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resolving disputes at work

DTI review of employment dispute resolution – TUC submission

a TUC publication

Section one

introduction

Background

1.1 The Trades Union Congress (TUC) represents 64 affiliated unions with a total of nearly 6.5 million members. Members of TUC affiliated unions are employed in a wide variety of industries, sectors and occupations. Trade unions play a vital role in advising their members on their statutory and contractual rights at work and have developed expertise in representing members at Employment Tribunals. By facilitating the resolution of disputes at work, negotiating changes to workplace procedures, and promoting good workplace practices and policies, trade unions also assist in reducing the numbers of claims that proceed to Employment Tribunal.

1.2 The TUC welcomes the opportunity to respond to the DTI review on *Resolving Disputes in the Workplace*. The TUC has consistently held the view that litigation should not be the first course of action for an employee when an employment dispute arises, but that wherever possible disputes should be resolved in the workplace, by means of effective internal procedures and collective bargaining.

Summary of key issues for the TUC

1.3 This section summarises the TUC responses to key issues raised by the consultation:

Resolving more disputes in the workplace

1.4 The TUC has always supported the principle underpinning the dispute resolution legislation. The TUC believes that all workers should have access to effective and fair disciplinary and grievance procedures at work.

1.5 As a result of the legislation, for the first time many employees, particularly in small workplaces, have had the right to use a grievance procedure to raise employment related problems with their employer, without needing first to resort to litigation for their complaint to be heard and to be accompanied by their trade union rep when doing so.

1.6 The repeal of the three step statutory procedures would have some adverse consequences. If the procedures are to be repealed it is essential that Government introduces measures which will create strong incentives for employers to retain or introduce effective grievance and disciplinary procedures. These include:

- The introduction of a strengthened statutory ACAS Code of Practice. The Code should actively encourage employers to develop effective grievance and disciplinary procedures. It should set out standards of fairness and natural justice and clear guidance on the range of steps employers should take when resolving disputes, including, carrying out effective and appropriate investigations, meeting with staff and providing for an appeal.
- A substantial increase in funding for ACAS to enable the service to provide effective advice and dispute resolution services and increase its capacity to provide assistance to smaller firms.
- The full reinstatement of the Polkey principle in unfair dismissal cases. The Government should also carry out a review of the band of reasonableness test in unfair dismissal law.
- Developing the right to be accompanied into a right for workers to be represented by a trade union rep or colleague in all informal and formal grievance and disciplinary meetings, in grading reviews and capability hearings.
- Promoting collective resolution of disputes by removing the small firms exclusion in the statutory recognition scheme.
- The powers of tribunals should be extended to increase compensation awards where an employer has failed to take reasonable steps to implement effective dispute resolution procedures or to comply with the ACAS Code of Practice.

Beyond the workplace

1.7 The TUC supports proposals for

- Increased provision of high quality, impartial advice for employers and employees. The ACAS helpline and internet should be adequately resourced and developed. This advice service should not however act as the single access point for ET1 claim forms.
- A new swift approach for dealing with straightforward, monetary based, claims provided by legally qualified tribunal chairs or officials.
- Increased capacity for ACAS to provide conciliation services in the period before employment tribunal claims are filed. It is important additional resources are identified for this service.
- The removal of the ACAS fixed conciliation periods.

More effective employment tribunals

1.8 The interaction between the statutory grievance and disciplinary procedures and employment tribunal procedures, in particular rules governing the acceptance of claims and the handling of multi-jurisdictional claims have generated unnecessary complexity and bureaucracy; have resulted in the early formalisation of disputes, which has reduced the likelihood of an amicable

resolution; and have restricted access to justice for vulnerable workers, in particular unrepresented applicants.

1.9 The TUC therefore welcomes proposals to:

- Repeal the pre-acceptance stage in employment tribunal procedures which has restricted access to justice, in particular for unrepresented applicants.
- Simplify claim forms. The current ET1 claims forms are too long and complex and place onerous obligations on applicants.
- Harmonise rules on standard time limits. A uniform six month time limit should apply to all jurisdictions, thereby enabling parties to complete all stages of internal workplace procedures before an application must be made to an employment tribunal.
- Harmonise the grounds on which tribunals may extend these time limits. In our view, tribunals should have the discretion to extend time limits in all cases where they consider it is just and equitable in the circumstances.
- Consider ways of handling multiple claimant claims. In particular the TUC believes consideration should be given to representative actions. We would be concerned about any increased powers for tribunals to select test cases. Applicants and their representatives must be able to influence which cases are test cases.

1.10 The TUC would not support proposals to:

- Require claimants to provide an estimate of loss on ET1 claim forms.
- Reduce the role for lay members on employment tribunals.

Section two

Resolving more disputes in the workplace

1. Should the statutory dispute resolution procedures be repealed?

2.1 The TUC remains firmly committed to the principle that wherever possible disputes should be resolved within the workplace through the use of effective grievance and disciplinary procedures and collective bargaining. Recourse to litigation should be a matter of last resort. The use of informal and formal internal procedures is the most successful route for finding an amicable resolution to disputes. Such procedures assist employees in keeping their jobs and employers in avoiding the costs of recruitment and training of new staff.

2.2 The TUC therefore believes that all workers should have the right to access a grievance procedure when facing problems in the workplace. Employers should also be legally required to follow fair procedures, which are based on the principles of natural justice, when considering disciplining or dismissing staff. Workplace procedures should form part of the contract of employment of all employees. The TUC remains disappointed that the Government failed to give effect to section 32 of the Employment Act, implying the statutory procedures as a term into every contract of employment. All workers should also have the right to be represented by a trade union official in grievances and disciplinary hearings.

2.3 The TUC believes that the three step statutory grievance and disciplinary procedures have brought some benefits. As a result of the legislation, employees, particularly those in smaller workplaces, have been able to raise grievances with employers and to be accompanied by a trade union rep or a colleague when doing so. This has assisted employees in accessing their statutory employment rights, which were otherwise being ignored by employers and has reduced the need for claims to employment tribunals.

2.4 The obligation on employers to set out in writing the grounds on which they are contemplating disciplining or dismissing a member of staff has also assisted employees and their representatives in preparing defences to alleged charges of misconduct or incapability prior to disciplinary hearings and to devise alternatives to dismissal. As a result of the legislation, employers have also been more likely to follow proper procedures when seeking to terminate fixed term contracts, as is also required by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Similarly the

procedures have assisted employers to comply with their wider obligations under redundancy law. We also welcomed the *de facto* extension of the right to be accompanied by a trade union representative in grievance and disciplinary hearings to all workplaces.

2.5 If the Government decides to repeal the statutory grievance and disciplinary procedures, the TUC believes that it is essential that the Government takes steps to ensure that employers maintain or introduce effective grievance and disciplinary procedures. These steps include strengthening the ACAS Code of Practice on handling grievances and disciplinaries; increasing funding for ACAS to provide effective dispute resolution services and advice, in particular for small firms; extending the existing right to be accompanied and reinstating the *Polkey* principle in unfair dismissal law.

2.6 The TUC's criticism of the 2004 legislation does not relate to the three step statutory procedures. Rather our concerns focus on the interaction between the statutory dispute resolution provisions and employment tribunal procedures, in particular rules governing the acceptance of claims and the handling of multi-jurisdictional claims by employment tribunals.

2.7 Throughout the consultation on the 2004 Regulations, the TUC expressed concern that the principal driver behind the proposed Regulations was the reduction of claims proceeding to an employment tribunal, as opposed to the promotion of good employment practices. In our view the Regulations were drafted from the viewpoint of the tribunal door rather from the perspective of improving procedures and employment relations in the workplace.

2.8 The employment tribunal procedures introduced in 2004 have generated negative consequences in three main areas. Firstly, they have contributed to the early formalisation of disputes within workplaces. As a failure to comply with the statutory procedures can have serious consequences in an employment tribunal, employers have often tended to focus on compliance with procedural requirements, rather than resolving the substance of the dispute. In some workplaces, this has led to a tick-box mentality. There has also been a worrying reduction in the use of informal stages for resolving problems at work. As a result, problems in the workplace often rapidly escalate into disputes which are less likely to be resolved amicably.

2.9 Secondly, the employment procedures have generated complexity and bureaucracy for the employment tribunal and the ACAS conciliation services. The regulations relating to the handling of multiple jurisdictional claims have proved particularly problematic. The rules relating to time-limits, particular in relation to claims involving a statutory and contractual element, are excessively complicated and virtually incomprehensible to all but qualified employment lawyers and disadvantage applicants. The employment tribunal claim forms are too long and complex and place onerous obligations on individuals seeking access to justice.

2.10 Thirdly, new powers for tribunals to reject applications where certain minimum requirements have not been met have restricted access to justice, particularly for unrepresented applicants. The Employment Tribunal Service Annual Report revealed that15% of all non-dismissal related claims were initially rejected by the employment tribunal services in 2005-06. 60% of rejected claims were either resubmitted and not accepted or never resubmitted. The TUC believes that the level of rejected claims is unacceptable.

2.11 The TUC therefore welcomes proposals to repeal many aspects of the 2004 employment tribunal procedures. In particular, we support the removal of the pre-acceptance stage in employment tribunal procedures; the simplification of employment tribunal claims forms; the proposed harmonisation of time limits and of grounds for the extension of time limits, providing tribunals with the discretion in all jurisdictions, to determine whether it is just and equitable in the circumstances to permit an extension. Proposals to removal the fixed period ACAS conciliation scheme are also very welcome. We have always taken the view that these arrangements restricted ACAS' ability to provide effective conciliation in many cases.

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

2.12 While the TUC believes that the repeal of many of revised employment tribunal procedures can only have beneficial consequences, the repeal of the statutory grievance and disciplinary procedures would have some adverse consequences.

2.13 Currently, legislation requires all employers, regardless of the number of staff they employ, to have in place grievance and dismissal procedures. There is concern that some employers, in particular those in small and medium sized enterprises, will revert to not using workplace procedures if the statutory obligation is removed. Prior to 2004, the *Polkey* principle required employers to follow natural justice principles and fair procedures prior to dismissing an employee or making them redundant. The TUC believes that the *Polkey* principle must be fully reinstated in order to create an incentive and requirement on employers to retain disciplinary and dismissal procedures.

2.14 Prior to 2004, there was, however, no *Polkey*-equivalent obligation on employers to provide a grievance procedure. Many employers accept the benefits of using grievance procedures as a forum for dealing with workers' concerns and for resolving disputes amicably. They recognise that leaving disputes unresolved within workplaces can lead to long term levels of discontent amongst staff which can impact of levels of motivation, loyalty and productivity. Unfortunately many other employers, especially in non-unionised and smaller workplaces, failed to provide such procedures prior to 2004. If the statutory grievance procedures are not retained, strong incentive

must be generated to encourage employers to retain effective grievance procedures. One option would be powers for tribunals to modify awards where employers do not have a grievance procedure in place, or have failed, in line with the ACAS Code, to seek to resolve disputes arising in their workplace prior to a claim reaching an employment tribunal. In any event, the TUC believes that the current rule prohibiting an employee from filing a claim with a tribunal unless they have put a grievance in writing and waited for 28 days for their employer to respond should be repealed.

2.15 The proposed repeal of the statutory disciplinary procedures would also have a detrimental effect on the right to be accompanied contained in section 10 of the Employment Relations Act 1999 (ERelA1999). The introduction of the statutory procedures *de facto* extended the right to be accompanied to all workplaces. If the procedures are repealed, the right to be accompanied would only apply in those workplaces where employers retain formal workplace procedures. As a result, the rights of trade union members to access union representation, as affirmed by the European Court of Human Rights in the *Wilson / Palmer* cases, and the ability of unions to organise in non-unionised workplaces could be seriously affected.

2.16 The TUC believes that the right to be accompanied must be strengthened in a number of key respects. In our view, all trade union members should have the right to be represented, as opposed to accompanied, by a trade union representative in disciplinary and grievances hearings. The right to representation should relate not only to hearings dealing with workers' existing 'rights', whether contractual or statutory, but also to their future 'interests'. In addition, the definition of what constitutes a grievance or disciplinary hearing for the purposes of section 10 of the ErelA1999 should be extended to include:

- Informal grievance and disciplinary meetings
- Investigatory meetings
- Grading review meetings
- Capability hearings

2.17 The way that the right to be accompanied applies in relation to the right to request to work flexibly and the right to request to work beyond the intended date of retirement under age discrimination law should also be brought into line with section 10 of the ERelAct 1999. In these cases, an individual should have the right to be accompanied by an accredited full time trade union official. Workers should not be restricted to being accompanied by a union rep or colleague who is employed by the same employer.

3. Should the Government offer new guidelines on resolving disputes?

2.18 The TUC believes that the ACAS Code of Practice on handling grievances and disciplinary matters should be the primary source of advice for

employers and workers on resolving disputes at work. It is essential that any revised guidance or advice issued by the Government is contained in a statutory code of practice which will be taken into account by the tribunals and courts when adjudicating on employment disputes. General advice issued by the DTI, which has no statutory status, is unlikely to have a significant effect on employers' actions or behaviour.

2.19 The TUC takes the view that the pre-2004 version of the ACAS Code of Practice provides a strong base for revised guidance on dispute resolution.

2.20 It is important that any revised Code:

- Clears sets out the benefits to employer and organisations of the use of effective workplace grievance and disciplinary procedures.
- Sets out standards of fairness and natural justice and clear guidance on the range of steps employers should take when resolving disputes, including, carrying effective and appropriate investigations, meeting with staff and providing for an appeal.
- Encourages employers to train line managers in dispute resolution skills. Employers should also be encouraged to ensure that union reps are given sufficient paid time off to be trained in resolving disputes through grievances and disciplinary procedures and collective bargaining.
- Encourages employers to insert workplace procedures into the contract of employment.
- Advises employers to use disciplinary and dismissal procedures when terminating fixed term contracts. The failure to use the procedures in such cases could represent a breach of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.
- Advises employers to use dismissal procedures in all redundancy cases. It is a well-established principle of unfair dismissal law that the employer should consult individually with those who are being considered for redundancy in order to determine whether the selection criteria are being applied fairly and lawfully and to examine redeployment options. This is in addition to duty to consult collectively. Failure to consult individually may give rise to a claim for unfair dismissal.
- Advises employers to set out in writing the reasons for contemplating disciplining or dismissing a member of staff, in advance of a disciplinary hearing.
- Advises employers not to drag out procedures but to handle them in a timely manner.

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

2.21 The Government should use a range measures to encourage employers to comply with guidance on resolving disputes.

2.22 First, as noted above, it is important that the ACAS Code of Practice remains the primary source of guidance on resolving grievances and disciplinary matters and that the Code retains it statutory status. Secondly, it is essential that funding to ACAS is substantially increased in to order to properly resource the service to provide dispute resolution services and advice to employers on the benefits of using effective informal and formal workplace procedures to resolve employment disputes. It is particularly important to increase ACAS' capacity to develop services for small and medium sized enterprises and to provide adequate funding for an improved ACAS advice and training service.

2.23 Thirdly, the Government should encourage employers to insert grievance and disciplinary procedures into contracts of employment. This would place employers and employees under a legal duty to follow procedures when problems arise in the workplace. Fourthly, as discussed below, consideration could be given to penalising employers who failure to implement workplace procedures or who fail to attempt to resolve disputes in the workplace. Fifthly, the Government should fully reinstate the *Polkey* principle in unfair dismissal law.

2.24 Sixthly, it remains our contention that wider collective resolution of employment rights disputes would be a more effective route to achieve a steady decrease in the volume of individual rights litigation. It is widely recognised that employers are far more likely to have effective workplace procedures where trade unions are present in a workplace. Trade unions also have an established track record in resolving employment disputes in the workplace without the need for recourse to litigation. The TUC would therefore urge the Government:

- to remove the small firms exclusion in the statutory recognition legislation;
- to amend the right to accompanied at grievance and disciplinary procedures to cover the right to be represented, in line with the European Court of Justice's judgement in the *Wilson and Palmer* case.

2.25 The TUC would not support guidance or legislation which required or compelled employers and employees to use alternative dispute resolution, such as mediation to resolve disputes. It is important to recognise that mediation or conciliation does not work well against a background of compulsion. Mediation works best where both parties agree it is an appropriate option for any give dispute.

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?

2.26 Consideration is given in the DTI consultation document to the introduction of new powers for tribunals to impose 'penalties' on parties who

have made wholly inadequate attempts to resolve disputes before making a claim to an employment tribunal. The Gibbons Review went further and proposed that tribunals should be able to review the reasonableness of the parties' conduct in seeking to resolve disputes.

2.27 Given the power imbalance which exists within the workplace, the TUC does not believe that the same penalties should apply to employees as to employers for failing to take steps to follow procedures. The onus should clearly sit with employer to put in place mechanisms for resolving grievances and disciplinary matters in the workplace, before they give rise to employment tribunal applications. The TUC supports the principle that the law should penalise employers who fail to put in place effective internal procedures for handing disputes in the workplace or take reasonable steps to comply with the ACAS Code of Practice.

2.28 The TUC would oppose a general power for tribunals to consider the reasonableness of claimants' behaviour prior to bringing a claim at an employment tribunal. It is important to recall that the purpose of the employment tribunal system is to enforce employment rights and to protect employees against arbitrary treatment by employers. Further it is also important to recognise that most employees would prefer to resolve disputes within the workplace. Taking a claim to an employment tribunal is costly for claimants, both in terms of financial and administrative burden of preparing a case, the stress and anxiety involved and possible damage to future career prospects. Litigation will usually be an option of last resort. It is therefore inappropriate for tribunals to penalise workers further by adjusting compensation awards, where the employer has been found in breach of the law. As further outlined below, in our view tribunals should only have the power to adjust the awards of employees who have not complied with contractual procedures.

6. What form should such penalties take?

2.29 The TUC has always opposed the application of a costs regime in the employment tribunal system and would not support the use of costs awards to penalise parties who have not made any attempt to resolve disputes prior to filing an employment tribunal claim. There are a number of reasons for this view. Costs orders could be made regardless of whether an applicant is successful. Under the existing system for award orders can only be adjusted where an employee succeeds in their claim. As the DTI consultation document recognises, the use of costs awards in such circumstances is also likely to have a disproportionate impact on employees. The costs regime is already heavily weighted in favour of employers who regularly employ professional legal advisers. Further employers are likely use threats of costs awards as a means of intimidating individuals into not filing employment claim or into accepting a settlement which does not reflect the genuine value of their claim.

2.30 The TUC would however support the use of powers for the tribunals to modify compensation awards to penalise employers who do not have in place effective workplace procedures or who do not take reasonable steps to comply with the ACAS Code of Practice when seeking to resolve an employment dispute, prior to it reaching an employment tribunal.

2.31 We would not, however, support equivalent powers for tribunals to reduce awards where an employee has failed to take reasonable steps to resolve a dispute before filing an employment tribunal claim. The only exception to this rule could be where an employee fails to use a contractual procedure.

2.32 Under the existing legislative framework, employees will be aware of, or can seek advice on steps which must be taken to comply with the statutory procedures. If the statutory procedures are repealed, the system would be less transparent and it would be difficult for an employee to ascertain what they must do to avoid a reduction in any compensation award, particularly where an employer only provides ad hoc methods for dealing with disputes. This could lead to unjust outcomes. For example, it would be inequitable for an employee to receive a reduced compensation award if they fail to take up an offer from an employer to go to mediation, made on the eve of the day on which they plan to submit their employment tribunal claim form.

2.33 It would also be unreasonable to expect an employee to approach an employer to ask for a meeting to discuss a grievance where the employer does not have a grievance procedure in place. In some workplaces, such individuals may be treated as trouble-makers and subjected for discipline or mistreatment for raising a problem with an employer. Further it should be recognised that an employee may have reasonable grounds for refusing to meet face to face in a grievance procedure, mediation or conciliation with a person who has either bullied or harassed them.

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

The response to this question replicates the response provided by the TUC to the DTI's supplementary review of the options for the law relating to procedural fairness in unfair dismissal

2.34 The legislation introduced in 2004 made significant changes to unfair dismissal law. Before 2004, the '*Polkey*' line of cases provided that where an employer failed to comply with workplace procedures or with standards of fairness set out in the ACAS Code of Practice, the dismissal would be found unfair, even if the employer argued that had they complied fully with the

procedural requirements it would not have affected their decision to dismiss. The principles established by the House of Lords in *Polkey* were substantially eroded by provisions introduced in 2004 to section 98A(2) of the Employment Rights Act 1992. This provided that where an employer complies with the statutory procedures, but fails to comply with a fuller workplace procedure, the dismissal may still be found to be fair, as long as the employer can show that his or her failure would not have affected the decision to dismiss.

2.35 The adverse effects of section 98A(2) were partially ameliorated by new rules stating that a tribunal would automatically find that a dismissal was unfair where the employer fails to comply with the minimum statutory procedures. However, overall, it is generally recognised that unfair dismissal law was weakened. Since 2004, tribunals have been less willing to find dismissals unfair where employers have complied with the minimum statutory procedures but failed to follow more comprehensible workplace procedures.

2.36 The DTI supplementary review invites comments on three options for the reform of procedural unfairness in unfair dismissal law. The TUC believes that, only one of these options is acceptable. In our view, in order to avoid a further weakening of unfair dismissal law, it is essential that the Government implements option A and repeals section 98A in full in order to reinstate the *Polkey* line of cases. In *Success at Work,* the Government made a clear commitment that any employment law simplification would not result in a reduction of employee rights. The TUC believes that in order to give effect to this commitment the Government must reinstate the *Polkey* principle in full.

2.37 The principles established in the *Polkey* line of cases are very familiar to employers and therefore would be straightforward to implement. If *Polkey* were reinstated, employers would be required to comply with internal workplace procedures when considering dismissing an employee. Many good employers recognise the benefits of effective disciplinary procedures as means of enhancing performance of staff and for reassuring staff and their representatives that standards of fairness would be observed. They also recognise that failure to follow procedures which are set out in the contract of employment or staff handbook can generate disaffection and mistrust within workplaces.

2.38 Employers would also be required to comply with generally accepted standards of fairness as set out in the ACAS Code of Practice, such as conducting effective and appropriate investigations into an alleged incident or assessing an employee's performance before deciding to dismiss an individual. It is also important to remember that the House of Lords made clear in *Polkey* that tribunals may reduce compensation, or indeed eliminate it entirely, where an employer can show that he or she would have dismissed the employee anyway, even if the relevant procedure had been followed completely.

2.39 The TUC would firmly oppose the implementation of either options B or C outlined in the Supplementary Review. Option B proposes that section 98A

should be repealed in full but that legislation should provide for alternative findings reflecting the balance of procedural and substantive unfairness in the dismissal. The TUC believes that this option is too complicated, would prove difficult to enforce and would provide far less protection for employees, for the following reasons:

2.40 Firstly there are serious definitional issues with this option. There is serious concern that any new statutory definition of procedural unfairness would more than likely be narrower and less flexible than existing common law principles established in *Polkey*. The Gibbons Review recognised that one of the weaknesses of the statutory three step procedures is that there is no 'one size fits all' approach. A new statutory definition of procedural unfairness is likely to replicate this problem. A statutory definition of procedural unfairness which covered all bases established in the *Polkey* line of cases would be excessively complicated and more than likely to be unworkable from a workplace perspective.

2.41 Secondly, it is likely to be difficult to differentiate between what is procedural and substantive unfairness, as was demonstrated by the complex and often inconsistent line of pre-*Polkey* cases. For example, failure to conduct a proper investigation could be argued to affect both procedural and substantive unfairness. In recent years, the courts have tended to emphasise that failure to investigate constitutes a breach of natural justice principles, but it also arguable that it must also affect the reasonableness of the employer's decision to dismiss was fair.

2.42 Thirdly, option B would significantly reduce the level of protection for employees. The DTI supplementary review indicates that where a tribunal finds that a dismissal was procedurally unfair but substantially fair, *'a penalty could be imposed according to a scale with a low cap'*. Following the development of the 'band of reasonable responses' test, it been virtually impossible for employees to win a claim for unfair dismissal on grounds of substantive unfairness. If adopted therefore this option would mean that very few, if any, employees would benefit from the increases in unfair dismissal awards introduced by the Government in 1999.

2.43 Option C, set out in the supplementary review, proposes a return to the 'no difference' rule which was developed in *British Labour Pump v Byrne*. It would result in a serious weakening of unfair dismissal and would be strongly opposed by the TUC. This option would send a signal to employers that there is not need to comply with principles of natural justice when dismissing an employee. It would also suggest that employers should be able to justify ill-founded decisions retrospectively. This option would be contrary to the Government's wider objectives of encouraging employers to adopt and implement effective workplace procedures.

2.44 In addition to reinstating the *Polkey* principle in full, the TUC believes that the Government should also conduct a review of the band of reasonable

responses test which has been developed by the tribunals to determine whether employers had acted reasonably when deciding to dismiss an employee. For many years the TUC has expressed concern that as a result of the 'band of reasonable responses test', the substantive fairness of any dismissal is rarely if ever scrutinised by the tribunals. The only exception is cases where the dismissal is deemed to be automatically unfair due generally to a form of discrimination. As a result, unfair dismissal law has effectively become a procedural right, with the courts never interfering in the managerial prerogative.

2.45 The tribunals apply the 'band of reasonable responses test' when determining whether the employer acted reasonably when considering the general fairness of a dismissal. The test falls well short of notions of reasonableness which apply in public law under the *Wednesbury* principles. In unfair dismissal law, employers are given a very wide discretion when deciding whether to dismiss and are not assessed against any fixed standard of reasonableness. In *Haddon v Van den Bergh Foods* [1999] IRLR 672 the EAT argued that a different approach should be taken to assessing fairness in dismissal cases. Morison J took the view that the band of reasonable responses test was an unjustifiable gloss on the statute and the basis test of fairness in section 98(4) should be applied 'without embellishment'. The reasonable responses test was 'illegitimate because it 'led tribunals to adopt a perversity test of reasonableness', that is to say one in which an employer's decision could not be disturbed unless it was one which no reasonable employer could have arrived at. However in subsequent cases, the EAT reverted to its traditional approach.

2.46 The TUC believes that the Government should revisit the test of fairness as applied in unfair dismissal cases to ensure that employers are required to comply with a minimum standard of substantive fairness when deciding to dismiss an employee.

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

2.47 The DTI asks for views on whether it should invite the TUC, CBI and other representative organisations to develop guidelines on best practice in dispute resolution, including the use of internal workplace procedures and alternative forms of disputes resolution, such as mediation.

2.48 The TUC would welcome the opportunity to work with the Government and the CBI to produce guidelines. It is important that this guidance complements and does not conflict with the ACAS Code of Practice.

2.49 The trade union movement has always been committed to the use of the right to be accompanied, of internal procedures and collective bargaining as the most effective means of resolving employment disputes and ensuring fair

treatment for trade union members. The TUC and affiliated unions provide regular training and advice to union reps and officials on the benefits of grievance and disciplinary procedures for resolving employment disputes. Trade unions only use litigation as a matter of last resort, where they consider it is necessary in order to protect their members' interests or to pursue strategic cases in order to establish a point of principle which will benefit not only the claimants listed in the litigation but also a wider group of workers.

Section three

Beyond the workplace

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

3.1 The DTI has indicated that it is considering introducing a new advice service on dispute resolution, including an enhanced telephone and internet helpline. The purpose of the service would be to provide advice and information on the employment tribunal system and to offer advice on alternative methods of resolving disputes.

3.2 The consultation document provides limited information on how the advice service would function; which organisation would operate the service; and how the quality of the advice provided or the qualifications of those giving advice would be guaranteed. The TUC would welcome further information on these points before expressing final views on the merits or demerits of the proposal.

3.3 The TUC supports the principle of the provision of high quality, impartial advice for employers and employees. It is important that the advice is well-publicised and appropriate resourced. In our view, ACAS is the best placed organisation to provide such advice. The TUC does not believe that it would be necessary to create a completely new advice service. Rather we would support increased investment in the existing ACAS helpline and internet service. It is also welcome that the CEHR will provide a hotline for advice on anti-discrimination law.

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?

3.4 The Government is also considering whether the advice service should also serve as an entry point to the tribunal system, for example being the sole access point for ET1 claim forms.

3.5 The TUC supports the principle that anyone contemplating a tribunal claim should be provided with adequate information on the potential costs, consequences. They should also be made aware of other options which are available to them. The TUC would not however support proposals for a new advice service to form the single entry point to employment tribunals. There is concern that such a service would act as a filtering mechanism for tribunal claims, thereby restricting access to justice.

3.6 We do not agree that the primary purpose of the advice service should be to advise individuals on alternatives for resolving disputes other than proceeding with an employment tribunal claim. In addition, it is unlikely that applicants will consider an advice service to be impartial where it's primary purpose is to steer individuals away from filing a tribunal claim.

3.7 The TUC is also concerned by suggestions that the advice should always be provided direct to individual claimants even where they have a representative acting on their behalf. This could result in individuals receiving conflicting advice which could generate confusion and act as a deterrent to individuals pursuing legitimate claims. There is also a concern that the proposals for a new advice service could conflict with Council of Tribunal standards which apply to all tribunals.

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

3.8 The DTI is also considering establishing new, free and swift procedures for handling monetary disputes, e.g. claims relating to unfair deductions from, or unpaid, wages or paid holiday leave. The aim is to offer a swift adjudication system and to avoid the need for tribunal hearings in straightforward claims. Once again the consultation document offers very limited information on how the procedure would operate. It appears however that tribunal officials would be expected to adjudicate on simple, fact based cases, on the basis of correspondence or telephone conversations with the parties.

3.9 The TUC supports the principle of the introduction of a new swift mechanism for resolving straightforward claims, provided that the service was free, and voluntary in nature. It would be important for applicants to retain the right to opt for a full tribunal hearing in all cases. The types of cases which might be dealt with under this process include failure to pay wages / unlawful deductions; failure to pay redundancy payments; national minimum wage claims and claims relating to unpaid annual leave. Such cases largely hinge on the calculation of monetary sums, as provided for in statute or contracts of employment. They do not involve decisions relating to the reasonableness of employers' or employees' behaviour, complex issues of discrimination law or complicated judgements relating to future losses or injuries to feelings. Cases falling into the latter categories would not be suitable for swifter forms of adjudication. It is also important to recognise that many workers bringing monetary related claims to the tribunals are likely to be employed in non-standard employment relationships, and may face difficulties in establishing their employment status as a 'worker' or 'employee'. These cases often raise complex points of law and therefore may also not suitable for a swift system of adjudication.

3.10 The TUC would welcome further information on the categories of officials who would be given the power to adjudicate in such cases. The TUC takes the view that individuals must be legally qualified and trained to make judicial as opposed to administrative decisions. Tribunal chairs would be well placed to adjudicate on such claims. Alternatively, consideration could be given to providing existing employment related inspectorates with enforcement powers on straight forward and monetary based employment rights. ACAS would not be an appropriate body to deal with such claims.

3.11 We also question the proportion of claims which it may be possible to adjudicate through such a mechanism. Many former 'Wages Act' claims are likely to form part of a wider claim relating to unfair dismissal. Similarly, it would be interesting to discover how many claims for redundancy pay are filed with a tribunal separate from a wider claim for unfair dismissal. The TUC would not support proposals for one aspect of a claim to be handled through the swifter process, while the remainder of the claim proceeds to a full tribunal hearing.

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?

3.12 The TUC fully supports proposals to increase the capacity of ACAS to offer dispute resolution services in the period before a claim has been filed with an employment tribunal service. ACAS already has the statutory powers necessary to provide conciliation prior to claims being filed. However, it is essential that additional funding is made available if these services are to be further promoted and expanded. This would ensure that the increased demand in work does not detract from ACAS's ability to conciliate claims which have been filed with an employment tribunal.

Qu. 13 and 14 . If it is necessary to target these new services, should the Government set Criteria to guide Acas to prioritise particular types of dispute?

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 procees 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.

3.13 The TUC recognises that it may be necessary for ACAS to target resources in order to respond to increasing demand for services. However the TUC would not support any changes to their statutory duties. Any revisions to the scope of the existing statutory duties to require to ACAS to target particular types of claims would run the risk of undermining the credibility and impartiality of the service. In addition, it is important to note that the large majority of claims which are made to an employment tribunal fall into one of the categories listed above.

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

3.14 The TUC firmly supports proposals to remove the fixed term conciliation periods which place time limits on ACAS' duty to conciliate employment tribunal claims. The TUC has always held the view that the introduction of fixed conciliation periods was inconsistent with the nature and purpose of conciliation. It is widely recognised that employers will not focus on agreeing to a settlement in employment disputes until a claim is listed for hearing or the hearing is imminent. There is evidence that ACAS' success rate in conciliating claims covered by the fixed conciliation period arrangements has fallen marginally since the legislation was introduced in 2004. The TUC therefore welcomes the proposal to dispose of fixed period conciliation.

Section four

More effective employment tribunals

16. Should the Government simplify employment tribunal forms?

4.1 The TUC welcomes proposals to simplify the ET1 claim forms. In our view, the new claim form is too long and complicated and places too great an onus on the claimant. Many of the questions set out in the form raise complex issues and in most instances claimants need to seek expert legal advice in order to fill out the form satisfactorily. For example, the apparently straightforward question of whether an individual is a 'worker' or an 'employee' can in some contexts raise complex legal issues and can be confusing for claimants.

4.2 The form therefore places applicants who lack representation and those with literacy or learning difficulties at a significant disadvantage. The length and complexity of the form is also likely to deter individuals from bringing a claim at all, regardless of the merits of their case.

4.3 If the pre-acceptance is removed from the employment tribunal procedures it would be possible to simplify the existing forms significantly. The TUC would not support any reduction in the amount of information which employers are required to supply on the ET3 response form.

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

4.4 The DTI is also canvassing views on whether claimants should be asked to provide an estimate or statement of loss when making a claim to an employment tribunal. The Government states that purpose of this proposal is to enable the faster settlement of straightforward claims.

4.5 The TUC does not support the proposal to ask claimants to provide an estimate or statement of loss at the time of making a claim to tribunal, , particularly if a new general power is also to be introduced for tribunals to modify awards on the basis of the lack of attempts by the parties to settle disputes before filing a claim with an employment tribunal. At present there is no such requirement. The ET1 claim form requires claimants to provide a number of items of 'relevant required information' (Employment Tribunal Rules 2004, Rule 1(4)) but this does not include a requirement to provide a schedule of loss at this stage. However, under their powers to make case management orders, tribunals frequently now require claimants to disclose a

schedule of loss to the respondent prior to the hearing. The purpose of the schedule of loss is to indicate precisely what the claimant is alleging they have suffered in terms of financial loss and to inform the respondent of this so they are aware of the detail of the compensation claim in advance of the hearing. This can concentrate the minds of the parties and encourage them to negotiate a settlement in some cases. However, not all claimants may be in a position to do this and certainly not all unrepresented claimants. The Gibbons report quotes SETA (2003) research into the profile of ET claimants, which shows that unqualified claimants were significantly over represented, when compared with the employed population as a whole.

4.6 There is concern that claimants, especially those who are unrepresented, may be ill informed of the nature of their claim or the possible remedies available before completing their claim form. As a result they could be penalised or disproportionately affected by tribunal powers to modify compensation awards or impose costs awards. If an individual under-estimates the value of their claim on the claim form but after receiving advice refuses to agree to a settlement offered by the employer above the level stated on the form, there is a concern that a tribunal may take this as evidence of an unwillingness to resolve the claim prior to entering the tribunal process. The TUC therefore takes the view that this proposal should not be implemented.

4.7 Further failure to provide an estimate of loss should not present a barrier to seeking redress. Claimants have strict time limits to meet for submitting their claim form and if they require information from the employer (for example about future award of bonuses) in order to accurately assess their loss, could risk missing the deadline, particularly if the employer is uncooperative. Once a claim has been submitted, case management procedures enable Orders to be made for disclosure and exchange of information and schedules of loss can be requested and prepared at this stage under existing tribunal rules.

Qus 18 and 19 Would simplifying the current time limit regime through harmonisation be a helpful additional reform, whether or not the statutory dispute resolution procedures are repealed?

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

4.8 There is wide consensus that the existing legislation on time limits for claims to an employment tribunal is excessively complicated. Different time limits operate according to the nature of the claim. For all contractual claims and some statutory claims there is a three month time limit. For other statutory claims a six month time limit applies. The dispute resolution legislation added further complexity to time limit arrangements. Where the statutory procedures apply time limits can be extended by three months in certain cases.

4.9 Since 2004, the inconsistency in the application of statutory procedures has caused significant confusion for applicants. Frequently when ET1 clams forms are submitted, aspects of a claim will be accepted by tribunals and others rejected pending the completion of internal procedures or rectification of some flaw on the claim form. This generates unnecessary bureaucracy for the Employment Tribunal Service and the ACAS conciliation service. In addition, it creates delays and reduces the prospect of conciliation by ACAS.

4.10 The TUC therefore welcomes proposals contained in the Gibbons Review and DTI consultation to harmonise rules on time limits. We support the principle that employees and employers should seek to exhaust internal procedures before resorting to litigation. The 2004 legislation recognised it is not uncommon for internal procedures to take more than three months to complete. The legislation therefore allowed for the normal three month limit to be extended to six months in many circumstances. The TUC believes that this principle should be maintained and that a uniform 6 month time limit should apply to all claims handled by the employment tribunal service. It is also important to note that it would not be possible under EU law to harmonise all time limits to three months.

Qus 20 and 21 Would total or partial harmonisation of the grounds for extension to the extent possible subject to legal constraints, be a helpful additional reform?

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

4.11 The TUC also welcomes suggestions from the Government to harmonise the grounds for extending the time limits for submitting claims to an employment tribunal.

4.12 The TUC takes the view that the broader 'just and equitable test' should apply to all jurisdictions. There is concern that the ‘reasonably practicable’ test has been interpreted narrowly and sometimes inconsistently by tribunals. The application of the ‘just and equitable test’ would broaden the grounds on which a tribunal could grant an extension and would improve access to justice. It is important to note that it would not be possible under EU law to extend the 'reasonably practicable test' to EU based employment rights.

22. Do you have views on specific ways in which employment tribunal procedures and case management could be improved?

4.13 The TUC welcomes many of the proposals contained in the consultation document for revising employment tribunal procedures. In particular, we support the removal of the pre-acceptance stage in employment tribunal procedures; the introduction of a six month time limit for all applications to employment tribunals and the harmonisation of grounds for the extension of

time limits, providing tribunals with the discretion in all jurisdictions, to determine whether it is just and equitable in the circumstances to permit an extension. Proposals to removal the fixed period ACAS conciliation scheme are also welcome.

4.14 The TUC is concerned that tribunals do not always take a consistent approach to case management or to the application of tribunal procedures. The 2004 Regulations introduced extended powers for the Presidents of the Tribunal Service to issue practice directions. The Presidents could be encouraged to issue additional directions to ensure consistency of approach.

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

4.15 Tribunals should make better use of their existing powers to manage multiple claimant cases. Cases involving related issues should be stayed across the country until judgement is given in a lead case, for example, and it may also be helpful if such cases were directed to the same tribunal for management and hearing.

4.16 The case management powers of tribunals should not be changed to mirror those that exist in the High Court where the court has wide-ranging powers, including determining which claims should be litigated as a group, what the common issues to be heard are, which future claims should be directed to join the group, and which should go forward as the test case. The TUC does not believes such powers are appropriate for multiple claimant employment cases. Applicants and their representatives should retain influence over which cases are selected as test cases. Tribunals should continue to work with the parties in identifying test cases and agreeing which should be bound by the outcome. Cases such as those relating to equal pay are highly complex, involve parties who are in an ongoing employment relationship, and require an understanding of legacy issues and how employment practices and pay systems have developed over time in a particular workplace or sector. Furthermore, as they are collective in nature (hence the multiple claims), the parties are normally represented and co-ordinated by trade unions which makes the consultative approach less onerous than it would be in situations where there are numerous individually represented parties.

4.17 Where litigation involves a collective workplace practice or pay system and thus gives rise to multiple claims, trade unions should be able to bring a representative action on behalf of a group of members, rather than having to lodge, and the tribunals having to administer, multiple individual claims. The TUC is currently considering wider issues of enforcement where there is a systematic breach of employment and discrimination law. We would hope to discuss these issues with the Government in a separate context.

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?

4.18 In cases involving multiple equal pay claims and discriminatory provisions in collective agreements there may be a role for CAC intervention as it has experience of adjudicating on collective matters and previously had a role enforcing equal pay.

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

4.19 The TUC believes that the existing powers for employment tribunals are sufficient and effective for dealing with weak and vexatious claims. The Gibbons Review reports that it was told that there are instances where claimants bring cases 'unnecessarily' to an employment tribunal and that employment tribunals are 'perceived' to be failing to deal with such cases effectively. The evidence to support these claims has not been published by employers' organisations.

4.20 Paragraph 4.18 of the consultation document acknowledges the powers already available to tribunals to require deposits, issue costs orders and strike out claims. The TUC believes these are considerable and sufficient. It is vital when considering this proposal that the objective of ensuring access to justice and the rules of natural justice are not undermined. The Gibbons Review itself acknowledges that ET claims are costly for claimants, both in terms of financial and administrative burden of preparing a case, the stress and anxiety involved and possible damage to future career prospects. Given such high stakes, the vast majority of claimants are extremely unlikely to be making frivolous or vexatious claims. For many (and particularly for unrepresented claimants whom make up around half of individual case applications - cited in Gibbons report, paragraph 1.27) taking a claim to ET is likely to be extremely daunting. The TUC is also concerned that if anything, existing powers are too great, allowing action against claimants for bringing a 'misconceived' claim – this is an unhelpful and punitive provision that is potentially a barrier to justice – particularly for unrepresented claimants. How are such applicants supposed to accurately assess the respective strengths and weaknesses of their case? The TUC is concerned that the threat of cost awards should be not allowed to deter claimants from seeking redress through the ET system (see the case of *Gee v Shell UK Ltd* 2003 IRLR 82) for a case on exactly this point.

4.21 We therefore believe the existing powers for tribunals are sufficient in this area and should not be extended. We however, recognise that it may be helpful if the Presidents to the Employment Tribunals were to issue guidance to ensure a consistent application of the existing powers.

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

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

4.22 The TUC does not support any extension of the power of tribunal chairs to sit alone when adjudicating on employment claims. The tripartite nature of employment tribunals remains one of the system's principle strengths. Lay members contribute important industrial relations experience and insight, which complements the legal expertise of the chair.

4.23 The Gibbons review paper states that the framework of employment rights in Britain is '*intended to combine social justice with economic prosperity.*' It is vital that any proposed change to the dispute resolution system does not compromise social justice in the interests of pursuing economic prosperity and that ensuring access to justice remains the overriding objective of the employment tribunal service. This is enhanced by the input of lay members, drawn from both sides of industry with considerable knowledge of current industrial relations practice and who more accurately reflect the profile of the working population than the judiciary.

4.24 The consultation document refers to lay members being deployed where '*they add most value*' but does not indicate where this is seen to be. The TUC believes that the particular value of the lay members is in their industrial relations and labour market knowledge and expertise and that this is valuable across the range of jurisdictions.

4.25 As the DTI consultation paper notes, chairs can already sit alone on proceedings set out in S4(3) of the Employment Tribunals Act 1996 (this includes breach of contract claims, certain trade union matters under TULR(C)A, matters concerning written statements of employment particulars and itemised pay statements). In addition, chairs may also sit alone where parties have given their written consent for this to happen and they also hold case management discussions and pre-hearing reviews alone. The TUC believes that the current provisions in Section 4(1) ETA strikes the right balance between cases heard by a panel consisting of a chair and two lay members and circumstances where a chair may sit alone and we therefore strongly oppose any further reduction in the role of lay tribunal members.

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?

4.26 Should the Government aim to promote employers' compliance with discrimination law through better advice and guidance, rather than be

widening the powers of employment tribunals to make recommendations in discrimination cases?

4.27 Tailored advice and detailed guidance on discrimination law and good equality practice should be available to employers through an adequately staffed and resourced Commission for Equality and Human Rights. However, there will always be some employers who ignore such advice and guidance, either because they have no interest in complying with discrimination law or because they do not understand how it applies to them. In addition, even where advice and guidance is accessed, litigation still arises and is often necessary to establish whether a particular act or employment practice constitutes unlawful discrimination.

4.28 Tribunals should have wider powers to make recommendations in discrimination cases. By their very nature, discrimination claims frequently involve establishing unfavourable treatment or disadvantage not just of the individual claimant but of a particular group in the workplace, such as women, black and minority ethnic workers, or LGBT workers, to which the individual belongs. Tribunals should therefore be able to make recommendations that not only require the employer to take action to stop or reduce the adverse impact on the individual complainant but which require the employer to amend their policies and practices to protect other affected workers and prevent future claims arising. There should also be provision for cases where the tribunal has drawn attention to failings in workplace practices for them to be referred to the CEHR for further investigation, guidance, and monitoring of compliance with any orders given.

4.29 In addition, consideration needs to be given to the problems faced by claimant in enforcing their tribunal awards. Currently, where an employer fails to comply with a tribunal award to pay compensation, an individual has to take a claim to the County court. This is a costly and complex procedure. The TUC believes that the Employment Tribunals should have increased powers to make sure that employers comply with the decisions of tribunals and do not act in contempt.

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