

BSA - The Business Services Association

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Consultation Response - 'Resolving workforce disputes: A consultation'

March, 2011

The BSA - The Business Services Association - represents leading UK organisations providing business and outsourced services across the private and public sector. A list of our members is provided as an annexe. The combined UK turnover of BSA members companies is in excess of £30 billion and members directly employ over half a million people nationwide. BSA members provide a range of business services including construction, maintenance, engineering, IT infrastructure, cleaning and catering.

We welcome the opportunity to respond to the Department for Business, Innovation and Skills consultation: 'Resolving workplace disputes: A consultation.' As a trade association, the below response covers the principles set out in the consultation document. We have not responded to direct questions regarding experience of dealing with the tribunals service as we are not direct employers.

This submission makes the following key points:

- **Tribunals should be given greater powers to discourage vexatious claims.**
- **A two year qualifying period for unfair dismissal should be introduced.**
- **Employers should be given more information ahead of a potential employment tribunal to enable them to make a more reasoned judgement about whether to proceed to tribunal.**

More specific questions raised by this consultation are covered in Appendix A of this document.

1. Tribunals should be given greater powers to discourage vexatious claims

The number of employment tribunal claims increasing - with 2009 witnessing the highest ever number of claims.¹ This is not because of the recession. Before the recession began in second half of 2008, claim numbers were already rising from a low of 86,181 in 2004.² The BSA therefore welcomes the following proposals made in the consultation to discourage vexatious claimants. In particular:

- Increase the power of judges to strike out
- Increase the maximum deposit required from employees at tribunal from £500 to £1,000

¹ BCC - Business and the Employment Tribunal System - 2010

² BCC - Business and the Employment Tribunal System - 2010

- To increase the maximum the current cap on cost awards limits from £10,000 to £20,000
- Introduce a “payment-in” mechanism to increase the likelihood of defeated employees paying court costs

The BSA supports proposals to increase powers for courts to require the losing party in a case to pay the costs of the winning party. This could act as a significant deterrent against vexatious tribunals. A government survey has previously indicated that 42% of employees’ decisions to go to trial would be significantly affected by potentially having to pay costs in the event of defeat.³ However, losing parties rarely pay costs. For example, in 2004, which was the year when the highest percentage of businesses were allocated a contribution to tribunal costs, only 755 employers received cost awards. Furthermore, the number of cost awards to employers has decreased year-on-year since 2004.⁴

We therefore welcome the proposed introduction of a “payment into court” system whereby participants in an employment tribunal can lodge a written offer of settlement with a court and, should the other side opt to reject that offer and subsequently be awarded a lower settlement, they may be ordered to pay costs. This will potentially significantly increase the number of cases in which court costs are awarded, which would be a welcome development.

An additional hurdle to prevent vexatious claims could be established through the introduction of a fee charging mechanism for using an employment tribunal. The BSA looks forward to hearing more details on fee levels and the mechanism through which fees would be paid, when the Department for Business, Innovation and Skills launches its further consultation on this issue in the Spring.

2. A two year qualifying service period for unfair dismissal should be introduced

The BSA welcomes proposals to return to a two year qualifying service rule for claiming unfair dismissal, which previously applied between 1985 and 1999, as the reduction of qualifying period has led to an upturn in the number of claims for unfair dismissal. For example, immediately prior to the introduction of the one year qualifying period in 1999, there were 37,034 unfair dismissal claims, whereas in 2009/10, 57,400 such claims were made.⁵

If a member of staff is not performing adequately, the extension of the qualifying period to two years may permit them time to improve and retain their employment. In comparison, the existing one year qualifying period could lead to dismissal at 11 months on the grounds that that individuals’ employment rights are about to increase.

Importantly, an increase in qualifying period would still leave employees protected with many employment rights within their first two years. For example, they could claim unfair dismissal on the grounds of unlawful discrimination on age, race, religious, sexual orientation or disability.

However, any increase in qualification period must be introduced carefully. A longer period could potentially have the unintended consequence of increasing the level of claims for discrimination on the grounds of age, race, religion etc... In addition, BSA members surveyed did not believe that extending the qualification period to two years would have any bearing on their decision to hire staff.

The BSA believes an increase in the qualifying period for unfair dismissal claims is an appropriate response to boost job growth and stimulate economic recovery, balanced with continued and necessary protections for employees.

³ DTI - Survey of Employment Tribunal Applications - 2003

⁴ BIS - Survey of Employment Tribunal Applications - 2008

⁵ Eversheds - IHC HR e-briefing 134: Employment Tribunal Reform, a promising start - 2011

3. Employers should be given greater information ahead of a potential employment tribunal to enable them to make a reasoned judgement about whether to proceed to tribunal

The BSA welcomes the emphasis the consultation places on increasing employer awareness of the potential cost they would incur in any employment tribunal. This is because, currently, employers have little faith in the employment tribunal system and therefore opt to head off potentially high costs from vexatious claims.

A decision by an employer to reach a settlement prior to employment tribunal is far from an admission of wrongdoing. Rather, often it is a rational business decision, based on:

- a) A lack of faith in the Tribunal Service to identify and deny weak claims. For example, in a recent survey, 26% of all employers felt obliged to settle claims they believed lacked merit.⁶
- b) Potentially high legal costs which might not be recouped. This point is particularly pertinent given the rising cost of legal advice which employers seek. The mean amount paid for professional and legal fees by employers in 2008 was £8,009.⁷

The BSA would therefore support reform of the ET1 form to include an Initial Statement of Loss by the claimant, which would better enable employers to make a reasoned assessment as to whether to fight a weak or potentially vexatious claim at tribunal.

⁶ CBI/Pertemps Employment Trends Survey 2005

⁷ BCC - Business and the Employment Tribunal System - 2010

Appendix A

The following observations are based on a survey of the BSA's membership.

Consultation Question	BSA member response
Q1 - To what extent is early workplace mediation used?	<p>Early workplace mediation tends to be used rarely at present. Where such a strategy is used it tends to be where employers are dealing with trade unions rather than individual cases.</p> <p>Judicial mediation is used on occasion, but this tends to be once a claim has been formally lodged.</p>
Q2 - Are there particular kinds of issues where mediation is especially helpful or where it is likely to be unhelpful?	<p>Mediation tends to be most helpful with regards to negotiating pay and conditions.</p> <p>Mediation is least helpful when dealing with individual cases.</p>
Q5 - What barriers are there to use (of mediation) and what ways are there to overcome them?	<p>The principle barrier to the use of mediation is the difficulty a claimant finds in accepting that the mediator is unbiased. The need for mediators to appear clearly impartial is of paramount importance.</p>
Q7 - What is your experience of in-house mediation schemes?	<p>In-house mediation schemes would not work effectively given the points made about impartiality in response to Q5 (see above).</p> <p>It should be accepted however that one advantage of in-house mediation (where used) is that it ensures the mediator has a thorough knowledge about the company concerned which can help inform the decision they take.</p>
Q21 - What benefits or risks do you see from a power to strike out a claim or response being exercisable at hearings other than pre-hearing interviews?	<p>Such a measure is likely to save both judicial and respondent time in the frequent instances where claimants are no longer pursuing a claim but have not notified the court.</p> <p>The introduction of such a measure is unlikely to impact negatively on honest claimants.</p>
Q24 - We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able to request the provision of further information before completing the ET3 fully. We would welcome views on the frequency at which respondents find that there is a lack of information on claim forms.	<p>Members estimate that around 65% of claim forms do not contain sufficient evidence on their own. This measure would therefore be supported.</p>
Q24a - We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able to request the provision of further information before completing the ET3 fully. We would welcome views on the	<p>It is often specific information which is found to be lacking.</p> <p>One BSA member gave the example of a claimant stating “<i>I was discriminated against by my manager because of my race</i>” but does not highlight why the claimant believes this to be the case, or which other employees (who were presumably differently treated) they are comparing themselves to.</p>

<p>type/nature of information which is frequently found to be lacking</p>	
<p>Q45 - Hearings are often unnecessarily prolonged by witnesses having to read out their witness statements. Do you agree with that view?</p>	<p>Tribunal hearings are often prolonged by the reading aloud of statements. However, members observed that many witnesses benefit from reading their statements aloud on the basis that it: a) reminds them of the evidence they are about to be cross-examined about; and b) puts them at ease.</p> <p>However, equally it is accepted that taking statements as read can save time, and that a requirement to read out statements can often prove embarrassing to witnesses with poor reading skills. Taking statements as read would avoid this.</p>