JUDICIARY OF
ENGLAND AND WALES

THE HONOURABLE MR JUSTICE UNDERHILL

29 June 2012

Dear Minister,

FUNDAMENTAL REVIEW OF EMPLOYMENT TRIBUNAL RULES

1. In November last year your predecessor asked me to lead a working group which would undertake a thorough review of the current Employment Tribunal Rules of Procedure and would develop a revised procedural code. The group started work in December. It comprised the Presidents of the Employment Tribunals in England and Wales and in Scotland, David Latham and Shona Simon, and a barrister and a solicitor specialising in employment law, Brian Napier QC and Angharad Harris of Watson Farley Williams. The group has worked harmoniously and hard, and I am most grateful to all of them. Particular thanks are due to Ms Harris and her firm for providing the venue for all but two of our meetings. We were most ably supported by civil servants from both BIS and the Ministry of Justice. I should mention in particular Sue Cope, Craig Robb and Katherine Willerton, who have attended almost all of our meetings: Ms Willerton has also been tireless in assisting us on technical drafting questions. I regret that we have not been able to complete the review quite within the time-scale sought: it has not been possible for any of us to take substantial time off from our primary responsibilities.

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2. You also asked us to consult an Expert User Group comprising the principal interest groups engaged on behalf of users of the employment tribunal system. A list of members of the Group is attached. We have reported regularly to it and invited its input. Their contribution has been very valuable.

3. I should make it clear that although the initiative for the review came from Government its perception that such a review was necessary reflected the views expressed by the judiciary, at the levels both of the Employment Tribunals and the Employment Appeal Tribunal (of which I was then the President) in the responses to last year's Resolving Workplace Disputes consultation. There was a consensus, expressed by myself and the two Presidents, at a meeting with Mr Djanogly, the Parliamentary Under-Secretary of State at the Ministry of Justice, that the current Rules were unsatisfactory in a number of respects.

4. I should also mention that it was and remains my view, as also of the two Presidents, that since the tribunal system has since the 2007 Act come under the aegis of the Ministry of Justice, it would now be appropriate for responsibility for the Employment Tribunal Rules to lie with that Department also. But we must obviously work within current arrangements, and we were pleased that it was proposed that the Ministry of Justice would be fully involved in the review, as indeed has been the case.

Recommendation and General Observations.

5. I attach a draft of the new Rules that we recommend should be made in place not only of the primary Rules set out in Schedule 1 to the current Regulations but also of the additional Rules in Schedules 3-5 (but not Schedules 2 and 6 - see below). I should, however, make four points about the scope of what we have done:

(1) It will be necessary to make fresh Regulations to which the Rules will be a Schedule. (The route of simply substituting the present Rules for the old as a Schedule to the current Regulations is not possible because we have taken into the new Rules some provisions at present contained in the Regulations.) This is a largely technical matter which we are happy to leave to the Departmental lawyers.

(2) We have held back from drafting any provisions in relation to national security (as covered by rule 54 of the current Rules and the special Rules in Schedule 2 to the Regulations). These are essentially self-contained and are primarily the responsibility of the Home Office. It is clear that some changes are likely to be required in response to recent case-law and changes in practice more generally. Discussions are currently ongoing in which Mr Latham is fully involved.

(3) We are aware of considerable dissatisfaction with the workings of Schedule 6 to the current Regulations, which contains the special rules applicable to equal value claims. We understand that equal pay law generally is the responsibility of the Home Office; and we recommend that either our working party or another be asked by the Home Office, with no doubt the involvement of BIS and the Ministry of Justice, to review those rules.

(4) We have undertaken a re-draft of the current prescribed claim and response forms: though these are not in fact prescribed by the Rules they are of course an essential part of the procedure. However, as a result of one or two technical problems our re-drafts are not available as I write this letter. They will be supplied to you shortly.

6. As will be apparent, we have re-drafted the Rules from scratch. We believe this to be necessary in order to make the drafting simpler and more accessible, which is an important objective in its own right. But the changes in style do not in the case of every provision mean a change in substance. The fundamentals of a fair procedure have not changed. Accordingly the new Rules follow the broad structure of the old, and the core wording of several of the substantive provisions, which are now well-understood, will stand: unnecessary change simply causes uncertainty and thus cost. But the differences are nevertheless substantial. I summarise the most significant as follows.

7. *Drafting style*. The current Rules are very elaborate in their drafting style. They are in consequence difficult for an intelligent layman or lay representative - and not infrequently also for lawyers - to follow. This is unsatisfactory in principle. It is important for the Rules to be as accessible as possible to lay people who will often perforce be unrepresented: this applies to respondents as much as claimants. We have tried to use as simple language as possible and to express ourselves as shortly as possible. The new Rules are less than half the length of the old, despite bringing in some provisions currently to be found in the parent Regulations and Schedules 3 - 5. We have achieved this not only by more succinct wording but also by leaving out many rules that simply prescribe administrative practice and by leaving some general case-management discretions unglossed.

8. *Presidential guidance.* We have provided for the two Presidents to issue guidance on matters of practice (rule 7). This will enable some questions which are essentially matters of good practice or of internal procedure to be addressed more flexibly and informally than if they had to be the subject of rules. But it is also intended to address two concerns expressed by some users - first, that parties (particularly, but not only, unrepresented parties) do not know what to expect, or what is expected of them, at various procedural stages; and, secondly, a perception (which may or may not be justified) that there are wide variations between how different judges, particularly at different centres, deal with the same kinds of hearing. Presidential guidance will be published and will be as accessible as the Rules. But we should emphasise that the guidance is not intended to be prescriptive: ultimately judges must have discretion to deal with the particular case before them. Nor is it intended to provide uniformity of practice between England and Wales on the one hand and Scotland on the other.

9. *Stronger case management*. Employment Judges are already encouraged to practise robust case management, but the structure of the Rules does not always make it easy. We propose two innovations:

(1) There will be an initial sift stage at which every case will be reviewed by an Employment Judge on the papers after the claim form and response have been received, with a view to (a) considering what directions are required in order to get the case ready for a final hearing, and (b) striking out at an early

stage claims or responses (or parts) which have no reasonable prospect of success (rules 22-25). (It is fair to say that some such process is already followed as a matter of practice, but its explicit inclusion in the Rules will encourage its effective use.)

(2) The present distinction between case management discussions and prehearing reviews, which has led to unnecessary technical complications, will be removed. A "preliminary hearing" may equally decide matters of case management or substantive preliminary issues (rules 39-42). Although we have not adopted the precise terminology used in the rule-making powers under the Employment Tribunals Act 1996, because we did not want to cause confusion by continuing to refer to "pre-hearing reviews", we have taken care to keep within the scope of those powers.

We recognise that effective case-management depends as much, if not more, on training and experience as on particular rules. The Presidents are already doing much to foster the necessary culture; but these changes should help. Apart from anything else, the training of Employment Judges which the introduction of new Rules will require will itself be a valuable opportunity to encourage the use of effective case management.

10. *Alternative dispute resolution.* Encouraging parties to settle where possible, and to take advantage of the various forms of ADR available (including the services of Acas and judicial mediation), is, again, a matter of culture as much as of rules. But the culture will be reinforced by express reference in the Rules (rules 2 and 39 (e)); and certain particular changes are made in order to remove some obstacles to settlement under the present Rules. We should take this opportunity to record the strong view of both the practitioner and judicial members of the working party that the current proposal to charge a fee for judicial mediation is likely to be a powerful disincentive to its use.

11. *Default judgments*. The regime in the current Rules governing the setting aside of default judgments has been peculiarly complex and productive of injustice. We have replaced it with a simpler and more flexible regime (rules 17-21).

12. *Timetabling of hearings*. We have included a specific rule allowing tribunals to set timetables for oral evidence and submissions and to enforce them by guillotines where necessary (rule 50). Tribunals already have the power to prevent disproportionately lengthy questioning and submissions; but the introduction of an express rule should encourage their use.

13. *Privacy, restricted reporting and anonymity*. The current Rules provide a limited and sharply-defined regime governing where anonymity and restricted reporting orders can be made, deriving from the prescriptive terms of sections 11 and 12 of the Employment Tribunals Act 1996. These have been held by recent case-law to be out of step with the requirements both of the Human Rights Act and of EU jurisprudence. Our proposed new rule 55 provides for a more flexible regime which allows Tribunals to take appropriate steps to balance the important principles of open justice and freedom of expression on the one hand and of privacy and effective justice on the other. The rule goes beyond the explicit rule-making powers conferred by the 1996 Act but we have no doubt that it is within your powers under the Human

Rights Act. The complications of the different vires have regrettably made the rule rather more elaborate than we would have wished. It is perhaps worth saying that this is not a case where the requirements of the ECHR compel a British legislator or tribunal to take steps that are contrary to domestic policy: the existing regime was poorly conceived and drafted and required revision in any event.

14. *Other changes*. Other new, or varied, rules which we should mention but to which we need not make detailed reference include: the rectification of the problem about extra-territorial jurisdiction identified in the case of Pervez v Macquarie (rules 8 (2) (c) and 8 (3) (c)); an express power to provide for lead cases where there are multiple claims (rule 31); and an explicit requirement for Tribunals to give reasons for all decisions on disputed issues (rule 58 (1)) - though qualified by an express recognition that in appropriate cases they can be very short.

15. *Costs.* As I explained when we met in April, we have seen no case for changing the substantive criteria for the award of costs or wasted costs or the making of deposit orders. There was no pressure for such change among users. You were, I believe, content with this but expressed some concern about the apparently small number of cases in which costs orders are made, which seems unlikely to reflect the real incidence of conduct satisfying the criteria for the award of costs. If this is right - as it may well be, though it is not straightforward to assess- it is not necessarily the result of any lack of awareness by Tribunals of their powers: there may be many reasons why a costs order is not sought, or made, in a case where it could be. Ultimately, this has to be a matter for individual Tribunals exercising their discretion. Having said that, I am sure that the Presidents will continue to include the exercise of the costs discretion in the matters on which judges and members receive ongoing training. One detailed change that we have made in this area is to remove the cap of £20,000 beyond which costs awards have to be referred for assessment to the County Court. Many Employment Judges, at least in England, are qualified to perform a costs assessment, and retaining the process in the Tribunal (where appropriate) may make the process simpler for beneficiaries of such awards.

Cross-Reference to the Terms of Reference

16. You specified four aims in the terms of reference. I take them in turn.

17. (a) Cases to be managed in a way that is proportionate to the nature of the issues involved, with the importance of saving expense considered throughout

This aim is essentially to be achieved by individual Employment Judges making effective and proportionate case management decisions in the cases before them rather than by specific rules. But we believe that the changes which we propose will foster a culture where that is the norm.

18. (b) Proceedings to be handled quickly and efficiently, with an emphasis on helping proceedings to resolve themselves otherwise than through judicial determination at hearings and dealing robustly and, so far as appropriate, consistently with cases where they appear to have little or no reasonable prospect of success, with a view to fairness for all parties and the tribunal and its resources;

The changes summarised at para. 9 above should have the effect of ensuring that claims, and responses, with no reasonable prospect of success are identified at the earliest possible stage and dealt with in a way which involves the least expense for the other party. The deposit procedure remains available for those cases which appear weak but which cannot properly be struck out. As for resolution otherwise than through the judicial process, see para. 10 above.

19. Consideration should also be given to the efficiency in the listing of cases for hearing

This is not a matter for the Rules. It is an issue of which the Presidents are well aware.

20. (c) Rules to be both simple and simpiy expressed, in particular given the significant proportion of unrepresented parties using employment tribunals

See para. 7 above.

21. (d) Proceedings have as much certainty as the nature of particular cases allows, and that in particular like

- cases are treated alike (with as much use made of standardised orders and directions as possible, building on the good work already developed around Case Management Discussion agendas)

- that rules are exercised, and orders are made, in a manner that is consistent, so far as appropriate, across Great Britain (backed, where necessary and appropriate, by relevant and published practice directions)

This will be addressed by the Presidential Guidance referred to at para. 8 above.

22. You also asked us to bear in mind in our recommendations the Government's wish to consider the use of legal officers to exercise interlocutory powers in appropriate cases. However the only approach that has proved practicable is for us to draft the Rules in the way that most conduced to fair and efficient case management; and the question of who the relevant powers may be exercised by is essentially a separate question.

Primary Legislation

23. We have in the course of our deliberations identified some desirable changes in the procedural law of the Employment Tribunal which are not possible without changes in primary legislation. Although we appreciate the pressures on legislative time, you might wish to consider whether advantage can be taken of the Employment and Regulatory Reform Bill currently going through Parliament to introduce these changes. I identify them briefly as follows.

(1) As we understand section 13 of the Employment Tribunals Act 1996, rules may only provide for the award of costs (or, in -Scotland~ expenses) in the sense understood in the ordinary courts, which does not include the charges or expenses of lay representatives. That seems to us unfair: if a party has

been represented by a non-lawyer, whose reasonable charges he has had to pay, and the other party is held to have acted (in short) unreasonably, we can see no reason why he should not recover those charges (subject of course to proper assessment) when he would have been able to do so if he had instructed a solicitor.

(2) The recent decision of the Employment Appeal Tribunal in Brennan (UKEAT/0288/11) confirms (subject to any appeal) that the Civil Liability (Contribution) Act 1978 does not apply to discrimination claims justiciable in the Employment Tribunal and that the Tribunal accordingly has no power to award contribution between two respondents (or potential respondents) who are held both to have unlawfully discriminated against the claimant. This is out of step with the position in the ordinary Courts and may be very unfair to the respondent against whom an award is made or enforced, who has to pay the award in full without any recourse against his fellow-discriminator.

(3) Under section 9 (2) (a) of the 1996 Act, the powers which the rules can confer to make a deposit order require the deposit to be paid as a condition of continuing "the proceedings" - which we take to mean the proceedings relating to a particular complaint - as a whole: in other words it is, as regards that complaint, all or nothing. But there will sometimes be cases where it will be useful to make a deposit order as a condition of pursuing a particular issue arising under the complaint.

If you are persuaded that further consideration should be given to trying to address all or any of these problems by way of amendment to the current Bill we would be happy to co-operate in any necessary drafting or fuller explanation.

Conclusion

24. We understand that if you find our recommendations acceptable you would intend to circulate our draft Rules for consultation. That is a process which we would welcome, and in which we would be more than willing to remain involved. Although we are comfortable with the main lines of our proposals, there may well be aspects that bear further consideration; and inevitably there will be room for improvement in the detailed drafting.