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Call for evidence to the Public Scrutiny Committee in respect of the Enterprise and Regulatory Reform Bill 2012-13

Response from the Employment Lawyers Association

16 July 2012

EMPLOYMENT LAWYERS ASSOCIATION RESPONSE

CALL FOR EVIDENCE TO THE PUBLIC SCRUTINY COMMITTEE – ENTERPRISE AND REGULATORY REFORM BILL 2012-13

WORKING PARTY RESPONSE

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather than to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee, chaired by Paul McFarlane and David Widdowson, was set up by the Legislative and Policy Committee of ELA, to respond to the call for evidence to the Public Scrutiny Committee considering the Enterprise and Regulatory Reform Bill 2012-13. Its report is set out below.

Enterprise and Regulatory Reform Bill 2012-13

A. Clauses 7-9 - Conciliation

General comments

1. In principle we consider this to be a positive step towards swifter resolution of employment disputes and reducing the burden on Employment Tribunals. We do, however, have some reservations as to how this may be achieved in practice.

2. We are unsure how many claims would actually settle using this process. In our members' experience, alternative dispute resolution, works best when both sides voluntarily engage in the process with the genuine desire to resolve the dispute. By compelling the parties to take part in pre- claim conciliation, it may result in this process being seen simply as another necessary hurdle that Claimant has to go through in order to present their claim at an Employment Tribunal. Some of our members have observed that some Respondents prefer to have a complete picture of the case (including documents and witness evidence) before engaging in settlement discussions and test the Claimant's resolve. Similarly, from a Claimant point of view, employment issues are matters that affect them personally. It can often be the case that Claimants want 'their day in court' and imposed conciliation will not dissuade them from this course of action.

3. ACAS has a long history assisting parties to resolve workplace disputes and involving them at an early stage, before a case potentially goes to an Employment Tribunal, should be encouraged. It may result in the matter being resolved without having to use the valuable resources of an Employment Tribunal. The introduction of a mandatory conciliation process before a claim may be presented to an Employment Tribunal, however, will have significant implications for its resourcing. We say this for the following reasons:

    (i) ACAS is currently under a duty to conciliate Employment Tribunal claims listed in section 18 (1) of the Employment Tribunals Act 1996 ('the Act'). There is no suggestion in the Bill that this will not continue..

    (ii) At present only a fifth of Claimants seek advice from ACAS before submitting their claims. The proposals in the Bill will in future require prospective

Claimants in 'relevant proceedings' to contact ACAS as a necessary pre-condition of presenting a claim. ACAS will then be required to conciliate (new section 18A of the Act).

(iii) Inevitably this will increase the existing workload of ACAS and its officers. Our experience suggests that its resources are already stretched and, if the proposed scheme is to work effectively, those will need to be increased.

(iv) The Explanatory Notes released with the Bill do not address this issue. The Final Impact Assessment published in relation to the "Resolving Workplace Disputes" identifies only savings which would arise from the reduced burden on Employment tribunals. We note that, during the second reading of the Bill, John Healey MP, asked the Secretary of State

'…what increase in resources will he make available to the [ACAS] if everyone who wants to put a claim to a tribunal must first put it to ACAS first?'

The response to this was *'We will indeed rely heavily on ACAS and it is important that it is properly resourced, so we will obviously have to look at that, but we have had no warnings that it cannot handle the processes that we propose to introduce…'*

In light of our comments above we strongly believe that the issue of ACAS resourcing should be proactively reviewed. .

4. As stated above, whilst in principle this proposal is welcomed, as the Bill currently stands, it lacks clarity in a number of key respects which could result in unnecessary satellite litigation if introduced in its current form some of which echo the former unsuccessful statutory disputes procedure. We have the following comments:

Conciliation Officer's certificate

5. In the event that Conciliation Officer considers that settlement is not possible we would suggest that the Conciliation Officer be required to set out clearly in the certificate the 'relevant proceedings' that have not been successfully conciliated.

6. As a consequence, the Conciliation Officer will need to be able to identify 'the relevant proceedings', which may entail some additional legal training for conciliation officers. This, we consider, ought to minimise the possibility of disputes at the Employment Tribunal concerning what 'relevant proceedings' were the subject matter of the Conciliation Officer's certificate.

7. The Bill states that if the Conciliation Officer considers that settlement is not possible or the 'prescribed period' has expired then s/he must issue a certificate to that effect, in the 'prescribed manner', to the prospective Claimant (the draft section 18A (4)). However, the Bill does not currently state what information will be contained in the Conciliation Officer's certificate. We have commented above on the issue of "relevant proceedings".

8. We therefore consider that the Bill and/or the accompanying regulations needs to include a process whereby at the end of the obligatory conciliation process the Conciliation Officer clearly understands what is required to be in the certificate and parties at least know which 'relevant proceedings' have been the subject matter of pre-claim conciliation, such that those matters can proceed to a claim before an Employment Tribunal. This could avoid unnecessary satellite litigation similar to which, for example, followed the implementation of the statutory grievance procedure on the issue what is a 'grievance' for the purposes of the procedure.

Claimant information

9. The fundamental point behind these proposals is to prevent prospective claimants pursuing claims before an Employment Tribunals before using ACAS. The Bill contains provisions requiring prospective claimants to provide 'prescribed information' in a 'prescribed manner' to ACAS (the new section 18A (4)). The only reference is at the draft section 18A(10) which defines "prescribed" as being "prescribed in employment tribunal regulations".

10. Is it intended that new regulations should be drafted to specify these? The draft section 18A(12) does not appear to do so. As drafted this lacks clarity as to exactly what a Claimant is expected to provide. In any event, we suggest that there should be clear guidance provided to Claimants regarding what is required of them so that these requirements can be complied with. Given that a large number of claimants are unrepresented (40,400, according to the statistics published for 2010-11) guidance drafted in non-legalistic way so that it can be easily understood would be helpful. We would suggest that draft guidance is published which is the subject of a consultation exercise to try and achieve this objective.

Complexity

11. The changes to the calculation of time limits for claims are set out in Schedule 2 of the Bill. This seeks to extend the time for presentation of a complaint. It does so by making allowance for the period between

    - the date when a Claimant complied with the new section 18A requirement to seek to conciliate complainants before the presentation of a claim to an Employment Tribunal (Day A); and

    - the date when the Claimant receives, or is deemed to have received, the Conciliation Officers certificate ('Day B').

    This period is not counted. Further, the Bill states that if the relevant provision would (if not extended by the relevant sub-section) expire during the period beginning with Day A and ending one month after Day B, the time limit expires at the end of that period i.e. one month after the end of Day B. We consider that, as currently drafted, these rules are complex and will not be easily understood by employees, employers, their representatives or the Employment Tribunals. To illustrate this point below we have set out below two worked examples of how we understand the new rules on time limit would work in an unfair dismissal case:

    Example 1

    Unfair dismissal: Effective Date Termination ('EDT') = 31.05.12; Time Limit ('T/L') = 30.08.12

    Day A = 15.06.12; Day B = 5.7.12

    1 month after Day B = 05.08.12

    T/L does not fall between 15.06.12 and 05.08.12

    Period which does not count = 16.06.12 – 5.07.12 = 20 days

    Add 20 days to 30.08.12 = 19.09.12

    Extended T/L ends on **19.09.12**

Example 2

Unfair dismissal: EDT = 31.05.12; T/L = 30.08.12

Day A = 15.08.12; Day B = 5.09.12

1 month after Day B = 05.10.12

As T/L falls between 15.08.12 and 05.10.12 extended T/L ends on **05.10.12**.

12. As can be seen from the above, the time limit for presentation of a claim, where the effective date of dismissal is the same, will vary from case to case depending upon how quickly the Conciliation Officer's certificate is received by a Claimant. We anticipate that this is likely to give rise to much confusion and unnecessary satellite litigation on the question of whether a claim has been presented in time or not

13. With discrimination claims, the calculation is likely to be further complicated because the Employment Tribunal may also have to consider whether there has been a 'continuing act'. We recall that when the statutory disciplinary procedure was introduced, similar changes were made to the rules on the calculation of time limits. This resulted in a period of uncertainty for parties about the date when the time limit for presenting a claim for unfair dismissal expired[1].

14. In order to avoid unnecessary satellite litigation on the time limits, we consider that the rules concerning time limits need to be simple and easily understood by all who have to use them i.e. Claimants, Respondents, their advisers and the Employment Tribunal. We do not yet know what the 'prescribed period(s)' will be for ACAS to try and settle claims that sent to them. However, it is clear that the government anticipates that additional time will be required in the process for ACAS and the parties to try and resolve claims using the mandatory conciliation process. Therefore, we would suggest that consideration is given to simply increasing the periods for presentation of Employment Tribunal claims. The existing rules dealing with the circumstances where Employment Tribunals can extend time would remain. This approach, we suggest, has the benefit of simplicity.

B. Clause 10 – Legal Officers

15. When questions about legal officers were proposed (as question 55) in the "Resolving Workplace Disputes" consultation in 2011 the proposals were that some interlocutory work undertaken by the judiciary might be undertaken by qualified legal offers and discussion was principally about the nature of work that could be given to legal officers, particularly under Rule 10.

16. In the response to the consultation, published in November 2011, government said that it would consider the role of the legal officers in the light of the fundamental review of tribunal rules. The present proposal, however, appears to have been published well before that fundamental review concluded, so there appears to have been a change of approach.

[1] Under the Employment Act 2002 (Dispute Resolution) Regulation 2004, the time limit for bringing an ET claim was extended by three months where an employee invokes the statutory grievance procedure. The most significant cases relating to time limits for the Statutory Grievance Procedure were: *Singh t/a Rainbow International v Taylor* and *Joshi v Manchester City Council* (both decisions of the EAT).

In *Singh t/a Rainbow International v Taylor UKEAT/0183/06* the EAT confirmed that the three month time extension runs from the day after the day on which the original time limit for submitting the tribunal claim expires (holding the total time limit was six months). However, the EAT departed from this decision in *Joshi v Manchester City Council UKEAT/0235/07* holding that the time limit for unfair dismissal claims where the statutory grievance procedure has been invoked is six months less one day. They found the words "beginning with" in Regulation 15(1) of the required an "inclusive construction" and mean that the day after the expiry of the normal time limit has to be included in any calculation.

17. The present proposal talks about determining proceedings of particular types to be specified in regulations not yet published. It requires that such a process be agreed by all of the parties. We agree that is an appropriate requirement.

18. The concern of some of our members was that this system might operate unduly favourably to employers, who will generally be in a better position to produce a case set out on paper, than many claimants. No agreed view was reached about this and we can appreciate that the proposal may well be welcomed by many employers as simpler and cheaper than appearing at a hearing. In that the provision requires consent of all parties, however, we do wonder whether it will in fact be taken up to any great extent. The experience, for example, in relation to the arbitration scheme would suggest that it may not.

19. There is a proposed amendment to this section, which adds a subsection that the Secretary of State and the Lord Chancellor should act together and consult on the appropriate level of professional attainment required by legal officers, and the appropriate remit of proceedings that an appointed legal officer should determine, and a mechanism for appeals. Both of these uncertainties will affect the views that we have of this proposal and no final view can be expressed until that has been made clear.

C. Clause 12 – Limit of compensatory award

20. Clause 12 proposes that the Secretary of State may by statutory instrument amend section 124 of the Employment Rights Act 1996 which prescribes the limit on the compensatory award for unfair dismissal.

21. ELA notes that this is a new proposal and has not been foreshadowed in any previous consultation document and in particular was not a proposal for consultation in "Resolving Workplace Disputes". ELA is concerned that such a potentially significant change to the floor of individual employment rights has not been put out to the usual consultation before being introduced in the Bill.

22. The clause could potentially be used to reduce the current cap on compensation (£72,300) to a specified amount of between one and three times median wages namely £26,000 and £78,000 or a specified number of weeks pay (but not less than 52), or the lower of the two. ELA notes that different limits could be applied to different kinds of employers such as a lower amount for small businesses.

23. In 2010-2011 the median unfair dismissal award was only £4,591. 90% of awards were for less than £20,000 and all but 2% were for less than £50,000. Since these figures include the basic award, which is not included in the cap, the average compensatory award must be significantly less. The proposed change is therefore unlikely to have any effect on the vast majority of unfair dismissal cases that come to a hearing.

24. ELA appreciates that the existence of the cap can have some effect on the behaviour of parties in a dispute in negotiations but considers that the impact of the current cap has no effect on the level of settlements in the vast majority of cases as compensation never reaches £72,300. If the cap were lowered to a sum equivalent to the annual median wages (which is one possibility), that could have a significant effect on behaviour in negotiations as many more cases in negotiation or at tribunal hearing would come up against the cap.

25. We note that there was a one-off rise in the limit from £12,000 to £50,000 in 1999 and thereafter index linked. ELA notes this rise was a compromise and the original proposal in the Fairness at Work White paper was to abolish the cap and bring compensation for unfair dismissal in line with that for breach of other employment rights such as discrimination cases or personal injury cases.

26. This is likely to have the benefit of discouraging the bringing of claims in respect of employment rights where there is no cap such as whistle blowing or discrimination claims in the hope of negotiating a higher settlement or obtaining a higher award from the Employment Tribunal. Such claims are generally more costly to defend and take up more resources in the tribunal in terms of length of hearing and the need to have a full panel hear the case. If the cap were reduced to median earnings (£26,000) in some or all cases, more claimants would be likely to bring additional discrimination or whistleblowing claims to avoid the cap.

27. It may be thought unsatisfactory that an employee who has been found to be unfairly dismissed and who, despite their best efforts to find alternative employment and mitigate their loss, has been unable to find work, could have their compensation capped at potentially £26,000 even though the Employment Tribunal finds their actual losses are far greater. These employees are likely to be the better paid and longer serving employee or have access to an occupational pension scheme. The main element of large compensatory awards at present is a long period of future loss of earnings or pension loss.

28. On this basis it is possible that a challenge to a cap at this level on the basis of indirect age discrimination might be brought as it is likely to disproportionately affect older employees who are more likely to have longer service and so higher salaries and larger pension losses. If such a challenge were made the Government would have to be prepared to explain its justification for the cap.

29. We are also concerned that the government proposes having a power to alter the limits between different kinds of employers. Although this is essentially a policy issue, it must be anticipated that it will provoke complaints as to fairness on the basis that, if an employer has been found to have unfairly dismissed an employee, to award compensation by reference to the size of the employer takes no or little account of the effect on the employee.

30. The fairness argument is not helped by the proposal in clause 13 to impose financial penalties on employers of up to £5000. This, by contrast, makes no distinction in treatment between different sizes of employer once the tribunal has found an aggravating factor.

D. Clause 13 – Financial Penalties on employers

31. This Clause grants the Employment Tribunal a discretion to impose a financial penalty of between £100 and £5000 and at 50% of any financial award to the claimant where one is awarded.

32. We refer back to ELA's response to the Government's consultation "Resolving Workplace Disputes" page 63 following. We note the government has taken on board the criticism that to penalise all employers across the board whatever the breach was not justified.

33. We are concerned, however, that the "aggravating factors" in draft clause12A (1)(b) are not otherwise defined. This may create uncertainty unless and until judicial guidance through case law develops. We anticipate that claimants and their lawyers may use the threat of inviting the tribunal to impose a financial penalty as a factor to negotiate an increase in the level of compensation in any settlement to avoid and/or to settle proceedings. However, it is an additional factor to negotiate about and in the experience of ELA members the more factors there are to negotiate about the more likely a settlement does not occur. This could have the consequence of increasing the number of tribunal claims and/or hearings and, unless some clear guidance is given at the outset, would be likely to frustrate the Government's policy aims for the Bill.

34. We understand the case for the proposition that, if an employer makes significant and/or deliberate breaches of UK legislation and then fails to engage in settlement discussions such that the case goes to hearing, it would be right that, when there are aggravating features, a penalty should be paid towards the costs to the Employment Tribunal system of dealing with the case.

35. As we said in our response to "Resolving Workplace Disputes":

> "by introducing discretion, this could give rise to additional arguments, litigation and legal costs incurred in relation to the exercise of that discretion, and potential appeals (as any exercise of discretion by the Tribunal would have to be appealable). Based on experience of the sort of litigation which arose as a result of the now abolished Statutory Dispute Resolution Procedures, our view is that this would not be desirable."

We went on to suggest:

> "We therefore believe that if it is finally decided that a penalty regime is to be introduced, in any case where an employer has made a genuine attempt to settle the case by way of a reasonable offer, which the employee has not accepted (and does not beat at the Employment Tribunal), the penalty should not be payable."

36. On the issue of paying the penalty to the Consolidated Fund we stated

> "Those ELA members who mainly act for employees note that the burden of bringing a claim all the way to Tribunal is on an employee Claimant. There is extremely limited public funding for such claims and an employee Claimant with a good case is often unable to pursue it because the burden of legal costs outweighs the value of the claim. In these circumstances where employees do proceed, at financial cost to themselves, the view of those ELA members representing employees is that the employee should be paid the financial penalty directly, or at the very least that the penalty payment be split between the Exchequer and the individual employee. However, those ELA members who mainly represent employers do not agree with this suggestion. One view is that both parties are capable of acting unreasonably or vexatiously in terms of settling a claim prior to the final hearing which could be reflected in the existing regulation of costs in relation to tribunal claims. Potentially a less onerous way of recompensing the Tribunal system for costs incurred would be to incorporate an additional award/penalty into Costs Orders in the Tribunal that is paid to the Exchequer."

These remain our views notwithstanding the proposal to limit financial penalties to cases with aggravating factors.

37. Finally, in our original response we stated

> "ELA notes that the rationale behind this proposal is to recompense the Tribunal system for the claim which would not otherwise have been brought. However, the Tribunal will only award it if the individual employee proceeds with the claim to a full hearing. One of the reasons why the Government has suggested making payment to the Exchequer is to avoid providing an incentive for speculative claims. As most employees will factor this payment into their negotiations for settlement, it is unlikely that payment of the financial penalty to the Exchequer will provide any less of an incentive to bring speculative claims, than if some or all of it was paid to the employee directly.
>
> ELA also considers that, if revenue is to be raised in this way, it should be directly ploughed back into improving the administration and operation of the Tribunal system, which has appeared to most employment lawyers to have been particularly under resourced in recent years."

These remain our views. As noted above, there is also the inconsistency between the proposal to adopt a variable award level dependent on employer size for the cap on awards but no such distinction proposed for this penalty system.

E. Clause 14 – Qualifying Disclosures

38. Clause 14 proposes amendment to section 43B of the Employment Rights Act 1996 to include a new requirement that, to be a "qualifying disclosure", a disclosure has to be made in the public interest. This reflects previous statements by the Department and in wider commentary that the judicial interpretation of the existing provisions, principally in the ***Parkins v Sodexho*** decision, had inadvertently widened the scope of the Act, such that disclosures received the protection of the law despite having no link with matters of public interest. This is a policy issue and our remarks are directed to the way in which it is sought to implement that.

39. The proposed wording seeks to achieve the objective of re-establishing a link between the enhanced protection afforded to those making protected disclosures and such disclosures being in the public interest. We have two main comments on this.

Subjective nature of test as drafted

40. First, the amended wording still retains the element of "reasonable belief (with the proposed amended wording in bold):

> "43B (1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure **is made in the public interest and** tends to show one or more of the following…"
>
> The impact of this amendment means that Tribunals, workers and employers are required to assess not just whether the issues **is** (presumably objectively assessed) in the public interest, but also that the individual worker **subjectively believed** that the issue was in the public interest. Therefore, under the test as currently proposed, an employee could still bring a whistleblowing claim where there was no public interest, but the individual genuinely believed that the issues raised were in the public interest. So, an Employment Tribunal might be satisfied that the employee had a reasonable belief that the disclosure made was in the public interest without itself concluding that the disclosure in question was a matter of public interest. For example the belief might be reasonably held based on information believed to be true, but in fact mistaken.

41. In addition, it would as we see it, almost always be necessary for the entirety of the evidence to be heard before the Employment Tribunal could reach a conclusion on the issue. As protected disclosure cases tend by their very nature to be lengthy it may be a very costly exercise for all concerned to take a case to a conclusion, only to find that the disclosure in question was not protected after all as the Employment Tribunal finds that there was no reasonable belief in the subject matter being in the public interest.

42. An alternative would be to move the amendment to an earlier part of the section, as follows:

> "43B (1) In this Part a 'qualifying disclosure' means any disclosure of information **made in the public interest** and which, in the reasonable belief of the worker making the disclosure tends to show one or more of the following…"
>
> This ensures that the decision as to whether a matter is in the public remains an objective one for the Tribunal to determine. It also does not materially limit the protection afforded to workers when read alongside the legislative intent. If a worker genuinely (and subjectively) believes a matter to be in the public interest, this would still form part of the Tribunal's assessment of whether a matter is in the public

interest. The claims which would then be excluded would be those claims where a worker, genuinely, believes that the issue he has raised is in the public interest but the Employment Tribunal does not agree. In such circumstances the individual employee would still have the remedies available under the unfair dismissal legislation to protect his or her rights.

43. Such an amendment is helpful to workers, employers and the Tribunal alike, as removing a subjective element of the tests gives greater certainty to all parties to any form of dispute. Were this issue not addressed, we fully expect it would be fertile ground for future litigation which could undermine the purpose of the amendment. If one takes the decision in **Sodexho** as an example, one can see how Tribunals will be forced to deal with claimants who are convinced the breach of their employment contracts is a matter of public interest. Although the Tribunal would still have to make a finding as to whether or not the disclosure was a matter of public interest,

    (i) this would be an objective decision for it to reach without having to make any assessment as to the Claimant's state of mind and/or knowledge; and

    (ii) it could be dealt with as a preliminary issue (in the same way as, for example, the question of whether or not a person is "disabled" within the statutory definition might be decided in a disability discrimination case), thus saving on the cost of a full hearing of the evidence,

Definition of 'public interest'

44. The amendment does not seek to define what will be deemed to be within the 'public interest'. ELA appreciates the difficulties of including an exhaustive definition, and does not suggest that this would be useful for workers, employers or the Tribunal.

45. However, putting this in context:

    (i) the need to amend the legislation arose from a lack of clarity following on from case law decisions; and

    (ii) case law on the meaning of 'public interest' is inevitable (and would be useful) going forward.

46. One issue which ELA believes the Government should consider is whether it is appropriate at this stage to consider including any guidance or parameters on such a definition. This would align with the overall purpose of the amendment to the legislation – providing clarity and focus to employment law, for all participants.

47. We consider that such parameters need not be prescriptive or exhaustive but could cover a number of areas including:

    (i) impact on a material number of or section of the public; such a definition could align with the test used for indirect discrimination under the Equality Act 2010;

    (ii) impact on individuals as members of the public and not, by way of example, as workers of a particular employer;

    (iii) impact which is substantial and adverse, and not trivial in nature, again aligning with existing tests in discrimination law.

F. Proposed Section 111A - Confidentiality of negotiations before termination of employment

48. We are concerned that there is a distinct possibility that the initial reaction of many advisors to these provisions will be that they are so uncertain and unclear that many will not make use of them. They will instead fall back on the existing without prejudice rules. We explain below why we believe that advisors will have very little confidence in the ability of the proposed rules to allow them to engage in a protected settlement offer under the proposed regime.

49. It is not clear to us why the alternative could not have been to reverse by statute the effect of the decision in ***BNP Paribas*** *v* ***Mezzoterro***, and simply say that, in termination (or proposed termination) situations in unfair dismissal claims, it is open to an employer to make a without prejudice offer whether or not a specific dispute has arisen. This in turn would be subject to the same protections provided by the existing rule relating to "unambiguous impropriety".

50. It seems likely that creating this new regime on top of the existing without prejudice regime, will lead to some very complex cases where arguments of both impropriety and without prejudice arise. As we consider that the barrier to without prejudice conversations becoming known to a judge (unambiguous impropriety) is a higher one than the 'improper' test is likely to prove, that could create some very difficult issues for a tribunal to resolve.

51. The test for without prejudice conversations and offers is widely understood by advisers at every level and is widely used in practice (albeit with the associated risks that any conversation is found to be outside the without prejudice rule, due to lack of an existing dispute). If this section is simply designed to get round the problem of the non-existence of a dispute when the offer of settlement is made in respect of an unfair dismissal it would be better for that to be tackled head on rather than to impose the uncertainties created by this proposal.

52. We comment on the proposed Clause taking each sub-clause in turn.

Subsection 1

53. In our view, whilst not entirely free from doubt, the words "may not take account of" imply that an Employment Tribunal may be informed of a settlement offer or discussions during the course of a hearing. We believe most judges will think that government does not propose to extend the without prejudice rule for these circumstances, but has proposed a different regime. If a different intention exists we believe the words will need to be changed or clearly defined. It will not remove this risk to explain the intention in guidance alone as judges will not be constrained from giving words their ordinary and natural meaning.

54. We note that whilst the title of the section refers to negotiations, the word "negotiations" does not appear in the new sub-section. It is suggested that this should be added to the sub section, to make clear that the whole process of offer and counter-offer would be covered by the proposal.

55. We also consider that if our interpretation is shared by the judiciary there may be some practical difficulties in a tribunal being aware of offers and discussions, but having to set them aside in their mind when determining whether or not a dismissal was unfair. For example, if discussions fail to achieve a settlement and are followed by a process of performance management, would the employment judge and/or lay members be able to exclude from their minds the fact that this method of resolving matters had already been attempted when considering if the performance management exercise was a sham?

56. The existence of this provision would not exclude the possibility of an additional debate about whether or not a conversation was also without prejudice. It would avoid the necessity for a second set of proceedings if the decision was that it was not without prejudice as in that event the tribunal is presumably expected to carry on and, when the time comes to determine the question of fairness, simply put out of their mind any information they have about the offer. If the conversation was held to be without prejudice then presumably a second hearing before a different tribunal would be required. Where matters might get very difficult conceptually will be if only part of the conversation or negotiation is clearly without prejudice (for example, where an employee had made a complaint during a negotiation) and therefore inadmissible before the judge. All of this is of course predicated on the basis of our original assumption on the interpretation of this section.

57. We also have a concern that limiting the principle to unfair dismissal cases may result in unlawful disparity of treatment. Many employers may be more reluctant to have a conversation, for example, with an ethnic minority employee than they will with an ethnic majority employee. This will mean disparity of treatment, which may, in turn, found claims. We suggest the department takes advice on this possibility.

    Subsection 1 is subject to the following subsections: -

Subsection 2

58. We understand this subsection means that if the complainant, at any time in the proceedings, alleges that one of the automatically unfair dismissal provisions applies, then subsection 1 does not apply.

59. There is therefore the possibility that a claimant might, for tactical reasons alone, make an allegation that he or she was dismissed for an automatically unfair reason.

60. We considered if this subsection should be amended so that the claimant had to have a genuine belief in that allegation. Whilst the possibility of tactical allegations exists we also have considerable reservations about imposing this additional burden, because it would make hearings even more complex. However it remains our view that this sub-section means that there is the possibility that a tribunal could be proceeding for some time under the impression that an offer could not be taken into account later, and then if it emerges that an automatically unfair allegation is involved the tribunal would have to bring back into account that an offer had been made. Possibly the existing costs rules would deal with a claimant who was found to have lied or deliberately concocted such a claim.

61. On balance, however, we consider this sub-section serves little purpose. It is not clear why this category of claim requires the additional 'protection' and whether it is worth the complexity it creates. There seems little reason in principle why this category of claim should not be settled and if the offer of settlement fails why the standard rule as to disclosure of the offer should not be applied.

Subsection 3

62. The word "improper" introduces a novel concept, and is likely to create uncertainty for some time. It is our experience that very broad terms such as this will lead to a variety of interpretations and so lead to inconsistent attitudes being taken in different regions (or even in different tribunals in the same region). Additional uncertainties are also created by the fact that the Tribunal has the liberty to take into account any offer to such extent that it considers "just". This also implies some improper behaviour may be overlooked but there is no clarity as to how this is to be assessed. A complete and open discretion is given to the judge, and in practice any decision made would be almost impossible to appeal. Such arbitrary and unfettered discretions, although they exist elsewhere in the

law, can generate discontent with the system of justice and are best avoided if possible. In unfair dismissal cases in the future this is most likely to be a discretion exercised by judge alone which will contribute to the lack of acceptance as historically all parties level of acceptance of the fairness of the system has been influenced by the tripartite nature of the adjudication.

63. There are three separate levels of uncertainty.

    (i) The meaning of improper
    (ii) When will it be just to lift the veil
    (iii) To what extent will the veil be lifted

    This example illustrates one of our concerns:

    Assume a conversation in which the employer says: "Your performance is unacceptable. We could put you on a Performance Improvement Plan, give you some training but my view is that would just be delaying the inevitable. I want you to go. Let's agree a severance payment?" The employee resigns and claims constructive unfair dismissal.

64. It is this situation the legislation is intended to legitimise and protect and yet we cannot tell whether the Tribunal can "take account" of the conversation or not. We presume the legislative intention is to allow the Claimant's case to be struck out on the basis that the Tribunal cannot take into account the conversation he relies on as repudiation. However, why would announcing an intention to dismiss without following a fair procedure or to run a sham procedure not amount to "impropriety"? The imprecision of the language means that there would be no easy cases. Impropriety will always be alleged until the EAT has fixed it with some meaning.

65. We note that there is a possibility that ACAS or BIS will produce guidance as to what amounts to improper behaviour. Some reservations were expressed about yet another set of guidance to which tribunals and employers would have to refer and we doubt that judges would be constrained from giving words their ordinary meaning by guidance, however persuasive the authorship.

66. Additionally, we noted that the phrase "connected with improper behaviour, "is very broad and presumably covers the possibility that further discussions might arise after there had been improper conduct, during which subsequent discussions nothing improper was said or done. However, because it would be connected with the initial improper behaviour, it would be open for the tribunal to take it into account.

Subsection 4

67. We interpret this as being the equivalent to making an offer that was 'without prejudice save as to costs', and it was anticipated that this would cover offers made by <u>both</u> employers and employees. We do not understand why this rule cannot be expressed in language that makes this plain which this sub-section fails to do.

Subsection 5

68. This is understood to mean that, where the Tribunal has also dealt with a discrimination claim between the same parties to an unfair dismissal claim and an offer had been made in the discrimination claim, that offer would be taken into account in the unfair dismissal claim. Whilst this was our view about the meaning of this subsection, we did not think it well expressed and we were concerned that it would not be entirely clear to unrepresented parties

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