

‘DELIVER US FROM EMPLOYMENT TRIBUNAL HELL’?: EMPLOYMENT LAW, INDUSTRIAL RELATIONS AND THE EMPLOYMENT BILL

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Abstract

This paper discusses the likely contents of the proposed Employment Bill, placing them in the context of what the government identifies to be a growing unease of employers at the cost, volume and complexity of cases brought to employment tribunals. The paper considers a number of common criticisms made of tribunals, suggesting that those which have most influenced government policy are misplaced. It suggests that the proposed Bill is unlikely to succeed in simplifying employment law. It concludes that employees have a great deal to lose, not so much from the envisaged reforms, but from a dynamic in which government is encouraging business to demand further and repeated changes to the system. The paper was delivered to a Centre for Research in Employment Studies seminar in the Business School at the University of Hertfordshire in December 2007.

Biographical Details

Dr David Renton is an Honorary Senior Research Fellow at the Centre for Research in Employment Studies in the University of Hertfordshire Business School. David Renton obtained an MA in Modern History from the University of Oxford in 1995 and a PhD in Modern History from the University of Sheffield in 1998. Between 1999 and 2001, he taught at Edge Hill University, where he was also the Branch Secretary of the lecturers' union, NATFHE. Between 2001 and 2003, he was a Senior Research Fellow at the University of Sunderland. From 2003 to 2006, he was a national official of NATFHE, later UCU, with responsibility for workplace equality. He is currently training to be a barrister. David is also the author of a large number of books, officer and now trainee barrister. He is the author of some 14 books (see <http://www.dkrenton.co.uk/books/books.html>). He is contactable on <david_renton@dkrenton.co.uk>.

In December 2006, the Department of Trade and Industry invited Michael Gibbons, previously the Director of UK Communications at PowerGen, to author a review of employment dispute resolution in Great Britain. The report was published in March 2007. Its proposals were endorsed (obliquely) by Gordon Brown in his final budget speech.¹ The report will inform an Employment Bill,² which will be a main plank of the government's legislative programme for 2007-8. Michael Gibbons' report brimmed with the confidence of a senior executive who expects his instructions to be implemented quickly and without question: 'I ... present a suite of complementary recommendations which, in aggregate, are genuinely deregulatory, and simplifying ... If implemented, they should reduce the complexity of the current system and reduce costs to businesses and employees ... I believe they should be cost effective for Government to implement.'³

Three issues dominated the Gibbons Report. The first was simply the cost of the employment tribunal system,⁴ which Gibbons estimated at £120 million per year.⁵ The second issue was the number of cases going to tribunal, which the report was designed to reduce. The Gibbons Report's main proposal, the repeal of the statutory dispute resolution procedures introduced as recently as 2004,⁶ was justified as a step to reduce the number of cases and hence the cost of the system. The third criticism was that employment law had been allowed to become over-complex and required simplification. These criticisms were presented as the common concern of experts drawn from every sphere of industry. The report was welcomed by each of the TUC and the CBI. Its findings have become the common policy of both Labour and Conservative parties, and of the majority of columnists to consider the issue. Yet the unanimity with which Gibbons' proposals have been welcomed should not conceal the extent to which they mesh together analyses that point in different directions. The tribunal is an adversarial system: the majority of claimants (i.e. workers) have certain common experiences, which are often different from those of most respondents (i.e. their employers).

The Gibbons Report identified the cost of litigation as a central problem of the current system. This is indeed a problem felt by both sides. Yet some of the dynamics are more complex than Gibbons makes them to seem. Around half of all claimants in employment tribunal cases are unrepresented.⁷ The financial costs to an unrepresented claimant will include travel, communication (phone calls and stamps) and lost earnings (for example, where a worker has to take the day of the hearing as unpaid leave). Yet, even with these costs considered, it remains the case that a worker can bring a case to the tribunal at a relatively modest economic cost to him- or herself. Unlike, for example, the Leasehold Valuation Tribunal (where landlord and tenant disputes are heard), there is no fee for issuing a claim form, nor to pay for the costs of the actual hearing.⁸ Of course, most claimants do obtain representation, either by paying for it directly (through hiring a solicitor or a solicitor and a barrister, typically on a 'no win no fee' basis⁹) or paying indirectly (through union subs)¹⁰ or by finding a friend or colleague or lawyer who will represent them unpaid. The average cost of bringing an employment claim has been estimated to be around £2493 to a worker:¹¹ which is approximately one tenth of the annual salary in the UK.¹² Cost is an issue to workers, it would be wrong to pretend otherwise. But its effects are felt unevenly on each party. Even a successful employer is likely to face substantial costs. The average cost of defending a claim is £9000, or roughly three times as high. From the adversarial dynamic of the process (and the business reality of the situation, which puts a premium on reaching settlement in advance of a hearing), the expense of litigation is surprisingly often a worker's friend: it causes some unwilling employers to settle, when otherwise they would not.

Much was made in the Gibbons Report of the complexity of employment law. Once again, this problem has different significance for workers and employers. For a claimant, one of the most important problems of the tribunal is that the law is inaccessible to them. Many workers simply do not understand what has happened to their case: as written and oral legal submission fit it into the necessary legal context of statute and competing precedent. A typical employer, by contrast, will have a greater knowledge of the law. They are more likely to have received some occupational training in the matter

which is now in dispute. They are more likely to have attended a tribunal hearing before. The process of litigation itself has fewer dangers. They have much less to lose emotionally from the process. Of course, many managers called as witnesses will want their day before the tribunal either as much (if their intention is to clear themselves, for example, from allegations of discrimination) or as little (disliking its unfamiliarity and the possibility of intrusive questioning) as a typical worker. But losing control of the case to the experts involves for many managers, a certain loss of responsibility for the decision that is now being challenged. Responsibility, and criticism, is taken away from them. Other people are paid to defend them. Having more resources than the worker, an employer can afford a better quality of representative: almost always a solicitor and increasingly commonly a barrister. Complexity almost always increases the employer's chance of success. Very rarely will it assist the worker who has made the claim.

The Gibbons Report encouraged a number of critics to suggest that the tribunal system was at risk of collapse. The *Financial Times* called upon the government to deliver employers from a system that it likened to 'Dante's vision of the Inferno'.¹³ The Engineering Employers' Federation asked aloud if tribunals remain 'fit for purpose'.¹⁴ Even Jenny Watson, the outgoing Chair of the Equal Opportunity Commission wondered in September 2007, in light of the increase in the number of equal claims being brought to tribunal, whether it would not be better to impose a moratorium, during which workers would be prohibited from bringing any further equal claims.¹⁵

Although it is unlikely that the Employment Bill will in fact result in a significant change from the current tribunal system, it does seem that newspapers sympathetic to business, employers' pressure groups and the like, are slowly being won to a new position of hostility to the employment tribunals. The first half of this paper therefore considers some of the common criticisms made of the tribunal system and asks how much truth there is to them. The second half examines the content of the proposed Employment Bill, and asks how much effect the proposals are likely to have: not merely on the tribunals, but on employment relationships more generally.

A. The Tribunals before Gibbons

1. Disproportionate number of cases?

The single most common criticism made of employment tribunals, especially by those who represent employers, is simply that the system allows too many cases to be brought each year. Between 1 January and 31 December 1972, some 13,555 cases came to the tribunal, while between 1 April 2006 and 31 March 2007, there were 132,577: a ten-fold rise. Indeed, much of the growth has taken place just in the last three years, with the number of claims rising from 86,189 in 2004-5 to their current level.

Table 1: Employment Tribunal applications (select years)¹⁶

Jan- Dec 1971	8,592
Jan-Dec 1972	13,555
Jan-Dec 1983	35,000
Jan-Dec 1987	29,000
April 1988-Mar 1989	29,304
April 1990-Mar 1991	43,243
April 1992-Mar 1993	71,821
April 1994-Mar 1995	88,061
April 1996-Mar 1997	88,910
April 1997-Mar 1998	80,435

April 1998-Mar 1999	91,913
April 1999-Mar 2000	103,935
April 2000-Mar 2001	130,408
April 2001-Mar 2002	112,227
April 2002-Mar 2003	98,617
April 2003-Mar 2004	115,042
April 2004-Mar 2005	86,189
April 2005-Mar 2006	115,039
April 2006-Mar 2007	132,577

To put these figures in context: in 1985, that there were 25.3 million workers in the UK. It was estimated that just over 1 in 100 of all workers (or, to be precise, 11 in 1000) were dismissed at some point in that year. In 1985, there were 33,000 tribunal applications complaining of unfair dismissal. It followed that roughly one in eight of all dismissed workers attempted to use the tribunals to gain a remedy.¹⁷ Another recent survey has estimated that around one in twenty of all workers (5.8%) who experience problems with their rights at work will end up bringing a tribunal claim.¹⁸ Since 1985, the total number of dismissals in the economy each year has almost certainly risen, but even today, at a little over 130,000 claims from a workforce of just over 29 million, the total number of claims each year is still less than one for every 200 workers. By way of contrast: a 2006 Acas report estimated that the total number of claimants bringing an employment tribunal claim each year in France was 0.7% of the workforce (or one in every 140 workers), and in Germany 1.5% (the equivalent of one in 60 workers).¹⁹

Further, while many different explanations could be given for the rise in tribunal applications since 2004, the really striking rise is surely the rise since 1971. In the last thirty-six years, workplaces have been transformed in all sorts of ways: by the trend towards smaller workplaces (there is a strong negative correlation between use of tribunals and workplace size), by the greater prevalence of dismissal, by speeded-up and lengthened patterns of work in which dispute has become more likely, and by the demise of union membership in the workplace (with an inevitable effect on the quality of employee consultation). Outside the workplace a claims culture has equally become more pervasive. If I was asked to choose any one of these factors to explain the rise in the number of tribunal applications, I would say just this: anyone in the room can draw a graph in their head of the pattern of strike incidence since 1971. In the same period, the number of tribunal calls has risen as dramatically and persistently as the number of strike days has fallen. Workplaces are inevitably sites of conflict; it should be no surprise that the decline in strike days has expressed itself in dispute elsewhere in the system.

2. Too many weak and vexatious cases?

Many employers complain that workers see tribunals as a sort of low-odds, high-payout lottery: an additional payment to be granted to dismissed former workers whether or not their claim is merited. Claimants are sometimes termed 'have-a-go-heroes',²⁰ well-off former workers, protected against detriment in their new position, people who can express an unfounded grievance without sanction in their new post. Thus, one of the Gibbons recommendations was to grant further powers to tribunals to strike out weak cases.²¹ In the intellectual terrain of abstract mathematics, against which the behaviour of some workers strikes some employers as absurd, a claimant 'should' probably bear in mind no more than two questions: 'are my odds of winning greater than 50%?', and 'if I do win, what will I receive?' Of course, these are important practical considerations. In 2001, another survey, analysing the historical trends in tribunal cases in the years from 1981 to 1997, drew three general conclusions about the factors determining the number of claims made to the tribunal each year. First, it found that there was a general trend for more people to make claims, year on year; second, it found that any increase (or decline) in the

number of workers bringing unfair dismissal claims correlated to variations in an applicant's chance of success; third, it found that the number of discrimination cases correlated to the value of previous successful claims.²² But any person's calculations of their odds of success and of what success would mean will almost immediately begin to take account of other factors. The chance of winning, meanwhile, requires also some consideration of what success would mean: survival as the claimant to the end of the case, with or without final vindication; an apology from the employer; the dismissal of the manager; a six-figure payout? The answers to that question given in surveys of claimants are not those that a manager would expect: a worker will repeatedly say that they seek vindication or re-employment, or an apology; for the manager, by contrast, the issue is more usually the amount of compensation.

3. Excessive costs to employers?

Another common complaint made by employers is that the costs of defending a tribunal case are excessive. The average tribunal case is currently estimated to cost an employer £9,000 to defend, and to take up some 9.85 days of the business's time, including 7.71 days of directors' and senior managers' time.²³ A 'justice' argument is also sometimes put: if many workers can represent themselves without cost, why should employers have to foot such expensive bills? One answer, although not a complete one, is that cases become expensive because employers have the choice to make them expensive. Some employers, typically small employers, do represent themselves at the tribunal. Their costs, evidently, are as low as those of an unrepresented worker.

Beyond self-representation, other options exist: consultants will represent employers at tribunal in return for an annual fee. Likewise, it used to be common for employers to be represented at tribunal by employers' representative organisations, and if that practice has become relatively rare in recent years,²⁴ that is largely because many employers have the spare resources to obtain a better quality of representation. One reason why cases become expensive is that some lawyers use the last weeks leading up to the tribunal hearing (the period after the date of the final hearing has been allocated, when both sides know the case is due, and certain procedural formalities are necessary, such as the service of documents and witness statements), as a terrain to try and gain advantages in the hearing itself. It is common for employers to seek to have the claimant's case struck out, or to seek the tribunal to require the claimant to pay a deposit if he is to continue. Such 'over-litigation', if successful to any degree, increases the employer's chance of success, but it requires the writing of letters, the drafting of witness statements, all sorts of costs on top of the expense of the hearing itself.

4. Insufficient legal aid?

If employers complain that an unrepresented worker has no costs, the equivalent complaint of workers is that claimants' receive insufficient legal support. In particular, legal aid does not cover representation at an employment tribunal. Where a solicitor or adviser has a contract with the Legal Services Commission under the Legal Help scheme, the solicitors provide initial support to claimants: for example, in ascertaining whether they should proceed with a claim, in advising of timescales, or in drafting the claim form.²⁵ The system would be fairer if legal aid was available for tribunal hearings. Most claimants are unemployed (76% leave their employment before submitting a claim, a further 17% in its immediate aftermath). Workers bringing cases to employment tribunals have fewer qualifications than the average (23% have no qualifications, compared to the national average of 10%). Very many are employed in small businesses (62% of tribunal claimants, compared to 37% of the total labour force).²⁶ Tribunal claimants are exactly the sort of people to which funds should be directed,

5. Judgments biased towards one side?

Another common criticism levelled by workers and their representatives is that the results of tribunal cases favour the employer. Certainly during the first decade or so, this tendency was marked. The large majority of cases were unfair dismissal cases, and in them, the worker was successful in noticeably less than half of all applications.

Table 2: Percentage of all unfair dismissal cases upheld (1975–82)²⁷

1975	39.6%	1976	37.6%	1977	30.8%	1978	27.7%
1979	27.2%	1980	27.7%	1981	23.3%	1982	30.7%

Over the past 25 years, claimants' chance of success at tribunal hearings has risen. Behind this trend are two further processes: a tendency for the tribunals to hear a much wider set of cases, and a growing tendency for cases to settle in advance of a hearing.

Table 3: Jurisdiction of cases 2006/7 (plain text) and 1999/2000 (bold), as percentage of all claims (selection)²⁸

Unfair dismissal	18.7% 42.9%	Redundancy pay and consultation	3.2% 5.6%
Working Time Directive	8.9% 22.3%	Disability discrimination	2.3% n/a
Wages claims	14.7% 9.3%	Race discrimination	1.6% 3.1%
Sex discrimination / equal pay	30.3% 7.0%	Other discrimination	0.8% n/a
Breach of contract	11.4% 20.4%	National minimum wage	0.3% 0.3%

Claimants' chances of success can best be seen by comparing three types of case, unauthorised deduction of wages cases (a good example of a jurisdiction in which the claimants' chances of success have historically been relatively high), unfair dismissal cases (the largest single category of case) and race discrimination cases (a jurisdiction in which claimants have typically had a very low rate of success).

Starting with all unauthorised deduction cases disposed between the start of April 2006 and the end of March 2007: 23,624 cases reached their conclusion in this period. Of this total, some 31% of these cases (7,354) were withdrawn by the claimant.²⁹ A further 28% of cases (6,615) were settled through the medium of ACAS. A further 6% of cases (1,330) were struck out, without a pre-hearing, while around 1% (333 cases) were dismissed following a pre-hearing. In 7% of cases, default judgment was issued (1,594), many of these would have been cases where an employer simply failed to submit a defence. Of those that came to hearing, the largest proportion were successful: 19% of cases ended with the tribunal declaring in favour of the claimant (4606 cases), in contrast to 8% for the respondent (1792 cases). The equivalent figures for unfair dismissal and race discrimination claims in the same period are as follows:

Table 4: History of claims (select jurisdictions) at tribunal 1 April 2006 to 31 March 2007³⁰

Jurisdiction:	Unfair Dismissal	Race Discrimination
Cases disposed	38,376 (100%)	3,117 (100%)
Withdrawn	12,764 (33%)	968 (31%)

Settled (ACAS)	13,540 (35%)	1,173 (38%)
Struck out	3,049 (8%)	224 (7%)
Dismissed	978 (3%)	161 (5%)
Default judgment	608 (2%)	24 (1%)
Success at hearing	3,870 (10%)	102 (3%)
Unsuccessful at hearing	3,567 (9%)	465 (15%)

It is striking that of all the unfair dismissal cases that actually were heard by the tribunal, around half were ultimately successful: 3870 of 7347 (or 53%).³¹ This proportion is noticeably higher than twenty years ago. Yet the cases which actually make it to tribunal get that far typically because the person bringing them has been advised that their case is unusually strong: in that context, the fact that only just over half go on to succeed is a sign that tribunals are no soft touch for the claimant.

6. Unable to award results sought?

In a typical unfair dismissal case, a worker may have three different definitions of 'victory'. First, they may desire the emotional satisfaction of hearing from a tribunal or from the employer that they should not have been dismissed. Second, they may seek re-employment with the same business. Third, they may seek compensation for their economic losses since their dismissal: if they are now unemployed, or if they are now employed in worse-paid job, the difference between the money that they would have earned and what they have in fact received. A 2006 survey of 40 claimants in race cases, found that many prioritised the first of these desirable outcomes:

- (1) [The Tribunal chair] said 'You haven't put any damages or claim'. I said, 'I'm not interested in money. I want justice.'
- (2) I expect [the company] to simply say sorry. I was not expecting a lot of money. I wanted a Tribunal to tell them they had done wrong ...
- (3) I wanted them reprimanded and opened to the scrutiny of people outside the organisation so other people could see what they were doing.
- (4) The main issue was that I was abused and all my people were abused and nothing was going to be done about that and they just wanted to bury the hatchet. Them apologising and bringing the man to book is much better than offering me money.
- (5) I wanted to speak for the downtrodden, those people who are being discriminated against. It wasn't any remuneration per se. I wanted those cowboy employers should be brought to book.³²

It is often a surprise, then, to claimants to discover that employment tribunals are practically incapable of providing the first of these potential remedies, while even the second is only granted exceptionally. The law focuses all its attention at the third.

Table 5: Reinstatement or re-engagement orders in all tribunal cases³³

1972	4.4%	1973	6.2%	1974	4.3%	1975	5.1%	1976	5.5%
1977	4.3%	1978	3.2%	1979	3.1%	1980	2.8%	1981	4.8%

In the twelve months ending 31 March 2007, a total of 44,491 unfair dismissal cases were submitted to employment tribunals. Of these cases, the tribunal eventually upheld 3,870. Of these cases, just 23 ended in an order of re-instatement or re-engagement.³⁴

Otto Kahn-Freund has blamed the unwillingness of tribunals to impose reinstatement on employers on 'the power of a legal shibboleth ... that a contract of employment cannot be specifically enforced against either side because equity does nothing in vain and also because an order for specific performance against the worker would savour of compulsory labour, and the rule of mutuality [i.e. the general legal principle that in civil cases a power is unjust if it can only ever be used against one of the two parties involved in the litigation] demands that if no such order can be made against the employee it cannot be made against the employer either.'³⁵

7. Inadequate damages?

Employment tribunal awards are linked to earnings. Awards for unfair dismissal are capped; awards for discrimination are uncapped. Not surprisingly therefore, the reporting of high profile claims gives in fact a very poor indication of the typical awards obtained by the average claimant. The mean compensation for unfair dismissal claims in 2005-6 was £8,679; the median in the same year was £4,228. The mean compensation for race discrimination cases was £30,361 in 2005-6; the median was £6,640.³⁶ In 2006-7, the median award in all unfair dismissal cases fell to just £3,800.³⁷ 'Even if you win, and that is not easy', one critic has written, 'you generally end up with peanuts'.³⁸

B. The Bill: Proposals and Consequences

At the time of writing, no details of the Employment Bill have been published, although some indication of the Bill's likely contents was given in Gordon Brown's pre-Queen's speech of summer 2007, and a further press release was produced for the Queen's Speech.³⁹ The Bill is likely to contain reforms to remedy the ill-treatment of specific groups of agency workers,⁴⁰ to reform the awards made to workers in the event of non-payment of the minimum wage,⁴¹ to extend the set of workers who are not entitled to the minimum wage to cover certain groups of volunteers,⁴² and to amend the statutory prohibition which prevents a union from excluding a member on the basis of their membership of a political party.⁴³ Those changes aside, the substance of the Bill is likely to take the form of an amendment of the statutory dispute resolution procedures which (in the briefest summary⁴⁴) currently require a worker, in advance of submitting a claim to the tribunal, to bring a grievance to the employer and require the employer, in advance of dismissing a worker, to hold a disciplinary or dismissal meeting and to allow the worker to appeal.⁴⁵ ACAS summarises the disciplinary procedures as follows:⁴⁶

At a glance

Drawing up disciplinary rules and procedures

- Involve management, employees and their representatives where appropriate (Paragraph 52).
- Make rules clear and brief and explain their purpose (Paragraph 53).
- Explain rules and procedures to employees and make sure they have a copy or ready access to a copy of them (Paragraph 55).

Operating disciplinary procedures

- Establish facts before taking action (Paragraph 8).
- Deal with cases of minor misconduct or unsatisfactory performance informally (Paragraphs 11-12).
- For more serious cases, follow formal procedures, including informing the employee of the alleged misconduct or unsatisfactory performance (Paragraph 13).
- Invite the employee to a meeting and inform them of the right to be accompanied (Paragraph 14-16).
- Where performance is unsatisfactory explain to the employee the improvement required, the support that will be given and when and how performance will be reviewed (Paragraphs 19-20).

- If giving a warning, tell the employee why and how they need to change, the consequences of failing to improve and that they have a right to appeal (Paragraphs 21-22).
- If dismissing an employee, tell them why, when their contract will end and that they can appeal (Paragraph 25).
- Before dismissing or taking disciplinary action other than issuing a warning, always follow the statutory dismissal and disciplinary procedure (Paragraphs 26-32).
- When dealing with absences from work, find out the reasons for the absence before deciding on what action to take. (Paragraph 37).

Holding appeals

- If the employee wishes to appeal invite them to a meeting and inform the employee of their right to be accompanied (Paragraphs 44-48).
- Where possible, arrange for the appeal to be dealt with by a more senior manager not involved with the earlier decision (Paragraph 46).
- Inform the employee about the appeal decision and the reasons for it (Paragraph 48).

Records

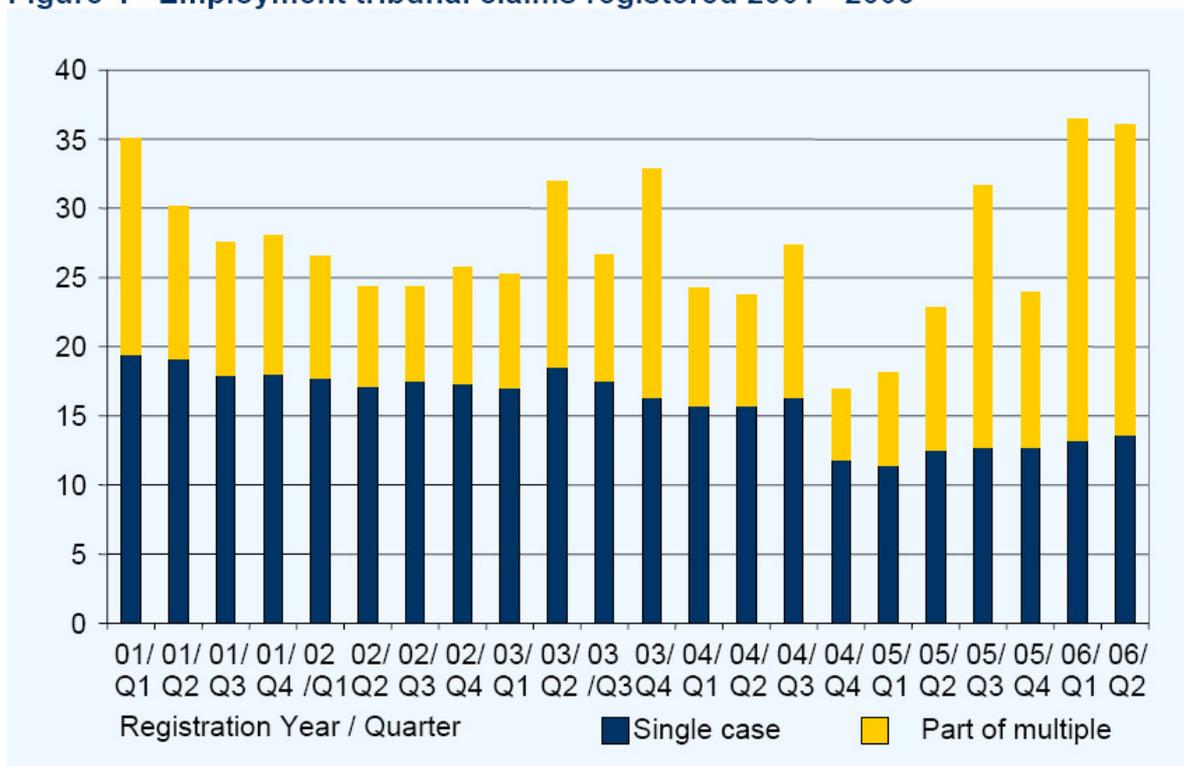
- Keep written records for future reference (Paragraph 49).

These procedures were introduced on 1 October 2004. Their logic was straightforward. If a worker was required to raise a grievance, before proceeding, and their case was weak or vexatious, they would soon realise this by the speed with which the employer rejected their grievance. If the case was strong, conversely, the employer would accept it, resolving the dispute at source. The regulations are undoubtedly complex, and there was pressure before their introduction from trade unions, ACAS and other bodies for the procedures to be simplified. This demand was resisted. It is possible that ministers or civil servants tolerated the difficulty of the process out of a belief that a more complex system would simply dissuade workers from bringing their case to court. Unnecessary litigation and cost would thereby be reduced. Civil servants estimated that the procedures would result in a net reduction of tribunal cases amounting to 34,000 to 37,000 cases per year.⁴⁷ The introduction of the procedures thus forms part of that general towards the idealisation of 'entrepreneurial prosperity', which even sympathetic authors have perceived to be a defining goal of New Labour's employment policies.⁴⁸

Further, and in contradiction of the common and superficial criticisms of them cited earlier in this paper, it probably is true that the procedures did lead to a one-off reduction in the number of cases,

which fell from 98,617 in 2002-3 and 115,042 in 2003-4 to 86,189 in 2004-5. In the following three years, however, the number of cases has risen by more than half to 132,577.⁴⁹ Some of the rise since may be explained by extraneous factors: for example, there has been a very sharp rise in the number of equal pay claims, from 4,159 in 2003-4 to 44,013 in 2007⁵⁰ with the main explanation being the national single status agreement in local government, which employers were required to implement locally by 2007.⁵¹ The following table illustrates the impact of these cases by distinguishing between cases brought by a single claimant (indicated in blue) and those brought by multiple claimants (indicated in yellow), among the latter the equal pay class actions brought in the NHS and local government are by far the largest group). Almost all the increase in tribunal claims is accounted for by the latter group:⁵²

Figure 4 - Employment tribunal claims registered 2001 - 2006



It has long been inevitable that 2006 and 2007 would see a rise in the number of these claims. It is possible therefore that the 2004 regulations were in fact successful on their own terms: that they have permanently and significantly reduced the number of employment tribunal claims, if not to the extent that the government had hoped.

If this analysis is correct, then the main relevant criticism of the procedures becomes something different, that they have brought lawyers into employment relationships, prematurely and unhappily. This has in fact been the most common complaint of employers: that under the new procedures workers are aware that it is more difficult for them to bring complaints and approach lawyers earlier than they did before. Even simple procedural steps such as the submission by the worker of a letter or grievance become subject to complex legal advice, with solicitors treating this stage as if it was the equivalent to the submission of particulars in the county court. Workers are warned that by failing to plead their full claim at this stage, they might be prevented from bringing a matter to the tribunal later. Employers, finding properly drafted legal letters at this very early stage, respond in kind, taking legal advice, which usually goes more often to the best way to dismiss a worker rather than the merits of dismissal. 'As

anyone who has had to deal with [the procedures] can testify, they are bureaucratic, onerous and almost impossible to follow in places. What was intended to spare parties the legal costs of a tribunal process instead just "front loaded" those costs.⁵³ Thus the iron law of unintended consequence requires a consistently pro-business government to repeal the very same policies that it had introduced in order to appease business.⁵⁴

As has been indicated, the text of the Employment Bill has not been published, but the most likely alternative is that some but not all of the 2004 procedures will be removed. Employers' organisations have not called for the procedures to be repealed entirely. It appears to be accepted that the situation before, in which there was little pressure on employers to hear a grievance promptly, was unjust to workers. Having established dismissal and grievance procedures, employers are in no hurry to remove them entirely. Following the Gibbons Report, the Department of Trade and Industry conducted a further consultation as to what new system should take effect once the 2004 procedures had been repealed. Three options were canvassed as follows:

(A) Revert to the position before the introduction of the 2004 procedures.

Repealing section 98A⁵⁵ in full would reinstate the Polkey decision⁵⁶ such that procedural failings would normally render a dismissal unfair, but compensation could then be reduced in proportion to the likelihood that the dismissal would have gone ahead anyway.

B) Repeal section 98A in full, but provide for alternative findings reflecting the balance of procedural and substantive unfairness in the dismissal.

This would allow tribunals to make the nature of the finding clearer by distinguishing between dismissals which were unfair on procedural and substantive grounds. Thus there could be a finding that a dismissal was procedurally unfair but substantively fair, in which case a penalty could be imposed according to a scale with a low cap. Costs could also, as at present, be awarded against an employer who was willfully obstructive during the tribunal process.

(C) Reverse the Polkey decision in full and revert to the "no difference" rule

If the 2004 procedures are repealed, then the repeal of 98A(1) and (3), which make dismissal automatically unfair if those procedures are not followed, would be an inevitable consequential amendment. It would, however, be possible to retain 98A(2), amended so as to be no longer subject to 98A(1).⁵⁷ This would in practice reverse the Polkey decision and reinstate the "no difference"⁵⁸ rule for all dismissals.⁵⁹

The same document indicated that the government's preference was position B. A moment's thought should indicate that such a system would be no simpler than the 2004 procedures, but if anything would risk greater complexity. Developed case law will be needed to show when a dismissal is procedurally unfair. Another problem is that tribunal hearings already have a tendency to be split in two (merit and remedy). There is a risk that they would in future be split into three (substantive fairness, procedural fairness, remedy). The greatest danger is that tribunal panels, naturally wanting to reach a balanced judgment, will adopt a default analysis of "substantially fair / procedurally unfair", a result that will result in workers typically receiving between a third and half of their claim. This may not seem objectionable, in itself, until it is remembered that the primary remedy for unfair dismissal is the wages that an employee would have received from the employer had he or she been at work between the dismissal and the tribunal hearing. As a result of their dismissal, the worker has lost – in essence – the full amount of their claim. To know that the claimant would, in all but exceptional cases, receive no more than a half of the money they had lost would leave workers unprotected even following a court order finding that the employer had been in the wrong.

The content of any new system will need to be known in advance; it is unlikely that anything could be introduced before April 2009. The current system, with its various faults will continue in the meantime. Plus of course, the complexity of employment law does not emerge haphazardly but as a

result of conscious intervention by the British state and the European Commission, sometimes even with an eye to increasing workers' rights. To speak of simplification⁶⁰ to promise far more than the government could deliver. That point applies, whatever the new system that is introduced.

Seen in the round, the government has encouraged business to think that the employment tribunal system is in need of major change. The Bill will not answer that demand. It is likely therefore that employers will continue to press for further 'reforms'. This is really the most striking aspect of recent events. It is hard to find any reason to believe that the new system, once introduced, will lead to any substantial fall in tribunal numbers. Inevitably, employers and the press will come back for 'more'.

It is perhaps appropriate to end therefore by recalling that the present employment tribunal system emerged at a distinct moment and time, and to a definite purpose. For while employment tribunals have existed in one form or another since the Industrial Training Act 1964, their original purpose was modest: simply to hear appeals from employers resulting from levy assessments made by the Industrial Training Board. Tribunals took on their present character, as employment courts to resolve disputes between employers and workers, only in 1971, as part of that year's Industrial Relations Act.⁶¹ To an audience of industrial relations specialists there is no need to labour the point, save only to recall that the Act was the centre-piece of Conservative industrial strategy in the 1970s and that when passed, the Act caused the greatest wave of working-class protest in post-war British history. The employment tribunals are today the Act's sole significant remaining progeny. Even on the government's own terms, it would seem to be a piece of grand political stupidity to raise before employers the possibility that they might no longer be required in future to suffer the expense of individual employment litigation. With or without the employment tribunals, some structure will be required to resolve workplace disputes. And if not the tribunals, then what?

Endnotes

¹ 'And here the right policy is to combine the most modern and flexible competition regime including, as announced today, the further extension of risk based regulation - into employment tribunals - with the most effective incentives and support for British investment and British innovation.' Her Majesty's Treasury, *Chancellor of the Exchequer's Budget Statement*, press release, 21 March 2007.

² Prior to the Queen's Speech, this intended Bill was known as the Employment Simplification Bill, and is still commonly referred to by that title. Its changing nomenclature may reflection an appreciation of some of the difficulties set out in the second half of this paper.

³ Department of Trade and Industry, *Better Dispute Resolution: A review of employment dispute resolution in Great Britain* (London: DTI, 2007), p. 4.

⁴ A note on terminology: industrial tribunals were established by section 12 of the Industrial Training Act 1964, originally to resolve disputes between employers and government as to the industrial training levy. Their functions were expanded dramatically by the Industrial Relations Act 1971, under which they acquired jurisdiction for example over unfair dismissal. Their powers have been increased widely since. The tribunals were renamed employment tribunals by the Employment Rights (Dispute Resolution) Act 1988. For simplicity this paper refers to both pre- and post-1988 tribunals as employment tribunals.

⁵ DTI, *Better Dispute Resolution*, p. 22.

⁶ As well as calling for the repeal of the statutory procedures, Gibbons also called for a significant expansion ACAS's mediation services. This proposal has been welcomed in various academic commentaries, including D. Esplin, 'Employment Dispute Resolution in Great Britain, The Case for Change, An International Perspective', University of Hertfordshire Centre for Research in Employment Studies, Working Paper 2007/1.

⁷ DTI, *Better Dispute Resolution*, p. 18.

⁸ At the time of writing, a tenant bringing a service charge claim of £5000 against their landlord is required to pay an application fee of £100 plus a hearing fee of £150 (unless the tenant is on benefits). Fees in the county courts

are not dissimilar, although of course a claimant who brings an employment dispute to the county court and loses is often required to pay the winner's legal fees. In the employment tribunal, by contrast, fees remain the exception.

⁹ K. Underwood, *No win no fee no worries* (London: Professional Publishing, 1999); S. Yarrow, *The Price of Success; Lawyers, Clients and Conditional Fees* (London: Policy Studies Institute, 1998).

¹⁰ Trade unions remain by far the single largest provider of 'free' legal representation at the tribunal. One recent report has argued that the extent of trade union support is a key factor in determining the extent of a claimant's satisfaction at the end of the tribunal process, K. Armstrong and D. Coats, *The costs and benefits of Employment Tribunal cases for employers and claimants* (London: BERR, 2007) p. 9.

¹¹ DTI, *Better Dispute Resolution*, p. 22.

¹² Median UK gross earnings in the UK were £24,301 in the year ending on 1 April 2006. *Annual Survey of Hours and Earnings 2006* (London: Office of National Statistics), table 1.7a. The more troubling figure is that 33% of all claimants (and 43% of all claimants in discrimination cases) report suffering stress or depression as a result of bringing a claim. These figures are based on samples taken by the DTI from their in-house *Survey of Employment Tribunal Applications 2003*, and reported at DTI, *Better Dispute Resolution*, p. 22.

¹³ J. Guthrie, 'Deliver us from Employment Tribunal Hell', *Financial Times*, 18 July 2007; also see 'Workplace mediation turning nasty as new rules backfire', *Observer*, 22 May 2007; 'Workplace dispute rules to be repealed', *Telegraph*, 22 May 2007; and 'Brown targets Tribunals', *Sunday Times*, 18 May 2002.

¹⁴ Schofield, 'Effective resolution of employment disputes'.

¹⁵ 'Workplace inequality', *Personnel Today*, 1 October 2007; for criticism of Jenny Watson's proposals, see M. Rubinstein, 'My month', *Equal Opportunities Review*, November 2007.

¹⁶ *Employment Tribunals: LRD's guide to the new procedures*, p. 2; Department for Business, Enterprise and Regulatory Reform, *Employment Tribunal and EAT statistics 1 April 2006, 31 March 2007* (London: DBERR, 2007), p. 2; Employment Tribunal Service, *Annual Report and Accounts 1999-2000* (London: ETS, 2000), p. 11; House of Commons, *Research Paper 03/87: Employment Tribunals* (London: House of Commons, 2003), p. 30.

¹⁷ L. Dickens, et al., *Dismissed: A study of unfair Dismissal and the Industrial Tribunal System* (Oxford: Basil Blackwell, 1985), p. 31.

¹⁸ N. Meager et al., *Awareness, Knowledge and exercise of Individual Rights* (London: DTI, 2002),

¹⁹ Cited at DTI, *Better Dispute Resolution*, p. 15.

²⁰ R. Donaghy, untitled paper presented to the 2007 ILS Conference, Oxford, 14 to 16 September 2007.

²¹ DTI, *Better Dispute Resolution*, p. 51.

²² S. Burgess, C. Propper and D. Wilson, *Explaining the growth in the number of applications to industrial tribunals 1972-1997* (London: Department of Trade and Industry, 2001), p. 57.

²³ DTI, *Better Dispute Resolution*, pp. 7, 21.

²⁴ The EEF represented 1545 employers at tribunal in 2006. Schofield, 'Effective resolution of employment disputes'.

²⁵ Funding from the Community Legal Service (or, in Scotland, Legal aid) can be used also to cover appeals against an unfavourable tribunal ruling to the Employment Appeal Tribunal. But only around one in every 200 cases is appealed. BERR, *Employment Tribunal and EAT statistics 1 April 2006 - 31 March 2007*, p. 2.

²⁶ DTI, *Better Dispute Resolution*, pp. 15-16.

²⁷ Dickens, et al., *Dismissed*, p. 86.

²⁸ BERR, *Employment Tribunal and EAT statistics 1 April 2006 - 31 March 2007*, p. 3; Employment Tribunal Service, *Annual Report and Accounts 1999-2000*, p. 15. Note; these are all jurisdictions raised by a claim (as a proportion of all application), rather than the main jurisdiction of the claim: this explains why the figure for 1999-2000 appears to include more than 100% of all cases.

²⁹ The verb 'withdrawn' covers a multitude of different outcomes. In some cases, a claim will have been withdrawn as a result of the claimant receiving an offer from their employer, in other cases, it would have been a genuine withdrawal, for whatever reason

³⁰ BERR, *Employment Tribunal and EAT statistics 1 April 2006 - 31 March 2007*, p. 3.

³¹ BERR, *Employment Tribunal and EAT statistics 1 April 2006 - 31 March 2007*, p. 3.

³² J. Aston et al., *The experience of claimants in race discrimination Employment Tribunal cases* (London: Department of Trade and Industry, 2006), pp. 37-39.

³³ Dickens, et al., *Dismissed*, p. 109.

³⁴ Department for Business, Enterprise and Regulatory Reform, *Employment Tribunal and EAT statistics 1 April 2006, 31 March 2007*, pp. 3-5.

³⁵ O. Kahn Freund, 'Uses and Misuses of Comparative Law', in *Selected Writings* (London: Stevens, 1978), p. 316.

³⁶ DTI, *Better Dispute Resolution*, p. 20.

³⁷ *Employment Tribunal and EAT statistics 1 April 2006, 31 March 2007*, p. 7.

³⁸ McIlroy, *Industrial Tribunals*, p. 23.

³⁹ Office of the Leader of the House of Commons, *Draft Legislative Programme 2007-8*, undated press release; also Department for Business Enterprise & Regulatory Reform, *Employment Bill*, undated press release, November 2007.

⁴⁰ For example, entertainers charged sums to attend so-called 'casting sessions', see Department of Trade and Industry, *Consultation on measures to protect vulnerable agency workers* (London: DTI, 2007), p. 21. The weak nature of these proposals and the contrast between them and the recent sharp decline in agency workers' rights in the light of the employment appeal tribunal's decision in *James v Greenwich Council* [2007] ICR 577 is discussed in D. Renton 'No protection', *Red Pepper*, October/November 2007, pp. 30-1.

⁴¹ Ending a current anomaly, whereby a worker who brings a wages claim for an employer's failure to pay the minimum wage is only entitled to claim the amount of minimum wage for the year in which the money was not paid, and not interest or an uplift for inflation, even where there has been a delay between the breach and the hearing. Department for Business, Enterprise and Regulatory Reform, *National Minimum Wage and Employment Agency Standards enforcement consultation* (London: BERR, 2007).

⁴² Department for Business, Enterprise and Regulatory Reform, *National Minimum Wage and Voluntary Workers* (London: BERR, 2007).

⁴³ Department for Business, Enterprise and Regulatory Reform, *The judgment of the European Court of Human Rights in the ASLEF v UK Case: implications for Trade Union law* (London: BERR, 2007).

⁴⁴ The Regulations are undoubtedly complex. In *HM Prison Service v Barua*, EAT case 0387/06, the regulations were described by Underhill HHJ as 'rebarbative', a courtly synonym for irritating or repellent.

⁴⁵ Employment Act 2002 (Dispute Resolution) Regulations 2004; section 98A Employment Rights Act 1996.

⁴⁶ ACAS, *Code of Practice 1: Disciplinary and Grievance Procedures* (London: ACAS, 2004), p. 4.

⁴⁷ DTI, *Full Regulatory Impact Assessment: Statutory Dispute Resolution Procedures* (London: DTI, 2004), p. 11.

⁴⁸ P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulations since the 1990s* (Oxford: Clarendon, 2007), p. 249.

⁴⁹ BERR, *Employment Tribunal and EAT statistics 1 April 2006 - 31 March 2007*, p. 2.

⁵⁰ Employment Tribunal Service, *Annual reports and accounts 2003-4* (London: Department of Trade and Industry, 2004), p. 23; BERR, *Employment Tribunal and EAT statistics 1 April 2006 - 31 March 2007*, p. 2.

⁵¹ For a discussion of perhaps the most significant of all the recent equal pay cases see D. Renton, 'Disaster averted? *GMB v Allen*', *Solidarity*, winter 2007-8.

⁵² Department of Trade and Industry, *Better Dispute Resolution: A review of employment dispute resolution in Great Britain* (London: DTI, 2007), p. 4.

⁵³ T. Potbury, 'Simplifying is not always so easy to do', *Personnel Today*, 24 July 2007.

⁵⁴ The government's present difficulty may help to explain the position of the construction workers' union UCATT, which has come out publicly against the repeal of the procedures. UCATT's argument was that they have at least required employers to hold disciplinary meetings, marking a step forward from the reality before 2004. 'Changes To Dispute Resolution Will Be Disasterous Warns UCATT', press release, 19 June 2007. It should be noted that the large majority of unions have however welcomed the repeal of the procedures, with probably the most common argument being that any new system is at least likely to simplify the timescale in which a claim must be brought. On balance, repeal is seen to be a measure of modest de-juridification, and thus (for unions which have no desire to be reduced to offering their members no more than legal insurance) a good and necessary thing.

⁵⁵ Section 98A Employment Rights Act 1996, as inserted by section 34(1), (2) of the Employment Act 2002, creates a rebuttable presumption that a dismissal is automatically unfair where the procedures have not been completed.

⁵⁶ A "Polkey reduction" may be made to an unfair dismissal award where a fair procedure was not followed but the tribunal finds that the employer would have dismissed had a fair procedure been followed. Between 1987 and 2004, the tribunal would deal with such cases by making a formal finding of unfair dismissal, but then reducing the damages awarded to the worker by anything up to 100%, *Polkey v A E Dayton Services Ltd* [1987] IRLR 503, HL

⁵⁷ Section 98A subsection (2) Employment Rights Act 1996 qualifies the rebuttable presumption (see footnote 47 above) by allowing an employer in effect a second defence: where procedures have not been completed, and an employer cannot show that the dismissal was not automatically unfair, the employer may still argue that he would have decided to dismiss the employer even if he had followed the procedure. The effect of s98A(2) is that in such circumstances, the dismissal may still be treated as fair.

⁵⁸ The "no difference" rule refers to the situation prior to *Polkey*: prior to 1987, a tribunal faced with a procedurally unfair but substantively fair dismissal would find that the worker was fairly dismissed.

⁵⁹ DTI, *Consultation on Resolving Disputes in the Workplace: Supplementary Review of Options for the Law Relating to Procedural Fairness in Unfair Dismissal* (London: DTI, 2007), pp. 3-4.

⁶⁰ Which was the Government's initial rationale and even title for the Bill. See note 2 above.

⁶¹ 'The Industrial Relations Act marked a milestone in the development of Industrial Tribunals', writes Roger Greenhalgh, 'it was with that Act that they came of age'. R. M. Greenhalgh, *Industrial Tribunals, a practical guide* (London: Institute of Personnel Management, 1973), p. 9.