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# Resolving disputes in the workplace

## Consultation response form

The closing date for this consultation is 20 June 2007

You may find it helpful to set out your responses to the consultation using this response form.

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Organisation's name and
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Return completed forms (preferably by e-mail) to:

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Please cross one box from the following list of options that best describes you.

- ☐ Individual
- ☐ Small to Medium Enterprise
- ☐ Large Enterprise
- ☐ HR professional
- ☒ Legal representative
- ☐ Trade Union
- ☐ Interest Group
- ☐ Regional Organisation
- ☐ Devolved Administration
- ☐ Local Government
- ☐ Central Government
- ☐ Other (please specify) _____

**Please feel free to answer as many or as few questions as you wish. It is helpful if you can explain your views as fully as possible in the comments boxes, continuing on a separate sheet if necessary, especially where you disagree with the measures set out in the consultation paper.**

**Question 1**

Should the statutory dispute resolution procedures be repealed?

Yes ☒ No ☐ No view ☐

| Comments |
| --- |
| FRU's experience of the procedures has been universally bad. They have overcomplicated litigation and done considerable injustice, partly by barring good claims for technical reasons and probably partly too by deterring claimants from bringing claims. |

**Question 2**

Would repealing the procedures have unintended consequences that the Government should address, in legislation or otherwise?

Yes ☐ No ☒ No view ☐

| Comments |
| --- |
| Transitional provisions will have to deal, in particular, as regards time-limits where a claimant has complied with (or believed they had complied with) a statutory procedure before its repeal. |

**Question 3**

Should the Government offer new guidelines on resolving disputes?

Yes ☒ No ☐ No view ☐

| Comments |
| --- |
| Government guidance is valuable to employers and employees in setting expected standards of behaviour and to tribunals in deciding cases – particularly dismissal cases.<br><br>The current guidance inevitably reflects the dispute resolution rules and will need to be changed if they are repealed. |

**Question 4**

Should there be a mechanism to encourage parties to follow such guidelines?

Yes ☐ No ☐ No view ☐

| Comments |
| --- |
| In relation to dismissals the right not to be unfairly dismissed should act as a mechanism to encourage parties to follow the guidelines. Tribunals should consider whether an employer followed the relevant guidelines when considering whether the dismissal was procedurally unfair. Failure to follow the guidelines should not automatically lead to a dismissal being unfair, but the guidance would guide tribunals in assessing the expected standard of behaviour.<br><br>The best incentive to encourage employers and employees to take steps to resolve other grievances is that it is in their own best interests to do so. |

**Question 5**

Should the mechanism take the form of a power for employment tribunals to impose penalties on those who have made wholly inadequate attempts to resolve their dispute?

Yes ☐ No ☒ No view ☐

Comments

One of the serious problems that the dispute resolutions caused was that both sides were forced to regard the raising of a grievance as the first stage in tribunal proceedings.

This has seriously impaired the ability of employers and employees to resolve their differences informally. A compulsory grievance procedure has the result that any grievance is likely to be seen as containing an implicit threat of tribunal proceedings, and this inevitably impairs the ability of the parties to discuss their differences constructively. Government guidance has a valuable role in encouraging parties to resolve their dispute and providing them with guidance as to how best to approach that effort. It is counterproductive to attempt to force unwilling parties talk to each other.

The current dispute resolution procedures have shown that a requirement to rigidly follow a set requirement does not work. But a more flexible approach would have its own problems. Unlike dismissal cases, grievance cases are not concerned with the parties' response to the grievance. It is not relevant to the substance of a discrimination claim whether the parties attempt to resolve the dispute arising from the alleged discrimination. This means that any need to impose penalties for inadequate attempts to resolve a dispute would require tribunals to spend considerable time and effort in investigation something irrelevant to the substantive claim. This is not a good use of their resources, nor of those of the parties.

A distinction should be drawn between imposing penalties arising from conduct prior to the tribunal claim and assessing the reasonableness of the parties' conduct of that litigation. It is far less problematic for tribunals to consider the parties actions once a claim have been brought. At this point, the parties are already in litigation and so, by definition, the opportunity to resolve the dispute without legal action has been lost.

**Question 6**

What form should such penalties take?

| Comments |
| --- |
| Penalties should not be imposes (see answer 5). If penalties were to be imposed they should take the form of adjustments to awards.<br><br>Costs are an inappropriate penalty because they act as a bar to access. Many respondents, and their representatives, use the existing costs rules aggressively to attempt to induce a withdrawal. Claimants are frequently threatened with substantial costs awards, where there is no prospect of costs being awarded. This causes particular problems for vulnerable claimants, without legal advice, who are unequipped to deal with these threats or to assess the merits of their claim. Meritorious claims are withdrawn as a result.<br><br>Expanded costs would also be weighted against claimants. Respondents are more likely to be represented and more likely to pay for representation. Claimants are more likely to be unrepresented, or be represented by organisations providing free representation in various ways. This means that claimants are less likely to be able to use costs as a reciprocal penalty.<br><br>Any system in which claimants might be barred from bringing claims would be extremely unjust. A claimant with a good underlying case should not be prevented from pursuing it because a tribunal takes the view that it could have been resolved and that adequate efforts to do so were not made.<br><br>Therefore, if a penalty is to be imposed, it should take the form of adjustments to awards. This would penalise the parties, without preventing claims being brought. |

**Question 7**

If the statutory dispute resolution procedures were repealed, should the law relating to procedural fairness in unfair dismissal:

- revert to the pre-2004 position, or
- be reviewed in order to assess whether it should be restated entirely?

Revert ☒ Review ☐ Other ☐ No view ☐

| Comments |
| --- |
| See attached response to secondary consultation. |

**Question 8**

Should the Government invite the CBI, TUC and other representative organisations to produce guidelines aimed at encouraging and promoting early resolution?

Yes ☐ No ☒ No view ☐

| Comments |
| --- |
| Such organisations, and other stakeholders, should certainly be consulted before new guidelines are produced. But government should retain the responsibility for producing the guidelines. This is likely to produce clearer and better guidance than negotiation between groups who, inevitably, have different approaches and objectives. |

**Question 9**

Should the Government develop a new advice service with the structure and functions suggested?

Yes ☐ No ☐ No view ☒

| Comments |
| --- |
| It is unclear precisely what the government is suggesting. Certainly advice on alternate dispute resolution and mediation, together with the possible provision of such services is a good thing.<br><br>We have concerns that the helpline is intended to advise on difficult and detailed issues, inevitably with incomplete information. It is important that claimants – who have a right to bring a claim – are not diverted into forms of alternate dispute resolution that are inappropriate. It is very important that the helpline and potential claimants are aware of the limits of this sort of advice.<br><br>The help that impecunious claimants need most is free specialist employment law advice. There are many organisations that aim to provide this, but they are woefully under-resourced. Setting up a new advice line of unproved usefulness would be a poor use of funds that could be better spent enabling existing organisations to assist more clients. |

**Question 10**

Should the Government redesign the employment tribunal application process, so that potential claimants access the system through a new advice service, and receive advice on alternatives when doing so?

Yes ☐ No ☒ No view ☐

| Comments |
| --- |
| While it is valuable to provide advice to potential claimants, it would be extremely undesirable for such a system to act as a gatekeeper on access to the tribunal.<br><br>This is primarily a practical issue. In any system with a required preliminary step difficulties will arise over whether the requirements have been complied with.<br><br>It also seems likely that a significant amount of the helpline's work would then be wasted. A claimant who had obtained specialist legal advice at an early stage and made rigorous efforts to resolve the dispute – unsuccessfully – would still need to contact the helpline and receive advice. This is not a good use of the government's or the claimant's resources. |

**Question 11**

Should there be a new, swift approach for dealing with straightforward claims without the need for employment tribunal hearings?

Yes ☒ No ☐ No view ☐

| Comments |
| --- |
| A fast-track approach is potentially beneficial for both parties, if it allows them to resolve a straightforward issue quickly and efficiently.<br><br>This approach, however, should not preclude claims being brought and considered in the normal way. Those jurisdictions where claims would often be appropriate for such a system, such as wages and holiday pay, are sometimes extremely complicated (even where the amounts may be relatively small). These complex cases will still need to be considered by the full process.<br><br>The fast-track approach should not apply where either party requests an oral hearing or the claim also contains other jurisdictions to which it does not apply. If, for example, an unfair dismissal claim is brought with a wages claim it makes sense to consider them together rather than splitting the claim in two. |

**Question 12**

Should additional Acas dispute resolution services be made available to the parties in potential tribunal claims, in the period before a claim is made?

Yes ☐ No ☒ No view ☐

| Comments |
| --- |
| While it is obviously desirable for employers and employees to resolve differences without going to the tribunal we do not think that ACAS is the right way of doing this.<br><br>ACAS's resources have been stretched extremely thin over recent years. This has had a negative effect on their ability to mediate the existing tribunal claims effectively.<br><br>If ACAS services are made available outside tribunal cases their resources will be further depleted. They would deal with a large number of cases that would never have reached the point of tribunal claims in any event. In effect the government would be giving ACAS responsibility for assisting in a practically infinite number of workplace disputes. The government should not take on a new and open-ended commitment to providing such assistance. Certainly it should not do so without further research into the cost of such a programme and how it might be delivered.<br><br>ACAS's efforts are better focused on those disputes that reach the point of a claim being made. |

**Question 13**

If it is necessary to target these new services, should the Government set criteria to guide Acas to prioritise particular types of dispute?

Yes ☐ No ☒ No view ☐

| Comments |
| --- |
| ACAS is quite capable of prioritising its own work. Allowing ACAS to do so would also allow them to be more flexible in the face of changing circumstances. |

**Question 14**

If the new services are to be targeted, then in the current circumstances, would it be appropriate for the Government to guide Acas to prioritise the following types of dispute:

- those likely to occupy the most tribunal time and resources if they proceed to a hearing, e.g. discrimination and unfair dismissal cases;
- those where the potential claimant is still employed; and
- those where the employer is a small business with fewer than 250 employees.

Yes ☐ No ☐ No view ☒

| Comments |
| --- |
| |

**Question 15**

Should the fixed conciliation periods which place time limits on Acas' duty to conciliate employment tribunal claims be removed?

Yes ☒ No ☐ No view ☐

| Comments |
| --- |
| In practice, although some claims are resolved at an early stage, many more are settled shortly before a tribunal hearing. The principal reason for this is that the impending tribunal date focuses the parties on the dispute and puts pressure on them to avoid the hearing.<br><br>The current rules mean that, many litigants are deprived of ACAS's assistance because, at the point they are considering settlement, they are outside the conciliation period. Rather than encouraging early settlement, the conciliation periods have made settlement at any point less likely. |

**Question 16**

Should the Government simplify employment tribunal forms?

Yes ☒ No ☐ No view ☐

| Comments |
| --- |
| Repeal of the dispute resolution regime would eliminate a good deal of the current material required by the form. The opportunity should be taken to design a simpler form.<br><br>It would also be helpful to move away from providing separate boxes for different jurisdictions. In practice where two claims are made they arise out of the same facts. For example, where an unfair dismissal claim is brought with a discrimination claim the discrimination claim is normally that the dismissal was an act of discrimination. In this situation separating the questions relating the unfair dismissal and discrimination confuses claimants and makes it more difficult to produce a coherent account. The claim form would be simplified if it provided a check box area to indicate what was being claimed and then asked claimants to set out the basis for their claim in a separate box. |

**Question 17**

Should claimants be asked to provide an estimate or statement of loss when making a claim?

Yes ☒ No ☐ No view ☐

| Comments |
| --- |
| It is beneficial to both sides, as well as the tribunal, for the claim to be quantified at the point that a claim is made.<br><br>At the claim stage, however, claimants should be asked for an estimate, not a formal statement of loss. Claims are frequently made without legal advice and, even if legal advice is available, it will often not be possible to accurately quantify the claim at such an early stage.<br><br>The absence of an estimate or schedule should not lead to a claim being rejected. It would be unjust to bar a claimant from the tribunal because they were unable to quantify their claim. |

**Question 18**

Would simplifying the current time limits regime through harmonisation be a helpful additional reform, whether or not the statutory dispute resolution procedures are repealed?

Yes ☒ No ☐ No view ☐

| Comments |
| --- |
| One of the particularly difficult elements of the dispute resolution regime has been the effect on time limits. It is extremely difficult, even for experienced advisors, to understand the operation of the rules. Claimants without legal advice, frankly, do not stand a chance.<br><br>A single, universal time limit would be extremely useful. It would avoid confusion and the grave problems that arise when the complex rules are misunderstood, leading to claims not being lodged in time because of that confusion. |

**Question 19**

If so, should the harmonised limit be three months, six months or another time period?

3 months ☐ 6 months ☒ Other ☐ No view ☐

| Comments |
| --- |
| A six month time limit allows the parties sufficient time to attempt to resolve their dispute, whether through meditation or other means.<br><br>A six month time limit would also address the problem many claimants face of a series of acts of discrimination, culminating in dismissal. Employees who have not taken action, often in the hopes of resolving the dispute, often face difficulty in bringing an appropriate claim, because the earlier acts are outside the three month time limit.<br><br>It is worth noting that 6 months is an extremely short limitation period when compared with those in civil jurisdictions, when time limits to bring a claim are measured in years. |

**Question 20**

Would total or partial harmonisation of the grounds for extension to the extent possible subject to legal constraints, be a helpful additional reform?

Yes ☒ No ☐ No view ☐

| Comments |
| --- |
| Harmonisation would help both employees and employers, who are frequently confused about the applicable rules. |

**Question 21**

If so, what should the grounds for extension be in respect of the relevant jurisdictions?

| Comments |
| --- |
| The ground of extension should be that it is just and equitable for time to be extended.<br><br>Employment tribunal time limits are some of the shortest in party-to-party litigation in the UK. Extensions on the basis of justice and equity are far more appropriate to such short time limits than the more draconian reasonable practicability grounds.<br><br>The “reasonably practicability” test prevents the prosecution of many unfair dismissal claims where the degree of lateness has caused the respondent no prejudice whatsoever. That is not appropriate and serves no legitimate purpose.agreed good point<br><br>There are also issues relating to the appropriate implementation of EU directives, particularly those related to equality rights. FRU doubts whether a short time limit and a reasonably practicable ground of extension would effectively implement the directives. |

**Question 22**

Do you have views on specific ways in which employment tribunal procedures

and case management could be improved?

| Comments |
| --- |
| Consideration should be given to producing standardised directions that – amended as necessary – could be given in the majority of claims. Standard directions are of particular help to parties unfamiliar with the tribunal process, since they set out what is expected of them.<br><br>Tribunals should also have more explicit powers to stay proceedings in order to allow the parties to pursue mediation or other alternative dispute resolution. Although this can be done under the existing rules, an explicit power, would focus tribunals and parties on the possibility. Tribunals should also have the power to direct the parties to consider alternate dispute resolution. This would reflect the powers available to the civil courts. |

**Question 23**

Would it be helpful to change the case management powers available to employment tribunals in respect of multiple-claimant claims?

Yes ☐ No ☐ No view ☒

| Comments |
| --- |
| FRU does not deal with multiple-claimant actions with significant numbers of claimants. |

**Question 24**

Do employment tribunals provide the most appropriate way of resolving multiple-claimant claims, or could other mechanisms better serve the interests of all the parties involved?

| Comments |
| --- |
| |

**Question 25**

Are the existing powers of employment tribunals sufficient to deal with weak and vexatious claims?

Yes ☒ No ☐ No view ☐

| Comments |
| --- |
| The tribunal has effective powers to strike out claims, to order costs against those who improperly bring claims and to require a deposit at an early stage before a claim can continue. These are strong powers and equivalent to anything provided to the civil courts by the CPR.<br><br>While weak and vexatious claims do exist, in FRU's experience they form only a small percentage of tribunal litigation. In our experience respondents tend to view any unsuccessful claim (and many successful ones) as both weak and vexatious. The fact that a claim has not succeeded does not mean that it should not have been brought.<br><br>When seriously weak claims are made the claimant rarely believes that they are being vexatious. Rather, they are brought because the claimant is not properly advised of the law or does not appreciate that they do not have sufficient evidence to succeed. Tribunal intervention does have a role in these cases, but the best way of avoiding them is to ensure that litigants have access to good advice.<br><br>It should also be recognised that there are as many weak and vexatious defences as claims. A significant number of employers will, for example, deny that a TUPE transfer has occurred or that wages are owed, even when the facts are plain. It would be unjust to place any additional obstacles on claimants bringing cases, if there were not to be similar provisions relating to respondents. |

**Question 26**

Do you have views on when chairs should sit alone to hear cases?

Yes ☐ No ☐

| Comments |
| --- |
| |

**Question 27**

Do you have views on how best to structure employment tribunal panels and use lay members more efficiently?

Yes ☒ No ☐

| Comments |
| --- |
| Employment tribunals have an astonishing range of jurisdiction and work, from a few hundred pounds in a holiday or wages claim to the multi-million pound discrimination cases.<br><br>This should be recognised in the structure of tribunal panels and use of lay members. Cases that benefit from specific expertise, such as discrimination cases, should be heard by panels with training and expertise in those areas. |

**Question 28**

Should the Government aim to promote employers' compliance with discrimination law through better advice and guidance, rather than by widening the powers of employment tribunals to make recommendations in discrimination cases?

Yes ☐ No ☒ No view ☐

| Comments |
| --- |
| Advice and guidance plays an important role in encouraging employers to comply with discrimination law and explaining best practice.<br><br>It is not enough, however, on its own. And the choice should not be between good advice and recommendations. Unfortunately, no matter how good the government advice it will not convince all employers to comply with their legal duties. By definition if a finding of discrimination has been made against an employee they have not met the required legal standard, despite the advice.<br><br>At that point tribunal recommendations are valuable and should not be seen as a necessarily hostile act. If the employer has fallen short it is useful for the tribunal to indicate what they need to do in order to avoid problems in the future. |

Thank you for taking the time to let us have your views.

We do not intend to acknowledge receipt of individual responses unless you tick the box below.

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We would like to keep you informed of the progress of this consultation, including further consultations. If you wish to join the mailing list, tick the box below.

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