



Department
for Business
Innovation & Skills

EMPLOYMENT TRIBUNALS

Government response to the
consultation on amendments to
employment tribunal
postponement procedures

FEBRUARY 2016

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1. Introduction

Background

The Government believes that workplace disputes are best resolved outside of the formalities of an Employment Tribunal. Employment Tribunals can be expensive and stressful for all participants, so providing a system that encourages early resolution, and where that is not possible, provides an efficient service with acceptable outcomes, is essential.

One of the concerns about the tribunal system voiced by businesses and stakeholders is the time it takes. In particular, short notice and repeated postponements cause unnecessary delays, cost and inconvenience to all parties.

In response to those concerns, we introduced measures in the Small Business, Enterprise and Employment Act 2015 to provide additional powers to make regulations governing Employment Tribunal postponement procedure. Using these, together with existing powers in the Employment Tribunals Act 1996 we set out proposals to amend the Employment Tribunal Rules of Procedure in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to:

- a. limit the number of postponements that can be granted to a party, in a single case, other than in exceptional circumstances;
- b. introduce a deadline after which applications for the postponement of a hearing would only be allowed in exceptional circumstances;
- c. place an obligation on ETs to consider granting costs orders where late notice postponements are granted.

The Government undertook a public consultation from 16 January 2015 to 12 March 2015, seeking views on the draft new rules to ensure that they supported our aims of improving the efficiency of the Employment Tribunal system for all users.

The consultation sought views by asking 10 questions requiring a 'yes' or 'no' answer, and also by inviting comments, examples and views on each question.

This document sets out a summary of the responses and the Government response.

2. Summary of responses

Numbers of responses submitted and by whom

A total of 33 responses were submitted in answer to the 10 questions put forward in the consultation.

39% of these responses were submitted by **legal representatives**. Of these, 31% provided representation mainly for claimants, 23% mainly for businesses and the remaining 46% represented both claimants and businesses.

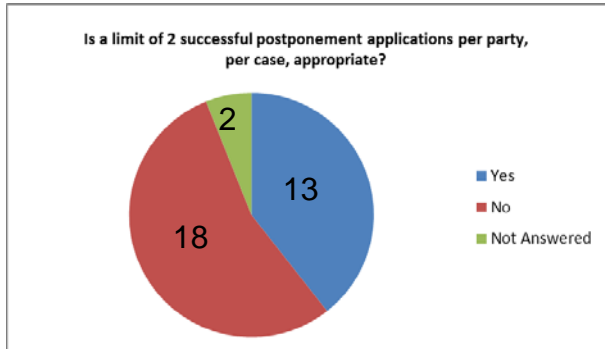
The remaining 61% were responses submitted by employers (including public and third sector) and their representatives (28%), Trade Unions (9%) and a judge, Employment Tribunal members and individuals (24%)

A full list of the respondents is set out at [Annex A](#).

Responses by question and Government responses

The following information provides a numerical breakdown of the responses received to each question in the consultation, together with details of respondent comments which provide additional context. Percentages have been rounded to the nearest whole number.

Question 1: Is a limit of two successful postponement applications per party, per case, appropriate?



YES	39%
NO	55%
Not Answered	6%

The majority of respondents (69%) who supported the proposal to limit the number of successful postponement applications per party, were made by businesses and/or business representatives.

Many of the views expressed (38%), stated that placing a limit on the number of postponements could potentially reduce time wasted and costs. Other comments included that a limit would encourage parties to focus on a more speedy resolution and help to discourage unnecessary postponement applications.

A third of the supportive respondents also expressed the view that the rules would need to be properly observed and clearly defined with additional clarification of the 'exceptional circumstances' to ensure consistency.

"I have experienced considerable difficulties, which has led to significant costs for a client, where a Claimant has continually made postponement applications on very short-notice in relation to most Preliminary Hearings and Full Hearings throughout five sets of proceedings. ...it is clearly being used as a tactical tool to delay proceedings and cause our client to incur further costs."

Legal representative

"I have myself experienced an Employment Tribunal that lasted for 4 years due to the amount of postponements that were granted to the other side."

Individual

Those that were not in favour of a limit mainly comprised of claimant representative groups or individuals. The majority of these (89%) considered that the changes were unnecessary, with 57% expressing the view that the existing Employment Tribunal Rules of Procedure and case management guidelines were sufficient to enable tribunal judges to reach reasonable decisions based on the facts of each case.

A third considered that there was no evidence to suggest that the number of postponements being granted was a problem, with one respondent commenting that more than two postponements in a case was rare.

“A specific rule to limit the number of requests is unnecessary, plus we note that the ET Judges will retain discretion to grant additional postponements in any event, meaning in practice little will change.

Legal representative

“The Tribunals already have considerable case management powers to manage cases efficiently and in the interests of justice.”

Trade Union or Staff Association

However, 16% of the respondents that answered ‘no’ did not support the proposal as they considered that a limit of two postponements was **too high**, particularly for more straightforward cases.

In addition, a small number of respondents suggested that a limit might weaken existing guidelines and give parties an impression that two postponements were an entitlement. These respondents represented both business and claimants.

Government response

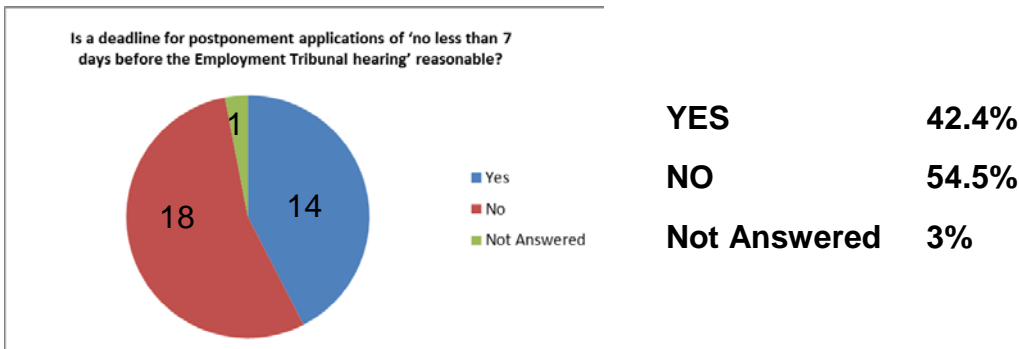
The Government has considered the responses and considers that the introduction of a limit to the number of postponements would be beneficial to the users of the service, by encouraging parties to think carefully about the need for a postponement, and motivating them to focus on finding a resolution to the case.

We recognise that a number of respondents felt that the current powers of the Employment Tribunal were sufficient, but the Government believes that the introduction of a specific limit would give the users of the service more confidence that the process would not be subject to repeated delays.

The Government considers that a limit of two postponements per party, per case, strikes a sensible balance between recognising that some postponements are necessary and inevitable, whilst discouraging the view that repeated postponements are acceptable.

Advice and guidance will be available to Tribunal users to help ensure that users are provided with adequate information to understand when a postponement application may be appropriate and understand the potential implications of making repeated or late notice applications.

Question 2: Is a deadline for postponement applications of ‘no less than 7 days before the Employment Tribunal hearing’ reasonable?



The majority of respondents (57%) who supported the proposal to introduce a deadline for postponement applications represented businesses.

Support for this proposal mainly centred around reducing the risk of unnecessary expenditure incurred by last minute postponements, particularly in respect of legal costs. Most considered that sufficient notice of a hearing was already provided, so last minute requests for postponements should be exceptional.

“Our members have been frustrated by getting a lawyer to prepare for the hearing only to be told at the eleventh hour that the case is not going ahead.”

Business representative organisation/trade body

Those respondents that did not support the proposal mainly comprised of claimant representative groups, and included a unanimous view from trade unions.

The majority considered that the time limit was unnecessary and that some claimants may be disadvantaged. Reasons for not supporting the limit included:

- it could result in injustice for claimants who have unexpected issues or events immediately prior to a hearing (33%)
- a claimant may feel the need to withdraw their case, rather than run the risk of facing a ‘costs sanction’
- the limit should be ‘no less than 14 days before the hearing’ to reduce costs and be more in line with the current minimum notice period of a hearing date that Employment Tribunals are obliged to give to parties. (17%)

“It serves no purpose to prescribe a one size fits all quota to all future cases when there are clearly those cases where an adjournment should never take place and those where several may be required.”

Legal representative

“Whilst parties should be encouraged to make requests at as early a stage as possible; unrepresented parties may be prejudiced by the 7 day rule.”

Trade Union or Staff Association

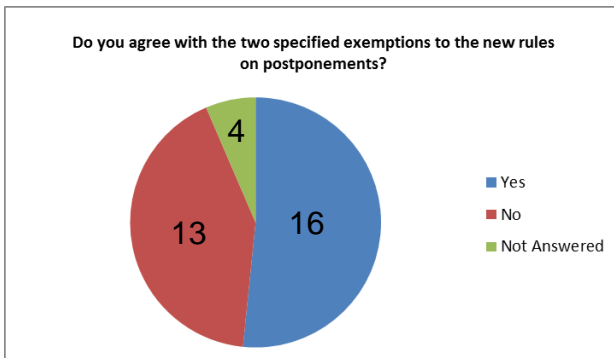
Government response

The Government has considered the responses and believes that introducing a deadline by which postponement applications are to be made would benefit Tribunal users by reducing costs, stress and time wasted.

Introducing a deadline should not disadvantage claimants involved in Employment Tribunals where they have a genuine need for a postponement. Employment Tribunal judges will still be able to exercise their discretion when they apply the new rules and will be able to grant a postponement if there are exceptional circumstances.

We will be providing guidance for Tribunal users that will make it clear from the outset that if there is a genuine need for a postponement, then an application should be made. Although the Tribunal will be obliged to consider a costs order if a last minute postponement is granted, that does not mean that costs will always be awarded. The reasons for the postponement will be taken into account by the deciding judge, and this will be made clear to users in guidance.

Question 3: Do you agree with the two specified exemptions to the new rules on postponements?



YES	49%
NO	39%
Not Answered	12%

The two exemptions:

- Where the need for a postponement is agreed by both parties and the Tribunal believes it is desirable in order to facilitate reaching a settlement
- where the Tribunal considers the need for a postponement was necessitated by an act or omission of the Tribunal or another party to the claim.

The 16 respondents that answered 'yes' were more evenly balanced between claimant and business representatives than for the previous questions. Six were made by Business Representative Groups, employer legal representatives or employers. Six were made by claimant representative groups, with half of those being made by individuals.

31% of those who agreed with the proposed exemptions considered that it made sense to grant a postponement where there was a reasonable prospect of the parties reaching a settlement. Two respondents that answered 'no' also qualified their response by adding that they were in agreement with this exemption.

Other comments and suggestions for circumstances to be included under exemptions included :

- if a postponement is requested by both parties, whether or not this is to facilitate a settlement. (Two respondents, both trade unions)
- if one party was acting unreasonably by not agreeing to a postponement;
- serious illness of a witness to be included as an act outside of a party's control.

"This means that parties are not unfairly penalised should the unexpected happen that is beyond their control."

Legal Representative

"The reasons for postponement such as omissions and failure to share information must be balanced by the focus on significant issues rather than a technical suppression of information."

Business representative organisation/trade body

The majority (77%) of the respondents that answered 'no' comprised of claimant representative groups or groups representing both claimants and employers.

It was generally considered that possible exemptions to the rule were more wide-ranging and could not be limited to just two, but some also acknowledged that these could feasibly be covered under the "exceptional circumstances" provisions.

Just under one third (31%) of those that did not agree with the exemptions, considered that they were not necessary as judges already had the discretion to consider all the circumstances when deciding applications for postponements.

One respondent (a legal representative) raised issues on how the rule would work in practice, such as the unlikelihood of getting all claimants in a multiple case to agree to a postponement to facilitate a settlement.

"....nothing should fetter the Tribunal's obligation to give effect to the overriding objective to deal with cases fairly and justly, including, of particular relevance here, ensuring the parties are on an equal footing, seeking flexibility in the proceedings and saving expense."

Legal representative

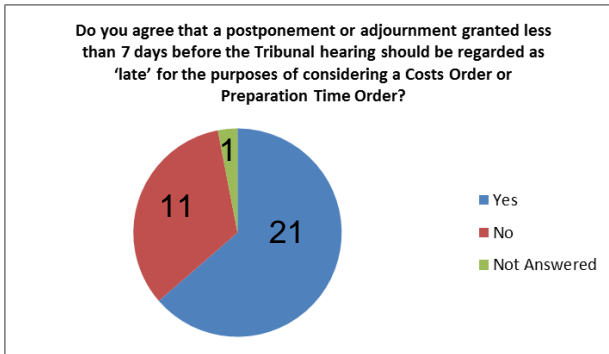
Government response

The Government recognises the need to ensure that postponement requests made as a result of genuinely exceptional circumstances are balanced with the need to expedite the proceedings and reach a speedy resolution to the dispute.

The consultation responses generally accepted that for the new provisions to work, the exemptions and exceptional circumstances needed to be wide enough to encompass the varying situations that may give rise to a postponement request. The government agrees with this view, which is why the rules will not be prescriptive in determining what constitutes an exceptional circumstance. This will be a decision for the judiciary.

However, we consider that there are some circumstances that should always be accepted as a reason for a postponement to be granted, such as where it is to facilitate a settlement between the parties. These will be exempt from consideration under the new rules, but should not be viewed as exclusive. They will be in addition to the exceptional circumstances provisions.

Question 4: Do you agree that a postponement or adjournment application granted by the Tribunal, but which was applied for less than 7 days before the Tribunal hearing¹, should be regarded as ‘late’ for the purposes of considering a Costs Order or Preparation Time Order?



YES	64%
NO	33%
Not Answered	3%

The respondents that answered ‘yes’ were mainly business representative groups, accounting for 43% of the responses. 28% of responses were from claimant representatives, of which two thirds were from individuals.

Comments generally supported the concept of considering costs and preparation time orders where a late postponement had been granted. However, most also added that the “exceptional circumstances” that would have had to apply need to be taken fully into account.

Nearly a quarter of respondents who agreed with this proposal also commented that the risk of costs being awarded against a party would ensure that only those with a genuine need would apply for a postponement.

“The majority of respondents agreed with this provided the Tribunal considers all the circumstances of the application for adjournment and full regard is given to the reason and to affordability before deciding on costs.”

Business representative organisation/trade body

The respondents that disagreed were predominantly representing claimants, including a unanimous response from the trade unions.

All the trade union responses, together with a legal representative, expressed the view that this measure was likely to affect more claimants than employers, and could deter claimants from applying for a postponement where a cost order would be considered.

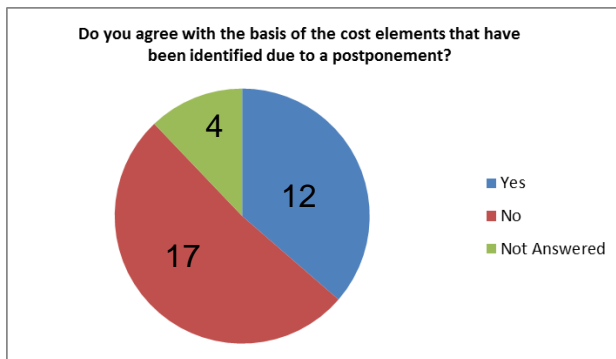
Other views expressed mainly centred on the fact that current provisions already allow for consideration of costs orders and that such decisions should be left for the Tribunal to decide, and not imposed on them.

¹ wording added, as some respondents pointed out that the original wording of this question was misleading and incorrect.

“There is also a possibility that the rule would deter litigants in person for applying for late postponements even when they have good reason for doing so, as they may be unable to assess the risk of an adverse costs order actually being awarded and so be put off making the application altogether.”

Legal representative

Question 5: Do you agree with the basis of the cost elements that have been identified due to a postponement?



YES	36%
NO	52%
Not Answered	12%

The respondents that answered ‘yes’ were fairly evenly split between business and claimant representatives or from organisations representing both. 80% of the claimant responses were from individuals rather than representative groups.

Those that disagreed with the basis of the cost elements were mainly claimant representative groups, accounting for 47%. The remaining 53% were split between business representatives and those representing both businesses and claimants.

Some comments associated with this question, whether ‘yes’ or ‘no’, queried the figures quoted in the consultation which were mostly considered to be either too low or out of date. Four respondents also raised the point that no consideration had been given to costs for claimants.

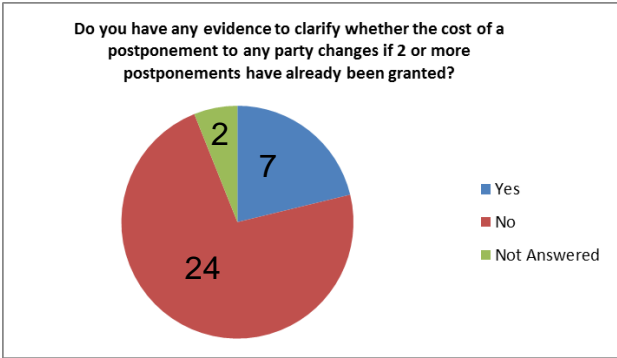
“.....the calculation was unclear and also conservative given the salaries of those who could be involved and the time for preparation, attendance and direct and indirect costs of lost opportunities.”

Business representative organisation/trade body

“The costs under-represent the costs of lost business for the employer. Opportunity costs and the time taken away from their business are a continued contention with our members.”

Business representative organisation/trade body

Question 6: Do you have evidence to clarify whether the cost of a postponement to any party changes if two or more postponements have already been granted?



YES	21%
NO	73%
Not Answered	6%

Most respondents (73%) stated that they did not have evidence to demonstrate changes in costs if two or more postponements are granted. However, 33% of respondents provided comments in response to the question, providing mixed views on whether costs would be increased with two or more postponements.

Nearly half considered that additional costs would be incurred for re-briefing legal counsel; whilst others considered that once the case is put together the costs would not increase with additional postponements. Two respondents considered that any postponement could potentially lead to reduced costs, for example, if the postponement was to facilitate a settlement.

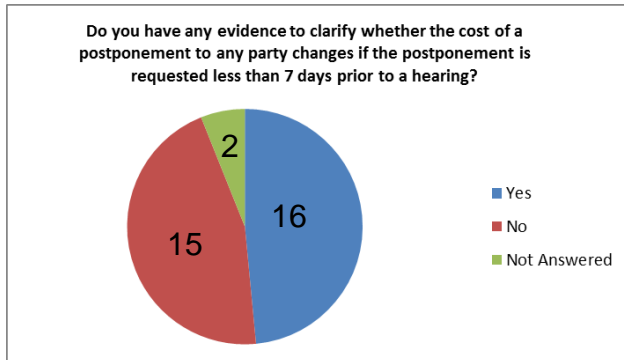
“It is the passage of time between any postponement and the hearing date that is the biggest factor in increasing costs because of the need to cover old ground and repeat preparation previously undertaken.”

Legal representative

“It depends on the reason for the postponement and when it is sought. For example, if the postponement is to facilitate settlement, it may reduce costs.”

Trade Union or Staff Association

Question 7: Do you have any evidence to clarify whether the cost of a postponement to any party changes if the postponement is requested less than 7 days prior to a hearing?



YES	49%
NO	45%
Not Answered	6.0%

The responses were fairly evenly split for this question, and again the comments provided by the respondents provide a more comprehensive view of opinions. Half of those that responded 'yes' were Legal Representatives, and comments made by most respondents agreed that parties would have incurred non-returnable legal fees seven days prior to a hearing.

Other cost implications for late postponements included those that may still have to be paid by the party if a late cancellation is made. These include: childcare costs, witness hotel, subsistence and travel costs. One respondent also added the 'emotional' costs incurred by late postponements.

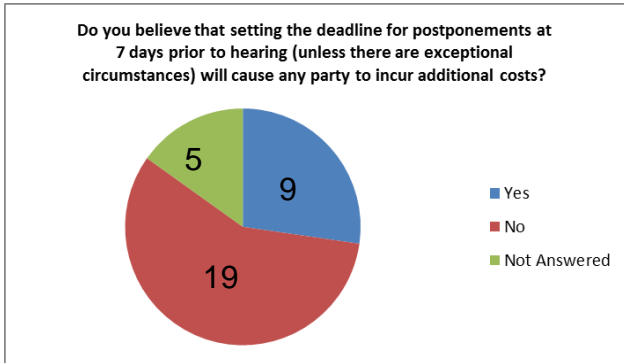
"The closer the parties are to the hearing, the greater the costs incurred in preparing for the hearing, for example, counsel's fees."

Large business

"Last minute postponements (within 7 days of the hearing) are the most expensive because by then the vast majority of legal and management costs in terms of preparation for a hearing will have been incurred."

Business representative organisation/trade body

Question 8: Do you believe that setting the deadline for postponements at 7 days prior to hearing (unless there are exceptional circumstances) will cause any party to incur additional costs?



YES	27%
NO	58%
Not Answered	15%

The majority of respondents, representing both claimants and businesses, considered that parties would not incur additional costs if a deadline for postponement applications was set at seven days before a hearing.

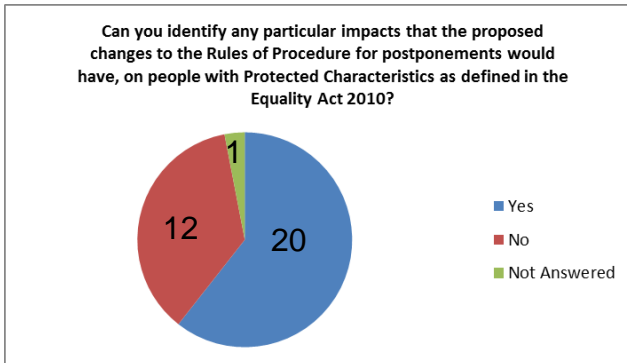
“In instances where a late postponement is sought because new or critical evidence is being produced then clearly additional costs in respect of legal support, securing documentation etc. are going to accrue.”

ET Members Association

Government response

The Government has acknowledged that the majority of respondents considered that last minute postponements result in increased costs for all parties. We will therefore introduce an obligation on Tribunals to consider a costs or preparation time order where a successful postponement application is requested less than seven days before the hearing. This will provide reassurance to parties that only those with a genuine need for a postponement will apply. The Government has noted the concerns of some respondents who consider that this will disadvantage some claimants and deter them from requesting a postponement. The new rules are not intended to prevent or put off genuine applications, but are intended to encourage parties to consider carefully their reasons and timing for requesting a postponement. Judges will be obliged to consider costs, but will also be obliged to take account of the circumstances that led to the application in the first place. Those with a justifiable cause would not be issued with a costs order.

Question 9: Can you identify any particular impacts that the proposed changes to the Rules of Procedure for postponements would have, on people with Protected Characteristics as defined in the Equality Act 2010?



YES	61%
NO	36%
Not Answered	3.0%

This question generated a fairly united response amongst respondents. The majority of respondents, including all trade union representatives considered that the changes to the rules on postponements would have an impact on protected groups.

Three groups of claimants were considered to be most likely affected:

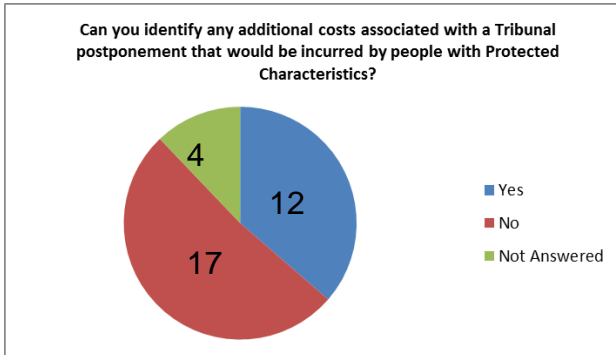
- a. People with disabilities
 - This group were considered to have a higher likelihood of requiring a last minute postponement on health grounds.
- b. Women with childcare responsibilities
 - This group were considered to have a higher likelihood of requiring a short notice postponement due to emergencies involving their children, or difficulties with childcare arrangements.
- c. People whose first language was not English
 - It was considered that indirect discrimination may occur for this group, due to difficulties in fully understanding the new rulings.

However, 41% of those respondents that provided comments also raised the point that some of these circumstances could be covered under the “exceptional circumstances” provision.

“Exceptional circumstances may provide the safety net for this but its possible individuals with a disability may have more sickness and so may need to apply for a postponement more frequently than someone without a disability and statistically women tend to have more childcare responsibilities and so may be more likely to request a postponement.”

Business representative organisation/trade body

Question 10: Can you identify any additional costs associated with a Tribunal postponement that would be incurred by people with Protected Characteristics?



YES	36%
NO	52%
Not Answered	12%

Of the 17 respondents that answered ‘no’, 47% represented claimants and 41% represented employers, with the remaining 12% represented both groups.

Of those that answered ‘yes’, additional costs cited included pre-booked childcare or support for a disabled person; transport costs and interpreters

“People with protected characteristics may require the attendance of an interpreter which may lead to additional costs being incurred in the event of a postponement.”

Trade Union or Staff Association

“...those who suffer from a physical impairment and cannot use public transport they may incur cancellation costs for the arranged transport.”

Legal representative

Government response

The Government has considered carefully the comments and views regarding the impact on protected groups, and we believe that the exceptional circumstances provisions and the discretion of the judiciary will provide adequate protection for most vulnerable groups.

However, we agree that certain people with disabilities or long-term health issues, may have an increased likelihood of requiring a last minute postponement, and their reasons may not always qualify as ‘exceptional circumstances’. We therefore intend to revise the provision to take account of circumstances where a last minute postponement is requested for reasons of ill health related to an existing long term health condition or disability.

We also acknowledge that the same groups are more likely to incur additional costs due to last minute postponements and so may be reassured by a tribunal considering a costs order if such a request was made by the respondent in a case.

3. Conclusion

The consultation as a whole generated a mixed response and provided valuable views and insight into the experiences of respondents, their clients or members.

Business representatives were collectively more supportive of the proposals, and welcomed measures that would result in a more efficient Employment Tribunal service with fewer delays and as a consequence, lower costs and stress.

Respondents from both sides concurred that repeated and late postponements could be both financially and emotionally costly, but it was equally acknowledged that on occasions a postponement was unavoidable or made sense. It was generally accepted that in instances of sickness or an unexpected emergency, a postponement would be justified. Furthermore, a postponement to facilitate settlement was viewed as sensible.

The Government has considered the responses to this consultation, and has decided that the three measures proposed in the Small Business, Enterprise and Employment Act 2015 will be implemented in April 2016 and will:

- a. Provide that where a party has been granted two previous postponements of hearings in the same case, any further applications by that party for a postponement will only be granted in exceptional circumstances.
- b. Provide that any application for a postponement presented less than seven days before the date of the relevant hearing or made at the hearing itself shall only be granted in exceptional circumstances.
- c. Oblige Tribunals to consider the imposition of a cost order or a preparation time order against a party that is granted a late postponement. A late postponement is a postponement which is applied for less than seven days before the hearing.

The Government considers that these measures will help to discourage Tribunal parties from applying for unnecessary postponements and will facilitate the speedier resolution of disputes. Importantly, the exemptions and exceptional circumstances provisions will protect parties with a genuine need for a postponement, and will safeguard the needs of vulnerable groups, such as the disabled and those with caring responsibilities. Furthermore, the Government is satisfied that Tribunals and the judiciary will apply their discretion accordingly and ensure that access to justice is maintained.

The Government is committed to improving the user experience of Employment Tribunals, and will continue to pursue improvements to the system. Some issues and suggestions raised by respondents in this consultation will be explored further as part of an on-going Tribunal reform programme announced by HM Courts and Tribunal Service in April 2014.

Thank you to all those that responded to this consultation.

Annex 1: List of respondents

- 5 Individuals
- Association of School and College Leaders (ASCL)
- Association of Teachers and Lecturers (ATL)
- Birmingham Law Society
- Chartered Institute of Personnel and Development (CIPD)
- Cloisters Chambers
- Devon & Cornwall Police
- Employment Lawyers Association (ELA)
- Essex Legal Services
- Forum of Private Business (FPB)
- Free Representation Unit (FRU)
- Jackson Osborne
- Large Employer (over 250 employees)
- Law Society
- Law Society of Scotland
- Legal Services, Birmingham University
- Lewis Silkin LLP
- Magrath LLP
- Morrish Solicitors
- Number 18 Chambers
- Royal Mencap Society
- Salaried Employment Judge
- Simpson Millar LLP
- Thompsons Solicitors
- Tribunal members Association – West Midlands
- Tribunal Members Association – Yorkshire
- UNISON
- UNITE the Union
- Universities and Colleges Employers Association (UCEA)



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