

# Reforming the Employment Tribunal System – Taking Forward the Principles of Wider Court and Tribunal Reform in the Employment Tribunal

Submission by Prospect to the Department for Business, Energy & Industrial Strategy & the Ministry of Justice

**16 JANUARY 2017**

## **Introduction**

Prospect is an independent trade union currently representing over 138,000 members in the public and private sectors. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, broadcasting, entertainment and media, defence, education, energy, environment, heritage, industry, scientific research and in telecommunications.

Prospect welcomes the opportunity to respond to the consultation on Reforming the Employment Tribunal System – Taking Forward the Principles of Wider Court and Tribunal Reform in the Employment Tribunal.

## **Key Points**

Prospect welcomes the recognition within the consultation paper that Employment Tribunals and the Employment Appeal Tribunal are rather different to most other tribunals in that they are dealing with disputes between parties rather than administrative tribunals which deal with disputes between parties and the state. This makes their role and procedures very different, and we consider it is crucial that this distinction is recognised and maintained.

Prospect also welcomes the recognition that the judiciary and non-legal members in Employment Tribunals and the Employment Appeal Tribunal bring particular specialist expertise and knowledge and that this needs to be maintained.

Prospect is strongly opposed to the fees being required for employment tribunal claims, and particularly the excessive nature of those fees. There is clear evidence that the introduction of fees has led to a dramatic reduction in the number of claims. This has led to a massive decline in cases being brought before tribunal, with many workers being priced out of access to justice. We believe that before any other reforms are considered it is essential that the Government issues the findings of their review on fees.

It is also notable that despite the significant reduction in the number of cases there are still extensive delays in getting cases listed. For example a claim presented to the tribunal at the beginning of October 2016 has been listed for a three day hearing in October 2017 (with this being the earliest date offered to the parties). Also we have had two cases in the last year that have been postponed by the tribunal a day or two before the hearing because of a lack of judicial resource. It is very worrying that such excessive delays occur.

Our key concerns in response to the consultation are :

- There is not enough detail given in the consultation document as to the extent to which the tribunal service will become digitised.
- The current digital system is not equipped to deal with an increased volume of casework without further resource being invested and improvements made.
- Any delegation of work for judges to caseworkers should only be for purely procedural issues which are not contested. Prospect is concerned that the level at which primary powers are set will mean other decisions will be also delegated to them.
- Lay members in the ET and EAT provide a vital role and this should be maintained.
- By reducing the number of cases on which lay members sit, members currently sitting in tribunals may have their existing skills diluted by sitting less frequently in the employment tribunal.
- We do not believe that the suggestion of online determination of cases would be appropriate for the vast majority of cases.

We have had the benefit of seeing the response submitted by the TUC, and can confirm that Prospect is in full agreement with the points made by the TUC. We are therefore submitting a fairly brief response.

***QUESTION 1 – Do you agree that with the right system in place the specific needs of users of Employment Tribunals and the Employment Appeal Tribunal can be accommodated in a more digitally based system?***

Prospect welcomes the proposal to have a more digitally based system, in part. We believe that some procedures can be streamlined and made more accessible (such as the claim and response forms) but we are concerned about the suggestion of determination of cases on line as we believe that this would not be suitable for the vast majority of cases.

The current system has not always worked effectively and has often increased time-pressures. Examples of such issues include, the system being unavailable when seeking to lodge claims, a failure of the automatic acknowledgment to a claim recording submission of documents attached to the claim form, the automatic response not detailing the list of multiple claimants and difficulties with making payments on line. Furthermore at the moment there is often a difficulty with being able to check what has been received or why a system seems to be down with tribunal service staff.

We consider that there could be improvements by allowing employers to respond to claims on line, perhaps based on the 'Money Claims Online' system used for small claims in the County Court, where parties can see the progress of the claim.

Should the system become digitised further, resource would need to be invested in the current system to ensure it can effectively deal with the increased usage.

We do generally agree with proposals to create a more digitally based system for dealing with purely procedural aspects of the claims process. However, whilst we welcome attempts to streamline and speed up the process, we do not feel that the consultation document goes far enough to explain the extent to which the system will be digitised.

Prospect also believes that there needs to be an option to retain the ability to make claims on paper. Whilst all of the claims presented by the trade union on behalf of members are

now done on line, we consider that that there needs to be some recognition that not everyone will feel comfortable with a digitised service.

***QUESTION 2 – What issues do you think need to be considered when deciding whether a claim would be suitable for online consideration?***

Prospect expresses serious concern at the suggestion that some cases could be determined online. Further guidance as to how this would work in practice would need to be provided before Prospect could provide more detailed comment.

However we should stress that we believe the majority of cases in the employment tribunal would not be suitable for on line determination. Nearly all claims are dependent on detailed factual evidence and often fairly complex legal argument, this certainly applies to discrimination cases, but even seemingly 'simple' cases of unpaid holiday pay or unlawful deduction of wages often include a detailed mix of fact and law.

We would be very concerned that the quality of judicial decision making could be impacted by an attempt to create online consideration.

***QUESTION 3 – What factors do you think should be taken into consideration when creating the scope to delegate judicial functions in Employment Tribunals?***

Prospect considers that there should be only very limited functions of the tribunal carried out by caseworkers, and we welcome the view that in all cases, a party may apply for a decision to be considered afresh by a judge.

Nonetheless, it is Prospect's position that there would be few determinations that would be appropriate for caseworkers, and these would be entirely procedural aspects without any significant impact on the manner in which the case progresses or is ultimately determined by the tribunal.

Although Prospect notes that the intention is to delegate mainly procedural work to caseworkers, Prospect is concerned that the level at which the primary powers are set will mean other decisions may be delegated to them. Prospect is particularly concerned by the suggestion in the consultation document that the decision to permit a party to amend a document may be taken by a caseworker. Such a decision is often taken after consideration of complex legal argument and therefore would need to be taken by a judge.

We believe that it may be appropriate for case workers to deal with some procedural aspects of case management, but this needs to be limited to such issues as uncontested applications for postponement or variation of case management orders. Where the application is contested or will have a direct impact on the outcome of the case the matter should be dealt with by an Employment Judge.

Prospect reiterates that caseworkers should not be required to make decisions on jurisdiction, liability or remedy.

***QUESTION 4 – Are there any specialist skills that a caseworker dealing with Employment Tribunals and the Employment Appeal Tribunal would need, distinct and different from those required for carrying out casework in other tribunals?***

Employment tribunals are recognised as being rather distinct from other tribunals and often involve longer and more complex hearings, so we believe it is important that caseworkers are experienced in dealing with employment law and tribunals.

***QUESTION 5 – Are there specific issues relating to Employment Tribunals and the Employment Appeal Tribunal that need to be taken into consideration in relation to making changes to the law regarding panel composition? Please give reasons.***

Prospect considers that the matters that come before Employment Tribunals are often extremely complex, both legally and factually. Many cases involve multi day hearings, and legal representation is much more prevalent in Employment Tribunals than in other tribunals (largely due to this complexity). We therefore consider that there needs to be specialist Employment Judges and lay members, in both the Employment Tribunal and Employment Appeal Tribunal.

Both Employment Judges and lay members require considerable experience and very specialist training to determine the cases before them. Prospect feels strongly that lay members have a vital role in both the Employment Tribunal and Employment Appeal Tribunal. Lay members with good experience of issues that arise in the workplace are well placed to determine many issues in respect of employment law, where the test is often reasonableness and fairness.

There is also a risk that by reducing further the number of cases on which lay members sit, members currently sitting in tribunals may have their existing skills diluted by sitting less frequently in the employment tribunal. This experience and training is crucial to enable them to deal with the complexities of cases coming before tribunals.

Following changes in recent years there are now only discrimination and whistleblowing claims that are automatically determined by a full panel in the employment tribunal. We believe that this change has been unhelpful and Judges have lost the very real added value of the lay members in other cases.

We consider that there should be no further increase in the number or type of cases heard by a Judge alone in employment tribunals and similarly in the EAT.

We consider that the tri-partite arrangements for Employment Tribunals and the EAT worked well, and the best approach is to have a Judge sitting with two lay members with experience of both sides of industrial relations and workplace issues.

Prospect does however, support the intention to appoint lay panel members to cases where they are experts in the issues and contends that there needs to be greater specialisation of members.

Should such changes to the panel composition be made, there must be a transparent criteria for determining whether lay members should be called upon.

We believe that the existing power for Judges to determine that lay members should hear a case must be retained and should be used much more frequently. Prospect would support the use of Practice Directions in this area to ensure a greater level of consistency is achieved across ETs in respect of the management of cases.

***QUESTION 6 – What criteria should be used to determine the appointment of the new employment practitioner member of the Tribunal Procedure Committee? Please give reasons.***

Prospect believes that responsibility for ET rules and procedures should remain with BEIS.

Prospect considers that those with responsibility for determining rules and procedures should have specific knowledge of employment law and workplace practice and procedures. Prospect is concerned that the Tribunal Procedure Committee would not have the relevant expertise or experience to deal with Employment Tribunal procedures, as cases handled by Employment Tribunals are different to those heard by other Tribunals.

Prospect agrees with the TUC proposal that the procedure followed in the 2012 Underhill review is more appropriate for reviewing ET rules and procedures.



***QUESTION 7 – Do you agree that the proposed legislative changes will provide sufficient flexibility to make sure that the specific features of Employment Tribunals and the Employment Appeal Tribunal can be appropriately recognised in reformed justice system?***

Prospect has no specific comment on this.

***QUESTION 8 – Do you anticipate the impacts of the proposed reform to be disproportionately large for small or micro sized businesses? Please explain your answer, referring to evidence as necessary.***

***QUESTION 9 – Do you agree that we have correctly identified the range of equalities impacts, as set out in the accompanying Equalities Impact Assessment, resulting from these proposals? Please give reasons.***

Prospect does not have any particular comment on this but does reiterate further guidance as to how an increased digital process would work in practice before proper consideration of these points can be given.

**PROSPECT**

16 January 2017