Question 1: Are the new rules less complex and easier for non-lawyers to understand? Do you think that the drafting style could be further improved and if so how?

☒ Yes ☐ No ☐ Not sure

Comments: Although most of the changes mean that the language is more straightforward there are examples where existing powers have been renamed (for example reconsideration for review) without apparent improvement in accessibility. "Substantive defects" (rule 11) may not readily be understood to mean defects in the way the claim itself is explained.

Question 2: Do you think Presidential guidance will provide all parties with clearer expectations about the employment tribunal system and ensure consistency in case management and decision making?

Do you have any comments on the draft example guidance on postponements and default judgments provided at Annex B

☒ Yes ☐ No ☐ Not sure

Comments: In principle, if applied consistently in all regions, Presidential guidance will ensure greater consistency. There is a risk that more prescriptive rules (that is to say the 2004 rules) will be exchanged for less prescriptive rules with very detailed guidance. If the tribunals do not need to be bound by the guidance then would it be an abuse of discretion to deviate from following the guidance when the parties have prepared on the reasonable expectation that it would be followed? The draft guidance of default judgments appropriately expands on the shortened rule 20 (compared with r.8 of ET Rules 2004). However the brevity & clarity of the drafting of the rules is not always mirrored by brevity & clarity in the guidance (for example: paragraph 3 under Action for Parties; paragraphs 3.b. and 3.d. under Action by the Employment Judge; paragraph 3.g. and h. read as though they ought rather to be stand alone paragraphs). If Presidential guidance covers many topics then, on the strength of the examples, the total quantity of guidance which may have to be given to parties is lengthy. The guidance on postponement is more than 6 pages long. Careful thought needs to be given to how the availability of this guidance should be publicised; is the Courts and Tribunal Service website sufficient? Should there be a requirement for paper copies to be sent out if it is foreseeable that the need for it might arise? Is this likely to be proportionate to the occasions on which it will be referred to in any given case and is there a risk that non-

legally qualified tribunal users will be less likely to read what they are sent if it is too lengthy?

Question 3: Will the recommendations for new rules on the initial paper sift and strike out powers lead to better case management early in the tribunal process?

☐ Yes ☐ No ☒ Not sure

Comments: We welcome the new Rule 22 which gives Judges a power to conduct an early assessment of the Claim and Response, and issue specific case management directions, such as an order for further particulars.

As a matter of principle, any process "weeding out" weak claims at an early stage is a positive step. However, there is concern as to whether sufficient judicial time and resource will be allocated to the sift process to ensure that it is carried out fairly and **consistently.** Although the test of lack of jurisdiction in Rule 23 may be simple to apply in terms of, say, qualifying service, the issue is much more complex when the jurisdiction issue (quite commonly) relates to whether the claim has been lodged in time in discrimination cases, where there are usually issues concerning "continuing acts", and/or consideration of whether it is "just and equitable" to extend time under the **Equality Act 2010.** Furthermore, EAT guidance and case law on strikeout on "no reasonable prospects of success" is restrictive and limited to cases where there is little or no factual dispute, and therefore difficult to apply in practice – see recent decisions of **Tayside Public Transport co v Reilly [2012] IRLR 755 (CS)** and **Balls v Downham Market High School [2011] IRLR 217 (EAT),** where strike out on "no reasonable prospects grounds" is to be used only in exceptional cases. Finally, there is also scope for potential injustice to a deserving claimant in person, with a meritorious claim being struck out because it has been expressed poorly due to a vulnerable or junior employee acting in person. There may be indirect discrimination issues arising out of strike out decisions that may unduly impact those claimants whose literacy skills are limited (for example because English his not their first language and they are in low paid jobs) or because of impairments due to disability (for example, because of learning disabilities, or impairments due to depression). Should such class of claimants receive a formal letter rejecting their claim, unless they request a hearing, there is scope that meritorious claims will not be progressed by such individuals.

It would appear that new rule 23(1) has the effect that if the Employment Judge on the sift considers that the claim has no reasonable prospect of success they have to send the notice ordering the claim to stand dismissed unless the claimant has written asking for a hearing. It would appear the judge has no discretion to order a preliminary hearing at that point. Similarly with the rule 24 power to dismiss the response.

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

☐ Yes ☐ No ☒ Not sure

Comments: Telephone case management discussions have become a very useful tool by which both the tribunal can keep a proportionate grasp on managing preparation for trial and the parties reduce costs of representation at hearings. Consideration needs to be given to whether it is appropriate for an employment judge to be able to exercise powers to determine disputed issues of liability by telephone. This might be dealt with by a judge's powers at a telephone preliminary hearing being limited to deciding the issues which have been notified to the parties in advance as being liable to be decided to allow for representations to be made, if necessary, to convert it to an oral hearing.

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

☒ Yes ☐ No ☐ Not sure

Comments: Our experience is that judicial comment to encourage parties to settle may sometimes be incorrectly construed as bias or pre-judgment of the claim or response. Therefore, although it is difficult to see how this rule will change practice (as currently judges do give parties encouragement to settle, for example at CMD hearings), it is a useful rule to state expressly, which may mitigate against allegations of bias, and encourage litigants in person to explore alternative dispute resolution earlier on in the process.

Question 6: Do you agree that a respondent should not be required to apply to the tribunal to have their case formally dismissed when the claimant has chosen to withdraw? Are there any disadvantages to this approach?

☒ Yes ☐ No ☐ Not sure

Comments: We are of the view that, save in exceptional cases (see further below), dismissal should be automatic upon withdrawal, analogous to the current Rule 25A. The current Rule 25A provides that upon the parties settling the case through ACAS in terms which include for the case to be dismissed on withdrawal then the employment judge is directed to dismiss the case within 28 days and no application is necessary. The new rule 37 appears, as with the present rule 25A, to envisage a conscious judicial act by which the claim is dismissed. It is noted that the new rule 37 will still require an application to withdraw being made in writing unless it is at a hearing which does not appear to include withdrawal as part of a judicially mediated settlement.

The exception should be limited to cases whether the Claimant expressly withdraws a claim to bring a claim in the civil courts. In such cases, the dismissal should not be automatic, The most common situation in which a claimant might wish to reserve the right to bring a further claim is where the value of a breach of contract claim exceeds the limit on compensation which an Employment Tribunal can award. In that situation the claimant would not wish to have their tribunal claim dismissed because the doctrine of res judicata would have the effect that they were estopped from bringing a claim in the County Court or High Court on substantially the same facts. The clarity of rule 38 could be improved were the words "in the Employment Tribunal or elsewhere" inserted between "further claim" on the 3rd line and "against the respondent". It is a disincentive to a claimant to withdraw in the situation that they are not certain to be able to bring proceedings in another jurisdiction until a Tribunal has expressed itself satisfied that there is a legitimate reason not to dismiss the claim. The rule itself provides no guidance as to what might be a legitimate reason. Under the present rule the requirement for a respondent to apply to dismiss the claim means that the claimant would be on notice and would, in an appropriate case, have the opportunity to apply for a hearing to determine dismissal.

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

☒ Yes ☐ No ☐ Not sure

Comments: Time-tabling of oral evidence does occur presently, usually in multi-day cases, and therefore a rule to that effect is a positive development. However, a strict time-tabling where the issues of fact and law have not been properly identified at the beginning of the hearing will lead to potential injustice to a party if the guillotine is applied before they have been able to cover all issues. Therefore the application of Rule 50 should be predicated on the basis that issues of fact and law have been properly identified at or by the commencement of the hearing, and the parties directed that questions may only be focussed on such issues. Therefore an unrepresented party (or a party represented by an unqualified representative) will be able to conduct their cases effectively, whilst also being able to manage the time allocated to them for questioning of witnesses.

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

☒ Yes ☐ No ☐ Not sure

Comments: It is sensible that the rule should explain the breadth of the Tribunal's powers relating to privacy and restrictions of disclosure rather than, as at present, the rule not reflect the powers of the Employment Tribunal. The proposed new rule 55 would appear accurately to reflect the powers of the Employment Tribunal as explained in case law such as **F v G [2011] EqLR 1219 EAT**.

Question 9: Is there a need for a lead case mechanism for dealing with multiple claims? What are the potential impacts of this approach?

☐ Yes ☒ No ☐ Not sure

Comments: Our anecdotal experience is that many multiple claims may have common threads (e.g. in equal pay claims) but each individual claimant's case still needs to be determined on facts specific to them. The

usual practice is to identify lead cases to determine common issues, and deal with each individual claim thereafter. As a result, we cannot see how the present rule will change practice.

Question 10: Do you agree that written reasons should be provided, where requested to parties, but in a manner which is proportionate to the matter concerned?

☐ Yes ☐ No ☒ Not sure

Comments: The parties have the right to expect that whenever written reasons are provided they are sufficient to enable them to understand the decision that has been made and the reasons for it. These may be very briefly stated in appropriate cases (for example returning to the pre-2004 distinction between "Summary Reasons" and "Extended Reasons"). It is desirable that the reasons given orally should be substantially identical to reasons given in writing, subject to correcting small errors of detail and grammar which are likely to occur in oral *ex tempore* reasons. Furthermore, it is difficult to understand what is meant by the word "proportionate" - some relatively low value claims may require the application of complex law (e.g. entitlement to holiday pay to those on sick leave), and therefore will require reasons which are robust to appellate judicial scrutiny.

Question 11: Are there any disadvantages to removing the £20,000 cap for awards before they are referred to the county or sheriff court (please provide examples where possible)?

☒ Yes ☐ No ☐ Not sure

Comments:Under the current regime, costs awards in excess of £20,000 have to go to the County Court for detailed assessment. Awards at or above that sum can be life-changing to an individual who is at the receiving end of such an award. Tribunals exercise their powers to award costs rarely, and a recent EAT decision (**Oni v NHS Leicester City [2012] UKEAT/0144/12/LA**) shows that Tribunals are at risk of having their costs award overturned in the event that they have found against a party, on the basis of bias. In essence, Tribunals are not experienced in assessing costs, in contrast with a civil court District Judges who are familiar with assessing and determining costs. Therefore to avoid injustice, inconsistency, and a potential increase of appeals arising from assessment decisions, it is prudent to retain the cap on assessment and preserving the status quo – i.e. giving Tribunals the power

to order costs in excess of the cap, but such awards have to be assessed by detailed assessment, if not agreed.

One option is to train specific judges so that they are qualified as costs judges in assessing costs in the Tribunal. Therefore a judge hearing a case may not necessarily be the judge to determine costs, should an application be made – this would be consistent with the recent case of **Oni.**

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

☒ Yes ☐ No ☐ Not sure

Comments: Under the present Rules, there is sufficient scope to order costs, however, anecdotal evidence suggests that Employment Judges have little appetite to make such awards, even when there are clear and proper grounds for doing so. Presidential guidance on this issue would be a welcome development. Furthermore, the literature sent out to Claimants and Respondents when a claim is issued or a response accepted could draw from that guidance, and point out what is expected of the parties in the conduct of proceedings, failing which an order for costs may be made against them.

There is scope to train designated judges to become specialists "costs judges" – see response to Q.11 above.

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

Comments: A preparation time order reimburses a litigant for the hours they are assessed likely to have spent preparing for the case except for the

duration of the final hearing itself. It does not appear that the tribunal has the power to reimburse the litigant for incidental expenses such as preparation of bundles and cost of telephone calls. The wording of the new rule 69(2) (preparation time orders) credits the receiving party with the time spent by any advisors. At present, a party cannot recover anything for time spent by non-legally qualified representatives at any final hearing. Lay representatives may be acting for profit or may not. In principle where a litigant chooses to instruct a lay representative who is acting for profit there is no reason why the litigant should not be able to recover the cost of paying for that representative at the final hearing from the paying party if their conduct justifies an award being made. The tribunal may have to require appropriate evidence of the basis on which the representative is instructed and the level of their charges. In principle there is no objection to a lay representative who is not acting for profit, such as a family member or friend, being reimbursed for their time in the same way as a litigant is reimbursed through a preparation time order which would exclude the time spent at the final hearing, in particular where the preparation time is greater because of unreasonable conduct on the part of the paying party .

The new rule 69(3) (as with the rule it replaces) would seem to penalise those who are legally represented in the early stages of proceedings, for example at a preliminary hearing, but represent themselves in preparing for the final hearing. If the paying party's conduct both at the preliminary hearing and in preparation for the final hearing (or in bringing proceedings at all) justifies a costs order it is hard to understand the rationale behind the prohibition on the receiving party both being awarded costs for the earlier hearing and a preparation time order in respect of work leading up to the final hearing. This may be designed to prevent double recovery in respect of the same work but that is a matter of assessment in an individual case rather than principle.

On a separate topic the test for the award of wasted costs is lower than for a costs order: compare "improper, unreasonable or negligent act or omission" in the new rule 76(1) with "vexatiously, abusively, disruptively or otherwise unreasonably" in the new rule 70(1). Whilst lay representatives who are acting not for profit might not be held to the same standards of negligence as a legal representative is it right that a party who has been put to additional expense by the improper or negligent behaviour of the other party's representative should be unable to be compensated for it solely because the other party chooses to be represented by a non-legally qualified person?

Question 14: Are there any disadvantages to allowing those who choose to represent themselves be able to claim both for preparation time and witness expenses (as part of a claim for costs)?

☐ Yes ☒ No ☐ Not sure

Comments: It is assumed that this refers to the ability of the litigant in person to claim witness expenses in respect of their own attendance at tribunal. There does not appear to be any overlap between the method of calculation of preparation time orders and witness expenses and therefore no disadvantage to this. However, it might be thought that, as a matter of principle, a party might be expected to be willing to attend at tribunal in their own cause without recompense.

Question 15: Do you agree that employment judges should be able to require deposit orders on a weak part of a claim or response as a condition of it continuing through the tribunal process?

☒ Yes ☐ No ☐ Not sure

Comments: The wording of new rule 36 contrasts with the old rule 20(1) and might be argued to limit a deposit order to the whole complaint (defined as "anything that is referred to in the relevant legislation as a claim, complaint, reference, application or appeal") rather than to part of it. Would it be broad enough to allow striking out of indirect discrimination but not direct discrimination oran allegation of direct discrimination on a particular date which is plainly long out of time and unconnected to another allegation which is in time?

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

Comments: Both the ET1 and ET3 should have a statement of truth attached to them, so that the documents may stand as evidence for sift, deposit order or strike out purposes. A statement of truth requirement (with the requisite warning) will also mean that parties will need to think carefully and take a considered approach when asserting matters in the claim form or response.

This may have the effect of reducing frivolous claims, or the assertion of allegations that a party knows not to be true.

ET1 Box 9.1 – "I was discriminated against on the grounds of", should read "I was discriminated against because of"...to fall in line with the statutory wording of the Equality Act 2010.

ET1 Box 9.1 – "I am claiming..." - this box is ambiguous, as it is not clear if this is a reference to the specifies of discrimination listed above, or other claims that fall within the ET's jurisdiction (e.g. unpaid wages, breach of contract, detriments connected with various rights), although other jurisdictions are set out in another box further down.

Question 17: Do you agree that any power to deploy legal officers in employment tribunals in relation to interlocutory functions should be modelled on the wider tribunals' template under the Tribunals Court and Enforcement Act?

☐ **Yes** ☐ **No** ☒ **Not sure**

Comments: This appears to envisage the appointment of individuals to the position of legal officer to carry out case management functions of a very wide nature. It is not clear what level of qualification or training these individuals will have (e.g. graduates or solicitors/barristers?). Consideration of practice statements issued by the President of Tribunals shows that in some jurisdictions striking out, summary assessment of costs, substituting or adding parties and issuing witness orders can all be done by legal officers. There is a spectrum of decisions which, at present, have to be done by an employment judge, some of which can be carried out by a legal officer with the safeguard to parties that they can apply for the decision to be reconsidered by a judge. Caution should be exercised to balance the efficient use of judicial time with the right of the parties to have important issues considered by a judge. On the other hand there are many occasions where agreed applications for the amendment of a timetable for disclosure or substitution of parties in the case of name change are delayed because of the need for judicial action. It might be appropriate for judicial reconsideration of a legal officer's decision to be as of right and not limited as is reconsideration by an employment judge of their own decision.

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

Comments: Given rule 56(3) gives the power for the EAT to order written reasons, and that under Rule 3 of the EAT Rules requires a party to submit written reasons to properly initiate an appeal, there needs to be clarity as to when the EAT will order written reasons when a party has not requested them at first instance.

Rules 23 and 24 of the EAT Rules (restricted reporting orders) will need to be consistent with rule 55.

Question 19: Do you agree that the introduction of a time limit of 14 days for the payment of awards, (with interest also accruing from this date), will encourage more prompt payments from parties?

☐ Yes ☐ No ☒ Not sure

Comments: In the majority of cases this is fair. However where a party is contemplating an appeal they have 42 days from the date of the decision to do so or later if written reasons were requested in time. To cause interest to run from 14 days after the date of the decision would put pressure on a party to make a decision on appeal within a shorter timescale. Perhaps such a time limit should be coupled with a power to the employment tribunal to stay enforcement of the award at least until time has expired for an appeal.

Question 20: What, in your view, are the main reasons for non payment of awards? What more can be done within the current employment tribunal system to better enforce these awards?

Comments:

The lack of an effective method for enforcing awards must contribute to the non payment levels. More of an issue, and perhaps an impediment to early payment, is the lack of clarity regarding the tax issues arising from any compensation payment ordered by the ET. Therefore, ET awards should state clearly the tax treatment of any award, and set out expressly the part of the award that needs to be paid directly to the successful Claimant, and the part that needs to be paid to HMRCs.

Question 21: Do you have any other views on Mr Justice Underhill's recommendations?

Comments:

Do you have any other comments that might aid the consultation process as a whole? Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Comments:

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☐

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☐ Yes ☐ No

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