (Limitation) Regulations 2014, which limit claims for underpaid wages to two years' back pay. Third, those 2014 Regulations should be revoked. The group of employees who tend to have deduction of wages claims going back six years in time tend to be those who have been denied the national minimum wage. Thus these Regulations penalise the lowest paid and most exploited members of the workforce.

Historically, a number of labour movement organisations have supported the extension of jurisdiction of the employment tribunal to encompass civil discrimination claims concerning e.g. goods and services. The rationale for this extension was traditionally two-fold. First, the employment tribunal had specialist expertise in dealing with discrimination claims, while relatively few county court judges (and very few indeed outside London) had comparable specialist knowledge of discrimination law. Second, tribunal claims were cheaper and simpler to litigate than county court claims, therefore there would be an advantage in terms of saving cost to the parties and reducing the burden of litigation.

Unfortunately, tribunals are now more complex than the civil courts, while the introduction of fees has in addition made it at least as costly, if not more costly, to litigate in the tribunals rather than the civil courts. Therefore, without significant reform of tribunal fees, and without significant measures to simplify employment law, we can see no justification for giving tribunals jurisdiction over non-workplace discrimination claims.

⁴⁹ See article 10 of the Extension of Jurisdiction Order 1994.

By the same logic, we also oppose any restriction of work-related breach of contract claims to the tribunal alone. Our practical experience is that unions are seriously considering moving wages claims from the ET to the civil courts, in order to save cost, improve the quality of justice encountered by litigants and benefit from preferential limitation periods. Preventing this from happening would be a retrograde step.

Should the Employment Appeal Tribunal have first instance jurisdiction for certain complex and high worth cases?

We struggle to see the benefit of this reform. The cases which are most likely to be complex or high worth are discrimination claims, which in practice revolve around questions of fact as to why a particular decision was taken by an employer. The EAT judges include a number of judges who sit part-time, have never been judges in the tribunal, and in quite a few examples have never been advocates in employment law. While we value their expertise in dealing with complex questions of law on appeal, we do not see that they would bring any saving to complex factual questions at first instance. Moreover given that EAT's lay panelists have been phased out, while lay panelists remain in the tribunal (albeit restricted to discrimination and some other claims) we would have serious concerns about determining complex claims without panelists' knowledge of industrial conditions.

Should the fees system be reformed? If so, how?

As set out above, fees should be abolished. The purported rational behind the introduction of fees (i.e. to make the system pay for itself) was misconceived: fees do not pay for the Tribunal system, and never will. The introduction of fees was necessarily accompanied by complex systems of fee remission and fee recovery, only introducing new layers of bureaucracy and cost. However, ultimately the ET system, like the criminal justice system, and large parts of the welfare state, will always require investment. The IER believes that this investment should be funded by general taxation, not from a system of fees.

If the incoming government is unable to abolish fees, there is no possible justification for requiring the burden of fees to fall on employees, the party with the least spare resource. If fees are retained, however, radical reform is required. There is no adequate justification for placing the burden on the employee alone, especially given the appalling record of enforcement, so that even if successful they may well never even recover a fee. If there must be a fee system, it should include at least the following: (i) a great reduction in the level of fees; (ii) a requirement on an employer to pay a fee to defend a claim (placing the burden on the claimant alone is now increasingly unjustifiable, not only owing to the evidence of enforcement, but also because now a claim is only issued after pre-claim conciliation has been initiated and failed - for which either party may be responsible); (iii) a radically improved enforcement regime, including steps to prevent employers hiding behind corporate identity to avoid payment of awards; (iv) a greatly simplified remission system which ignores a partner's income and redundancy/notice payments, and with much lower thresholds in order to obtain remission; (v) the remission system should be renamed using a term that is more descriptive and accessible such as 'full or partial fee waiver' or 'fee reduction/exemption'; (vi) the automatic recovery of

fees for a successful party, in place of the existing discretion; (viii) the requirement of the state to reimburse a successful party's fee in the first place, so that it is the state and not the claimant that bears the risk of its abysmal enforcement system failing.

Conclusion

The IER believes that the best mechanism for setting workplace standards and settling workplace disputes is through collective bargaining. Therefore, the best way to reduce ET hearings is to reverse the decline in trade union recognition and collective bargaining coverage. To do that the industrial relations system must embrace a more proactive and comprehensive role for trade unions in the workplace. Within the remit of this consultation, we believe that can best be achieved by reintroducing a duty on ACAS to promote collective bargaining as part of its role.

The IER believes that rights and justice at work are social goods, not reducible to the interests of the state in steering the economy or of employers in minimising costs. Workers deserve respect and fair treatment at work as minimal conditions of fairness and citizenship. A society which permits economic interests to outweigh rights at work, or ceases to guarantee the effective upholding of those rights, is one whose very legitimation is called into question.

				<u>ANNEX</u>					
	2012	2013	2013		2013	2014	2014		
Type of claim	Oct-Dec	Jan-Mar	Apr-June	Total	Oct-Dec	Jan-Mar	Apr-June	Total	Total Decline
Total claims	45,710	63,715	44,334	153,759	9,801	10,967	8,540	29,308	-81%
Age Discrimination	673	810	621	2,104	248	601	392	1,241	-41%
Breach of Contract	7,803	7,804	6,297	21,904	2,486	2,514	1,928	6,928	-68%
Disability Discrimination	1,915	1,811	1,801	5,527	807	969	671	2,447	-56%
Equal Pay	5,807	7,928	8,091	21,826	998	1,236	1,995	4,229	-81%
National Minimum Wage	111	122	108	341	36	37	45	118	-65%
Part Time Workers Regulations	173	204	447	824	151	96	131	378	-54%
Race Discrimination	1,173	1,240	1,089	3,502	500	502	422	1,424	-59%
Redundancy - failure to inform and consult	3,292	3,635	1,841	8,768	417	270	355	1,042	-88%
Redundancy pay	3,411	3,205	2,805	9,421	831	866	900	2,597	-72%
Religious belief discrimination	230	248	220	698	92	91	79	262	-62%
Sex Discrimination	4,342	6,017	6,310	16,669	980	1,122	591	2,693	-84%
Sexual Orientation Discrimination	174	154	158	486	43	62	53	158	-67%
Suffer a detriment/unfair dismissal - pregnancy	371	388	376	1,135	235	288	203	726	-36%
Transfer of an undertaking - failure to inform and consult	335	255	587	1,177	158	121	124	403	-66%
Unauthorised deductions (formerly Wages Act)	12,602	21,213	9,797	43,612	3,977	3,133	2,545	9,655	-78%
Unfair dismissal	12,211	11,041	11,258	34,510	4,287	4,235	2,919	11,441	-67%

Working Time Directive	21,972	52,204	21,313	95,489	3,596	3,255	2,171	9,022	-91%
Written pay statement	332	388	348	1,068	73	133	66	272	-75%
Written statement of reasons for dismissal	182	212	162	556	72	90	61	223	-60%
Written statement of terms and conditions	1,447	854	798	3,099	287	337	228	852	-73%
Others	1,566	1,486	2,049	5,101	4,157	3,894	2,227	10,278	101%
Total	80,122	121,219	76,476	277,817	24,431	23,852	18,106	66,389	-76%