Department for
Employment
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Developing Modern, Efficient and Effective Employment Tribunals

Public Consultation

July 2015

Foreword

Industrial tribunals (ITs) and the Fair Employment Tribunal (FET) are important cornerstones of our employment relations system here in Northern Ireland, providing a vital means of redress for those who feel that their employment rights have been infringed. They provide access to a legal remedy in situations where other means of resolving workplace disputes have been unsuccessful or are not appropriate.

Dr Stephen Farry MLA
Minister for Employment and Learning

While I am absolutely clear in my commitment to promoting effective measures to deal with employment disputes, whether by supporting a clearer understanding of employment rights and responsibilities, promoting good practice workplace procedures or providing professional assistance through the Labour Relations Agency (LRA), sometimes there will be situations in which disputes require a legal remedy. Our tribunals will continue to have a key role to play in our employment relations landscape and it is therefore critical that they remain fit for purpose and retain the confidence of their users.

When I commissioned my Department's wide ranging review of employment law in 2012, I was conscious that the last substantive revision of the rules specifying how the tribunals operate took place in 2005. It was therefore important to me that the employment law review deal not only with better regulation measures and the early resolution of workplace disputes, but also with the need to ensure that we continue to have efficient and effective employment tribunals.

To that end, in November 2012, I asked officials to work with the tribunal service to develop a single, consolidated set of tribunal rules taking into consideration recent developments in the comparable tribunal system in Great Britain following a review of procedures there led by Mr Justice Underhill. Underhill's recommendations included clearer, simpler and more concise rules or procedure; better guidance on matters of good practice and internal process; stronger powers to manage and set timescales for the consideration of cases; and measures to encourage the greater use of alternative dispute resolution. However, conscious that devolution allows us to shape employment law and its implementation to suit the particular circumstances of Northern Ireland, I reflected on stakeholder feedback and concluded that it would not be appropriate to introduce a number of Great Britain inspired initiatives. In particular, I ruled out the introduction of fees for users to access or progress through the tribunal system. I made it clear that I wanted to see proper consideration of the particular needs of our own employment relations community, including work to ascertain the practicability of introducing a form of early neutral evaluation into the tribunal service.

This consultation is the culmination of a substantial body of detailed work carried out by Departmental officials and the tribunal rules committee, which consists of the judiciary and representatives of tribunal users. It is an important part of the wider review of employment law undertaken by the Department, seeking your views on

how we can improve the tribunal service and the experience of individuals seeking a legal determination on an employment rights dispute.

Until now, the Department's engagement with stakeholders has been primarily on the very important issues of early resolution and better regulation. Amongst the proposals I will be taking forward within an Employment Bill is a new process, to be operated by the LRA, known as 'early conciliation'. Under this arrangement potential tribunal claimants, in most circumstances, will have to contact the LRA, which will then seek to contact the potential claimant with a view to offering conciliation. There will be no obligation to accept the offer, and where it is rejected, conciliation fails, or contact is unsuccessful, the LRA will issue a certificate which will act as evidence in the absence of which a tribunal claim will generally not be accepted. This consultation takes into account the early conciliation model and includes an option for a form of early neutral evaluation as part of early case management within the tribunal system.

I want to maximise opportunities for early resolution whilst ensuring that Northern Ireland's citizens continue to have available to them a tribunal service that is fit for purpose. I want it to be a system that is grounded in a modern, revised and updated single set of regulations and rules setting out clearly the powers and duties of tribunals and their users at each stage of what can be a complex process. I would also like to see a system that is better understood and more easily navigated by users and potential users.

Regulations and rules have been developed, in draft form, that are ultimately intended to replace and improve upon the separate sets of IT and FET rules that were last revised substantially in 2005. This consultation is accompanied by draft regulations and rules on which you are invited to comment.

At least as important as establishing the detailed legal requirements for the conduct of each case is improving the user experience, so that people know whether taking a tribunal case is the right option for them (and in a range of situations it may not be); so that employers know how to respond; and so that all parties better appreciate how they can make the process work best for them.

Improving the user experience means embedding flexible administrative systems and providing accessible information and step-by-step guidance that meet the needs of today's tribunal users.

This consultation is your opportunity to contribute to policy developments which are intended to give tribunal users a fuller understanding of and clearer expectations about what a tribunal will require of them, whether it is the most appropriate forum for their dispute and, if it is, what they need to do and how and when they ought to do it for best effect.

In responding to the consultation, you are asked to consider the questions set out below and summarised in **Chapter 5**.

Dr Stephen Farry MLA
Minister for Employment and Learning
June 2015

1. Introduction

1.1 **Much positive work has been done in recent years to improve the operation of industrial tribunals (ITs) and the Fair Employment Tribunal (FET) in Northern Ireland. Enhanced case management and streamlined administrative processes have led to cases being dealt with more quickly and to the elimination of the significant backlogs which were once present in the system.**

1.2 There can, of course, be no room for complacency. The employment rights and relations environment is changing, and it is important that our employment tribunals deliver a service that meets today's needs, and not those identified ten or more years ago when the governing regulations and rules were last substantially revised.

1.3 Acting on the response[1] to its 2012 discussion paper[2], which sought views on how it could develop more efficient and effective employment tribunals in Northern Ireland, the Department, working with the valuable assistance of the tribunal judiciary and legal representatives, has reviewed the current procedural requirements governing the operation of employment related tribunals here. On the basis of that work, draft regulations and tribunal rules of procedure have been drawn up to replace the two separate IT and FET provisions introduced in 2005.

1.4 The new rules, available in draft form alongside this document, are intended to be more accessible to users and efforts have been made to simplify language where possible. As a single piece of legislation, the new rules will be shorter and more clearly structured. However, the Department does acknowledge that there is only so much that can be done to simplify what can be quite complex legal requirements.

1.5 We therefore aim to complement work on the rules with a reappraisal of the guidance and direction that is available to tribunal users so that they have a clearer understanding about what preparing for and going to a tribunal will be like and how they can get the best out of the service.

CONTEXT

1.6 Historically, a great majority of the rules and processes operated by ITs have been the same as those operated by employment tribunals in Great Britain. However, even during times of direct rule, it was appreciated that Northern Ireland's needs can and do differ from Great Britain's. The FET is a clear example, brought into being initially on the basis of 1989 legislation (itself

[1] *Employment law discussion paper: Departmental response* (DEL, November 2012); http://www.delni.gov.uk/employment-law-discussion-paper-departmental-response.pdf.
[2] *Employment law discussion paper* (Department for Employment and Learning (DEL), May 2012); http://www.delni.gov.uk/employment-law-discussion-paper.pdf.

derived from 1976 provision). It was the first employment related tribunal in the UK to have the power to adjudicate on disputes concerning alleged discrimination on grounds of religious belief or political opinion, and its establishment reflected the particular difficulties created by historical and cultural factors.

1.7 Since devolution, and particularly in more recent years, there has been a still more pronounced emphasis across the wider employment relations arena on the opportunity that exists for Northern Ireland to develop systems that are suited to the needs of the region, whether this means following precedent set across the Irish Sea, looking south of the border or, indeed, further afield for inspiration.

1.8 Northern Ireland, at the time of writing, remains the only region of the United Kingdom to which employment law is devolved, and the Department for Employment and Learning is committed to ensuring that mechanisms that are in place to protect employment rights continue to be effective, proportionate and fit for purpose to meet the needs of people here.

Developments in Great Britain

1.9 The above said, the strong similarities between employment law here and in Great Britain mean that it is important to consider developments there. In November 2011, the UK Government committed to launching an independent review of the rules of procedure governing employment tribunals in Great Britain. Stakeholders had reported that, over time, the employment tribunal rules had suffered from piecemeal change which meant that they were no longer working as effectively and efficiently as they might.

1.10 Mr Justice Underhill was asked to undertake that review, with a remit to set in place simpler rules providing a framework for cases to be managed more effectively and efficiently without compromising access to justice.

1.11 The Underhill report, presented to UK Ministers in July 2012, and a variety of relevant initiatives taken forward by the Department for Business, Innovation and Skills (BIS), have resulted in changes including:

- *restructuring and rewording of the rules to make them easier to follow;*
- *a new procedure for preliminary hearings that combines separate pre-hearing reviews and case management discussions;*
- *the inclusion of enhanced strike out powers intended to ensure that weak cases that should not proceed to final hearing are halted at the earliest possible opportunity;*
- *guidance from the employment tribunal Presidents to help ensure that hearings are dealt with in a consistent manner which ensures parties know what to expect;*

- *scope for a tribunal chair to sit alone in unfair dismissal cases;*
- *provision for witness expenses;*
- *an increase, from £10,000 to £20,000, in the maximum level of costs that may be assessed by a tribunal;*
- *new financial penalties on employers who have breached employment rights;*
- *a requirement to pay fees to access and proceed through the tribunal system.*

1.12 Further changes have subsequently been taken forward in Great Britain by way of the Small Business, Enterprise and Employment Act 2015[3], designed to limit postponement of employment tribunal proceedings and set in place a mechanism to impose on employers who do not pay tribunal awards a financial penalty (payable to the state).

Process and legislative improvements in Northern Ireland

1.13 It is against this background that, as a key element of the employment law review in Northern Ireland, the Department for Employment and Learning has been considering the way forward for tribunals here.

1.14 It is worth reflecting on the fact that much positive work has already been done in recent years to improve the efficiency and efficacy of our own tribunals. Operationally, the judiciary and administrative staff have worked to improve processes. A robust case management discussion system is in operation that requires parties to detail or narrow the issues of the case, introduces timetabling for exchange of documentation, agrees the use of witness statements and the date for listing the case for final hearing. The President of Industrial Tribunals and the Fair Employment Tribunal has also introduced a rigorous postponement policy which requires parties to justify applications for the deferral of a hearing. The tribunal secretariat is subject to challenging listing targets which are reported upon annually. A Memorandum of Understanding in place between the Labour Relations Agency (LRA) and the Office of Industrial Tribunals and the Fair Employment Tribunal (OITFET) sets out how the two organisations work together to maximise opportunities to resolve disputes without the need for a tribunal hearing.

1.15 In legislative terms, restrictions have been removed that, in some cases prior to 2011, required separate FET and IT proceedings to deal with a single case involving both fair employment and other employment rights. The judiciary, representatives of the legal profession and Departmental officials have been working in partnership for some years on a non-statutory rules committee to consider the effectiveness of the current rules and recommend changes

[3] http://www.legislation.gov.uk/ukpga/2015/26/contents/enacted.

where appropriate. Following a request from Minister for Employment and Learning, Dr Stephen Farry MLA, work has been taken forward that has enabled the Department to prepare a single set of draft rules and regulations taking account of changes in practice over the past 10 years and lessons learned from the Underhill review.

WHAT IS NOW NEEDED

New tribunal procedural rules

1.16 The draft rules that have been prepared with the rules committee's assistance, available alongside this consultation and explained in **Chapter 3**, are intended to improve the efficiency and effectiveness of tribunal processes, setting out in a single, simpler set of regulations, duties and powers previously contained in two separate, lengthy provisions.

1.17 The Department acknowledges that the draft rules have taken significant inspiration from the revised employment tribunal rules in Great Britain. This is deliberate; the new rules in Great Britain have been well received and, where there are no arguments for 'reinventing the wheel', the Department has chosen to adapt relevant Great Britain provisions for Northern Ireland purposes. However, it is right that the new rules take into account issues that are considered to be of particular importance for this jurisdiction. The draft rules already reflect this approach in a number of places, most notably in making provision for a new approach to early case management.

1.18 The Department would welcome feedback on whether the rules, as drafted, meet the specific challenges faced by Northern Ireland's tribunals. If different approaches are merited in some areas, what are the arguments for these and how might they be implemented?

1.19 The Department is also anxious to maximise readability of what will inevitably be a somewhat technical document, and would be grateful for suggested drafting improvements.

Improved guidance

1.20 Providing comment on draft rules is a technical exercise and may be outside some stakeholders' expertise. However, all stakeholders have a part to play in this consultation.

1.21 Improved legislation is a critical part of the way forward, but alone will not meet the needs of tribunal users. Rules and regulations are inevitably associated with a level of complexity: they convey legal requirements, and there is a limit to the degree to which these can be simplified. Appropriate non-legislative approaches must also be considered. The users and potential users of tribunals need a clear understanding of what it means to enter the process and what they need to do to make it work effectively for them.

1.22 Guidance materials need to be easily understood and accessible. They need to make clear the purpose of the tribunal system and the requirements that it imposes. They need to highlight options, including alternative dispute resolution and the services offered by the LRA. They need to establish realistic expectations.

1.23 Tribunals can be a daunting experience, which to a degree is inevitable given the legal issues, often arising from deep disagreements, that they are required to determine. However, there are actions that can and should be taken to prepare people for the experience and make it more straightforward.

1.24 Options which are explored in this consultation include: mechanisms for engaging with a wider cross-section of tribunal users to allow feedback to improve services; the development of learning materials such as online and offline multimedia; simplified and expanded written guidance; and claimant and employer case studies. The Department would appreciate receiving views on these and indeed any wider issues relating to the development of a more accessible system.

Actions that have been ruled out at this stage

1.25 It is appropriate to reiterate the Department's earlier announcement that it will not be taking forward, at this time, the following proposals:

- *a requirement for unfair dismissal cases to be heard, in most instances, by a chairman sitting alone;*
- *power for the tribunal to direct a losing party to reimburse a successful party for the cost of the attendance of witnesses;*
- *an increase in the maximum level of costs that may be assessed by a tribunal;*
- *the introduction of financial penalties payable by employers who have breached employment rights;*
- *a requirement to pay fees to access and proceed through the tribunal system.*

Employment law review

1.26 This consultation is part of the Department's wider employment law review, and we are separately publishing the policy response to public consultation on that subject.

1.27 By bringing together the separate and individually lengthy IT and FET provisions into one set of regulations and rules, this consultation has an objective that is consistent with that review's emphasis on better regulation. The review also stresses the importance of early resolution of workplace disputes, and proposes a new system of LRA early conciliation which would

prevent most tribunal claims from going forward until potential claimants have first had an offer of help from the LRA to resolve their dispute (see paragraphs 2.15 to 2.20). Ultimately, the introduction of this new service depends on enabling powers being established by an Employment Bill. The draft rules provided alongside this document have been prepared on the assumption that these will be in place.

1.28 The draft rules also include provision concerning deposits, reflecting the proposal at paragraph 2.40 to 2.43 which, if implemented, will require primary legislation to be amended by an Employment Bill. The remaining options on deposits discussed in paragraphs 2.44 and 2.45, though not present in the rules as currently drafted, would likewise require primary legislation, as would altering references to "chairmen" of tribunals to reflect the now established practice of referring instead to "employment judges" (paragraphs 2.64 to 2.68).

1.29 The remaining content of the draft rules can be addressed through secondary legislation; appropriate enabling powers already exist.

GLOSSARY

The Labour Relations Agency (LRA) provides a range of statutory services which have the objective of improving employment relations. These include a statutory role in offering conciliation to parties who are involved in, or who could become involved in, a tribunal case. The LRA also offers an employment rights helpline.

Industrial Tribunals (ITs) are independent judicial bodies in Northern Ireland that hear and determine claims to do with employment matters. These include claims relating to unfair dismissal, breach of contract, wages and other payments as well as discrimination on the grounds of sex, race, disability, sexual orientation, age, part time working and equal pay.

The Fair Employment Tribunal (FET) is also an independent judicial body in Northern Ireland that hears and determines complaints of employment related discrimination on the grounds of religious belief or political opinion. The FET may assume the powers of an industrial tribunal when considering a fair employment matter along with other issues that would normally fall within the remit of an IT[4].

The Office of Industrial Tribunals and the Fair Employment Tribunal (OITFET), currently based in Killymeal House, Belfast, houses the main tribunal hearing rooms, the judiciary, and the secretariat that provides support to the tribunals. The lead official, referred to in the rules, is the Secretary.

The Standing Advisory Committee on the Tribunal Rules of Procedure (Rules Committee) is as its name suggests. It consists of tribunal judiciary,

[4] See Article 85 of the Fair Employment and Treatment (Northern Ireland) Order 1998.

representatives of tribunal users and government officials having responsibility for policy and legislation. The Department, not the Committee, ultimately decides on whether to implement Committee recommendations; however, the Committee's detailed knowledge of the tribunal process from the beginnings of a claim has been invaluable in developing the accompanying draft rules.

SUBMITTING YOUR VIEWS

1.30 Consultation responses should be with the Department no later than 25 September 2015 and may be submitted to:

Post: Employment Law Review: Tribunal Reform
Employment Relations Policy and Legislation Branch
1st Floor, Waterfront Plaza
8 Laganbank Road
BELFAST
BT1 3LY

E-mail: employment.rights@delni.gov.uk

Telephone: 028 9025 7580

1.31 Please indicate in your response whether the views you are expressing are your own individual views or those of the organisation you represent.

1.32 If you think that any organisations or individuals are likely to have an interest in this consultation, please let us know their contact details.

Alternative formats

1.33 This paper and other Departmental publications may be made available in alternative formats upon request.

PRIVACY IN RESPECT OF CONSULTATION RESPONSES

1.34 Following the end of consultations we shall publish a summary of responses received. Information people provide in response to our consultations, including personal information, may be disclosed in accordance with the Freedom of Information Act 2000 and the Data Protection Act 1998. If you don't want the information that you provide to be disclosed please tell us, but be aware that we cannot guarantee confidentiality.

2. Key issues

2.1 **Employment related tribunals are less formal than some other legal settings. For example, those presiding and participating do not wear court robes (i.e. no gowns or wigs are worn); panels contain lay members (with experience of the workplace and without a legal background); the hearing is held in a large room laid out with the tribunal panel sitting at a slightly raised desk rather than a traditional court room; and the process is designed so that employees and employers can state their case without the need for legal help, if they wish to do so. However, it is clearly the case that tribunals adjudicate on sometimes complex legal matters and inevitably there are occasions on which legal requirements and protocols must be observed.**

2.2 This dichotomy and tension between the presentational informality of the tribunal environment and the actual formality of the legal process lies at the core of any effort to improve the user experience within the tribunal system. There is need to minimise confusion and unrealistic expectations for some participants and prevent the process from becoming any more daunting than a legal process needs to be.

2.3 The Department, while acknowledging the dichotomy, wishes to make ITs and the FET as accessible as possible to claimants and respondents, particularly if they are not represented. Some improvements can and should be made to the regulations and rules of procedure to make them more readily understood, but there is only so much that can be done to simplify what can be difficult and technical legal language. For this reason, it is important to consider how best to educate parties through information and guidance as to the purpose of the tribunal, as well as what to expect, and what is expected of everyone, at various procedural stages.

RULES AND PROCEDURES

2.4 Currently, the broad legal framework under which ITs operate is provided by the Industrial Tribunals (Northern Ireland) Order 1996. For the FET, this purpose is fulfilled by the Fair Employment and Treatment (Northern Ireland) Order 1998.

2.5 More detailed provision is then made in two separate but similar Statutory Rules, the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 and the Fair Employment Tribunal (Rules of Procedure) Regulations (Northern Ireland) 2005. The rules, which in most respects mirror the employment tribunal rules in Great Britain, specify, among other things, the steps necessary to deal with claims and responses, requirements around conducting hearings, the process for reviewing a decision and the circumstances in which an award of costs may be made.

2.6 The new rules are modelled largely but not exclusively on the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013[5] that ultimately emerged in Great Britain following the review undertaken by Mr Justice Underhill. This is no accident; the tribunal Rules Committee is aware that the Underhill proposals have been well received in Great Britain and are viewed as a significant improvement over pre-existing provisions, setting out a simpler and more logical structure and providing tribunals with more effective case management powers.

2.7 However, the rules also bring together existing IT and FET requirements, and the Rules Committee has developed innovative suggestions of its own. As a result of its work, the tribunals have already been successfully trialling a form of early case management, including the option of offering early neutral evalution to help parties appreciate the key issues in dispute from the outset so that they can make an informed decision on how to proceed. Formal provision for early case management therefore forms part of the draft rules supplied alongside this consultation.

2.8 As the above suggests, the draft rules contain novel provisions but, where existing practices are working well, changes have been limited to revisions of language or presentation which are designed to make the rules easier to understand.

2.9 **Chapter 3** delves into the content of each rule, and stakeholders should feel free to comment on any rule (or the need for a particular provision that is not present) if they wish. However, below, the Department has identified and asked questions about issues on which it would particularly welcome feedback.

2.10 In general terms, the Department is first of all interested in receiving your overall impressions of the rules. The following questions are relevant.

Q1. *Are the new rules less complex and easier for non-lawyers to understand?*

Q2. *Can the language or style of the rules be improved and, if so, how?*

Q3. *Do any of the rules appear ambiguous or create confusion? If so, please explain any improvements you feel could be made.*

Overriding objective

2.11 The central purpose of the rules, the "overriding objective", has been expanded upon; new rule 2 of Schedule 1 states that tribunals must deal with cases fairly and justly. Unlike current provision, this now explicitly includes dealing proportionately with the financial position of each party and the amount of money involved; effective resource management; avoiding

[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429633/employment-tribunal-procedure-rules.pdf.

unnecessary formality; seeking flexibility; avoiding delay where feasible; and enforcing compliance with rules, practice directions and orders.

2.12 The overriding objective, in full, is expressed in rule 2 of Schedule 1 as follows.

- *ensuring that the parties are on an equal footing;*
- *dealing with cases in ways which are proportionate to the complexity and importance of the issues, the financial position of each party and the amount of money involved;*
- *allotting to cases an appropriate share of the tribunal's resources, while taking into account the need to allot resources to other cases;*
- *avoiding unnecessary formality and seeking flexibility in the proceedings;*
- *avoiding delay, so far as compatible with proper consideration of the issues;*
- *enforcing compliance with rules, practice directions and orders; and*
- *saving expense.*

2.13 Rule 2 also requires the tribunal to "seek to give effect to the overriding objective in...exercising any power" given to it in the rules or otherwise. The parties are required by the same rule to "assist the tribunal to further the overriding objective" and "co-operate generally with each other and with the tribunal".

Q4. *Does the overriding objective in rule 2 set out the most important objectives of the tribunal process? If not, please explain.*

Alternative dispute resolution

2.14 Improving the tribunal process is one strand of the Department's ongoing work to create and maintain a 'fit for purpose' employment relations system in Northern Ireland. A closely related initiative, also aimed at this overarching objective, is to encourage resolution of workplace disputes at the earliest possible stage.

2.15 The two strands are complementary as, while early dispute resolution can provide a cost effective and restorative solution to addressing employee and employer concerns where agreement cannot be reached, it is essential to have an efficient and effective tribunal system which provides access to legal remedy for those who want or need it.

2.16 Rule 3 is new, providing that "a tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of the [Labour Relations] Agency or other means of resolving their disputes by agreement."

This is supplemented by rule 93, which (essentially replicating an existing requirement) specifies that where conciliation is available, OITFET will send an LRA conciliation officer a copy of the claim and response forms, and the parties will be told that LRA services are available to them.

2.17 However, the new rules set out to do much more than this; it is intended that they will link to a proposed new LRA system developed to support early intervention. In Great Britain, a mandatory early referral to ACAS conciliation (with some exemptions) has been in operation since May 2014[6]. Taking inspiration from this initiative, the LRA has developed proposals for a new early conciliation (EC) service which, having been the subject of Northern Ireland public consultation in 2013[7], the Department intends (with the appropriate approvals) to introduce.

2.18 Under EC, most potential employment tribunal claims will be routed, in the first instance, to the LRA with a view to attempting to resolve them. Under these arrangements, claimants will no longer be able to have a claim accepted by a tribunal (unless an exemption applies) without providing evidence that the LRA has offered EC. Evidence of compliance will take the form of a certificate confirming that EC requirements have been met. The certificate will set out a unique reference number that can be used by OITFET to verify this. The actual EC process can be summarised as follows.

- *The case will be allocated to an LRA conciliation officer, who will contact the prospective claimant within two working days following receipt of the EC form. At this stage the officer will establish if the individual wishes to engage in early conciliation. If so, the officer will contact the prospective employer/respondent within two working days.*

- *Where either party declines EC or cannot be contacted after reasonable efforts, the conciliation officer will issue a certificate stating that the prospective claimant has fulfilled the obligation to first contact the LRA before presenting a complaint to a tribunal. It is envisaged that the certificate will also be issued if conciliation discussions have failed to resolve the issues in dispute or only some of the issues have been resolved and other elements of the claim remain in dispute.*

- *Parties will be under no obligation to accept the LRA offer, and no negative inference will be drawn if parties choose not to engage.*

- *During a limited period to allow for EC, the normal time limit for lodging a tribunal claim will pause, giving parties an opportunity to focus on conciliation.*

2.19 As this proposed system has been well received by the great majority of stakeholders, the Department intends to establish appropriate enabling

[6] http://www.acas.org.uk/earlyconciliation.
[7] http://www.delni.gov.uk/index/consultation-zone/archived-consultations/archived-consultations-2013/employment-law-review.htm.

powers with a view to having the system in operation in 2016. Work is currently ongoing to consider the detailed operation of the proposed system.

2.20 It is essential that the new legislative arrangements complement, and are complemented by, the revised tribunal processes that are the subject of this consultation. It particularly important that, even where EC is not successful, the tribunal process can adequately support and encourage resolution where it appears that a legal determination may not be required. The draft tribunal rules have been prepared with this in mind.

2.21 EC itself is not a matter for this consultation; however, the interface with the tribunal process is pertinent. Under draft rule 11, OITFET will reject a claim unless it asserts an exemption from EC or, alternatively, contains evidence that EC has been offered. Under rule 12, the claim will be rejected by a chairman in any case if it starts proceedings to which EC would apply but:

- *it contains no evidence of EC having been offered and does not assert that it is exempt;*
- *it wrongly asserts that it is exempt;*
- *the name given for the claimant or respondent does not match the details given during the EC process (unless the mismatch is a minor error).*

2.22 The Department is interested in your views on the interface between EC and the tribunals (although remember that this consultation is not asking for views on EC itself).

Q5. *Do the rules do enough to encourage the appropriate use of alternative means of resolving disputes? If not, please explain.*

Q6. *Please identify any potential issues with the proposed interface between early conciliation and the tribunal system.*

Presidential guidance

2.23 Rule 8 introduces the new concept of Presidential guidance, in addition to the already existing power for the President to offer practice directions (regulation 14). Unlike practice directions, Presidential guidance does not impose requirements but rather suggests appropriate means of dealing with particular issues. The rule reads, in full:

The President may publish guidance as to matters of practice and as to how the powers conferred by these Rules may be exercised. Any such guidance shall be published in an appropriate manner to bring it to the attention of claimants, respondents and their advisers. Tribunals must have regard to any such guidance, but they shall not be bound by it.

Draft rule 8

2.24 The Department notes that some of those who responded to the 2012 employment law discussion paper considered there to be a need for greater consistency in the processes and practices operated by the tribunals in Northern Ireland. Rule 8 could allow identified areas of inconsistency to be addressed in that the President could set out clear guidelines as to how tribunals might approach particular points.

2.25 Ultimately the Tribunal Users Group, discussed in paragraphs 2.86 to 2.88, is intended to provide a forum for ongoing input from users, and any decision on whether and how to exercise power conferred by rule 8 would be a matter for the President. Initial indications of areas in which the rule might be usefully deployed are nevertheless of interest to the Department in helping it assess the potential value of the provision.

Q7. *Do you support the concept of Presidential guidance being issued under rule 8 and, if so, how might it be used?*

Acceptance of claims

2.26 The process for lodging and dealing with tribunal claims, with the exception of the EC requirements described above, will be essentially the same as now. OITFET will review each claim, rejecting it if it does not contain key information, and referring it to a chairman for a decision in certain circumstances.

2.27 Rule 11 sets out how claims will initially be reviewed by OITFET, with those not meeting basic requirements to be rejected and returned to the claimant with information on how to apply for the matter to be reconsidered. In addition to being rejected for the early conciliation reasons discussed in paragraph 2.19, a claim will also be rejected if it is not on the prescribed form or does not contain claimants' and respondents' names and addresses.

2.28 Rule 12 deals with a second phase of scrutiny, applied to claim forms by tribunal chairmen. In addition to the reasons for rejection concerning early conciliation outlined in paragraph 2.19, a claim will be rejected at this stage if the chairman deems that the tribunal has no jurisdiction to consider it; it cannot be sensibly responded to; or it is an abuse of the process.

Q8. *Should any changes be made to the grounds for rejecting a claim under rules 11 and 12? If so, which changes and why?*

2.29 Unlike in Great Britain, but consistent with existing practice here, the rules will continue to require a register of claims to be kept and be open to public inspection without charge at reasonable hours (see in particular regulation 17 and rule 16). This is in addition to the register of judgments and reasons which is already available online.

2.30 Employers responding to a claim will again have to follow essentially the same requirements as at present, generally being given 28 days to provide

the tribunal with a completed form indicating whether they intend to resist the claim and giving details. The process is set out in rules 17 to 23.

Early case management

2.31 A proactive and intensive system of early case management was introduced for all discrimination, complex non-discrimination and multiple claim cases in 2005 following consultation with the Tribunal User Group. The main purpose of the early case management process is set out below.

(i) Bring the parties and any representatives together before a chairman at an early stage to let them know and see what is involved in a tribunal hearing.

(ii) Give them the opportunity to resolve their disputes at an early stage without the need for a tribunal hearing. (A conciliation officer from the Labour Relations Agency will be available at the case management discussion if the parties wish to explore conciliation at that stage.)

(iii) If resolution is not possible at that stage, consider whether there are any matters which require to be dealt with at a pre-hearing review and which may obviate the need for a main hearing where, for example, a claim has been lodged outside the statutory time limits. A pre-hearing review may also be arranged where a party contends that a claim or a response has little reasonable prospect of success, to consider whether the other party should be required to pay a deposit not exceeding £500 as a condition of proceeding to the main hearing.

(iv) If a pre-hearing review is not required, ensure that the parties are fully prepared for the main hearing. The chairmen will achieve this by identifying the issues which require determination and by drawing up a timetable with the parties for:

- *the provision of additional information, if required;*
- *the exchange of documents which would assist the parties to prove/defend the case;*
- *the use of witness statements to reduce the stress on witnesses when giving evidence and the length of the hearing; and*
- *the preparation of a bundle of documents for use at the hearing.*

(v) The chairmen will then give the opportunity to select hearing dates within a three month listing period. The parties will already have been informed of the listing period so that they can check witness availability during it, thereby avoiding postponement applications on that basis.

2.32 The early case management process was extended in 2010 to include the large number of undefended cases where employees who had lost their jobs,

as a result of the recession, were seeking payments in respect of wages, holiday pay, notice pay or redundancy pay. The process was developed to identify, at a very early stage, whether the claimant needs to pursue a tribunal claim at all; or whether, instead, he or she should focus on making a payment application to the Redundancy Payments Service. Where a tribunal hearing is required, the early case management process ensures that a hearing date is provided within a maximum of eight weeks and that the decision of the tribunal is issued on the date of the hearing.

2.33 A further initiative to extend the system was taken forward in 2013 to provide for the early case management of all non-discrimination cases by way of telephone conference, to ensure that the parties are given the opportunity to try to resolve their cases as early as possible and, if not, to ensure, as in the discrimination cases, that a pre-hearing review is arranged if required. Where a pre-hearing review is not required, the process still ensures that the parties are prepared for hearing on dates selected by them within the tribunal listing framework.

2.34 Importantly, the process has also been developed to provide the parties with an early neutral evaluation of the claim and defence by the chairman, where appropriate, to assist them to resolve their cases without the need for a hearing.

2.35 Feedback from tribunal users has indicated that early case management has been very helpful in:

- *bringing parties and their representatives together at a very early stage, which assists in the resolution of cases;*
- *letting parties know and see what is involved in a tribunal case if it goes to hearing;*
- *assisting the parties to prepare properly for a hearing, if required.*

2.36 Rule 27, which is intended to establish legislative support for the process, is new and provides that the chairman may give the parties an assessment of the issues, evidence and arguments, and opportunities to resolve matters without the need to pursue the tribunal process further. It provides for the issuing of case management orders, including in relation to evidence, procedures and timetabling. The chairman is also formally empowered to communicate by whichever means are appropriate; this acknowledges the success of telephone case conferencing. The new rule in effect endorses and supports good practices developed within the tribunal system during recent years. This consultation seeks views on the process and suggestions for improving it.

Q9. *Do you support developments in the early case management process and can you suggest any improvements?*

Case management powers

2.37 The case management powers of the tribunal are set out in Part 7, though as is noted in rule 28, this is not an exhaustive list. Key areas in which these powers differ from or build upon existing case management provisions are explored in more detail below, but the Department would welcome input on whether the powers, taken together, are sufficiently flexible to meet the needs of today's tribunals.

Q10. *Are the case management powers provided for in the rules sufficiently clear and flexible? Please explain.*

Lead cases

2.38 Rule 33, unlike current provision, explicitly sets out a mechanism for dealing with situations where "two or more claims give rise to common or related issues of fact or law". In these situations, the tribunal or the President can specify one of these as the "lead" case and postpone the hearing of the related cases until the lead case is dealt with. When the tribunal decides on a matter concerning the common or related issues, that judgment will be binding in respect of the related cases unless a party successfully applies for an order to the contrary.

Q11. *What are the advantages and disadvantages of the lead case mechanism for dealing with multiple claims in rule 33?*

Cases having little or no merit

2.39 The Department has over the years heard arguments, particularly from organisations representative of employers, that significant numbers of unmeritorious claims enter and are pursued through the tribunal system, resulting in employers incurring costs in preparing for and pursuing the case (whether through lost time and productivity or direct payment for legal representation). Although these arguments are made primarily by employers, reference is occasionally also made to respondents who opt to contest claims unreasonably, in situations where there is little or no arguable defence.

2.40 Although the Department believes, following its extensive review of systems for resolving workplace disputes several years ago, that it is easy to overstate the impact of unmeritorious claims, it does not discount the importance of the issue for some people. It is important that tribunals continue to have the confidence of their users and powers to deal proportionately and fairly with cases of this kind.

2.41 Having in place robust case management powers to address weak and unmeritorious claims deals in a more measured way with these concerns than the introduction of fees to access or use the tribunal system. The Minister for Employment and Learning has explicitly ruled out fees for the present, and in addition does not intend to increase above the current level of £10,000 the maximum amount of a costs order that may be assessed by a tribunal.

2.42 Bearing this in mind, it is worthwhile to review the powers of tribunals to strike out unmeritorious claims or responses and to require parties wishing to continue with 'weak' claims or responses to pay a deposit in order to do so.

2.43 Rule 35 permits a tribunal, on its own initiative or following an application by a party, at any stage, to strike out all or part of a claim or response that is "scandalous", "vexatious" or "has no reasonable prospect of success". It may also do so if the conduct of the proceedings by the claimant, respondent or a representative has been "scandalous, unreasonable or vexatious". Other grounds for striking out are non-compliance with any rule or order; failure to actively pursue a claim or response; or inability to continue to have a fair hearing. No strike out will occur without the affected party having an opportunity to state in writing or at a hearing why the strike out should not occur.

2.44 In contrast to the present rules, strike out powers have been clearly delineated within a specific rule to make them more readily understood. This is also the case with regard to 'unless orders' (rule 36) which can result in dismissal of all or part of a claim or response if not complied with by a specified date.

Q12. *Are the strike out mechanisms set out in rule 35 reasonable and proportionate? Please explain, proposing any alterations.*

2.45 Rule 37 sets out the tribunal's power, at a preliminary hearing, to order a party to pay a deposit of up to £500 in order to be permitted to continue advancing "any specific allegation or argument" where the tribunal believes that continuing to do so will have "little reasonable prospect of success". Unlike the relevant provision under the current rules, this phrasing (which will require an adjustment to the enabling primary legislation) explicitly empowers a tribunal to require more than one deposit (each of up to £500) if more than one issue is identified as unlikely to succeed if further pursued.

2.46 As now, it will not be possible to issue such an order until the tribunal has made "reasonable enquiries into the paying party's ability to pay the deposit"; and the tribunal will "have regard to any such information when deciding the amount of the deposit".

2.47 Again, just as at present, if an issue is later decided against a party for the reasons identified in a deposit order, this will influence a tribunal's decision on whether to award costs, with the deposit contributing to the payment of any costs. If a costs order is not made, the deposit will be refunded.

2.48 Power to require a deposit concerning one or more issues falling within an overall claim or response, rather than per claim or response as a whole, is new. The objective is give the tribunal more nuanced powers to deal with 'weak' aspects of claims or responses (and there may be more than one) without preventing other matters from going forward. The Department would welcome your views on the proposal, bearing in mind the safeguard that the tribunal will continue to be required to have regard to a party's ability to pay.

2.49 In a number of recent tribunal cases, a single claimant has been ordered to pay more than one deposit in order to continue with a claim against each one of a number of named respondents i.e. one deposit per respondent. Arguably this recognises the importance of giving each respondent the option of asking the claimant to consider very seriously whether each has a substantive case to answer. Views would be welcomed on whether a provision explicitly facilitating this practice (which would need to be supported by amended primary legislation) should be included within the new rules. Those who support the proposal are asked to consider how, having regard to fairness and proportionality, it could operate alongside the 'deposit per issue' provision outlined above.

2.50 There has been some discussion as to whether the maximum level of a deposit should be increased from £500, a level set in 2004[8], to £1,000, the level established in Great Britain since 2012[9]. Given that this consultation asks whether the imposition of multiple deposits should be permitted under the rules, we would like your views on whether a new maximum figure should be established, the amount, and whether the same or a different cap should apply if multiple deposits are allowed.

Q13. *Should tribunals have power to require one deposit per issue identified as unlikely to succeed?*

Q14. *Should tribunals have power to require claimants to pay deposits per named respondent in order to proceed?*

Q15. *What should be the maximum level of an individual deposit?*

Q16. *Should there be a maximum cumulative deposit if multiple deposits are permitted?*

2.51 Currently, where a party loses a case for the reason identified in a deposit order, but no costs order is subsequently made, the deposit is recoverable by the paying party. There has been a suggestion that an alternative approach should be adopted, namely that any deposit not paid to meet a costs order, rather than being refunded, should be recovered by the Department.

Q17. *Should a party who has lost a case for the reason(s) identified in a deposit order forfeit the relevant deposit even where no costs order is made?*

2.52 Rule 102 sets out for the first time a process that a tribunal may follow to ask the Attorney General for Northern Ireland to review documents and information with a view to deciding whether to prepare court proceedings to restrict the ability of individuals considered 'serial' vexatious litigants to approach the tribunal in future. This provision is likely to be rarely used, but is

[8] See http://www.legislation.gov.uk/nisr/2004/158/contents/made and http://www.legislation.gov.uk/nisr/2004/157/contents/made.
[9] See http://www.legislation.gov.uk/uksi/2012/149/made.

necessary to deal with a very small number of individuals who are considered to be making improper use of the tribunal system. It should be noted that the Attorney General already has the power to apply for court proceedings of this kind to be started. Rule 102 simply establishes a clear process whereby the tribunal can apply for action of this type to be considered.

Vulnerable people

2.53 While the tribunals are more informal than other courts, the necessity of dealing with legal matters, even in a comparatively informal setting, can nevertheless be daunting for some of those concerned.

2.54 Vulnerable parties, including those with learning disabilities or mental health conditions, migrant workers or people whose first language is not English, people who have been subject to substantial or sustained discrimination and/or harassment on any ground, or those who have been the victims of labour exploitation (including victims of human trafficking), can face a variety of challenges. The Joseph Rowntree Foundation has indicated that "the impact of employment tribunal changes need[s] evaluating to ensure that vulnerable workers are not precluded from accessing justice"[10].

2.55 The Department's commitment to reviewing the position of trafficked victims of labour exploitation was first set out in the Northern Ireland Human Trafficking Action Plan 2013/14[11] (and was carried forward to the 2014/15 Plan). However the Department is conscious of the need to take a wider look at vulnerable people's access to tribunals. The key objective of the consultation, in this context, is to review practices to ensure that vulnerable parties have an effective means of redress. Part 8 of the rules sets out general requirements about hearings, and the Department suggests that a number these contribute to achieving this objective.

- ***Rule 40(3)*** *carries forward an existing power allowing for exclusion from the hearing, in the interests of justice, of any person who is to appear as a witness until such times as that person is to give evidence. It is suggested that this provision can protect a vulnerable party by, for example, excluding certain witnesses whose presence may be perceived as intimidating.*

- ***Rule 42*** *permits limitations to be placed on the time allowed for the giving of oral evidence and the questioning of witnesses. Limits of this kind are generally useful to the tribunal as a case management tool that supports efficiency, but could also be used to help vulnerable people manage fears and expectations around the process.*

[10] http://www.jrf.org.uk/sites/files/jrf/forced-labour-united-kingdom-summary.pdf.
[11] 'Northern Ireland Human Trafficking Action Plan 2013-14: Progress Report' (Department of Justice, May 2014); see http://www.dojni.gov.uk/northern-ireland-human-trafficking-action-plan-2013-14-progress-report.

- ***Rule 43**, in permitting a hearing to be conducted completely or partly by electronic communication, could protect those who, for valid reasons, may be reluctant to proceed if they have to come face to face with a particular person. Unlike the current rule dealing with electronic communication, rule 43 applies to all kinds of hearing, opening up more scope to cater for the needs of vulnerable people as well as generally promoting greater efficiency and flexibility in proceedings.*

- ***Rule 47**, which consolidates and builds upon a range of currently separate provisions within a single rule, confers wide power on the tribunal to restrict disclosure of information or hold proceedings in private. This may be done in the interests of justice, to protect human rights, or for a range of other reasons including mitigating risks to a person.*

2.56 In addition to these measures, the Department has also committed to exploring with the President of the tribunals whether Presidential guidance (rule 8) can be used to develop additional non-legislative, responsive and practical support for vulnerable parties.

Q18. *Do the rules give sufficient protection to vulnerable people? Please explain.*

Q19. *How might Presidential guidance address the needs of vulnerable parties?*

Q20. *Does rule 47 make the privacy and restricted reporting regime sufficiently flexible? Please explain.*

Q21. *What additional measures or rules should the Department consider implementing, to support vulnerable parties?*

2.57 The Department has already taken steps to improve the enforceability of tribunal awards. Section 7 of the Employment Act (Northern Ireland) 2011[12] contained a legislative amendment to make awards of industrial tribunals enforceable as though payable under an order of the county court. Similar provision already exists in respect of awards of the Fair Employment Tribunal.

2.58 Nonetheless, the Department continues to hear of situations where a minority of employers seek to avoid the obligation to pay an award, requiring the intended recipient of the award to pursue the matter through the courts. While some undoubtedly have the wherewithal and the determination to do so, vulnerable individuals may lack confidence in taking this approach.

2.59 In Great Britain, powers have been taken, through the Small Business, Enterprise and Employment Act 2015, to allow financial penalties to be imposed on employers who do not pay employment tribunal awards, costs awarded against them, or sums due under conciliated settlements. As a first

[12] http://www.legislation.gov.uk/nia/2011/13/section/7.

stage in the procedure, a warning notice will be issued advising the employer of the intention to impose a financial penalty, with 28 days allowed to pay or to set out a case as to why no financial penalty should be imposed. Subject to certain caveats, where payment is required, it will be 50% of the sum owed (or 100% if the employer has defaulted on an agreement to pay by instalments), excepting that the minimum amount of the penalty will be £100 and the maximum £5,000. The intention is that this will act as a deterrent to attempts at avoidance. Importantly, the monies recovered will be payable to the state rather than the individual to whom the funds are owed.

2.60 The Department has not reached a view on the suitability of such a system for Northern Ireland, and is keen to use this consultation to gather evidence on the issue generally.

Q22. *What, if any, quantifiable evidence do you have of failure to pay tribunal awards and its impacts?*

Q23. *What additional measures, if any, are necessary to address non-payment of awards?*

Preliminary hearings

2.61 New rule 50 sets out the scope of preliminary hearings, allowing a tribunal to consider the claim on a preliminary basis with the parties, make a case management order, decide any "preliminary issue" (for example, points that are to be decided at a final hearing, or whether an event has taken place), consider a strike out or deposit order, and explore alternative means of resolving the dispute.

2.62 This approach combines what are now pre-hearing reviews and case management discussions into a single process. There may be more than one preliminary hearing. The Department is interested in views on this process, and whether the rules need to be adjusted to ensure that there is no potential conflict between it and early case management under rule 27.

Q24. *Are there any drawbacks to the approach adopted in rule 50, which enables pre-hearing reviews and case management discussions to proceed as part of one or more preliminary hearings?*

Q25. *Are there any potential interface issues between preliminary hearings under rule 50 and early case management under rule 27? If so, please explain.*

Judgments, case management orders and reasons

2.63 Part 12 of Schedule 1 to the draft rules deals with the issuing of judgments, case management orders and reasons. Attention is drawn, in particular, to rule 60, which deals with the provision of reasons. It requires the tribunal to give reasons for each judgment either orally at the hearing or later in writing. Reasons given orally need only be provided in writing if they are requested at

the hearing or within 14 days (of if required by a court). The reasons must identify the issues, findings, the relevant law and its application, and how any financial award has been calculated. Going further than present requirements, the rule also states that the reasons must be "proportionate to the significance of the issue".

Q26. *Do you agree with the proposed approach to giving reasons in rule 60? Please explain.*

Costs, preparation time and wasted costs

2.64 Part 14 of the rules essentially restates existing provisions dealing with costs, preparation time and wasted costs, but attempts to set out requirements more clearly than in the existing rules. It is important to note that tribunals do not order parties to pay costs as a matter of course. An order to pay another party's costs (or for that party's preparation time) will only be considered in the circumstances outlined in rule 76 i.e. where a party or representative has "acted vexatiously, abusively, disruptively or otherwise unreasonably" in bringing or conducting the case; where the claim or response had no reasonable prospect of success; where a party has been non-compliant; or where the party has caused a postponement. Payment may be required in certain circumstances relating to unfair dismissal cases. Under rule 80, a tribunal may also make an order for wasted costs against a legal or other representative who is acting for profit in respect of "improper, unreasonable or negligent" behaviour. A tribunal may have regard to a party's ability to pay in making any of these orders.

2.65 Costs payable in respect of fees charged by a lay representative are capped at an hourly rate of £36 initially, increasing by £1 each year (rule 78(2)). That same hourly rate is also the basis for calculations of time spent by an individual preparing for a case when not legally represented (rule 79(2)).

2.66 The maximum amount of costs that a tribunal can itself determine, without agreement between the parties or an assessment by a court, will remain at £10,000. This differs from the position in Great Britain, where the maximum figure is now £20,000. Costs orders, even when they are made, tend to be much lower than this in most situations, although the Department believes it is important that tribunals continue to have discretion to require significant costs to be paid where the circumstances warrant it.

Q27. *Does Part 14 make appropriate provision in respect of costs, preparation time and wasted costs? Please explain.*

Costs threats

2.67 The Department is aware of concerns in some quarters that some tribunal users, particularly those who are unrepresented, can be too readily dissuaded from continuing with proceedings when advised, usually by the other party's representative, that they could face significant costs if they proceed with the case. Individuals who do not know the circumstances in which a tribunal may

make a costs award, and do not have access to independent advice, may face a difficult decision as to whether to continue with the process.

2.68 Through this consultation the Department would like to establish a clearer understanding of this issue by asking about consultees' experience of making, receiving or otherwise dealing with costs threats. Who tends to make them? In what circumstances? Are they effective? Why? Are there circumstances in which such a communication should be deemed unreasonable and, if it is, what should be the consequence? Could guidance be improved to be clearer about the circumstances in which a costs award is likely?

Q28. *What are your experiences of 'costs threats'?*

Q29. *What changes, if any, should be made to deal with the issue?*

Terminology: "employment judge"

2.69 A practice direction issued by the tribunals' President on 19 February 2014 provides that, from 31 March 2014, a person who is a member of the panel of chairmen of tribunals in Northern Ireland is to be referred to as an employment judge. While "employment judge" is now the term used on a day to day basis within the tribunal system, the underlying legislation has yet to reflect this, and continues to refer to "chairmen" of tribunals.

2.70 Within the comparable employment tribunal system in Great Britain, the governing legislation[13] has for some years accommodated the renaming of "chairmen" as "employment judges". A majority of case law used in the tribunals in Northern Ireland originates in Great Britain and refers to "employment judges"; both academic textbooks and wider publications use this terminology; and the term is gender neutral, in keeping with respect for diversity generally. Its use emphasises to users that they are involved in a judicial process.

2.71 Whilst it is possible to argue that "employment judge" suggests a more formal court-like experience than the tribunals were originally intended to provide, and might be perceived as obscuring the role of 'lay' members of tribunal panels, the Department understands that in practice the change in terminology has not increased the formality of tribunal proceedings in any way and that the Presidential practice direction has been implemented without objection from either tribunal users or the senior judiciary[14].

2.72 The divergence between the terminology used in daily practice and that in the underlying legislation, and between Northern Ireland and Great Britain, can give rise to confusion, particularly for litigants-in-person who do not appreciate that the two titles ("chairman" and "employment judge") mean the same thing.

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[13] The Employment Tribunals Act 1996, as amended.

[14] The Court of Appeal now refers to employment judges, in accordance with the Presidential direction. See *McKinstry -v- Moy Park Limited and Others [2015] NICA (unreported).*

2.73 For the time being, the rules as drafted retain the reference to "chairman"; but the Department is seeking to include a power in primary legislation to allow them instead to use the term "employment judge". The Department would welcome stakeholders' views on whether the final rules (legislative powers permitting) should refer to "employment judges" rather than "chairmen".

Q30. *Should legislation formally provide for reference to be made to the position of "employment judge"? Please explain.*

INFORMATION AND GUIDANCE

What is currently available from OITFET?

2.74 Current information and guidance material has been considered with a view to identifying what, if any, supplementary guidance and information could be provided.

2.75 OITFET currently provides a number of pieces of guidance for both claimants and respondents[15]. These include guidance notes for employees considering bringing a claim[16] and employers who receive notification that a claim has been lodged against them[17]. The guidance provides parties with an outline of their right to bring or respond to a claim, and the key elements of the process that they need to complete.

2.76 The OITFET website provides contact details for organisations which may be of assistance to parties that are making or responding to a claim[18]. These organisations include the LRA, the Equality Commission, the Health and Safety Executive and the Law Centre (NI).

2.77 Also provided is a more detailed booklet entitled 'Procedures for those concerned with industrial tribunal and Fair Employment Tribunal proceedings'[19], describing the procedure for making or responding to a claim and what happens at a tribunal hearing. This guidance is intended to enable those involved to prepare for and comply with the legal requirements of the tribunal process. It is therefore focused on procedural details and steps necessary to comply with tribunal processes and requirements.

2.78 The booklet provides general advice to claimants on "Getting help with a claim" from a trade union, voluntary sector advice agency, the LRA or the Equality Commission, and the possibility of applying for legal aid to obtain advice, but not representation, in connection with a claim.

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[15] See http://www.employmenttribunalsni.co.uk/.
[16] http://www.employmenttribunalsni.co.uk/guidance_for_et1-2.pdf.
[17] http://www.employmenttribunalsni.co.uk/guidance_for_et3.pdf.
[18] http://www.employmenttribunalsni.co.uk/index/useful_info.htm.
[19] http://www.employmenttribunalsni.co.uk/procedural_booklet_working_copy_aug2_14.pdf.

2.79 Respondents are advised that they may represent themselves or obtain representation from "for instance an employers' organisation or a solicitor", and of the availability of conciliation services through the LRA. A list of "useful contacts" is provided at the end of the booklet. The booklet is currently published in English, Lithuanian, Polish, Portuguese and Slovakian.

What other guidance is available?

2.80 Additional sources of straightforward written advice are already available to claimants. For example, guidance from Citizens Advice[20] is set out in clear and simple language and covers the following topics:

- *understanding employment tribunals;*
- *starting an employment tribunal claim;*
- *employer's response to an employment tribunal claim;*
- *understanding the Labour Relations Agency and settlements;*
- *preparing a tribunal case;*
- *employment tribunal hearings;*
- *employment tribunal hearing process – flowchart;*
- *after the employment tribunal hearing;*
- *employment tribunal jargon buster.*

2.81 While the information provided is very helpful, it may not be readily available to those who do not have access to online communication or who may not be computer literate. Although individuals still have the option of making an appointment at their local Citizens Advice Bureau, this may not suit everyone.

2.82 The Law Centre (NI) and the Human Rights Commission have jointly compiled a publication for migrant workers entitled 'Your rights in Northern Ireland – a guide for workers'. This guide is intended to help migrant workers understand their rights and entitlements while in Northern Ireland and to ensure that, if they encounter any problems in accessing those rights and entitlements, they receive the right advice. This is available in several European languages and can be obtained from the Law Centre's website at www.lawcentreni.org. The publication covers a broad range of issues, with the section that is devoted to employment rights including details of the tribunal system and relevant time limits. The information is for all migrant workers in Northern Ireland and is written to address some of the most

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20 http://www.adviceguide.org.uk/nireland/work_ni/problems_at_work_ni/employment_tribunals_ni/understanding_employment_tribunals_ni.htm.

common problems faced. The employment topics include:*the difference between workers and employees;information for both workers and employees on basic employment rights such as national minimum wage;*

- *information for employees about additional rights;*
- *how to enforce rights if an employer has not fulfilled his/her legal responsibilities including an explanation of industrial tribunals;*
- *a list of useful contacts including the LRA and the Equality Commission.*

2.83 The focus of this document, in general terms, is not specifically the tribunal process; however, it has the significant merit of setting tribunals in the wider employment rights context.'Employment-related tribunals: an introduction'[21] on the NIdirect internet portal is a further source of employee focused information. This resource provides details on the following:*what employment related tribunals do;*

- *whether a claimant needs to go to a tribunal;*
- *starting the process;*
- *time limits;*
- *whether the claim will go ahead;*
- *settling before the hearing;*
- *the hearing;*
- *what happens if the claimant wins or loses;*
- *where to get help.*

2.85 The information is up to date and presented in a straightforward and understandable way. It is noted that there is not a direct link to this information in the material produced by OITFET.

2.86 From an employer perspective, the NIbusinessinfo internet portal is also a useful source of information, though again this is not signposted by the OITFET material. In the section entitled 'Employment-related tribunal claims – the process'[22], details are given on key issues:

- *common reasons for employment related tribunal claims;*

[21] http://www.nidirect.gov.uk/employment-tribunals-introduction.
[22] http://www.nibusinessinfo.co.uk/content/employment-related-tribunal-claims-%E2%80%93-process.

- *the claim procedure;*
- *preventing a claim from reaching a hearing;*
- *LRA conciliation, mediation and statutory arbitration;*
- *glossary of terms.*

2.87 While this information and guidance, taken collectively, is an important resource to tribunal users, it is arguable that more needs to be done to signpost users to the variety of material that is available. It is also arguable that there is not sufficient basic introductory material for those who are completely unfamiliar with what it means to go to tribunal. The Department would welcome suggestions as to particular issues which might be included within revised material to assist users better to understand the tribunal experience, its purpose, what is needed to build up an effective case, alternative options such as LRA conciliation or arbitration, and potential outcomes. Such revisions should have the purpose of facilitating informed decision making by claimants and respondents facing the prospect of tribunal proceedings.

Q31. *Taking into account the sources of information already available, is there a need for further guidance on the tribunal process? If so, what type(s) of information and guidance should be developed, and what issues would benefit from a particular focus?*

Innovative communication of information and guidance

2.88 The guidance that is currently available is primarily written narrative in its form and is either available online only or both online and in hard copy. While this is likely to meet the needs of many, it may be of less assistance to vulnerable claimants such as individuals with poor literacy or whose first language is not one of those catered for by current publications.

2.89 The Law Centre (NI) suggested in a 2011 research report[23] that tribunal users could be intimidated by the prospect of a tribunal hearing and require better forms of support to familiarise themselves with what this entails. For example, not all tribunals have public hearings and not all users are able to view other hearings in advance of their own to understand what the process is like.

2.90 It was further suggested that the use of multimedia would be helpful for users. Video material, for example, could communicate in a much more direct way what to expect and illustrate to potential users the roles of tribunal members and staff. It could also illustrate how to prepare the case; the role of evidence in the hearing; and how the hearing is likely to proceed. It, or the written guidance, or perhaps some form of interactive online tool, could include case studies to increase clarity. The argument runs that the provision of

[23] http://www.lawcentreni.org/Publications/SupportingTribunalUsers2011ELECTRONICVERSION.pdf.

information in this format could help allay fears, as well as providing assurance and support. The Department is interested in views on this issue.

Q32. *Do you support the suggestion of a multimedia familiarisation resource and, if so, what should be its focus?*

Q33. *How else can users be helped to understand the nature of the process, including the value of particular claims?*

Engaging tribunal users

2.91 The Department is aware that some tribunal users have raised concerns about the consistency of the tribunal experience. Ultimately, we believe that the Tribunal Users Group is a forum at which concerns of this kind are best aired. While the Group, which generally meets twice annually to discuss a range of issues concerning tribunal practice, is an appropriate forum, the Department does recognise that there are calls for the Group's membership to be diversified.

2.92 Currently, although there are no restrictions on membership, meetings are attended for the most part by parties' representatives, most of them from a legal background. The existence and purpose of the Group and the timing of its meetings are arguably not well publicised to the broader community of those having an interest in the conduct of tribunals, and the Department and the tribunals are committed to addressing any identified shortfall.

2.93 This consultation therefore seeks your views on whether the Tribunal Users Group, as currently constituted, is fit for purpose, and how representatives of employer and employee interests generally might be encouraged to become more involved.

Q34. *How can engagement between the tribunal system and its users be improved?*

IMPACTS

2.94 Chapter 4 deals with the impacts which, in the Department's view, arise from the proposals set out in this consultation. Your views on whether these impacts, and whether there are other impacts that have not been captured, would be appreciated.

Q35. *Do you concur with the Department's assessment of the impacts of the proposals set out in the consultation?*

Q36. *What, if any, additional impacts need to be considered?*

GENERAL

2.95 Although, through this consultation, the Department is asking for specific feedback on a range of issues, we are keen that stakeholders take the opportunity to share with us any other thoughts on how the tribunal process can be improved. Suggestions might range from technical changes to procedure to wider thinking about the tribunal 'experience'.

Q37. *Do you have any other views on how the tribunal process could be improved?*

3. Outline of draft regulations and rules

REGULATIONS

3.1 **Regulation 1** gives the regulations and the Schedules containing the rules their respective titles. It also specifies the date on which the regulations will come into effect. **Regulation 2** removes the previous regulations, which were introduced in 2005, from statute. **Regulation 18** makes arrangements about when claims will be treated as being subject to the old regulations and the new.

3.2 **Regulation 3** lists key terminology used throughout the regulations. Importantly, it specifies that the word "tribunal" will be used throughout the regulations and rules to refer to both industrial tribunals and the Fair Employment Tribunal collectively, and to any particular tribunal, whether an IT or FET. (Occasionally throughout the rules, reference to an IT or FET is made where it is appropriate to note a distinction between the two tribunals.)

3.3 **Regulation 4** confirms that ITs and the FET will continue; no institutional changes are being made. **Regulation 5** deals with the jurisdiction of the Fair Employment Tribunal.

3.4 **Regulation 6** concerns the appointment of chairmen of tribunal panels and members of those panels representative of the interests of employees and of employers. It also specifies how they may resign office. (Note that the appointment of the President and of the Vice-President are dealt with in the Fair Employment and Treatment (Northern Ireland) Order 1998.)

3.5 **Regulation 7** specifies that the IT and FET, as institutions, consist of the President, the Vice-President, the panel of chairmen, the panel of employee members, and the panel of employer members. In accordance with **regulation 10**, in most cases, an individual tribunal hearing a particular case will consist of a chairman, an employer member and an employee member. However, with the parties' agreement, one of the latter may be absent.

3.6 On occasion, tribunals must deal with cases requiring specialist knowledge or qualifications. **Regulation 8** allows the President or Vice-President to establish specialist panels from whom the panel in an individual case may be selected under **regulation 11**. **Regulation 9** has a similar purpose with regard to national security cases, with the selection of the particular panel governed by **regulation 12**.

3.7 **Regulation 13** requires the President (or in the President's absence, the Vice-President) to use resources to deal with proceedings speedily and efficiently; allocate proceedings between tribunals; and determine where an when tribunals are to sit. It also allows the general functions of the President or the Vice-President to be delegated to a member of the panel of chairmen.

3.8 **Regulation 14** goes on to provide that the President may issue practice directions to specify how minor procedural issues should be handled. This is not to be confused with the power to issue Presidential guidance (Schedule 1, rule 8).

3.9 **Regulation 15** gives the Department for Employment and Learning power to decide on the content of claim and response forms, and to make it compulsory to provide certain information.

3.10 **Regulation 16** states that Schedule 1 contains the rules dealing with the vast majority of tribunal proceedings. Schedule 2 contains specific rules dealing with national security cases and Schedule 3 with equal pay cases.

3.11 **Regulation 17** requires OITFET to maintain a freely accessible register to record details of claims and copies of tribunal judgments and associated written reasons.

SCHEDULE 1

Part 1: introductory and general

3.12 Schedule 1 is the most important part of the draft as it deals with the rules applicable to the vast majority of tribunal proceedings.

3.13 **Rule 1** defines key terminology.

3.14 **Rule 2** sets the overriding objective of the rules, which is to ensure that the parties have an equal opportunity to present their case and that each case is dealt with proportionately, flexibly and without undue formality, delay or expense. It remains true that cases ending up at a tribunal do not necessarily need to be there and that they may be more appropriately addressed by other means; **rule 3** addresses this by requiring the tribunal to encourage alternative dispute resolution where practicable and appropriate.

3.15 **Rule 4** makes clear that a tribunal may regulate its own procedure.

3.16 **Rule 5** sets out how references to time, and periods of time, are to be understood. Some examples are given to assist with interpretation. **Rule 6** provides the tribunal with a general power to adjust time limits.

3.17 **Rule 7** deals with the consequences of failing to comply with the rules or an order made by the tribunal. The tribunal can waive the requirement or vary it; it can strike out all or part of the claim or response; it can restrict a party's ability to participate in the proceedings; and it can make an order for the payment of costs.

3.18 **Rule 8** states that the President may issue guidance dealing with practice issues. This is not to be confused with the power to issue practice directions, dealt with in regulation 14.

Part 2: starting a claim

3.19 **Rule 9** specifies that a claim must be on the correct from, comply with any relevant practice direction, and must deal with Northern Ireland based matters. **Rule 10** makes clear that a single claim form can contain the claims of more than one claimant, provided that all claims are based on the same set of facts.

3.20 **Rule 11** states that a claim will be rejected if it is not made on the correct form or does not contain the claimant's or the respondent's name or address. As the Department will be seeking to pass legislation that will require claimants (with exceptions) to show that they have been offered LRA conciliation, there is also a requirement that the claim should either include evidence of that early conciliation offer or confirm that the claim is exempt from that requirement.

3.21 There are other circumstances in which the claim form will be rejected. These are set out in **rule 12**. Under this rule, the Secretary of the tribunals must refer a claim form to be considered by a chairman where they believe that it deals with issues that are outside the jurisdiction of the tribunal; where they believe that it is very unclear or an abuse of the process; or where there is unsatisfactory evidence about early conciliation.

3.22 Where a claim is rejected under either rule 11 or 12, it will be returned with an explanation of how to apply for the rejection to be reconsidered under **rule 13**. An application for reconsideration under rule 13 has to be presented in writing within 14 days and has to explain why the rejection was wrong (requesting a hearing where desired) or correct the problem that caused the rejection. If a correction is accepted, the claim is treated as having been submitted on the date of the correction. An application for reconsideration can be dealt with without the need for a hearing, but if a hearing takes place, only the claimant need attend.

3.23 **Rule 14** allows the tribunal, if the claimant consents, to send to the relevant regulator a copy of all or part of an accepted claim dealing with a protected disclosure.

Part 3: tribunal's actions on receiving the claim

3.24 **Rule 15** requires the Secretary to send a copy of an accepted claim to the identified respondent. It must be accompanied by the proper response form and an explanation of whether any part of the claim has been rejected; how and when to submit a response, the consequences of not doing so; and the availability of alternative dispute resolution services, including those offered by the LRA.

3.25 At essentially the same time, OITFET is required by **rule 16** to enter the details of the accepted claim in the register. The details that must be recorded are the case number, the date of receipt, the names of each claimant and respondent, and the type of claim.

Part 4: the response to the claim

3.26 **Rule 17** requires the response to be on the proper form and be presented to OITFET within 28 days of the date the claim form was sent to the respondent. The response form can include the response of more than one respondent or respond to more than one claim provided that the substance of the response is the same in each case. A response will be rejected under **rule 18** if it is not on the proper form or leaves out the respondent's name or address. It will also be rejected if it does not specify whether the respondent contests the claim (and, if so, give details of why) or if, under **rule 19**, it is late and an extension of time has not been allowed. A request for an extension (dealt with under rule 21) can be submitted alongside or as part of the response.

3.27 Where a response is rejected, the tribunal will return it, explain why, and set out how apply for reconsideration or (if relevant) an extension.

3.28 Under **rule 20**, the respondent may apply for rejection of a response to be reconsidered. This must be done in writing within 14 days and must explain why the decision to reject was wrong (requesting a hearing where desired) or must correct the matter that was the cause of the rejection. If a correction is accepted, the response is treated as having been submitted on the date of the correction. An application for reconsideration can be dealt with without the need for a hearing, but if a hearing takes place, only the respondent need attend.

3.29 A written application to extend the time allowed for a response can be made under **rule 21** provided that it sets out why the extension is being asked for. If it is submitted after the normal time limit, it must be accompanied by the response or an explanation of why the response cannot be provided. The application must be copied to the claimant and state whether the respondent wishes to request a hearing (though such a request will not necessarily be granted). The claimant may give written reasons objecting to the proposed extension, provided that this is done within seven days.

3.30 Under **rule 22**, if no response has been received, the claim is not contested, or a response has been rejected (with no application for an extension outstanding), a chairman will decide whether there is sufficient information to determine the claim, or part of it. To the extent that the matter can be determined, a judgement will be issued and recorded in the register; otherwise, a hearing will be arranged before the chairman, sitting alone. The respondent will be notified of developments but will be able to participate only to the extent the chairman allows.

3.31 **Rule 23** requires the Secretary to copy a response that has been accepted to all of the other parties.

Part 5: employer's contract claims

3.32 Part 5 deals with the specific circumstances where an employer alleges breach of contract by the claimant.

3.33 Under **rule 24**, an employer alleging breach of contract must include relevant information in the response form. The tribunal is empowered to reject the employer's claim in the same terms as under rule 12. If it does, rule 13 applies.

3.34 **Rule 25** requires the tribunal, when sending the response to the other parties (under rule 23), to advise the claimant of the employer's breach of contract claim, of how to respond to it, the time for providing a response, and the consequences of failing to respond within that time.

3.35 The claimant must respond, per **rule 26**, to an employer's contract claim within 28 days. The claimant may apply for an extension of the time allowed to respond, as under rule 21, and the effect of failing to do so is the same as under rule 22.

Part 6: early case review

3.36 **Rule 27** makes clear that, as soon as possible after the end of the time limit for presenting a response, the tribunal will commence a process known as early case review. The process has been developed on the basis of a successful pilot scheme that has now been operated by the tribunals for some time.

3.37 Under the process, a chairman will review documents held by the tribunal that are relevant to the claim. Having completed this review, the chairman may give the parties an assessment of the issues that the tribunal will determine, the arguments and evidence that the parties propose to use, and any opportunities that may exist to resolve the dispute without the need to proceed further with the tribunal process.

3.38 The chairman conducting the review is explicitly given the power to issue any case management order consistent with the overriding objective defined in rule 2. Case management orders are dealt with in further detail in Part 7 but may, among other things, impose requirements about evidence, documents and information and deal with the identification of issues that the tribunal will determine; the exchange of witness statements (including whether in sequence or simultaneously); numbers of witnesses; and arrangements for various stages of the tribunal process. The chairman can use any means of communication appropriate to run early case management. Telephone case conferencing, in particular, has been used effectively in the pilot.

Part 7: case management orders and other powers

3.39 In accordance with **rule 28**, the tribunal can issue a case management order at any stage. A case management order, in essence, is a requirement that will assist the tribunal in gathering the evidence, arguments and facts, and scheduling the processes to ensure that the case is dealt with efficiently and fairly. The tribunal is able to make a case management order whether it has itself decided to do so or has been prompted by a party making an application requesting one. The tribunal can modify or replace orders it has made

previously if this is in the interests of justice, particularly if an affected party has not had a reasonable chance to make representations. Importantly, rule 28 makes it clear that particular powers set out in the rules are not exhaustive; the tribunal retains a general power to issue orders to manage cases.

3.40 **Rule 29** provides that an application for a case management order can either be made in writing (which must include notification to the other parties that any objections should be sent to the tribunal within seven days) or orally at a hearing. The tribunal itself can deal with an application in writing or at a hearing.

3.41 **Rule 30** makes clear the tribunal's powers in relation to the production of evidence, and the likely consequence of unreasonable failure to comply (namely a fine).

3.42 Under **rule 31**, the tribunal can decide (on its own initiative or following an application) to add, replace or remove a party. **Rule 32** further provides that the tribunal can allow anyone to participate in proceedings, to a specified degree, where that person has a legitimate interest.

3.43 **Rule 33** deals with situations where the tribunal takes the view that multiple claims relate to common issues. In such cases, the President can order one or more claims to be identified as the 'lead' case(s). In these situations, a judgment relating to the common issues is binding on all the affected parties unless, having received a copy and applied in writing to the tribunal within 28 days, a party is able to secure an order to the contrary. If a lead case is withdrawn before a decision on the common issues is made, the tribunal will indicate whether another lead case has been identified, and whether an order affecting the related cases is to be modified.

3.44 **Rule 34** makes clear that the President or the Vice-President may decide (following an application or otherwise) that a Fair Employment Tribunal may take on the powers of an industrial tribunal to deal with a particular case. The use of this power is likely to be considered where a case concerns alleged discrimination on grounds of religious belief or political opinion as well as other alleged breaches, including other forms of unlawful discrimination or contraventions of employment rights that would normally be considered by an industrial tribunal.

3.45 **Rule 35** enables the tribunal to strike out, at any stage, all or part of a claim or response. It may do so if it believes that one of the grounds listed in the rule applies, which amount to unreasonable presentation of material or conduct, including non-compliance or failing to pursue the case. Striking out is also possible where the tribunal believes that a fair hearing is no longer possible. However, nothing will be struck out unless the party concerned is offered a chance to address the issue in writing or, if the party requests, at a hearing. Where a response has been struck out, it is treated as though rule 22 applied.

3.46 "Unless orders", dealt with by **rule 36**, are orders that, if not complied with, will result in the dismissal of all or some of the claim or response. The tribunal will

notify the parties of any such dismissal, following which the affected party has 14 days to apply in writing to have the order set aside in the interests of justice. Such an application may be dealt with in writing, though the party may request a hearing. A response that has been dismissed is treated as though rule 22 applied.

3.47 Deposit orders, dealt with under **rule 37**, are an important means of discouraging parties from pursuing cases with little substance. Recently, the tribunals have stressed that parties seriously questioning the merit of the opposing party's case should ask for a deposit to be ordered. As the Minister for Employment and Learning has ruled out the introduction of fees to access and use the tribunal system, deposit orders are an important means of ensuring that tribunal users think carefully before proceeding with a potentially weak case. Rule 37, as drafted, allows the tribunal to order payment of a deposit of up to £500 where a specific allegation or argument has "little reasonable prospect of success". In making such an order, the tribunal must have regard to a party's ability to pay. The order, once made, will be accompanied by the tribunal's reasons for making it and an explanation of its potential consequences. Failure to pay will result in striking out, and any response struck out will be treated as if rule 22 applied. If the tribunal subsequently decides against the party for essentially the reasons identified in the deposit order, and makes a costs or preparation time order, the relevant party may forfeit any part of the deposit so as to defray a costs or preparation time order, with the rest refunded.

Part 8: rules common to all kinds of hearing

3.48 **Rule 38** contains a general requirement to conduct hearings fairly; this does not constrain the tribunal's power under rule 4. Under it, the tribunal may question parties or witnesses as appropriate to gather evidence and clarify issues; and is not required to adhere to strict requirements associated with admissibility of evidence before the courts.

3.49 Under **rule 39**, the tribunal will consider written material submitted by a party who does not intend to be present at a hearing provided that the material is delivered to the tribunal no less than seven days beforehand.

3.50 **Rule 40** makes clear that witnesses giving oral evidence, who may themselves be parties, are required to give an oath or affirmation. Their written witness statement will be considered their evidence in chief unless the tribunal decides otherwise. In the interests of justice, the tribunal has power to exclude a witness until it is time for that person to give evidence. **Rule 41** specifies that witness statements which provide evidence in chief are open for inspection during the hearing, except for any part that is not being admitted as evidence.

3.51 **Rule 42** enables the tribunal to restrict the time available to a party for presenting evidence, asking questions of witnesses, or making submissions to the tribunal.

3.52 **Rule 43** allows the use of electronic communication, which includes telephone communication, where the tribunal considers this just and equitable. Where electronic communication is to be used, those in attendance will need to be able to hear and see the witness to hear and see what the tribunal hears and sees.

3.53 If a party neither attends a hearing nor sends a representative, **rule 44** allows the tribunal to dismiss the claim or proceed without the party, providing that it has first sought to establish why the party is absent and has considered the information received.

3.54 Per **rule 45**, a tribunal can convert a preliminary hearing to a final hearing and *vice versa*, provided this does not adversely affect the parties.

3.55 A tribunal may make a majority decision in a case where it is composed of three members, as specified in **rule 46**. However, where there are only two members, the chairman has a deciding vote.

3.56 **Rule 47** deals with privacy and the restriction of publicity. At any stage the tribunal may make an order to prevent or restrict the public disclosure of the proceedings. It can do so if it is in the interests of justice or to protect rights under the European Convention on Human Rights. It may also do so if it is hearing evidence that, if disclosed, would breach a legal requirement or a confidence, or would substantially damage a business. If constituted as a Fair Employment Tribunal, such an order can also be issued if it would create a substantial risk of physical attack or sectarian harassment, or would be against the interests of national security, public safety or public order.

3.57 Orders may include requirements to conduct a hearing in private or to protect a person's identify from public disclosure (for example, by anonymising material). They may also include, in the case of industrial tribunals, a restricted reporting order or, in the case of the Fair Employment Tribunal, an order prohibiting the disclosure of specified information. A restricted reporting order, about which notice must be prominently displayed, will specify whose identify is protected, the matters concerned and the duration of the order. It may be applied to other proceedings that are part of the same hearing.

3.58 A party who has not had an opportunity to raise concerns with the tribunal before any order under this rule was issued has the right to apply in writing for the order to be revoked or discharged, either by presenting the arguments in writing or by making a request for a hearing at which those arguments may be presented.

Part 9: withdrawal of claim

3.59 Under **rule 48**, a claim or part of it is considered to be at an end if the claimant informs the tribunal of its withdrawal in writing or at a hearing. However, this comes with the caveat that the respondent remains entitled to make an order for costs, preparation time or wasted costs under Part 14.

3.60 Where such a withdrawal takes place the tribunal, under **rule 49**, will issue a judgment dismissing it. Dismissing the claim means that the claimant may not make any further claim against the respondent dealing with the same issues unless it believes this would not be in the interests of justice, or the claimant has reserved the right to bring a further claim and the tribunal is content that there would be a legitimate reason for doing so.

Part 10: preliminary hearings

3.61 Preliminary hearings, described in **rule 50**, give the tribunal an opportunity to consider the claim with the parties, make case management orders and directions, decide any preliminary issue (for example, the legal provisions which must be tested, or whether a dismissal has taken place), consider a strike out or a deposit order, and explore alternative dispute resolution options. There may be more than one preliminary hearing in any case.

3.62 Per **rule 51**, such a hearing may be arranged at the tribunal's discretion, whether or not a party has requested it. The parties will be given reasonable notice of the hearing date, and if the hearing concerns preliminary issues, will be given at least 14 days' notice of the issues to be decided (unless the parties agree to a shorter period). The hearing will be conducted by a chairman alone unless, as set out in **rule 52**, notice has been given that preliminary issues may be considered and the chairman agrees to a written request for a full tribunal to deal with the matter.

3.63 In accordance with **rule 53**, the preliminary hearing will be in private unless the tribunal decides otherwise. However, where it involves case management directions or determines preliminary issues, the relevant part will be in public.

Part 11: final hearing

3.64 As **rule 54** indicates, a final hearing is a hearing to determine the substantive issues, and there may be more than one in any case to determine different issues. Parties must receive 14 days' notice of a final hearing, in accordance with **rule 55**.

3.65 Per **rule 56**, at such a hearing, the tribunal will be comprised of either a chairman sitting alone or a full panel. The composition will depend, in the case of an industrial tribunal, on the nature of the case being heard, with the criteria set by Article 6 of the Industrial Tribunals (Northern Ireland) Order 1996. The composition of the IT or FET panel will also be governed by regulation 10 of the new regulations.

3.66 **Rule 57** specifies that any final hearing will be in public (although, as with similar provisions in the rules, restrictions apply where a national security issue arises or it is necessary to restrict disclosure).

Part 12: judgments, case management orders and reasons

3.67 Judgments or case management orders made without a hearing will be signed and communicated to the parties in writing in accordance with **rule 58**. Where there is a hearing, **rule 59** provides that the tribunal may either announce the judgment or order at the hearing or send it as soon as practicable to the parties in writing.

3.68 **Rule 60** deals with reasons. If a judgment is announced at the hearing, the chairman must give reasons either at the hearing or later in writing. If it is given at the hearing, reasons need not be provided later in writing unless requested by a party at the hearing or within 14 days of the judgment being sent; or unless requested by a court. The reasons given must be "proportionate to the significance of the issue" and must identify the issues, findings, relevant law and its application, and any payment related information that is required.

3.69 **Rule 61** provides for the signing of a judgement, case management order or reasons where the chairman is unable to sign.

3.70 **Rule 62** states that parties may agree to the terms of any judgment or order, in which case the tribunal can issue the order or judgment on the basis of that consent.

3.71 **Rule 63** specifies that the effective date of a judgment or order is the day on which it is given or made or a later date specified by the tribunal.

3.72 **Rule 64** provides that a copy of any judgment or order, and associated reasons, will be placed on the register (subject to national security and restricted disclosure provisions).

3.73 **Rule 65** makes clear that a copy of any judgement and written reasons must be referred to a court where the initial referral of the proceedings came from there.

3.74 **Rule 66** allows for the correction of mistakes in any document produced by the tribunal.

Part 13: reconsideration of judgments

3.75 Tribunals are empowered by **rule 67** to reconsider any judgment in the interests of justice. If the tribunal itself is proposing the reconsideration, **rule 68** provides that it must inform the parties of its rationale for doing so before proceeding. Reconsideration may also be prompted by a party's application which, in accordance with **rule 69**, must be made in writing and copied to all other parties within 14 days of the original decision (or, if later, the written reasons for it) being sent to the parties. The application must set out why the reconsideration is in the interests of justice.

3.76 Per **rule 70**, having considered an application under rule 69, the chairman may refuse it if there is no reasonable prospect of the original decision being

changed. If the chairman decides to accept the application, or the reconsideration is on the tribunal's own initiative, the parties will be advised of the time limit for responding to the proposed reconsideration and asked for views on whether a hearing will be required. They may also be informed of the chairman's provisional views on the matter.

3.77 If there is to be a reconsideration of the original decision, **rule 71** requires it to be at a hearing unless the chairman, taking account of any representations on the issue, believes that one is not necessary in the interests of justice. If the reconsideration goes ahead without a hearing, the parties will have a reasonable opportunity to make further representations.

3.78 **Rule 72** states that, where practicable, consideration under rule 70 and reconsideration under rule 71 must be carried out by the chairman who made the original decision or chaired the tribunal that made it. Where this is not practicable, the President or Vice-President will appoint another chairman or tribunal (which may consist of members of the original tribunal or a wholly or partly reconstituted tribunal).

3.79 **Rule 73** makes clear that reconsideration can lead to the original decision being confirmed, varied or revoked. If it is revoked, the decision can be taken again.

Part 14: costs orders and preparation time orders

3.80 **Rule 74** defines "costs", "legally represented", "preparation time" and "represented by a lay representative". **Rule 75** indicates that costs orders are associated with representation and preparation time orders with self representation; if one is made against a party, then the other may not be made against the same party.

3.81 **Rule 76** specifies circumstances when a costs or preparation time order may or must be made. A tribunal must consider making one if a party or representative has behaved unreasonably, or if the claim or response was unlikely to succeed. It can impose one on a party who has not complied with an order or practice direction, or who has successfully sought a postponement or adjournment. It must make an order in unfair dismissal cases where the hearing is postponed or adjourned because the respondent, without good reason, has not produced timely and proper evidence dealing with a claimant's request to be reinstated or re-engaged.

3.82 An application for such an order, in accordance with **rule 77**, can be made within 28 days following the judgment. The party against whom the order is made will be given a reasonable opportunity to respond, either in writing or at a hearing.

3.83 The amount of a costs order, explained in **rule 78**, is up to £10,000 unless the parties agree otherwise or is determined in a county court. Costs orders are generally less than £10,000, and the Minister for Employment and Learning has given a commitment not to raise their maximum level at this time. In

calculating costs in respect of fees charged by a lay representative, the hourly rate of £36 is to be used, with this amount increasing by £1 each April.

3.84 The amount of a preparation time order, dealt with in **rule 79**, is arrived at by multiplying the hourly rate of £36 (increasing by £1 each April) by a number of hours assessed as being appropriate by the tribunal. That assessment is on the basis of information provided by the party to whom the award is to be paid, tempered by the tribunal's own assessment of what is reasonable and proportionate in the particular circumstances of the case.

3.85 **Rule 80** states that a "wasted costs order" may be made where a party's representative's (or that representative's employee's) improper actions or omissions have resulted in costs unreasonably being incurred. Such an order may be made in favour of any party, and can be made to a representative's own client. However, it may not be made against a party's employee who is representing the party. The term "representative" excludes those who are not acting for profit. A wasted costs order may require the representative to pay all or part of the wasted costs, disallow a payment otherwise due to be made to the representative, or order the representative to repay the client (**rule 81**). Under **rule 82**, the order may be made by the tribunal on its own initiative or following an application, which must be made within 28 days of the judgment being issued. It will not be made until the representative has had a reasonable chance to respond in writing or at a hearing. The representative's client will be advised of relevant developments.

3.86 **Rule 83** makes clear that where a costs, preparation time or wasted costs order is issued, the order may include a requirement to pay the Department for Employment and Learning all or part of an amount covering any allowances paid by the Department in relation to that person's attendance at the tribunal. Such allowances do not include those payable to the tribunal panel in respect of their attendance.

3.87 **Rule 84** requires the tribunal to have in mind a party's or representative's ability to pay when assessing the amount (if any) of an order for costs, preparation time or wasted costs.

Part 15: delivery of documents

3.88 **Rule 85** specifies that documents may be delivered to the tribunal directly (for example by courier), by post or electronically. It also allows the tribunal to require the parties to use a particular address or form of communication. **Rule 86** enables documents to be delivered to parties by the same means, or in addition by being handed personally to the party or the party's representative. The relevant address is that noted in the claim or response form, or a different address later conveyed to the tribunal by the party. If more than one address, electronic or otherwise, has been provided, then any one of them may be used. **Rule 87** deals with delivery to non-parties, which must be to any address that has been notified, any known or registered address or, if the President permits it, an address outside the United Kingdom. Special cases, where documents are to be sent to particular bodies such as the

Department or the Equality Commission, may be dealt with by practice direction, as stated in **rule 88**.

3.89 **Rule 89** deals with situations where it appears that sending documents to a particular address is unlikely to bring them to the attention of the person intended to receive them. In this situation, the President or the Vice-President can order the documents to be communicated in an alternative manner, as seems appropriate.

3.90 In accordance with **rule 90**, a document delivered to the tribunal or a party will be taken as received on the day on which it would ordinarily arrive by post; the day of electronic transmission; or the day of direct delivery. There is also provision allowing post to be treated as having been delivered if sent to a last known address but returned as undelivered. Per **rule 91**, the tribunal may also take a document as delivered if it is content that the intended recipient has become aware of it.

3.91 **Rule 92** requires communication to the tribunal to be copied to all the other parties, except where the tribunal orders a departure from this practice in the interests of justice or the party is applying for an order in respect of attendance to give evidence, produce documents, or produce information.

Part 16: miscellaneous

3.92 **Rule 93** details the role of the Labour Relations Agency; where statutory conciliation applies to a case, OITFET is to send copies of the claim and response forms to the Agency and the parties will be told that conciliation is available. A LRA representative may attend any hearing, subject to national security or privacy restrictions.

3.93 **Rule 94** sets out the procedure whereby a person required to pay a sum under a conciliated settlement may apply to the tribunal (within 14 days of the compromise certificate being issued) seeking a declaration that the sum is not recoverable under the general law of contract.

3.94 **Rule 95** deals with national security issues. In Crown proceedings, the Secretary of State (whether or not a party) can require the tribunal to hold a case (or part of it) in private, exclude someone, or take steps to conceal witness identity. A tribunal may do any of these things on its own initiative, in relation to any case, in the interests of national security. It can also order a person not to disclose documents or their content, although it may make exceptions. In deciding whether to do so, the tribunal can consider material without disclosing it. The Secretary of State (whether or not a party) may apply to the tribunal to take any of these actions. During the period when it is considering such an application, the tribunal can impose any of the above as interim restrictions and, pending its decision on a request to exclude a person, will not send a copy of the response to that person. As with any respondent, the Secretary of State can apply for an extension of the time for providing a response. Where the tribunal decides not to make an order under this rule, rule 6 of Schedule 2 applies, but the reasons will not be placed on the

register. Generally, the tribunal is under a duty to ensure that information is not disclosed that is contrary to the interests of national security.

Part 17: other proceedings

3.95 In accordance with **rule 96**, where a tribunal is dealing with interim relief matters, it will do so at a preliminary hearing, and need not hear oral evidence.

3.96 **Rule 97** entitles the Department for Employment and Learning to be treated as a party to any proceedings dealing with a potential payment out of the National Insurance Fund. This applies, for example, in cases concerning statutory redundancy payments.

3.97 Under **rule 98**, in cases involving a collective agreement under certain discrimination law, the claimant's employer or prospective employer and, if identifiable, any affected workers' or employers' organisation, are to be treated as respondents.

3.98 **Rule 99** requires that where a case involves a devolution issue, the tribunal must inform the relevant authority, if not already a party, as soon as practicable and provide copies of the claim and response form. If the authority responds within 14 days, it may be treated as a party. Notices under this rule must be copied to all of the parties.

3.99 **Rule 100** specifies that the tribunal, if referring a question to the Court of Justice of the European Union for a preliminary ruling, must copy its decision to do so to the registrar of that court.

3.100 Where proceedings are referred to a tribunal by a court, **rule 101** makes clear that they are to be treated as if presented to the tribunal by the claimant.

3.101 Tribunals are empowered by **rule 102** to ask the Attorney General for Northern Ireland to review documents and information with a view to the Attorney determining whether to apply to the High Court under section 32 of the Judicature (Northern Ireland) Act 1978. Following such an application, if the High Court is satisfied that a person has "habitually and persistently and without any reasonable ground instituted vexatious legal proceedings", it may decide to impose restrictions on a person's ability to bring future legal proceedings. The tribunal will provide the Attorney General with any documents or information that will assist in considering making such an application.

3.102 Under **rule 103**, OITFET must send the Equality Commission for Northern Ireland copies of judgments and written reasons relating to unlawful discrimination in employment. The duty does not apply in some national security related circumstances.

3.103 **Rule 104** specifies slight changes to the application of the rules in cases involving appeals against industrial training levies. It has been possible to

shorten to a single rule requirements that are set out in Schedule 4 to the present industrial tribunal rules.

3.104 **Rule 105** deals similarly with appeals against improvement and prohibition notices imposed for health and safety reasons. Again, a single rule stands in place of requirements set out in Schedule 5 to the existing rules.

3.105 **Rule 106** contains relevant adjustments to the wording of the rules to cater for cases involving appeals against requirements imposed by the Equality Commission to deal with unlawful discrimination. This single rule replaces both Schedule 6 of the current industrial tribunal rules and Schedule 2 of the Fair Employment Tribunal rules.

3.106 **Rule 107** takes a similar approach to applications by the Equality Commission for enforcement of directions it has given or an undertaking it has received in relation to fair employment. This rule replaces Schedule 3 of the present Fair Employment Tribunal rules.

Schedule 2: national security rules

3.107 **Rule 1** of Schedule 2 specifies that this particular schedule applies to national security proceedings before an industrial tribunal. Rule 96 of Schedule 1 is relevant. The rules in Schedule 2 modify the main rules (in Schedule 1) for the specific purposes of these proceedings.

3.108 **Rule 2** makes clear that a copy of the response to the claim will not be sent to a person excluded from all or part of the proceedings for national security reasons.

3.109 **Rule 3** deals with situations where the tribunal is considering making, or has made, an order concerning evidence or documents and a person has been excluded. In such a situation, the Secretary of State can apply for the order not to be made or, if already made, set aside. The tribunal will hear such an application in private, and the Secretary of State may address the tribunal.

3.110 **Rule 4** requires the tribunal to inform the Advocate General for Northern Ireland if a party is excluded on national security grounds, following which the Advocate may appoint an appropriately legally qualified special advocate to represent that person's interests where the person or their representative is excluded. If the excluded person is a party, he or she is entitled to make a statement to the tribunal before the proceedings or the part of them to which the exclusion applies.

3.111 The special advocate is entitled to communicate with the excluded person at any time before receiving material that the Secretary of State indicates should not be disclosed to the person. After receiving such material, the special advocate can generally only communicate with the tribunal, the Secretary of State or a representative or the Advocate General or a representative. Communication with others (except the excluded person) is also possible for purely administrative purposes. Communication with the excluded person

may generally only take the form of acknowledgement of any written communication from that person. However the advocate is entitled to apply to the tribunal to authorise communication with the excluded person or any other person, in which case the tribunal will inform the Secretary of State, who may object within a specified time. The rule concludes by clarifying the interpretation of the word "party" for certain purposes.

3.112 **Rule 5** states that hearings shall take place in public insofar as this is compatible with the national security issue or other privacy requirements; as such, any party may attend and participate.

3.113 **Rule 6** requires that the Secretary of State be sent the tribunal's written reasons, given under rule 60 of Schedule 1. The Secretary of State has up to 42 days to consider these and may issue a direction, on grounds of national security, which can require non-disclosure of the reasons to "specified" people. The direction can also require "edited reasons" to be prepared, with the omitted information initialled by the chairman. If edited reasons are prepared, they must be sent to the specified people (i.e. those to whom the unedited reasons are not to be disclosed). The edited reasons will also be sent to the respondent and representative, the claimant and representative, any special advocate, and any court that has referred the proceeding to the tribunal. The unedited reasons (i.e. those not sent to the specified people) are to be sent to those listed above, except to a clamant, respondent or representative who has been "specified". Where written reasons are associated with an affected judgment, only the edited version of them can be placed on the public register. If the reasons (edited or otherwise) are corrected under rule 67 of Schedule 1, the same people who received the originals will be sent the corrected version.

Schedule 3: equal value claims

3.114 **Rule 1** of Schedule 3 specifies that the Schedule applies to proceedings involving an equal value claim and modifies the main rules (in Schedule 1) for this specific purpose. It also sets out definitions and how references are to be interpreted.

3.115 In accordance with **rule 2**, a tribunal can order that no new facts will be accepted as evidence unless they are disclosed to all parties by a given date (unless this is not reasonably practicable). It can also order parties to send documents and provide information to an independent expert; order the respondent to grant the expert access to premises during a specified period to conduct interviews; and order a joint presentation, where more than one expert is involved, as to matters agreed and matters on which the experts disagree. The rule goes on to state that the tribunal, in managing proceedings, will have regard to the indicative timetable provided at the end of the Schedule.

3.116 **Rule 3** specifies how a stage 1 equal value hearing will be conducted. The tribunal must give parties reasonable notice of the hearing and the issue that will or may be considered. It must also give notice of the standard orders in

rule 4. At the stage 1 hearing, the tribunal can strike out all or part of the claim if, having provided the claimant with an opportunity to make representations, it decides that work is not of equal value. The tribunal may itself decide the answer to that question or refer it to an independent expert. If it decides itself, it will set a date for a final hearing; otherwise, it will set the date for a stage 2 equal value hearing. The tribunal may hear evidence on defence of a genuine material factor (section 1(3) of the Equal Pay Act (Northern Ireland) 1970) before deciding whether to seek an independent expert's report.

3.117 In accordance with **rule 4**, at the stage 1 hearing the tribunal, unless it is inappropriate, will generally impose the following requirements. The claimant will have 14 days to provide the respondent with written information to identify the comparator and the period for comparison. 28 days will be afforded to the respondent to disclose in writing the name of the comparator, if not already known and assuming one can be identified; for the parties to exchange job descriptions for claimant and comparator; and to communicate to each other the facts each considers relevant to the question of equal value. The respondent must grant the claimant and his or her representative access to premises to allow interviews with any comparator.

3.118 Within 56 days, the parties must give the tribunal an agreed written statement specifying the job descriptions, the facts which both parties consider relevant to the question, points of disagreement and the reasons for disagreeing. Within this period, the parties must also disclose – to each other; any independent expert; and the tribunal – witness statements presenting the facts on which they intend to rely at the final hearing.

3.119 At least 28 days before that hearing, they must also give the tribunal a statement of facts and issues on which they agree, a statement of facts and issues on which they disagree, and a summary of the reasons for disagreeing. The tribunal has flexibility with regard to these orders.

3.120 **Rule 5** provides that where an independent expert has been asked to prepare a report, the tribunal may order that expert to assist it in establishing the facts that will form the basis of the report.

3.121 **Rule 6** sets the procedure for a stage 2 equal value hearing, which must be conducted by a full tribunal. The parties must have reasonable notice of the hearing, drawing their attention to rule 6 and the standard orders in rule 7. The purpose of the hearing is to establish the facts on which the parties do not agree; require the independent expert to prepare a report based on those facts which either have been agreed or have been determined by the tribunal; and set a date for the final hearing. The established facts are those on which the tribunal will rely at the final hearing, unless the independent expert successfully applies for some or all of them to be amended.

3.122 **Rule 7** requires the tribunal generally, unless it is inappropriate, to specify a date by which the independent expert must prepare a report, based only on the established facts, and send it to the parties and the tribunal, As with the

standard orders for a stage 1 hearing, the tribunal has flexibility with regard to the orders it may make.

3.123 **Rule 8** concerns the final hearing. An independent expert's report will be taken into evidence unless the tribunal considers that it is not based on the established facts relating to the equal value question. If it does not admit the report, it can itself decide the question or ask another independent expert to prepare a report. The tribunal can refuse to admit evidence of facts or hear submissions on issues that one party, in spite of having a reasonable opportunity, has not disclosed to another.

3.124 **Rule 9** deals with the duties and powers of the independent expert, of which the expert must be informed when preparing a report or assisting the tribunal to establish the facts. The expert's duty to the tribunal is to assist it in furthering the overriding objective; comply with the rules and any orders; keep the tribunal informed of any significant delays and comply with the set timetable where reasonably practicable; provide progress reports upon request; prepare a report based on the established facts; and attend hearings.

3.125 The expert may apply for any order or hearing in the same way as a party. The tribunal may withdraw the requirement to prepare a report after it has given the expert an opportunity to make representations. If it does this, it may itself decide the question or involve a different independent expert in preparing a report. If it decides to call on a different independent expert, the first expert must provide the tribunal with work in progress by a specified date, in a form that can be used by another expert or the tribunal.

3.126 **Rule 10** deals with the role of experts acting for a party. It requires the tribunal to use expert evidence only so far as required. It also places a duty on experts to assist the tribunal, regardless of any duty they may have to the person paying or instructing them. An expert cannot be called or an expert report admitted without the tribunal's permission, and no expert report will be considered unless it has been disclosed to all the parties and any independent expert at least 28 days before the final hearing.

3.127 Where a report has been prepared by an independent expert, the tribunal will not accept the evidence of another expert unless it is based on the established facts relating to the question of whether the work is of equal value. Any such report will generally have be disclosed to all parties and the tribunal at the same time as the independent expert's report is sent to them. Non-compliance by an expert (other than an independent expert) with the rules or an order may result in the tribunal ordering that expert's evidence not to be admitted. When two or more parties want to submit expert evidence on an issue, the tribunal can order that the evidence be given by one joint expert only and, if the parties cannot agree on a joint expert, the tribunal may select one.

3.128 Written questions to experts, whether independent or otherwise, are the subject of **rule 11**. Where any expert has prepared a report, a party or any other expert involved in the case may put written questions about the report to

its author. Unless the tribunal decides otherwise, these may only be asked once, within 28 days of the report having been sent, must only seek to clarify the report's factual basis, and must simultaneously be copied to all other parties and experts. The expert to whom the questions are put must answer them within 28 days, and the answers will form part of the report. If the expert does not answer, the tribunal may order that the party instructing that expert may not rely on the expert's evidence.

3.129 Under **rule 12**, an independent expert who has prepared a report is entitled to receive notice of any hearing, application, order or judgment in the same way as a party. Any requirement for a party to provide information to another party will also require the information to be provided to the independent expert. This rule also makes clear that there may be more than one stage 1 or stage 2 equal value hearing, and that any power in the general rules (Schedule 1) may be exercised by a full tribunal or a chairman alone.

3.130 **Rule 13** specifies that where equal value proceedings include a national security issue, an independent expert is to send a copy of his or her report and any responses to written questions to the tribunal only. Before the tribunal sends the report or answers to the parties, it will follow rule 6 of Schedule 2, with application to the report or answers (except for provisions dealing with entry into the register).

4. Impact assessment

4.1 **This chapter considers the potential impacts of the options set out in the consultation across a range of areas. The Department would welcome the views of stakeholders on the identified impacts, and on whether there are further impacts which need to be considered.**

HUMAN RIGHTS

4.2 The Department has considered the human rights implications of the options set out in the consultation and has concluded that proposals to enhance tribunals' powers to order a deposit in order for a party to continue with proceedings have relevance to article 6 of the European Convention on Human Rights, the right to a fair trial.

4.3 By way of reminder, the options and the associated rationales are set out below.

- ***A deposit payable by a party in order to continue pursuing a case deemed to have little reasonable prospect of success.*** *This is the 'status quo' option.*

- ***A deposit payable by a party in order to continue pursuing a particular aspect of a case where doing so is deemed to have little reasonable prospect of success.*** *This is now effectively the position in employment tribunals in Great Britain. It allows a more fine grained approach to the imposition of deposits, in that deposit(s) are associated only with aspects of a case that are deemed unlikely to succeed, and not necessarily the case as a whole. This option would allow for the imposition of multiple deposits where multiple issues are identified as having little reasonable prospect of success if pursued further.*

- ***A deposit payable by a party in order to continue to cite a named respondent where the tribunal considers that the claim will have little reasonable prospect of success against that respondent.*** *The intent here is to address the fact that each named respondent is likely to incur separate costs as a case proceeds. By challenging at an early stage claims which have little prospect of succeeding against a particular respondent, the aim is to encourage claimants to think carefully whether they wish to continue to cite multiple respondents, some of whom may not be relevant. This option would allow for the imposition of multiple deposits. It is recognised that, particularly in discrimination cases, it is entirely appropriate to cite multiple respondents, and the provision would not apply to these situations.*

- ***A change in the maximum level of an individual deposit (currently £500).***

- ***A cap on the cumulative amount of multiple deposits**, if introduced.*

4.4 It must be asked whether these potential variations on draft rule 37, some of which are mutually exclusive, are necessary and proportionate. To a degree, early case management (supported by the new rule 27) can undoubtedly be used to give people a realistic appreciation of their case and allow them to make an informed judgment as to whether and how to proceed.

4.5 However, where a claimant (or indeed a respondent) wishes to proceed with contentions that have little reasonable prospect of success, it is important that tribunals have at their disposal tools to lend weight to efforts which discourage claims and responses (or aspects of them) that have little merit.

4.6 The requirement to pay a deposit has the benefit of encouraging parties to consider carefully whether they have appropriate evidence for all of the issues they intend to pursue, encouraging them to continue only if they feel that there is a clear case to answer. If this approach succeeds, the tribunals will be able to remove peripheral issues from cases, concentrating their expertise on dealing with substantive matters, so delivering a more efficient service. A deposit requirement does not prevent parties from pursuing issues about which they feel strongly, but in order to do so, they must pay the relevant amount.

4.7 There is of course a need to acknowledge that, where a tribunal identifies that pursuing a matter will have "little reasonable prospect of success", it is not saying that there is no such prospect. It is worth emphasising, then, that the tribunal's power to order a deposit is associated with a duty on the tribunal to "make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit". It should also be pointed out that the tribunals' revised overriding objective (rule 2) includes "dealing with cases in ways which are proportionate to the complexity and importance of the issues, the financial position of each party and the amount of money involved" [Department's emphasis].

4.8 The maximum level of deposit is currently £500, and the consultation asks whether a change should be made to this figure; by way of example, in Great Britain, the corresponding figure is £1,000. The consultation also asks whether, if there is a facility to order multiple deposits, there should be an overall cap on the maximum cumulative amount. It should be noted that, if implemented, these options would be subject to the requirement for a tribunal to have regard to ability to pay.

4.9 It is recalled that the Minister for Employment and Learning has ruled out at this time more far-reaching action such as the introduction of a fees regime or an increase in the £10,000 cap on costs that may be assessed by a tribunal. In this context, it is in the Department's estimation reasonable to consider options which will ultimately allow tribunals to focus on meritorious cases, or cases which a party feels strongly need to be pursued.

4.10 The Department wishes to safeguard access to justice but, in so doing, must also seek to address a concern that exists, particularly amongst employers, that unmeritorious cases too readily progress through the system, which can generate costs for employers and harm productivity even where there is no substantive case to answer. The Department would welcome input on the human rights implications of the deposit proposals.

4.11 It should be noted that this impact assessment does not deal with the general policy of early conciliation, which has already been the subject of public consultation by the Department as part of the wider employment law review. The draft rules are intended to facilitate that process. Claimants will remain fully entitled to access tribunals provided that they comply with EC by submitting a form to the LRA advising that they have a potential tribunal claim; crucially, they are not required to engage with conciliation unless they wish to do so. If conciliation fails, is not desired or the LRA cannot contact the claimant within a reasonable period, he or she will be sent a certificate by the LRA which will act as evidence allowing OITFET to accept the claim (providing it meets the general acceptance criteria in rules 11 and 12).

LEGAL AID

4.12 No impacts arise from the options set out in this consultation in relation to legal aid. The consultation does not suggest changes to current arrangements, whereby assistance may be available through the 'Green Form' scheme to applicants preparing for a case, but is not available to fund legal representation at a hearing. Both the Law Centre (Northern Ireland) and the Equality Commission for Northern Ireland represent claimants in limited circumstances. The Department has no proposals to make changes to these arrangements.

EQUALITY IMPACT

4.13 The Department has carried out equality screening in respect of this consultation[24]. This work has concluded that draft rule 37 (deposits) has the potential to have negative impacts on those section 75 groups which are more likely to include people on lower incomes. These are people from minority ethnic backgrounds (perhaps from particular religious faiths), people with disabilities and lone parents (particularly women). These impacts arise only if deposits imposed in practice under new provisions are higher than at present. (As a reminder, the options for deposits are set out at paragraph 4.3.)

4.14 In mitigation of the possible negative impact, the screening work notes that draft rule 37(2) requires tribunals to "make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit". This corresponds with

[24] The equality screening document is available from the Department's website at www.delni.gov.uk.

the existing requirement[25], although the language used is more straightforward. The document also notes that most deposits ordered by tribunals at present are under £500. It further suggests the following options for mitigation:

- *leave the existing deposit mechanism unchanged;*
- *clarify that, if multiple deposits are required, they are to be capped at an overall figure;*
- *make it clear that the requirement to have regard to a party's ability to pay applies to a cumulative deposit and not only to each one of number of deposits;*
- *include greater clarity as to how the 'ability to pay' provision is to apply in situations (if permitted) where multiple deposits are required.*

4.15 The Department will consider these options and any other proposals emerging from the public consultation.

4.16 Overall the proposed procedural and process changes are designed to benefit both claimants and respondents irrespective of section 75 grouping; the changes are intended to provide a more efficient and effective tribunal service that is better understood by users and potential users, and to that extent modest benefits across all groups are anticipated. However, the following specific benefits have been identified.

Understanding the system

4.17 Better information and guidance may help, in particular, people from racial or ethnic backgrounds whose first language is not English and people experiencing a disability that makes it difficult for them to interpret complex guidance. This is particularly the case if innovative approaches such as the development of multimedia materials (paragraph 2.85) to illustrate and explain the tribunal process is pursued.

Reduced stress

4.18 Where information, guidance and more effective case management lead to parties being better informed about their options and what they will need to do if they wish to proceed with their case, those parties are more likely to feel that they are in control of the process.

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[25] The existing requirement is phrased as follows: "No order shall be made under this rule unless the chairman has taken reasonable steps to ascertain the ability of the party against whom it is proposed to make the order to comply with such an order, and has taken account of any information so ascertained in determining the amount of the deposit."

4.19 In addition, where better case management has a role in reducing the time taken to deal with proceedings, or encourages settlement between the parties, the exposure of all parties to the stress associated with lengthy legal proceedings can be reduced to the extent that those proceedings are curtailed.

4.20 Reduced exposure to stress is of particular benefit to those with mental health issues who may be more vulnerable to the effects of stress, for example because their condition is likely to be triggered or exacerbated by it.

Measures to protect vulnerable claimants

4.21 Paragraphs 2.48 to 2.55 discuss issues faced by vulnerable people in accessing the tribunal system. From a section 75 perspective, vulnerable people for the purposes of this work include, in particular, ethnic minorities, women and disabled people with learning difficulties or mental health issues. Following paragraph 2.50 it is suggested that the revised rules benefit vulnerable people as follows:

- *rule 40(3) allows for exclusion from the hearing of any person who is to appear as a witness until such times as that person is to give evidence;*
- *rule 42 permits limitations to be placed on the giving of oral evidence and the questioning of witnesses;*
- *rule 43 permits the hearing to be conducted completely or partly by electronic communication;*
- *rule 47 confers wide power on the tribunal to restrict disclosure of information or hold proceedings in private.*

4.22 The consultation also asks whether there is a role for Presidential guidance, and what other measures might be considered. Overall the proposed changes are considered to have modest positive differential impacts for vulnerable people, and the Department is seeking feedback on whether and how these positives might be strengthened.

Monitoring and evaluation

4.23 The tribunal judiciary and administration will seek feedback on the operation of new rules and processes following their introduction through the Tribunal User Group, which in recent years has been convened on a biannual basis. If the Department concludes that unforeseen negative equality impacts are evident, it will work with OITFET and the judiciary to establish how these can be mitigated.

Feedback

4.24 The Department would welcome the views of stakeholders on the identified equality impacts and any additional equality impacts that are considered likely to arise.

HEALTH IMPACTS

4.25 The proposals set out in the consultation may have a minor effect on health and well-being by reducing the stress involved in pursuing a claim relating to a workplace dispute. This is because the proposed changes are intended to provide parties with a better appreciation of what going to tribunal will involve, allowing them to make informed decisions about whether and how to proceed and thus feel more in control of the process. Stress effects may also be addressed in a small way if the process, as intended, operates in a more streamlined way as a result of the procedural improvements contained within the draft rules; if guidance and communication materials are made clearer; and if Presidential guidance is used to establish standardised approaches to particular issues.

REGULATORY IMPACT

4.26 The Department, in recent years, has taken forward measures designed to promote the early resolution of workplace disputes, aware that by no means all of the claims that go to tribunal are best suited to a legal remedy. Indeed, as the latest in this series of steps, the Department is currently seeking to introduce a new system of 'early conciliation' which, if passed into law, will place a requirement on most potential tribunal claimants to contact the Labour Relations Agency before being able to have a tribunal claim accepted. The intention is to encourage parties to explore opportunities to resolve matters between them without the need for time-consuming, potentially costly and stressful litigation. The draft rules that form part of this consultation take account of early conciliation, but this impact assessment does not consider the issue further; the anticipated cost savings to employees, employers and government have been assessed elsewhere[26].

4.27 Some disputes, it is well understood, are most appropriately dealt with at tribunal. From an employer perspective, steps can of course be taken to reduce the likelihood of these arising through effective employee engagement and on the basis of fair and robust employment relations policies. Help is already available to set appropriate systems in place, either through free assistance from the Labour Relations Agency or paid-for advisory services.

[26] Net benefits across all employees of £580,000 and all employers of £1.220m a year are envisaged, as initially set out in 'Public consultation on employment law review: partial regulatory impact assessment' (Department for Employment and Learning, July 2013).

4.28 However the reality is that some disputes will occur and, in spite of efforts to resolve them (or because efforts have been inadequate) these will, on occasion, escalate to tribunal. This consultation's focus is on how tribunal systems and processes can be refined and improved to deal more effectively with disputes reaching this stage.

4.29 The Department is aware that some employers and their representatives are concerned about the costs that arise in mounting a legal defence of a tribunal claim. A degree of cost to respondents cannot be avoided in that, in resisting a claim, employers must devote staff time to preparing for the case and, if they consider it appropriate, must spend money to secure paid legal assistance or representation. Claimants too must devote time to preparing for a case, seeking help from friends and colleagues; or advice or representation through a trade union or citizen advocacy service. They may also incur costs by engaging legal support.

4.30 It is important that the tribunal system operates in a way that minimises cost to all parties. Savings can be realised by developing a more efficient service that is better understood by its users; a system that operates as quickly as possible whilst maintaining its integrity, sets clear expectations and requirements as processes advance and manages cases in a way that focuses on the key issues in dispute.

4.31 The key benefits of the consultation proposals are set out below.

- *Clearer information and processes, Presidential guidance and a simpler single set of rules and regulations to replace the two lengthy industrial tribunal and Fair Employment Tribunal provisions currently in operation, will promote better understanding of the tribunal system among users and potential users.*

- *Revised case management powers will build upon existing good practice to ensure that cases proceed within challenging but achievable timescales[27]. They will do so by helping parties understand what they can expect and encouraging them to think about their arguments and marshal their evidence.*

- *Where users have a better appreciation of their options and what is expected of them, they will feel more in control of the process and better able to make informed decisions about how to proceed.*

- *Better informed parties, having explored their options, may in some instances be more ready to settle or withdraw in preference to going forward with the tribunal process, reducing time and money spent. Of*

[27] All discrimination cases (sex, equal pay, disability, religious belief/political opinion, race, age, sexual orientation, part time working and public interest disclosure) include an offer of final hearing between weeks 26 and 39 from the date a claim is received. In non-discrimination cases (except redundancy/insolvency cases), a hearing is offered between weeks 12 and 14. In redundancy/insolvency cases, a hearing is offered by week 8.

course, better information may conversely encourage parties to proceed, but where they conclude that their case has real prospects of success, this is to be expected.

- *Options to build on the existing deposits regime, if implemented, will strengthen disincentives to proceed with aspects of cases that have little reasonable prospect of success, saving time and expense.*

- *Where time is saved, less time is spent away from day to day business activity (and there are therefore cost savings, though these cannot be quantified). Time saved also has the potential to reduce stress for all parties; protracted disputes can take their toll on health and wellbeing.*

4.32 Cost savings will be modest for the most part and cannot be quantified with the data available. No differential impacts are expected to fall on small businesses.

4.33 As our tribunal system in many (but far from all) ways resembles that operating in Great Britain, it is instructive to consider the below table, reproduced and repurposed for Northern Ireland[28]. If the assumption is accepted that the costs indicated apply, broadly speaking, in Northern Ireland, then it is clear that, where effective case management leads to a case not proceeding to a final hearing, perhaps because it has been settled or withdrawn, savings will be realised for claimants and more especially for respondents.

Table 1: Estimated costs of tribunal proceedings by outcome

	Tribunal hearing	LRA conciliated	Privately settled	Withdrawn	Dismissed	Total
			CLAIMANTS			
Value of time spent on case	£714	£568	£636	£636	£908	**£636**
Costs for advice and representation post ET1	£1,017	£558	£1,026	£763	£134	**£763**
Costs incurred for travel, communication	£23	£20	£20	£22	£17	**£21**
Total (rounded)	**£1,800**	**£1,100**	**£1,700**	**£1,400**	**£1,100**	**£1,400**
			RESPONDENTS			
Cost of time spent on case (directors and senior staff)	£2,268	£1,234	£1,645	£822	£1,234	**£1,234**

[28] The table is based on tables 2 and 3 found in 'Employment tribunal rules: review by Mr Justice Underhill – impact assessment' (Department for Business, Innovation and Skills, September 2012), p. 12.

	Tribunal hearing	LRA conciliated	Privately settled	Withdrawn	Dismissed	Total
Cost of time spent on case (other staff)	£444	£444	£444	£444	£444	**£444**
Costs for advice and representation post ET1	£3,488	£1,780	£3,115	£1,736	£1,780	**£2,225**
Total (rounded)	**£6,200**	**£3,500**	**£5,200**	**£3,000**	**£3,500**	**£3,900**

4.34 Savings to individual claimants or respondents should not be overestimated; there is understood to be significant front-loading of expense as people prepare for their case and, where they feel it appropriate, engage the services of a paid representative. More substantial savings are expected elsewhere, with the introduction of early conciliation.

4.35 The Department's objective is to support a more efficient and effective tribunal system without compromising access to justice. While savings to users will be modest, and in many respects non-monetary, the Department is confident that the consultation proposals are a sound better regulation measure. The draft rules issued alongside the consultation are the result of extensive engagement with the Standing Advisory Committee on the Tribunal Rules of Procedure, which consists of judiciary and legal representatives. They draw inspiration from changes made to the similar rules in Great Britain, which the Committee understands have been well received, as well as addressing Northern Ireland specific needs.

4.36 The Department would welcome your views on the regulatory impact of the proposals, and on whether other options should be considered.

OTHER IMPACTS

4.37 The Department has not identified impacts in relation to social need, crime, community safety and victims, rural issues, the economy, the environment or State Aid Compliance.

FEEDBACK

4.38 The Department invites comments on the impacts identified in this chapter and on any of the proposals raised in the consultation document which have not been specifically mentioned here (see questions 35 and 36).

5. Questions

5.1 The Department would welcome your views on the following questions.

Q1. *Are the new rules less complex and easier for non-lawyers to understand?*

Q2. *Can the language or style of the rules be improved and, if so, how?*

Q3. *Do any of the rules appear ambiguous or create confusion? If so, please explain any improvements you feel could be made.*

Q4. *Does the overriding objective in rule 2 set out the most important objectives of the tribunal process? If not, please explain.*

Q5. *Do the rules do enough to encourage the appropriate use of alternative means of resolving disputes? If not, please explain.*

Q6. *Please identify any potential issues with the proposed interface between early conciliation and the tribunal system.*

Q7. *Do you support the concept of Presidential guidance being issued under rule 8 and, if so, how might it be used?*

Q8. *Should any changes be made to the grounds for rejecting a claim under rules 11 and 12? If so, which changes and why?*

Q9. *Do you support developments in the early case management process and can you suggest any improvements?*

Q10. *Are the case management powers provided for in the rules sufficiently clear and flexible? Please explain.*

Q11. *What are the advantages and disadvantages of the lead case mechanism for dealing with multiple claims in rule 33?*

Q12. *Are the strike out mechanisms set out in rule 35 reasonable and proportionate? Please explain, proposing any alterations.*

Q13. *Should tribunals have power to require one deposit per issue identified as unlikely to succeed?*

Q14. *Should tribunals have power to require claimants to pay deposits per named respondent in order to proceed?*

Q15. *What should be the maximum level of an individual deposit?*

Q16. *Should there be a maximum cumulative deposit if multiple deposits are permitted?*

Q17. *Should a party who has lost a case for the reason(s) identified in a deposit order forfeit the relevant deposit even where no costs order is made?*

Q18. *Do the rules give sufficient protection to vulnerable people? Please explain.*

Q19. *How might Presidential guidance address the needs of vulnerable parties?*

Q20. *Does rule 47 make the privacy and restricted reporting regime sufficiently flexible? Please explain.*

Q21. *What additional measures or rules should the Department consider implementing, to support vulnerable parties?*

Q22. *What, if any, quantifiable evidence do you have of failure to pay tribunal awards and its impacts?*

Q23. *What additional measures, if any, are necessary to address non-payment of awards?*

Q24. *Are there any drawbacks to the approach adopted in rule 50, which enables pre-hearing reviews and case management discussions to proceed as part of one or more preliminary hearings?*

Q25. *Are there any potential interface issues between preliminary hearings under rule 50 and early case management under rule 27? If so, please explain.*

Q26. *Do you agree with the proposed approach to giving reasons in rule 60? Please explain.*

Q27. *Does Part 14 make appropriate provision in respect of costs, preparation time and wasted costs? Please explain.*

Q28. *What are your experiences of 'costs threats'?*

Q29. *What changes, if any, should be made to deal with the issue?*

Q30. *Should legislation formally provide for reference to be made to the position of "employment judge"? Please explain.*

Q31. *Taking into account the sources of information already available, is there a need for further guidance on the tribunal process? If so, what type(s) of information and guidance should be developed, and what issues would benefit from a particular focus?*

Q32. *Do you support the suggestion of a multimedia familiarisation resource and, if so, what should be its focus?*

Q33. *How else can users be helped to understand the nature of the process, including the value of particular claims?*

Q34. *How can engagement between the tribunal system and its users be improved?*

Q35. *Do you concur with the Department's assessment of the impacts of the proposals set out in the consultation?*

Q36. *What, if any, additional impacts need to be considered?*

Q37. *Do you have any other views on how the tribunal process could be improved?*

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