

The Labour Relations Agency's response to:

The Department for Employment and Learning's consultation 'Developing Modern, Efficient and Effective Employment Tribunals'

Introduction

The Labour Relations Agency (the Agency) welcomes the opportunity to contribute to this consultation and commends the Department and the Tribunal Service's commitment to develop a single, consolidated and more transparent set of tribunal rules that will bring significant improvements to the experiences of both employers and employees. The Agency is encouraged that the consultation document reinforces the Department's commitment to maximise opportunities for early resolution of workplace disputes. The Agency already has very positive working relationships with the Tribunal Service as set out in the joint OITFET/LRA Memorandum of Understanding and sees the current DEL consultation as an opportunity to further strengthen this delivery partnership.

The Agency's response provides some general comments on the draft rules and, where appropriate, offers specific responses to the individual questions posed in the consultation document.

General comments on the draft rules

In reviewing the draft rules the Agency has focussed on the following issues:

- the statutory role of the Agency;
- the more general promotion of Alternative Dispute Resolution (ADR); and
- the interface between the proposed Early Conciliation service and the tribunal procedures.

The statutory role of the Agency is referred to under the Miscellaneous Section of the draft rules, Part 16, Rule 93. The Agency is concerned that this general heading has the potential to underplay and ultimately diminish the importance of the Agency's role as the primary deliverer of ADR services within the tribunal setting. In the current rules there is already a dedicated section to conciliation and the role of the Agency (rule 21). The Agency believes that there is value in retaining a dedicated section, entitled the statutory role of the Agency, and that this should come much earlier in the new rules either at the end of part 1 or 2. The Agency would be willing to work with the Department and the Tribunal Service to flesh out the wording of this rule in a way that would facilitate a greater understanding of the Agency's role.

The Agency would also like the whole content of rule 21 to be included in the new draft rule to replace new rule 93 - it is critical to the process of conciliation that the Agency continues to receive all of the documentation in respect of cases lodged with the Tribunal Service.

The Agency welcomes the initiative that the Department and the Tribunal Judiciary has taken in terms of **the more general promotion of ADR**. The Agency believes that the new rules could be strengthened to further that aim by including references to ADR in other critical sections of the new rules. As a starting point the following propositions are offered:

- make an explicit linkage between rule 2 dealing with the Overriding Objective and Rule 3 which deals with ADR, this would be consistent with the approach taken under rule 15 and rule 50(1)(e) where there is explicit reference to ADR and the role of the Agency;

- there may also be an opportunity to expand the wording of rule 3 to promote a greater understanding of ADR;
- at new rule 27(2)(a)(iii) insert the following at the end of this part, *including the use of the Agency's services*; and
- there may be a further opportunity to refer to ADR at Part 7 - Case Management Orders and Other Powers.

The Agency is available to assist the Department and the Tribunal Service in the drafting of any additional references to ADR.

The Agency has reviewed Part 2 of the new rules (Starting a Claim) to ensure that there is consistency in terms of **the interface between the proposed Early Conciliation service and the tribunal procedures**. The new rules are consistent with the Early Conciliation model that has been developed by the Agency informed by the GB model developed by Acas. The following minor adjustments/comments are offered:

- new rule 11(1)(c)(i) should refer to early conciliation certificate;
- new rule 11(2) insert claim before form; and
- new rule 12(2), the Agency welcomes the discretion that is afforded to a chairman in relation to minor errors.

Previous rule 55 - **Dismissals in connection with industrial action** - appears to be missing but may be covered elsewhere.

New rule 94 - **Conciliation: recovery of sums payable under compromises**

It would be helpful to have clarification on the purpose of this new rule and whether it has any implications for the current arrangement whereby an Agency Conciliated Settlement acts as a certificate to enable a claimant to proceed directly to the Enforcement of Judgments Office.

Responses to the consultation questions

The Agency's response to the consultation questions is set out below. In drafting its response the Agency has sought to be open and discursive on issues that are central to the work of the Agency. However, the Agency does occupy a very unique position in terms of employment relations and has therefore not commented on some of the policy/operational matters that are more appropriately addressed by stakeholders and bodies that represent individual employers and employees.

Q1. *Are the new rules less complex and easier for non-lawyers to understand?*

Yes, the move to a single set of rules will make it easier for tribunal users to understand and access the tribunal system.

Q2. *Can the language or style of the rules be improved and, if so, how?*

No comment

Q3. *Do any of the rules appear ambiguous or create confusion? If so, please explain any improvements you feel could be made.*

No, on the basis that the Agency's specific queries raised in this response are fully addressed.

Q4. Does the overriding objective in Rule 2 set out the most important objectives of the tribunal process? If not, please explain.

The rule is better laid out with the additional elements. The overriding objective is seen as having a significant influence of the behaviours of Chairmen and representatives; we would therefore suggest that there is merit in considering the inclusion of a reference to ADR in this rule or that there should be a cross reference to Rule 3.

Q5. Do the rules do enough to encourage the appropriate use of alternative means of resolving disputes? If not, please explain.

The use of ADR is certainly referenced in Rules 3, 15 and 50 but perhaps more emphasis is needed throughout the document, for example on the sections dealing with deposits and costs; presidential guidance; vulnerable parties; and case management orders

Q6. Please identify any potential issues with the proposed interface between early conciliation and the tribunal system.

The matter of the name of the employer on the certificate and the decision of the tribunal to reject a claim if they are not the same is an important issue – the claimant may not know the actual employer’s name and it may be that they find this out after the certificate has issued particularly in those situations where they have not engaged in conciliation. This rule needs to be clear that the Tribunal will not reject claims as a matter of course, and thereby encourage satellite litigation.

Q7. Do you support the concept of Presidential guidance being issued under rule 8 and, if so, how might it be used?

Yes, as long as the guidance is clear and compelling. Presidential guidance could be helpful in addressing inconsistent behaviours which are at odds with the overriding objective.

Q8. Should any changes be made to the grounds for rejecting a claim under rules 11 and 12? If so, which changes and why?

See 6 above. There should be an objective justification for any decision to reject a claim.

Q9. Do you support developments in the early case management process and can you suggest any improvements?

The Agency is very supportive of the early case management process and believes that this approach is consistent with the overriding objective. The Agency has worked very closely with the Tribunal Service in the development of the early case management; and in particular with reference to Para 2.32 of the consultation document where the Agency agreed a specific approach to insolvency claims to include the provision of a targeted information sheet for claimants. The Agency will continue to support the Tribunal Service in this area.

Q10. Are the case management powers provided for in the rules sufficiently clear and flexible? Please explain.

Yes

Q11. What are the advantages and disadvantages of the lead case mechanism for dealing with multiple claims in rule 33?

Rule 33 is helpful in terms of how multiple claims can be more effectively managed through the identification of lead cases on which a decision will be based. The Agency also needs to be notified when an alternative lead case has also been identified by the Tribunal. This

enables a decision to apply to remaining cases but the Agency needs to be informed of any issues that may subsequently arise in these cases, eg appeals/withdrawals.

Q12. Are the strike out mechanisms set out in rule 35 reasonable and proportionate? Please explain, proposing any alterations.

The Agency has no comment to make.

Q13. Should tribunals have power to require one deposit per issue identified as unlikely to succeed?
The Agency has no substantive comment to make about the merits of any of the proposals raised in Questions 13-17 relating to deposits. However, whatever decisions are taken regarding the structure and level of deposit orders clear and unambiguous guidance needs to be available to tribunal users.

Q14. Should tribunals have power to require claimants to pay deposits per named respondent in order to proceed?

See response to Q13.

Q15. What should be the maximum level of an individual deposit?

See response to Q14.

Q16. Should there be a maximum cumulative deposit if multiple deposits are permitted?

See response to Q15.

Q17. Should a party who has lost a case for the reason(s) identified in a deposit order forfeit the relevant deposit even where no costs order is made?

See response to Q16.

Q18. Do the rules give sufficient protection to vulnerable people? Please explain.

There needs to be further consideration of what measures could be put in place by the Tribunal Service to meet the needs of vulnerable people. The approach taken by the Tribunal Service, supported by the Agency, in insolvency cases is a very positive example and could be replicated for migrant workers and other vulnerable groups who experience particular difficulties in accessing the Justice system. Presidential guidance may be part of the solution but any guidance needs to be clear and should make reference to ADR as a viable alternative to litigation and specifically refer to the Agency. Any guidance should highlight that a tribunal decision on an individual claim is not binding and that individual claims cannot be used to address collective issues, which is a view wrongly held by many migrant workers.

Q19. How might Presidential guidance address the needs of vulnerable parties?

See response to Q18.

Q20. Does rule 47 make the privacy and restricted reporting regime sufficiently flexible? Please explain.

The Agency has no comment to make.

Q21. What additional measures or rules should the Department consider implementing, to support vulnerable parties?

See response to Q18. Engagement with the various representative bodies could also help.

Q22. What, if any, quantifiable evidence do you have of failure to pay tribunal awards and its impacts?

The Enforcement of Judgements Office will be able to provide information on the issue of non-payment. Anecdotally, the Agency does hear of employers not paying on settlements; it has been suggested to the Agency by some claimants that employers go out of business and then restart under a different trading name and therefore are not liable for payment.

Q23. What additional measures, if any, are necessary to address non-payment of awards?

The Agency has no comment to make.

Q24. Are there any drawbacks to the approach adopted in rule 50, which enables pre-hearing reviews and case management discussions to proceed as part of one or more preliminary hearings?

The only comment is that Rule 50(1)(e) does refer to the use of the Agency's services as an alternative means for resolving the issues in acclaim. This is a positive but the rule and the role of the Agency might be strengthened if the statutory role of the Agency was highlighted.

Q25. Are there any potential interface issues between preliminary hearings under rule 50 and early case management under rule 27? If so, please explain.

The only comment is that the reference to the Agency's statutory role in the response to Q24 equally applies to rule 27.

Q26. Do you agree with the proposed approach to giving reasons in rule 60? Please explain.

The Agency already collects management information especially on outcomes of hearings to inform how we improve/target our services; and would prefer a written decision even if it only provided headline information, number of days in tribunal; settlement awarded. We will address this in our discussions with the Tribunal Service to review our Memorandum of Understanding.

Q27. Does Part 14 make appropriate provision in respect of costs, preparation time and wasted costs? Please explain.

The Agency has no comment to make.

Q28. What are your experiences of 'costs threats'?

The Agency does receive anecdotal comment from some claimants and their representatives that in many cases claimants are threatened by costs.

Q29. What changes, if any, should be made to deal with the issue?

This is matter for the Tribunal Service but clear guidance would be helpful.

Q30. Should legislation formally provide for reference to be made to the position of "employment judge"? Please explain.

The Agency has no comment to make.

Q31. Taking into account the sources of information already available, is there a need for further guidance on the tribunal process? If so, what type(s) of information and guidance should be developed, and what issues would benefit from a particular focus?

Clear guidance with references to costs, ADR and deposit hearings would be helpful; given the integral role of the Agency it would be helpful if the Tribunal Service guidance provided links to our website and to specific publications on key services such as conciliation and mediation.

Q32. Do you support the suggestion of a multimedia familiarisation resource and, if so, what should be its focus?

Any measure that would aid users' understanding would be helpful and could extend to the role of the Agency.

Q33. How else can users be helped to understand the nature of the process, including the value of particular claims?

The early case management process will certainly help parties to understand the value of claims.

Q34. How can engagement between the tribunal system and its users be improved?

The Tribunal Judiciary could be asked to give presentations on the early case management system to key stakeholders to raise awareness of the positive changes to the tribunal processes and the interrelationship with the Agency

Q35. Do you concur with the Department's assessment of the impacts of the proposals set out in the consultation?

The Agency has no comment to make.

Q36. What, if any, additional impacts need to be considered

The Agency has no comment to make.

Q37. Do you have any other views on how the tribunal process could be improved?

The Agency has no further comments to make.