

The background of the entire page is a blue-tinted photograph of construction workers. They are silhouetted against a bright sky, carrying a long, dark pipe or beam across their shoulders. The workers are in various stages of movement, some leading and others following, creating a sense of a team working together. The image is slightly out of focus, emphasizing the overall scene rather than individual details.

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BETTER DISPUTE RESOLUTION

A review of employment
dispute resolution
in Great Britain

MICHAEL GIBBONS

MARCH 2007

Better Dispute Resolution

A review of employment dispute resolution in Great
Britain

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Department of Trade and Industry

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Foreword

Letter to Rt Hon Alistair Darling MP, Secretary of State for the Department of Trade and Industry

Dear Secretary of State,

On 12 December 2006 you asked me to review the options for simplifying and improving all aspects of employment dispute resolution.

I was impressed by your willingness to commission an Independent Review of the situation despite the fact that the Dispute Resolution Regulations had been implemented only two years previously. You also made it clear that you wanted to take on the challenge of adapting the Regulations if it were agreed that they are not working as intended. Both these factors were important to me in taking on the work.

I am pleased to submit my final recommendations well ahead of the schedule you set. While the timetable has been aggressive, I am confident that the conclusions and recommendations have been fully tested and are robust. Some recommendations relate to the need for further work.

The headline recommendation is the complete repeal of the statutory dispute resolution procedures set out in the 2004 Dispute Resolution Regulations. I also present a suite of complementary recommendations which, in aggregate, are genuinely deregulatory, and simplifying. If implemented, they should reduce the complexity of the current system and reduce costs to business and employees. They uphold and preserve all existing employee rights and ensure access to justice. I believe they should be cost effective for Government to implement.

Notwithstanding the fast-track delivery of this Review I have involved a very wide range of interested parties, including business representatives, trade unions and others in considering the options for change. They have given me a high degree of confidence in the quality of the recommendations, and in the general level of their acceptability to the stakeholder community.

In conducting the Review I was struck by the overwhelming consensus that the intentions of the 2004 Regulations were sound and that there had been a genuine attempt to keep them simple, and yet there is the same near unanimity that as formal legislation they have failed to produce the desired policy outcome. This is perhaps a classic case of good policy, but inappropriately inflexible and prescriptive regulation.

There is a corollary to this. The key message from this Review is that inflexible, prescriptive regulation has been unsuccessful in this context and it follows that the measures to be used in future should be much simpler and more flexible – and therefore will offer rather less certainty and predictability in their operation. I trust that those parties who have so strongly opposed the current regulations will as willingly accept the challenges that a different style of regulation will bring about.

Other key recommendations are that Government should:

- ensure that employment tribunals at their discretion take into account reasonableness of behaviour and procedure when making awards and costs orders;
- introduce a new simple process to settle monetary disputes without the need for tribunal hearings;
- increase the quality of advice to potential claimants and respondents through an adequately resourced helpline and the internet; and
- offer a free early dispute resolution service, including where appropriate mediation.

The overall purpose of the recommendations is to bring about effective resolution of disputes as early as possible. The consequences of success would be less disruption to workplaces and to individuals' careers, and reduced burdens on the resources of all concerned – employers, employees and the state.

I would like to comment on how employment disputes not solved in the workplace should be resolved in the future. My vision is of a greatly increased role for mediation; my attitude is based, as you know, on my knowledge of the use of mediation in resolving difficult family disputes, and also with some involvement in alternative dispute resolution through the civil courts. Encouraged by signs of success in the context of employment disputes elsewhere in the world, I commend increased use of mediation to employers, employees and practitioners in Great Britain.

I firmly believe that the conclusions of the Review are founded on the principles of better regulation. The impact of the recommendations, while implying a net increase in costs to the state, should include benefits and burden reductions to employers and employees which far outweigh the costs to the state.

The Review contains a long list of acknowledgments, among which I have identified the members of an advisory forum who were invaluable in testing and informing this work.

I would also like to pay tribute to the professionalism and energy of Caroline Normand, Tony Stafford, Malcolm Frost, Sue Cope, Rosemary Howard, Lindsay Croucher, Steve Whittington, Alicia Law, and Sarah Barber in the DTI Employment Relations Team and Zamila Bunglawala from the Better Regulation Executive in the Cabinet Office. I am extremely grateful to each one of them for the support I have received.

A handwritten signature in black ink that reads "Michael Gibbons". The signature is written in a cursive style. Below the signature is a single horizontal line.

Michael Gibbons

Executive Summary

The aim of the Review has been to identify options for simplifying and improving all aspects of employment dispute resolution, to make the system work better for employers and employees while preserving existing employee rights. It has considered the current system from end to end, including the 2004 Dispute Resolution Regulations¹, how employment tribunals operate and the scope for new initiatives to help resolve disputes at an earlier stage.

Most employees experience problems in the workplace at one time or another; survey evidence shows 42% of respondents have reported a problem at work in the last 5 years². The great majority of these are resolved within the workplace, either informally or through employer disciplinary and grievance procedures.

Minimum standards for disciplinary and grievance procedures were set down in legislation which came into force on 1 October 2004. Employers must follow three specified steps before dismissing an employee. In most situations an employee must follow similar procedures before making an employment tribunal claim. Employment tribunals are independent judicial bodies which hear employment-related cases in over 70 jurisdictions.

In almost all tribunal cases, Acas has a statutory duty to offer conciliation to the parties, in order that they may agree a resolution to their dispute.

The average cost to business of defending an employment tribunal claim has recently been estimated to be around £9,000³. The financial cost to employees is lower but there are also very significant non-financial costs, including stress and damaged employment prospects. The dispute resolution system costs the Government around £120 million per year.

¹ The Employment Act 2002 and Employment Act 2002 (Dispute Resolution) Regulations 2004

² Employment Rights at work – Survey of Employees 2005 (DTI)

³ BRE-PwC Administrative Burdens Database (2006)

Statutory dispute resolution procedures

The statutory dispute resolution procedures introduced in 2004 have brought some benefits. Employers and employees have more clarity about the steps they must follow when formally pursuing a disciplinary or grievance issue and as a result many employers now place more emphasis on training managers to handle such situations effectively. Employers also have an opportunity to consider an employee's grievance before a tribunal claim is submitted, giving a valuable opportunity for early resolution. Single-claimant employment tribunal claims have fallen following the introduction of the procedures.

However, the procedures carry an unnecessarily high administrative burden for both employers and employees and have had unintended negative consequences which outweigh their benefits. Many businesses told the Review that they have caused an increase in the number of disputes.

Formalising disputes

Rather than encouraging early resolution, the procedures have led to the use of formal processes to deal with problems which could have been resolved informally. This means that problems escalate, taking up more management time. Employees find themselves engaged in unnecessarily formal and stressful processes, which can create an expectation that the dispute will end in a tribunal. The complexity of the procedures and the penalties for failing to follow them mean that both employers and employees have tended to seek external advice earlier.

One size does not fit all

The use of formal processes in cases where other approaches would be more appropriate affects the climate for resolution, and makes parties defensive and more likely to consider an employment tribunal from the outset.

For smaller employers the need to put things in writing is often counter-cultural and can actually exacerbate a problem rather than help to solve it.

The Review heard that the procedures apply to many situations where they do not fit or are excessive. For example, the three-step process is inappropriate in agreed redundancy situations or where fixed-term contracts terminate. It frequently does not fit well where an employee wishes to make a complaint after employment has ended.

Employment tribunals

Too bureaucratic and complicated

Employment tribunals are considered too costly and complex for all involved. The requirement to focus on procedure rather than merits is now excessive.

Over half of claims have more than one jurisdiction (e.g. discrimination together with unfair dismissal). Differing time limits for different jurisdictions

can have the effect that an individual may need to submit more than one claim covering the same event.

The Review heard that vulnerable employees can be deterred from accessing the tribunal system by the complexity of both the underlying law and tribunal process. In such cases the need to confront the employer directly before applying to a tribunal could act as a barrier to justice.

More effective targeting of resources needed

Employment tribunals process a wide variety of claims, from simple wage claims worth less than £100 to very complex discrimination cases with unlimited damages. Yet all cases that do not settle and are not resolved go to a judicial hearing. The costs to parties and the state can be highly disproportionate to the value of the claim.

Multiple-claimant cases (where a number of employees claim against the same employer about the same issue) now significantly outnumber single-claimant cases. The current system was set up to deal with individual claims and needs to be adapted to meet the changing demands on it efficiently.

Consistency and costs

Businesses have frequently expressed concerns that employment tribunals are making inconsistent decisions and that too many weak and vexatious claims are being allowed through the system.

Businesses further believe that tribunals do not consistently use the powers available to them e.g. in efficient case management, and also in the award of costs in cases of particularly unacceptable behaviour.

Early resolution and alternatives to tribunals

It is clear that the earlier a dispute is settled, the better it will normally be for all concerned e.g. in terms of disruption to businesses and lives, and associated costs. Early resolution can also involve outcomes not available through the tribunal system such as a positive job reference, an apology and changes in behaviour.

Mediation and other alternative dispute resolution techniques are effective means of achieving early resolution. However, in the current system parties tend to get caught up in process rather than focusing on achieving an early acceptable outcome. Experiences with mediating employment disputes in New Zealand and the United States are positive, as is the emphasis on alternative dispute resolution in our civil courts.

Around 75% of claims made to tribunal are resolved without the need for a hearing, a substantial proportion with the involvement of Acas. Acas' conciliation service appears to be effective and is well regarded. However, recent reductions in funding and limitations on the periods in which they have

a duty to conciliate⁴ have adversely affected the level of Acas involvement. Acas typically becomes involved after a tribunal application has been made, and is sometimes prevented from offering its services late on in the tribunal process. It may therefore miss both early and final opportunities for achieving settlement.

Recommendations

The Review recommends that the Government should:

Support employers and employees to resolve more disputes in the workplace

1. Repeal the statutory dispute resolution procedures set out in the Dispute Resolution Regulations.
2. Produce clear, simple, non-prescriptive guidelines on grievances, discipline and dismissal in the workplace, for employers and employees.
3. Ensure there are incentives to comply with the new guidelines, by maintaining and expanding employment tribunals' discretion to take into account reasonableness of behaviour and procedure when making awards and cost orders.
4. Challenge all employer and employee organisations to commit to implementing and promoting early dispute resolution, e.g. through greater use of in-house mediation, early neutral evaluation, and provisions in contracts of employment.

Actively assist employers and employees to resolve disputes that have not been resolved in the workplace

5. Introduce a new, simple process to settle monetary disputes on issues such as wages, redundancy and holiday pay, without the need for tribunal hearings.
6. Increase the quality of advice to potential claimants and respondents, through an adequately resourced helpline and the internet, including as to the realities of tribunal claims and the potential benefits of alternative dispute resolution to achieve more satisfactory and speedier outcomes.
7. Redesign the employment tribunal application process, so that potential claimants access it through the helpline and receive advice on alternatives when doing so.

⁴ Fixed conciliation periods were introduced in 2004 alongside the statutory procedures

8. Offer a free early dispute resolution service, including where appropriate mediation, before a tribunal claim is lodged for those disputes likely to benefit from it. The Government should pilot this approach.
9. Offer incentives to use early resolution techniques by giving employment tribunals discretion, to take into account the parties' efforts to settle the dispute, when making awards and cost orders.
10. Abolish the fixed periods within which Acas must conciliate.

Make the employment tribunal system simpler and cheaper for users and government

11. Simplify employment law, recognising that its complexity creates uncertainty and costs for employers and employees.
12. Simplify the employment tribunal claim and response forms, removing requirements for unnecessary and legalistic detail, eliminating the 'tick-box' approach to specifying claims and encouraging claimants to give a succinct statement or estimate of loss.
13. Unify the time limits on employment tribunal claims and the grounds for extension of those limits; this should simplify claim pre-acceptance procedures.
14. Give employment tribunals enhanced powers to simplify the management of so-called 'multiple-claimant' cases where many claimants are pursuing the same dispute with the same employer.
15. Encourage employment tribunals to engage in active, early case management and consistency of practice in order to maximise efficiency and direction throughout the system, and to increase user confidence in it.
16. Review the circumstances in which it is appropriate for employment tribunal chairs to sit alone, in order to ensure that lay members are used in a way that adds most value.
17. Consider whether the employment tribunals have appropriate powers to deal with weak and vexatious claims and whether the tribunals use them consistently.

The current dispute resolution system

1.1 The Review was established to consider the options for simplifying and improving all aspects of employment dispute resolution for employees, employers and the Government. This chapter gives some background on the current employment dispute resolution regime in Great Britain.

1.2 Employees in Great Britain enjoy a framework of employment rights intended to combine social justice with economic prosperity. The employment dispute resolution system supports this framework. It prescribes workplace processes, facilitates a state system of conciliation, and includes the provision of employment tribunals to resolve workplace disputes.

Employment disputes in the workplace

1.3 Estimates of the number of employment disputes in Great Britain vary. In a DTI survey 42% of respondents had experienced a workplace dispute in the past five years⁵. In other research, around 1.7 million, or 6.9%, of employees said that they had been unfairly treated at work on the grounds of their personal characteristics (e.g. sex, race, age or appearance)⁶.

1.4 Employers and employees can seek advice on resolving a dispute from a range of organisations including Acas, the public body with statutory responsibilities to help resolve disputes, advisory bodies such as Citizens Advice, and legal representatives.

1.5 Disputes which are not resolved can lead to an employment tribunal claim being made and/or the employment relationship coming to an end. However, the great majority of disputes are resolved within the workplace, either informally or by following internal procedures (in 2004 only 8% of managers reported that their workplace had faced an employment tribunal claim)⁷.

1.6 There is currently a minimum standard framework for disciplinary and grievance procedures laid down in statute with which employers and

⁵ Employment Rights at work – Survey of Employees 2005 (DTI)

⁶ Fair Treatment at Work survey 2005 (DTI)

⁷ The Workplace Employment Relations Survey (WERS) 2004 – (DTI)

employees must comply prior to taking matters to employment tribunal. This framework is described below. There is also a statutory code of good practice in disciplinary and grievance situations produced by Acas. This code, which was substantially revised in 2004 to encompass the new statutory procedures, also sets out good practice beyond the statutory framework. The code is taken into account when determining the fairness of a dismissal but does not have to be strictly followed.

1.7 Many organisations have well-developed internal procedures for dealing with disputes that go beyond what is set out in the Acas code. Some large organisations make use of mediation as a part of an in-company process, either using internal or external mediators.

1.8 Acas can be asked to conciliate on issues that may result in an employment tribunal claim. Conciliation, like mediation, is a process where a third party helps the parties to find a resolution of the dispute.

1.9 A dispute concerning a breach of legal rights can be settled using a form of agreement which sets out the terms and conditions of the settlement and prevents employment tribunal claims on the issues cited. Such a document is only valid if it is either the result of Acas conciliation or if it is a 'compromise agreement', i.e. a statutory type of private settlement. There are procedural requirements in creating a compromise agreement which are designed to ensure employees do not unwittingly sign away their rights. There are no figures for the use of compromise agreements but intermediaries have confirmed that they are widely and probably increasingly used.

The statutory dispute resolution procedures

1.10 The Employment Act 2002 (Dispute Resolution) Regulations (the Dispute Resolution Regulations) came into force on 1 October 2004 and require all employers to follow minimum statutory procedures in dealing with dismissal, disciplinary action and grievances in the workplace. The three steps they must follow in respect of dismissal and disciplinary action are set out in Figure 1.

Figure 1 - Standard (three-step) dismissal and disciplinary procedure

Step One	The employer sends the employee a written explanation of the circumstances that have led them to consider taking dismissal or disciplinary action.
Step Two	The employer invites the employee to a meeting to discuss the issue. After the meeting, the employer informs the employee about any decision, and offers the employee the right of appeal.
Step Three	If the employee wishes to appeal, he/she informs the employer. The employer then invites the employee to attend a further hearing to appeal against the employer's decision, and the final decision is communicated to the employee. Where possible, a more senior manager should conduct the appeal hearing.

1.11 Employees and employers must, similarly, follow statutory procedures if the employee has a grievance. These are set out in Figure 2.

Figure 2 - Standard (three-step) grievance procedure

Step One	The employee sets down in writing the nature of the alleged grievance and sends the written complaint to the employer.
Step Two	The employer must invite the employee to a meeting to discuss the grievance. After the meeting, the employer informs the employee about any decision, and offers the employee the right of appeal.
Step Three	If the employee considers that the grievance has not been satisfactorily resolved, he/she informs the employer he/she wishes to appeal. The employer then invites the employee to an appeal meeting. After the meeting, the employer's final decision must be communicated to the employee. Where possible, a more senior manager should attend the appeal hearing.

1.12 In a case of unfair dismissal, an employment tribunal will check that the employer has followed these procedures. If the employer has not done so, the employment tribunal must make an automatic finding of unfair dismissal. Likewise, in most cases a tribunal will not accept a claim if the employee has not first sent a grievance letter and waited a specified period. A tribunal can increase or decrease awards by between 10% and 50% if either party fails to comply with the procedures.

1.13 Research⁸ suggests that in 2004, grievances were raised in just under half (47%) of all workplaces⁹, although most are resolved informally or by following internal procedures.

The employment tribunal system

1.14 If a dispute is not resolved in the workplace, an employee may make a claim to an employment tribunal. These are specialist judicial bodies made up of a legally qualified chair and two lay members; one from a trade union or employee background and one from an employer background. Employment tribunals have powers to determine over 70 different legal jurisdictions. Hearings take place in a range of locations to meet the needs of tribunal users. The majority of cases are offered a tribunal hearing within 26 weeks of the initial claim¹⁰. Tribunal judgments are binding unless appealed.

1.15 An employee wishing to submit a claim to an employment tribunal must do so on a prescribed claim form (known as the ET1). This is checked by the Tribunals Service¹¹ to determine whether the form has been completed correctly and whether the statutory grievance procedure has been followed, and to filter out claims that are weak, incomplete or that the tribunal does not

⁸ The Workplace Employment Relations Survey (WERS) 2004 – (DTI)

⁹ A workplace can be defined as a single premises, where the activities of a single employer takes place

¹⁰ including complaints of unfair dismissal, discrimination, unauthorised deduction of wages, breach of contract and redundancy pay

¹¹ The Tribunals Service is an agency of the Department of Constitutional Affairs (DCA). It provides administrative support to employment and other main central government tribunals

have jurisdiction to hear. The employer will then be asked to complete a response form (known as the ET3). If this is not received within 28 days, the employment tribunal may issue a default judgment without a hearing.

1.16 Once both the forms have been submitted, Acas has in most cases a statutory duty to offer to conciliate and help the parties to find a resolution of the dispute. This may lead to a formal legal settlement of the dispute (this is known as a COT3). Parties may also resolve the dispute privately, which may involve a compromise agreement. Claims can also be withdrawn. Acas' conciliation is available for specified time periods (for most claims this is seven weeks, for unfair dismissal 13 weeks and for equal pay and discrimination cases the period is open ended).

1.17 An appeal against a tribunal judgment can be made to the Employment Appeal Tribunal but only on points of law or if there has been an administrative mistake. In 2005-06, 1,728 requests for appeal were received of which 836 were accepted. The EAT sat on 634 occasions disposing of 867 appeals¹².

1.18 In comparison with many other European states, Great Britain has a low rate of employment litigation. For example, in Germany around 1.5% of the working population submitted an employment claim in 2002 while in France the figure was 0.7%. By contrast, the rate was just 0.4% in Great Britain¹³.

Characteristics of parties to tribunals

1.19 The latest available research¹⁴ provides valuable data on the characteristics of parties to an employment tribunal. Analysis shows:

- men brought the majority of applications across most jurisdictions. However, 91% of sex discrimination cases were brought by women;
- in comparison with the workforce as a whole employment tribunal claimants are more likely to be aged 45 or over. Redundancy payment cases in particular are contested disproportionately by older workers;
- nearly a quarter of claimants (23%) had no qualifications at the time of their application which is significantly higher than among the employed population generally (10%);
- professional, associate professional and technical, and administrative and secretarial occupations account for 26% of all cases, but 56% of discrimination cases; and
- 9% of claimants worked mainly at or from home in the job relating to the tribunal application, a higher proportion than in the employed population as a whole (5%).

1.20 The majority of individuals (76%) leave employment before submitting an employment tribunal claim and a further 17% end their employment after having submitted their claim. In discrimination cases a larger proportion of

¹² ETS Annual Report 2005/06

¹³ Acas policy discussion paper No. 3: New rules, new challenges: Acas' role in the employment tribunal system, 2006

¹⁴ Survey of Employment Tribunal Applications (SETA) 2003 – (DTI)

individuals make their claim while the employment relationship is still intact (only 60% leave before submitting a claim) but a greater than average number subsequently feel the need to leave (22%).

1.21 Employment tribunal applications are disproportionately high in manufacturing; construction; hotels and restaurants; and transport, communications and utilities industries.

1.22 Tribunal applications are disproportionately high in small employers, and particularly those employing between 50 and 249 employees. Figure 3 shows that 21% of applications come from a group of employers that employ only 4% of the workforce. Taken together, businesses employing fewer than 250 are respondents in 62% of cases, but employ only 37% of the labour force.

Figure 3 – Proportion of cases from different sizes of employer

Number of employees	Cases in employer survey % cases	Labour force %
1-24	29	23
25-49	12	10
50-249	21	4
250 +	38	63

Source: SETA 2003

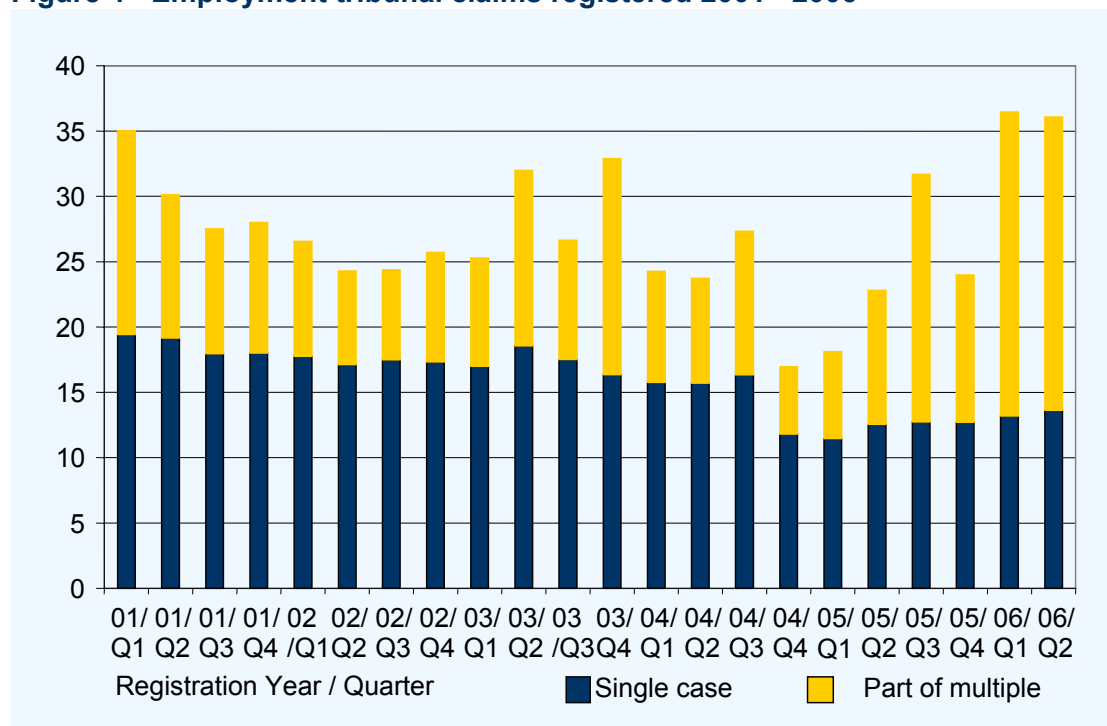
1.23 The private sector accounts for 82% of cases, public sector 12% and the not for profit sector 6%.

Single and multiple-claimant claims

1.24 The Review considered it important to identify separately single-claimant (or 'individual') claims (where an individual makes an isolated claim against their employer) and multiple-claimant claims (where a number of employees claim against the same employer about the same issue).

1.25 Figure 4 shows the trends in employment tribunals claims since 2001. Prior to 2004, when the Regulations came into force, the number of single-claimant claims was relatively stable. Following the introduction of the Regulations the number of single-claimant claims reduced, and has since increased modestly.

Figure 4 - Employment tribunal claims registered 2001 - 2006



Source: ETS¹⁵ & Tribunals Service (Employment) case management database, Q1 2001 - Q2 2006

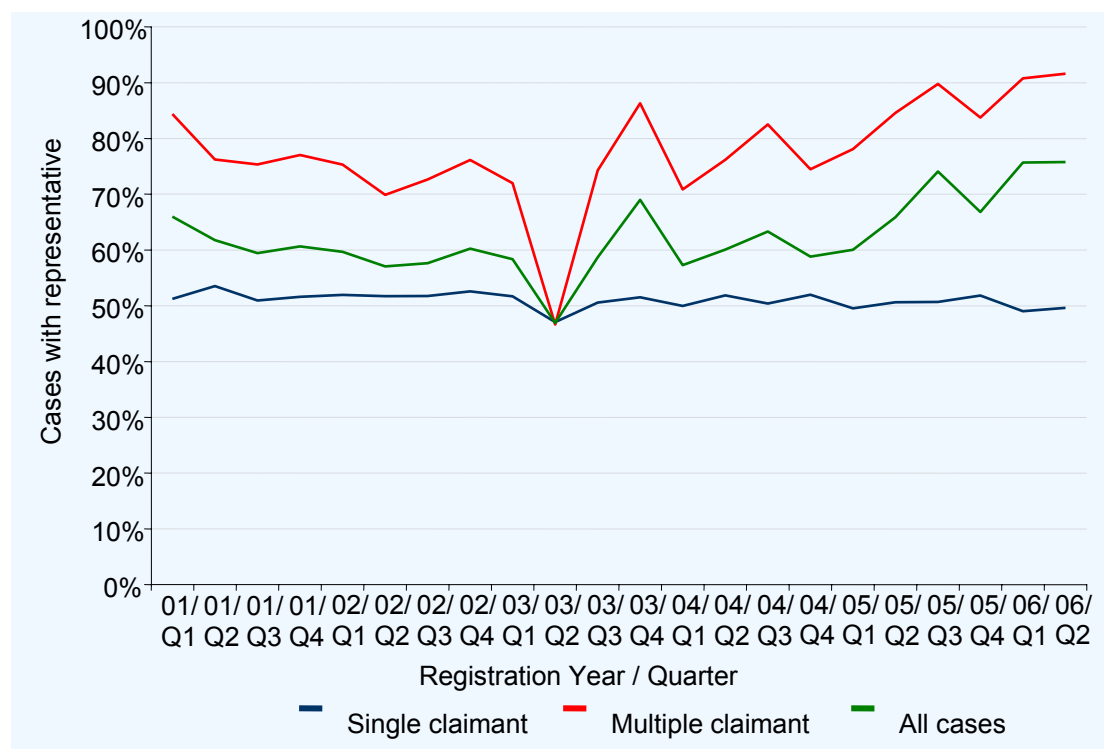
1.26 By contrast there has been a substantial increase in the number of multiple-claimant claims, which now significantly outnumber single-claimants. This figure inevitably fluctuates substantially because it is heavily influenced by large scale disputes. The number is growing as a result of significant numbers of public sector equal pay claims that cover large groups of a workforce. In 2005/06 115,039 claims were submitted to employment tribunals of which 63,543 were multiple-claimant claims¹⁶.

1.27 Figure 5 shows the number of cases where a claimant nominates a representative on their tribunal application. For single-claimant cases the proportion is steady at around 50% and has not changed since 2001 or as a result of the introduction of the Regulations. However, for multiple-claimant claims the proportion is higher and appears to be steadily increasing. The Review understands that at least part of this trend is associated with 'no win no fee' representatives.

¹⁵ The Employment Tribunal Service (ETS) was an agency of DTI. In 2006 it became part of a unified service – The Tribunals Service based in Department of Constitutional Affairs (DCA)

¹⁶ ETS Annual Report 2005/06

Figure 5 - Any representative recorded for claimant in case (% cases)



Source: ETS & Tribunals Service (Employment) case management database, Q1 2001 - Q2 2006

1.28 It was suggested to the Review that some claims to employment tribunals are driven by ‘no win no fee’ representatives. Cases are pursued in the expectation that businesses will settle a claim at a level below what they believe it would cost to defend a claim at a hearing. If settlement negotiations fail, the Review heard that these advisers can drop claimants ‘on the steps of the courthouse’.

1.29 A report¹⁷ by the Department for Constitutional Affairs (DCA) in July 2004 analysed whether the UK was seeing a growth in compensation culture and examined ‘no win no fee’ arrangements, otherwise known as conditional fee agreements (CFAs), in relation to employment tribunals. Their analysis suggests that although CFAs may increase private settlement rates in employment tribunal cases, and may achieve higher settlement terms for claimants, there is no evidence that they create more cases. Further analysis of the extent of the current role of CFAs was not available to the Review.

Types of claims

1.30 The most common types of employment tribunal claims are unfair dismissal claims, straightforward claims involving relatively small amounts of unpaid wages or holiday pay and discrimination claims. Figure 6 shows a breakdown of all claims by jurisdiction.

¹⁷ Too much blame and claim? An analysis of litigiousness and the compensation culture 2004 (DCA)

Figure 6 – breakdown of employment tribunal claims

Jurisdiction	Percentage of claims
Unfair Dismissal	20.8
Working Time Directive	17.6
Wages claims	16.4
Sex discrimination and equal pay	16.4
Breach of contract	13.0
Redundancy pay and consultation	5.6
Disability discrimination	2.3
Race discrimination	2.0
Other discrimination	0.6
National minimum wage	0.2
Others	5.0

Source: ETS Annual Report 2005/06

1.31 Each claim may invoke more than one jurisdiction and on average each claim covers 1.9 jurisdictions¹⁸. However, 46% of claims cover only a single jurisdiction, with single jurisdiction claims in the four apparently simple jurisdictions (wages, working time, redundancy pay and breach of contract) accounting for 24% of the total tribunal caseload¹⁹.

1.32 Some jurisdictions commonly occur together, reflecting problems arising from the same event, e.g. particularly:

- discrimination along with unfair dismissal;
- unpaid wages along with breach of contract or national minimum wage; and
- sex discrimination along with equal pay.

1.33 There are significant differences between the different types of cases passing through the system. In general, simpler cases tend to take less time to conclude but are less likely to settle early, whereas more complex cases such as discrimination take longer but are more likely to settle before a hearing.

1.34 The majority of wages claims take around three months to conclude and unfair dismissal cases take around four. In both jurisdictions a relatively small number of longer cases take the mean duration to around six months. Discrimination claims vary more significantly; half of such claims take less than six months but the more lengthy cases take the mean duration to over a year²⁰.

1.35 Acas conciliation plays a significant role in achieving earlier settlement of claims. To make the most effective use of resources Acas concentrate their conciliation efforts on the most complex cases. In 2005/06 the

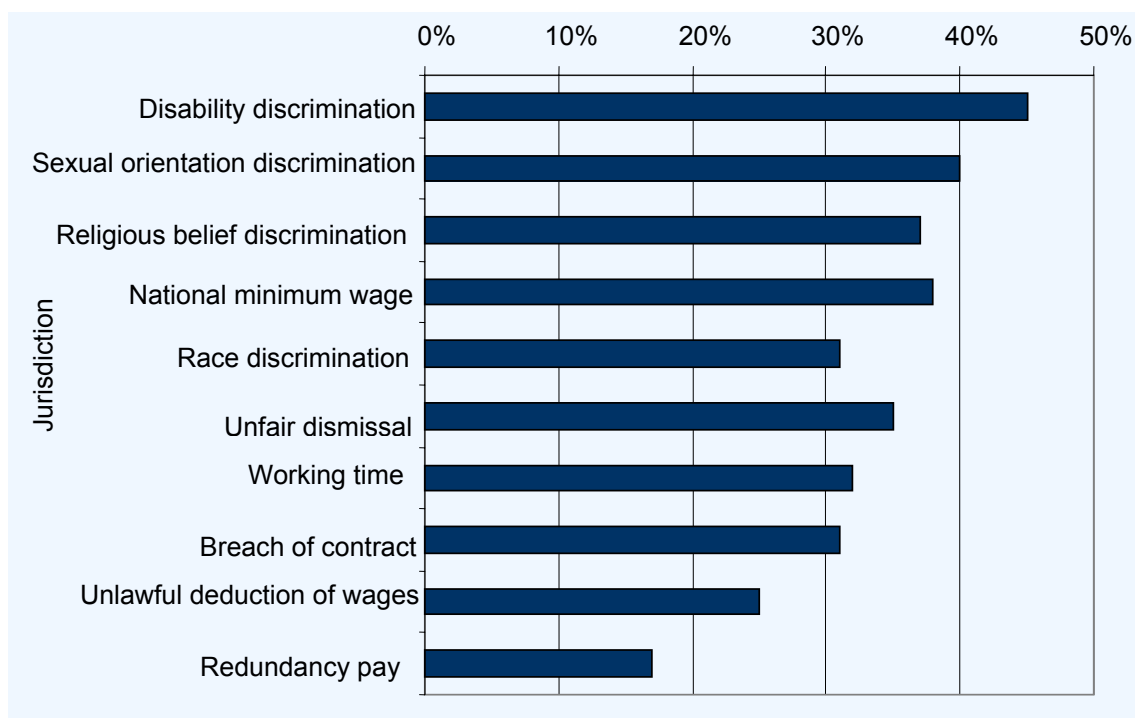
¹⁸ Tribunals Service (Employment) case management database, Q2 2006. All data from the Tribunals Service case management database presented here has been cleaned and analysed by DTI researchers. The findings presented here have not been audited and should be treated as indicative rather than definitive. The analysis and supporting data can be made available for inspection on request to bona-fide researchers.

¹⁹ ETS & Tribunals Service (Employment) case management database, Jan - Dec 2005.

²⁰ ETS & Tribunals Service (Employment) case management database, Jan 2001 - Aug 2006

settlement rate varied substantially by jurisdiction with simpler claims generally more likely to result in a hearing (only 17% of redundancy pay claims were settled through Acas prior to hearing) and discrimination cases having a higher rate of settlement (45% for disability discrimination cases). This is shown in Figure 7.

Figure 7 - Claims settled through Acas prior to a tribunal hearing 2005-06 (%)



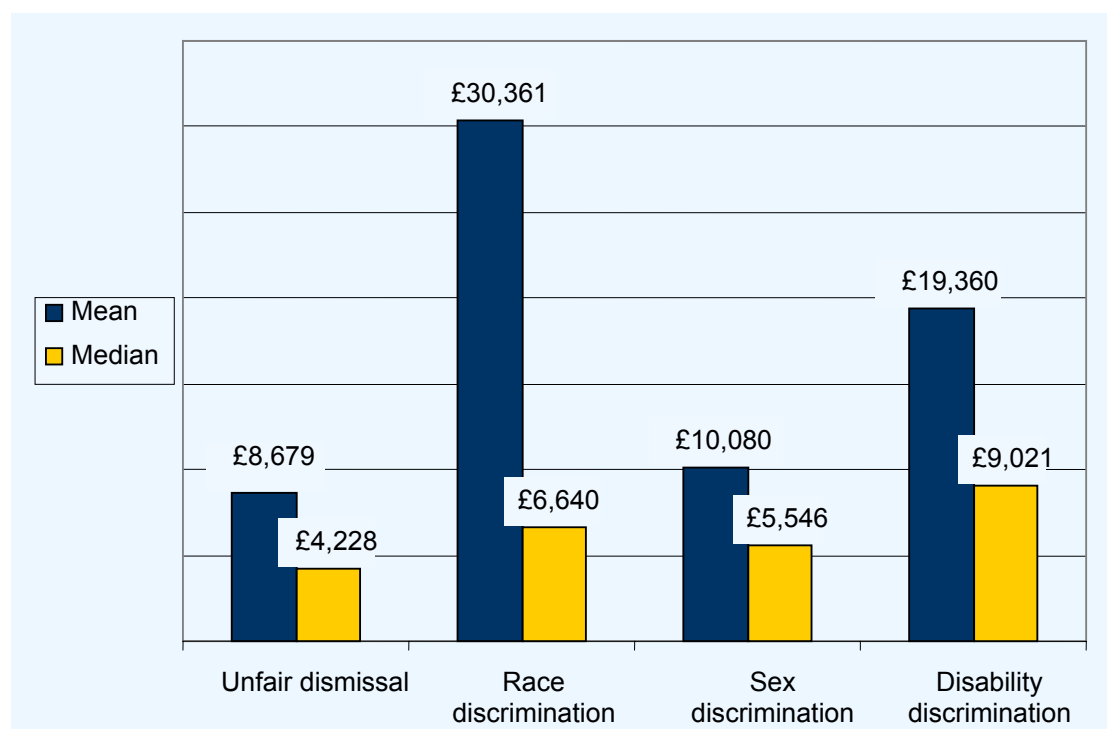
Source: ETS Annual Report 2005/06

1.36 In 2005/06 Acas' conciliation services are estimated to have saved 73% of potential tribunal hearing days, 48% through cases settled directly under Acas auspices and a further 25% through influencing the parties in cases either withdrawn or privately settled. Additionally, Acas settled just over 31,500 cases where no claim had been presented to the employment tribunal, of which 30,000 related to claims for equal pay.²¹

1.37 In many jurisdictions a relatively small number of high profile and high value claims can result in prospective claimants expecting a higher payout than they are likely to receive. The mean compensation for unfair dismissal claims in 2005/06 was £8,679 whereas the median was less than half that at £4,228. The mean compensation for race discrimination cases (which have uncapped awards) was £30,361 but the median was £6,640. (The median is the figure at which half the claimants receive less and the other half receive more. The mean is the simple arithmetic average of the figures.) This is shown in Figure 8.

²¹ Acas Annual Report 2005/06

Figure 8 – Median and mean awards in employment tribunal claims



Source: ETS Annual Report 2005/06

Costs for Employers

1.38 Both employers and employees find the tribunal process expensive and stressful. The financial costs of a claim to businesses include time spent by staff handling the claim and the costs of specialist advice. It has been estimated that the Regulations cost firms nearly £290 million a year, £172 million of which stems from responding to claims²².

1.39 Evidence from 2003 shows that a tribunal claim costs respondents an average of £4,360 in legal fees. A business spends 9.85 days on average on a claim, 7.71 days of which is directors' and senior managers' time. The data also shows that the legal costs of a private settlement are significantly higher than an Acas conciliated one (£8,351 compared to £2,863)²³. 33% of employers also report non-financial negative effects as a result of a case. More recent data suggest that the average cost of defending an employment tribunal claim has been estimated to be around £9,000²⁴.

Costs for Employees

1.40 Tribunal claims are also costly for employees, the non-financial problems being as important as the expenditure.

1.41 The overwhelming view of those the Review spoke to was that tribunals are increasingly complex, legalistic and adversarial making them a daunting experience for many. The burden of preparation and anxiety over what is to come can adversely affect health and strain relationships both

²² PricewaterhouseCoopers/BRE admin burdens measurement exercise 2005

²³ SETA 2003

²⁴ PricewaterhouseCoopers/BRE admin burdens measurement exercise 2005

within and outside the workplace, and the experience can damage future career prospects. Survey data shows stress and depression were reported in 33% of cases (rising to 43% for discrimination cases)²⁵.

1.42 The same 2003 data shows claimants spent an average of £2,493 on legal fees alone.

Costs for Government

1.43 The costs to government are incurred through funding the Tribunals Service and Acas. The combined budget for these two bodies in 2005/06 was £120 million.

1.44 The Tribunal Service operates from 34 permanent offices across Great Britain. In 2005/06, Tribunal Service employed an average of 744 staff and had a total budget of £70 million.

1.45 Acas has approximately 750 staff based in 11 main regional centres throughout England, Scotland and Wales with a head office in London. Acas' budget for 2005/06 was £47.4 million, of which staff salaries comprise £31 million²⁶.

²⁵ SETA 2003

²⁶ Acas Annual Report and Accounts 2005/06

Resolving disputes early

2.1 This chapter considers how effectively the Regulations solve disputes in the workplace and recommends changes that could be made to support and encourage early resolution.

The current system

2.2 When a dispute arises in the workplace, it is in the interests of all parties to resolve it as soon as possible. There is a window of opportunity for early resolution. Delay increases the likelihood of positions becoming entrenched and the dispute leading to formal processes, with significant financial costs to both parties and to the Government, and a serious impact on employers and employees in terms of lost time, stress and the likely breakdown of the employment relationship.

2.3 Employers and employees will usually attempt to resolve disputes informally at an early stage. Government produces a range of advice and guidance on handling disputes, including web-based guidance on the Business Link and Directgov websites. A helpline provided by Acas receives around 900,000 calls per year and they produce a statutory code of practice on disciplinary and grievance procedures. Advice can also be sought from organisations such as Citizens Advice, trade unions, business organisations and independent advice providers. There is a buoyant private sector market for practical employment law advice.

2.4 Changes to the dispute resolution system came into force on 1 October 2004 in order to address perceived shortcomings in the system. The Regulations brought into force prescribed minimum disciplinary and grievance procedures with which all businesses must comply. The procedures each consist of three steps: an initial letter, a meeting and an appeal. In most cases employers must comply with the disciplinary procedure before dismissing an employee and employees must comply with the grievance procedure before complaining to an employment tribunal.

2.5 The Regulations were introduced because it was felt that too many issues were being referred to employment tribunals without efforts first being made to resolve them in the workplace. This resulted in a significant increase in tribunal claims and complaints that in too many cases the first time an employer learned of a workplace dispute was when it received notice from the ETS that an employment tribunal claim had been filed.

2.6 The policy behind the statutory procedures was first set out in the 2001 consultation paper 'Routes to Resolution'²⁷. This proposed three principles for a modern dispute resolution system: access to justice; fair and efficient tribunals; and a modern, user friendly public service. The objectives of the 2004 changes were to enable the early identification of grievances, to encourage employers and employees to discuss disputes in the workplace, and to promote effective alternative ways of resolving disputes without resorting to employment tribunals.

Problems with the current system

Views expressed to the Review

"The procedures are seen as a prelude to employment tribunals, rather than a way of resolving problems in the workplace"

Employee organisation

"By the time things are in writing, it's probably too late to resolve things over a pint in the pub"

Small business

"The actual effect of the regulations has been to make everyone focus on process resulting in a draconian and bureaucratic system"

Intermediary

2.7 This Review has taken the views of around sixty organisations with a strong interest in the dispute resolution system. Employers, employees and intermediaries, along with the bodies who represent them and those who administer the system have all expressed their opinions. (The full list of contributors is given in Annex B). The strong consensus is that the principle behind the 2004 changes is sound: parties should be encouraged to resolve disputes at as early a stage as possible. However, there is also a strong consensus that the attempt to achieve that objective through statutory procedures has been unsuccessful and has had unintended negative consequences. These consequences are discussed below.

²⁷ Routes to Resolution: Improving Dispute Resolution in Britain 2001 (DTI)

The Regulations exacerbate and accelerate disputes

2.8 The Regulations have had the effect of formalising disputes that would better have been dealt with informally. The main reason for this is the strong link between the internal procedures and employment tribunal proceedings i.e. particularly:

- if the procedures have not been followed, an employer faces having a dismissal found to be automatically unfair while an employee may find a tribunal refusing to accept his/her application (there is also provision for modification of compensation up or down by between 10% and 50%); and
- an employee (or former employee) with a grievance usually has three months in which to lodge a tribunal complaint²⁸, so even where employees want to resolve matters informally they may feel under pressure to get the formal process underway.

2.9 As a result parties tend to focus on ensuring all the provisions of the procedure are fulfilled, lest they are penalised later at an employment tribunal, rather than examining ways of resolving the underlying problem. The Regulations create expectations of the case going to tribunal rather than incentives to resolution.

2.10 Both large and small businesses have reported that the number of formal disputes has risen. The Review has heard that 30 to 40% increases have been typical in the retail sector. Many disputes which could have been amicably and sensibly resolved informally without the need for formal procedures are becoming escalated and taking a disproportionate amount of management time; the Review has heard that the increased use of formal processes has been an unnecessary burden that has not increased the rate of resolution.

2.11 For small businesses the procedures have been especially problematic. Small businesses tend to have a more informal culture and the requirement to express problems in writing can act as a trigger for greater conflict rather than a route to resolution. Whilst the Review recognises that organisations which do not have formal dispute procedures will normally benefit from introducing them (employers with procedures are far more likely to be successful at tribunal than those without) the requirement to follow a prescriptive 'one size fits all' process does not always help.

Complexity drives users to seek legal advice earlier with associated increased costs

2.12 Although there is no evidence at this stage that a greater proportion of individual tribunal users are employing legal representation (see Figure 5 in Chapter 1), there is considerable anecdotal evidence that legal advice is being sought earlier on in the process (e.g. when the internal procedure is initiated, rather than at the point the grievance is clearly heading to tribunal) and more lawyers' time is required per case. In particular, the Review has heard that lawyers are being asked to advise at the outset of a grievance

²⁸ Although there is an extension to six months available in some circumstances, the rules around this are felt to be too uncertain to rely on in every case.

process and that the need for a grievance letter is considered a trigger to seeking legal advice. There is also a perception of wide interpretation by tribunals in deciding what constitutes a 'grievance' for the purposes of the statutory procedures, which leads both employers and employees to become too focused on the possibility of legal action.

2.13 The Regulations have been criticised for their complexity. The three-step process was intended to be simple but the detailed requirements are complex in practice. Some of the intermediaries consulted by the Review said that they do not fully understand the Regulations and that interpreting the legislation often requires specialist legal support.

2.14 Particular problems arise in:

- establishing what documentation constitutes a grievance letter. For example, comments in resignation letters and in 360-degree feedback forms have been held to meet the requirements, so some employers feel it is necessary to check closely and investigate any written communication that might be construed as a grievance;
- making sure that documentation, timings and meetings fulfil the requirements of the procedures; and
- establishing which staff are 'employees', to which the Regulations apply, rather than 'workers' to which they do not.

The Regulations are not relevant to all situations

2.15 The dismissal procedures apply to situations which include agreed departures, termination of fixed term contracts and redundancy. The Review has been told that in these situations the interpretation of the procedures is unclear and can act as an obstacle to amicable separation and in other cases can be an unnecessary burden. For example, one business felt it necessary to follow the three-step procedures for each of their Christmas temporary staff before they left – a process which added no value.

2.16 Similarly the grievance process cannot easily be implemented once employment has ended. In 76% of tribunal cases the employee has left employment prior to submitting a claim²⁹.

2.17 The Review has heard that the appeal stage is an unnecessary burden, especially for small businesses. The appeal will often be to the same person who made the original decision. It can also be difficult in cases where employees have left the workplace.

2.18 In the context of multiple-claimant cases (see Chapter 1), such as equal pay claims where large numbers of individuals must submit individual claims concerning an employer's pay system, the procedures are a major unnecessary burden. Employers and employees are forced to go through the process for each of the claims even though the claim will be pursued on some sort of group basis.

²⁹ SETA 2003

2.19 In a dispute between an employee and a manager, there are often disciplinary and grievance issues raised at the same time (for example if an employee feels a disciplinary process is discriminatory, it is not uncommon for a manager to believe that the employee is raising grievances as a way of hiding poor performance). It is not always clear how the two strands of the Regulations should operate in such circumstances, and employers can feel compelled to hold excessive numbers of meetings and write excessive numbers of formal letters to be sure of fulfilling the procedural requirements.

Proposals for change

Repealing the Regulations

2.20 The Review has been told that the steps set out in the procedures are those which most reasonable parties would follow to resolve most disputes. However, the statutory and detailed nature of the processes which requires employers to follow them strictly in every case is a fundamental problem which needs to be addressed. The Review reached the opinion that, given the variety and complexity of employment disputes, it would be impractical to design Regulations which could successfully address all circumstances without becoming unacceptably complex.

2.21 The overwhelming consensus of interested parties is that repeal of both the disciplinary and grievance procedures is the right way forward.

Recommendation 1: The Government should repeal the statutory dispute resolution procedures set out in the Dispute Resolution Regulations.

2.22 Interested parties have made it clear, however, that the principles behind the statutory procedures are sensible and in many situations represent good workplace practice. They were particularly intended to address:

- the possibility of an employee raising a problem with the employment tribunal without first having raised it with their employer;
- the lack of focus on early internal resolution of disputes; and
- the lack of good workplace procedures in many (mostly smaller) businesses.

2.23 In order to encourage good practice and early resolution of disputes without laying down strict steps, the Review proposes a combination of clear, simple, non-prescriptive guidelines on how to resolve a dispute, incentives to follow those guidelines, and additional support.

2.24 Acas provides a Code of Practice on disciplinary and grievance procedures, which has been widely used and is generally supported. The Review has been told that the Acas Code could be improved in a number of areas, for example in respect of early resolution, the needs of small businesses and best practice in disputes where employment has terminated. The guidelines which the Review is proposing should address these areas of concern.

Recommendation 2: The Government should produce clear, simple, non-prescriptive guidelines on grievances, discipline and dismissal in the workplace, for employers and employees.

2.25 In order to encourage parties to take appropriate steps to resolve matters before submitting a tribunal claim, the Review considers that parties should be incentivised to resolve disputes informally, with sanctions against those who do not make adequate efforts to do so. However, there is a need for enough flexibility to allow the individual circumstances of particular cases to be taken into account.

2.26 The Review considers that employment tribunals should be able to consider the behaviour of and steps taken by the parties to resolve the dispute and, if they have been unreasonable, to have a discretionary power to reflect this in the size of tribunal award or in costs.

2.27 Such a provision should ensure parties consider fully the options available to them for achieving the best outcome to their dispute before it reaches an employment tribunal.

Recommendation 3: The Government should ensure there are incentives to comply with the new guidelines, by maintaining and expanding employment tribunals' discretion to take into account reasonableness of behaviour and procedure when making awards and cost orders.

Promotion of early resolution

2.28 While many firms value being able to discuss grievances early and have a written disciplinary and grievance procedure, not all have human resources professionals to help implement them in practice, leaving many to rely on external professionals such as accountants and solicitors for employment advice. Moreover, awareness of the benefits of alternative dispute resolution methods such as mediation and conciliation, when to apply them and what they can achieve, is not as high as it should be.

2.29 When a dispute arises, it is important for the parties involved to communicate to resolve the situation. Sometimes an independent third party can assist them to explore the issues in a non-adversarial way in order to reach a conclusion. Alternative dispute resolution (ADR) is the collective term used to describe ways in which parties can settle disputes without recourse to litigation. A summary of various ADR mechanisms is outlined in figure 9.

Figure 9 – Alternative dispute resolution mechanisms

Arbitration	An impartial arbitrator hears both sides in a dispute and decides between two claims. The two sides of the dispute will agree in advance whether the arbitrator's decision will be legally binding or not, and any constraints on the outcome.
Conciliation	An independent third party helps the people involved in a dispute to resolve their problem. The conciliator is unbiased and will not take either party's side.
Mediation	An independent mediator facilitates an agreement between disputing parties. The parties to the dispute influence and decide the terms of the settlement.
Early Neutral Evaluation	An independent third party considers claims made by each side and produces an opinion on the strengths of their case. The evaluator is normally an expert in the field.

2.30 Both employee and employer organisations have said they want to see more early resolution but that in many cases the Regulations are not helpful in this respect. In the context of the recommended repeal of the Regulations such organisations should be urged to commit to ensuring that all parties genuinely attempt to resolve disputes early, e.g. through promoting awareness of early resolution methods and encouraging parties to find mutually acceptable solutions before resorting to litigation. Examples of action to promote early dispute resolution are set out in figure 10.

Figure 10 – Action to promote early dispute resolution

Employer organisations should:	<ul style="list-style-type: none">• promote early resolution as a management tool and provide advice, guidance and training to empower managers to resolve disputes in the workplace; and• consider encouraging the use of mediation as a standard provision in contracts of employment.
Employee organisations should:	<ul style="list-style-type: none">• raise awareness among their members of the benefits of genuinely attempting to resolve disputes early by dialogue with employers.
Both employer and employee organisations should:	<ul style="list-style-type: none">• ensure their members are aware of the realities of litigation e.g. by encouraging parties to seek high quality advice. This can help parties to determine the strengths and weaknesses of their case and increase awareness of what to expect should they proceed to litigation; and• improve understanding and awareness levels among their members of the value of third-party mediators to help resolve internal workplace disputes which they are not able to resolve themselves.

2.31 Trade unions, employer organisations, trade associations and human rights bodies in the UK should seek to promote mediation, e.g. as is understood to have been the case in the US. The ‘Universal Agreement to Mediate’ (UAM) is an agreement between the Equal Employment Opportunity Commission in the US and an employer to mediate all eligible claims filed against the employer before litigation proceedings take place. Application of a UAM may be local, regional or national.

Recommendation 4: The Government should challenge all employer and employee organisations to commit to implementing and promoting early dispute resolution, e.g. through greater use of in-house mediation, early neutral evaluation, and provisions in contracts of employment.

Refocusing government support

3.1 This chapter considers how the Government currently helps to resolve employment disputes outside the employment tribunals, highlights the problems with the current arrangements, and recommends changes.

The current system

3.2 Where an employment dispute is near or at the point of crystallising into a claim to an employment tribunal, both the parties to the dispute and the Government have an interest in helping to resolve it without the need for a tribunal hearing. This saves state-funded tribunal resources, and the time and money of the parties to the dispute.

3.3 The Government seeks to resolve individual and collective employment disputes through Acas. Acas contributes to dispute resolution by offering general advice and guidance, and through statutory and non-statutory intervention by Acas conciliators and mediators. The advice and guidance services include a range of publications, internet guidance, and a popular national advisory telephone helpline which offers personalised advice on disputes and other employment issues to employees and employers.

3.4 Acas has a statutory duty to offer conciliation in most cases where an individual has a complaint concerning their employment rights. This duty relates both to complaints that have been made to an employment tribunal ('post-claim') and, if asked by at least one side in the dispute, to those which have not yet reached the point of a claim being made to the tribunal ('pre-claim'). In practice, Acas targets the vast majority of its conciliation resources on post-claim cases, since these are easier to engage with, and (if conciliated successfully) more easily shown to save employment tribunal costs than pre-claim cases.

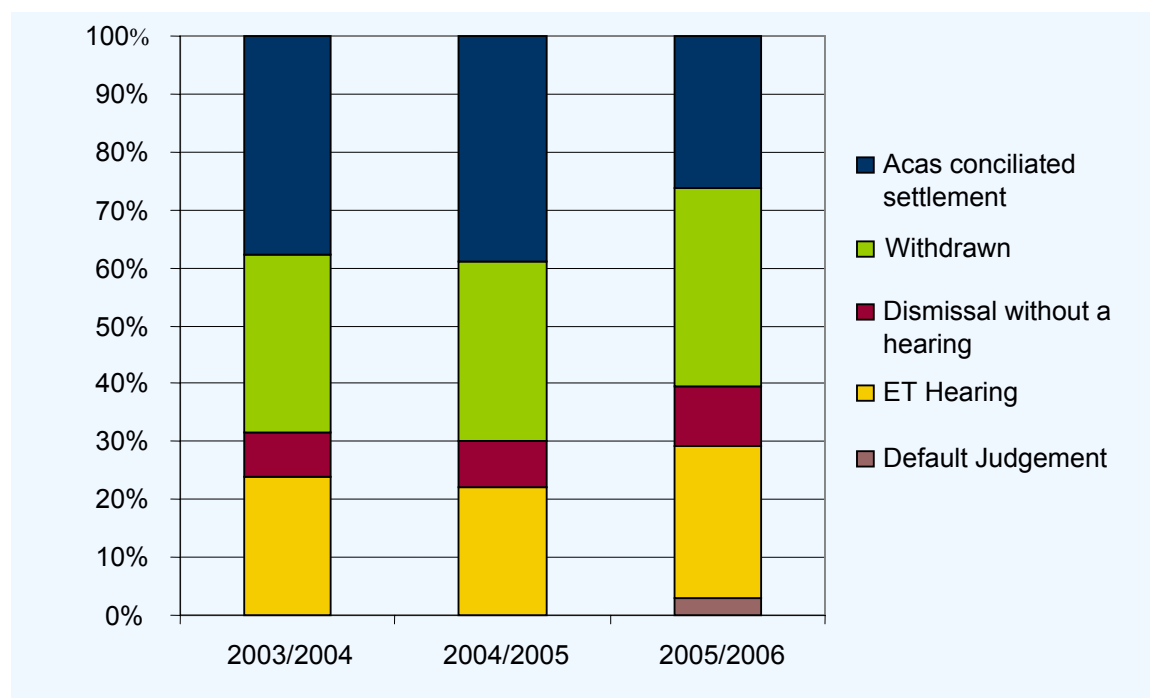
3.5 The Acas conciliation service is free, voluntary, impartial and confidential. It is funded by DTI and free to users. Since October 2004, the statutory duty to conciliate has been restricted to limited time periods for most types of complaint; examples are:

- equal pay, discrimination and ‘whistleblowing’ – no time limit;
- redundancy, wages, breach of contract – during the first seven weeks after the date on which a claim is sent to the respondent; and
- unfair dismissal – during the first thirteen weeks after the date on which a claim is sent to the respondent.

3.6 The service is largely carried out over the telephone, but face-to-face conciliation can be used where deemed necessary. The Government sets performance targets for Acas which incentivise it to focus its conciliation work on those complaints likely to take longest to resolve at a tribunal hearing, such as discrimination cases.

3.7 Of the total 160,000 employment tribunal jurisdictions disposed of in 2005/06, 119,000 (74%) did not reach a tribunal hearing. Of these, 42,000 were settled by Acas and a further 55,000 were withdrawn, many through the influence of Acas³⁰. The proportion of claims settled or withdrawn was somewhat less than in the previous two years. Trends in employment tribunal claim outcomes over the last three years are shown in Figure 11 below, which shows a fall in Acas conciliated settlements from 39% in 2004/05 to 26% in 2005/06.

Figure 11 - Breakdown of outcomes of employment tribunal claims



Source: Employment Tribunal Service Annual Reports.

³⁰ Source: Employment Tribunals Service Annual Report 2005/06

3.8 In addition to its statutory conciliation service, Acas also provides arbitration and, at a cost to users, non-statutory mediation services. The arbitration service is available as an alternative to an employment tribunal hearing for alleged unfair dismissal and flexible working request claims. Both parties have to agree to use the process and, unlike a conciliator, the arbitrator is empowered by the parties to make a binding decision on the merits of the case, and the remedy. However, only 55 cases have been arbitrated by Acas since 2001, and only 6 in 2005/06. The Acas mediation service is voluntary, and is currently charged at £550 per day. It tends to be used for disputes which are not potential employment tribunal claims, such as bullying cases. Acas mediated only 85 cases in 2005/06, of which 93% were resolved. In 2003/04 Acas ran a pilot mediation scheme aimed at organisations with fewer than fifty employees. This had a low take-up (24 cases over a period of a year, in the two pilot regions) but reported positive outcomes.

3.9 There are other initiatives in dispute resolution. A mediation pilot is currently underway involving nine employment tribunal chairs. The civil justice system has developed several schemes to support the use of mediation, including a National Mediation Helpline which provides civil court users in England and Wales with advice and information³¹.

3.10 In addition to Acas, a wide range of private sector providers offer paid-for mediation services and other routes to settle employment disputes. These providers are often used to reach private settlements, particularly in cases involving senior-level employees such as company directors. Such settlements can be given effect by a legally binding compromise agreement.

Problems with the current system

Views expressed to the Review

“Early mediation/conciliation in the workplace is the way to resolve disputes before irretrievable breakdown in relations occurs. This is key where people wish to continue working within the same organisation”
Intermediary

“Solve things quickly; get Acas in before the letters start flying”
Small business

“Access to good advice saves money”
Intermediary

³¹ <http://www.hmcourts-service.gov.uk/cms/7770.htm>

3.11 The current system in Great Britain is reasonably successful at resolving those employment disputes that turn into tribunal claims before they reach a hearing. As shown in Chapter 1, only 26% of employment tribunal cases reach a hearing. International comparisons are not straightforward because of the significant differences between national systems; most European countries do not publish figures. In the New Zealand system, discussed later in this Chapter, around 15% of cases reach a hearing, with the remainder being settled or withdrawn.

3.12 Despite the generally good position in the UK, the users and providers of the tribunal system and Acas services suggest that there is scope for a substantial improvement:

- a significant proportion of those cases that do reach a tribunal hearing are capable of being resolved beforehand, by settlement between the parties. The Review has heard that in most instances, a negotiated settlement would provide a better outcome for both parties, in terms of time, money and stress, than a tribunal hearing; and
- where cases are settled, the settlement is often reached late in the process. It is clear that many claims are settled ‘at the tribunal door’, just before a hearing, no doubt because the imminence of the hearing concentrates the parties’ minds on the realities of the situation. Settling so late in the process is usually a better outcome than a hearing, but the parties have already suffered a significant burden in terms of time, costs and stress, which would have been reduced or avoided if settlement had been reached earlier.

3.13 The Review has heard from a wide range of parties, who have highlighted a number of factors inhibiting earlier resolution, as set out below.

Poor understanding of the realities of employment tribunals

3.14 The Review has heard that many people who have experienced the employment tribunal system would, with hindsight, have handled the dispute differently. In particular, both claimants and respondents report that at the outset of the dispute, they did not properly appreciate the implications of bringing or defending a claim at an employment tribunal, in terms of the time the process takes, the costs (both in personal or management time, and the costs of using representatives), and the stress and emotional upheaval involved.

Employment tribunals are not always appropriate

3.15 In some cases (e.g. those relating to simple monetary issues such as deductions from wages or breach of contract), the legal points at issue are relatively straightforward. Such cases could be resolved more quickly by an expert determination, ensuring both parties understand their rights and obligations, and reducing time and cost for all involved.

3.16 In more complex claims, such as those involving discrimination, a finding on legal rights alone may not be sufficient to resolve the matters. For instance, a claimant may put a higher value on an apology by the employer, or a change of policy to reduce the risk of further problems, than on a judicial

finding and a financial award. There is some compelling evidence that claimants in certain discrimination cases find the experience of bringing an employment tribunal claim difficult, unpleasant and ultimately not a good solution to the original problem, even in cases where the claim is successful.³²

Dispute resolution services are not fully used

3.17 Acas has a statutory duty to offer conciliation in most employment tribunal claims ('post-claim') and, where one of the parties requests it, in potential claims ('pre-claim'). Potential claims are harder for Acas to identify and tackle in most cases. Therefore, in order to manage legal risk and target its resources effectively, Acas interprets the statutory criteria strictly in considering whether to offer pre-claim conciliation.

3.18 Acas post-claim conciliation activity is triggered by the claim form. The Acas conciliator contacts the parties or their representatives and invites them to conciliate the claim.

3.19 If either party fails to take up the offer of help then there is no further contact with Acas, and the case will either proceed to a hearing, or be settled privately and/or withdrawn. Parties can fail to engage with Acas for a variety of reasons; sometimes simply because the conciliator cannot contact them (e.g. because a telephone call is missed), or because a party does not understand what Acas' role is, or how its services might provide a better outcome than going to a tribunal hearing.

Acas conciliation not only starts too late, but ends too soon

3.20 The statutory position, and the way in which Acas interprets it in the pre-claim period (see above) means that opportunities for it to act at the earliest possible stage in disputes are limited. The 2004 reforms introduced new time limits on the period in which Acas conciliation is available to the parties in most cases. The purpose of the time limits was to focus the parties' minds on conciliating their dispute relatively early on in the tribunal process, rather than waiting until the eve of a hearing. This was a sensible aim, but the Review heard considerable evidence that the time limits are not having this effect; parties still fail to consider settling until later in the process, and then if the time limit has expired the services of Acas are not available to help in resolving the dispute.

3.21 The Review has explored what might be done to address these problems, to increase the number of employment tribunal claims that are resolved before reaching a hearing, and to encourage resolution as early as possible in the process. It has concluded that there is considerable scope to improve the current position, at both ends of the process.

³² DTI Employment Relations Research Service publication 55, "The experience of claimants in race discrimination Employment Tribunal cases", 2006

Proposals for change

A new approach to resolving simple monetary disputes

3.22 There are several types of employment tribunal claims, i.e. those involving determinations of fact in monetary disputes, such as unlawful deductions of wages, holiday pay, breach of contract and redundancy pay, which could in most cases be settled quickly without the need for a tribunal hearing. What is required is a quick, expert view on the legal position, and on the appropriate next steps (e.g. payment of an amount due to the claimant, or the withdrawal of the claim), coupled if necessary with some kind of enforcement order. It would be necessary to ensure access to a full employment tribunal hearing if it were necessary, for example to deal with those claims which do raise unusually complex legal or factual issues.

3.23 A new process of this sort would offer significant benefits. It would make it easier for employees to obtain monies legally due to them, and would be particularly helpful for vulnerable workers, especially those without access to advice or support, who currently find it difficult to enforce their rights. It would enable employers to defend unfounded claims quickly and inexpensively. It would allow the state to resolve these cases more quickly and at lower cost than at present, and to concentrate the resources of the employment tribunal system on more complex cases. The Review understands that at least 10% of all employment tribunal claims are simple claims which could be handled without a hearing, so the saving to the taxpayer would be significant.

3.24 There are probably two main options for providing this kind of service:

- expand the current arrangements within employment tribunals for dealing with simple wages cases by a tribunal chair sitting alone. A wider range of cases might be handled e.g. by a legally qualified adjudicator acting under the supervision of a chair. This option would have the advantage that if on examination there were more complex issues and a tribunal hearing were required it would be straightforward to manage; or
- establish a new service outside the employment tribunals. Complaints to a helpline might be referred to a 'compliance officer' who would advise the parties of the legal position and issue enforcement orders where appropriate following a desk-based investigation. Such a service would not require new powers of inspection.

Recommendation 5: The Government should introduce a new, simple process to settle monetary disputes on issues such as wages, redundancy and holiday pay, without the need for tribunal hearings.

Improved advice

3.25 As noted above, many users of the system have a low awareness of the employment tribunal system and of the other options open to them. Moreover, the current process requires a tribunal claim to be made fairly early after the event that triggers the dispute. The tribunal machinery tends to dominate the parties' minds, so it is understandable if the parties find

themselves engaged in preparing for a tribunal rather than actively considering other means of dispute resolution, e.g. requesting the involvement of a third party mediator.

3.26 The Review believes that the state has twin obligations in this context. One is to provide a prompt and efficient judicial determination to those who seek it. This is generally achieved, although this report argues elsewhere that there is scope for improvement.

3.27 The other obligation is to ensure that all those entering the judicial process have a reasonable understanding of what they are doing, and of whether other processes might serve them better. This is not the case at present. For example, it is possible for a potential claimant to download an employment tribunal application form from the internet, complete and submit it, without being offered any advice about the implications of doing so, or about other courses of action. Where a potential claimant does seek advice, as the large majority do³³ - for instance from Citizens Advice, a high street solicitor or a helpline - he or she is likely to be advised to use the statutory grievance process, which leads inevitably to consideration of a tribunal claim. Similarly, an employer who is concerned about an emerging dispute with an employee is likely to be advised of the likelihood of a tribunal claim, and of the steps that should be taken to protect the employer's position in the event of a claim.

3.28 The Review believes that whenever this happens a significant opportunity to help the parties to understand their situation, and how to resolve it, is being missed. This is not the fault of advisers; they are simply responding to the way the system currently works. In such cases, the current statutory dispute resolution procedures have added to the problem, by leading employers and employees to think about disputes in terms of a tribunal claim almost from the outset.

3.29 The Review has considered two complementary solutions to this problem:

- to refocus Government advice on disputes, so that those who are in a situation that may give rise to a dispute are given clear, impartial, consistent and well-rounded information about what going to an employment tribunal involves, and what the other options for resolution are. This advice should be provided in an accessible, efficient way, and in a variety of forms (e.g. via the telephone and internet) to meet the needs of a diverse audience; and
- to redesign the entry point to the employment tribunal process, in such a way that anyone who is considering bringing a claim, or who is finding out how to respond to one, receives this advice. The simplest way of ensuring that the parties engage with the helpline would be to make it the sole source of tribunal claim and response forms, and to structure the service so that the parties always receive relevant advice when initiating a claim.

³³ SETA 2003 found that 88% of claimants received 'professional advice' before submitting a claim form.

3.30 A challenge here is to ensure that where a representative is obtaining a form on behalf of a client, the client still receives the relevant briefing. If the Government accepts this recommendation, it will need to consider the position in consultation with representatives.

Recommendation 6: The Government should increase the quality of advice to potential claimants and respondents, through an adequately resourced helpline and the internet, including as to the realities of tribunal claims and the potential benefits of alternative dispute resolution to achieve more satisfactory and speedier outcomes.

Recommendation 7: The Government should redesign the employment tribunal application process, so that potential claimants access it through the helpline and receive advice on alternatives when doing so.

Providing the right dispute resolution services at the right time

3.31 The Government currently provides dispute resolution services to the parties in employment tribunal claims through Acas conciliation, and although the system achieves a good settlement rate, it has limitations, for example in respect of time and resources. There are considerable advantages, both for users and the state, in reshaping the service so that more disputes are settled pre-hearing, and as early as possible in the dispute lifecycle. These advantages will become even more significant if – as is possible – the repeal of the statutory dispute resolution procedures, which were aimed at promoting early settlement through internal processes, leads to an increase in the number of workplace disputes that become employment tribunal claims.

3.32 Fundamentally, what is needed is a *culture change*, so that the parties to employment disputes think in terms of finding ways to achieve an early outcome that works for them, rather than in terms of fighting their case at a tribunal. Chapter 2 discusses the role of ADR techniques, including conciliation and mediation, in resolving employment disputes.

3.33 Mediation has the potential to be particularly effective in the context of employment disputes. It brings the disputing parties together to discuss their problems in an open way, and they can agree that discussions are confidential – such that they cannot be taken into account in any subsequent litigation. The process can enable the parties to keep control of the dispute, negotiating and resolving it themselves with the assistance of an independent third party. It is a pragmatic, flexible and informal way of providing both parties with positive outcomes. A detailed description is given in figure 12.

Figure 12 – Mediation

Mediation is a well established process for resolving disagreements in which an impartial third party helps people to find a mutually acceptable resolution. It has the following elements:

- collaborative problem solving – trying to find a resolution acceptable to all. The parties themselves are fully involved in seeking an outcome they can accept;
- it can allow people to rebuild relationships, unlike a formal legal process which, being essentially adversarial, tends to preserve hostility;
- it is usually far quicker than going to court – even very complex cases are typically mediated in two days or less;
- it is usually less costly than employing lawyers to represent the parties in legal proceedings;
- the range of solutions can be as flexible as the parties wish to make them;
- strict confidentiality is preserved, both between the parties as necessary, and completely to the outside world, including the courts.

3.34 All those with an interest in employment disputes agree that in many cases, the intervention of a third party – via Acas conciliation, mediation or another technique – offers the best way of achieving early resolution. Such interventions also hold out the prospect of providing the parties with a wider, more flexible range of outcomes than a tribunal verdict can deliver – e.g. an apology, job reference, new behaviour and/or financial settlement. Thinking through how best to facilitate these interventions has been a challenging aspect of this Review.

A near-mandatory approach?

3.35 One option which the Review has considered in some depth is a radical reorganisation of the system, to ensure that in the case of nearly all employment tribunal claims, the parties are prompted to use ADR before the claim can proceed to a hearing.

3.36 In such a system, the parties would be strongly directed to use the services of an ADR provider – which would probably have to be state funded – and the employment tribunals would be empowered and encouraged to refer claims back to ADR if they felt it appropriate to do so. A similar approach, involving the provision of free mediation services by the state, was adopted by New Zealand in 2000, and has resulted in a fall of approximately 50% in the number of claims heard at the country's equivalent of the employment tribunal system, albeit at the cost of a sharp increase in the overall number of employment disputes handled by the state in the form of mediation. It is difficult to draw direct comparisons between the UK and New Zealand systems because there was no equivalent to Acas conciliation in the pre-2000 New Zealand system, and because the UK's legislative background of EU and Human Rights law is quite different.

3.37 This ‘near-mandatory’ approach to the use of ADR is the most powerful way to ensure that potential claims that could benefit from mediation are required to attempt it before proceeding to a tribunal. It therefore offers the greatest possible chance of promoting the early resolution of employment disputes, and thus of reducing the burden on the tribunal system. A near mandatory approach would act as a strong driver for culture change, and it suggests itself because the awareness of mediation in the UK is low, voluntary take-up may therefore be low, and because there is a need for culture change.

3.38 Such an approach would need to be carefully designed to fit the circumstances of the UK – for instance, it would be important to involve the growing private market in ADR provision in the UK, which is much more advanced than in New Zealand. This challenge should be resolvable.

3.39 However, the Review has concluded that it would not be appropriate to recommend the introduction of a mandatory or near-mandatory approach to ADR in the UK at this time. While externally-provided ADR could be expected to help resolve a large number of disputes, it is unlikely to be suitable in all cases. For instance, many large employers have extensive internal dispute resolution procedures, often involving internal or bought-in mediation expertise, and if these do not resolve matters, the problem is unlikely to benefit from being required to sit through an additional, state-funded mediation process before going to tribunal. In other cases, one of the parties may have good cause to insist on their “day in court”, rather than reaching a mediated settlement behind closed doors.

3.40 The Review initially argued that if some cases have to undergo an unwelcome state-driven mediation process, that is an acceptable price to pay for a higher overall rate of early settlement. However, the Review has been advised that the drawbacks of a near-mandatory system are a significant concern for many of the key stakeholders in the UK, including employer and employee representatives. In particular, if the use of ADR is required in the vast majority of cases, regardless of their circumstances, then ADR runs a risk of becoming seen as just another procedural ‘step’ in the dispute resolution system. In that case, a near-mandatory approach could produce unintended consequences, as the statutory dispute resolution procedures have done.

3.41 There is therefore a strong view that near-mandatory mediation may not achieve the meaningful engagement of parties that is required, although the evidence for this in near-mandatory regimes is not conclusive. A near-mandatory system also, of course, poses a financial risk to the state in that its funding would have to be demand-led, and demand could grow substantially (as it has in New Zealand) if a free service is provided on demand. The Review is very reluctant to propose prescription or compulsion in an arena where it has failed so recently, and in the context of reducing burdens on businesses and employees.

A voluntary approach?

3.42 The Review has therefore concluded that the Government should adopt a voluntary approach to encourage and enable more use of ADR techniques in order to settle disputes early. There are two themes to be developed:

- one involves driving up the awareness of and *demand* for ADR services, by promoting their benefits and encouraging culture change over time. The Review's recommendations on the use of a helpline as an entry point to the employment tribunal system (Recommendation 7), and on engaging the social partners in promoting early dispute resolution (Recommendation 4), would help to achieve this. The US experience of a voluntary system based around 'Universal Agreements to Mediate' is an interesting precedent; and
- the other is to ensure an adequate and timely *supply* of ADR services, in order to meet increased demand. There are many ways in which this could be achieved, but the simplest would be to place a new expanded emphasis on Acas' existing statutory duty to provide conciliation prior to a tribunal application where requested. It is likely that additional money would need to be made available for this, though it would be offset by reductions in state funding elsewhere if the Review's recommendations were adopted.

3.43 Ideally, there would be sufficient capacity to offer early conciliation / mediation to any potential claim seeking it, as in a near-mandatory system. If this cannot be achieved, it would be sensible to devise a method of targeting those disputes that are most likely to benefit. The method would need to be flexible in order to adapt to changing circumstances, but candidates for targeting could include:

- discrimination disputes, which tend to be complex and can be particularly well-suited to a mediation-type approach;
- disputes where the employee is still in a working relationship with the employer, and a mediated settlement could allow the employment to continue; and
- disputes involving small and medium-sized employers, which may have fewer in-house resources for dispute resolution.

3.44 The Government should pilot this new approach in order to test out the most appropriate resourcing and targeting arrangements.

Recommendation 8: The Government should offer a free early dispute resolution service, including where appropriate mediation, before a tribunal claim is lodged for those disputes likely to benefit from it. The Government should pilot this approach.

Improving the uptake of dispute resolution services

3.45 The recommendation that an early dispute resolution service should be offered on a voluntary, rather than near-mandatory, basis poses the challenge of how to bring about the culture change necessary for it to be used widely. Advice and promotional work and the provision of sufficient capacity to meet demand, as recommended above, may not be sufficient, and will almost certainly not bring about rapid change. The Review has therefore considered what additional steps the Government could take to encourage greater use of early dispute resolution techniques.

3.46 The civil courts can ask the parties to cases whether they have explored ADR as a potential means of resolving their differences. They have powers to penalise an unreasonable failure to do so by adjusting awards of costs at the end of the case. There is not a direct parallel with the employment tribunal system here because employment tribunals, unlike the civil courts, do not award costs to the winner of a case other than in exceptional circumstances of unreasonable behaviour and because there is no legal aid available in employment tribunals in England and Wales.

3.47 However, there would be benefits in building suitable incentives into the employment tribunal system, so that the parties will be aware from the outset that their willingness to undertake mediation, or by contrast an unreasonable failure to use ADR or otherwise seek an early resolution of the dispute, may be reflected in the financial outcome of any tribunal hearing. This is not straightforward because a badly designed incentive could lead to perverse behaviour or 'gold-plating' by users of the system. For instance, employers may be uncertain as to what the tribunals may regard as 'unreasonable', and consequently seek to protect themselves by engaging in ADR without any commitment to resolution.

3.48 The Government will therefore need to consider carefully what the appropriate incentives could be. A general power for tribunals to use their discretion, to take into account the parties' efforts to settle their dispute, may be appropriate if it can be designed so as to:

- set clear parameters;
- be used consistently, rather than creating new grounds to appeal tribunal judgments; and
- avoid perverse behaviour.

There are obvious connections between this issue and the Review's recommendation on giving tribunals discretion to reflect the parties' behaviour and reasonableness of procedure in the workplace when setting awards and making cost orders (Recommendation 3).

Recommendation 9: The Government should offer incentives to use early resolution techniques by giving employment tribunals discretion, to take into account the parties' efforts to settle the dispute, when making awards and cost orders.

Ensuring that Acas can conciliate whenever appropriate

3.49 The Review heard overwhelming and compelling evidence that the statutory time limits on Acas' conciliation duty should be removed. This would especially address the concern frequently emphasised by users of the system that at present, Acas is often unable to conciliate late on in the tribunal process even where both parties are asking it to do so.

3.50 It follows that Acas should be given the authority and resources to conciliate at any stage in the dispute resolution and post-claim process. Settling at the door of the tribunal is not as good an outcome as settling early, because the parties and the state will have used considerable time and money in getting to the door, but it is still likely to provide a better and cheaper outcome than proceeding to a tribunal hearing.

Recommendation 10: The Government should abolish the fixed periods within which Acas must conciliate.

Streamlining employment tribunals

4.1 This chapter considers how employment tribunals currently operate, highlights the problems with the current system and recommends changes.

4.2 The Review has worked closely with the Discrimination Law Review in the new department of Communities and Local Government (CLG). This identified issues relating to the way in which discrimination claims are dealt with in employment tribunals, which we have agreed would be considered within the context of this Review.

The current system

4.3 Employment tribunals are independent judicial bodies established to resolve disputes between employers and employees over employment rights. These include matters such as unfair dismissal, redundancy payments, discrimination and a range of claims relating to wages and other payments. The Tribunals Service is an agency of the DCA. It provides administrative support to employment and all other tribunals.

4.4 Employment tribunals must comply with rules of procedure. Tribunal proceedings are conducted under the direction of tribunal chairs who have powers to determine, usually acting with two lay members, over 70 different types of claim. The jurisdictional powers are contained in primary legislation creating the various rights, and the procedural powers are in the revised Employment Tribunal Regulations³⁴ in use since 2004. Details of the number and type of claims dealt with by employment tribunals are set out in Chapter 1.

4.5 Claims, submitted on the ‘prescribed’ form known as an ET1, must be submitted within strict time limits, which vary according to the jurisdiction of the claim. A claim will be rejected if required information is missing or if it is outside of the time limits. Where an employee has a grievance against their employer, a tribunal claim will not be accepted unless a grievance has been

³⁴ The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004

raised at least 28 days before presentation of the claim. If that has been done, the time limits for making a claim can, in most instances, be extended by up to three months from the normal expiry date.

4.6 Once accepted, a copy of the form is sent to the respondent who then has 28 days to respond. If there is no response, a default judgment may be issued, without the need for a hearing. In most cases, copies of the claim and response forms are sent to Acas, which has a statutory duty to offer to help the claimant and respondent reach an agreement. In most cases a fixed conciliation period is allowed, the length of which depends on the nature of the complaint. If agreement is not reached and the claim is not withdrawn before the end of the period the claim will proceed to a hearing.

4.7 A hearing will be scheduled as soon as possible after receipt of the response. Parties will be notified of the date at least 14 days before the hearing. In some cases there are issues that need to be discussed before a hearing and a case management discussion will be arranged with a chair sitting alone. In most cases such discussions can be conducted over the telephone or in person.

4.8 From the time a claim is submitted to a judgment being issued, the Tribunals Service estimates that the process can take approximately 30 weeks to complete. Some complicated cases can take longer.

Problems with the current system

Views expressed to the Review

“Tribunals are intended to be relatively simple, but the complexity of the law means they are unavoidably difficult”

Intermediary

“We always settle, it’s cheaper”

Small business

“There is a lack of consistency on costs”

Intermediary

4.9 This Review has been concerned with simplifying processes and reducing burdens associated with the resolution of employment disputes. To that end, it has addressed the chain of processes from the workplace to the tribunals. However, it should be noted that the dispute resolution process cannot be “simple” where the underlying legislation, on which a dispute rests, is complex, burdensome or not clearly drafted.

4.10 The majority of disputes are resolved before they reach a tribunal hearing. However, for those that do enter the tribunal system, the procedures can often be complex and time-consuming before the parties reach a hearing. This is in the main due to the introduction of the dispute resolution

procedures. The overwhelming view is that the implementation of the dispute resolution procedures has added layers of complexity to the whole process of tribunal application, pre-acceptance and hearing (and judgment). As a consequence, the system has become complex and confusing for users and detracts from the ability of administrators and the judiciary to run an efficient system of justice for resolving disputes.

4.11 In addition to the statutory procedures, the Review has found a number of other issues that cause problems for users of tribunals, the administration and the judiciary. It is, therefore, timely to reflect on the design of the system within which the enforcement of employment rights currently operates, and to seek to provide a modern, effective and cost efficient tribunal system which will complement the other recommendations made in this report.

Simplifying the application process to a tribunal

4.12 Before the introduction of the Regulations, employment tribunal claim and response forms were two page documents. The Regulations required additional questions to be answered before a claim could be accepted. The claim form is now eight pages long.

4.13 Claimants find the form difficult to complete (for example, claimants do not always know whether they are or were employees). The form is more complex to process adding to cost and delays in administrative procedures. The Review heard that the design of the form invites 'box-ticking'; in particular claimants sometimes tick off more jurisdictions than originally intended and are relevant to the circumstances of their claim. This adds to the case management workload as tribunals must establish the jurisdictions under which the claim is to be considered.

4.14 By contrast there is a strong view that the supply of additional information on the form in relation to the amount a claimant is owed in deduction of wages and similar claims would enable the parties to come to a settlement or a tribunal to reach a decision earlier.

Claim time limits and grounds for extension add confusion

4.15 The time limits within which claims must be made are set out in the legislation governing different legal jurisdictions. Where appropriate the time limit can be extended by the tribunal. In most cases the time limit is three months from the date of event that caused the claim with some notable exceptions, such as equal pay, redundancy claims and discrimination.

4.16 Many claims are made in relation to more than one jurisdiction. In such cases claimants and the tribunal administration need to determine which jurisdictions and time limits apply to the claim. A tribunal chair has the power to extend time limits, according to criteria which are set out in the relevant legislation for each jurisdiction. Where a claim covers a number of jurisdictions the chair applies these different criteria and may, as a result, be able to allow the claim in respect of some jurisdictions but not others.

4.17 The Review has been told that the introduction of the Regulations has further complicated the position. The introduction of the statutory 28-day period between lodging a grievance and bringing a tribunal claim has been reflected in provisions for certain claim time limits to be extended. These provisions can in turn create additional confusion about whether the differing time limits applying to different jurisdictions in a claim should be extended.

Multiple-claimant cases create pressure on administrative resources and judicial time

4.18 Employment tribunals have seen an increasing number of multiple-claimant claims (i.e. a number of employees making a complaint against the same employer about the same or a similar issue). Last year over 60% of tribunal claims were multiples. The Review understands that many of these are in relation to claims for equal pay / equal value. In most cases, the Regulations require an employer to deal with all grievances separately which is a tremendous administrative burden in the context of multiple claims. Currently employment tribunals have to rely on the co-operation of the parties in identifying test cases and being prepared to submit them as a bundle of claims and to accept the outcome of the decision. However, claims still have to be treated separately in relation to settlement or withdrawal, which creates uncertainty on enforcement and closure. Tribunal chairs have limited powers to manage cases that are similar.

4.19 The Review discussed this issue at length with many interested parties including the Discrimination Law Review. The dramatic rise in multiple-claimant claims appears to many to be an acute problem but there is uncertainty concerning the future level of multiple-claimant claims, e.g. in the private sector.

Claims of inconsistency in case management and judgments

4.20 The perceived problem of inconsistency in relation to case management and decisions has been raised by a number of those consulted who have significant experience of observing tribunal outcomes. It is difficult to identify specific examples but the high level of concern suggests more could be done to promote consistency.

4.21 The Review recognises the importance of judicial independence but takes the view that good, consistent directions are a key factor in the success of the system. The Review has heard that the perceived inconsistency and varying case management may be the consequence of inconsistent individual chair performance. It is not within the scope of this Review to make recommendations on the terms and conditions of judicial appointments and reappointments. However, it is worth noting that the behaviour and judgments of different tribunal chairs appear to many to give employment tribunals a reputation for inconsistency and that reduces the confidence of users in the system.

The use of lay members

4.22 There are currently 2,300 lay members, forming two panels representing the workplace experience of employers and employees. They are effectively appointed until the age of 70 and are paid £163 per day. Lay members always sit on full hearings apart from in a few cases where the chair may sit alone, these deal with, for example:

- breach of contract;
- matters relating to written statement of employment particulars and itemised pay statement;
- entitlement to a redundancy payment; and
- unauthorised deduction of wages.

4.23 Lay members never sit on case management discussions and rarely sit on pre-hearing reviews (only where a party requests it, the chair agrees and issues an order, and in equal pay / equal value cases).

4.24 The requirement to have a panel made up of a chair and lay members can present scheduling problems for the Tribunal Service e.g. where cases need to be heard over a number of days or have to be rescheduled due to unavailability of the lay members.

4.25 The Review has heard that many of those who are lay members are retired or have been out of the workplace for a number of years. This can mean that in such cases their experience may not always reflect current workplace practice. On the other hand, lay members who are currently working in industry, e.g. as intermediaries or representing employees, have inevitable problems with availability (lay members are often required to be available for a considerable number of days).

Dealing effectively with weak and vexatious cases

4.26 The Review has heard concerns that too many weak or vexatious cases are still entering the system and proceeding to hearing. Employment tribunals have powers to discourage and if necessary strike out weak claims. At a pre-hearing review, if a chair considers that the contentions put forward by any party in relation to the matter to be determined have little reasonable prospect of success he/she can require either party to pay a deposit. The tribunal also has the power to award costs against either party. There is a generally held external view that chairs are reluctant to use the powers available to them and they are not applied consistently.

Proposals for change

Simplify employment law

4.27 It has been emphasised to the Review that government action to simplify employment law for users, such as is taking place within the DTI and in relation to discrimination law is to be strongly supported. It is recognised that some problems arise from underlying European Directives.

Recommendation 11: The Government should simplify employment law, recognising that its complexity creates uncertainty and costs for employers and employees.

Simplify the claim and response forms

4.28 The recommendation that the dispute resolution procedures should be repealed would help to simplify employment tribunal claim and response forms.

4.29 In addition further information in relation to the financial loss of the applicant could be requested on the form. This may not be feasible in all cases. However, in suitable cases, an estimate or statement of loss from the applicant would enable the respondent to have early indication of the value of the claim and this would possibly facilitate an agreement between the parties. It would also assist chairs or legal officers if a new, simple process is introduced for simple claims as outlined in Recommendation 5 and in any case would assist employment tribunal hearings.

Recommendation 12: The Government should simplify employment tribunal claim and response forms, removing requirements for unnecessary and legalistic detail, eliminating the ‘tick-box’ approach to specifying claims and encouraging claimants to give a succinct statement or estimate of loss.

Make time limits easier for all to understand and apply

4.30 Repealing the dispute resolution regulations would solve some of the problems on time limits. However, complexity would remain, particularly where a claim has more than one jurisdiction. In those cases where there are different time limits and grounds for extension, complexity, confusion and administrative burden would persist.

Recommendation 13: The Government should unify the time limits on employment tribunal claims, and the grounds for extension of those limits; this should simplify claim pre-acceptance procedures.

Improve the management of multiple-claimant cases

4.31 The civil courts have procedural rules that allow them to manage similar cases as group litigation. While employment tribunals have some general powers (such as the ability to make an order that different claims be considered together) these are limited.

4.32 It has been suggested to the Review that there is scope to extend the powers available to employment tribunals in order to manage groups of similar cases better, through a provision to allow the identification of a ‘test’ case, i.e. a decision on one case which could be binding on all cases in the group. This would save costs and improve consistency of judgments in similar cases. It would also reduce the burden on employers and employees.

4.33 An alternative to identifying a ‘test’ case would be the approach followed by some other legal systems, where a body such as an equality commission or trade union may be empowered to bring a claim on behalf of a group of individuals. These are known as representative actions. An individual would still have the right to pursue their claims separately if they so wished or if they did not want to be represented by the appointed body.

4.34 The Review has heard views from those who feel representative actions would be a useful route for people to bring cases to an employment tribunal especially when they are unwilling or unable to bring claims themselves. There would also be savings on time and cost to the Tribunals Service. However, the Review has heard strong views that representative actions can encourage speculative and spurious claims.

4.35 Clearly multiple-claimant claims are placing a burden on users of the service, administrators and on the judiciary. The volume of multiple claims is likely to remain high at least in the short term.

Recommendation 14: The Government should give employment tribunals enhanced powers to simplify the management of ‘multiple-claimant’ cases where many claimants are pursuing the same dispute with the same employer.

Use early case management to resolve cases quickly and efficiently

4.36 The Review recommends that the Government introduces a new, simple process to settle monetary disputes on issues such as wages, and holiday pay, without the need for tribunal hearings (Recommendation 5). One option is to introduce a legally qualified adjudicator acting under the supervision of a chair to provide active, early case management for simple claims to move through the system faster, reach a determination more quickly and free judicial resources to focus on more complex cases.

4.37 The Review has heard that the lack of consistency across the employment tribunals is a concern. It is accepted that demographic and other factors can affect this and clearly the circumstances of cases are different. However, there is action that can be taken to try to ensure consistency in tribunals. It has been suggested that greater consistency could be achieved by wider and more effective use of practice directions issued by the tribunal Presidents.

Recommendation 15: The Government should encourage employment tribunals to engage in active, early case management and consistency of practice in order to maximise efficiency and direction throughout the system, and to increase user confidence in it.

Using lay members effectively in the tribunal system

4.38 The jurisdictions that employment tribunal chairs are required to give judgements on have become increasingly complex and now require understanding of much more legislation than when the system was set up. In some cases the Review has heard that the added value of lay members has reduced to the point where it may be preferable for chairs to judge some cases alone which would enable those lay members with relevant, necessary expertise to be deployed where their knowledge is most useful.

Recommendation 16: The Government should review the circumstances in which it is appropriate for employment tribunal chairs to sit alone, in order to ensure that lay members are used in a way that adds most value.

Dealing effectively with weak and vexatious cases

4.39 Weak and vexatious cases make up only a small minority of tribunal claims. However, if they are not dealt with effectively they can be very time-consuming for parties and can undermine the credibility of the whole system, reducing confidence in its fairness and effectiveness. The Review recommends that existing mechanisms, such as striking out weak claims or making costs orders and requiring deposits, should be used effectively and consistently, wherever appropriate.

4.40 Further consideration should be given to how consistency in this context can be encouraged, for example through the wider use of practice directions. In addition, the Government should review existing powers to see whether they are adequate and whether extending them would be effective in deterring those cases that have no prospect of success and parties whose intent or action is to waste time and drain valuable tribunal resources.

Recommendation 17: The Government should consider whether the employment tribunals have appropriate powers to deal with weak and vexatious claims and whether the tribunals use them consistently.

Better regulation, benefits and costs

Better Regulation

5.1 The five principles of better regulation championed by the Better Regulation Commission are:

- proportionality;
- accountability;
- consistency;
- targeting; and
- transparency.

A description of the key interpretations of these principles is available from the Commission's website³⁵.

5.2 These principles have underpinned the work of the Review and are clearly evident in the recommendations. In particular, the Review regards the recommended repeal of the statutory dispute resolution procedures as a proportionate response to the widespread consensus that they are, on balance, unhelpful. The principle of consistency features strongly in the recommendations concerning improving the consistency of case management and decision making in employment tribunals.

5.3 In 2005, the Better Regulation Task Force, the predecessor body of the Better Regulation Commission, recommended that the Government measure, using the standard cost model, the administrative burdens that are a consequence of its regulations, and set challenging targets to reduce them. These recommendations were accepted, and as a consequence government departments brought forward simplification plans in 2006 to achieve these reductions. The DTI highlighted employment law simplification measures as a major part of its plan.

³⁵ <http://www.brc.gov.uk/publications/principlesentry.asp>

5.4 In 2006, the Better Regulation Commission used four tests to challenge each of these government department simplification plans:

- Is it ambitious?
- Is it credible?
- Is it quantified?
- Will it be delivered?

5.5 The Review believes that its recommendations pass three of these tests: the work of the Review has involved a very large number of expert stakeholders (listed in Annex B), who have given the team confidence that these recommendations are indeed ambitious, credible and deliverable. The challenge concerning quantification is properly addressed in a regulatory impact assessment which would be prepared as part of a government policy-making process. The key benefit and cost issues are therefore only generally referenced below.

Benefits and Costs

5.6 No significant change in regulation should be contemplated without a full impact assessment including high quality economic judgements and none should proceed without a clear balance in favour of the benefits.

5.7 It was not within the scope of the Review to prepare an impact assessment, but the Review is very confident that these recommendations, if implemented, would offer major savings to employers and employees. In particular, there would be major burden reductions, as referenced in Chapter 1, from the removal of the Regulations. In addition, costs to users would be significantly reduced by minimising the number of tribunal claims; simplifying the process of dispute resolution; making available better quality advice; and offering free mediation services.

5.8 The balance of costs and benefits to government is more complex. There are several recommended measures which should reduce costs to the state. There would be savings to the Tribunals Service from repeal of the Regulations through reduced pre-acceptance and hearing costs; removing the need for tribunal hearings for “simple” cases; directing disputes to alternative dispute resolution rather than tribunals; and any reduction in the use of lay members in tribunal hearings.

5.9 New costs to government, however, will arise from an upgraded helpline and associated awareness and promotional campaigning; the funding of free mediation services; and the set-up and pilot costs for these services.

5.10 The Review accepts that it is highly probable that a net increase in costs to the state will occur as a consequence of implementing these recommendations. However, the Review is fully convinced that the cost to the state should be greatly outweighed by the major reduction in costs / burdens to the users. Moreover, to the extent that the outcomes reflect better

employment relations and less time out of work for employees, there should be significant general economic benefits to the country.

Recommendations

The Government should:

Support employers and employees to resolve more disputes in the workplace

1. Repeal the statutory dispute resolution procedures set out in the Dispute Resolution Regulations.
2. Produce clear, simple, non-prescriptive guidelines on grievances, discipline and dismissal in the workplace, for employers and employees.
3. Ensure there are incentives to comply with the new guidelines, by maintaining and expanding employment tribunals' discretion to take into account reasonableness of behaviour and procedure when making awards and cost orders.
4. Challenge all employer and employee organisations to commit to implementing and promoting early dispute resolution, e.g. through greater use of in-house mediation, early neutral evaluation, and provisions in contracts of employment.

Actively assist employers and employees to resolve disputes that have not been resolved in the workplace

5. Introduce a new, simple process to settle monetary disputes on issues such as wages, redundancy and holiday pay, without the need for tribunal hearings.
6. Increase the quality of advice to potential claimants and respondents, through an adequately resourced helpline and the internet, including as to the realities of tribunal claims and the potential benefits of alternative dispute resolution to achieve more satisfactory and speedier outcomes.

7. Redesign the employment tribunal application process, so that potential claimants access it through the helpline and receive advice on alternatives when doing so.
8. Offer a free early dispute resolution service, including where appropriate mediation, before a tribunal claim is lodged for those disputes likely to benefit from it. The Government should pilot this approach.
9. Offer incentives to use early resolution techniques by giving employment tribunals discretion, to take into account the parties' efforts to settle the dispute, when making awards and cost orders.
10. Abolish the fixed periods within which Acas must conciliate.

Make the employment tribunal system simpler and cheaper for users and government

11. Simplify employment law, recognising that its complexity creates uncertainty and costs for employers and employees.
12. Simplify employment tribunal claim and response forms, removing requirements for unnecessary and legalistic detail, eliminating the 'tick-box' approach to specifying claims and encouraging claimants to give a succinct statement or estimate of loss.
13. Unify the time limits on employment tribunal claims, and the grounds for extension of those limits; this should simplify claim pre-acceptance procedures.
14. Give employment tribunals enhanced powers to simplify the management of so-called 'multiple-claimant' cases where many claimants are pursuing the same dispute with the same employer.
15. Encourage employment tribunals to engage in active, early case management and consistency of practice in order to maximise efficiency and direction throughout the system, and to increase user confidence in it.
16. Review the circumstances in which it is appropriate for employment tribunal chairs to sit alone, in order to ensure that lay members are used in a way that adds most value.
17. Consider whether the employment tribunals have appropriate powers to deal with weak and vexatious claims and whether the tribunals use them consistently.

Acknowledgments

Michael Gibbons and the Review team carried out various consultations with key stakeholders, through a series of meetings and focus groups.

They were extremely grateful for the invaluable contributions received from a wide range of organisations. Acas and the Tribunal Service offered their knowledge and expertise of employment dispute resolution generously. The Team also would like to thank in particular:

- Acas – Keith Mizon, Ron Woods
- TUC - Sarah Veale
- EEF - Peter Schofield
- CIPD - Mike Emmott
- Tribunals Service - Jeanne Spinks, Lynn Adams
- CBI - Susan Anderson
- Citizens Advice - Richard Dunstan
- Small Business Council (SBC) - Scott Johnson

The following organisations contributed to the Review, as did a number of intermediaries, trades union representatives and individuals with experience of the tribunals process:

- Acas
- Amicus
- British Airways
- British Chambers of Commerce
- British Retail Consortium
- Citizens Advice representatives
- Castleford Kennels
- Construction Confederation
- CBI
- CEDR
- Central London Law Centre
- Chambers of Dinnington
- CIA

- CIPD members
- CLG – Discrimination Law Review team
- CRE
- DRC
- DWP
- EAT
- EEF
- ELA members
- Employment Tribunal Regional Chairs
- E.ON UK
- EOC
- Fanfield
- Farrar’s Building
- Finmeccanica
- FPB
- Free Representation Unit
- FSB
- GlaxoSmithKline
- Globis People Solutions
- Hairwayz
- Hopespare
- HSBC
- IoD
- John Lewis Partnership
- Law Centre representatives
- Law Society
- Lewis Silkin
- Mayor Brown & Rowe
- MORI Survey individuals
- Nationwide Group Staff Union
- Network Rail
- New Zealand Department of Labour
- North Kensington Law Centre
- Pattison & Brewer
- Presidents of the Employment Tribunals, England and Wales, and Scotland
- Royal Mail
- Russell Jones & Walker
- SBC
- Siprinters
- TGWU
- Tribunals Service
- TUC

Glossary

Definitions

Applicant	See claimant
Arbitration	An impartial outsider who hears both sides in a dispute and reaches a decision which may or may not be legally binding
Claimant	A person or company who brings a complaint against another party
Compromise Agreement	An agreement between the parties to a dispute to settle it out of tribunal or court
Conciliation	An independent third party helps the people involved in a dispute to resolve their problem.
Conditional Fee Agreement	See 'no win no fee'
Early Neutral Evaluation	An independent third party – usually an expert in the field – considers the claims made by both sides and produces an opinion.
Mediation	An independent third party helps disputing parties settle their differences. The parties to the dispute decide how the dispute will be settled.
Multiple-claimant claim	A case involving multiple claimants claiming against the same employer about the same issue
Multiple jurisdiction claim	A case involving more than one legal issue (e.g. unfair dismissal and sex discrimination)
No win no fee	'No win no fee' representatives act for claimants on the basis of receiving a proportion of the award if the claim succeeds but no fee if it does not. This is also known as a conditional fee agreement.
Representative	An individual representing a person or company at an employment tribunal or Employment Appeal Tribunal hearing
Respondent	The person or company against whom a complaint has been lodged
Step 1 letter	The letter an employee writes to their employer in order to commence the statutory grievance procedure

Abbreviations

Acas	Advisory, Conciliation and Arbitration Service
ADR	Alternative Dispute Resolution
BRE	Better Regulation Executive
CBI	Confederation of British Industry
CEDR	Centre for Effective Dispute Resolution
CFA	Conditional Fee Agreement
CIA	Chemical Industries Association
CIPD	Chartered Institute of Personnel and Development
CRE	Commission for Racial Equality
CLG	Communities and Local Government
COT3	Form to close off an ET claim settled by Acas without a hearing
DCA	Department for Constitutional Affairs
DLR	Discrimination Law Review
DRC	Disability Rights Commission
DRR	Employment Act 2002 (Dispute Resolution) Regulations 2004
DTI	Department of Trade and Industry
EA	Employment Act 2002
EAT	Employment Appeals Tribunal
EEF	Engineering Employers' Federation
ELA	Employment Lawyers' Association
EMAR	Employment Market Analysis and Research
EOC	Equal Opportunities Commission
ET	Employment Tribunal
ETS	Employment Tribunals Service (became part of Tribunal Service in 2006)
ET1	Initial claim form to instigate a claim to the ET
ET3	Employers' form to respond to an ET1 claim
FPB	Forum for Private Business
FSB	Federation of Small Businesses
HMRC	HM Revenue and Customs
IoD	Institute of Directors
PwC	PricewaterhouseCoopers
SETA	2003 Survey of Employment Tribunal Applications
SBC	Small Business Council
TGWU	Transport and General Workers Union
TUC	Trades Union Congress
WERS	2004 Workplace Employment Relations Survey



Printed in the UK on recycled paper containing a minimum of 75% post consumer waste.
First published March 2007. Department of Trade and Industry. www.dti.gov.uk
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