Resolving workplace disputes - A Consultation - response form

You can complete this response form online through Survey Monkey:

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Alternatively, you can email, post or fax completed response forms to the Dispute Resolution policy team at the Department for Business, Innovation and Skills (BIS)

Email: RWDconsultation@bis.gsi.gov.uk

Postal address:

Dispute Resolution policy team
Employment Relations
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1 Victoria Street
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The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

Name:

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Fox Williams LLP is a firm of solicitors. This response was compiled based on the results of an online survey conducted by the firm through its online service hrlaw.co.uk and its twitter, hrlawonline. It also reflects the experience and views of solicitors at the firm who specialise in employment law.

Please state if you are responding as an individual or representing the views of an organisation, by selecting the appropriate group. If responding on behalf of a company or an organisation, please make it clear who the organisation represents and, where applicable, how the views of the members were assembled. Please tick the box below that best describes you as a respondent to this consultation:

NB – When we publish the figures may be different because more Respondents

	Business representative organisation/trade body
	Central government
	Charity or social enterprise
	Individual
	Large business (over 250 staff)
	Legal representative
	Local government
X	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)
	Trade union or staff association
	Other (please describe):

CHAPTER I: Resolving disputes in the workplace

Mediation

Q 1. To what extent is early workplace mediation used?

As a firm of solicitors we act for and against businesses falling within the small to large range, primarily in the financial, insurance and professional services sectors, but also for clients as diverse as a Premiership Football Club and a global mining company. Our overwhelming experience is that early workplace mediation is very rarely used, even where disputes cannot be resolved informally or through disciplinary or grievance processes.

Q 2. Are there particular kinds of issues where mediation is especially helpful or where it is not likely to be helpful?

In our experience mediation is most helpful for employers where the value of a possible claim is high and the potential litigation complex and time consuming. Most cases we have mediated have involved High Court claims by employees in which the costs risk is much more of a concern. Mediation in such cases often comes after initial settlement discussions have taken place but the parties cannot reach agreement on the sums to be paid to the employee. In these circumstances both parties may be more prepared to spend the time and money which mediation involves despite the uncertain outcome. Disputes involving concerns over the inappropriate management of an employee, performance assessments or alleged poor treatment (including discrimination) ought to be ideal for mediation. In our experience, however, and in practice, employers rarely see mediation as the commercial way to deal with a workplace dispute, notwithstanding the litigation risk, particular given the current cost and compensation regime.

In today's job market where recruitment is relatively easy, once an issue with an employee who remains in employment reaches the stage at which mediation might be considered (usually once formal internal grievance or disciplinary processes are exhausted) most employers consider a parting of ways with a cash sum paid under a compromise agreement a more attractive and commercially sensible option than working towards a reconciliation with the employee through mediation. The exception can be smaller or start-up businesses for whom such costs are relatively more significant.

Q 3. In your experience, what are the costs of mediation?

The cost of mediation can vary enormously depending on the mediator chosen, the complexity of the case, the time it takes to mediate, where the mediation takes place, whether and the extent to which lawyers are involved and how many people attend the mediation. Even if lawyers do not attend, they will often be called on to assist with the preparation which incurs fees.

The cost includes the loss to the business arising from having staff (often senior staff) spending the whole or a significant part of a working day involved in the mediation. In our experience many employers are most focussed on these costs rather than the cost of a mediator or the facilities. This makes them reluctant to engage in mediation in cases where the value of a possible claim is small.

Q 4. What do you consider to be the advantages and disadvantages of mediation?

For a number of years now the Government has been trying to encourage employers to mediate at an early stage in a dispute but that encouragement has not on the whole, in our experience, translated into more workplace mediation or an appetite to try it. Most employers can see the obvious benefits of resolving certain disputes at an early stage. That is certainly the case for the respondents to our survey who highlighted in particular the potential cost savings involved in mediation if it results in a settlement and importantly, that it can be a less stressful means of resolving disputes for both parties than preparing for and appearing in an employment tribunal. We have already highlighted the concern many employers have as to the value of spending time and money in a process with an uncertain outcome. We welcome the Government now attempting to understand through this consultation process why, despite this, mediation has not

yet become a first choice option for resolving disputes.

Q 5. What barriers are there to use and what ways are there to overcome them?

We have highlighted in our answers to questions 2 and 3 above the time and cost issues which tend to be significant barriers to parties engaging in pre claim or workplace mediation.

We believe one of the biggest barriers is cultural. In our experience, many managers feel uncomfortable with the prospect of a face to face debate with an employee about the way they have managed or treated that employee. In a Tribunal, or even an internal grievance or disciplinary process, the interaction between the Claimant and Respondent is more arms length as opposed to being by direct exchanges. The respondents to our survey were clear that a body like ACAS has a key role to play because of the arms length nature of the mediation service it provides. Most welcomed ACAS having a greater role to play, although there was some concern as to whether ACAS is currently capable of providing an enhanced service.

Although we have seen some changes in this regard, it remains the case that many employers do not have a culture of open and constructive feedback about colleagues, at all levels of seniority, and open communication about problems and issues. Until that culture in the workplace changes, it will remain difficult and uncomfortable for many employers to engage in the mediation process at an early stage of a dispute. Many will simply bury their heads, hand over a potential dispute to their lawyers to deal with and hope that in fact there will be no claim brought or if there is a claim, that it can be settled through a compromise agreement.

These barriers can be overcome if managers actually experience mediation, but it is getting them to agree to do this which remains the problem.

Q 6. Which providers of mediation for workplace disputes are you aware of? (We are interested in private/voluntary/social enterprises – please specify)

N/A

Q 7. What are your views or experiences of in-house mediation schemes? (We are interested in advantages and disadvantages)

We are not aware of any of our clients having such schemes.

Compromise agreements

Q 8. To what extent are compromise agreements used?

In all the sectors in which our clients operate, regardless of the size of the business, compromise agreements are by far the most common means of resolving disputes. Some disputes are settled through a COT3 particularly where a Claimant is a litigant in person, however, even where litigation has been commenced and ACAS has contacted, the vast majority of cases will settle with a compromise agreement negotiated between the parties without ACAS's involvement.

Q 9. What are the costs of these agreements? (Note: it would be helpful if you could provide the typical cost of the agreements, highlighting the element that is the employee's legal costs)

The cost of reaching agreement on the terms of a compromise agreement will vary enormously. Factors which affect the cost will be the complexity of the employee's legal situation, whether the employee has complex incentive arrangements, how each party conducts the negotiations, the expectations of both parties as to what is a suitable financial compromise and the extent to which there remains any goodwill between the parties.

Typically we find that compromise agreements negotiated between lawyers will cost either party £3,000 plus VAT to £10,000 plus VAT unless they are very straightforward and a commercial deal has been agreed prior to lawyers being instructed. In some cases where the legal situation, particular the contractual entitlements, are complex costs can be in excess of £20,000.

Typically the contribution towards the costs of the compromise agreement will start at £500 plus VAT up to £1,000 unless negotiated separately.

The costs of negotiating a compromise agreement have risen as case law has developed so that they often run into over 10 pages, even where there is an employee below director level.

The current uncertainty about the interpretation of s147 of the Equality Act has also increased the legal fees involved in the negotiation of a compromise agreement.

Q 10. What are the advantages and disadvantages of compromise agreements? Do these vary by type of case and, if so, why?

Advantages:

- Compromise agreements can be a quick way to resolve disputes at any point during a dispute process but particularly at the outset.
- The necessity of involving lawyers on the Claimant's side tends to lead to deals which are a sensible reflection of the value of an employee's claim (taking into account the cost and time saving involved in an early settlement and the advantage to the employee of monies up front).
- They enable the parties to address issues which are not addressed if a case proceeds to a tribunal namely confidentiality, protection of confidential information and of a client's business interests, references and other provisions to protect the parties' reputations.

Disadvantages:

- Whilst agreements tend to be very much commercially driven, Claimants find it frustrating that their employment protection amounts to nothing more than a horse-trade over

compensation as opposed to an examination of the rights and wrongs of their case.

- There can be a lack of satisfaction on both sides in the sense that neither party is given the opportunity to publically state how they feel about the other.

In our experience the advantages and disadvantages are the same regardless of the type, size or complexity of the case.

Q 11. What barriers are there to use and what ways are there to overcome them?

respondents to our survey commented that one of the key barriers to compromise agreements is the current uncertainty about the interpretation of section 147 of The Equality Act. This inhibits settlement and costs employers and Claimants in legal fees.

The cost of a compromise agreement can be disproportionate to the possible size of the deal (see our response to question 9 above). Some ACAS officers are very willing to step in at the last minute to facilitate a COT3 in such circumstances. Others can be less keen and less flexible about what goes into the COT3, for example, recently we have encountered some ACAS officers refusing to allow agreed references or waivers of claims other than those contained in an ET1, for example, in a disability discrimination case a waiver of personal injury claims. This inflexibility drives the parties towards the compromise agreement route which is more costly for both.

Early Conciliation

Q 12. We believe that this proposal for early conciliation will be an effective way of resolving more disputes before they reach an employment tribunal. Do you agree? If not, please explain why and provide alternative suggestions for achieving these objectives.

Yes [ ] No [X]

If "No", please explain why:

The respondents to our survey were on the whole very positive about proposals for early conciliation. They felt this would avoid the commonly employed tactics of delaying negotiations until the other party had incurred high costs in order to drive up or drive down (depending whether it's the Claimant or Respondent) the cost of the settlement.

The reason for answering "no" to this question is that whilst most respondents to our survey welcomed steps the possibility of being taken to give ACAS a more active role in trying to limit the number of cases which proceed to a tribunal hearing, a number commented on a less than satisfactory experience with ACAS. For example some felt frustrated that ACAS did not offer either side views about the strength of the claim and often made little attempt to really encourage a reluctant party to consider settlement. Some felt that ACAS was simply ineffective or that a consistent level of effective service was lacking which did not inspire confidence that

ACAS had the means, service delivery ethos and consistent quality to really make a difference.

In our survey we asked respondents to give the three approaches most likely to lead to early settlement of the claim. Whilst 39% voted for conciliation through ACAS, out of the 7 choices conciliation by ACAS ranked only 5th. The other choices were:

- judicial mediation - 22%, ranked joint 6th;
- mediation by third parties e.g. private mediators -22%, ranked joint 6th;
- requiring Claimants to lodge a Schedule of Loss with every claim – 40%, ranked 4th;
- requiring Claimants to lodge with every claim evidence of attempts to mitigate – 52%, ranked 3rd;
- widening the power of tribunals to require deposits in weaker cases 61%, ranked 2nd;
- introducing a Part 36 offer procedure as per the High Court – 65%, ranked 1st;

Q 13. Do you consider that early conciliation is likely to be more useful in some jurisdictions than others? Please say which you believe these to be, and why.

We see no reason why early conciliation cannot be useful in any type of case. In complex cases for example equal pay claims, it might be helpful and necessary for the Tribunals to be proactive in making orders for provisional information, for example statistics and responses to discrimination questionnaires, prior to mediation so that certain amount of information is available from which parties can form a view on settlement.

Q 14. Do you consider Acas' current power to provide pre-claim conciliation should be changed to a duty? Please explain why?

In our view ACAS's current power to provide conciliation should not be changed to a duty. Whilst some claims may be settled at this early stage, in our experience conciliation is most effective once the parties have set out their case in an ET1 and ET3 form, as at that point each can take a view about the relative merits, the likely time, witnesses and costs involved. Many Claimants we act for want to see what their employer has to say before agreeing to settle as they fear they may be selling themselves short. Conversely employers can be reluctant to offer settlement before they have a chance to put their side of the story on the record as they hope this might manage the employee's expectations with regard to an appropriate level of compensation. Therefore it is more important to retain ACAS's duty to conciliate post claim when we believe there is a greater chance of a successful conciliation.

Q 15. Do you consider Acas duty to offer post-claim conciliation should be changed to a power? If not, please explain why.

Yes [ ] No [X]

If "No", please explain why:

Our Respondents very much welcomed the duty of ACAS to offer post claim conciliation so we do not believe that should be changed to a power. If pre- claim conciliation has not resulted in a settlement ACAS should encourage the parties to re-think once they have both forms ET1 and ET3 and are better placed to take a view on the merits, the likely time, witnesses and costs involved.

As per the response to question 12, one Respondent highlighted the fact that ACAS's role would need to change to be much more challenging, to give opinions and to be more pro-active about encouraging settlement if it is going to be more effective at reducing the number of claims which proceed in the tribunal.

Q 16. Whilst we believe that this proposal for early conciliation will be an effective way of resolving more individual, and small multiple, disputes before they reach an employment tribunal we are not convinced that it will be equally as effective in large multiple claims. Do you agree? If not, please explain why.

Yes [ ] No [X]

If "No", please explain why:

See response to question 13 above.

Q 17. We would welcome views on: *the contents of the shortened form*

A short form should include:
- the claims being made and brief details of the basis for them;
- an outline of losses including full details of remuneration and benefits package;
- brief details of steps taken to mitigate and estimate of time it will take to get another job and the basis for this estimate e.g. feedback from recruitment agencies.

Q 17a. We would welcome views on: *the benefits of the shortened form*

See answer to 17b below

Q 17b. We would welcome views on: *whether the increased formality in having to complete a form will have an impact upon the success of early conciliation*

We believe the formality will focus a Claimant's mind on the possibility of settlement at an early stage, particularly if required to consider their actual losses and therefore the likely value of the claim.

Q 18. We would welcome views on: *the factors likely to have an effect on the success of early conciliation in complex claims*

We see no reason why early conciliation cannot be useful in any type of case. In complex cases for example equal pay claims, it might be helpful and necessary for the Tribunals to be proactive in making orders for provisional information, for example statistics and responses to discrimination questionnaires, prior to mediation so that certain amount of information is available from which parties can form a view on settlement.

Q 18a. We would welcome views on: *whether there are any steps that can be taken to address those factors*

See our answer to question 18 above

Q 18b. We would welcome views on: *whether the complexity of the case is likely to have an effect on the success of early conciliation*

Please see our answer to question 18 above.

Q 19. Do you consider that the period of one calendar month is sufficient to allow early resolution of the potential claim? If not, please explain why.

62% of the respondents to our survey thought that one calendar month would be sufficient.

Yes [X] No [ ]

If "No", please explain why:

Q 20. If you think that the statutory period should be longer that one calendar month, what should that period be?

CHAPTER II: Modernising our Tribunals

Part A : Tackling weaker cases *- power to strike out*

Q 21. What benefits or risks do you see from a power to strike out a claim or response (or part of a claim or response) being exercisable at hearings other than pre-hearing reviews? Please explain your answer.

The ability to exercise the power to strike out a claim or response at hearings other than at pre hearing reviews (e.g. case management discussions) could reduce the costs involved in seeking such an order. Over 66% of the respondents to our survey expressed support for the proposal that employment judges be given the power to strike-out a claim on the basis that it has no reasonable prospect of success without having a hearing, or otherwise allowing the affected parties to make representations.

Some respondents to our survey felt that Tribunal judges are reluctant to exercise the powers they already have in this regard and, therefore, having the power to strike-out a claim at hearings other than pre-hearing reviews may not in fact lead to less weak cases proceeding.

Q 22. What benefits or risks do you see from a power to strike out a claim or response (or part of a claim or response) being exercisable without hearing the parties or giving them the opportunity to make representations? Please explain your answer.

Based on our experience, the benefit would be in relation to costs and, possibly, timing, in that Tribunals could consider whether or not to strike out a claim or part of a claim quickly if they are able to form a view on the matter without seeking representations from both parties. The risk, however, is that claims may be struck out without proper consideration of all the arguments as to whether or not a particular claim should be struck out. In particular, if a Claimant is unrepresented, the ET1 will probably not be as sophisticated as the ET3 and this could prove to be vital if a Judge does not have much more than those documents on which to base his/her decision. There is therefore a concern (as reflected in some responses to our survey) that the interests of justice will not be served, in particular if the costs of an appeal are prohibitive to a Claimant.

Q 23. If you agree that the power to strike out a claim or response (or part of a claim or response) should be exercisable without hearing the parties or giving them the opportunity to make representations, do you agree that the review provisions should be amended as suggested, or in some other way?

We agree with the proposed review provisions set out in the consultation document (allowing parties affected by a strike-out order made in the absence of their representations to apply to have that judgment or order set aside).

Q 24. We have proposed that Respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: *the frequency at which Respondents find that there is a lack of information on claim forms*

Based on our experience, claims drafted by unrepresented Claimants in particular tend not to contain sufficient information for the Respondent to understand the nature of the claim being made.

Q 24 a. We have proposed that Respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: *the type/nature of the information which is frequently found to be lacking*

The value of the claim (i.e. the amount being claimed) and the reasoning behind any figures that are provided is often lacking. 40.3% of the respondents to our survey were of the view that requiring Claimants to lodge a schedule of loss with every claim is likely to lead to early settlement of claims. This supports the view that Respondents will be better able to asses whether there is scope for negotiating a settlement to claims early on in the process.

Examples of the poor treatment being relied upon by Claimants which form the basis for the allegations of ill treatment that are made in the claim form vary enormously. In our experience, the particulars of claim generally tend to be one of two extremes – either incredibly long and detailed, or very short with almost no detail at all. We appreciate that it is not appropriate to be too prescriptive as to what is stated in the claim, but we believe there is merit in having a sentence or two in the relevant section of the Form ET1 giving guidance on what should be included in the particulars of claim section (for example "give examples of events demonstrating that you have been subjected to the treatment claimed").

The request for further information could be done by completing a specific form and there could be a strict timetable as to when such a request should be made – similar to the statutory questionnaire regime. For example, Respondents could be given 14 days from receiving the claim form within which to make a request for further information. The 28 day time limit in which to file the ET3 could then start to run when the Claimant provides the information requested.

Q 24b. We have proposed that Respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further

information before completing the ET3 fully. We would welcome views on: *the proposal that "unless orders" might be a suitable vehicle for obtaining this information*

Our experience is that Tribunal judges do not use their powers to make "unless orders" very often, particularly against Claimants who are unrepresented and that some Tribunals are more likely to make them than others, e.g. the London Tribunals rarely do it, Reading is more bullish in their use. Claimants are given a lot of leeway when it comes to compliance with case management orders which is not satisfactory from Respondents' point of view as it creates an impression of unfairness.

Such orders should be a useful and suitable vehicle to obtain further information and, generally, to weed out Claimants who have simply submitted a claim as a negotiation tactic and have no real intention of pursuing their claim. However, Tribunal judges must be consistent in their approach to making such orders and should not be as reluctant to make them against Claimants where circumstances justify this as they have been in the past.

Q 24c. We have proposed that Respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: *the potential benefits of adopting this process*

The more information that is provided to Respondents with regard to the details of the claim and the facts on which allegations are based, how much the Claimant is claiming (and the basis for claiming those amounts) and the steps taken to mitigate financial loss, the better able they are to form a view on whether there is scope to settle the claim.

Q 24d. We have proposed that Respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: *the disadvantages of adopting this process*

Although logical in principle, the proposal is arguably open to abuse by Respondents who may seek further information as a tactic to buy time and delay submitting a response and/or to put Claimants under more pressure. Claimants who are represented would incur more costs in responding to requests for further information and could be quite stretched financially by the time they receive the respondent's ET3.

Q 24e. We have proposed that Respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: *what safeguards, should be built in to the tribunal process to ensure that Respondents do not abuse the process, and*

Having applications for further information go through the Tribunal (and be viewed by a judge

before being issued to the Claimant) would provide an adequate safety net to Claimants. Judges should have the power to refuse such requests if they are seen to be unreasonable, excessive or disproportionate.

Q 24f. We have proposed that Respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on: *what safeguards/sanctions should be available to ensure Respondents do not abuse the process?*

There could be a mechanism allowing Claimants to resist such requests for information on the basis that the request is disproportionate or unreasonable. However, there is a risk that the process of applying for and receiving such additional information could become protracted and lead to a delay in the progression of claims which would not be favourable.

Part A : Tackling weaker cases – *deposit orders*

Q 25. Do you agree that employment judges should have the power to make deposit orders at hearings other than pre-hearing reviews? If not, please explain why.

respondents to our survey were generally of the view that Tribunals already have many of the tools they need to tackle weaker claims but are not always as robust as they could be in using them. On that basis, although giving Tribunals the power to make deposit orders at hearings other than pre-hearing reviews is a good idea in terms of giving Tribunals more flexibility, the general view is that this would be of little use without a change in the general approach of Tribunals towards exercising such powers.

Q 26. Do you agree that employment judges should have the power to make deposit orders otherwise than at a hearing? If not, please explain why.

On the whole, it appears sensible that employment judges should have such a right. In most cases, it will be possible to form a view as to the appropriateness of making such an order on review of the ET1 and ET3.

61% of the respondents to our survey were of the view that widening the scope of Tribunals to order Claimants to pay deposits in weaker cases is one of the proposals most likely to lead to early settlement of claims.

Q 27. Do you think that the test to be met before a deposit order can be made should be amended beyond the current "little reasonable prospect of success test? If yes, in what way should it be amended?

In our view, the existing test to be met before a deposit order can be made is appropriate. However, as stated by some of the respondents to our survey, Tribunal judges should perhaps be more open and bullish in applying the test and making such orders.

Q 28. Do you agree with the proposal to increase the current level of the deposit which may be ordered from the current maximum of £500 to £1000? If not, please explain why.

Yes. Given that most Claimants claim amounts far in excess of that amount, it seems logical that the maximum deposit should be increased to £1,000. £500 in today's world would not necessarily, in our view, act as a deterrent to many Claimants who wish to pursue a claim for as long as possible to keep the pressure up on the Respondent until the matter reaches the point where it becomes disproportionate for the Respondent to continue fighting the claim and, therefore, prompt settlement. In those circumstances, the settlement package that could potentially be negotiated could far outweigh the deposit paid.

Q 29. Do you agree that the principle of deposit orders should be introduced into the EAT? If not please explain why.

It seems logical to us that such a mechanism should exist and be available to EATs if it is available to Tribunals.

Part A : Tackling weaker cases *– the costs regime*

Q 30. Do you agree with the proposal to increase the current cap on the level of costs that may be awarded from £10,000 to £20,000? If not, please explain why.

Yes [X] No [ ]

If "No", please explain why:

Q 31. Anecdotal evidence suggests that in many cases, where the Claimant is unrepresented, Respondents or their representatives use the threat of cost sanctions as a means of putting undue pressure on their opponents to withdraw

from the tribunal process. We would welcome views on this and any evidence of aggressive litigation.

In our experience, Respondents do make offers to settle claims on a Without Prejudice basis and make such offers subject to costs. However, the purpose of making such offers is not, in the vast majority of cases, to put undue pressure on Claimants, but to explore if there is scope to reach a reasonable settlement at an early stage in the Tribunal process. Such offers are generally a fair reflection of what Claimants are likely to recover in the event they pursue their claim and win. They are a genuine attempt to settle and bring the claim to an end without further costs being incurred on either side. Such offers also generally contain wording advising unrepresented Claimants to seek independent legal advice (including from their local Citizens' Advice Bureaux).

Some Respondents also inform Claimants of the costs regime in the Tribunal where it has been felt necessary to do so.

Q 32. Should there be sanctions against organisations which place undue pressure on parties, particularly where they are unrepresented? If yes, we would welcome views on: *what evidence will be necessary before those sanctions are applied*

Yes [X] No [ ]

If "Yes", please explain why:

The evidence would normally be copies of the correspondence between the parties from which a judge could form a view as to whether the wording, tone and frequency of the communications in question amount to undue pressure.

As mentioned in answer to some of the earlier questions, it was felt among some respondents to our survey – and we would agree – that the Tribunal judges have sufficient powers in regard to applying such sanctions but are generally reluctant to exercise those powers.

Q 32a. Should there be sanctions against organisations which place undue pressure on parties, particularly where they are unrepresented? If yes, we would welcome views on: *what those sanctions should be, and*

Yes [X] No [ ]

If "Yes", please explain why:

Costs against such parties and/or a fine that would be subject to a maximum cap set by secondary legislation that is reviewable from time to time.

Q 32b. Should there be sanctions against organisations which place undue pressure on parties, particularly where they are unrepresented? If yes, we would

welcome views on: *who should be responsible for imposing them, and for monitoring compliance – for example regulatory bodies like the Solicitors Regulation Authority and the Claims Management Regulator, or employment tribunals themselves.*

Yes [X] No [ ]

If "Yes", please explain why:

The employment tribunals themselves would be the obvious authority to impose such sanctions in the first instance. In particularly serious instances of undue pressure, matters could be referred to the Solicitors Regulation Authority by either the Claimant or the judge.

33. Currently employment tribunals can only order that a party pay the costs incurred by another party. It cannot order a party to pay the expenses incurred by the tribunal itself. Should these provisions be changed? Please explain why you have adopted the view taken.

Yes [ ] No [X]

If "No", please explain why:

Given that no such order can be made in normal civil proceedings, it is difficult to see how they can be justified in tribunal proceedings. It would be disproportionate for parties to be exposed to tribunal costs as well as the costs of the other side and their own costs.

Part B : Encouraging settlements – *Provision of information*

Q 34. Would Respondents and/or their representatives find the provision of an initial statement of loss (albeit that it could be subsequently amended) in the ET1 form of benefit?

Yes [**X**] No [ ]

Q 35. If yes, what would those benefits be?

In our experience, in particular in relation to those who are not legally represented, many Claimants are not aware of how compensation is calculated in the employment tribunal when bringing a claim. Settlement is hindered because Claimants do not consider offers to settle in light of their actual or expected losses. By introducing a requirement to provide an initial statement of loss it is likely to focus such Claimants on what are their realistic prospects of obtaining compensation. It will hopefully lead to Claimants considering more carefully what is an appropriate level of compensation at which they should settle any potential claims.

More than 40% of respondents to our survey indicated that they thought this requirement would lead to the early settlement of claims.

Q 36. Should there be a mandatory requirement for the Claimant to provide a statement of loss in the ET1 be mandatory?

Yes [X] No [ ]

Q 37. Are there other types of information or evidence which should be required at the outset of proceedings?

In our experience, many Claimants are unaware of their obligation to mitigate their losses. We suggest, based on our experience, that requiring Claimants to provide evidence of their attempts to mitigate their losses such as job applications would assist in focusing such Claimants on their realistic prospects of being able to mitigate their losses and subsequently encourage settlement negotiations based on what they might actually achieve in any employment tribunal.

52% of respondents to our survey indicated that they thought this requirement would lead to early settlement of claims.

Q 38. How could the ET1 Claim Form be amended so as to help Claimants provide as helpful information as possible?

We suggest that there should be a standard form questionnaire through which Respondents can request further information after receipt of the ET1. The deadline for responding to the ET1 should be extended so it is not due until 28 days after the completed questionnaire is lodged with the tribunal. The questionnaire could include sections such as the statement of loss and efforts to mitigate. In order to ensure the requests for further information are not abused, Respondents should only be able to request them within 14 days of receipt of the ETC.

Part B : Encouraging settlements - *Formalising offers to settle*

Q 39. Do you agree that this proposal, if introduced, will lead to an increase in the number of reasonable settlement offers being made?

Yes [X] No [ ]

Q 40. Do you agree that the impact of this proposal might lead to a decrease in the number of claims within the system which proceed to hearing

We find that many reasonable settlement offers are rejected by both Claimants and Respondents. This can be because one party does not appear to have understood what the Claimant might be able to obtain at a tribunal or because one party has an unreasonable view of the strength of either their claim or their response. In some instances, even if a Claimant is aware that he has a weak claim, when they are a litigant in person with no legal costs to bear, there is no risk of paying the respondent's costs and so they continue regardless, relying on the "hassle factor" as leverage to extract a higher settlement sum than they might otherwise expect to be awarded at a tribunal. Similarly, Respondents with weak responses can, in some cases, pursue a case and refuse to agree a reasonable proposal of settlement, preferring to use their superior ability to pay legal fees to force Claimants into the difficult position of having no job and ongoing legal fees. This can mean that, even where Claimants are successful at a merits hearing, financial pressure means they accept a relatively low settlement, rather than wait up to six months for a remedies hearing.

Currently, such unreasonable refusals are not taken into account by employment tribunals. We expect that if reasonable offers to settle were formalised, both parties would have to consider the consequences of such a refusal much more carefully. This proposal was thought to be the most likely to lead to early settlement by 65% of respondents to our survey.

Of course, many reasonable offers of settlement are rejected because either of the parties wish to continue to litigate as a matter of 'principle'. Particularly in the case of Claimants, many view the tribunal as an arena in which their former employers can be brought to justice and where they can obtain a declaration that they were unfairly dismissed, discriminated against, etc. We have also experienced employer clients who have resisted cases, even though it would have made commercial sense, because they do not wish to portray to other staff that they will as a matter of course settle claims in circumstances where they believe that they have managed situations in the best way possible taking into account both the employee's rights and the needs of the business.

Q 41. Should the procedure be limited only to those cases in which both parties are legally represented, or open to all parties irrespective of the nature of representation? Please explain your answer.

Although we did not ask this question in our survey, a large number of Respondents chose to make additional comments on the proposals and many were concerned that the proposals would not work without ACAS playing a greater role. We suggest that if ACAS were required to assist employees in relation to such formal offers of settlement, even where Claimants are not legally represented, formal settlement offers should be permitted. The overall view of respondents to our survey is that ACAS' involvement is very important, welcome and is a positive addition. 40% of respondents to our survey thought that early conciliation through ACAS would lead to early settlement of claims. Some Respondents felt that ACAS should be more robust in its views on assessing the strengths of Claimants' claims and explaining how the employment tribunal calculates compensation. This is not generally the case in our experience with most ACAS conciliators but we do agree that greater consistency needs to be achieved.

Q 42. Should the employment tribunal be either required or empowered to increase or decrease the amount of any financial compensation where a party has made an offer of settlement which has not been reasonably accepted? Please explain your answer.

Employment tribunals should be empowered to increase or decrease the amount of any financial compensation where a party's offer of settlement has not been reasonably accepted. respondents to our survey have commented that tribunals should not only be empowered but required to use these powers in the relevant circumstances.

Given that the party may well be a Claimant who has not secured alternative employment, it might be difficult to implement a regime which mirrors the CPR part 36 procedure's imposition of cost penalties. Instead, it would seem sensible to increase or decrease the amount of compensation which will still incentivise the parties to consider any reasonable offer of settlement but not impose serious financial hardship in the event that a Claimant loses a case and does not have alternative employment. We again refer to 65% of our Respondents who thought formal offers of settlement, including increasing/decreasing compensation would lead to early settlement of cases. There needs to be clear parameters which show what the penalty is (like the 25% uplift for not following the ACAS Code).

The employment tribunal should also take into account that many Claimants require a declaration that they have been unfairly dismissed. 50% of said it would make a positive difference to their perception of a candidate who had been terminated from their last employment if they had subsequently successfully obtained a tribunal finding to that effect.

Q 43. What are your views on the interpretation of what constitutes a 'reasonable' offer of settlement, particularly in cases which do not centre on monetary awards?

A reasonable offer of settlement would be an offer which is not significantly different to the award made by an employment tribunal. Focussing on mitigation at an early stage will help Claimants consider what is a reasonable offer, taking into account mitigation as well as the value of the claim and accelerated receipt of the payment without going through a merits, remedies and possible appeal hearing and avoiding legal costs. This firm does not have significant experience in relation to cases which do not centre on monetary awards.

Q 44. We consider that the adoption of the Scottish Courts judicial tender model meets our needs under this proposal and would welcome views if this should be our preferred approach.

Although this firm is not familiar with the Scottish courts judicial tender model, the suggestion that instead of paying a sum of money into the tribunal, that written details of the offer are lodged formally with the tribunal, and communicated directly to the other side, seems practical.

Part C : Shortening tribunal hearings – *Witness statements taken as read*

Q 45. Anecdotal evidence from representatives is that employment tribunal hearings are often unnecessarily prolonged by witnesses having to read out their witness statements. Do you agree with that view? If yes, please provide examples of occasions when you consider that a hearing has been unnecessarily prolonged. If you do not agree, please explain why.

Yes [X] No [ ]

If "No", please explain why:

We do not think it a good use of Tribunal time to prolong a hearing, particularly a simple unfair dismissal claim, to have a hearing last more than a day or two because of the time that must be allocated to the reading of long witness statements.

Having witness statements taken as read can make it particularly difficult for Respondents to inform their witnesses as to when they should make themselves available to attend the tribunal hearing. In cases where the reading of one statement overruns, a witness who made him/herself available on that day may find that they need to set aside another day to attend the Tribunal because there was not enough time for them to read their statement on the day originally thought. Witness statements being taken as read would remove this problem.

Q 46. Do you agree with the proposal that, with the appropriate procedural safeguards, witness statements (where provided) should stand as the evidence of chief of the witness and that, in the normal course, they should be taken as read? If not, please explain why.

Yes [X] No [ ]

If "No", please explain why:

Q 47. What would you see as the advantages of taking witness statements as read?

It would save both the parties and the Tribunal time and costs and enable the tribunal to deal with more cases more quickly.

Q 48. What are the disadvantages of taking witness statements as read?

There is value in the Tribunal and the other party seeing how each witness handles their evidence when presenting their case. Having to read out their statement also gives witnesses an opportunity to settle into the tribunal set up and become more comfortable with the surroundings before being subjected to cross-examination. This adjustment time would be lost if witness statements are taken as read.

Having witness statements taken as read may undermine the principle that Tribunal hearings are public hearings given the fact that a lot of information and detail would be unclear if those statements are not read out loud. Copies of statements would need to be made available in the tribunal, which incurs photocopying expenses and a debate about who pays.

Part C : Shortening tribunal hearings – *Expenses of witnesses and parties*

Q 49. Employment tribunal proceedings are similar to civil court cases, insofar as they are between two sets of private parties. We think that the principle of entitlement to expenses in the civil courts should apply in ETs too. Do you agree? Please explain your answer.

Yes [ ] No [X]

If "Yes", please explain why:

Q 50. Should the decision not to pay expenses to parties apply to all those attending employment tribunal hearings? If not, to whom and in what circumstances should expenses be paid?

Yes [X] No [ ]

If "No", please explain why:

Q 51. The withdrawal of State-funded expenses should lead to a reduction in the duration of some hearings, as only witness that are strictly necessary will be called. Do you agree with this reasoning? Please explain why.

Yes [X] No [X]

If "Yes", please explain why:

Part C : Shortening tribunal hearings – *Employment Judges sitting alone*

Q 52. We propose that, subject to the existing discretion, unfair dismissal cases should normally be heard by an employment judge sitting alone. Do you agree? If not, please explain why.

Yes [X] No [ ]

If "No", please explain why:

Q 53. Because appeals go to the EAT on a point of law, rather than with questions of fact to be determined, do you agree that the EAT should be constituted to hear appeals with a judge sitting alone, rather than with a panel, unless a judge orders otherwise? Please give reasons.

Cases before the EAT generally concern complex points of law and, ultimately, are challenges against one judge's reasoning and application of the legal principles in question. On that basis, we are of the view that it is more appropriate for there to be a panel hearing appeals.

Q 54. What other categories of case, in the employment tribunals or the Employment Appeal Tribunal, would in your view be suitable for a judge to hear alone, subject to the general power to convene a full panel where appropriate?

Please see above.

Part D : Maximising proportionality – *Legal officers*

Q 55. Do you agree that there is interlocutory work currently undertaken by employment judges that might be delegated elsewhere? If no, please explain why.

Yes [X] No [ ]

If "No", please explain why:

We have experienced extensive delays in receiving the outcome of employment tribunal judgements. Promulgation of judgments can take up to 6 months. A number of respondents to our survey mentioned that their primary concern was to speed up the process. Therefore, if delegating such interlocutory work elsewhere would free up employment judges to draft judgments and attend hearings, this would be welcomed.

Q 56. We have proposed that some of the interlocutory work undertaken by the judiciary might be undertaken by suitably qualified legal officers. We would be grateful for your views on: *the qualifications, skills, competences and experience we should seek in a legal officer, and*

They should be legally qualified solicitors or barristers with a suitable level of experience. We acknowledge that this is already the case in relation to employment judges. We think that certain experienced wing members who have undertaken some appropriate legal training could also be a qualified legal officer.

Q 56a. We have proposed that some of the interlocutory work undertaken by the judiciary might be undertaken by suitably qualified legal officers. We would be grateful for your views on: *the type of interlocutory work that might be delegated.*

Case Management Discussions or case management queries relating to matters such as extensions, postponements or witness orders. This may become more relevant if tribunals become stricter on compliance with case management orders (which we and some respondents to our survey think they should be).

CHAPTER IV : Business taking on staff and meeting obligations

Extending the qualification period for unfair dismissal

Q 57. What effect, if any, do you think extending the length of the qualifying period for an employee to be able to bring a claim for unfair dismissal from one to two years would have on: *employers*

70% of respondents to our survey did not believe that extending the length of the qualifying period would encourage employers to recruit more staff. One Respondent suggested that the practical effect would be a two year "probationary period" for new employees.

One Respondent noted that these measures assume that the current system is bombarded by unfounded claims but sees no empirical evidence to support this assumption. Our experience as a firm of solicitors acting for both Claimants and Respondents confirms this: we see relatively few completely unfounded claims.

Q 57a. What effect, if any, do you think extending the length of the qualifying period for an employee to be able to bring a claim for unfair dismissal from one to two years would have on: *employees*

Some of those surveyed suggested that the effect would be an increase in discrimination claims and claims where there is no qualifying length of service. For example, our experience suggests that Claimants who have not reached the qualifying period try to bring whistleblowing related unfair dismissal claims for this same reason. Recent case law developments have encouraged this, as they have meant that it is increasingly easy to bring a whistleblowing claim as the scope of a qualifying disclosure has widened to include situations where an employee makes a disclosure relating to a breach of his/her employment contract or a statutory employment right.

As such, the effect of increasing the qualifying period may in practice result in an increase in those "spurious" or unfounded claims which the Government is seeking to weed out.

Further, in our experience, where a respondent believes that a Claimant has brought an unfounded claim in order to have redress against a dismissal prior to the first year of service, they are unlikely to want to conciliate and reach settlement.

Q 58. In the experience of employers, how important is the current one year qualifying period in weighing up whether to take on someone? Would extending this to two years make you more likely to offer employment?

As noted in Q56, employers might in effect use the two year period as a longer "probationary

period" in which to asses employees ability and "fit" with their business. However, 70% of the respondents to our survey did not believe the change would achieve the Government's objective of encouraging employers to recruit more staff.

Q 59. In the experience of employees, does the one year qualifying period lead to early dismissals just before the one year deadline where there are no apparent fair reasons or procedures followed?

In our experience, if an employee is not working effectively or performing at desired levels, he or she would be dismissed, irrespective of length of service. However, we have worked with a number of employees who felt that rushed decisions had been made to dismiss them just before they reached the qualifying period, as the employers knew that it would have been slower and/or more expensive to dismiss after that date. In most such cases, there are genuine performance or conduct issues, or concerns over an employee's "fit" in the workplace, underlying the decision to dismiss. The motivation is usually to avoid the process which would be necessary to render the dismissal fair if the employee has a year's service. It is not, in our experience, the case that employees who are performing to standard are dismissed and replaced simply to avoid any staff qualifying to bring an unfair dismissal claim.

Q 60. Do you believe that any minority groups or women likely to be disproportionately affected if the qualifying period is extended? In what ways and to what extent?

Groups which are more likely to have breaks in their continuity of service, such as mothers who take career breaks, will be disproportionately affected as they will need to "build up" to the two year qualifying period after every break.

Younger employees who have not reached the qualifying period or who have had shorter careers, perhaps struggling to gain long term employment in the current economic climate, may also be disproportionately affected.

CHAPTER IV : Business taking on staff and meeting obligations

Financial Penalties

Q 61. We believe that a system of financial penalties for employers found to have breached employment rights will be an effective way of encouraging compliance and, ultimately, reducing the number of tribunal claims. Do you agree? If not, please explain why and provide alternative suggestions for achieving these objectives.

Yes [ ] No [X]

If "No", please explain why:

A number of those surveyed thought a system of financial penalties for an employer would be unfair as it would result in the employer having to make a payment to the employee as well as the tribunal if it loses the case. Respondents to our survey noted that this would put a particular strain on small businesses.

Others saw potential for such fines to 'clog up' the tribunal further by adding additional administrative burdens, especially if the fines are disputed.

The level of possible penalties will strongly influence whether employers get better at compliance.

Q 62. We consider that all employment rights are equally important and have suggested a level of financial penalties based on the total award made by the ET within a range of £100 to £5,000. Do you agree with this approach? If not, please explain and provide alternative suggestions.

Yes [ ] No [X]

If "No", please explain why:

Our survey asked what would be the fairest way of assessing financial penalties for employers. 50% of Respondents believed the fairest way would be by reference to the extent of the unlawful behaviour by the employer; 17% by reference to the size, turnover and profitability of the employer's business; 16% by reference to the value of the claim; 9% by reference to the type of claim; and 6% by reference to the employee's pay, subject to the £5,000 cap.

Q 63. Do you agree that an automatic mechanism for up-rating tribunal awards and statutory redundancy payments should be retained? If yes : *should the up-rating continue to be annual?*

Yes [X] No [ ]

Annual

Q 63a. Do you agree that an automatic mechanism for up-rating tribunal awards and statutory redundancy payments should be retained? If yes: *should it continue to be rounded up to the nearest 10p, £10 and £100?*

Yes [X] No [ ]

£100

Q 63b. Do you agree that an automatic mechanism for up-rating tribunal awards and statutory redundancy payments should be retained? If yes: *should it be based on the Consumer Prices Index rather than, as at present, the Retail Prices Index?*

Yes [X] No [ ]

Retail Price Index, as present

Q 64. If you disagree, how should these amounts be up-rated in future?

If you wish to make any other comments on the consultation, please note them in the box below:

The premise for the conclusion that the employment tribunal system is in need of reform seems to be that the system is inundated with wholly unfounded claims which have no prospect of success but are designed to intimidate employers into making settlement offers. No empirical evidence has been presented in support of this proposition and it is not generally supported by the experience of this firm nor most of its employer clients. While some of the respondents to our survey welcomed the proposed reforms as a means of tackling the "*current 'why not raise a claim' culture*", others were concerned that the reforms would hinder access to justice for those employees who were genuinely aggrieved but may not be able to pay the fees to lodge a claim or risk the financial penalties if they lose at tribunal.

A number of Respondents commented that a more useful exercise would be to consult on why tribunals are not robust in using the tools that are available to them when dealing with weaker cases, one Respondent commented: *"more use should be made of deposits, CMDs should be held as a matter of course as this will weed out the Claimants who never really intended to*

engage with a tribunal process beyond filing of a claim and PHRs should be a bigger feature. Tribunals should be more prepared to make orders that claims will be struck out if case management orders are not complied with".

Some Respondents believed the Government's principal aim is in fact saving costs and that its publicised objectives are secondary to this.

A number of Respondents commented on the current role and status of ACAS. Some felt that ACAS's power and influence was negated by their unwillingness to offer either side any views upon the strength of the claim whilst others were of the view that unless both sides to a claim showed an early eagerness to reach settlements the ACAS officers were quick to walk away instead of probing into the issues and trying to discover why one or both parties preferred to take the case to a Tribunal.

If fees for submitting a claim are introduced, 40% of those who responded to our survey thought these should be based on the Claimant's earnings, 39% said it should be a fixed fee set by the Government and 20% said it should be based on the amount being claimed.

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