Department for Business, Innovation and Skills: Ending the Employment Relationship

Response by Thompsons Solicitors

November 2012

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.

Introduction

In Thompsons view:

- Settlement agreements carry unintended consequences for employers and employees
- Are open to abuse by employers
- Will result in satellite litigation to establish meaning of "undue pressure"
- Will create dispute and confusion similar to that around the Step 1 grievance under the now scrapped statutory dispute resolution procedures
- The government's reasoning for a cap on unfair dismissal awards is wrong
- There has been no inflation-busting rise in unfair dismissal compensation
- It will not affect the expectations of claimants or create certainty for business
- It will result in an increase is discrimination claims.

Settlement agreements

Thompsons recognises the usefulness of being able to have a conversation of the type envisaged by this consultation. Our trade union clients tell us that they already have them on a regular basis, and that they originate from both sides of the business. These are facilitated by having good industrial relations and the involvement of employee representatives helps to avoid any accusations of foul play.

Thompsons believes however that the proposals as they stand are ill-conceived. They have been drafted on the basis that an offer is made and accepted in short order without fuss. They fail to adequately consider the alternatives and how these proposals fit within a broader employments rights, and industrial relations context. We therefore believe that they would create all sorts of unintended consequences for employer and employee alike, and that these would cause the uncertainty, delay and expense that these measures are intended to avoid.

The format of the consultation does not easily lend itself to explanations of these problems. Nevertheless we have done our best to provide them where we can and are happy to discuss these issues further with BIS. On balance however we consider that the proposals are a poor fit to the reality of the modern workplace and should be abandoned.

Thompsons also notes that by the time this consultation opened the enabling provisions contained in the Enterprise and Regulatory Reform Bill (ERRB) were well underway, and have already reached the House of Lords. We place on record our deep concern about the efficacy of a consultation about a measure which is almost already on the statute books.

Question 1: Do you agree that these are the correct principles to underpin the use of a settlement agreement which is inadmissible in unfair dismissal cases?

We will address the suggested principles in turn below. We repeat our belief that this is a deeply flawed idea and our observations should be read in that context:

Principle #1 – "The protection in legislation (inadmissibility of the offer in evidence to Employment Tribunals) only applies in Unfair Dismissal cases"

In our view, this is a strange fudge. These provisions are born out of the idea of 'protected conversations'. The original impetus for protected conversations was summarised by BIS thus:

> Some respondents have suggested that a provision should be introduced for either party to initiate a "protected conversation". This would enable parties to have early conversations, for example about performance issues or retirement plans, without the fear of the matter ending up either in a dismissal (employee) or tribunal case (employer). Indeed, protected conversations are seen by some as a potentially significant new tool to resolve disputes generally – and not simply in the context of compromise agreements – in a way that might preserve the employment relationship.[1]

Although the problems with the concept of protected conversations have been well ventilated, the idea persists, albeit limited to all non-automatically unfair dismissals. Despite this the focus of discussion by the government and the employers' lobby has been about capability and conduct situations – i.e. where an employee is not able to do the job to the required standard due to ill health or a lack of aptitude, or where their behaviour is incompatible with the employment continuing.

Thompsons sees the benefits of protected conversations for capability and conduct but is deeply concerned about how it would apply to other aspects of unfair dismissal. By way of example:

> Redundancies - an employer wants to make redundancies, but wishes to avoid the 'red tape' of fair selection criteria as well as meeting its obligations surrounding individual and collective consultation. It also wants to lose specific individuals and to do so without meeting the enhanced redundancy payment obligations which are contractually agreed with staff. It therefore calls the identified employees into a protected conversation, conceals the fact that a redundancy situation exists and successfully persuades them to go at a fraction of the cost.
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> Some Other Substantial Reason/Constructive Dismissal – a manager has taken a personal dislike to an employee. He institutes a protected conversation and makes it clear to the employee that they have no future in a way which would be a fundamental breach of mutual trust and confidence. He makes them an offer in terms which he knows the employee will not accept and sits back and waits for the employee to leave of their own accord. Constructive dismissal is not available to the employee as the fundamental breach of contract occurred during a protected conversation and cannot be referred to in the Employment Tribunal.

We are unable to think of examples of how the protected conversation provisions could be abused by the employee, nor have we seen any examples in the press or media.

If the government is to proceed with the protected conversation idea we would have to question the

[1] Paragraph 37, *Resolving Workplace Disputes : Government Response to the Consultation*, November 2011

wisdom of making it an option in the broader unfair dismissal jurisdictions. We would suggest that thought be given to restricting it to capability and conduct.

Principle #2 – "Either party may propose settlement"

This would be appropriate.

Principle #3 – "The reason for being offered the settlement should be made clear"

This would be appropriate. Although the unvarnished truth might sometimes be an impediment to acceptance, the whole process has been predicated on having an honest discussion.

Unless the reason is set out, the offeree cannot make an informed decision about the offer, and if the employer is required to set it out it will be a deterrent to the 'improper behaviour' currently identified in the proposed legislation (see Appendix).

Principle #4 – "Settlement offers should be made in writing and set out clearly what is being offered (e.g. settlement sum and if appropriate agreed reference) as well as what the next steps are if the individual chooses not to accept the offer"

We agree that the offer should be set out in writing. To do so otherwise could lead to misunderstanding and would be an obstacle to the other party properly considering and getting advice upon it. We do not consider that it should be necessary to put an offer in writing prior to any negotiations commencing. As we noted above, many conversations occur already; most start tentatively and figures are discussed only when both parties have indicated receptiveness to the idea of a settlement. Requiring written figures from inception may be a bit too "full on" for many situations.

Principle #5 – "It would not be necessary for an employer to have followed any particular procedure prior to offering settlement"

We believe that a minimum of formality must be observed and so some procedure is inevitable.

In capability or conduct scenarios the employee may well see the writing on the wall and expect a difficult conversation. However, because the scope of the proposals is so wide there may not be such a warning and a protected conversation will be out the blue. Genuinely productive discussions will be impossible where the employee feels ambushed, unprepared or isolated. It will be important for the success of these measures to prevent a 5 o'clock call to the office, or a conversation in a corridor.

We therefore believe that the discussion should be held by written invitation and on notice. Up to 48 hours notice should be adequate and will minimise the period of anxiety for all concerned. Because of the very serious nature of the discussion, the risks of abuse, the difference in relative bargaining positions and the fact that emotions may run high, we believe that the employee should have the right to be accompanied at that meeting.

That companion could help support the employee, and act as honest witness. It is common for HR to accompany a manager in these circumstances, and the same opportunity for support should be extended to the employee. We would therefore urge that s.10 Employment Relations Act 1999 be extended to cover the protected conversations process.

Principle #6 – "The Code will make clear that if an employer handles settlement in the wrong way (i.e. not as explained in the Code) there is a risk that this will give rise to a breach of the implied term of trust and confidence and allow the employee to resign and claim constructive dismissal"

We find it ironic that the government proposes a new code of practice just months after expressing concern about the accessibility of the most common code of practice.[2]

We note the intention to introduce a statutory code of practice[3] and take the time to note that a statutory code of practice does not create obligations. As one current code puts it:

> A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases.[4]

It is relevant only as a benchmark for behaviour when considering whether a specific right has been breached. What then is the right which this code of practice would be relevant to? We presume 'ordinary' unfair dismissal since the proposed s.111A(3) ERA96[5] disapplies the protection "in relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour".

If the settlement is handled in a discriminatory way none of the protections apply anyway. The same is true of automatically unfair dismissal situations. If the handling of the settlement is relevant to a later dismissal or resignation then the issue of impropriety becomes relevant. Simply limiting guidance in the code of practice to the risk of behaviour amounting to a fundamental breach of mutual trust and confidence and leading to constructive dismissal gives a misleadingly narrow, and over-simplified, account. Clear and comprehensive guidance needs to exist to prevent parties believing that a protected conversation gives them carte blanche to behave in any way they choose. If employers act incautiously the protected conversation regime may actually expose them to risks that they otherwise would have avoided.

Principle #7 – "Where an individual refuses settlement, the employer must go through a fair process before deciding whether to terminate the relationship"

This would be appropriate.

Principle #8 – "Individuals should be given a clear, reasonable period of time to respond"

This would be appropriate, although what they are responding to must be clear. The protected conversation will probably include at least the following stages: initial approach; tentative discussions; negotiations about figures; drafting the paperwork; and negotiations about the paperwork.

A common employer tactic in compromise agreement situations is to impose a very tight deadline for the agreement to be signed. Often this is as little as 24 hours. An accompanying threat to withdraw the offer is also made. This limits the time available to the employee to consider the situation, to find and consult appropriate advisors and to negotiate any necessary or relevant changes. This is an opportunity to cure this abuse. Thompsons considers that it would be useful for a cooling off period to be introduced to prevent this abuse. If it was either impossible to conclude an agreement within 14 days of the initial approach, or possible to withdraw from it within 14 days afterwards, protections could be maintained without loss of flexibility. It would also act as

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[2] *Call for evidence: Dealing with Dismissal and 'Compensated No Fault Dismissal' for Micro Businesses*, March 2012
[3] Consultation document, paragraph 4
[4] ACAS code of practice 1, *Disciplinary and Grievance Procedures*, April 2009 at page 1
[5] See Appendix (page **Error! Bookmark not defined.**)

an incentive for employers to avoid impropriety.

Principle #9 – "The Code should give specific examples of what may constitute "improper" behaviour"

This would be appropriate. The approach taken in the *Guidance on matters to be taken into account in determining questions relating to the definition of disability* is a good model.[6]

Principle #10 – "No undue pressure should be put on a party to accept the offer of settlement"

This is vital. Thompsons wonders whether the government has fully understood the scope for satellite litigation on this point however.

The whole system of protected conversations which is suggested in this consultation is predicated on applying pressure on the claimant. The impetus came not from employees looking to get settlements, but from employers looking to get rid of someone. The chosen model, as we see in the consultation is carrot and stick. The employee is threatened with disciplinary proceedings (but not given details, evidence etc) which can be avoided by accepting a settlement to go quietly.

Furthermore, the approach suggested in the consultation's draft letters appears to give the impression that a decision has already been taken ("…we have reached the preliminary view that we may have to terminate your employment"). The impression which that imparts is one of 'being out to get' the claimant. Add to that the very real likelihood of this conversation coming unexpectedly, being alone whilst at the meeting, and having a very short period of time to come to a conclusion and sign any paperwork, and the whole system quickly begins to resemble a vice. Thompsons questions whether the government has given any real thought to where the 'undue pressure' line will be drawn.

A whole jurisprudence will build up about what 'undue pressure' means. It is inevitable that the judiciary will say that what amounts to undue pressure will vary on a case by case basis as it is a fact-specific context. Inevitably too the decisions which get reported will be said to be 'illustrative'. What that means in practice is that the only way in which a claimant is going to know whether the pressure they felt was undue is to put it before an Employment Tribunal. We believe that we will see another juridical mess of the sort that arose over what constituted a step 1 grievance under the now repealed statutory dispute resolution regime.

It is also worth considering how the tribunals will address this issue when it is raised. A key purpose of the protected conversation suggestion is identified in the consultation paper:

> Responses to the Resolving Workplace Disputes consultation and further feedback through the Employment Law Review and the Red Tape Challenge has highlighted employer concerns about their ability to have conversations with their staff about sensitive work issues without fear of ending up in an employment tribunal. This was most notable in relation to discussions around ending the employment relationship.[7]

On a broader stage the government's recent measures have been about reducing the claims that go to tribunal, and making those which do take less time. If a respondent wishes to challenge the claimant's attempts to claim impropriety via undue influence then the tribunal will have to deal with that in a way which does justice to the parties. The claims are likely to be heavily fact specific and current case law[8] indicates that in those situations early resolution of the point via the strike-out

[6] See http://odi.dwp.gov.uk/docs/wor/new/ea-guide.pdf
[7] Paragraph 18
[8] See for example Anyanwu v South Bank University [2001] IRLR 305 House of Lords; A v B [2010] EWCA Civ 1378, Court of Appeal; Governing Body of St Albans Girls' School and another v Neary [2010] IRLR 124, Court of Appeal; North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 Court of Appeal; Tayside Public

power of pre-hearing review procedure will be inappropriate. Therefore the parties will have to fully prepare the case for argument. This means disclosure of relevant documents, witness statements and a contested hearing which is unlikely to last much less than a day.

However, what happens if the respondent is successful and the allegation of impropriety is dismissed? If it is a single claim case then the respondent wins. Very few cases are though, and it is likely that at least will continue. Where the respondent has immunity such as that proposed the only sensible claimant response is to counteract it in the best manner available. That means running arguments of automatic unfair dismissal, discrimination and impropriety together. The attritional nature of that adds to the claimant's negotiating position, and if it continues to tribunal all that is needed is one argument to succeed and the point is home.

Consider a claim where the facts are of a series of low level bad behaviour by a manager which does not amount to a fundamental breach of contract individually but which could well be enough for constructive dismissal on the basis of a 'last straw' claim. The last straw is the handling of the protected conversation meeting. The claimant alleges the same events amount to disability discrimination and detriment due to an earlier whistleblowing.

The substantial factual overlap means that an employment tribunal is very unlikely to hive off the protected conversation element to be heard separately. All claims are likely to be heard at once. Depending on the head of claim being considered a tribunal will simultaneously need to remember that the meeting might be relevant to everything being claimed, but might only be able to be considered for bits of it. The tribunal needs to forget the meeting when considering 'ordinary' unfair dismissal but draw it back from oblivion when considering automatic unfair dismissal and discrimination. If it is considered relevant to fairness generally, but impermissible under the indemnity then the tribunal must deny that reality and yet still consider it elsewhere.

The respondent is particularly exposed where the meeting is a last straw and the case is finely balanced. It is easy to envisage a situation where, without the evidence of the meeting coming though the back door, the claim would fail, but it would succeed as the tribunal gathers sympathy for the claimant and builds a broader picture. That sympathy can see a finding of impropriety which could not easily be appealed as it is a finding of fact.

Principle #10 –"As closely as possible, the approach should reflect current practice in without prejudice negotiations which many employers and legal professionals are already familiar with"

We do not think that this is appropriate. It assumes that there is a regularised practice and that is not necessarily a safe assumption. It would not add anything to the usefulness of protected conversations, employers would just label everything 'without prejudice' and it would encourage satellite arguments about what was actually covered by the without prejudice rule, what wasn't and what was impropriety.

Principle #11 –"The employer should not make discriminatory comments or act in a discriminatory way when making an offer of settlement.

This is certainly appropriate. We repeat the concerns which we raised at Principle #6 about incomplete guidance.[9]

Transport Company Ltd v Reilly [2012] IRLR 755 IHCS; Newcastle upon Tyne v The Governing Body of St Mary's Church of England (Aided) Junior School [1994] EAT/905/93

[9] See page 4

Question 2: Do you agree that model letters proposing settlement and a template for producing a settlement agreement should be included in a Statutory Code?

Yes.

Question 3: If you currently use settlement or compromise agreements, what impact would these templates have on the costs to your organisation of using agreements?

Many organisations have templates, or ready access to expertise to produce them. It is unlikely that the existence of them in the guidance or code of practice would make much impact upon them. A greater benefit is likely to be felt by those employers who do not.

Question 4: Would model letters proposing settlement and a template for producing a settlement agreement be likely to change your use (increase / decrease / stay the same) – please give reasons

Our response is not about this firm's likely approach, but is an observation on settlement drivers. Although employee settlement drivers have been studied at length[10] less has been done on employer drivers. SETA 2008 noted that,

> For cases where no offer was made, the most common reason cited was that the employer felt that the claimant was in the wrong (22 per cent). One in nine (11 per cent) believed that they would win the case. Seven per cent felt that the claimant did not have a case.[11]

That of course was in the context of an ongoing Employment Tribunal case, but it is perhaps indicative. Thompsons remains to be persuaded that more agreements will be reached.

Question 5: Do you have comments on the content of the model letters?

Overall the model letters are very poorly drafted. They display no understanding of the surrounding law, forget the principle at the heart of protected conversations and could even create a contract outside of the compromise agreement structure.

Thompsons is very concerned by the throwaway remark in paragraph 59 of the consultation that templates, "…will require less legal advice, if any at all" (emphasis added). Obtaining independent legal advice is a vital protection and since this appears to be a sole reference to such a change we presume that it is simply a poor choice of words.

The Letters

All the letters have common flaws. They are apparently designed to be the opening letter of the process. They seek to apply the carrot and the stick, but are fundamentally flawed:

1. The overall tone of the letters is misjudged. It is more likely to impede a settlement than promote one;

2. If the offer is not accepted, and unfair dismissal is claimed, an employer might need to establish that they followed a fair procedure. Part of that procedure is setting out the charges and the evidence and giving the employee an opportunity to defend themselves.

[10] See for instance BIS Employment Relations Research Series No.119, *Understanding the behaviour and decision making of employees in conflicts and disputes at work*, May 2011
[11] Paragraph 9.6, BIS Employment Relations Research Series No.107, *Findings from the Survey of Employment Tribunal Applications 2008*, March 2010

This letter doesn't do that very well, but even its modest achievements would seem to be caught by the basic problem that it would form part of the "…discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee" and thus rendered inadmissible by proposed s.111A(1) ERA96;

3. There is a typographical error in the very first paragraph of Letter 1;

4. The announcement in the opening paragraph that a preliminary view about dismissal has been reached comes (apparently) before an investigation, before the charges are put, before the defence is considered, before any reasonable belief in guilt can legally be formed, and before the band of reasonable responses can reasonably be assessed. It suggests a prejudged decision and would be a self-inflicted wound for any employer looking to show fairness;

5. The nature of the meeting referred to in paragraph 2 is wholly ambiguous. It is not phrased so as to make it clear that it is actually a disciplinary hearing. That fact can be discerned through a knowledge of the right to be accompanied, but will be lost on most. As the earlier paragraph recommends only brief details of the problem to be given, and says nothing about handing over supporting material, the likely result is that the employee attends the meeting wholly misinformed about what to expect, unprepared to defend themselves, and very likely to be unfairly dismissed as a result. This draft sets up the employer for a large fall;

6. It is wholly disingenuous to suggest that dismissal is likely, to say that the employee will be given an opportunity to improve and to give between the date of the letter and the date of the meeting to do so ("about 10 days"). This is likely to undermine any spirit of compromise from the start;

7. The guideline tariff is an inappropriate idea (see below);

8. Because it operates outside of the environment of the without prejudice rule this is an offer capable of being accepted immediately. The reference to asking the employee to enter into an agreement is inadequate as it appears to be put as something which can be agreed or not as the case may be. A settlement can be reached orally, and in correspondence. Simply emailing back an acceptance is enough to create a contractual right to receive the offered sum. The letter fails to make a settlement agreement a condition precedent and exposes the employer to the situation where they settle the matter at common law, contract to pay the settlement monies, but get none of the protections afforded by s.203 ERA96 and its equivalents; and

9. Although the consultation at Principle #8[12] talks about a reasonable period of time to respond the time frame in the template letter arguably does not comply with that principle. This draft sees the disciplinary meeting in 10 days. That may be just six working days (or

[12] See page 4

less if there is a bank holiday) during which time the employee apparently is expected to continue working and prepare their defence to the charges they face.

Question 6: Do you have comments on the content of the model settlement agreement and guidance?

The Model Settlement Agreement

Broadly, our observations are:

1. It is a pity that the government has failed to take the chance to change the need to identify all disputes before they can be settled in a compromise agreement format. That failure makes this document far longer than it ought to be, far more complicated, and exposes the unadvised employer to great risk;

2. The agreement is clearly an imperfectly edited version of an employer's standard agreement. It contains clauses which go significantly beyond the stated task of simply settling claims. By doing do so the government is undermining its own statement that, "The Government is clear that legislation has an important role in setting a minimum baseline of fair legal protections, but that wherever possible, the State should not interfere in the relationship between an employer and employee."[13] We believe that any standard settlement agreement should do absolutely no more than settle the claims. It should not go beyond that remit;

3. The agreement is too long and too legalistic. We consider that a format more akin to a short form COT3 would be far more appropriate for the target user groups;

Our more specific observations are:

1. It is inappropriate, and legally incorrect, to mark the agreement "without prejudice" despite the fact that there is no dispute (hence the reason for the protected conversation);

2. The recitals (i.e. clause 1) are not necessary;

3. Since this is supposed to be used before any proceedings are commenced the reference in clause 4.2 to writing to the Employment Tribunal to withdraw the claims is inappropriate and confusing. It could also result in the Employment Tribunal Service having to deal with a multitude of applications to withdraw non-existent claims;

4. The wording of clause 4.3 is inadequate to achieve what it seeks to achieve;

[13] Paragraph 28 of the consultation

5. The employer is legally responsible for accounting to HMRC for tax. Therefore clause 5.2 misstates the true position and leaves the employer with a false sense of security in the event of a failure to account for tax;

6. The parties are lay people and are in no sensible position to make the declaration at clause 6 that the relevant statutory provisions have been complied with. The inclusion of this clause is required by law, but will confuse lay people in its current format. The Guidance doesn't really explain this well enough;

7. There is no good reason for clause 7 to be in the agreement as it goes well beyond the act of settling claims. Furthermore the use of the format of warranties is inappropriate. In law a warranty is a strict liability undertaking. This means that if your warranty is wrong to any degree, no matter how much you believed it to be accurate when you gave it, or tried to comply, you are strictly liable for any loss. Theoretically a paperclip in a handbag or a forgotten mug in a kitchen could render a party in breach. If this clause is to remain in the agreement then this should be no more than a declaration to that effect;

8. Clause 8.1 refers to restrictive covenants, despite the fact that most employment contracts do not contain any;

9. Clause 8.2 is far too wide. Confidentiality is a common condition, and this is a common draft but it causes problems. By preventing either party acknowledging the existence of an agreement:

    a. The employer restricts its ability to fully comply with its obligations under the law on job references which is to ensure they are fair, balanced and truthful;
    b. The employee is unable to explain a sudden departure from their job which may hamper their ability to obtain new employment, to claim unemployment benefit, or to receive unemployment insurance;
    c. By the time the agreement is signed it is common for a wide pool of people to already know it exists. These include: HR staff; legal staff; managers; people the managers have told; trade union reps; spouses; close friends; independent financial advisors etc. This form of clause cannot bind these people retrospectively, and therefore seeks to shut the stable door long after the horse has bolted with very little obvious purpose.

10. Clause 9 goes far beyond 'a minimum baseline'. In particular:
    a. We repeat our observation about warranties;
    b. Clause 9.1.3 is not necessary for the agreement to be binding and should be removed. It also ignores the twin realities that the employee is a lay person and cannot come to that conclusion, and that for the fees generally available an independent advisor is unable to take a full case history and advise on whether other claims are available. This clause has too much scope to make a liar out of the employee and place them in breach for no good reason;
    c. There is no requirement to have an advisor sign an agreement. This may slow down the advice process (see Question 7 at page 11 below for details). In any event there is a broken reference to Annex C;

d. Clause 9.1.5 is inconsistent with the point of a protected conversation termination. The point is to achieve a termination without having to go through a process. By accepting an offer an employee would be taking the risk that the settlement is an under value but accepts a clean break. The quid pro quo must be that the employer accepts the risk that had they chosen to do it properly they could have dismissed summarily;
e. It is bewildering why an employee is being expected to routinely warrant about claims which a third party may or may not have. The relevance of this aspect of clause 9.1.5 is impossible to see and goes even further beyond 'a minimum baseline' than the other provisions;

11. There are no clauses 11, 13 or 14;

12. Clause 16 should be amended to allow the independent advisor to sue the employer directly for a breach of the fees clause (clause 10);

13. The final cross-reference to clause 8.2 makes no sense. We wonder whether it is an editing error;

14. It is wholly inappropriate for Annex A to include personal injury claims within the list of settled claims;

15. It is wholly inappropriate for Annex A not to limit breach of contract claims to those arising out of the employment. It would unfairly compromise claims where the employee is also a customer of the business. For instance if the employee was injured by a faulty product produced by the employer this draft agreement would seek to compromise their claims for personal injury, and breach of contract. For this reason Annex A's inclusion of any other claim is too sweeping.

The Guidance

The September 2011 NIACE report "Work, Society and Lifelong Literacy" found that: one in six people of working age lacks the literacy skills to function effectively in modern society; that the North East, Yorkshire and the Humber, the West Midlands and London have the largest numbers of people with literacy problems; and that one-third of those in higher managerial or professional jobs did not achieve GCSE-level literacy skills (page 6).[14]

Despite that the Guidance has a Flesch-Kinkaid reading ease score of 46.7 which places the reading skills required to understand it at just below university graduate.

Question 7: Do you agree that the use of templates should not be compulsory?

Yes, to a point.

To make the templates compulsory would restrict employer choice and the templates would have to be much better than they are now to do an adequate job.

However, if part of the government's aim is to make it quicker, easier and cheaper to get them

[14] Available at http://shop.niace.org.uk/media/catalog/product/l/i/literacy_inquiry_-_full_report-web.pdf

signed off by the independent advisor then it needs to give proper consideration to this and the practical and professional restrictions on the advisor. The less an advisor is required to do, the faster they can do it, and the more cheaply it can be done. We therefore make the following suggestions:

1. Trade unions have not advised on compromise agreements for years and barristers only advise at the tribunal. The government must recognise and account for the fact that advisors are therefore solicitors and FILEX qualified. Those groups are restrained by professional obligations;

2. The settlement wording should be kept to the bare minimum requirements. Gold-plating it involves more work for the advisor. In particular it is massively counter-productive to lock the advisor into taking a case history and then advise on the merits of the various theoretical Annex A claims in order to comply with clauses like clause 9.1.3;

3. If the settlement agreement contained a declaration that the wording did not deviate from the standard then the advisor could avoid wasting time doing a line by line comparison trying to identify the changes. They could use standard advice material without it needing bespoke elements included in the advice, and would not need to seek amendments to the wording of the agreement in order to discharge professional obligations to their clients. Much of the process could be automated;

4. There is no need for an advisor to sign an agreement. By including that requirement the government is forcing either a face-to-face meeting between advisor and employee, or a delay whilst signed originals travel through the post. If this requirement was scrapped economies of scale and speed savings could be achieved through the use of remote advice units operating by telephone and email

Question 8: Do you think it would be helpful if the Government set a guideline tariff for settlement agreements?

No.

Question 9: What would you expect to be the impact of having a guideline tariff?

Guidelines would quickly become prices. Thompsons opposes all attempts to commoditise rights in the work place.

In any event, a 'one size fits all' tariff would be broadly meaningless. The complexity of employment law in the workplace is such that there are many variables to arriving at a fair valuation. This means that one employee could have a negligible valuation, whereas the next could have a significant value. If the tariff itself was too high then the employer loses out, with the reverse being true.

Thompsons would expect that a published figure would solidify expectations in a way which would make negotiation and settlement more difficult. If an employer wanted to offer less than the tariff then the employee would be likely to insist upon the tariff figure. Similarly, if the employee felt that they should receive a higher figure (merited or not) an employer is more likely to resist attempts to go above the tariff.

Question 10: If you do favour a guideline tariff for settlement agreements, do you have a view on the approach or formula that should be used?

Not applicable.

Question 11: Do you have a view on what level of tariff would be appropriate?

A tariff would not be inappropriate.

Question 12: Do you have ideas for other ways to help effectively disseminate the guidance and materials?

Publication on the internet and distribution through agencies like libraries, CABx, and the EHRC.

Unfair Dismissal – limits on compensatory awards

The stated policy objectives of these proposals are to:[15]

- Set an appropriate cap on unfair dismissal compensation, taking into consideration the large one-off increase and subsequent above inflation increases which have increased the current cap to a historically high level.
- Improve certainty of the amount of award that businesses will pay and make expectations of awards more realistic among claimants, whilst retaining adequate levels of compensation for claimants who have been unfairly dismissed."

For the reasons given below Thompsons believes the former is a fallacy, and that these proposals will not affect the latter.

The History of the Compensatory Award Cap

Paragraph 80 of the consultation document gives the impression that unfair dismissal claimants were given a massive inflation-busting boost when the cap rose from £12,000 to £50,000 in 1999. However, this is a highly misleading justification for change.

The 1999 up rating was in fact to reverse the deleterious effect of inflation on the original figures which had been set by the Conservative government of Edward Heath.

The following summary is taken from a House of Commons Library Research Paper dated November 1998:[16]

> The Industrial Relations Act 1971, which introduced the right to take a case to an industrial tribunal for unfair dismissal, made no provision for a basic award. Compensation was to be "such amount as the ... tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the aggrieved party in consequence of the matters to which the complaint relates, in so far as that loss was attributable to action taken by or on behalf of the party in default.[17]

[15] Impact Assessment, page 10
[16] *Fairness at Work*, 17th November 1998, Cm3968 available at www.parliament.uk/briefing-papers/RP98-99.pdf
[17] section 116

There was a limit on the amount of compensation of 104 weeks' pay or £4,160 (that is to say 104 x £40) whichever was the less.[18] This limit was increased to 104 weeks' pay or £5,200 (that is to say, 104 x £50) by the Trade Union and Labour Relations Act 1974.[19] Under the Employment Protection Act 1975, which introduced the basic award, the compensatory award remained limited by the 1974 Act formula - i.e. to a maximum of £5,200.[20] There is no requirement to review this limit annually, though it has been raised since 1975 as follows:

Limit on compensation award	£
1971	4,160
September 1974	5,200
February 1979	5,750
1 February 1980	6,250
1 February 1982	7,000
1 February 1983	7,500
1 April 1985	8,000
1 April 1987	8,500
1 April 1989	8,925
1 April 1991	10,000
1 June 1993	11,000
27 September 1995	11,300
1 April 1998	12,000

> Had the limit been increased in line with average earnings since 1971, it would now be about £52,800. In fact very few unfair dismissal awards approach the current limit. The median award in 1996-97 was £2,575 and only 223 awards exceeded £9,000.[21]

The rise to £50,000, rather than to £52,800, was therefore a marginally **sub-inflationary** one.

The impact assessment makes the observation:[22]

> Figure 1 shows that the cap on compensation is currently much higher than it was prior to the one-off increase in 1999. During the period 1999 - 2011, the RPI increased by 42% and average (median) earnings increased by 47%. In contrast, the cap on unfair dismissal compensation increased by 503%, however this includes the increase from £12000 in 1999 to £50,000 in 2000.

It is important to correct this misleading analysis. If the government's stated RPI increase is applied to £50,000 then the figure becomes £71,000. If the median earnings increase is applied it becomes £73,500. Applying the up to date RPI adjustment the figure is £75,100.[23] This compares very favourably with the current maximum of £72,300 and can, **in no way**, be fairly considered to be anything other than broadly in line with the original 1971 figure of £4,160. If anything it is slightly

[18] section 118
[19] schedule 1, para 20
[20] section 76, 1975 Act
[21] DTI evidence to Trade and Industry Committee, *Fairness at Work*, HC 980 1997-98, 21 July 1998, p 64
[22] *Unfair Dismissal Compensatory Awards: Impact Assessment*, September 2012, page 8
[23] For the period 1st April 1998 to 1 September 2012 at http://fplusr.net/indexation.aspx

less.

Thompsons has difficulty in understanding how these figures are consistent with the government's claim that there have been "…above-inflation increases in compensation in most years"[24] or that "reducing the cap would rebalance the level of the cap following the large recent increases".[25]

It is also worth noting that the original proposal in the *Fairness at Work* White paper was the total removal of the cap.[26] The White Paper argued it thus:[27]

> Where a tribunal finds that individuals have been unfairly dismissed, they should receive a proper remedy. Tribunals issue very few re-employment orders, so the amount of compensation for unfair dismissal is very important. Although many awards are well below the current limit on compensation, which the Government has recently increased, the existence of a limit prevents some individuals from being fully compensated for their loss. The likelihood of proper compensation being awarded should also encourage employers to put proper voluntary systems in place. The current cap on compensation for unfair dismissal, which has steadily fallen in real terms, provides no such incentive. **The Government therefore proposes to abolish the maximum limit on such awards.**

Thompsons considers that the force of this observation remains undiminished in the 14 years since it was made.

We have two further observations at this point:

1. The current median earnings figure of £26,000 would be equivalent to just £2,133 in 1971 prices[28] which is just 51% of the 1971 maximum figure; and
2. The current proposal to limit the compensatory award at 12 months wages would produce a limit even lower than the 1971 figure which was double that.

Question 13: Would the introduction of a cap of 12 months' pay lead to more realistic perceptions of tribunal awards for both employers and employees?

No.

The proposal is, in our view, simplistic and naïve and does not make sense even on its own logic. The proposal is based on the fact that the median unfair dismissal award in 2011-12 was £4,560. Even applying the median wage stated in the consultation of £26,000 this is just nine weeks pay. That figure ignores the role of the Basic Award so the Compensatory Award figure is actually much less. It is difficult to see how setting up an expectation of recovering 5.7 times the average award is much better than one of recovering 15.8 times.

The proposal also ignores the government's own research into this area. The BIS study *Understanding the behaviour and decision making of employees in conflicts and disputes at work* set out the factors relevant to policy-making in chapter 8. The following is an extract:[29]

[24] Impact Assessment, page 7. The cap actually fell from £66,200 to £65,300 on 1st February 2010
[25] Impact Assessment, page 11

[26] *Fairness at Work*, Cm 3968, May 1998, Chapter 3. Available at www.berr.gov.uk/files/file24436.pdf
[27] Ibid, paragraph 3.5 [emphasis in the original]
[28] Source: http://www.thisismoney.co.uk/money/bills/article-1633409/Historic-inflation-calculator-value-money-changed-1900.html
[29] *Understanding the behaviour and decision making of employees in conflicts and disputes at work*, BIS Employment Relations Research Series No.119, May 2011

Encouraging realistic expectations

The review suggests that expectations of the outcome of a employment tribunal claim can be unrealistic. In particular, optimistic overconfidence suggests that disputants may be overconfident both about their likelihood of success and the potential value of a claim. Indeed, there is evidence from an analysis of parties' expectations in relation to ET claims (unpublished, Paul L Latreille) to support this.

More realistic expectations of the outcome of a claim may result in employees deciding to resolve their dispute at an earlier stage or in a different manner. Ways to encourage more realistic expectations include:

- reviewing existing advice and guidance to improve its effectiveness in countering the tendency of both parties to be overoptimistic.
- providing potential claimants with advice that is well-grounded, impartial and expert that enables them to make a realistic assessment of their case, including information that would help them to understand its possible strengths and weaknesses. Independent advice can also serve to counter the potential negative effects of potential claimants being encouraged by unrealistic advice from colleagues, friends and family who may not be well informed;
- ensuring that employees have access to information about external services such as Acas or Citizens Advice, or helping them to provide advice in other forms, such as in-house employee helplines or counselling services.
- dissemination of accurate information on the employment tribunal process and likely outcomes more widely so that informal advisers (family, friends etc who potentially have an influence on employees) are better informed about the outcomes of employment tribunals
- improving existing advice and guidance so that it gives individuals and employers clear information on the different routes available to resolve a dispute and the costs and benefits of each approach, for instance using mediation versus making an employment tribunal claim. Individuals should also be given accurate information about what is involved in the process of taking a tribunal claim and the alternative ways to resolve conflict (possibly through the use of case studies and testimonies)
- encouraging the development of trust in the workplace. Trust is an issue that recurs throughout this review. If the parties involved in a dispute have
- a basis of trust, any conflict that they enter into is more likely to be resolvable without escalation: individuals are less likely to be concerned about protecting 'face' and therefore less likely to adopt a confrontation approach to resolving an issue. Trust can be built up in an organisation by promoting good employment relations and an open and honest environment, which in turn leads employees to believe that their organisation is a just and fair place to work. Ways to achieve this include:
- encouraging organisations to have good and clear employment relations policies in place that are made available to employees, covering issues such as equal treatment, harassment and bullying and discipline and grievances. If employees have been involved in the formulation of these procedures, for example, through the input of a trade union or employee representatives they will feel that they own the processes and will be are more likely to view them as fair and therefore accept them, even if they do not agree with the outcome. Procedures should not be a tick-box exercise, but should attempt to empower the parties as far as possible in order to deal with potential conflict situations;
- ensuring that organisations actually implement those policies. It may, for example, be helpful to draw organisations' attention to the Acas Code of Practice on disciplinary and grievance procedures;

- encouraging organisations to have an effective communications system in place, in order to ensure that employees feel that they know what is happening in the organisation and can air any concerns they have.

These types of actions will not prevent workplace conflict from arising, but they will help to ensure that when conflict does arise, the parties to the conflict are operating in an environment that is supportive and based on trust and good faith. Organisations should therefore be encouraged to put into place and build on these good practice measures.

We have included the full list since the issues of trust in the workplace, communication, and good employment practices are all areas which are being undermined by the government's changes elsewhere in its Red Tape Challenge. Given that the impact assessment refers to this research we are surprised that it has been treated in such a cursory way.

If the government wants an unfair dismissal claimant to realise that median awards are just £4,560 then it can say so (as it does on the ET1 guidance now). It is not necessary to reduce the existing cap, nor will that change anything.

Question 14: Would the introduction of a cap of 12 months' pay encourage earlier resolution of disputes?

Perhaps.

SETA98 considered settlement motivation in the Employment Tribunal. It concluded:[30]

9.6 Reasons for settling

Saving money and time were the main reasons why employers favoured settling their cases. Of those who made an offer, one half (51 per cent) cited factors related to saving money (for example, keeping costs to a minimum, more cost effective to settle) and one-quarter (25 per cent) said that they had done so for convenience and to save time. These findings are similar to those observed in 2003.

For cases where no offer was made, the most common reason cited was that the employer felt that the claimant was in the wrong (22 per cent). One in nine (11 per cent) believed that they would win the case. Seven per cent felt that the claimant did not have a case.

Claimants who were made an offer, but did not accept it, were asked why this was the case. Three in ten (29 per cent) said it was because they felt that not enough money was offered. Six per cent said that their claim had never been about money or that money was not important to them."

In turn, this interacted with expectations:[31]

Claimants' expectations about the outcome of the case at the point of initiating their claim were generally positive (Table 9.18). Close to one-half (48 per cent) of claimants thought that they were very likely to be successful at the start of their case. One-fifth (21 per cent) thought they were quite likely to be successful and one quarter (24 per cent) thought they had an even chance. Only two per cent thought they would not be successful. Claimants' expectations about the outcome of their case closely resemble those seen in 2003. … Three in ten (29 per cent) claimants who had expectations of receiving money at the very start of their case were hoping to gain a sum under £1,000. Around one third (35 per cent) were hoping to obtain over £5,000. The mean amount claimants hoped to receive was

[30] *Findings from the survey of Employment Tribunal Applications 2008*, BIS Employment Relations Research Series No.117, March 2010, page 83
[31] Ibid paragraph 9.9

£14,629. However, the mean figure is again inflated by survey respondents who gave particularly high figures, and the median amount of £2000 may provide a more reliable indicator of this expectation (Table 9.19). Despite these expectations, claimants would have been prepared to settle for lower amounts. The lowest mean amount of money that claimants said they might have been prepared to settle for at the very start of the case was £5,458 and the median was £1,500 (Table 9.20).

Employers' views about whether they had expected to win the case were mixed, with many being optimistic (Table 9.18). Three-fifths (60 per cent) of employers thought that the case was very or quite likely to be decided in their favour when they first received the notification form. One quarter (26 per cent) thought they had an even chance of the case being decided in their favour and one in eleven (nine per cent) thought that the case was very or quite likely to be decided in favour of the claimant. Not all those who thought they were going to be successful actually were: in seven per cent of cases where the employer thought the case would be very or quite likely to be decided in their favour, it was actually decided in the claimant's favour. These findings are in line with those observed in 2003.

The latest statistics from the Employment Tribunal Service shows that of all the 2,309 unfair dismissal awards that year 1,205 (54%) were under £5,000 and just 148 (6%) exceeded £30,000.[32]

This question makes the mistake of assuming that claimants share the philosophy of the commoditisation of rights that the government does. So long as the government treats it as a transaction it will ask questions like this. If you ask the wrong question, you get the wrong answer.

Where an employee has a clear claim, with losses clearly in excess of the maximum, and the employer's expectations are realistic, then earlier resolution is a reasonable expectation. However, if expectations are not realistic, either for the reasons set out in our reply to Question 13, or because the figures for the maximum award continue to be a 'one size fits all' approach, we do not think that settlement is likely to come earlier as a result of this proposal.

Tinkering with the unfair dismissal cap will not encourage settlement of unfair dismissal claims which have a discrimination element as well. We may well see more discrimination claims being pleaded in order to create negotiating leverage, or as a means of circumventing the government's proposals on pre-settlement negotiations by establishing impropriety.

The ONS confirms that currently 27.6% of all periods of unemployment exceed 12 months.[33] It is entirely possible that if claimants view the one year's wage limit as too low then their behaviour may in fact change as they hold out for a higher settlement in order to cushion them from this fact.

If settlement is achieved sooner it will be down to proper advice about merits and value from a trusted advisor, and not because the cap has changed.

Question 15: Would the introduction of a cap of 12 months' pay provide greater certainty to employers of the costs of a dispute?

Not necessarily.

It is necessary to consider what the phrase "the costs of the dispute" means. 12 month's wages is certainly part of the costs of an unfair dismissal dispute, but it is only part. Employers are overwhelmingly likely to employ professional advisors (usually lawyers) in an Employment Tribunal dispute.[34] There are therefore legal costs and management time lost.

If an employer made a quick decision to settle for 12 month's pay then the other associated costs would be minimised. If however it decided to elongate the proceedings, for whatever reason, then

[32] *Employment Tribunals and EAT Statistics 2011-12*, MOJ, Table 5
[33] http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/october-2012/table-cla02.xls
[34] *Findings from the survey of Employment Tribunal Applications 2008*, BIS Employment Relations Research Series No.117, March 2010, paragraph 5.2

the ‘cost’ of compensation is more likely to be only a small element of the overall bill.

One must also remember that “dispute” in this context is unfair dismissal. It would be unwise to extrapolate swifter unfair dismissal settlements as an overall benefit to cases generally.

Question 16: Do you support the introduction of a cap on compensation of 12 months’ pay?

No.

Question 17: Do you have any comments on the impact of this proposal on claimants?

This proposal will have a negligible impact on the expectations of claimants. For the reasons given above it fails to realise that expectations are more complicated and subtle than the reduction of employment rights to a fixed-price menu.

In reality very few claimants will be affected by the proposals. The official statistics demonstrate this. However, for those who are impacted by them the effects will be significant and long lasting. There are numerous examples of employees whose lives have been so blighted by their employer’s wrongdoing that their losses significantly exceed 12 months wages. Not only will they lose out on the compensation that they are morally due, but the tortfeasor has been allowed to limit the effect of their wrongdoing, thus leaving them free to repeat that behaviour. This is not acceptable.

Question 18: Do you have any comments about the impact of this proposal on employers?

This proposal sells employers short almost as much as it does employees. It had its genesis in the employer lobby’s anecdotes about businesses being afraid to recruit staff and is aimed at reassuring employers that the worst case scenario of an unfair dismissal claim is finite and affordable. However in doing so it implicitly buys into the idea that Employment Tribunals impose unjustified and expensive decisions on hapless employers who need protecting from such caprice with low caps. Such a notion undermines our system of justice and benefits no one.

If an employer is ordered to pay compensation it is because a court of law has found them to be in breach of their legal obligations. The aim of compensation is not to punish but to restore the victim to their pre-tort position. A cap puts this notion on its head as victims bear the cost and wrongdoers reap the reward.

We repeat the 1998 observations in *Fairness at Work*:

> Although many awards are well below the current limit on compensation, which the Government has recently increased, the existence of a limit prevents some individuals from being fully compensated for their loss. The likelihood of proper compensation being awarded should also encourage employers to put proper voluntary systems in place.

There are employers who behave badly; some deliberately, some not. This proposal does nothing to address that and is yet another step backwards from that. It is particularly disappointing that the impact assessment recognises a windfall to non-compliant businesses but does not see that as an impediment to the proposals. Adrian Beecroft said: “While this is sad I believe it is a price worth paying.”[35] We disagree.

We seem set to return to the days of low caps which elicited the observation from Lord Steyn that, “…the low statutory limit on the award of compensation made the attainment of corrective justice

[35] Report on Employment Law, Adrian Beecroft, 12th October 2012, original leaked version, page 4

impossible."[36]

Better employer performance is the key to better productivity. ACAS made the following observation in October 2012:[37]

> It's well reported that good leadership can have an enormous positive impact in the workplace, driving employee engagement to boost morale and productivity. But what's on the other side of the coin? Do bad leaders have a similar impact in the other direction, undermining relations and wreaking havoc in organisations?
>
> The management consultancy Orion Partners seems to think so. In their recent survey of 2,000 UK workers, almost a quarter said that their leaders had poor communication skills, were overstressed and failed to empathise with employees. Orion Partners believe this 'catastrophically bad' and 'destructive' approach to leadership is taking its toll on productivity.
>
> The survey further identified four key areas where British leaders are perceived to be underperforming by their employees. These were 'threat versus reward', managing change, empathy and self-awareness. Almost half said they felt threatened by their bosses rather than rewarded, meaning that they were less likely to perform to their full potential. In severe cases, the authors warned that it might increase the risk of employees suffering from anxiety and depression.

Finally we note with interest recent academic research into the relationship between regulation and innovation.[38] The researchers conclusions, drawn on studies of the US, UK, France and Germany, were that laws limiting employment-at-will (or hire-and-fire) encourage employees to take risks, leading to more innovation. Laws against unfair dismissal thus lead to more innovative firms:

> Laws affecting employment and dismissal are an important part of the policy toolkit for promoting innovation and possibly economic growth.[39]

Any measure which empowers poor employer behaviour must be denigrated at a time when innovation and productivity are so important to the country. Whilst many employers will no doubt welcome these proposals, it will be because they continue to misunderstand the risks which they actually face. It is that misunderstanding which needs addressing.

Question 19: Do you have any other comments on the proposal?

We consider that the proposal is based on some serious historical inaccuracies and ignores evidence and common sense. We find it alarming that this consultation is running alongside the passage of the enacting legislation through Parliament. The Enterprise and Regulatory Reform Bill was introduced 16 weeks before the consultation opened and will have already had its second reading in the House of Lords before this consultation ends. This consultation is therefore simply window dressing.

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[36] Johnson v Unisys [2001] IRLR 279 at 284, House of Lords
[37] http://www.acas.org.uk/index.aspx?articleid=3984
[38] *Labor Law Society and Innovation*, Acharya, Baghai & Subramanian, June 2012, and *Wrongful Discharge Laws and Innovation*, Acharya, Baghai & Subramanian, April 2012, prepared for the US National Bureau of Economic Research. Available at http://www.isb.edu/faculty/KrishnamurthySubramanian/images/WDL_Innovation_paper_withnames_11Apr2012.pdf and http://pages.stern.nyu.edu/~sternfin/vacharya/public_html/Labor%20Laws%20and%20Innovation_27June2012.pdf
[39] *Wrongful Discharge Laws and Innovation*, Acharya, Baghai & Subramanian, April 2012, prepared for the US National Bureau of Economic Research. Page 42

Question 20: Do you consider that the overall cap on compensation for unfair dismissal is currently set at an appropriate level (£72,300)?

Thompsons believes in the principle 'polluter pays'. As such it believes that there should be no cap at all.

Question 21: What do you consider an appropriate level for the overall cap, within the constraints of full-time annual median earnings (c£26,000) and three times full-time annual median earnings (c£78,000)?

We do not support a cap.

Question 22: Do you have any other comments on the level of the overall cap?

As above.

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