



Unite the Union’s Response to/Comments on the Dispute Resolution: secondary legislation consultation

Response due by 26 September 2008 to

DisputeResolutionSecondaryLegislation@berr.gsi.gov.uk

This response is submitted by Unite the Union (“the Union”). The Union is the UK’s largest trade union with 2 million members across the private and public sectors. The Union’s members work in a range of industries including manufacturing, financial services, print, media, construction, transport and local government, education, health and not for profit sectors. The changes to the dispute resolution process will potentially impact upon all of the Union’s members in their dealings in the workplace. It will also impact upon all of the Union’s representatives who deal with disciplinary and grievance issues. The Union, together with its officers, representatives, and members have significant experience of the current (and indeed previous) dispute resolution processes.

Executive Summary

- The Union has considered the consultation paper and its proposals and specifically a number of the questions set out in the paper.

- The Union has responded only to those questions upon which it has particular views and which it believes are relevant to the interests and concerns of the Union's members and the Union generally.
- The Union has serious concerns about the proposal to extend the definition of "relevant advisor" for the purposes of section 203 of the Employment Rights Act 1996, on grounds of actual and perceived partiality, and on grounds of there being no requirement for members of the CIPD to have employment law expertise and to keep apprised of developments in the law.
- The Union does not agree with applying a floating rate of interest on unpaid awards because it considers that the rate should be consistent with the civil court rates for debt actions. The Union does, however, agree with the proposal to streamline the date from which interest is paid in the manner proposed, again for consistency reasons.
- The Union has set out below the guidance that it believes should be provided to parties about tribunals' extended powers to make recommendations. The Union considers that the starting point in judicial guidance about making recommendations should be that the recommendation should seek to eradicate the discrimination complained of in its entirety. The Union has also suggested below various means of information dissemination about recommendations made in the past.
- The Union has serious concerns about the proposals relating to written determinations for the reasons set out below.
- The Union does not agree with the proposal relating to holiday pay claims being heard by an Employment Judge sitting alone as it considers that the experience of lay members is often essential in determining factual disputes and issues surrounding employment status that often form part of a defence to a holiday pay claim.
- The Union agrees with the suggested redrafting of the provisions relating to interim relief hearings, subject to one small amendment, set out below.
- The Union supports the proposal to make default judgments mandatory, but has some concerns about the proposals made where insufficient information has been supplied. It instead sets out its own proposals to resolve such difficulties.

- The Union is content with the proposal relating to electronic communications subject to one proviso detailed below.
- The Union has two drafting concerns in relation to the proposals on withdrawing claims.
- The Union objects to the proposals for equal value hearings on the basis that it believes that the experience and input of lay tribunal members is required at such hearings.
- The Union objects to the proposals in relation to reducing the qualification period for appointment as an Employment Judge because it considers that, given the complexity of employment law, particularly in areas such as discrimination and equal pay, the additional years of experience currently required are vital.
- The Union does not agree with the suggested redraft of the TUPE Regulations because of the uncertainty surrounding whether a particular grievance will fall within the scope of the new ACAS Code. The Union makes an alternative suggestion.
- The Union makes a number of points relating to the transitional provisions, set out below.
- The Union suggests a few amendments to the proposed new ET1 form, also set out below.

Specific comments

1) Extending the definition of a “relevant advisor” who can sign off compromise agreements

i) Do you agree with adding CIPD members to the list of relevant advisors?

The Union does not agree with the Government’s proposal in this regard.

ii) What do you think are the benefits, disadvantages and risks?

The role of the relevant advisor is to provide independent advice to an employee or former employee on the terms and effect of a compromise agreement. This is an important role because an employee clearly needs to understand the serious

implications of signing a compromise agreement and its impact upon pursuing any claims. The importance of the role is emphasised by the fact that section 203 of the Employment Rights Act 1996 provides that it is a specific requirement for a compromise agreement to be valid that an individual receives advice from a relevant advisor prior to signing the agreement. In a number of situations the advice given may impact upon whether or not an individual decides to remain in employment or terminates their employment, or whether or not they pursue a tribunal claim. As a result, the advice must be tailored to the needs and specific circumstances of the employee and cannot be just a box-ticking exercise.

It is therefore submitted that members of the CIPD, an organisation that advises and represents employers, would be inappropriate advisors of employees for the purposes of section 203. The suggestion that those who would be included are qualified HR professionals from within the CIPD only increases the Union's concern as such individuals are usually specifically involved in protecting employers' interests and therefore the Union considers that it would be wholly inappropriate for them to undertake a role that involves consideration and protection of an employee's interests. This is also underpinned by section 203, which provides that the advisor must be a "relevant *independent* advisor". Whilst similar concerns might be raised about particular solicitors who may do large amounts of work for employers, the much stricter regulatory regime and strict rules on conflicts of interest etc within the profession are, we consider, more sufficient to allay these similar concerns.

In addition, it is important for an individual receiving advice to believe that they are receiving impartial advice and to be able to set store by, and, as mentioned above, make decisions based on, the advice they receive. At the very least, therefore, the inclusion of members of the CIPD as relevant advisors should be avoided so as not to cause a perception of partiality. This is likely to be a particular concern in situations where there was a continuing relationship between an employer and a particular member of the CIPD, who regularly undertook the role of relevant advisor for that particular employer. Whilst again, the same concern may be levelled at solicitors, we would again point to the strict regulatory regime which allays such concerns to some extent.

The Union would also point out that in reality, in a large number of cases, the role of the relevant advisor involves advising not just on the terms and effect of an agreement, but also on the individual's general employment situation and the merits and likely quantum of any claims that they might have. This requires an even more in-depth consideration of the employee's interests in a particular situation, which we do not believe is an appropriate role for a CIPD member to undertake given their usual role in protecting employer interests as mentioned above. We understand that there is no requirement for CIPD members to have employment law expertise and to keep themselves apprised of developments in the law. The Union would be very concerned if such individuals were involved in either advising employees about the merits/likely value of their claims or in seeking to negotiate amendments.

iii) Do you think any other group(s) of advisors ought to be considered and if so, why?

The Union does not believe that any other groups ought to be considered.

2) Arrangements for accruing interest on unpaid employment tribunal awards

iv) Do you agree with the case for moving from a fixed to a floating rate of interest on unpaid awards?

We do not agree with this suggestion. The current 8% rate is the interest rate applied in the civil courts in debt cases and we see no reason why a lower rate should be applied to employment tribunal cases.

vi) Do you agree with the case for streamlining the date from which interest is paid? This would mean aligning with the existing provisions on discrimination and equal pay.

The Union does agree with this proposal, as it would provide a more consistent approach to remedies across the spectrum of different claims within the tribunal's jurisdiction. It seems that the proposal is only to extend the existing provisions on discrimination and equal pay to awards for those types of claims which already attract a rate of interest payment where there is a failure to pay timeously. The Union would suggest that the proposal is extended to also cover awards in claims that do not

currently attract an interest payment in the case of late payment of the award, such as holiday pay and outstanding wages, to achieve further consistency.

3) Employment tribunal recommendations in discrimination cases

vii) What guidance ought to be made available to parties on the operation of the extended power?

Parties should be advised that the purpose of the recommendation is to ensure that the employer's policies and practices seek to eliminate discrimination and that this is of benefit to both the employer (in that there will be less successful discrimination complaints against it) and the workforce, who will benefit from a working environment that is, if not free from, exposed to a significantly lower degree to, discrimination, which will have a positive impact upon morale, retention levels etc. The Union considers that it is extremely important for the guidance to be expressed in a positive way so as to increase the likelihood of an employer being actively encouraged to seek to implement the recommendations.

The guidance should also make clear when recommendations are likely to be made, and give examples of what types of recommendations could be made and what specific situations such recommendations would seek to impact upon. It would also be helpful, in terms of positive messages, if examples of situations where recommendations have been successful are cited, perhaps in the form of case studies.

Basic information, such as the fact that non-compliance may lead to a higher risk of a finding against an employer in future claims, the fact that the recommendations are recorded and publicly available (including where and how an individual can check if a recommendation has previously been made against their employer), and the fact that they may be made even (and presumably often) in situations where an individual complainant has left the employ of the employer, should also be provided. It also needs to be made clear that recommendations at one site will apply to other sites of the same employer.

viii) Should guidance to the judiciary emphasise that recommendations should be commensurate to the capacity of the employer to implement them?

Whilst the Union accepts that the resources of an employer may impact to some extent upon ability to comply and ability to comply timeously with a recommendation, if recommendations are being made to avoid further discrimination from occurring then the Union believes that the starting point for any recommendation should be the complete eradication of that discrimination. Partial removal is insufficient and may well lead to further litigation. The Union believes that any genuine and substantiated concerns that an employer has about the recommendation/specific parts of it can be raised by way of representations once the employment tribunal has reached a preliminary view as to the nature of the recommendation that it will make. Any specific concerns that the employer has may at that stage be considered, so that appropriate recommendations can then be made. The Union considers that this is the correct approach to attempts to eliminate discrimination by way of recommendations.

ix) Do you have views on how employees might be informed about recommendations made to their employer?

The Union considers that employees may be informed in a number of ways. Firstly, it may be that the method of disseminating the information about the recommendation is considered when the recommendation itself is being considered, such that the tribunal specifically asks the employer how it can disseminate the information by way of noticeboards/staff magazines etc. Also, we would suggest that explanation be included in the relevant discrimination questionnaire about the possible existence and effect of an earlier recommendation, together with details of the appropriate website etc where the individual may check whether any recommendations have been made about their employer. Thirdly, similar information should be included on the ET1 form, and when an ET1 is submitted, a check should automatically be made and the individual automatically notified of any previous recommendations against their employer in the employment tribunal letter acknowledging receipt of the ET1. The Union assumes in addition that trade unions, CABs, law centres, solicitors' firms etc would all have open access to the register of recommendations/employment tribunal judgments and that therefore individuals who have some form of representation would be able to check whether previous recommendations had been made with the assistance of their adviser.

x) Do you think that a mechanism should also be put in place for alerting tribunals to relevant previous recommendations?

The Union strongly agrees with this, as otherwise there would be little point in recommendations being made and registered. If the procedure in relation to automatic disclosure of recommendations upon submission of an ET1 form suggested above were implemented, then any recommendations that were registered would presumably be included on the tribunal's file about the case and would therefore come to the attention of a tribunal when it was considering the file for the purposes of case management/hearing etc.

4) Written determinations

xi) Do you agree that there are benefits in introducing such a procedure?

The Union has significant concerns about this proposal. Whilst we accept that it is likely to achieve savings in terms of resources and time, we have concerns about whether unrepresented individuals who have had no prior experience of employment tribunals, employment law, or employment complaints, and who may not be able to express themselves articulately in writing, may well suffer disproportionately as a result of the proposals in this section. In addition, presumably the only claims to which such a procedure could apply would be those where there was no factual dispute. We consider that the number of cases in which there is no factual dispute is an extremely small proportion of the total number of tribunal claims issued and we would therefore question how much of a positive impact the introduction of this proposal would actually have in practice. The issue of "informed" consent is also, we consider, fraught with difficulty as we would be concerned that individuals might not fully understand that the written determination procedure would be binding upon them, and also may not fully understand the nature of any defence submitted by their former/current employer to their claim where it is set out on paper rather than verbally. The Union does not, therefore, consider that the proposals in this section would be appropriate.

xii) Can you propose an alternative approach, which would still protect the rights of parties to tribunal cases and ensure that written determinations were only made on the basis of informed positive consent?

The Union is unable to propose such an alternative approach given its concerns, as set out above, about the very concept of a written determination procedure.

5) Adding holiday pay to the list of jurisdictions that an Employment Judge would normally hear alone

xiii) Do you agree that Holiday Pay should be added to the list of jurisdictions normally heard by an Employment Judge sitting alone? Please give your reasons for agreeing or disagreeing.

The Union has concerns about this on the basis that holiday pay cases often involve issues surrounding the employment status of an individual which necessarily need to be resolved before the main dispute can be considered. In such situations, the industrial experience of wing tribunal members can be very useful in considering such issues, and there may also be factual issues to determine, which again would benefit from the additional observations and views of wing tribunal members.

6) Other changes

a) Interim relief hearings

The Union agrees that the Tribunal Rules should be amended to take account of the fact that the procedure for interim relief hearings will not always be the same as that for other pre-hearing reviews. However, we believe that the draft provision (rule 18A) should be amended so that the words “hearing of the” are inserted before the words “following applications as they apply to pre-hearing reviews:” and again at the start of each of sub-paragraphs (a) and (b). This is purely in order to make the drafting clearer.

b) Default judgments

The Union supports the proposal to make default judgments mandatory, particularly when one considers and compares the very strict time limits within which claimants must issue claims and the extremely narrow scope of the extension of time provisions. The Union considers that introducing mandatory default judgments would provide a degree of certainty for claimants. By the time that a claim has been issued, a number of claimants may be out of work and experiencing some level of financial difficulty. The certainty that a mandatory default judgment would therefore provide, particularly for those who may be concerned about solicitors' fees if they are required to pursue the claim to a hearing, will be very valuable. In addition, for those claimants who have suffered emotionally as a result of their treatment at work (whether that be by way of, for example, sexual harassment, the stress of being dismissed, etc), the provision for mandatory default judgments will provide some relief as it will bring a sense of finality to their predicament at an early stage. Providing for mandatory default judgments brings tribunal procedure more into line with the overriding objective, it is submitted, because of the sense of certainty and finality that it introduces.

The Union has some hesitation, however, about the proposal that mandatory default judgments may not be introduced where there is insufficient information. The Union considers that it will usually be the case that further information can be obtained such that a default judgment can be made and therefore considers that the application of such a provision should be limited to a very narrow range of situations. The Union further considers that a distinction should be drawn between default judgments relating to liability and those relating to quantum. The Union considers that, whilst it may well be of assistance to seek further information from both claimant and respondent in relation to quantum, and whilst it may be necessary to seek further information from a claimant in respect of liability, it will usually be inappropriate for a tribunal to seek further information from a respondent in respect of liability, as this in effect provides the respondent with an opportunity by the "back door" to present the salient parts at least of their defence. As a result, the Union considers that a distinction should be drawn between liability and quantum default judgments, and that a tribunal seeking further information before making a default judgment on liability should only seek that information from a claimant unless extremely unusual circumstances apply that mean that default judgment cannot be issued unless

information is sought and provided by the respondent. The Union considers that the range of circumstances in which this situation would arise is very narrow.

A further observation relating to quantum is that the proposed amended ET1 form does not, it appears to us, ask sufficient questions about losses sustained to enable many, if indeed any, default judgments to be made on quantum. The Union would suggest that further directed questions are included on the form in order to, at least in some situations, enable default judgments on quantum to be made, or at least to simplify any remedies hearing.

Paragraph 7.7 of the consultation document states that “Where, in the opinion of the Judge, more information would be required to enable a default judgment to be made, the respondent would be asked to provide further information. Where this is not forthcoming, a default judgment would be issued”. Two observations strike us from this, firstly, and as mentioned above, this appears to give the respondent a second chance to provide a defence in such a situation, even though it has presumably by this point failed to submit a timeous defence. Secondly, that it is only where further information is not provided that a default judgment may be issued. This strikes us as undermining the very principle of a mandatory default judgment and we object strongly to this.

In conclusion in relation to this section, the Union would suggest:

- i) that provision be included for mandatory default judgments to be issued;
- ii) that any provision stipulating that default judgments may not be issued where there is insufficient information should be circumscribed as far as possible;
- iii) that a distinction is drawn between a mandatory default judgment on liability and such a judgment on quantum;
- iv) that where a tribunal requires further information in order to issue a mandatory default judgment on liability, it may request further information from the claimant (and only in very exceptional circumstances as set out above, from the respondent);
- v) that where a tribunal requires further information in order to issue a mandatory default judgment on quantum, it may request further

information from the claimant and/or the respondent (but that this should not delay the issuing of any mandatory default judgment on liability).

c) Electronic communications

The Union welcomes this proposal on the proviso that no party is *required* to communicate electronically.

d) Withdrawal of proceedings

We make the following comments in relation to proposed rule 25(A). In the first instance, we note (from paragraph 7.12 of the consultation document) that the Government is considering introducing a provision to the effect that it will be the act of (we presume) ACAS notifying the tribunal that a settlement has been reached that will trigger the withdrawal and dismissal procedure set out in rule 25(A). The introduction of such a provision would be welcomed by the Union. However, we note that the current wording of the proposed rule suggests that the triggering act is when the *claimant* informs the tribunal that s/he is withdrawing their claim. This difference therefore needs to be resolved, if the proposal is accepted.

Our second point is that the reference in paragraph 1(a) to “settle the proceedings through ACAS” is, we consider, too loosely worded and the wording of section 203 (2)(e) should instead be used (ie “the parties settle the proceedings by way of an agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996”).

e) Stage 1 equal value hearings

We do not agree with the proposal in relation to this as we consider that it is imperative that a full tribunal is present at such hearings. The issue for consideration in a stage 1 hearing is whether the tribunal is able to determine whether the jobs are of equal value without the assistance of an independent expert. This will involve the tribunal hearing evidence about the claimant’s job and that of her/his comparator in order to decide whether to appoint an expert. Hearing such evidence necessarily requires, in our view, the input and experience of tribunal lay members, given that it

will often involve hearing and deciding upon issues that are in dispute. In addition, as it is the full tribunal itself who will be required to determine equal value in the event that it is decided to dispense with the services of an independent expert, it should be a full tribunal that determines whether it is able to do so. The Union considers therefore that it is necessary for a full tribunal to consider such issues.

In addition, we refer to the fact that the thought process behind the current provisions was that a stage 1 hearing is distinct from a PHR where a full tribunal may not be required. There is nothing in the Union's view that indicates that this thought process is incorrect or has changed such that stage 1 hearings should now be treated as PHRs.

f) Implementation of the provisions of the TCE Act 2007 in relation to qualification periods

The Union does not agree with this proposal and is of the view that the current provisions requiring a longer qualification period should be maintained. With the increasing complexity of employment law and employment claims, particularly, for example, the law relating to equal pay, the Union considers that additional experience to that proposed is required in order to be competent.

7) Changes to secondary legislation as a consequence of the Employment Bill

xviii) Do you agree that references to the 2004 Dispute Resolution Regulations in the TUPE Regulations should be replaced with references to the ACAS Code of Practice on Disciplinary and Grievance Procedures?

The Union does not agree with this. Whilst we accept that the current references to the Dispute Resolution Regulations will need to be removed, we do not agree with the suggested replacement. This is because there is likely to be, in our view, differing views as to whether the ACAS Code of Practice applies in a particular situation in a way that did not occur, at least to the same extent, under the Dispute Resolution Regulations, for example, it is currently unclear whether the ACAS Code covers collective grievances. As a result, the Union considers that the most appropriate way to amend the TUPE Regulations would be to refer to situations where the disciplinary

procedure has been followed or a grievance raised by the employee or their representative.

xix) Do you agree with the Government's conclusion on transitional arrangements? If not, can you suggest an alternative which enables more cases to transfer to the new regime sooner **without** retrospective changes to the legal position of individuals and employers?

In relation to Schedule 1 of the draft statutory instrument, section 2 causes the Union significant concern as its effect will be that where an employer contemplates, prior to 6 April 2009, dismissing or taking relevant disciplinary action against an individual, the Dispute Resolution Regulations will apply. The Union is extremely concerned at this as it will effectively enable the employer to choose whether or not it wishes the Regulations to apply to a particular case simply by asserting that, for example, whilst it may have taken no steps to begin the disciplinary process, it did in fact contemplate doing so prior to 6 April and therefore the Regulations should apply. Conversely, an employer may assert that it was not contemplating dismissal/disciplinary action prior to 6 April 2009 in a particular situation where it does not want the Regulations to apply. We are very concerned that "procedure shopping" and further disputes will arise from this provision. We consider that the Regulations should only apply in disciplinary situations where the disciplinary process has begun before 6 April 2008. Whilst this may still allow for a certain level of "procedure shopping", it will be more limited and we do not believe that this provision in itself will give rise to as many disputes as the current proposal.

In relation to the transitional provisions relating to the grievance procedures, we would point out that the scenario where an individual's complaint is about action that began before and ended on 6 April 2009 is not clearly provided for in the draft transitional provisions (although we assume that the outcome would be similar to the outcome for those complaints which began before and ended after 6 April 2009 – that provided that a complaint was submitted by 5 July/October 2009, then the Regulations will apply).

We would point out that the transitional provisions will extend the life of regulations that it is in nobody's interests to retain. We would also point out that overall, this extension will impact more harshly upon individuals than upon employers given the particularly draconian provisions in relation to a refusal to accept a claim where a grievance has not been submitted.

8) Revised Employment Tribunal Forms

xxi) Do you have any comments on the revised Employment Tribunal forms (drafts of which are set out at Annex D)?

We refer to the comments made above about the Employment Tribunal forms in the sections on default judgments and tribunal recommendations. In addition we make the following comments:

- a) in the initial page of explanatory notes to the ET1, we suggest that the words “you have taken advice and you still” are deleted from the beginning of the third paragraph and that the word “you” is added before the words “want to make a claim” instead. This paragraph otherwise seems to suggest that an individual must have sought advice before making a claim.
- b) In paragraph 4 of these explanatory notes, we suggest that it be made clear that the form attached is the form to be used. We further suggest that the word “approved” in this paragraph is replaced by the word “correct” or “appropriate”, to aid clarity and keep the wording as simple as possible.
- c) Also in paragraph 4 of these explanatory notes, we would suggest that the consequences of failing to provide the information requested by the asterisked questions be made clear, ie that the form will probably be rejected and returned and that the time limit will not be extended.
- d) in question 4.8 on the ET1, we suggest that specification is sought as to whether the earnings are gross or net.

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