Department for Business, Innovation and Skills – Employment Tribunal rules: review by Mr Justice Underhill

Response by Thompsons Solicitors

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About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

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 agree that the new rules appear less complex and easier to understand. As lawyers we are not in a position to comment any further on whether they will be understood more easily by non-lawyers.

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?

We agree that Presidential guidance has the potential to provide parties with clearer expectations and consistency. One of the difficulties parties face at present is inconsistency in decision making, both regionally and within individual tribunals, on case management issues.

Overall we agree with the approach of the draft example guidance. It could be useful to provide additional guidance on when the tribunal will grant postponements based on joint applications by both parties, particularly in circumstances where it may not otherwise grant a postponement if the application was unilateral. We have experience of cases when such applications have been made and despite a postponement being the preference of both parties the tribunal has refused the application. While sometimes it may be appropriate for the joint application to be refused it would often be helpful to all parties to know that if an appropriate joint application is made it will more likely than not be granted, as this enables both parties to plan appropriately and not incur unnecessary costs.

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?

We agree that an initial consideration of the file by an employment Judge is sensible and should assist with better case management. However, we are concerned about the breadth of this power to strike out all or part of claims. It is crucial that this power does not become a test of written English skills and good drafting of the ET1. This would severely disadvantage those whose first language is not English, whose written English skills are poor and those who are not legally represented.

If the employment tribunal system is to remain accessible to lay people then the test of a good case must not be the way the ET1 is presented.

A sift striking out claims that the tribunal does not have jurisdiction to hear is less problematic. This can be dealt with at the outset under Rule 11(a).

We are also concerned that this proposal gives judges the power to strike out claims they consider have no reasonable prospects of success when they have only reviewed the pleadings. As drafted the discretion granted to the Judge is very broad and appears to be relatively blunt. If the relevant party objects they must request a hearing and this is the only way to prevent a strike out. The draft rules do not provide for any intermediary process enabling the party to make written representations which the tribunal will consider.

Given the severity of the proposed action it is likely that parties will generally request a hearing leading to additional costs for both that party and the tribunal. This would seem to defeat the purpose of trying to simplify the process and reduce costs.

In our view a more nuanced approach may achieve the same aims. Under the current proposals the employment Judge would be required to provide their reasons for the proposed strike out in any event. Rather than immediately propose a strike out the tribunal could send the relevant party the Judge's initial views on the parts of the claim or response considered to have no reasonable prospects of success and invite the parties to withdraw or provide written representations. This should assist with case management and focussing the minds of the parties on the stronger elements of their case without automatically triggering a strike out or hearing to consider the issue.

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

The practical problems of combining a case management discussion and pre-hearing reviews will depend on the type of case being considered. The main difficulty will be identifying the preliminary issue for determination which will not always be apparent on the pleadings. In many cases Pre-Hearing Reviews are not necessary in any event. The cases in which a Pre-Hearing can be of use are often complex and it will not always be obvious what would be best dealt with at a Pre-Hearing Review until the issues have already been clarified at a Case Management Discussion.

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

It is unclear what this rule will entail in practice and on this basis it is difficult to comment on whether it will have the desired effect. It is unlikely that the rule as drafted will have much effect in itself in cases where a party is unwilling to enter into settlement discussions and it should be supported with guidance on steps a Judge should take to encourage settlement, along with material consequences for a party that is not cooperative with attempts to resolve matters.

Creating this rule does risk encouraging allegations of unreasonable behaviour and therefore to costs demands. This could increase, rather than decrease, certain types of dispute.

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 do not agree. Such a change assumes that if a claimant withdraws a case it is dismissed. In a few limited circumstances a claim can, and should, be resurrected and it is not, in our view, right to prevent this happening.

For example, a breach of contract claim worth more than £25,000 might need to be withdrawn from the employment tribunal and lodged in the court. A dismissal would prevent that.

And where a settlement has been reached but the respondent refuses to honour it, the claimant must have the right to revive the claim, even potentially to seek reinstatement in the case of unfair dismissal.

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

We agree with the proposals that Judges should limit oral evidence for better case management and ensuing hearings are not unnecessarily long. This needs to be proportionate though and ensure that when exercising this discretion the most relevant evidence is heard.

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

We have no strong views on this proposal.

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 agree that a lead case mechanism for multiple claims would be helpful. In our experience the approach by employment tribunals towards multiple claims is inconsistent at present and not always efficient. A more streamlined approach would benefit all parties, potentially leading to shorter hearings and cases being concluded more quickly. If cases are genuinely sufficiently similar, particularly those which turn on an identical finding of fact or on the law, it should be possible to identify a lead case which is binding.

The risk is that any multiple-claim mechanism is applied too prescriptively. Sometimes there will be a small number of claims that although substantially similar to the lead case have significant differences or additional elements to be considered. Any mechanism needs to ensure that these are identified, either separating them out or identifying sub-groups.

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?

We agree, but the judgment must remain "Meek compliant" by explaining why the evidence of one party is preferred to the other and, if appropriate, why the evidence of a witness whose credibility was not questioned has been rejected.

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)?

We do not envisage any specific disadvantages with removing the cap on costs.

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

This question assumes that it would be preferable if costs were awarded more frequently and that parties should be encouraged to apply for costs.

We are concerned to ensure that this is not an indication of any overtures to introducing a costs regime by stealth. Any encouragement of parties to seek costs is a step towards this and would complete the transformation of employment tribunals into mini courts. Any such change should be done openly and after full consultation.

The existing regime ensures that employment tribunals remain accessible to individuals and lay representatives and is not a hunting ground for lawyers. Greater use of the costs regime will inevitably result in greater involvement by lawyers in the system, in particular ones looking for discrimination claims.

At a time when the government's restriction on unfair dismissal rights are likely to lead to an increase in discrimination claims, we would assume that ministers would want to avoid

encouraging this and would seek to preserve the unique nature of the ET system.

Having said that, clearly there are times when it is legitimate for a party to apply for costs and we presume that this is the proper context for this question The costs regime is not sufficiently certain to warrant parties making applications for costs in many occasions. The party making the application must incur additional (and unrecoverable) costs in pursuing this course of action without having any clear guidance on whether they will be successful.

Any costs regime will only work efficiently and be utilised more if the overall case management system is more consistent and there is clearer guidance on what is expected of the parties. This would make it easier to identify when a party may be acting unreasonably in terms of their conduct during proceedings.

In light of the proposal that tribunals encourage resolution of cases by alternative means it could be helpful to more clearly tie in any proposals on the costs regime with attempts to settle.

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

Not being lay representatives we do not have any strong views on this issue.

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)?

We do not have any strong views on this issue.

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 agree that employment Judges should be able to require a deposit order on weak parts of a claim or response, as opposed to attaching it to the claim or response as a whole. This would be proportionate and encourage parties to identify and focus on the stronger elements of their case.

In our view this proposal should be tied in with the issues considered in question 3 regarding an initial sift or strike out.

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

We have no comments on the general form of the proposed ET1 and ET3, save that we note that not all protected characteristics under the Equality Act 2010 have been included within the types of discrimination.

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 Court and Enforcement Act?

If legal officers are to be deployed we agree with modelling them on the suggested template. Our concerns relate more to the scope of the powers delegated legal officers.

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

We agree that in principle rules in the ET and EAT should be consistent, but this should keep in mind the different functions of the two bodies.

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?

We agree that a 14 day time limit for the payment of awards may encourage prompt payment.

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?

There are several reasons for the non-payment of awards, including:

- The respondent intends to appeal the decision
- Employment tribunals have no powers to enforce awards.
- Traditionally, the only way to enforce awards was for the claimant to pursue complex and costly legal action in the civil courts.
- This is useless where the respondent no longer exists, has no resources or where tracking down their resources would not be cost effective because the claimant is just one of many creditors chasing the same pot of money.
- The ET and Acas Fast Track enforcement regime introduced in 2010 after pressure from Citizen Advice Bureau and others has had little impact.
- This requires claimants to pay a fee to High Court Enforcement Officers (HCEOs).
- Richard Dunstan, CAB senior policy officer has established that the claimed 70-80% success rate of the HCEOs only reflects the proportion of the total value of the debt that is recovered *in those cases where some money is recovered*.
- Even if the Fast Track enforcement rate were improved, it is clear that other ways of ensuring justice for claimants needs to be found.

A post-Judgment mediation system such as ongoing involvement by ACAS, to assist the parties to agree a payment plan, may improve payment rates.

Where the paying party is actively seeking to avoid payment and refuses to accept the decision of the Tribunal, the Fast Track system for enforcement ought to be useful. But as noted above, its success rate is poor. It is time consuming and the HCEO deduct their fees from any sums paid by the Respondent before they are paid to the claimant.

Ultimately only part of the money owed is recovered by the claimant.

We are also seeing increasing use of insolvency proceedings by respondents to avoid payment. We suggest that the government gives consideration to reforming insolvency provisions to prevent this happening.

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