The Law Society

What is the future for Employment Tribunals?

A summary of David Latham's thought leadership speech.

August 2014

FORWARD

This paper is based on a presentation made on 4 June 2014 by David Latham, following his recent retirement as President of the Employment Tribunals of England & Wales.

David Latham was invited by the Employment Law Committee of the Law Society to share his thoughts on the issues facing the current Employment Tribunal system and how it might be appropriate to shape its development over the next few years. Groups with special interest and knowledge of employment law were invited to attend the presentation and to put forward their ideas.

Our objective was to have an informed debate about what legislative and other changes could be made to the Employment Tribunal in England & Wales. Given that it is less than a year to the General Election it is an opportune time to engage in this debate.

There will be particular interest in the part of the presentation in which he discussed where we might go from here. New ideas were put forward around options on alternative dispute resolution, equal pay, creating a new Employment and Equalities Court, the enforcement of awards and how to best utilise the skills of lay members.

Some ideas are radical and would present a significant departure from the current system. We have yet to form a view on the proposals. The purpose of this paper is to stimulate debate. Over the next 6 months we will gather more evidence before publishing recommendations on how to best resolve those employment disputes that leave the work place. Details about how you can contribute to our investigation can be found at the back of this paper.

The Employment Law Committee looks forward to hearing from you.

Best wishes,

Angharad Harris
Chair of the Employment Law Committee of the Law Society of England & Wales

INTRODUCTION

Employment Tribunals have changed dramatically since their creation in 1971. Given that Employment Tribunals are a creature of statute they have been, and continue to be, heavily influenced by politics. In looking at the history and development of the Employment Tribunals David Latham highlighted particular features that are unique to the Tribunal system. Chief amongst these was the large growth in multiple claims. One feature of multiple claims is that they are mostly to do with equal pay, which almost entirely emanate from the public sector - notably the NHS, local authorities and central government - or are insolvency based.

There have been three recent major procedural changes:

- the introduction of fees in order to proceed with a claim in the Employment Tribunal;
- the mandatory requirement to go through early conciliation before being able to lodge a claim in the Employment Tribunal; and
- a complete redrafting of the Employment Tribunal Rules.

The redrafting of the Employment Tribunal Rules is significant in that for the first time the process was completely judicial led. From the perspective of tribunal users the simpler language and the concepts used should be easier to navigate. The new rules contain conceptual changes that provide greater scope for the case management of claims. We are already seeing an increase in the number of preliminary hearings and this trend is set to continue as increasing pressure grows to resolve major claims.

The case management of some individual cases has become harder because of the reduction in assistance available from voluntary advice centres whose services have shrunk due to legal aid cuts. This is seen on a practical level in the Employment Tribunal in how some claims are not properly framed, with the result of consuming greater judicial resources.

The current Tribunal statistics show a significant drop in the number of claims being lodged in the Tribunal system. Detailed data analysis will be required to establish the longer term trend and implications.

Employment law remains complex and Employment Tribunals are equipped with specialist judges. The purpose of the Employment Tribunal system remains to provide a service to the public who need redress in respect of their statutory rights.

The backdrop to this continues to be the huge pressure on the public funds required to pay for a Tribunal system. **Given this pressure, it is appropriate to address what a today's society needs and wants in terms of modern dispute resolution. We need to consider what framework can best deliver what is needed.**

ALTERNATE DISPUTE RESOLUTION (ADR)

ADR is in vogue. The Government is trying to spread ADR across many jurisdictions. There are a number of ways in which dispute resolution for employment matters can be expanded.

It should be noted that ADR has now been formally built into the new Employment Tribunal Rules which gives Employment Tribunals the power - wherever practicable and appropriate - to encourage the use of the services of Acas, judicial or other mediation, or other means of resolving their disputes by agreement. As yet this power is little used. There is further scope for alternative dispute resolution through the initial consideration process that was also introduced in the new Employment Tribunal Rules.

It was suggested that an ADR process could attach to various stages of the Employment Tribunal process. It might be at the initial consideration stage of a claim as outlined above. It might involve having Acas present at a preliminary hearing dealing with case management issues and then using the opportunity of having both parties present to seek to conciliate. In this regard, a pilot scheme operated by Acas in London was considered to have been successful. A further pilot is being held in Leeds.

One option might involve an employment judge making a decision by considering the papers. This would be a quick and cheap way of getting a resolution. However, the nature of employment disputes means that there will often be inequality in position and as such appropriate safeguards would need to be put in place. Further, such a process could only take place with the express agreement of both parties.

Another route might be through the use of **early neutral evaluation** (ENE). This would enable the judge at an early stage to state, on the basis of the evidence heard up to that point, what they believe the likely outcome of the case would be. By receiving an objective evaluation parties may decide to move away from unrealistic positions, or to focus on the issues that are central to the determination of the case. The success of ENE would very much depend upon the parties' faith in the fairness and objectivity of the judge, plus both parties must be willing to compromise.

A variant of ENE would be for judges to give an “early indication” as to what they think the outcome would be in a case. However, such an intervention would require particular care and express agreement from the parties otherwise there is a risk of an accusation of bias, which could potentially compromise the entire proceedings.

All of these ADR ideas could be incorporated into a “one stop shop” court designed for all matters under its jurisdiction. In broad terms there would be a very informal process at “ground floor”, with the option for a user to opt for a more involved determination process if they went higher up the “floors” with the process at the top being the most formal, used for full-blown litigation. Users would make their choice depending on finance and the complexity - both legally and emotionally - of the case. Subject to appropriate safeguards being in place, the general concept would be to create a mechanism for justice that allows parties to choose in what form it was delivered and at what speed.

In such a system judges would no longer be able to restrict themselves simply to determining disputes. The notion of judges “rolling up their sleeves” and becoming

involved in the type of dispute resolution the users had elected to use was put forward as a solution. It was recognised that to take forward this type of concept there would needs to be engagement from both Department of Buisness Innovation and Skills (BIS) and the Ministry of Justice (MoJ) given that BIS currently has responsibility for the Employment Tribunal Rules whereas the MoJ have responsibility for the operation of the Employment Tribunals, including the issue of fees.

In broader terms the concept set out above could be applied in the whole civil justice system, having a single starting point with referrals on to specialist jurisdictions, or alternative forms of dispute resolution. In such a system the possibility of a much wider remit for ACAS across all areas of civil dispute resolution was canvassed.

REASONS FOR BRINGING ALL EMPLOYMENT CLAIMS INTO ONE COURT

Another potential area of reform is to **draw upon the huge expertise in the Employment Tribunal system by ensuring that employment types of claims are dealt with in a single Employment and Equalities Court.** This would see the end of breach of contract and discrimination claims being heard in the County Court and the High Court. It would also enable all breach of employment contract claims to be dealt with by Employment Tribunal to be properly dealt with rather than being limited to claims of £25,000. There is no basis for imposing such a limit given that Employment judges can make unlimited awards in complex discrimination cases. Further, the new Employment Tribunal rules now provide for Employment judges to carry out costs assessments. In addition, this court could also deal with employer's liability for personal injury claims.

Logistically the Employment and Equalities Court could operate in a similar way to the newly formed single Family Court. The Family Court exercises jurisdiction in all family proceedings, so there no longer exists separate family jurisdiction in the magistrates' courts and county courts. This means users do not have to work out whether to make an application to the county court or magistrates' court. The Family Court is a national court thus able to sit anywhere. The remit of such a court could also logically include equality claims relating to goods and services.

CHANGE THE LEGAL TEST IN EQUAL PAY CLAIMS

The structure for the determination of equal pay claims has barely changed since the legislation was enacted in 1970. **A strong view was expressed that this is an area of the law that is simply not working.**

Equal pay legislation is too technical. These cases involve too many detailed separate rules and often require an overly lengthy "expert" procedure. Where specialist job evaluation advice was needed by the tribunal, this could be provided by a job evaluation expert sitting as an assessor with an Employment judge.

It was proposed that **the special contractual and procedural rules relating to equal pay could be abolished. Instead such matters could be classified only as a form of sex discrimination.** The view was also expressed that European law did not preclude equal pay from being treated as a type of sex discrimination.

The merits of adopting such an approach would be that it would dispense with the automatic need for independent experts. Equal pay disputes should be dealt with as an aspect of sex discrimination.

CREATE A PANEL OF LAY MEMBERS WITH SPECIALIST INDUSTRY EXPERTISE

When employment tribunals were first established it was envisaged that they would act as an industrial jury with the panel made up of a legally qualified judge, and two lay "wing" members, with one representing industry and the other from a union background. In reality this is now no longer the case.

Indeed the normal position now is for a judge alone to determine an unfair dismissal claim. The evidence indicates that this has led to a speedier resolution of claims. The question of how the skills of lay members could be better used within the Tribunal system in a more cost effective way that also gives added value to the judicial process was posed.

It should be noted that the value of lay members on complex discrimination matters was not questioned. Rather the proposition was whether there was merit in redefining lay members into specialists and then grouping them in accordance with their industry expertise and/or particular specialist sector knowledge. In these circumstances, it would enable a judge to have a lay member on a case where, for example, a medical background and/or with a background in financial services might be of particular assistance in understanding the issues.

TRIBUNAL AWARDS AND STATE ENFORCEMENT

The enforcement of tribunal awards has been a long-term problem. Reference was made to the fact that we already have state enforcement for the National Minimum Wage. There might also be a case for implementing a state enforcement mechanism for Employment Tribunal awards. It was noted that "penalty awards" for breach of employment rights by an employer that are paid to the State are collected immediately by the State.

The proposition that employment tribunal awards should be treated as preferential debts in the event of an insolvency was put forward. This would have the added benefit of saving money that would otherwise have to be claimed from the National Insurance Fund. The rules on insolvency are unhelpful because many unpaid awards are against insolvent businesses. There is a particular issue when an award is made against an employer that results in "phoenix companies". Some felt that the responsibility to pay should stay with the directors and owners when they begin to trade again through another company.

The possibility of whether there might be a case for giving Employment Tribunals the power to make personal awards against directors and owners of phoenix companies, which would then facilitate a state enforcement mechanism, was canvassed. Arguably such a mechanism would then make the collection of such awards easier and more cost efficient.

INTERESTED IN JOINING THE DISCUSSION?

If you have specialist interest or knowledge in employment law we would be interested in hearing your views. Please contact Nick Denys on

Nick.Denys@LawSociety.org.uk. In September we will produce some specific questions that we would be interested in finding answers to.

We want all employment law practitioners to join in this discussion. Please join the Employment Law Committee's Linked–In group:

https://www.linkedin.com/groups?home=&gid=5085756&trk=anet_ug_hm