How should Employment Tribunals operate in the future?

Response from the Discrimination Law Association — February 2015

Introduction

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

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

3. We welcome the opportunity to contribute to the debate on the future of Employment Tribunals, through the Law Society’s Consultation. Given the wide scope of the issues raised, this response focuses on a few key points, that are of particular concern to the DLA and its membership.

4. Discrimination in the workplace and in the provision of education and services amongst other things continues to be a significant problem within UK society. The Law Society is aware of studies and reports which note the impact of cuts in services upon black people, women and disabled people in particular, and we are aware of the continued lack of real equality of opportunity in areas of life including access to the professional, access to health care, housing and wealth creation generally.

5. Our concern as lawyers and practitioners is where restrictions on opportunities arise from unlawful discrimination actions disputes should be resolved with speed and minimum additional expense to the claimant. There is a public interest in discrimination cases being brought before the courts, as part of the need to redress the inequalities referred to above. The pressure on individuals is already very great in terms of both the risks to reputation, future work opportunities and health.
6. We are increasingly concerned that the direction of travel for dispute resolution in discrimination cases is towards a greater burden on the claimant in terms of cost and in terms of procedural requirements, at the same time as there is a reduction in the availability of support and assistance and a reduction in the safeguards and measures specifically designed to assist with discrimination litigation.

7. Discrimination cases often arise in circumstances where the claimant is particularly vulnerable. If they are still in employment, they risk ongoing discrimination as well as victimisation in response to their claim. If their employment has been terminated, they are likely to be both emotionally and financially vulnerable. In the vast majority of cases discrimination claimants have far fewer resources, in particular financial reserves, than the respondent. Arrangements for resolving discrimination complaints have to take account of this context.

### Employment Tribunal Fees

13. No discussion of the future of the Employment Tribunals can avoid dealing with the impact of tribunal fees. Since they were introduced, there has been a precipitate decline in cases being brought to the tribunal. Given the Committee's expertise, we will not rehearse in detail the statistics and arguments, which it will be well familiar with. In summary:

- The number of claims has dropped to approximately a third of the pre-fees level
- There is no evidence that this represents the removal of vexatious or weak claims from the system — contrary to assertions from ministers and others. Tribunal outcomes for the claims remaining have remained static
- It seems clear that fee remission is failing to preserve access to justice for poor claimants. Not only are the capital and income limits for remission set too low, the process of applying for remission is bureaucratic and acts as a barrier to accessing the tribunal (particularly for vulnerable claimants).
- The impact of these changes has fallen disproportionately on the vulnerable, the low paid and those from traditionally disadvantaged groups.
- The result of all of these factors is that it is significantly harder for employees to enforce their employment rights than it was pre-fees. This significantly reduces the practical value of these rights.

14. To a significant extent, discussion of other matters relating to the employment tribunal risks becoming a distraction from this core issue. While fees prevent employees accessing the tribunal, it matters little how it is operating. The barrier of fees is a problem that can only be effectively addressed by their removal — or substantial changes to the level at which fees are set and the arrangements for remission.

15. The DLA agrees entirely with the Committee's statement of principle: ‘People need an employment law system that allows everyone to protect their rights. For those few disputes that cannot be resolved in the workplace, there should be straightforward ways
in which employers and employees can get justice.’ At present, fees pose an insurmountable barrier to access to justice in the employment context. We continue to be appalled at the cost of claiming discrimination, even where the discrimination is tied in with other matters. We do not support any system of fees which makes any discrimination claim for expensive than any other employment claim.

Alternative Dispute Resolution

Judicial Mediation

16. A further negative aspect of the introduction of fees was the fee for judicial mediation. Judicial mediation, without cost to the parties, had previously been an effective form of ADR within the employment tribunals. In our experience, the introduction of a fee has almost entirely eliminated it as a practical option.

17. Judicial mediation was not only of significant assistance to parties, it also represented a significant cost saving to the tribunal, by taking long, expensive cases out of the system when settlement was agreed.

18. It is therefore hard to see the policy rational for imposing the fee, particularly when preliminary hearings do not attract a fee.

Early Conciliation

19. It is too early yet to assess the impact of Early Conciliation on the ability of parties to resolve conflict outside the employment tribunal. The early numbers provided by Acas suggest that it may be having some success. Anecdotally, the experience appears to be mixed, with too much depending on the particular Acas conciliator who is assigned to the case.

20. So far as the Employment Tribunal system itself is concerned, however, there have been substantial negative impacts.

21. First, Early Conciliation, however well intentioned as an ideal, acts as a further barrier to accessing the tribunal. For employees who have a genuine dispute with their employer, which requires judicial resolution, it is too often simply another hoop that must be jumped before accessing the tribunal. Obviously, there are trade-offs between ensuring access to the tribunal and encouraging alternative dispute resolution — but when other barriers, such as fees and remission have been created it is unfortunate the Early Conciliation increases their impact.

22. Second, the fact that Early Conciliation operates as a jurisdictional bar introduces further barriers and the lack of judicial discretion once a case reaches the tribunal means that errors made at an early stage of the process have a wholly disproportionate affect. Many employees do not know the correct legal name of their employer; often because they have been misled or because there has been a failure to comply with the legal requirement to provide proper particulars of employment. Similarly, many employees do not appreciate the affect of TUPE transfers or the need to name potential individual respondents in discrimination cases.
23. Because the Early Conciliation law acts as an absolute procedural bar to the tribunal’s jurisdiction, there is no effective mechanism through which these problems can be addressed once a case reaches the tribunal. Claims often have to be struck out while the employee returns to Acas to go through Early Conciliation. Then the claim must be re-submitted and the tribunal must decide on the time-limit issue. Often this serves no useful purpose. It would be far better for judges to have discretion to allow claims to proceed. At the very least, there should be an express power to stay a claim, pending completion of the Early Conciliation process.

Decision making the Employment Tribunal

Should the tribunal be more inquisitorial?

24. The tribunal should be inquisitorial — provided that this is done in an appropriate way. There is a worrying trend of Employment Judges feeling that they should not act in an inquisitorial fashion for fear of allegations of bias in some form. We do not believe that this is, or should be, the case.

25. Robust case management is not an indication of bias. Assisting a litigant in person by explaining the tribunal process is not an indication of bias. Asking questions of a witness — particularly where an unrepresented party is not in a position to do so effectively themselves — is not an indication of bias. All of these things, if done improperly or insensitively, can be forms of ineffective judging or might give rise to allegations of bias.

26. But the fact that something can be done badly, does not mean it cannot be done well. Provided they are carried out properly, these are all proper exercises of the judicial role, that can be done in accordance with the overriding objective. Judges should be supported in carrying out their inquisitorial role effectively, in particular through training.

27. The Employment Tribunal is simply not a jurisdiction where justice is best achieved by a judge sitting back from the case in order to act only as a disinterested umpire. This might be appropriate where parties are invariably represented by experienced lawyers. But, even in those jurisdictions, there is an increasing recognition of the value of good judicial case management and engagement during the trial.

28. The reluctance of judges to take on a inquisitorial role can be actively counterproductive, especially where they are still required to exercise case-management powers. For example, judges not infrequently have to restrain a party who wishes to cross-examine beyond the scope of the issues before the tribunal. This, not unnaturally, tends to create deep unhappiness for litigants in person who feel they are being unreasonably constrained. When a judge feels that they are not able to explain their view of the law clearly and put their decision in context, their decision is more likely to appear arbitrary, even though it is not.

29. We also consider there should be a greater focus on the training of judges and wing members to deal with discrimination issues. This should include guidance on the early disclosure of workforce statistics and monitoring information either through a new style questionnaire procedure, or some form of standardised discovery and questioning.
Employers should be required to provide such information in most discrimination cases.

Is there a place for making a decision on papers only?

29. In practice, no. There might be some scope, in a very small subset of wages cases, to make decisions on the papers only — if the tribunal could be confident that they would be presented with all the relevant papers in an accessible format.

30. This is simply not practical in a jurisdiction where, in the majority of these simple cases, one or both parties is unrepresented. In practice, too many parties are not capable of clearly setting out their case and providing the necessary accompanying evidence. These are issues that can be much more easily resolved at a hearing. Attempting to decide such cases on paper is only likely to prolong them and use up more judicial time than dealing with them at a hearing.

31. In any event, the vast majority of employment claims involve disputes of fact that cannot be sensibly resolved on the papers. This is as true of most simple wages claims as it is of more complicated claims. It is common for the authenticity of documents, such as contracts of employment or pay-slips to be disputed. Such disputes of fact are simply not susceptible to paper based decision making.

Should a costs regime be brought into employment law cases? If so how would this work?

32. Our view on introducing a cost regime into the employment tribunal flows from our position on and experience of tribunal fees. It is clear that most claimants cannot afford to pay tribunal fees. Therefore, it is clear that they would not be in a position to risk paying the legal costs of respondent — which, in many cases, would be much higher. Introducing a costs regime would therefore create a further, potentially even more onerous, barrier to individuals accessing their rights.

33. Given the importance of those employment rights, especially those related to discrimination claims, both to individuals and the wider public interest, this cannot be justified. Employment tribunals have already moved too far from their founding ideal of being accessible to all.

Should the Employment Appeal Tribunal have first instance jurisdiction for complex / high value claims?

32. No. The EAT is no better suited to deal with complex or high value claims than the tribunal — indeed the tribunal has significantly greater experience of handling employment cases at first instance than the EAT. A High Court or Circuit Judge who deals with a small volume of complex cases a few times a year, between other work and appeal cases, is not likely to do a better job than an experienced tribunal judge who spends the vast majority of their time dealing with first instance employment cases.
33. We should also not conflate complex and high value claims. Many complex claims are low value. For example, holiday pay issues are frequently highly complex, but comparatively low value. Many high value claims are no more complex than similar low value claims. This is particularly true in the employment context, where the value of claims generally depends primarily on the income level of the claimant in employment, rather than the issues of the claim.

34. Creating a first instance jurisdiction for the EAT is also likely to create procedural complications. The jurisdiction would need to be defined and decisions made about which cases were assigned there. This will only add to the complexity and cost of the process. It would also complicate the appeal structure, since some first instance cases would need to be appealed directly to the Court of Appeal.