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11 October 2011

## **The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2011**

This is the response of the Administrative Justice and Tribunals Council concerning the above regulations following consultation by the Secretary of State in accordance with paragraph 24 of Schedule 7 to the Tribunals, Courts and Enforcement Act 2007.

### **Background**

The AJTC responded to the Department's consultation paper on "Resolving Workplace Disputes" published in January this year. We expressed our concern that some proposals – including the planned legislative responses to weak claims and the qualifying period for unfair dismissal – were based on limited evidence and would bring little benefit to employers or to the tribunal system while having a disproportionate and chilling effect on employees. In contrast, insufficient use is made of the range of judicial responses available – including practice directions – to deal with issues in the system. These would be far simpler to implement and far more proportionate in their effect.

We are supportive of attempts to resolve disputes earlier, and preferably in the workplace. We also back an increased role for Acas. However, we noted that one of the government's main aims is cost containment. Greater use of mediation, conciliation and related means of resolving disputes outside the tribunal system would benefit everybody but will almost certainly require significant investment in the short-term in order to reap longer-term gains. We said we would welcome such a strategic commitment from government as one outcome from this consultation.

This draft negative resolution Statutory Instrument is intended to give effect to policy decisions taken in the light of the consultation, although the Government Response to the consultation has yet to be published. The regulations make some of the changes to the

Employment Tribunal Rules of Procedure proposed in the consultation in respect of witness statements and expenses, deposits and costs. They also amend the present Rule on sending certain documents to the EHRC in some types of cases.

The Department sent the draft SI to the AJTC on 30 September, seeking views by 7 October.

### **The consultation on the regulations**

We do not consider it appropriate to attempt to comment on this draft SI. Firstly, the notice given is far too short. Guidelines on consultation with the AJTC are set out on our website and have been brought to the attention of the Department on previous occasions. The Department acknowledged in your covering letter that the Council needs to consult its Welsh and Scottish Committees, which renders the proposed 7-day timescale even more unfeasible. Secondly, it is not appropriate in our view to consult on draft regulations in advance of the government's response to the consultation paper. The SI doesn't make sense on its own. For example, it says the cost of witness expenses may be costs in the cause but it is not clear who pays in the first instance - the state, the witness or the parties? Without knowing this it is difficult to comment on the ancillary issue of expenses being awarded in the cause. In any event, commenting on this without being clear on other measures arising out of the consultation will only produce disjointed comments likely to be of little value.

### **Flexible, Effective, Fair: Promoting Economic Growth Through A Strong And Effective Market & Red Tape Challenge Focus on Employment Law**

Whilst writing, we feel impelled to comment on these recently-launched 'discussion' exercises. It is surprising that these exercises have been embarked upon before the Government Response to Resolving Workplace Disputes is published. This, and the short deadline for response, puts potential consultees at a significant disadvantage. Allied with the draft regulations, it creates an overall general impression of ill-considered and hasty policy making. We have already expressed concern in our earlier consultation response that some government proposals appear to be based on little evidence.

We have seen the recent obiter remarks of Lord Justice Mummery in the Court of Appeal's judgment in *Gayle v Sandwell & West Birmingham Hospitals NHS Trust [2011] EWCA Civ 924*. He said:

"One area of debate is about cases of little or no merit, but considerable nuisance value. All are agreed that they should be cleared out of the system as soon as possible. They should not be allowed to take up a disproportionate amount of time in the ET or cause the other party to incur irrecoverable legal costs and loss of valuable working time".

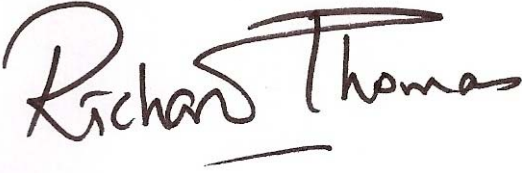
We share that view. We also share his view that:

"as for those who complain about the time taken and the legal costs and other expenses and losses incurred, I think that they would want the hearings to be conducted in the interests of justice to both sides. I have seen very few constructive suggestions for practical improvements. If workers are given rights, there must be properly qualified, impartial and independent tribunals to adjudicate on them in accordance with a fair procedure."

## **Fees**

Finally, we would welcome clarification of the present position on the introduction of fees for Employment Tribunal claims. It is axiomatic that everybody in the UK should have appropriate access to justice. We are opposed to the use of fees to create potential barriers to justice and would be particularly concerned if the effect of fees policy were to introduce unfairness by deterring meritorious claims and to favour one side over the other.

In conclusion, I would like to re-affirm the AJTC's wish to provide constructive feedback and our belief that we can offer a unique perspective on Employment Tribunal issues in view of our neutrality. Unlike many other stakeholders we do not look at the issues from the employers' or employees' standpoint alone. It is unfortunate that on this occasion we have not had a proper opportunity to consider the important matters at stake. We remain always willing to offer comment but need adequate time and information to do this effectively.



Richard Thomas

**Richard Thomas**  
**Chairman**