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The Employment Tribunal system was intended to be a forum to hear labour disputes, quickly and cheaply by those with a particular expertise in labour relations, in a relatively informal environment. However, tribunals are rarely determined either quickly or cheaply. Makbool Javaid, Partner at Simons Muirhead & Burton, and Tamara Ludlow, Employment Specialist at the law firm, explore the need for reform.

Special report:

Employment Tribunal system - a need for reform

Perhaps a contributory factor in the failings of ETS proceedings is, that the issues being tried are decidedly more complex now than when the system was first introduced. On a daily basis, tribunals deal with European Union legal issues, and those arising out of the ever-burgeoning, anti-discrimination legislation.

The sums of money that Tribunals can award can far exceed those awarded by county courts, and regularly do. As the issues become more complex, inevitably, so must the procedure for dealing with them. Tribunal case management whilst not requiring observation of the same formalities as the civil courts has nonetheless, over time, become significantly more procedural. These procedural requirements - and the fact that the Tribunal costs regime is not one in which the 'winner takes all' - add significantly to the burden of employers, so that the first consideration when presented with a claim, however unmeritorious, is to determine whether it is cheaper to settle rather than defend. Because there is no cost

involved in initiating proceedings, nor satisfactory checks and balances to prevent the issuing of unmeritorious claims, the number of claims being issued has risen exponentially over the last twenty years.

Successive governments have attempted to address the issues affecting the Tribunal system. The last Labour government focussed its concern on attempts to reduce the Tribunal's workload. It decided that the answer lay in the form of the overly technical and burdensome statutory dispute resolution procedures. These were introduced in 2004 and, after a very short life, we bade them farewell in 2009.

What came in place was the considerably less complicated statutory ACAS Code. As practitioners, we are still in a period where the success, or otherwise of the Code is to be assessed. But on balance it appears to have been received well by employers and does not appear to be onerous in operation. But employers have found that many of the problems with the tribunal system remain, and there has been increasing pressure on the Government over the last year, to introduce reform. Perhaps unsurprisingly, the current Government's focus has been to redress the balance in favour of employers, and BIS has devised proposals which, it is intended, should do this.

The proposals

On 27 January 2011, the BIS launched a consultation on reforms to the Tribunal system. The consultation entitled, *Resolving Workplace Disputes: A Consultation* set out a number of proposals, many of which were aimed at encouraging early resolution of disputes without a hearing; speeding up the tribunal system, reducing the costs to taxpayers, boosting economic growth, increasing business confidence in recruitment and ensuring that the tribunal process is "swift, user-friendly and effective". These are noble aims indeed and, of course, we are a long way off from understanding how effective the proposals, if implemented, will be. However, there has already been much comment from both practitioners and academics, and the key proposals are discussed below.

Unfair dismissal - raising the qualifying period from one to two years

This is one of the more controversial of the reforms proposed. When the Employment Tribunal system was first established in the 1970s, the qualification period for unfair dismissal was six months. In the 1980s, this period was increased by the Tory Government, before being reduced to the present figure of 12 months in 1999. This came after the House of Lords ruled that a two year continuous period of service requirement discriminated against women who were unlikely to remain in a post long enough to reach the qualifying period. Quite what has changed between then and now is not clear and many argue that if the Government wants to reduce the number of qualifying claims at tribunals, it cannot be right to do so at the expense of women being able to assert their rights.

The statistical evidence that persuaded the House of Lords in the 1990s has not changed, so any increase in the qualifying period may still be vulnerable to a similar challenge. The BIS stated aim is to encourage businesses to recruit rather than to reduce the number of tribunal claims, although it does estimate that the change would reduce the

number of claims by around 3,700 - 4,700 a year. Employers are likely to welcome this change as one which would allow them a longer period of time in which to assess employees' suitability for the role. John Cridland, the CBI's director-general designate said; "extending the qualifying period for unfair dismissal is a positive move that will give employers, especially smaller ones the flexibility and confidence they need to hire".

Stephen Overell, associate director of policy at the Work Foundation, has stated that; "doubling to two years the length of time someone must work before they are entitled to basic employment rights will do little to encourage employers to create more jobs, while adding to rising job insecurity. The effect of the move may well be a short-term reduction in the numbers of employment tribunal claims, as people will have to work longer before they can bring a claim." Our view is that this change may not drastically reduce the number of claims brought but will change the emphasis of those claims, with Claimants seeking to bring claims of discrimination, or whistleblowing or other claims, without a service requirement, as happens now in the case of those employees with under one year's service. This proposed reform could ultimately lead to 'ill-conceived' claims for discrimination which could cause an even bigger problem for employers.

Compulsory pre-claim conciliation

Claimants will be required to submit an outline version of the claim on an abbreviated version ET1 to Acas, which would lead to a one month period to allow for pre-claim conciliation. If successful, this will be a useful early dispute resolution tool, and Acas' recently introduced pre-claim conciliation service, though not sufficiently widely used, has proved successful in many cases. However, figures show that only 20 percent of claimants actually speak to Acas before submitting their claim to the tribunal.

Whether a month will be sufficient time to allow for employers to investigate the substance of the claim and take a considered view on settlement, remains to be seen, but it is hoped that early intervention by Acas will assist in the disposal of unmeritorious claims. The success rate we feel will be variable given that even now conciliators are not necessarily able to persuade intransigent claimants to settle even the weakest claims. In addition, it is unlikely, in a cost cutting environment that Acas will have additional resources to make the service effective.

Mediation and compromise

Enabling greater use of alternative dispute resolution tools, such as mediation, is seen as key to reforming the Tribunal system. The benefits are well known and include reduced cost and

speedy disposal of claims, when compared with litigation. The Government has no specific proposals at this stage but is seeking information as to the prevalence, costs and benefits, before it decides whether to take action. Regardless of the lack of Government proposals, we would urge employers to consider the use of mediation internally. Such mediation schemes have proved to be a success and there are variations to a basic model, some involving groups of employers pooling resources to create a mediation scheme for use by a diverse range of businesses. The Government also seeks information about the benefits of using compromise agreements and the associated costs. In our experience employers do find compromise agreements a cost effective way of minimising the chances of litigation from the outset of any possible dispute.



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Charging claimants a tribunal fee

This is intended to discourage weaker claims, and was something which exercised the media to some degree. Although the Government itself has not identified possible fee levels, it has been suggested in the media that the fee could be as high as £500. Those who are concerned about access to justice will be troubled by any fee, yet alone one at a level which is considered disproportionate. It appears to us to be unlikely that the Government would introduce a flat fee at this level, across the board. No fee mechanism has been suggested yet but in the civil courts the level of fee is referenced to the value of the claim. This is unlikely to work in the Tribunal system as ultimately, a judge decides on the amount of compensation awarded, irrespective of the sum claimed. So even if claimants undervalued claims (in order to pay a lower fee) it would be hard to see how a tribunal could not award compensation at higher levels when it is required to make an award on the basis of what it considers just and equitable. Wider powers to strike out a claim, or order payment of a deposit,

BIS proposes that tribunals be given more vigorous and flexible powers to strike out claims with no reasonable prospect of success, by allowing them to strike out claims: At any hearing, rather than solely at pre-hearing reviews; on paper, without hearing the parties or giving them the chance to make representations; although claimants would have an opportunity to request such decisions be reviewed.



Too many employers are being held to ransom in tribunals by vexatious employees and no-win/no-fee lawyers



Tribunals can already order claimants to pay a deposit of £500 if they believe the claim has "little reasonable prospect of success", although in our experience this is not a widely-used power; the Government did consider widening this test, or whether criteria should be introduced for the application of this test. It is suggested that this power be available to judges at any hearing and not just at pre-hearing reviews. The Institute of Directors (IoD) suggest that employee deposits should be compulsory to prevent spurious claims and that access to justice will not be jeopardised if deposits are taken only after an employee loses their case.

Encouraging settlement

BIS' proposal is to introduce a concept where by settlement offers are formalised, as in the civil courts and what are known as Part 36 offers. This would allow for rejected settlement offers to be paid to the tribunal, pending determination of the claim and where any award is made which is less favourable than the amount paid in. The additional costs incurred by the other party in proceeding to hearing will be recognised. Failing to accept a reasonable offer may be evidence of vexatious or unreasonable behaviour which could ultimately trigger a cost award.

Awarding costs

Currently a tribunal can only order costs in limited circumstances and only up to £10,000. Higher awards can be made if the matter is referred to the county court for a detailed assessment, a procedure which the Government considers too cumbersome and therefore it

proposes increasing the maximum amount tribunals can award up to £20,000. This will certainly be a useful and cost effective way of recovering legal costs, and when one considers that most costs awards do not exceed £5,000 and are still relatively rare, this proposal seems sensible. However, employers will be disappointed to note that there has been no move to the "loser pays" principle.

Fines for employers

of up to £5,000 if they lose a case. This proposal is at odds with most of the rest in that it could not be termed supportive of businesses. Those who are cynical may see the measure as a useful revenue raising tool for the Government. The proposal creates an automatic levy on employers who lose a claim, of 50 percent of the award, subject to a lower limit of £100 and an upper limit of £5,000 and this being in addition to any damages awarded. The fines would be payable directly to the Exchequer. This is step change in the manner in which tribunal compensation is assessed, where the general rule-of-thumb is, that compensation must not be punitive and has to be based on losses incurred by the employee. However, it seems the Government may be seeking to recover some of the costs incurred in hearing a case from those employers who pursue unmeritorious defences. The concern is however that a general application of this financial penalty may be too wide and is certainly not appropriate in the case of every case that is lost at the Tribunal.

Employment judges and lay members

BIS seeks to widen the circumstances in which employment judges can sit alone and reduce the number of cases in which lay members are required to attend. This will have significant cost savings and assist in the speedy administration of claims. However, the proposals to include most unfair dismissal cases, as those in which judges can determine alone, has been challenged by those who say that these are just the types of case where the lay members' expertise is invaluable, given they involve an assessment of good employment practice. The consultation also questions the value of lay members at EAT level, since the EAT has no fact-finding remit and appeals are on a point-of-law only. Whilst there is no doubt that lay members add value, it is not anticipated that a failure to include them in proceedings will have a detrimental impact on access to justice, given the skills and experience of employment judges.

Ultimately, the jury is out as to whether these proposals go far enough to balance the rights of employers and employees, and create a system where vexatious claims are struck out and cases brought before the tribunal a lot quicker. It is clear,

from the proposals outlined above that most will be out-of-favour with employees and trade unions. The new employer fine system does not balance out what is a business-friendly framework. Alex Ehmann, Head of Regulation at the IoD, welcomed the proposals back in January 2011: "Too many employers are being held to ransom in tribunals by vexatious employees and no-win/no-fee lawyers." We are unconvinced that the impact of the proposals will increase job creation.

The real challenge is the regulatory environment that creates red-tape and inflexibility for businesses. In our view, the real cultural shift that is required will only come about when employment judges are allowed to be more proactive and robust in managing cases, combined with a more practical approach from the senior judiciary, which accommodates this. For far too long, the tribunal system has had to cope with an ever-increasing caseload, which cannot be reduced by active case-management, because the higher courts appear to curb the discretion of employment judges to throw out weak claims. In order to prevent a successful appeal, it is far easier to avoid "grasping the nettle". As HR professionals know only too well, many managers take a similar approach to performance management.