Discrimination Law Association

BIS CONSULTATION: Resolving Workplace Disputes

The Discrimination Law Association ('DLA'), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

The DLA is a national association with a wide and diverse membership. The membership is growing and currently consists of over 300 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

We note that there is no specific question in relation to Chapter III of the consultation – charging fees. We regard the introduction of fees to the tribunal system as a major barrier to access for justice. Unrepresented claimants will be deterred from bringing claims, and effectively shut out of the system. The cost burden of running the tribunal service is shouldered by all taxpayers as everyone benefits from workplace disputes being resolved.

The notion that fees will "incentivise earlier settlements" is based on the assumption that claims can be brought without cost to the claimant. This underestimates the amount of time and emotion litigating consumes – it is rare in our members' experience for claims to be brought frivolously. Weak and vexatious claims should be dealt with by expert advice, and not a cost mechanism that cannot discriminate between meritorious and unmeritorious claims.

The comparison to the civil courts is also misplaced, as the courts have different funding arrangements, and the costs jurisdiction means that fees are generally recoverable if the claim is successful.

1. To what extent is early workplace mediation used?

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

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

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

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

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

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

8. To what extent are compromise agreements used?

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)

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

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

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.
If "No", please explain why:

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.

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

15. Do you consider Acas duty to offer post-claim conciliation should be changed to a power? If not, please explain why.
If "No", please explain why:

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.
If "No", please explain why:

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

18. We would welcome views on: *the factors likely to have an effect on the success of early conciliation in complex claims*
18a. We would welcome views on: *whether there are any steps that can be taken to address those factors*
18b. We would welcome views on: *whether the complexity of the case is likely to have an effect on the success of early conciliation*

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.
If "No", please explain why:

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

Comment (questions 1 - 20): We are very concerned with the idea that claims must be first lodged with ACAS for 1 month before going to the employment tribunal for the following reasons:

1. The idea of enforced conciliation / negotiation is very similar to the failed experiment with statutory dispute resolution procedures, although it is understood that the proposal is not to force parties to negotiate.
2. It delays the start – and therefore the conclusion – of the case.
3. Conciliation is not necessarily better pursued before the case is presented to the tribunal – often it is the progression of the case, and imminent case management orders, that encourage negotiation.

The consultation paper states that: Evidence suggests that claimants and employers tend to be over-confident about the likelihood of their success and potential value of a claim. We will therefore make sure that clear, accessible information is available to enable claimants to make a judgement about the value of pursuing a claim, and the likelihood of a successful outcome.

In our view, it is not always possible to provide clear advice on the value of claims on paper at the outset when the claim is lodged. Particularly, where the alleged discrimination has led to the termination of employment and continued ill-health thereafter. In cases such as these, expert medical evidence would be required to explore issues such as causation; the viability and the length of time it will take for the employee to seek suitable alternative employment. In addition, expert evidence may also be required, say from an employment consultant, as to the length of time it would take for the employee to find suitable alternative employment and the level of remuneration. All this greatly impacts on the quantum of the claim. Thus, in discrimination claims, it may be impossible to properly quantify a claim. Further, in complaints of disability discrimination, more often than not, the employer may not accept that the potential claimant has a 'disability' as defined in the EA 2010, especially where the employee is suffering from a 'hidden disability' such as depression. Again, suitable medical evidence would need to be obtained. The non-acceptance of a condition in these circumstances, coupled with an employee who is not well, may place undue pressure on an employee not to progress his/her claim. The stigma attached to mental health conditions should also not be underestimated. The employee may not feel comfortable talking about the symptoms to someone whom they have no relationship with. The best way to ensure appropriate advice is to maintain an accessible free informed advice service for potential claimants.

The suggestion that ACAS provide impartial advice and information to parties before a claim is lodged is of concern. ACAS cannot at the same time act as an adviser and a mediator. Moreover, though ACAS officers have good general knowledge of employment law, experience suggests they do not have the level of specialism appropriate to tailor advice accurately to a particular case. It would be highly unsatisfactory for unrepresented claimants to be led to rely on vague, unspecific and not always accurate advice from a statutory

source. Considerable training and resources will need to be put in place if ACAS officers are to provide pre-action advice on settlement of potential claims.

In the proposal, far too great a role is given to ACAS officers, who will potentially be led into advising on merits, eligibility and value of claims. As already stated, the expertise of ACAS officers is not built on running claims themselves; they simply see a great number of claim forms and responses. They do not have the expertise to give this level of advice. Nor is it appropriate for a statutory impartial service to be asked to give advice. Where claimants are unrepresented, which will always be the most vulnerable parties, they will place undue weight on what the ACAS officer says.

Moreover, where parties have a disability or if English is not their first language, or they do not come from a professional background, they may also have difficulty in understanding how much weight to give to ACAS advice. Will there be funding to recruit more ACAS officers? Any available funding might be better directed at specialist publicly funded legal advice bodies facing extinction in the context of the proposed cuts to civil legal aid funding.

The DLA considers that this view is supported by independent research: personal contact with an ACAS officer is associated with reduced levels of satisfaction with the outcome of the case (although there may be other factors common to these cases that account for these differences in satisfaction).[1]

The following quotes from "The Experiences of Sexual Orientation and Religion or Belief Discrimination Employment Tribunal Claimants **ACAS** 2007" are informative:

> *"I spoke to Acas a couple of times just to get some things clear in my head. But I didn't find them overly helpful at all ... I got really cross at one stage because in some instances, they would give me conflicting information. ... [The Acas representative] was a complete and utter waste of space. He actually upset me ... I was never asking him to make decisions, because he can't do that. But you know, he also is not supposed to take a side and I didn't always necessarily believe what he said to me either. You know what, this is really awful, but I didn't trust him ... I was really really disappointed."*
> SO, lesbian, HR manager, settled
>
> A small number of claimants made negative comments about ACAS, typically these claimants were unrepresented and expressed the fact that they were in need of support, legal advice, personal contact and representation. One claimant was extremely disappointed when she said she

[1] K. Armstrong and D. Coats (2007) *The costs and benefits of Employment Tribunal cases for employers and claimants* London: DTI.

went to meet her Acas representative and they didn't turn up:

> *"I felt that I had to fight, I had a real fight on my hands to try and get anyone. I just felt that it just wasn't fair, not at all."*

She recommended they:

> *"... get their act together. Seriously get their act together. And find out more about transgender issues, rather than thinking that they can help."*

While conciliation is an important aspect of workplace disputes, it requires resources and representation to be effective. Making conciliation mandatory is unlikely to impact settlement rates, as shown by the pilot judicial mediation scheme – the March 2010 Ministry of Justice research concluded that there was "no discernable, statistically significant effect".

In some cases mediation may be wholly unsuitable; for example, when there has been harassment, or direct discrimination that approaches, or is, abusive. Mediation in these types of cases would only constitute pointless delay, and would add to the stress and trauma of all parties.

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.

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.

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?

Comment:
At present, parties are clearly forewarned that they are coming to an interim hearing where there is a risk that claims may be struck out or costs orders made. This enables them to prepare fully and take advice where they are unrepresented.

In relation to discrimination claims, the public interest in hearing the full claim should be remembered, see Lord Steyn in *Anyanwu* [2001] IRLR 305 at para 24:

> "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. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university."

The risk of giving the tribunal powers to take these steps at a CMD is that the parties are not properly forewarned. They come expecting to deal with case management issues (hearing dates; number of witnesses; dates for exchange of witness statements etc) and can have sprung upon them questions and issues which can lead to them losing part of their claim.

The risk is that a standard letter notifying the CMD will be sent out referring to the tribunal's power to strike out claims, but this will be so standardised that it will not act as sufficient focus on the relevant issue at risk to focus parties' minds.

Many unrepresented parties are still receiving some form of advice, and they need to be properly equipped to deal with such matters. They cannot be expected to think on their feet as would an experienced representative.

This is a particularly sensitive issue on discrimination cases because these are so complex, with many facts, and potentially several discriminatory incidents which are the subject of complaint. What is needed is clear management by a tribunal to ensure the acts of discrimination are clearly identified. Any claim or part of a claim which may not be suitable to proceed, eg due time-limit problems, should be clearly identified and dealt with separately. Jurisdictional arguments are complex. Unless the claim is significantly out of time with no mitigating factors, in discrimination claims, all the evidence should be heard before making a judgment on whether there is a continuing act of discrimination. The tribunal's discretion to extend time on a just and equitable basis in discrimination claims needs to be preserved.

Often a claimant will have representation for a PHR, but not a CMD (for example, in union-funded cases). The conflation of these two types of hearing means that less claimants will be represented at these hearings, which will increase the Tribunal Service's workload as inevitably they are left to perform work that would otherwise have been done by counsel.

The consultation remarks on the lack of power for the tribunal to strike a case out on the papers. However, a judge can always call a PHR of their own initiative. A desire to reduce the number of unmeritorious claims does not require a change in the procedure for striking out claims – the need for forewarning should not be forsaken.

The consultation lacks a clear evidence base to even suggest that there are hundreds and thousands of undeserving complainants of discrimination wasting the tribunal service's time and resources. Anecdotally, the DLA's experience is that the converse was true. Complainants were often scared and often did not recognise the content of complaints as capable of amounting to discrimination as a matter of law.

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
• the type/nature of the information which is frequently found to be lacking
• the proposal that "unless orders" might be a suitable vehicle for obtaining this information

Often respondents will file a holding response until additional information regarding the claim is filed.

comment: An 'unless order' has always been viewed within courts as well as by parties as a draconian method of ensuring proper procedures are adhered to through litigation. It does not allow sufficient flexibility for judges to take account of the circumstances why a party may have been unable to comply with an Order or whether the failure to comply has led to any real prejudice for the other party. It also invites applications after the event of striking out to reconsider the decision, which is a more clumsy and time-consuming method than exercising discretion and hearing views in advance. 'Unless orders' are particularly unsuitable in regard to a party's failure to provide sufficient detail of his/her claim in a discrimination case. This is because (i) what constitutes sufficient information may in borderline cases be a matter of opinion for the Judge and not at all obvious or pro forma; (ii) a minor shortfall in clarity should not be punished to the same extent as a complete failure to set out a claim; (iii) in an area as difficult as discrimination, and especially at a time when advice services beyond an initial diagnosing telephone call are increasingly unavailable, writing a tribunal claim is particularly difficult. Tribunal judges are able to help claimants formulate claims appropriately at case management discussions. There is a further objection to the proposed process in that Respondents may be tempted to press for further information when sufficient has been given by way of discouraging claimants from progressing with their case. This is not an unrealistic scenario, because it is precisely what has happened with regard to making costs threats. Some Respondents routinely write to claimants asserting their claims do not stand a reasonable prospect of success and threatening costs. This intimidates claimants, particularly unrepresented ones, and can lead to fair claims being withdrawn. In the experience of our members, letters threatening costs are often written in cases which clearly have merits and indeed, which go on to be successful.

Until there is a claim and a response the tribunal does not know what the issues in the case are, and so cannot determine what information about the claim is relevant.

The consultation assumes that a claimant is either withholding information, or has not taken the time to sufficiently prepare the case. However, in discrimination claims, the bulk of information about the allegations is usually held by the respondent (emails, statistics about the workforce, policies, notes/memorandum of management decisions). The difficulty in claimants proving discrimination is reflected in the provisions for shifting the burden of proof. A sparse claim form may reflect the totality of the information the claimant has before disclosure or the question and answer procedure has been completed. The respondent should not be permitted to take advantage of their already favourable position with regards to information about the claim.

Often, it is the respondent that has the bulk of the documents to disclose.

•the potential benefits of adopting this process

•the disadvantages of adopting this process

Comment: The disadvantages have been described above. Moreover, tribunals may become clogged up with Respondents inappropriately using this as an early 'strategy' to discourage claims or gain themselves more time in which to prepare a response. Thus tribunals will become involved in adjudicating on 'unless orders' and also in managing cases which have become delayed because of this whole process. Until a response (ET3) is filed, the case cannot progress; the claimant cannot continue with preparation; tribunals cannot arrange a case management discussion.

•what safeguards, should be built in to the tribunal process to ensure that respondents do not abuse the process, and

•what safeguards/sanctions should be available to ensure respondents do not abuse the process?

Comment: It is not possible to safeguard against these concerns.

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.

Comment: The crucial point is that parties coming to the relevant hearing or discussion are aware in advance that there is a risk that a deposit order may be made and the issue will be addressed. Confining this power to PHRs provides a safeguard in the sense that the subject of the PHR must be announced and it is not lost amid other more organisational subjects of the meeting, eg case management. Therefore, if this power were to be extend to, say, case management discussions in discrimination claims, it should be a

requirement that this is set out very clearly on the letter inviting parties to the case management discussion.

There is then another danger that the prospect of deposit orders being made becomes a routine consideration in every case at every case management discussion. Discrimination claims would be more vulnerable to this because they are the claims which most often are the subject of case management discussions. This would be an unfair disadvantage placed disproportionately on claimants bringing discrimination claims. It also runs contrary to the ethos of tribunals, which are not a jurisdiction where costs are not routinely awarded.

Deposit orders are akin to striking out, and should be used as sparingly – it is rare that a conclusive view of the merits of the claim can be reached at such an early stage in proceedings.

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.

Comment: No. The parties have a right to be heard on such a disadvantageous order. Otherwise there is too much premium on how skilfully the ET1 (or ET3) is written, which penalises unrepresented parties. Moreover, parties against whom a deposit order are made are likely simply to ask for a review in person afterwards, thus causing more time in all. It can also discourage settlement of a claim at an early stage.

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?

Comment: It should be 'no reasonable prospect of success'. Parties are entitled to have their case heard if there is a prospect of success. Moreover, in discrimination claims, it is extremely hard to judge in advance their chances of success.

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.

Comment: No. This penalises the lowest paid earners. Tribunals are supposed to be a costs free jurisdiction. In the sort of cases where deposit orders are effective, £500 is easily a large enough amount – if you have £1,000 you would be able to afford some measure of advice, and so would hopefully not be in a position where a deposit order was being considered.

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

Comment: No. The EAT has a sift procedure which should be sufficient to eliminate appeals without reasonable prospects of success.

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.

Comment: No. The figure you refer to is not currently an absolute cap; it is the amount which can be awarded without being assessed by the county court. £10,000 is already a huge amount of money for a party to pay, especially a claimant who is out of work. It is unsatisfactory that amounts even as high as £10,000 can be ordered without a proper taxation. No party defending a claim should be spending even as much as £10,000.

The most recent tribunal statistics show that the current limit is more than adequate: the median award is £1,000, and the average is £2,288.

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.

As already stated, this is fairly common. Some Respondents routinely write to claimants asserting their claims do not stand a reasonable prospect of success and threatening costs. This intimidates claimants, particularly unrepresented ones, and can lead to fair claims being withdrawn. In the experience of our members, letters threatening costs are often written in cases which clearly have merits and indeed, which go on to be successful. Some of our members have attended training courses where employers' representatives have been advised to routinely write a '*Calderbank*' letter threatening costs, and indeed to do so even more if it is a good claim.

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.[2]

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

- what those sanctions should be, and

- who should be responsible for imposing them, and for monitoring compliance – for example regulatory bodies like the Solicitors Regulation

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

Authority and the Claims Management Regulator, or employment tribunals themselves.

Comment: one sanction would be for the employment tribunals to award costs against a party which made an unreasonable costs threat. This would need a provision to lift the veil of without prejudice correspondence limited to threat of costs.

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

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?

35. If yes, what would those benefits be?

36. Should there be a mandatory requirement for the claimant to provide a statement of loss in the ET1 Claim Form be mandatory?

Comment: in most cases, the form is already sufficient in that it seeks details of the claimant's age, gross and net pay when working for the Respondents. This enables Respondents to work out the basic award and likely compensatory award in an unfair dismissal claim. The unknown factor is how long it will take the claimant to get a new job and what that rate of pay will be. At the time of completing the ET1, it is unlikely that 95% of claimants will yet have got a new job. Any other type of detail will be superfluous and too complex for claimants. Claimants already have difficulty in understanding what a Schedule of Loss should comprise.

It is common for case management orders to include an order for a schedule of loss. It is not clear what advantage would be gained by adding this requirement to the ET1.

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

Comment: If they are seeking financial information from the outset then the claim form should be expanded with pointers/notes such as notice pay; bonus; pension, benefits etc. The respondent should then also be required to provide a 'counter-schedule' in their response. Both should be regarded as provisional only.

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

Comment: It should say in a short paragraph that they should set out their complaint in short numbered paragraphs in chronological date order.

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

Comment: No, because the claimant has rarely got a new job yet. Therefore Respondents already have the information they need to broadly assess the value of a claim.

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

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.

Comment: Even if a claimant is legally represented, they may still have limited funds.

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.

Comment: No. There is already a problem with costs threats by Rs. This would only be increased. Moreover, it requires skill and knowledge to assess both the chances of success and the value of a claim. Unless claimants are represented – and represented by specialists (not simply front line agencies) – they will be unable to make proper assessments of an offer. Finally, with regard to discrimination claims in particular, a claim is a matter of principle, not purely of money, and a party is entitled to a declaration that discrimination has occurred and recommendations. Recommendations can have wider, positive implications in the workplace

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?

In discrimination claims, as well as a suitable financial offer, a party would be entitled to an admission of discrimination plus agreement to take corrective steps. This will vary for each case, but could include training for members of staff and independent consultation on policies. Tribunals should be given the power to encourage a respondent to apologise to the claimant/acceptance of wrongdoing.

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.

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.

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.

Comment: Tribunals should be left to exercise their discretion along the lines set out in the *Mehta* case. The DLA's experience is that tribunals generally use this discretion sensibly.

Often, in discrimination claims, the claimant is the only witness. The respondent can sit back and get a feel for the process whilst the claimant is cross-examined. Also, the claimant may come from a background or be in a role where they are not used to speaking or expressing themselves in public, in contrast to managers who may be giving evidence on behalf of the respondent. This may be time consuming but would the DLA would recommend that claimant has the opportunity to take the tribunal through key sections of the statement and refer the tribunal to evidence referred to in the body of statement.

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

Comment: It saves time, and can also help parties who have difficulty reading.

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

Comment: Members of the public are unable to follow the case. It is not satisfactory to give them copies of witness statements as they may take these away. Also, where several statements are read at once or statements are long, it can be difficult for the panel to absorb or recall all the details and there can be a tendency to skim read.

It is also difficult to ensure that the appropriate documents are looked at, even if referred to in the witness statements. Tribunals need to build in sufficient time to read the witness statements, but as it is seen as a time saving exercise, it is likely they will not.

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.

Comment: No. Legal Aid is not available for ET Hearings and it is essential that parties and witnesses are not deterred because of the cost. It will penalise the lowest paid workers.

Expenses are rarely the motivating factor for witnesses attending tribunal – most witnesses other than the claimant have to take time off work, in addition to the inconvenience of attending tribunal. Many potential witnesses are deterred from giving evidence as the respondent is their current or previous employer, it is therefore important not to add any further disincentive.

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?

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

Comment: It would be highly inappropriate if which witnesses are called was determined by expense rather than relevance. The likelihood is that necessary witnesses will not be called by those at the lowest end of the earnings scale. It should be noted that claimants call very few witnesses anyway compared with Respondents, simply because they don't have access to them.

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.

Comment: Definitely not. The essence of employment tribunals is that they are an industrial court with representatives from each side of industry. This ensures fairness of outcome and gives confidence to the parties. Unfair dismissal is exactly the jurisdiction where one would expect to see members.

The consultation acknowledges that judges are more suitable for determining questions of law, and yet the issue at the heart of unfair dismissal claims is the "range of reasonable responses"; whether somebody acted reasonably is a "pure question of fact" (*UCATT V Brain* [1981] ICR 542).

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.

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?

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

Comment: No. Interlocutory work is extremely important in ensuring cases are properly prepared so as to shorten hearings, save costs, keep issues fair and relevant, and encourage settlement. This is even more so in discrimination claims were case management discussions are invariably held and extremely complex. Judges are best placed to decide interlocutory matters because they see the end result. The separation of those who prepare cases and those who run hearings is never efficient; bad interlocutory decisions will cause more problems later.

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

• the type of interlocutory work that might be delegated.

Comment: We do not agree that any interlocutory work can be done by non-judges.

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
• employees

We do not accept that extending the qualification period will build employer confidence to employ more staff and encourage more employers to create jobs. 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.

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.

Comment: On employers – none. 1 year is long enough to decide whether an employee is suitable, or to manage a workforce such that rights are not acquired.

Comment: On employees – substantial. It is deeply unjust in principle that an employee can be dismissed for no good reason at all after having worked at least 1 year with an organisation. Even more so at a time of recession when it is so hard to find another job.

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.

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.

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?

Comment: In the experience of our members, this does happen.
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.

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?

Comment: Yes. Women tend to build up less service because of childcare breaks. Minority groups tend to build up less service because of their previous experiences of disadvantage or discrimination. 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, and to a lesser extent young BME people, some of those who find it hardest to get work, from the most basic procedural fairness in the employment context?

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.

Comment: It sounds like a good idea, though it is not clear which employment rights are meant.

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.

Comment: We are not entirely clear about this idea. Is the proposal to add a penalty in addition to actual loss suffered by the claimant?

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?
- should it continue to be rounded up to the nearest 10p, £10 and £100?
- should it be based on the Consumer Prices Index rather than, as at present, the Retail Prices Index?

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