Department for Business Innovation & Skills

EMPLOYMENT TRIBUNAL RULES:

Government response to Mr Justice Underhill's review of employment tribunal rules of procedure

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Employment Tribunal Rules: Review by Mr Justice Underhill

Contents

Employment Tribunal Rules: Review by Mr Justice Underhill 1
Foreword from the Minister for Employment Relations and Consumer Affairs 3
Introduction 5
Summary of responses to the consultation 6
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? 6
Government response 6
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? 7
Do you have any comments on the draft example guidance on postponements and default judgments provided? 7
Government response 8
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? 8
Government response 9
Question 4: Are there any practical problems with combining pre-hearing reviews and case management discussions into a single preliminary hearing? 10
Government response 10
Question 5: Will a stand alone rule help to encourage parties to consider alternative ways to resolve their workplace disputes, such as independent mediation? 11
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? 12
Question 7: Should judges, where appropriate, limit oral evidence and questioning of witnesses and submissions in the interests of better case management? 13
Question 8: Do you agree with the recommended approach to make the privacy and restricted reporting regime more flexible? 14
Question 9: Is there a need for a lead case mechanism for dealing with multiple claims? What are the potential impacts of this approach? 16
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? 17
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)? 18
Question 12: Are there other measures that can be taken to ensure greater use of the costs regime? 19
Question 13: How should the tribunal calculate awards for costs for lay representatives? 20
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)? 21
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? 22
Question 16: Do you have any comments on the ET1 and ET3 forms attached separately (including the provision for multiple claims)? 23
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 Courts & Enforcement Act? 23
Question 18: What changes that should be made to the EAT rules to ensure consistency with the new rules of procedure for Employment Tribunals? 24

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? ... 25
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? ... 27
Question 21: Do you have any other views on Mr Justice Underhill's recommendations? 28
Next steps and implementation ... 29
Annex 1: Answers to quantitative consultation questions by type of respondent ... 30
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? ... 30
Question 2 – Do you think Presidential Guidance will provide parties with clearer expectations about the Employment Tribunal system and ensure consistency in case management and decision making? ... 31
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? ... 32
Question 4: Are there any practical problems with combining pre-hearing reviews and case management discussions into a single preliminary hearing? ... 33
Question 5: Will a stand alone rule help to encourage parties to consider alternatives such as independent mediation to resolving their workplace disputes? ... 34
Question 6: Do you agree that 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? ... 35
Question 7: Should judges, where appropriate, limit oral evidence and questioning of witnesses and submissions in the interests of better case management? ... 36
Question 8: Do you agree with the recommended approach to make the privacy and restricted reporting regime more flexible? ... 37
Question 9: Is there a need for a lead case mechanism for dealing with multiple claims? What are the potential impacts of this approach? ... 38
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? ... 39
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)? ... 40
Question 12: Are there any other measures that can be taken to ensure greater use of the costs regime? ... 41
Question 14: Are there any disadvantages to allowing those who choose to represent themselves to be able to claim for both preparation time and witness expenses (as part of a claim for costs)? ... 42
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? ... 43
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 Courts & Enforcement Act? ... 44
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? ... 45
Annex 2: List of Organisations who responded to the consultation ... 46

Foreword from the Minister for Employment Relations and Consumer Affairs

I am delighted to publish the Government's response to the Underhill review of Employment Tribunal rules. It is gratifying when an independent review is as well received by stakeholders as this one has been. It has demonstrated to Government that there was a real desire for simplification of the Employment Tribunal process, and that a more effective and efficient set of procedural rules is in everyone's interests.

I do not underestimate the difficulty of simplifying legislation. It is a real challenge to take a set of rules that have evolved and have been amended over time, and ask whether they are still delivering an effective and efficient system that works well for everyone. What is comforting detail and the removal of ambiguity to one user of the system is impenetrable complexity to another. I therefore extend my thanks, once again, to Mr Justice Underhill and his working group for their ongoing work to get the balance just right. It is now for Government and the judiciary to put them into practice.

This consultation has given us important feedback, with responses sometimes pointing out quite technical, but important points in order to ensure we have a better set of rules of procedure for the Employment Tribunal. Mr Justice Underhill and his working group have considered these points and amended the draft rules where it makes sense to do so. Some other points will be reflected in Presidential guidance, or in administrative changes to the functions of the Employment Tribunal itself.

It is envisaged that the new rules will come into force in the summer, alongside those changes required to introduce fees and the Underhill recommendations in the Enterprise and Regulatory Reform Bill into the Employment Tribunal. We consider that it will be preferable for users of the system to familiarise themselves with one set of new rules, rather than introducing the changes required by the Underhill review, and then amend these shortly afterwards to include fees. Her Majesty's Courts and Tribunal Service are currently carrying out important work to ensure that the required changes to the administration and IT of the Employment Tribunal are made, so that the Tribunals will be ready to operate under the new rules.

However, new procedural rules are only one element of the dispute resolution work programme we set ourselves in the Resolving Workplace Disputes consultation back in 2011. It should be seen very much as one part of our commitment to ensuring disputes are resolved as early as possible, and where possible, outside of the Employment Tribunal. A lot has been achieved. We have increased the qualifying period for unfair dismissal cases from one to two years, given judges the power to sit without lay members in unfair dismissal cases, and have given them greater flexibility when making costs or

deposit orders by raising the upper limits. And there is a lot more to deliver. The Employment and Regulatory Reform Bill is nearing completion in Parliament, and includes: a power to amend the cap on compensatory awards for unfair dismissal, which we intend to use to introduce a cap of 12 months' pay (alongside the existing cap); a new provision which stipulates that the offer of a settlement agreement is inadmissible as evidence in subsequent unfair dismissal cases, and a new process for Early Conciliation of employment disputes, which will require individuals to send details of their prospective claim to Acas before it can be lodged at an Employment Tribunal.

We are clear that settlement agreements offer a potential win-win for both employer and employee, avoiding the cost and distress of a tribunal process whilst resolving issues in a consensual and mutually beneficial way. We want to give both parties as much clarity, certainty and confidence as possible to negotiate settlement agreements successfully. That is why we are working closely with Acas on a new Statutory Code of Practice and substantive accompanying guidance, to be introduced later this year alongside the legislative change.

We are also conscious of the particular difficulties in managing confidently and fairly that many smaller firms face, often without the support of HR professionals. We have therefore looked at how to simplify the process for small businesses of how to manage, and if necessary, dismiss fairly. We are also working with Acas to produce online guidance aimed at guiding smaller businesses through disciplinary and underperformance issues.

As Employment Relations Minister, I look forward to continuing to work with you on these issues to ensure that this programme of reforms make a difference to workplaces across the country.

Jo Swinson MP, Minister for Employment Relations and Consumer Affairs

Introduction

1. In the Government response to the Resolving Workplace Disputes Consultation, which was published in November 2011[1], Government committed to launching an independent review of the Employment Tribunal Rules of Procedure. Stakeholders had reported that, over time, the rules had suffered from piecemeal change which meant that they were no longer working in the most effective and efficient way possible.

2. Mr Justice Underhill was asked by Government to review the Rules of Procedure contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, with a view to ensuring that robust case management powers could be applied flexibly, effectively and where possible, consistently. This was to be achieved by simpler rules which provided a framework by which cases could be managed as quickly and efficiently as possible. He presented his recommendations to Ministers in July 2012.

3. In addition to changes to the rules, Mr Justice Underhill recommended some amendments to primary legislation that would give greater flexibility to the deposit order regime and correct some inconsistencies in the current costs regime. These changes have been taken forward as part of the Enterprise and Regulatory Reform Bill, which is currently before Parliament.

4. Finally, this consultation took the opportunity to ask some further questions on the way tribunals operate, such as the role of legal officers performing interlocutory functions and on the enforcement of Employment Tribunal awards. These were outside of the scope of Mr Justice Underhill's review, but are areas where Government is considering taking work forward.

5. The consultation ran from 14 September 2012 to 23 November 2012.

6. There were 63 responses to the consultation mainly from business and employee representatives and members of the legal community and judiciary.

[1] www.gov.uk/government/uploads/system/uploads/attachment_data/file/31439/11-1365-resolving-workplace-disputes-government-response.pdf

Summary of responses to the consultation

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?

7. The majority of respondents (83%) welcomed Mr Justice Underhill's review, and supported the move towards stripping out complexity and over elaboration in the tribunal rules. They particularly welcomed the 'plain English' approach adopted, and the shortening of the rules. One response from the judiciary even describes the review as "the most conspicuous example of drafting simplification anywhere".

8. As with any review that has at its heart a desire to simplify legislation and to strip out unnecessary prescription there were some concerns that in places, the new draft rules had taken this process too far. A number of responses therefore made specific, detailed drafting suggestions, usually requesting that more detail was provided in certain sections, to make the rules clearer where it was felt that their might be room for ambiguity. These suggestions included more direction in the rules about when it would be considered proportionate to provide only short written reasons for decisions other than a judgment, or the procedural detail as to exactly how a lead case mechanism would be established in practice.

Government response

9. Government is pleased that this review has been so well received by stakeholders, particularly expert users of the system. It thanks those who took the time to make detailed suggestions for improvements to Mr Justice Underhill's draft rules and those who suggested wider changes to the way in which the rules of procedure operate in practice.

10. All the specific drafting suggestions made in responses were considered by both Government and Mr Justice Underhill and his working group. Where it made sense to do so, these suggested changes have been reflected in the revised draft rules.

11. Where the working group agreed with the substance of suggestions made in responses, but did not agree that it was a matter to be dealt with by the rules, the Employment Tribunal Presidents will consider addressing the suggestions in Presidential guidance that will support the rules.

12. Where comments were of an administrative nature, Her Majesty's Courts and Tribunal Service is working to reflect them in operational changes to the functions of the Employment Tribunal where it makes sense to do so.

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?

13. Almost all respondents (93%) agreed with the principles behind Presidential guidance. They feel that guidance which sets out normal or likely practice will be important in supporting shorter rules, and appreciate that the combination of shorter rules accompanied by Presidential guidance will be easier for non lawyers to understand. These responses also largely agreed that the guidance has the potential to provide clearer expectations to users of the system of what to expect from a tribunal in terms of how their case would be managed, and also would also help to ensure consistency in how cases are managed and decisions are made.

14. Some concerns were expressed that the Presidential guidance would also need to apply the same 'plain English' test as the rules review itself, and that it would be difficult to craft guidance that was of use to and easily understood by judges, the legal community and individual users of the system who may have no prior experience or knowledge of tribunal procedure. The concern was that this would be too much to ask of one guidance document.

15. Others were concerned about the accessibility of the document. Some responses felt that there is still a lot of misunderstanding as to how an Employment Tribunal operates and the level of award that an individual might receive if they are successful. These responses suggested that the guidance should be as accessible as possible, and that individuals might struggle to find it if it were only available on the HMCTS website.

16. On the examples of guidance provided on default judgments and postponements (included as part of the consultation), differing views were received. Whilst some responses favoured the concise approach adopted for the draft guidance on default judgments and found it accessible and easy to understand, others preferred the longer style adopted for the draft covering the postponement of a hearing, which they felt covered more eventualities. One response voiced concern that separate Presidential guidance for England and Wales, and for Scotland would lead to confusion within the system.

17. Finally, whilst this consultation did not ask for views on what areas should be covered by Presidential guidance, a number of suggestions were made. These were:

a. Alternative Dispute Resolution

b. Cost Orders

c. Withdrawal of a claim

d. Use and significance of deposit orders

e. Timetabling of oral evidence

f. Provision of written reasons

Government response

18. Government is pleased that responses largely welcomed the concept of Presidential guidance, particularly as a way of helping address perceptions that there is inconsistency in the way different judges at different tribunal centres manage cases. The guidance should help to ensure that judges are dealing with hearings in a consistent manner, which ensures individual parties know what to expect.

19. Government will also consider publishing a guide to the Employment Tribunal rules of procedure, as it did in 2004 when they were last overhauled. This guide would seek to provide a rule by rule break down on what the legislation covers, largely aimed at those who choose to represent themselves at tribunal and have little prior knowledge of the legislation. Government will take the decision as to whether or not such guidance would be useful once the Presidents of the Employment Tribunal have published their own guidance.

20. Although the Presidents will not be bound by the suggestions made on potential topics for Presidential guidance, Government has passed these on for consideration.

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?

21. The majority of responses (61%) welcomed these new rules and felt that they would lead to better case management early in the tribunal process if it is applied consistently by judges. There was a general feeling that this would be effective in helping to ensure that weak cases that should not proceed to a full hearing were halted at the earliest possible point in the tribunal system.

22. However, there were concerns that the rules in this area might disproportionately affect more vulnerable groups, such as those who do not speak English as a first language or have a disability which makes presenting information in a written format difficult. These

responses sought reassurance that these groups would not be penalised for their presentation skills, and assessed as presenting information *"in a form that cannot be reasonably responded to"* (new rule 11(b), and thereby struck out. There was also some confusion in some responses that assumed tribunal staff as well as judges could take the decision to strike out a claim on these grounds in isolation.

23. Some concerns were expressed in some responses about how judges are reluctant to use the existing strike out powers because these decisions get overturned on appeal. These responses suggested that any new rule would need to consider the interaction with the Employment Appeals Tribunal (EAT).

Government response

24. Government recognises and shares the concern that cases should not be struck out simply because the presentation of the complaint on paper is not perfect. However, the new rules do not intend to make a change in this area. It is only a judge, and not a member of tribunal staff who can strike out a claim where it is in a form that cannot sensibly be responded to. The limited grounds on which a tribunal member of staff can reject a claim are set out in detail in the new rules. Any decision to reject a claim because it has substantial defects would only be made if this were in accordance with the overriding objective. Government would not seek to prescribe criteria for this decision making, and does not consider it helpful to provide illustrative examples in the rules themselves. It feels that it is a matter that is better left to judicial discretion and expertise to take the most sensible course of action. This may be an area in which Presidential guidance could consider providing more detailed examples.

25. Under the new draft rules, Tribunal staff can only reject a claim when it is not received on the ET1 form or where the names and addresses of claimant and respondent are not complete. This is a small change from the existing procedure, and simply means that incomplete forms do not have to be referred to a judge. Government considers that this rule change will result in a sensible division of judicial and administrative responsibilities and resources.

26. On the issue on the exercise of judicial discretion, responses received from the judiciary were in favour with what was being proposed. While the exercise of discretion must be for judges alone, Government can consider future calls for any more prescriptive provisions in the rules if feedback suggests it could be beneficial. But given the feedback already received, particularly from the judiciary, we are confident that the right balance has already been struck in the new draft rules. Government considers that this will result in the division of administrative responsibilities and resource provisions.

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

27. Most responses welcomed the new rules which will combine the separate functions of Case Management Discussions and Pre-Hearing Reviews into one preliminary hearing. These submissions outlined how this would lead to potential cost savings for all parties, and could see the logic for combining these functions into one meeting.

28. There were a number of concerns expressed around how preliminary hearings will operate in practice. Some responses were concerned that any cost savings would be negated if preliminary hearings were not conducted on the telephone as frequently as Case Management Discussions currently are. Concerns in this area centred on any potential for the rules to demand that preliminary hearings were held in public. Others felt that the change might increase costs, with parties more likely to instruct lawyers to represent them at the preliminary stages of a claim if substantive issues such as striking out a case, or deposit orders, were likely to be discussed.

29. The need for both parties to have a clear expectation of what issues would be discussed at preliminary hearing was also a view put forward in a number of responses. It was felt that this was key to preliminary hearings working as they are intended to, and that parties should know in advance which issues will be discussed, and that they will have enough notice of any hearing in order to prepare properly. If there were any ambiguity about what would be covered, some responses argued that this would lead to parties preparing for every eventuality, and the associated rise in costs of instructing lawyers accordingly. Whilst some responses argued for flexibility in what a preliminary hearing should consider, the majority of concerns rejected such an approach. Some responses also argued that the rules could usefully specify a period of notice that the tribunal has to give of any preliminary issues that are to be discussed at the preliminary hearing.

Government response

30. Government is content that the preliminary hearing model is an effective model for combining Case Management Discussions and Pre-Hearing Reviews, and agrees with Mr Justice Underhill that the current practice of two different kinds of hearings which deal with different matters is not necessary. It accepts that if the process is managed properly, with enough notice given to parties, both case management issues and preliminary issues can be dealt with in one preliminary hearing if required.

31. Government would expect Employment Judges will hold preliminary hearings by telephone wherever possible, in the same way that they do now for Case Management Discussions. This is a sensible approach that should not be jeopardised by the rule change. The new rules

should help reassure parties that the preliminary hearing will, in most cases, be held in private, as Case Management Discussions currently are, and will therefore not require face-to-face meetings. There are clearly cost and efficiency savings to all parties if this approach is maintained.

32. Government is not persuaded that the combined preliminary hearings will lead to a rise in costs due to parties choosing to instruct a lawyer to represent them at this early stage in proceedings. We feel that this rule change will make little practical different to the choices parties make, but will benefit all sides in more efficient use of both the judge's and the party's time.

33. However, Government does understand, and appreciates the argument that any ambiguity in what is to be discussed, or about how much notice of the hearing will be given is unhelpful. If ambiguity exists, it could lead to parties instructing lawyers to cover all eventualities at preliminary hearing. This will be addressed in two ways. First, an amendment has been made to the new rules to specify that 14 days notice will be given where any preliminary hearing will deal with any preliminary issues, including strike out, deposit orders, or alternative ways of resolving the dispute. Secondly, the letter that is received by both parties from the Tribunal giving notice of the hearing will outline which issues are to be discussed. We hope this will serve to reassure parties that they will always have notice of what can be expected from any preliminary hearing, and can prepare accordingly, avoiding any additional preparation costs for issues that are not addressed at the hearing.

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

34. The majority of responses (60%) stated that a stand alone rule providing judges with a clear mandate to encourage the use of mediation was a positive move, and would provide the scope for raising such issues with parties without being accused of bias. These responses could not identify a downside to such an approach.

35. 21% of responses received questioned whether a stand alone rule on its own would have any effect on encouraging parties to consider alternatives to a full hearing. A number of these responses suggested that a rule on its own would be of little use, unless it was accompanied by the provision of free mediation for parties, either by a judge or another provider. Others argued that the rules of procedure are not the place for addressing alternative forms of resolving disputes because if such a course of action is to be successful, it should be considered much earlier in the process of taking a claim if it is to be successful. Others commented that once fees are introduced to the Employment Tribunal and claimants are paying a fee both to lodge their claim and to

have it heard, they are unlikely to consider alternative means of resolving their dispute, and will feel that they have paid for 'their day in court'.

Government response

36. Government accepts that a stand alone rule on mediation, in isolation, will not encourage more disputes to be settled outside of a full hearing. However, we have set out clearly that our commitment is to resolving disputes as early as possible, and ideally, within the workplace and without recourse to Employment Tribunal in the Resolving Workplace Disputes Government response in November 2011. Work continues to encourage the use of mediation, particularly within SMEs, to facilitate the greater use of compromise agreements (to be re-named 'settlement agreements') to end an employment relationship in a way that meets the needs of both parties and to introduce early conciliation which will be a free voluntary service, provided by Acas, which will seek to facilitate the settlement of disputes before claims are presented to an Employment Tribunal. Any form of alternative dispute resolution which helps avoid a costly and stressful hearing is to be welcomed at any point in the dispute resolution process.

37. However, Government accepts that there will still be cases that are not resolved by any of these methods for resolving disputes outside of the tribunal, and they will proceed to a full hearing at tribunal. Judges are well placed to facilitate discussions between parties early in their case where they are close to agreement and there is potential for their case to be resolved outside of the tribunal via mediation or conciliation. We accept that some parties are more likely to accept this advice from a judge than if it is received from Acas or a legal representative. With this in mind, whilst there might be only few parties who choose to take up mediation or conciliation at this late stage of resolving a dispute, we still want to encourage this. The stand alone rule on mediation therefore has merit in giving judges a firm legislative basis from which they can raise such matters in confidence with the concerned parties.

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?

38. This recommendation was welcomed by the majority of respondents (81%) as a sensible way in which unnecessary process can be taken out of the Employment Tribunal procedure. It was a widely held view that there was no reason to maintain this procedure for the majority of cases.

39. However, a range of legal, business and employee representatives felt that whilst this was a welcome change, it was important to ensure that claimants, particularly those who were not represented by a lawyer,

were aware of the significance of withdrawing a case when taking this course of action. They were concerned that under the new rules, because dismissal of the case would be automatic on receipt of a request to withdraw a case, unrepresented claimants might not understand that this would be likely to mean that they would be unable to bring a further claim on the same matter. A number of responses suggested that the tribunal should inform claimants of the significance of this decision, be it in a formal letter, or through advice from the judge or the issue should be addressed as part of Presidential guidance.

Government response

40. Government agrees that removing this unnecessary process is beneficial to both respondents and the more efficient administration of the Employment Tribunal system. It also accepts that it can, where the circumstances justify it, be in the interests of justice to allow a claim to be withdrawn, but not to bar future proceedings on that same set of facts between those parties. That is why the existing rules are structured as they are. We share the view of Mr Justice Underhill and his working group that the current process is far from ideal, but the principle it seeks to protect is important. To that end, the new rules will make clear that a withdrawal will usually result in a dismissal, and consequently, will bar parties from bringing future proceedings, unless one of the two exceptions applies. This removes an unnecessary step for respondents, brings finality for all parties involved, and therefore will ordinarily be in the interests of justice. But the rules have been drafted to allow for judicial discretion where there are exceptional circumstances, such as a claimant withdrawing a claim on the basis that a settlement is agreed with their employer, but they then do not received the agreed payment. The new rules therefore allow Employment Tribunals to accept a notice of withdrawal, but not subsequently issue a judgment for dismissal. Government believes that this will allow judges the necessary discretion to deal with such cases.

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

41. Responses on this question were largely supportive, with 81% welcoming the change. Some felt that any rule on limiting oral evidence should not be prescriptive and that limiting the time that parties had to question witnesses and give submissions was never in the interests of justice. However, others felt that the limiting the time parties had to question witnesses and provide submissions was welcome, and that judges need a stand alone rule so they could feel confident in cutting off overly long representations.

42. One response suggested that judges should direct parties at the beginning of evidence sessions towards the facts of the case and the law in this area, and require parties to restrict themselves to these areas. One message that came across in the majority of responses to

this question is that any rule in this area should be applied consistently by judges.

Government response

43. Government believes that the new rule on timetabling for oral evidence and submissions is a sensible balance between the needs of parties to be able to represent themselves fully and the importance of the tribunal being able to manage its workload effectively. The rule is not designed to be overly prescriptive, but to set out clearly in the legislation that judges may take this course of action to limit representations where there is, in their view, a need to do so.

44. There were concerns expressed that the new rule would need to be applied consistently and proportionately by judges, and that parties should be informed early in the proceedings where their representations might be limited if overly long or if they were not properly focused on the facts of the case and the corresponding points of law. Government feels that these are issues that are better addressed by the Employment Tribunal Presidents rather than further iterations of this rule. The Presidents may also consider that timetabling of hearings is an area that could usefully be covered by Presidential guidance but this is for them, rather than Government, to take forward.

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

45. The majority of responses (75%) to this question welcomed the new rule which is a simplification of what was considered by many to be an overly prescriptive provision. It was widely felt that a more generic rule for when the proceedings, or part of the proceedings, could be held in private would allow judges the discretion they need to decide on the most appropriate action in individual cases.

46. However, we did receive strong representations from groups representing the media, who felt that this new approach was contrary to the principles of open justice and out of step with the prevailing degree of openness witnessed in other courts and tribunals. These responses considered that a more flexible privacy regime represented a move towards an augmentation in the number of closed hearings, with parties putting undue pressure on judges to restrict the reporting of tribunals for fear of damage to a business's reputation if cases were widely reported. These responses also demanded a fuller explanation of why Government was taking this approach to the privacy rules.

Government response

47. It is not the Government's intention that the new rules on privacy should restrict the ability of the media and other commentators to report on proceedings where it is appropriate to do so. The old rules on privacy and restricted reporting were designed to deal with specific instances where hearings should be held in private, and covered proceedings that involved, for the main part, allegations of sexual misconduct or disability discrimination. Mr Justice Underhill felt that it was important that his review brought the provisions on privacy in Employment Tribunals more into line with the requirements of the Human Rights Act 1998 and jurisprudence of the European Court of Human Rights and new rule (new rule 60) is therefore less prescriptive. Whilst the suggested changes to the rules widen the existing legislative provisions in this area, and give judges more discretion and flexibility in the rules for deciding whether anonymity or restricted reporting orders are required, such power already exists (see the case of *F v G [2012] ICR 246*). In *F v G*, the Employment Appeal Tribunal said that where anonymisation or reporting restrictions are needed to protect a party's rights under article 8 of the European Convention on Human Rights, an Employment Tribunal can use its general powers under rule 10 to order such privacy measures. Nonetheless, it is not the intention that simply because a power is stated explicitly in the new rules it will be exercised substantially more frequently than it currently is. In making these recommendations, Mr Justice Underhill has sought to balance the needs for open justice on one side with the need for privacy and an effective tribunal system on the other.

48. Government believes that Mr Justice Underhill's suggested rule on privacy and restricted reporting strikes the difficult balance between the need for the justice system to be as open as possible whilst also ensuring that judges have the provisions they need to manage sensitive cases in the most efficient and effective way. The new rule on privacy is much simpler to understand for all parties, and provides judges with the clear case management powers they need to approach sensitive claims on a case by case basis. However, Government recognises the concerns of the media around this amendment, and agrees that it should not become the normal practice of tribunals to hold proceedings in private. As it is now, reporting should only be restricted where it is in the interests of justice to do so. To address these concerns the new draft of the rules makes clear that in making a decision on privacy, the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

49. The Employment Tribunal Presidents may also consider that this is an issue that would benefit from Presidential guidance or for additional judicial training.

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

50. The majority of responses (85%) welcomed the way in which a stand alone rule would provide a formal mechanism for joining cases that are dealing with the same point of law, a practice that has long been in operation with the tribunal where it makes sense to manage cases in this way. Responses stated that, against a backdrop of high levels of multiple claims in the system, a formal rule for managing this workload was welcomed. A number of responses suggested that in practice, parties are able to establish between themselves which case should act as the lead case in proceedings, and should be able to make arrangements accordingly. But the power for the tribunal or President to also make this direction, where required, was welcome and would aid consistent case management across the different tribunal offices.

51. However, some responses thought that more clarity was needed on the mechanism for establishing and managing a lead case. Some felt that the rules should specify what action can be taken if a party does not agree with the decision of the tribunal or President to link them to a lead case, or where they feel there is good reason why they should not be bound by the decision that is made in the lead case. Whilst the draft rules address the latter point, they do not set out in detail the process or the test the judge will apply.

Government response

52. Government recognises that the rule covering the lead case mechanism does not set out in detail some of the finer points on how it will operate in practice. However, we consider that in line with a desire for shorter, easier to understand rules, it is not appropriate to overload the legislation with such detail. Furthermore, judges need some flexibility to establish and manage multiple cases in the most effective way, and Government agrees with Mr Justice Underhill and his working group that overly prescriptive rules in this area will not aid this flexibility.

53. However, Government recognises that if a new rule is required in this area to formalise the way in which tribunals have been managing multiple cases in practice to date, parties will need to understand how the rule is to operate, and will expect it to be applied consistently by Employment Judges. It is a fine balance to make this rule simple and easy to understand to all, without adding detail to tackle ambiguity which overcomplicates the rule. With this in mind, Government feels that the finer practical details of exactly how this rule is likely to operate in practice might be addressed best in Presidential guidance, and would urge the Employment Tribunal Presidents to consider further.

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?

54. The majority of responses (86%) welcomed this approach to the provision of written reasons, and felt that judges should have the power to be flexible in their approach, because unnecessary requests for long written reasons were not a good use of judicial time and resource. Some respondents also welcomed the Ministry of Justice's decision not to charge a fee for the provision of written reasons on request which, in the case of a final judgment, are needed in order to lodge an appeal.

55. Some responses did, however, raise concerns about consistency as to when and in how much detail written reasons were provided. There were some concerns that the rules, or Presidential guidance, should set out more clearly what should be considered when assessing whether the provision of a written reason was proportionate to the matter concerned. Some judicial responses also raised concerns about the new rule requiring written reasons to be provided for every small decision made as part of the management of the hearing. Judges also requested that they should have the power to refuse requests for written reasons where a party has been successful at tribunal, and that party had been present at the hearing and heard the reasons for the judgment be given orally. They considered both of these issues to be an inefficient use of judicial time and resource.

Government response

56. Government is in agreement with the direction of the new rule, which aims to strike a balance between providing parties with the reasons behind the way in which their case has been managed, and making the best use of judicial time. It is also important that there is consistency between tribunal offices in the provision of written reasons to parties. Government recognises that some parties will always wish to rule out any ambiguity by longer, more detailed rules which set out the criteria for assessing whether or not it would be proportionate to provide full, or brief written reasons. We are, however, of the view that it is for Presidential guidance or judicial training to address these issues, rather than the rules themselves.

57. Mr Justice Underhill and his working group have sought to address judicial concerns that written reasons would be requested under the new rules for every small hearing management decision, and have therefore made amendments to the new rules. The judicial request for a power to refuse requests for written reasons where a party has been successful at hearing and has already received an oral judgment, were also considered. Government was sympathetic to the judicial position that this did not represent an efficient use of an Employment Judge's time. However, it also understands that the provision of written reasons in successful cases can be of use to the parties who may use the full

reasons as a learning and development tool, for example. Accordingly, the new rules should not prevent this.

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)?

58. Answers on this question were mixed, with the majority (53%) answering that they were not sure. Some responses welcomed the suggestion that awards above £20,000 could be dealt with in-house, and would not require referral to a county court (in England and Wales) or sheriff's court (in Scotland), and supported cutting out this piece of process.

59. Other responses were against the change, but for differing reasons. A number of responses misunderstood the question, and viewed the £20,000 cap as an overall cap on costs (or in Scotland, expenses) orders. They were concerned that the removal of the cap would mean that vulnerable claimants would be at risk of having higher cost orders made against them. However, there is at present no overall cap on cost awards; orders higher than £20,000 can be made by judges in the county and sheriff's courts, and such orders are made, albeit infrequently. These responses did not recognise that this recommendation is a procedural one; so that where a judge thinks that a costs order may be for more than £20,000, the case will no longer have to be transferred to a county or sheriff's court and could instead be dealt with by the Employment Tribunal.

60. Other concerns centred around the ability of Employment Tribunal judges to assess cost orders above £20,000; there was a concern that these judges would lack experience to deal with these claims, and would require additional training. Some responses suggested that larger costs assessments could be given to relevant judges who would undertake these assessments for other tribunals, or that the status quo should remain as the county and sheriff's court are better placed to make these assessments.

Government response

61. Government remains committed to the principles of this review, which are that re-drafted and refreshed rules will allow tribunals to manage their workloads in the most effective, efficient and cost effective manner. In reviewing the procedural process, Government is keen where possible, to restrict any unnecessary process, so as to simplify the tribunal system.

62. Government accepts Mr Justice Underhill and his working group's advice that Employment Judges are able to make assessments on costs orders in excess of £20,000, and that it is not necessary that

these decisions should have to be referred to a county or sheriff's court. That said, the new rule does not prevent Employment Judges referring the matter to a county court or sheriff's court for assessment if they wish to do so.

63. The Presidents of the Employment Tribunal are best placed to decide whether and how additional training should be provided to some or all judges on making these assessments. Government will therefore leave the judiciary to consider what action, if any, is required in light of this change.

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

64. A number of detailed responses were received in answer to this question. There was strong support from some business and legal stakeholders for encouraging greater use of the costs/regime (in Scotland, "expenses", but referred to below as the "costs regime"). Suggestions ranged from making a cost order for failure to follow judicial direction, time wasting, bullying and aggressive tactics and non attendance at tribunal. There was some sense in these responses that cost orders were not applied as frequently as behaviour at tribunal suggested they should be.

65. However, some respondents felt that for the most part, the costs regime was not well understood by many parties, and thereby individuals were not applying for costs where they might be a strong argument for a judge making such an order. Others suggested this was an area of the rules that is not applied consistently by the tribunals, and would benefit from clearer expectations all round. A number of responses felt that costs are a clear area which could benefit from Presidential guidance in order to ensure it was fully understood by all parties. This was envisaged both for parties to understand what the risks of having a cost order made against them are, and when they should be requesting that a costs order should be made against the opposing party.

66. Government also received a number of responses from trade unions and those representing claimants who felt that greater use of the costs regime should not be encouraged. They felt that threats of large cost awards being made against parties, particularly the self represented, are being used by some parties to scare individuals into accepting an early settlement to cases. These responses were keen that this tactic should not be further encouraged and said that further guidance in this area would be welcome.

Government response

67. Government has a fine balancing act to play on the issue of costs. Whilst some responses cited examples where vexatious, abusive, disruptive or otherwise unreasonable behaviour was not addressed by the tribunal via a costs order, others felt that the (possibly unfounded) threat of a costs order being applied to them was intimidating parties with valid claims into not pursuing them further. Whilst some of the suggestions received merit consideration, Government is concerned as to the effect of amending the current costs regime if it is not well understood by parties.

68. Government was struck by the number of responses, from differing sides, who asked for Presidential guidance to address the costs regime in more detail. It was felt that this was a really important area for ensuring that all parties have access to the right information and know both what to expect and what is expected of them when interacting with an Employment Tribunal. It was also felt that further guidance in this area would also address concerns that judges do not always make costs orders consistently.

69. Whilst it is for the Presidents of the Employment Tribunal to decide which areas of procedure will be covered in the Presidential guidance, Government would encourage them to consider whether they might address costs. Responses suggest that there are concerns from both sides: that a threat of potential costs orders being made is used by some legal representatives to push parties into settling, and that parties are not aware of when the opposing party's behaviour might warrant them requesting that the judge make a costs order. It would seem that further guidance would be welcome from both these standpoints.

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

70. Views differed on what it would be appropriate for a lay representative to be able to claim for the services they provide. Whilst some responses felt that a lay representative should reasonably be able to claim for anything they could provide a receipt for, others felt that an hourly rate of pay was more appropriate. The current rate of £32 an hour that preparation time can be claimed at was suggested as a figure. Some responses suggested that this rate should be similar to the costs that can be claimed for a lawyer's services, whilst others felt that it was not appropriate to make any hourly rate akin to those of a lawyer.

71. Some other responses raised concerns with the principle of a costs award being made for the services of a non-lawyer. They were concerned that an industry could inadvertently be created for individuals seeking to exploit this change in the rules, and would offer their services to clients on a no win, no fee basis in the hope of taking a proportion of any cost award that was made in their clients favour.

Government response

72. Government thinks that the fairest way in which to allow lay representatives to claim costs at the same rate for those who claim for preparation time, currently at £32 an hour (due to rise to £33 on 6th April 2013). We reject the argument that costs for lay representatives should be calculated at the same rate as lawyers because they are not providing an equivalent service to parties. An hourly rate which directly mirrors the rule for preparation time would also be the simplest approach for the tribunal to administer.

73. There was also some confusion in the responses about the ability of individuals to make a profit from this change in the rules, particularly there was concern about no win, no fee operations becoming common place in Employment Tribunals.

74. Cost orders in respect of lay representatives will only be possible where a party has *paid* for the services of their representation and advice at tribunal. This won't therefore apply unless the lay representative specifically charged a fee for providing legal advice and/or representation in relation to a party's case. Government believes that here is therefore little, if any to no scope for a new industry to develop in this area with people offering to represent parties with the hope of profiting from any cost award made in their favour, particularly considering that cost orders are only made in very limited circumstances (e.g. the party has behaved unreasonably). There is therefore nothing that a lay representative can actively do to encourage a judge to make a cost award against the opposing party, so little room to take action that will lead to them and the party they represent receiving a costs order.

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)?

75. Few disadvantages were identified by responses to this question. Almost all responses were clear that they felt parties who choose to represent themselves should not have to choose between claiming for preparation time and witness expenses, and should be entitled to both, as part of the expense incurred working on their case.

Government response

76. No unintended consequences were identified to the Government's proposal of allowing self-represented parties to claim for both preparation time and witness expenses. We are making the necessary amendment to the relevant primary legislation through the Enterprise and Regulatory Reform Bill, which is due to achieve royal assent in the near future. An amendment to the Employment Tribunal rules will then follow as soon as is practicable thereafter.

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?

77. Responses to this question were mixed. Most of the submissions (71%) which included a number from legal and business representatives, welcomed the introduction of additional flexibility to the deposit order regime. One respondent suggested that it would avoid the "kitchen sink" approach to claims, in which a number of allegations are pursued in various jurisdictions. This approach, it was argued, increased costs for all parties, and the current deposit regime could not be used to ensure claims were focussed on those areas where the substantial allegation(s) lay. Some of these responses suggested that deposit orders should be made earlier in the process, at the initial sift.

78. Other responses, primarily from trade unions, voiced concerns about the changes to the deposit regime. These submissions suggested that tribunals already had sufficient powers to deal with weak and vexatious claims, and therefore this amendment to the deposit regime was unnecessary. There were particular concerns that the new regime would disadvantage unrepresented claimants, who had not had legal advice on how to present their claim effectively at preliminary hearing where a deposit order was likely to be considered. Some responses noted that alongside the introduction of fees for lodging a claim at Employment Tribunal, deposit orders would act as a financial barrier and disincentive to individuals pursuing legitimate claims.

Government response

79. Government agrees with Mr Justice Underhill's assessment of the need to be able to apply greater flexibility to the deposit order regime. It accepts his analysis that there are currently cases that come before a tribunal which are unfocussed and contain weak elements that should only really proceed to a full hearing if the party is prepared to pay a deposit; any deposit be refunded if the party is successful. However currently, judges do not have the flexibility to order deposits in respect of individual allegations within a claim, and a deposit order would be made as a condition of the whole claim proceeding. This is not effective case management, and inevitably increases costs for all parties.

80. Government does not agree with the assessment that greater flexibility in the use of deposit orders will disadvantage unrepresented claimants. Responses from the judiciary do suggest that they recognise the "kitchen sink" approach to a claim and would welcome case management powers which allow them to focus the case on the substantive allegation(s). This should allow judges to encourage all claimants, including those who are unrepresented, to focus their attention on the stronger element(s) of their claim, and not to waste time and resource on those with little reasonable prospect of success. A deposit order made by a judge is a very clear signal to individuals on

how to best manage their case. It is also important to note that deposit orders can be made against respondents too.

81. Government does not, however, agree with calls that this power should be extended to earlier in the tribunal process, and feels that the preliminary stage, where parties have an opportunity to discuss their case with a judge, is the most appropriate point at which for any deposit order can be made. We will therefore continue to pursue this amendment through the Enterprise and Regulatory Reform Bill and implement it as soon as is practical.

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

82. Some detailed comments were received on the suggested changes to the ET1 and ET3 forms. Most responses felt that the changes made the forms easier to understand and complete. Some suggested that more detail was needed. These are largely technical points which are not covered in any detail in this Government response.
Whilst the forms are final in terms of the content, they are subject to further amendments to ensure the presentation is accessible as possible.

Government took the opportunity of this consultation exercise to ask some questions about tribunal reform which were outside of the remit given to Mr Justice Underhill and his working group. These are dealt with the responses to questions 17-20 of the consultation exercise.

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 Courts & Enforcement Act?

83. Few detailed responses were received on this question. A number of comments suggested that it was difficult to answer the question in abstract without having some more detail on exactly the sort of interlocutory functions that legal officers would carry out in this context. Some responses misunderstood the question, and expressed concerns about the Government's separate proposal to engage legal officers on making decisions on low value, straightforward claims in a Rapid Resolution scheme. This question was not related to those proposals, but instead at how the existing power contained in section 4(6B) of the Employment Tribunals Act could be exercised. This section allows regulations to be made permitting legal officers to carry out functions that are currently carried out by a judge. In other tribunals (such as the First-tier Tribunal, Tax Chamber and Health, Education and Social Care Chamber –Mental Health Tribunal), legal officers are used effectively to perform tasks such as case management functions including varying time limits, granting permission to amend documents,

and adjourning or postponing hearings. In the Employment Tribunals this sort of decision can only ever be taken by a judge or full tribunal.

84. The majority of concerns voiced on this issue in the responses were that legal officers should not be given the power to make final judgments or any other significant decisions that would have a strong bearing on how the case was managed.

Government response

85. Government understands and appreciates the need for those responding to this consultation to be provided with more detailed proposals on exactly how legal officers would be used in the Employment Tribunal context before commenting further.

86. Government has therefore decided not to pursue the proposal to use legal officers to perform interlocutory functions in Employment Tribunals until it has taken the time to assess further how effectively they are being utilised in other jurisdictions. We are also mindful that it may be wise to allow some time for the new rules to bed down in the Employment Tribunal's procedures and practices before suggesting further change in this area. Government will, therefore, if required, return to this issue in due course.

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

87. There were few detailed responses to this question, with the majority of responses simply noting that consistency between the rules of procedure for both tribunals should be maintained where it made sense to do so. The only substantial suggestion made in this area was that rules governing privacy for both the ET and EAT should be consistent.

Government response

88. The EAT President and his judges submitted a full response to this consultation exercise, and have been keep informed of rule changes as Mr Justice Underhill's review has progressed. Given that the EAT is conducting its own review of whether rule changes are required in light of Mr Justice Underhill's work, Government will wait for the outcome of this before considering any changes.

89. On the issue of privacy, Government believes that there is currently enough consistency between the both tribunals.

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?

90. Responses to this question were mixed. The majority of responses (61%) welcomed the amendment, and stated that it was important that parties were provided with certainty, both with when the debt should be paid without incurring interest, and when it should be actively pursued by the successful party. They also tended to agree that certainty about when the debt accrues interest would help focus minds towards making prompt payments, where the intention was to pay the award. However, whilst agreeing with the direction of the change, some of these responses questioned whether the insertion of a date into the rules by which interest would accrue was achieve much on its own, suggesting that without an effective enforcement mechanism, it would be of little use.

91. Some responses pointed out practical problems around a date from which interest accrues which was not aligned with the timeframe within which an individual has the right to appeal, which is currently 42 days. Others suggested that SMEs might have cash flow problems which would affect their ability to make a payment in the 14 days following judgment, and suggested that they should not be penalised by way of accruing interest, preferring a date of 28 days.

92. Finally, some responses pointed out that an award is currently due from the date of judgment (ie. day 1), with interest only accruing (except for in discrimination cases) if payment is not received after the 42 day period for appeal has elapsed. Whilst a time limit could be inserted into the rules by which an award should be paid, it made little sense for interest to accrue from the same date (eg. 14 days). The date of judgment or the end of the 42 day appeal period were considered better markers.

Government response

93. Government believes that there is merit to requiring the Employment Tribunals to insert into their written awards a time limit of 14 days by which the award should be paid. We feel that the inclusion of a time limit will leave little room for doubt as to what the tribunal expects, and perhaps most importantly, it signals when it is legitimate for a party to start pursuing enforcement action. This amendment can be made with little to no change to the administration of the tribunal system.

94. Government does not agree that the date on which interest accrues on an unpaid award has to be aligned with the 42 day period parties have in which to lodge an appeal against the Tribunal's decision. Research on cases that HCEOs have enforced to date in England and Wales shows that only around 15% of enforcement action is currently taken before the 42 days for appeal have elapsed. But in some cases,

prompt enforcement action may minimise the risk of debtors seeking to hide their company assets from the HCEO pursuing a debt. In cases where the debtor is considering appealing the judges decision, and enforcement action is taken against them, they can apply for the enforcement action to be stayed while they considering the merits of lodging an appeal. This would suggest that there is no procedural need for the timeframes for interest accruing on the debt and that for lodging an appeal to be aligned.

95. Government also does not accept the argument that SMEs are more likely to experience cash flow problems which will disadvantage them if interest is charged earlier than 42 days. All parties at tribunal are likely to have already known they would experience some expense in defending the claim, which they will factor into the way in which they choose to defend the case when it is first brought. Payment of an award if the defence is unsuccessful, or agreeing to settle the case before it reaches Employment Tribunal are calculation that parties already have to make, and a small change to the way in which interest is charged on any eventual award is unlikely to affect this decision making.

96. However, Government does recognise that providing for interest to also accrue from 14 days post-judgment does not sit easily with the concept that an award is due following judgment (ie. on day 1). This is an inconsistency that we are keen to iron out if all parties are to have certainty and know what to expect when paying or enforcing awards.

97. Balancing these views, Government has decided to amend its proposal slightly. Instead of interest accruing from 14 days, we plan to amend the Employment Tribunals(Interest) Order 1990 to provide for interest to accrue on the award from the date of judgment, but interest will not apply if payment of the full award is received within 14 days. Interest in discrimination cases is currently dealt with via separate regulations which already award post-judgment interest in this way. Government will also take this opportunity to correct an anomaly in the way pre-judgment interest is calculated for discrimination awards in England and Wales and in Scotland, and will ensure that there is consistency between the two jurisdictions in the future. Put together, these amendments will ensure there is as much consistency as possible, between discrimination and non-discrimination awards. Government is satisfied that this is a balanced proposal, which seeks to avoid penalising those who pay an award promptly, and follows the principle that interest is due on an award from the date of judgment (as is the case in other types of civil claims). If payment is not received within 14 days successful claimants should hopefully feel that it is reasonable to pursue enforcement action at this point. We also hope that earlier enforcement action (that is, after 14 days rather than 42 days) may lead to fewer businesses being able to avoid, or hide their assets from the HCEO enforcing the debt.

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?

98. A number of suggestions were made in response to this question, with most citing insolvency of the debtor as the main reason for non payment of awards. Others suggested that difficulty in pursuing a debt was sometimes caused by a company deliberately dissolving itself, then re-establishing itself under a different name, sometimes at the same address, in order to avoid paying a debt. This is commonly known as a 'phoenix company' and was, in some responses, a reason for inability to enforce an award. Other responses suggested that the current enforcement system in England and Wales, the Fast Track Service, under which High Court Enforcement Officers (HCEOs) file a writ of Fi Fa with a court on behalf of the claimant and then pursue the debt, was not able to deal effectively with cases where the debtor simply refuses to pay (the 'won't pays').

99. There were also a number of suggestions for reform of the system. Some responses felt that rapidly increasing scales of penalties, coupled with interest, would deter malicious non payers. Others felt that the Employment Tribunal itself should have greater powers to enforce the award, and that it should be able to direct HCEOs directly, rather than them having to apply for a writ from the court in order to pursue the debt.

100. However, others suggested that the HCEO route for enforcement needed an overhaul. Some responses felt that the HCEOs were not well equipped or incentivised for collecting Employment Tribunal debts. Some suggested that a complete overhaul of the current HCEO enforcement route was required. Others suggested that Her Majesty's Revenue and Customs should be responsible for collecting awards.

Government response

101. Government agrees with much of the assessment contained in responses as to the nature of the problem of non payment. It concurs with responses that insolvency and so-called phoenix companies are some of the principle reasons behind non payment of awards. However, it also believes that the reasons for non payment are complex, and involve both the behaviour of the employer and the claimant. All of this needs further investigation and assessment.

102. A number of the suggested remedies to non payment of awards would involve fundamental change to both the powers of enforcement that the Tribunal has, and to the current Fast Track enforcement mechanism which uses the network of HCEOs who facilitate the process of obtaining a writ from the county court and pursuing the debt. Alternative suggestions, such as Her Majesty's Revenue and Customs

pursuing the debt directly are not suitable for low level debts, which Employment Tribunals would be considered under HMRC's business model.

103. In light of these suggestions for fundamental change to the system, BIS, working with Her Majesty's Courts and Tribunal Service, has commissioned some up new research on the issue of non payment of awards. This analysis will cover both England and Wales and Scotland, and will give a current position of how many awards go unpaid, the reasons for non payment and whether individuals are using the Fast Track system to pursue their debts. This research will compliment the Ministry of Justice's soon to be published 2 year review of the Fast Track Scheme, which has considered whether parties are now more aware of the availability of the Fast Track enforcement scheme and other enforcement options.[2] The findings of the report commissioned by BIS should be published in May this year. With a firm evidence base for the reasons behind why some individuals either cannot pay an award or avoid doing so, Government can consider taking forward action in a targeted way in this area.

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

104. A number of very detailed drafting points were received in answer to this question. These views and concerns have been considered and reflected in the new draft rules, where it was considered appropriate to do so by Mr Justice Underhill and his working group.

[2] Published on 31st January 2013 http://www.justice.gov.uk/publications/policy/moj/the-employment-tribunal-fast-track-scheme-2-year-report

Next steps and implementation

105. Some of Mr Justice Underhill's recommendations require primary legislation. Those that the Government has accepted are being taken forward as part of the Enterprise and Regulatory Reform Bill, which is due to achieve Royal Assent later this year.

106. It is the Government's intention to lay the new draft rules before Parliament in the spring, with a view to them coming into force alongside the changes required to introduce fees into the Employment Tribunal, which is expected this summer. Government believes that it will be preferable for users of the system if these changes are made at the same time, rather than as a series of changes to the Employment Tribunal rules. Her Majesty's Courts and Tribunal Service are currently carrying out the necessary IT changes to ensure that the new rules can be effectively administered when they come into force.

Annex 1: Answers to quantitative consultation questions by type of respondent

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?

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	10	83%	1	8%	1	8%	12
Charity or social enterprise	2	100%		0%		0%	2
Individual		0%		0%	1	100%	1
Large Business (over 250 staff)	3	100%		0%		0%	3
Legal representative	8	100%		0%		0%	8
Local Government	1	100%		0%		0%	1
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)	1	100%		0%		0%	1
Other (please describe)	5	63%		0%	3	38%	8
Trade union or staff association	12	80%	2	13%	1	7%	15
Grand Total	**43**	**83%**	**3**	**6%**	**6**	**12%**	**52**

Question 2 – Do you think Presidential Guidance will provide parties with clearer expectations about the Employment Tribunal system and ensure consistency in case management and decision making?

Organisation Category	Yes	%	Not sure	%	Grand Total
Business Representative organisation / TU	10	91%	1	9%	11
Charity or social enterprise	3	100%		0%	3
Individual		0%	1	100%	1
Large Business (over 250 staff)	4	100%		0%	4
Legal representative	7	88%	1	13%	8
Local Government	1	100%		0%	1
Medium business (50 to 250 staff)	1	100%		0%	1
Micro business (up to 9 staff)	1	100%		0%	1
Other (please describe)	7	88%	1	13%	8
Trade union or staff association	16	100%		0%	16
Grand Total	**50**	**93%**	**4**	**7%**	**54**

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?

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	8	67%	1	8%	3	25%	12
Charity or social enterprise	2	67%	1	33%		0%	3
Individual		0%		0%	1	100%	1
Large Business (over 250 staff)	3	100%		0%		0%	3
Legal representative	6	75%		0%	2	25%	8
Local Government	1	100%		0%		0%	1
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)	1	100%		0%		0%	1
Other (please describe)	4	80%	1	20%		0%	5
Trade union or staff association	5	31%	8	50%	3	19%	16
Grand Total	**31**	**61%**	**11**	**22%**	**9**	**18%**	**51**

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

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	4	33%	5	42%	3	25%	12
Charity or social enterprise	2	67%	1	33%		0%	3
Individual	1	100%		0%		0%	1
Large Business (over 250 staff)	2	50%		0%	2	50%	4
Legal representative	3	38%	5	63%		0%	8
Local Government	1	100%		0%		0%	1
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)	1	100%		0%		0%	1
Other (please describe)	1	20%	3	60%	1	20%	5
Trade union or staff association	14	88%	2	13%		0%	16
Grand Total	**30**	**58%**	**16**	**31%**	**6**	**12%**	**52**

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

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	7	64%	2	18%	2	18%	11
Charity or social enterprise	2	67%		0%	1	33%	3
Individual		0%	1	100%		0%	1
Large Business (over 250 staff)	2	67%		0%	1	33%	3
Legal representative	3	38%	2	25%	3	38%	8
Local Government	1	100%		0%		0%	1
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)	1	100%		0%		0%	1
Other (please describe)	6	75%	2	25%		0%	8
Trade union or staff association	9	56%	4	25%	3	19%	16
Grand Total	**32**	**60%**	**11**	**21%**	**10**	**19%**	**53**

Question 6: Do you agree that 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?

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	10	100%		0%		0%	10
Charity or social enterprise	2	100%		0%		0%	2
Individual	1	100%		0%		0%	1
Large Business (over 250 staff)	3	100%		0%		0%	3
Legal representative	6	86%	1	14%		0%	7
Local Government	2	100%		0%		0%	2
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)	1	100%		0%		0%	1
Other (please describe)	5	83%	1	17%		0%	6
Trade union or staff association	8	53%	6	40%	1	7%	15
Grand Total	39	81%	8	17%	1	2%	48

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

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	10	91%	1	9%		0%	11
Charity or social enterprise	1	33%	2	67%		0%	3
Individual		0%	1	100%		0%	1
Large Business (over 250 staff)	1	33%		0%	2	67%	3
Legal representative	7	88%	1	13%		0%	8
Local Government	1	100%		0%		0%	1
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)	1	100%		0%		0%	1
Other (please describe)	5	100%		0%		0%	5
Trade union or staff association	12	86%	1	7%	1	7%	14
Grand Total	**39**	**81%**	**6**	**13%**	**3**	**6%**	**48**

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

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	8	57%	4	29%	2	14%	14
Charity or social enterprise	3	100%		0%		0%	3
Individual	1	100%		0%		0%	1
Large Business (over 250 staff)	3	100%		0%		0%	3
Legal representative	6	75%		0%	2	25%	8
Local Government	1	100%		0%		0%	1
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)	1	100%		0%		0%	1
Other (please describe)	3	75%		0%	1	25%	4
Trade union or staff association	9	75%		0%	3	25%	12
Grand Total	**36**	**75%**	**4**	**8%**	**8**	**17%**	**48**

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

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	7	78%	1	11%	1	11%	9
Charity or social enterprise	2	100%		0%		0%	2
Individual	1	100%		0%		0%	1
Large Business (over 250 staff)	2	67%		0%	1	33%	3
Legal representative	6	86%		0%	1	14%	7
Local Government	1	50%		0%	1	50%	2
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)	1	100%		0%		0%	1
Other (please describe)	7	100%		0%		0%	7
Trade union or staff association	13	87%		0%	2	13%	15
Grand Total	**41**	**85%**	**1**	**2%**	**6**	**13%**	**48**

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?

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	8	80%		0%	2	20%	10
Charity or social enterprise	3	100%		0%		0%	3
Individual	1	100%		0%		0%	1
Large Business (over 250 staff)	2	67%		0%	1	33%	3
Legal representative	8	100%		0%		0%	8
Local Government	1	100%		0%		0%	1
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)	1	100%		0%		0%	1
Other (please describe)	3	50%	1	17%	2	33%	6
Trade union or staff association	14	93%	1	7%		0%	15
Grand Total	**42**	**86%**	**2**	**4%**	**5**	**10%**	**49**

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)?

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	4	44%	4	44%	1	11%	9
Charity or social enterprise	1	50%	1	50%		0%	2
Individual		0%		0%	1	100%	1
Large Business (over 250 staff)	1	33%	1	33%	1	33%	3
Legal representative	2	25%	6	75%		0%	8
Local Government		0%	1	100%		0%	1
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)	1	100%		0%		0%	1
Other (please describe)		0%	4	100%		0%	4
Trade union or staff association	6	40%	7	47%	2	13%	15
Grand Total	**16**	**36%**	**24**	**53%**	**5**	**11%**	**45**

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

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	7	88%	1	13%		0%	8
Charity or social enterprise	2	67%	1	33%		0%	3
Individual		0%		0%	1	100%	1
Large Business (over 250 staff)	2	67%		0%	1	33%	3
Legal representative	5	63%	2	25%	1	13%	8
Local Government	1	100%		0%		0%	1
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)	1	100%		0%		0%	1
Other (please describe)	1	50%	1	50%		0%	2
Trade union or staff association		0%	13	87%	2	13%	15
Grand Total	**20**	**47%**	**18**	**42%**	**5**	**12%**	**43**

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

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	3	33%	6	67%		0%	9
Charity or social enterprise		0%	1	100%		0%	1
Individual		0%		0%	1	100%	1
Large Business (over 250 staff)	3	75%		0%	1	25%	4
Legal representative		0%	6	75%	2	25%	8
Local Government	1	100%		0%		0%	1
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)		0%	1	100%		0%	1
Other (please describe)		0%	3	100%		0%	3
Trade union or staff association	2	13%	12	80%	1	7%	15
Grand Total	**10**	**23%**	**29**	**66%**	**5**	**11%**	**44**

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?

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	12	100%		0%		0%	12
Charity or social enterprise	2	100%		0%		0%	2
Individual		0%	1	100%		0%	1
Large Business (over 250 staff)	2	67%		0%	1	33%	3
Legal representative	8	100%		0%		0%	8
Local Government	1	100%		0%		0%	1
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)	1	100%		0%		0%	1
Other (please describe)	4	80%		0%	1	20%	5
Trade union or staff association	4	27%	9	60%	2	13%	15
Grand Total	**35**	**71%**	**10**	**20%**	**4**	**8%**	**49**

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 Courts & Enforcement Act?

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	3	38%		0%	5	63%	8
Charity or social enterprise	1	33%	2	67%		0%	3
Individual		0%	1	100%		0%	1
Large Business (over 250 staff)	2	67%		0%	1	33%	3
Legal representative	5	63%		0%	3	38%	8
Local Government		0%		0%	1	100%	1
Medium business (50 to 250 staff)	1	100%		0%		0%	1
Micro business (up to 9 staff)		0%	1	100%		0%	1
Other (please describe)	2	33%		0%	4	67%	6
Trade union or staff association	3	21%	3	21%	8	57%	14
Grand Total	**17**	**37%**	**7**	**15%**	**22**	**48%**	**46**

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?

Organisation Category	Yes	%	No	%	Not sure	%	Grand Total
Business Representative organisation / TU	3	30%	6	60%	1	10%	10
Charity or social enterprise	2	100%		0%		0%	2
Individual	1	100%		0%		0%	1
Large Business (over 250 staff)	1	33%	2	67%		0%	3
Legal representative	6	75%		0%	2	25%	8
Local Government	1	50%		0%	1	50%	2
Medium business (50 to 250 staff)		0%	1	100%		0%	1
Micro business (up to 9 staff)		0%	1	100%		0%	1
Other (please describe)	1	50%		0%	1	50%	2
Trade union or staff association	12	86%	1	7%	1	7%	14
Grand Total	**27**	**61%**	**11**	**25%**	**6**	**14%**	**44**

Annex 2: List of Organisations who responded to the consultation

Respondents to Mr Justice Underhill's review of Employment Tribunal rules of procedure consultation included:

Acas

Administrative Justice and Tribunals Council

Association of School and College Leaders

Birmingham Law Society

British Retail Consortium

CBI

Chartered Society of Physiotherapy

Citizens Advice

Council of Employment Judges

Doyle Clayton

EEF

Electrical Contractors' Association (ECA)

Employment Appeal Tribunal

Employment Judges London North & West Region

Employment Judges of Birmingham Region

Employment Lawyers Association

Engineering Construction Industry Training Board

Ethnic Minorities Law Centre

Eversheds LLP

FSB

Glasgow City Council

GMB

Greater Manchester Chamber of Commerce

Institute of Directors

John Stamford + Associates

Joint Industry Board for the Electrical Contracting Industry

Lewis Silkin

Local Government Association

LYONS DAVIDSON SOLICITORS

Media Law Association

MIND

Morrisons Plc

NASUWT

National Union of Teachers

North East Chamber of Commerce

PCS

Peninsula Business Services

President Employment Tribunals (Scotland)

Press Association

Prospect

RBS Mentor Services

RMT

Royal College of Midwives

Royal College of Nursing

Scottish Trade Union Congress

SK Employment Law

Society of Editors

Society of Local Council Clerks

Tata Steel Corporate Functions

The Bar Council

The Law Society

The Newspaper Society

Thompsons Solicitors

Transport for London

Transport Salaried Staffs' Association

TUC

UK Chamber of Shipping

Union of Construction, Allied Trades & Technicians

UNISON

Unite

USDAW

Vice President Employment Judges Scotland

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