

Equality and Diversity Forum submission in response to the Resolving Workplace Disputes consultation

The Equality and Diversity Forum (EDF) is the network of national non-governmental organisations (NGOs) working on equality and human rights. The network unites some of the major national NGOs tackling discrimination on the grounds of age, disability, gender, gender identity, race, religion or belief and sexual orientation together with leading human rights organisations and advice agencies. A list of current members is attached.

Summary

The members of the EDF are concerned about proposals whose effect will be to make the ETs more formal, legalistic and inaccessible. In particular, we are concerned about the proposals in relation to:

- powers to strike out,
- make deposit orders,
- make costs orders, and
- extend the qualification period from one year to two years.

Context

We agree with the consultation's objective that '*As a Government, we need to encourage employers and employees to work together to resolve disagreements that arise in the workplace*',¹ however, this should not be done in a way that impairs access to justice for members of the community who are not able to pay for assistance from lawyers.

We note the concerns expressed by some business organizations noted on pages 15-16 of the Consultation document that too many weak cases reach the Employment Tribunals. There is no hard evidence of this, no studies have been undertaken to establish that there is a significant number of weak cases and such evidence as there is appears to be anecdotal. However, on the other hand there is evidence, mostly from Government sponsored reports, to suggest that many employees who have experienced discrimination at work are already reluctant to take any further action at all to pursue their case through the tribunal system. The Fair Treatment at Work Survey 2008 found that 7% British employees reported

¹ *Resolving Workplace Disputes*, p3.

experiencing bullying, harassment or discrimination.² Similarly, the Citizenship Survey, in 2009/10, which found that 7% of people in England and Wales felt they had experienced discrimination in the labour market in the last 5 years by being turned down for a job.³ However, research into experiences of discrimination found that only a small number of these people went onto challenge an employer based on their perception of discrimination, more commonly they simply left their jobs.⁴

Similarly, the EOC formal investigation into the employment experiences of pregnant women found that almost half of the 440,000 pregnant women in Britain experienced some form of disadvantage at work, simply for being pregnant or taking maternity leave.⁵ Around 30,000 women were sacked, made redundant or treated so badly that they felt they had to leave their jobs. Seven in ten pregnant women treated unfairly by their employers do not speak out and only 3 per cent of those who lose their job take legal action.

Employment Tribunals were set up to be informal and easily accessible. Progressively they have become more formal, legalistic and inaccessible. The changes being proposed in this consultation can only contribute further to this process.

These proposals need to be considered alongside the proposals that legal aid should be taken away from employment, although not discrimination, cases. In the Proposals for the Reform of Legal Aid in England and Wales this removal of legal aid is justified because

*appellants are able to present their case themselves because of the easily accessible and user-friendly procedure of the tribunal.*⁶

We cannot see that this will continue to be the case if complainants have to pay a fee, are threatened with deposit and costs orders and further formalisation of the procedures around witness statements ...

Furthermore, it should be remembered that Employment Tribunals do not have an investigative function, this is highly significant because the deficiencies of a litigant in person in presenting his or her case cannot be addressed by the judge. This point was made very clearly by the Court of Appeal⁷:

² R. Fevre, T. Nichols, G. Prior and I. Rutherford (2009.) *Fair Treatment at Work Report 2009: Findings from the 2008 Survey*, Department for Business, Innovation and Skills.

³ Communities and Local Government (2010) *Citizenship Survey: 2009/10*

⁴ H. Rolfe, A. Duhdar, A. George and H. Metcalf (2009) *Perceptions of discrimination in employment* Government Equality Office.

⁵ Equal Opportunities Commission (2005) *Greater Expectations: Summary final report EOC's investigation into pregnancy discrimination.*

⁶ Proposals for the Reform of Legal Aid in England and Wales, Ministry of Justice, November 2010, para 4.190.

⁷ In *Mussett v HM Prison Service* [2010] EWCA Civ 25, [2010] IRLR 451 by Rimer LJ repeating what he had said in a case concerning the duty of circuit judges towards such litigants *Lemas v Williams* [2009] EWCA Civ 360, at [57].

...It is for the litigant himself to decide what case to make and how to make it, and what evidence to adduce and how to adduce it. It is not for the judge to give directions or advice on such matters. It is not his function to step into the arena on the litigant's side and to help him make his case.... It is not their role to engage in the sort of inquisitorial function that [counsel for the appellant] suggests or, therefore, to engage in an investigation as to what further evidence might be available to one of the parties which, if adduced, might enable him to make a better case. Their function is to hear the case the parties choose to put before them, make findings as to the facts and to decide the case in accordance with the law.

Because proceedings are adversarial the intelligence, knowledge of the law and analytical and communication skills of a litigant in person will determine the outcome of the case in many circumstances.

We note that the legal aid consultation identified that those in receipt of legal aid in employment cases clients are 45% women, 24% ethnic minorities and 9% disabled. This compares to a national population of 51% women, 8% ethnic minorities and 18% disabled people.⁸ These figures show that the removal of legal aid from employment cases as well as the introduction of stricter ET procedures will have a disproportionately high adverse impact for ethnic minority people.

Mediation

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

Whilst mediation may well be helpful in a number of cases we consider that it requires very careful handling in the cases where there are allegations of harassment between members of staff if it is not to cause unnecessary distress without achieving a positive outcome. Mediation is certainly a good idea where it is not made an extra cost and where it is sensitive to the context.

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.

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.

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

⁸ All these figures are taken from the Proposals for the Reform of Legal Aid in England and Wales, Ministry of Justice, Equality Impact Assessment, November 2010.

them the opportunity to make representations, do you agree that the review provisions should be amended as suggested, or in some other way?

We consider that the power to strike out should be used sparingly and only when the party concerned has been given appropriate notice of the application and had a chance to make representations. It should never be done without hearing the parties and giving them the opportunity to make representations. Currently parties are clearly forewarned of such an application and hence will have a chance to prepare properly. This is particularly important for the unrepresented claimant as they are likely to be less adept than an experienced advocate at responding to new arguments. Additionally, inappropriate striking out leads to further appeals and satellite litigation about the decision to strike out. Thus it can have the perverse result of driving up the cost of litigation and the time spend on the case (see, for an example of case where a strike out application was deplored by the House of Lords, *Anyanwu & anor v South Bank Student Union & anor and the Commission for Racial Equality* [2001] UKHL 14)⁹.

See also comments in the 'Context' section, above.

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.

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.

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?

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.

We do not agree with these proposals as we consider that they will act as a deterrent for individuals considering enforcing their employment rights. £500 could easily be a barrier to justice for many and £1000 will certainly be so.

See also comments in the 'Context' section, above.

⁹ See, in particular, Lord Steyn at para 24 – *'In the result this is now the fourth occasion on which the preliminary question of the legal sustainability of the appellants' claim against the university is being considered. For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.'*

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

There is no need for such a provision in relation to the EAT as it already exercises effective supervision of inappropriate appeals through the rule 3 process – cases with little prospect of success do not proceed in the EAT. Appeals lie on a point of law alone to the EAT and the judges of the EAT are astute to ensure that no case goes to a substantive hearing where a point of law is not raised. If it is properly raised there would be no basis for a deposit. In fact costs are very rarely awarded in the EAT precisely because of this filter.

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.

No

Applications and threats of applications for costs are widely used as a means to overbear poorer litigants into submission. This will lead to satellite litigation where ‘costs warnings’ with the implication that there could be costs of £20,000 are made inappropriately. Such satellite litigation is to be avoided if at all possible.

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.

Those of our members who are engaged in regular employment tribunal casework report persistent examples of this. This is well illustrated in the ACAS report *The Experiences of Sexual Orientation and Religion or Belief Discrimination Employment Tribunal Claimants* they noted that in the ‘majority’ of cases where sexual orientation claims were brought and in several of the religion or belief claims employers had threatened the claimant with an order for costs.¹⁰

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

Yes.

Penal costs orders could be made which not only reimburse for the costs incurred but also penalise the party who has abused the process.

See also comments in the ‘Context’ section, above.

¹⁰ ACAS Research Paper, *The Experiences of Sexual Orientation and Religion or Belief Discrimination Employment Tribunal Claimants*, 2007, p 129.

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*

We do not accept that extending the qualification period will build employer confidence to employ more staff and encourage more employers to create jobs. We do not think that a sustainable programme of job creation is likely to be helped by giving employers confidence that they may without consequence treat a greater number of employees in a manner which falls below generally accepted standards of fairness.

The qualifying period for unfair dismissal was cut from 2 years to 12 months in June 1999. Yet in the following 10 years, more than 1 million new jobs were created. There is also no reason at all to suppose that employers will increase their employment rates if this action is taken. When the qualification period was last increased there was no compelling evidence that it had led to new jobs being added as a direct result of the change. At most it will lead to employment churn.

We consider that there are also substantial disadvantages for employers and for the Employment Tribunal service. The proposal will encourage employees with short service to bring artificially constructed complaints of discrimination or automatic unfair dismissal which will necessarily be more complex, expensive and time-consuming than a simple unfair dismissal claim.

In practice, the Government are proposing that employers should be free to dismiss staff without good cause for the first two years of employment, provided they do not breach discrimination law.

The Government estimate that approximately 2.9 million workers have worked for their employer for between 12 months to 2 years, representing 12% of employees in the UK. They also estimate that the proposed change will reduce the number of claims to Employment Tribunals by between 3,700 and 4,700 a year. This represents approximately 9% of unfair dismissal claims (based on 2009/2010 Employment Tribunal Statistics).

The Government states that this change will not affect employees' rights to claim that a dismissal is discriminatory or the basic principle that employers must have a fair reason for a dismissal and must follow contractual procedures. However this disregards the inadequacy of remedies in wrongful dismissal claims, the fact that the common law does not require employers to have a good or fair reason to dismiss staff and the difficulties which employees face in proving discrimination claims. In practice, 12% of UK employees (based on LFS statistics for August – October 2010) will no longer have statutory rights if they believe their employer has dismissed them for an unfair reason (other than discrimination) or without following a proper procedure. Removing this protection may increase the number of claims of discrimination for which there is no qualification period.

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*

It would increase the insecurity for the 12% of employees who have between 12 months and 2 years service. It would mean that during that period their employer could safely act in breach of basic terms of their contract – or dismiss them – without any redress being available to them.

It is not widely appreciated that unfair dismissal is difficult to prove as the test for a fair dismissal is very low indeed and it amounts to no more than being able to show fair and proper dealing with the employee. It is not onerous for employers.

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?

Employers rarely require trial periods of longer than six months for new employees. We consider that one year is more than long enough to assess whether an employee is suitable for their job.

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?

Those of our members who are engaged in regular employment tribunal casework report some examples of this occurring, there are even some employers who are known to make a regular practice of dismissing all their staff just before they reach the qualification period. If the qualification period is increased to 2 years we would expect to see the practice being modified to reflect the new period.

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?

The figures given by the Ministry of Justice in relation to their consultation on Legal Aid as well as the figures given in the Impact Assessment for this consultation indicate that changes to the Employment Tribunal procedures are likely to have a more significant impact on BME people compared to the white population and even more significantly on younger mixed race people (those between 16 and 24). Is the Government really seeking to exclude young mixed race people, some of those who find it hardest to get work, from the most basic procedural fairness in the employment context?

The EDF is firmly opposed to proposed extension of the qualifying period for unfair dismissal claims and we are not convinced that this is a burden on business nor required by many employers. We would ask the Government to show what evidence they have that the qualification period will create jobs or 'encourage growth'.

April 19th 2011



EDF Members

Advice UK

Age UK

British Humanist Association

British Institute of Human Rights

Children's Rights Alliance for England (CRAE)

Citizens Advice

Discrimination Law Association

End Violence Against Women Campaign

Equality Challenge Unit

EREN – The English Regions Equality and Human Rights Network

Friends, Families and Travellers

Fawcett Society

JUSTICE

Law Centres Federation

Mind

National AIDS Trust

Press for Change

Race on the Agenda (ROTA)

RADAR

Refugee Council

RNIB

RNID

Runnymede Trust

Scope

Stonewall

The Age and Employment Network (TAEN)

Trades Union Congress (TUC)

UKREN (UK Race in Europe Network)

UNISON

Women's Budget Group

Women's Resource Centre