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How should Employment Tribunals operate in the future?

Response by Birmingham Law Society Employment Law Committee

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Alternative Dispute Resolution (ADR)

- How can parties be encouraged to use ADR?
- What stops people from using ADR?

ADR is to be encouraged, but the fees discourage engagement, and the provision of ADR must be consistent.

There should be no fees for using ADR. The costs of Judicial Mediation (JM) are a particular barrier to employers: both the tribunal fee itself and the associated lawyers' fees. Many feel reluctant as a point of principle to be responsible for JM fees (and the loss of them where mediation is unsuccessful) when the claimant has no such burden.

The Employment Tribunals have historically been inconsistent in their approach to JM. Some judges push for resolution more strongly than others; some focus on offers regardless of merit; some are keener to flesh out the issues and to test the evidence in order to get parties to take a realistic view. A more consistent approach would lead to greater confidence in the system.

ADR will not be appropriate in every case (where one or both parties are intractable; where a tribunal finding will impact on similar claims in the future, etc). However, if the Employment Tribunal continues to encourage parties and their representatives to mediate, and offers both consistency and value for money, then it will be best placed to grow organically.

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

Yes. The present model of JM is limited, in that the Judge is constrained from giving his or her own view of the merits of a claim or defence. Where it fails, it has often taken the parties no further forward.

For this reason, early neutral evaluation (see below) would not only encourage settlement by providing a realistic assessment of each party's case, but would also help to narrow the issues and prepare parties for trial even if unsuccessful.

Arbitration on the other hand is binding and therefore presents no less a risk than litigation. For this reason it is not appropriate.

As stated above, any fee regime will pose a significant deterrent to ADR.

- How has early conciliation (EC) been working? Can it be improved?

There has been a mixed response to EC. Results have been positive where ACAS officers have been well-informed and presented the matter fairly. However, there are still issues.

For example, some respondents have received their first contact very late in the day (on some occasions mere days before the end of the conciliation period). This has severely limited the possibility of settlement at that point.

Employers also need to be given enough information about a potential claim to make a decision on settlement. The quality of information passed on by ACAS given has varied greatly, and in some cases the employer has not even been told the broad nature of the claim itself. Naturally this is not conducive to settlement.

At the risk of introducing a further piece of paperwork, a simple pro forma should be introduced to ensure that ACAS take all of the correct information (even if couched in terms of a non-binding understanding of the ACAS officer). Both parties could then be certain about where they stood.

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

Multi-stage appeals processes may encourage employers to feel that a claimant has already had enough bites of the cherry, and the length of such processes may have already served to alienate the parties. However, it is neither suggested that robust appeals procedures are a bad thing, nor that they should be changed.

<u>Decision Making in Employment Tribunals</u>

- Are there any areas of law, or business sectors, where people cannot enforce their employment rights? If so, what is the reason for this?

Some claims are financially unattractive, rather than entirely unenforceable. For example, claims for flexible working.

Bullying is difficult to deal with where it is not related to a protected characteristic.

- How can cases be better managed?
- Would disclosure earlier than at present be of assistance? If so, in what way?

Judges already have power to managed cases pro-actively.

Early disclosure would not be of assistance. In order for the parties' expenditure to remain proportionate to the issues, disclosure needs to take place once those issues have been narrowed – or at least discussed – at a preliminary hearing.

There is already a mechanism for early disclosure where appropriate.

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

Yes. Lay members are valuable assets in discrimination cases and are a sad loss from unfair dismissal claims. The balance between employer and employee perspective is an important one and, with many cases revolving around the relationship between the parties, it is essential that both of these perspectives are considered.

Further, lay members often have a valuable insight into the practicalities of the workplace. For example, understanding how long a successful claimant is likely to be unemployed in a successful unfair dismissal claim assists greatly in assessing quantum.

The present system should therefore not be altered. However, it would be helpful to allocate lay members to public/private sector-specific cases, depending on their experience. Where there are sufficient lay members available in a given geographic area, consider allocating lay members with specialist skills (e.g. medical) or industry experience (e.g. manufacturing) to relevant cases.

- Should employment judges become more inquisitorial?

Judges can already be inquisitorial in trials, and are best placed to consider when it is appropriate and when it is not.

- Is there a place for early neutral evaluation (ENE)?

See ADR discussion, above.

Where both parties agree to it, ENE could be very helpful in settling disputes, especially where one or both parties have unrealistic expectations.

Further, even where parties fail to reach an agreement through ENE, they will have done more to narrow the issues than they would through mediation.

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

There is already a sifting process at the tribunal, and Judges have the power to manage cases pro-actively.

Not every claimant appreciates which issues in their case are the most relevant, and fewer still can condense complex and emotive subject matter into the correct legal form. Where a case is not clearly made out from the pleadings, the claimant should therefore be given the opportunity to clarify it (not to add further information or heads of claim).

Where it is clear that the facts as pleaded do not give rise to a claim or defence, then that pleading could be rejected. However, the fact that there would have to be an appeal process might defy the point of deciding on the papers in the first place.

Alternatively, decisions on the papers could be encouraged where both parties agree and there is no substantial dispute of fact.

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

No. This is an access to justice issue, and the recent introduction of fees has already given parties with legitimate grievances pause for thought. The threat of costs sanctions against a person who has just lost their job and has no income will have a further adverse effect on their ability to bring a claim. Applications for costs can already be made where cases are brought or handled inappropriately.

Notwithstanding the recent introduction of fees, a costs regime would not necessarily deter potential mischievous, vexatious claimants; however there are already mechanisms for costs in these circumstances and these should remain.

- What role should ACAS have in the process?

Having a duty officer available at tribunal to deal with settlements has been very successful in the past, and it is worth considering whether this would be possible in the future. See also EC, above.

Jurisdiction

- Should the Employment Tribunal hear some cases currently heard in the civil courts or other tribunals? If so, what should be the extent of its jurisdiction?

Yes. The process as set up at the moment with breach of contract claims and discrimination claims heard in the Civil Courts is biased towards the legally represented. On the other hand, the Tribunal system is designed to support claimants who are unrepresented. Whilst it does not always get it right, it does have the ability to impact on employment relations in a more practical way, as opposed to the costs and damages driven civil process.

- Should there be a single employment court system dealing with all employment related claims? What should be the extent of its jurisdiction?

A claimant can currently reserve their rights in respect of contract claims in the County or High Court, when issuing a claim in the Employment tribunal. It is difficult for the respondent properly to defend the claim without having seen pleadings for the contractual claim, which may be the biggest head of loss (loss of commission, bonus etc).

There should therefore be a single jurisdiction dealing with all employment matters including breach of contract and equality related matters, as well as personal injury claims brought by employees. However, given the potential limitations, parties should retain the choice of the jurisdiction in which to litigate.

- Would it be beneficial to have different procedural considerations according to the level and complexity of a case?

Yes, if the Tribunal were to have responsibility for all employment related matters, such as PI claims; complex disability claims (independent medical evidence); and equal pay claims (equal value process unless the law on equal pay claims is revised).

- Should the EAT have first instance jurisdiction for certain complex and high worth cases?

Depending on the complexity and worth of the case, it could disproportionately affect the regions to hold all such hearings in London.

However, the EAT is set up to make a ruling on a point of law, and there is much benefit to be had from the availability of specialist judges when, for example, construing restrictive covenants. Also, certain cases are already automatically remitted to the High Court, for example injunctions to prevent planned strikes from taking place. The EAT is perhaps better placed to hear this type of application than the ET, which is set up to hear and examine evidence.

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

Yes. Access to the Tribunal has become significantly less accessible, if not inaccessible. The Tribunal needs to be stable and robust and accessible to all. However, robust and fit for future processes come at a cost, and regardless of the extent to which that impact is passed on to employee/employer, the Tribunal needs to ensure that access to justice is not compromised. Employment relations will worsen as internal grievance processes reach their limits, and employers' bad behaviour risks going unchecked.

Fees should be kept, but at significantly reduced levels. Fees have not deterred ill-thought-out claims alone, but have reduced claims across the board. Lower fees would still discourage entirely meritless claims without dissuading genuine claimants, who sensibly decide that they cannot afford to risk litigation.

There should also be a greater range of fees depending on the value of the claim. This would not only help to ensure access to justice, but would also reflect the fact that for many cases, the fee is greater than value of the claim.

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