



## **Unite response to Resolving Workplace Disputes Consultation 2011**

### **Introduction**

This response is submitted by Unite the union. Unite is the UK's largest trade union with almost 1.5 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, food and agriculture, financial services, print, media, construction, transport, local government, education, health and not for profit sectors.

### **Executive Summary**

Set out below are the key issues contained in this response although Unite has commented upon all aspects of the consultation.

1. Unite rejects the premise upon which the need for this review is based, that is that the current employment tribunal system is a deterrent for employers to engage new employees. (Overview pages 2-5)
2. Unite supports the resolution of workplace disputes at the earliest possible stage and believes that this is normally best achieved through agreed internal procedures between the employer and employees. (Mediation page 5)
3. Unite believes that where formal collective and individual agreements exist between the workforce and the employer the prospect of early resolution is more likely. (Mediation page 5)
4. The view of the Union is that mediation is more likely to be helpful where the employment relationship is ongoing. (Mediation page 5)
5. Unite believes that mediation can only work as a completely voluntary and confidential form of alternative dispute resolution. (Mediation page 5)
6. The Union sees no advantages to in-house mediation. (Mediation page 6)
7. The Union does not consider that there are any significant barriers to the use of compromise agreements. In addition, Unite does not believe that it would be appropriate for the requirements relating to independent legal advice to be watered down. The requirement that an employee has received independent legal advice is a fundamental and necessary part to the settlement of claims by means of a compromise agreement but objects to suggested procedure. (Compromise agreements page 7)
8. Unite supports the principle of having a pre-claim conciliation (PCC) process. (Conciliation page 7)
9. Unite sees no benefit with compulsory PCC being applied to multi-applicant claims or those dealing with complex legal issues such as equal pay for equal value claims or multi jurisdictional claims. (Conciliation page 8)
10. Unite considers it wholly inappropriate for a power to strike out a claim or response (or part of a claim or response) being exercisable without hearing

- the parties or giving them the opportunity to make representations. (Strike out page 10)
11. Unite is opposed to the proposal that "unless orders" might be a suitable vehicle for obtaining further particulars and takes the view that adequate powers already exist to obtain such information. (Further particulars page 11)
  12. Unite is opposed to the increase proposed for deposits and the suggestion that such orders could be made at other than pre-hearings. (Deposit orders pages 12-13)
  13. Unite does not agree with the current cap on costs being raised to £20,000. (Costs pages 13-14)
  14. Unite is not in favour of an employment tribunal being either required or empowered to increase or decrease the amount of any financial compensation where a party has made an offer of settlement which has not been reasonably accepted. (Statements of loss pages 14-16)
  15. Unite believes that the reading out of witness statements is something which should be determined by the tribunal members in each case and not normally be taken as read by regulation. (Witness statements page 17)
  16. Unite is opposed to the removal of a contribution to the provision of expenses for witnesses by the State. (Expenses page 17-18)
  17. Unite is opposed to changes in the existing breadth of cases where Judges may sit alone and in particular to extend this provision to unfair dismissal applications. (Judges sitting alone pages 18-20)
  18. Unite does not believe that interlocutory work should be delegated to legal officers. (Interlocutory work page 20)
  19. Unite is totally opposed to the suggestion that the qualifying period for unfair dismissal claims be extended to two years. (Qualifying period for unfair dismissal claims pages 20-22)
  20. Unite is in favour of a continuing annual up-rating of tribunal awards and statutory redundancy payments and that in the case of determining the up-rating level for tribunal awards which reflect earnings it is our view that the Retail Price Index is the most appropriate. (Up-rating of tribunal awards pages 22-23)

## **Overview**

In addressing the questions set out in this consultation, it is important to set the process of dispute resolution in context and to reflect upon the establishment and purpose of Employment (previously Industrial) Tribunals.

The Donovan Commission in its report in 1968 envisaged the system as *'an accessible, speedy, informal and inexpensive' dispute resolution mechanism.*<sup>1</sup>

Unite agrees that where workplace disputes arise whether individual or collective it is incumbent on both parties and in their shared interests to seek a resolution at the earliest possible stage. This pre-supposes that there are appropriate and fair procedures in place within the workplace and that employees have access to representation for this purpose. Unite's experience in recognised workplaces is that such procedures will be in place in most instances but it is apparent that, in workplaces where no formal representation for employees exist, such processes are frequently not in place and employees have little or no access to fair representation.

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<sup>1</sup> Royal Commission on Trade Unions and Employers' Associations 1965–8 (1968) *Report*, London

The need for dispute resolution was recognised as long ago as 1964 when the Industrial Tribunals were first established under s.12 of the Industrial Training Act to consider appeals by employers against training levies imposed under that Act. Since then their scope, procedures and powers have changed and expanded dramatically. The Central Office of Industrial Tribunals was established to co-ordinate the activities of the industrial tribunals set up under the Industrial Tribunals (England and Wales) Regulations 1965 and the Industrial Tribunals (Scotland) Regulations 1965 following the Industrial Training Act 1964. The tribunals were known as Industrial Tribunals until 1st August 1998. Since then they have been called "Employment Tribunals" and come under the Employment Tribunals Act 1996 s.1 to 19.

The original format for Industrial Tribunals has not changed with the Chairman (now Employment Judge) sitting with two lay people to hear applications from claimants and the response from the employer. In the early stages such cases were presented by lay people and very few would have involved professional legal representation. Over the years, as the complexities of employment law have grown and extended so has the growth of legal representation in Tribunals. The make up of issues referred to Tribunals has also changed most notably in areas of equal pay and sex discrimination following case law in these areas. Equal Pay cases increasingly involve multiple applications and recent increases in the number of cases lodged is largely attributable to this area of work. The statistics show that the growth in claims peaked in 2009 and is now showing a small decline. It would be wrong in the view of Unite, to determine a need for changes simply on the basis of an inaccurate description of tribunal applications "*spiralling out of control*".

The government suggests that there has been a "dramatic increase in the number of claims submitted to ETs" (page 15). In fact the number of "single claims" (i.e. claims submitted by just one employee) was *lower* in 2009/10 than it was in 2000/1, notwithstanding the recession. The average number of jurisdictions per claim was *lower* in 2009/10 than it was in 2008/9. By far the largest increase in 2009/10 was in multiples, but that increase was due to specific factors and not underlying structural problems of the kind which the proposed changes allegedly seek to address.<sup>2</sup>

The government relies on "evidence" provided by business representative bodies – see in particular those listed on pages 15 and 16 of the consultation document - as demonstrating a need for a change, and so as justification for the changes proposed. However, when the reports of those bodies are read, the "evidence" is in fact almost completely anecdotal. Hard statistics and analysis are missing.

The government quotes research in a way which some might find misleading and in a way which suggests that conflict is rampant in UK workplaces when in fact it is not. For example, "Research from the CIPD indicates that UK workers spend on average 1.8 hours per week dealing with conflict" (page 19). However the figure for Germany is 3.3 hours and for the USA 2.8 hours; only 2 of the 9 countries included in the study had lower figures than the UK, with the average being 2.1 hours.

The context of this consultation is premised upon the cost and time involved in resolving disputes. Employers have focussed on the number of claims and the suggestion that it is too easy and too cheap for disgruntled employees to lodge a claim regardless of its merits in the hope that a settlement will be offered rather than proceeding to a tribunal hearing. In addressing these alleged concerns the consultation paper makes a number of proposals, the majority of which appear

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<sup>2</sup> ET and EAT Annual Statistics 2009-2010

heavily weighted in favour of the employer and consequently restricting access to justice for employees.

Unite in its responses below to the consultation questions will argue that the proposals are based on a number of myths and that there is no evidence to suggest that they will address the labour market issues suggested or contribute to the economic outlook of the country. Unite also would stress that the quantity of claims received should be viewed in the context of the number of employed people in the UK and, even at its highest level, this represents less than 1% of the working employed population.

The government is clearly concerned about the rise in applications to the Tribunal, “between 2008/09 and 2009/10, the number of claims rose by 56%, from 151,000 to 236,000, a record number”. To reduce this number it hopes that its commitment “to improving the skills of first line managers” will make a difference. In other words, it hopes that disputes can be resolved in-house in the first instance.

This approach of in-house resolution is not dissimilar in principle to the last Labour Government’s that introduced a statutory dispute resolution procedure with the Employment Act 2002 which it repealed with its own 2008 Act.

Neither the statutory approach nor the managerial approach will deal with the fundamental problem of individual employees seeking recourse to the Tribunal, in increasing numbers, to seek workplace justice.

The Employment Act of 1980 removed from ACAS its statutory duty, with all of its faults, to promote collective bargaining. From this point forward trade union influence in the workplace has weakened as union density and the coverage of collective bargaining has declined, associated with other legislation introduced by the 1979-97 Conservative Government.

The statutory trade union recognition procedure and the right to be accompanied (by a trade union official) at grievance and disciplinary hearings introduced by the Employment Act 1999 have not, by themselves, reversed this trend.

Trade unions provide a “voice” at work – when trade unions are absent employers go to great lengths to create an alternative “voice”, thousands of pounds are spent on consultative committees, company councils and similar arrangements; trade unions provide all those “voice” functions and of course are independent of the employer; in a report published in March last year<sup>3</sup> the authors concluded that in the private sector strong unions can deliver benefits to both employees and employers alike and the evidence indicated that the “voice” function provided by strong workplace organisation promotes employment relationships which are both more stable and more constructive in the longer term.

Unite believes that a more efficient resolution of disputes at workplace level would be facilitated by legislation that encouraged, rather than hindered, the growth of trade unionism and union recognition.

The Employment Tribunal system is unique in our legal system in that the Tribunal is a civil court that adjudicates over claims that the applicant’s statutory rights have been breached. Any lessening of an applicant’s ability to access the Tribunal is a

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<sup>3</sup> Bryson A & Forth J (2010) Union Organisation and the Quality of Employment Relations - NIESR

lessening of his/her ability to uphold rights that Parliament felt were important enough to legislate for in the first instance.

Overall, Unite does not accept that there is a need for either substantial or urgent change to the Employment Tribunal system, and, in any event, does not accept that the proposals set out in this paper will lead to the resource savings envisaged.

### **Questions 1 – 7 Mediation**

Unite supports the resolution of workplace disputes at the earliest possible stage and considers that this is normally best achieved through agreed internal procedures between the employer and employees. Unite would further argue that where formal collective and individual agreements exist between the workforce and the employer the prospect of early resolution is more likely. In a report published in March 2010<sup>4</sup> the authors concluded that in the private sector strong unions can deliver benefits to both employees and employers alike and the evidence indicated that the voice function provided by strong workplace organisation promotes employment relationships which are both more stable and more constructive in the longer term.

Unite sees a limited use for this method of dispute resolution and does not believe that it would contribute significantly to the reduction in tribunal applications given that the majority of these arise out of disciplinary processes such as dismissal or multiple claims which would be unlikely to lend themselves to this form of dispute avoidance.

#### **Q1**

The use of mediation within Unite is limited. This reflects as much the positive impact of collective organisation in the workplaces where its members work rather than any outright antipathy to the concept of mediation. Where mediation has been used then this has primarily been through the offices of ACAS as the body which Unite believes has the most understanding of workplace industrial relations and a reputation for independence. Unite notes the views expressed by ACAS on the suitability of the use of mediation in disciplinary matters. Given the nature of mediation Unite shares the view that employers may be unlikely to relinquish their rights in the resolution of perceived misconduct or poor performance.

#### **Q2**

The view of the Union is that mediation is more likely to be helpful where the employment relationship is ongoing. Mediation is also more likely to be helpful in claims where it is not only financial compensation which is at stake.

#### **Q3**

The experience of the Union is that mediation can be less expensive than going to a hearing. However it still involves "upfront" costs which do not arise in other forms of settlement. The services of a mediator and the necessary meeting rooms can add up to £2k-£3k for a day's mediation.

#### **Q4**

Unite believes that mediation can only work as a completely voluntary and confidential form of alternative dispute resolution and therefore we welcome the absence of any suggestion of compulsion for this form of dispute resolution.

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<sup>4</sup> Union Organisation and the Quality of Employment Relations - Alex Bryson and John Forth  
National Institute of Economic and Social Research

However, Unite would be concerned if undue pressure were brought to bear upon individuals to go down the route of mediation through the potential for penalties to be imposed when pursuing a case to hearing. Further concerns arise should the process be used as a means of undermining the formal processes in place for dealing with grievances and disciplinary issues. In order to counter these concerns Unite would urge that any guidance on the use or encouragement of mediation contain the following principles:

- Process must be entirely voluntary for both parties;
- Individual employees should have the right to representation;
- Workplace mediation should be an integral part of existing workplace procedures and should be introduced by joint agreement between management and workers;
- Formal processes should be suspended whilst mediation is continuing;
- Either party may withdraw from mediation without prejudice to their case.

#### **Q5**

It appears to the Union that it is possible to become an accredited mediator by following a course lasting only a few days. There are plenty of "mediators" offering services of perhaps dubious value. A single nationwide accreditation scheme might assist.

#### **Q6**

ADR, CEDR, ACAS

#### **Q7**

The Union can see no advantages to in-house mediation. There are, however, obvious disadvantages. In particular, it is difficult to see how an "in-house" mediator could be seen as independent by an employee. Further an "in-house" mediator employed by the employer would have an inevitable conflict-of-interest whenever seeking to resolve a dispute which was, in reality, between the employer and an employee and not simply between employees.

### **Questions 8 – 11 Compromise agreements**

#### **Q8**

The Union's experience is that compromise agreements are used very regularly when parties are able to reach settlement terms following the termination of an employee's employment.

#### **Q9**

The costs of the Union's solicitors in advising on a compromise agreement to be signed by one of the Union's members are typically in the region of £350.

#### **Q10**

The Union believes that a compromise agreement is simply one method of documenting a settlement. It is not a mechanism for reaching a settlement or resolving a dispute. In order to comment on its advantages and disadvantages, it is necessary to compare it to some other form of settlement.

The other form of settlement most commonly used is a COT 3 agreement. By comparison with a COT3:

**Advantages:** that an employee must receive independent legal advice.

**Disadvantages:** the representatives of employers tend to seek to include a whole variety of terms in compromise agreements which are not relevant to the dispute being resolved. For example, restrictive covenants.

**Q11**

The Union does not consider that there are any significant barriers to the use of compromise agreements. As stated above, however, they are not a mechanism for dispute resolution, but simply a way of documenting a settlement. In the Union's experience, if a settlement can be reached then a compromise agreement can be concluded.

In addition, Unite does not believe that it would be appropriate for the requirements relating to independent legal advice to be watered down. The requirement that an employee has received independent legal advice is a fundamental and necessary part to the settlement of claims by means of a compromise agreement.

**Questions 12 – 20 Conciliation**

**Q12**

The principle of having a pre-claim conciliation process is one that Unite supports. It notes that in the first year of this provision being available ACAS dealt with approximately 18,500 referrals and approximately 75% of these were converted to conciliation.

**Q13**

The consultation document seeks views on whether early conciliation is likely to be more useful in some jurisdictions rather than others. Those claims which are seeking to enforce a legal entitlement and where the outcome is more reliant upon a straightforward application of the law would benefit more from this process than those where the conduct of the parties is the subject of complaint. Examples of claims in which PCC would be particularly useful would be unlawful deduction from wages; national minimum wage; statutory redundancy claims; and statutory sick pay claims.

**Q 14**

In order to extend this scheme to a compulsory process for all potential tribunal claims would require significant additional resources to be made available to ACAS at a time when the government appears more intent on reducing resources. The proposals also suggest that ACAS would be required to provide the claimant with details about the merits of the claim and whether the tribunal would have jurisdiction to hear it. These place upon ACAS additional duties which may prejudice the generally accepted impartiality of the organisation and require it to provide legal advice for which it may not have adequately qualified staff.

**Q15**

No. This proposal that the current duty to offer post claim conciliation be amended from a duty to a power would not be beneficial. Our experience of this provision is that settlement arising from ACAS intervention up to the last possible moment is common place and to remove this duty could in fact be counter productive to the government's objective to reduce the number of actual hearings.

**Q16**

Unite agrees with the consultation document and sees no benefit with compulsory PCC being applied to multi-applicant claims or those dealing with complex legal issues such as equal pay for equal value claims or multi jurisdictional claims.

**Q17**

The consultation document proposes that this process will involve the claimant in submitting a shortened version of the ET1 claim form containing key details and once this has been received the time clock for tribunal claims will be suspended for a period suggested of one calendar month. Unite is concerned as to whether this provides adequate time for proper consideration to be given to a claim and for any conciliation meetings to take place.

Unite does not support the introduction of an additional shortened ET1 form for the following reasons.

First, it introduces an additional administrative burden (and so an additional expense) for potential claimants. Instead of completing one ET1 form to begin a tribunal claim, they will need to complete two. It represents an additional and unnecessary hurdle.

Secondly, it unnecessarily complicates the process of beginning a Tribunal claim. Unite is concerned that it is likely to lead to satellite litigation of the kind which plagued the statutory disciplinary and grievance procedures. For example, Respondents will make much of any difference between the contents of the short and long form ET1s and this will result in litigation, in the same way that differences between a statutory grievance and a subsequent ET1 did during the lifetime of the statutory grievance procedures.

Unite believes that there should be just one ET1 which should be the current form, appropriately shortened. (See comments later on Q.38) This will remove the need for two forms and, also, dispose of the risk of satellite litigation concerning differences between the two ET1 forms in any given case.

**Q18**

It is inevitable that in cases where the complexity arises from claims covering more than one jurisdiction the proposed limit of one month may prevent early conciliation being successful. We suggest in the response to the following question how this might be addressed.

A further limitation on the ability to succeed through early conciliation will be any decision to extend the unfair dismissal qualifying period. This is likely to lead to claims being adjusted to include other jurisdictions where the qualifying period does not apply.

**Stop the clock mechanism****Q19**

Unite is very concerned by the complications which the “stop-the-clock” mechanism would introduce into the initial stages of the Employment Tribunal process and the unfairness which it would result in for potential claimants.

First, Unite is concerned that the proposal may result in potential claimants having insufficient time to obtain advice on the “second” ET1 and to arrange for it to be submitted. If the clock is stopped just a few days before limitation, the potential claimant would be left with just a few days to obtain advice on the contents of the

“second” ET1 and to arrange for it to be submitted. This is clearly unfair and so wrong. Unite proposes that submitting the first ET1 if there is to be one (and Unite opposes that proposal) should have the effect of “resetting” the limitation clock, not stopping it. Thus, provided the “first” ET1 was submitted in-time to ACAS, the potential claimant would have a further 3 (or 6) months to submit the “second” ET1 to the Employment Tribunal following the end of the PCC stage.

Secondly, “stop-the-clock” will create confusion. Many potential claimants did not understand the extension of limitation provisions contained in the statutory disciplinary and grievance procedures in force between 2004 and 2009, with the result that many potential claimants did not know when the deadline for submitting their claim was. “Stop-the-clock” would cause similar confusion. Its introduction would be a retrograde step, given the clarity which was re-introduced in relation to limitation periods by the repeal of the statutory procedures.

Thirdly, Unite is concerned that the proposal will result in satellite litigation. When will the clock restart? It cannot be on the date that ACAS writes to the parties certifying that the PCC stage has been completed, as that date will not be known to the potential claimant until after they have received the ACAS communication, which could in turn be after limitation (if the clock has stopped just a couple of days before limitation). There should not be “deemed service” provisions as these will be incomprehensible to many claimants and may in any event create substantive unfairness. However if the clock is restarted on the date that the potential claimant receives the ACAS communication, that will cause satellite litigation as there will be disputes about the date on which the ACAS communication was received. It is unlikely that potential claimants will date-stamp their post. Such disputes could lead to ACAS being required to appear as witnesses at Tribunal Hearings, a prospect that would be both damaging to the independent reputation enjoyed by ACAS as well as adding a further complication to the tribunal process for the parties.

If the PCC stage is introduced then it should work as follows: a single ET1 (in a simplified form, [see Q38]) is sent to the Tribunal Service. That will record receipt in the normal way and so the parameters for any future dispute about limitation will be established. The Tribunal Service will then stay the claim for one month (and so the ET1 will not be sent to the Respondent) and send the ET1 to ACAS. This will avoid much of the complication, unfairness and scope for satellite litigation inherent in the current proposal. If conciliation is not successful then the ET1 would then be sent by the ETS to the employer and the time for submission of the ET3 response would start in the usual way.

## **Q20**

If pre-claim conciliation is limited to straightforward single claimant/jurisdiction claims then one month is an adequate time for resolution providing that ACAS are equipped with sufficient resources. However, Unite believes it should be possible for some flexibility to be built into the process subject to the agreement of both parties if there is a prospect of early resolution.

## **Questions 21 – 23 Strike out**

### **Q21**

Pre-hearing reviews are specifically listed to consider issues of strike-out, and it is appropriate that issues of strike-out are considered at hearings where all parties are aware of the application (as to which, see further response to question 22 below) and have the opportunity to be ready to make representations either for or against such applications. Requiring issues of strike-out to be considered by way of a pre-hearing

review has a definite advantage in that it contains the consideration of such issues to specific hearings and ensures that, for example, a party does not attempt to seek a strike-out on every occasion that there is any preliminary hearing. We consider that there is a risk that removing this safeguard allows strike-out to be raised potentially at any CMDs that are held as well as at PHRs, which may well have an impact upon the length of time required for what would otherwise perhaps be a straightforward and speedy CMD.

## **Q22**

The Union considers that this would be a wholly inappropriate step to take. Unrepresented parties may well find it difficult to fully articulate their claims or responses in writing and therefore allowing decisions to be made from reviewing the pleadings in isolation will lead to questionable strike-out decisions being made and a denial of access to justice for a number of individuals. Whilst we are aware that such applications can be made without notice in the civil courts, given the informal nature of the employment tribunal system, there are a larger number of unrepresented individuals pursuing claims through employment tribunals than through the civil courts and thus this proposal would lead to a greater denial of access to justice than in the civil courts.

We also predict that there will be a large increase in the number of reviews of strike-out decisions if the proposal is implemented, which will not therefore result in the desired outcome of reducing the amount of tribunal time spent on claims overall. We also consider that this will impact negatively upon access to justice in that it will probably be harder for an unrepresented party to understand what is required in a review application and the limited grounds upon which a review application can be made than to understand what is required in making a standard claim to the tribunal.

Again, dealing with inexpertly articulated review applications will, in our view, ultimately be a further drain on the tribunal system's resources. In some cases, for example certain TUPE related matters, claimants are often reliant upon the respondent's discovery to assist them in establishing their claim. Allowing what would in effect be an extension of strike-out powers without an opportunity to make representations could well result in meritorious claims being struck out in situations when, had the matter been allowed to proceed to a full hearing, the full evidence that would have been before the tribunal would have meant that such claims would have succeeded.

Extending the strike-out provisions will also not assist in the large number of claims that contain substantial disputes of fact where a tribunal will need to hear witness evidence and consider documentary evidence etc in order to ascertain the true fact situation. Finally, we consider that making decisions in this way may lead to race/disability discrimination occurring, on the grounds that the difficulties encountered by some in preparing articulate written claims/responses will be due to race (where a person's first language is not English) or disability (where a person has difficulty communicating in writing because of a specific disability, e.g. dyslexia).

## **Q23**

n/a

## **Further particulars**

### **Q24**

#### **We would welcome views on:**

##### **- the frequency at which respondents find that there is a lack of information on claim forms**

In our experience, it is rare for respondents to genuinely have difficulty in responding to a complaint. Most employers will already be on notice that an individual is aggrieved about a particular matter, because there will have been a dismissal, or a grievance, or some other form of internal complaint will have already been raised. If a respondent does genuinely encounter such difficulties, then there is already machinery in place for them to seek additional information – they can simply provide a brief ET3 denying all of the allegations and requesting further particulars of the ET1. There is therefore absolutely no need for additional provisions to be introduced, which will simply increase the number of arguments about procedure that will need to be resolved before the substantive case can be considered.

##### **- the proposal that "unless orders" might be a suitable vehicle for obtaining this information**

Unite's view is that adequate powers already exist to obtain information.

The first point that strikes us about this proposal is that there will be a complete change of emphasis in the use of unless orders if this proposal were implemented. Currently, they are employed very much as a last resort for serious breaches of Tribunal orders/rules etc. The suggestion in the consultation document would significantly alter this, so that they were being used much more routinely to address minor procedural problems. In our view, their use in the situations suggested would be disproportionate and extremely draconian.

We refer to the comment made above in response to question 22 about claimants in certain claims being to some extent reliant upon the respondent's discovery in order to establish their claim. We would also refer to the comment in the response to question 22 to possible race/disability discrimination issues arising, and to the fact, also mentioned at 22 above, that it may be particularly difficult for unrepresented claimants to articulate their claims clearly in writing, and the fact that they should not be penalised for this by having their claim struck out.

An increase in the number of claims struck out is likely to lead to an increase in the numbers of review applications, with all the attendant disadvantages that this entails, again as set out at response 22 above. This proposal does not seem to take into account the possibility that an individual may themselves be seeking further information from a respondent by way of a discrimination questionnaire, and how this would be factored into the process, e.g. they will need to be given sufficient time after receipt of the respondent's questionnaire response to submit additional information. This proposal also fails to address what will happen to the time limit for submission by the respondent of their ET3 - will their deadline be extended?

Finally, we note that this proposal completely fails to impose any reciprocal obligation on a respondent who fails to provide sufficient information in their ET3 to a claimant, who is then left with no option but to pursue a claim that should have been conceded/settled by the respondent from the outset.

##### **- the potential benefits of adopting this process**

We do not consider that there are benefits to this proposal - although initially it may seem that this will lead to a saving in time and expense, given the likely increase in

review applications and appeals, we consider that there will be no saving in time and expense overall.

**- the disadvantages of adopting this process**

We have set these out above - broadly, the increase in the number of review applications/appeals and the attendant resource drain that this will cause; risks of disability and race discrimination; the fact that a larger number of unrepresented claimants who are unable to properly articulate their claims in writing are likely to have their claims struck out and the impact of this on access to justice; and the failure, it seems, of the proposal to address procedural issues such as how discrimination questionnaires and their responses will fit into the process.

Finally, we would point out that adoptions of this process will be wholly superfluous, as tribunals already have the power to order a claimant (or a respondent) to provide further information where they deem it appropriate.

**- what safeguards/sanctions should be built into the tribunal process to ensure that respondents do not abuse the process**

For all of the reasons set out above, the Union is strongly of the view that this process should not be adopted. However, if, contrary to the Union's position, the proposal is adopted, the process should contain a penalty for respondents who do abuse the process, such as elevated damages/costs being recovered from such a respondent.

**Questions 25 – 29 Deposit orders**

**Q25**

As with the response to question 21, the benefit of such powers being contained to specific hearings is that it maintains some order within the process and prevents applications being made on an ad hoc basis at every possible opportunity. The proposal can therefore only have a negative impact upon the duration of preliminary hearings. In addition, widening the occasions upon which such powers can be exercised will also be likely to increase the numbers of review applications that will be made and need to be considered. In general terms, we also consider that this proposal is inappropriate given that claimants are often likely to be in financial hardship, particularly those that have been dismissed. Widening the scope of deposit orders in any way would impact negatively on access to justice for such claimants.

The consultation paper cites the fact that deposit orders can only be made at a pre-hearing review, and not at a case management discussion, as a limitation on the use of deposit orders. We would question how much of a limiting effect this actually has in practice; in our view, the power that tribunals currently have is used quite frequently.

**Q 26**

The Union strongly disagrees with this suggestion. We would repeat the points set out in our response to question 22 above as these form the reasons for our disagreement in this respect – i.e. the likelihood of race/disability discrimination arising in the exercise of such powers, the negative impact on unrepresented claimants that this will have, the resulting increase in the number of review applications/appeals, and the difficulties inherent in understanding and making review applications for unrepresented claimants. In addition, we consider that there is an increased risk of respondents using widened powers to seek to obtain a tactical advantage over claimants by putting claimants under increased pressure by making

applications for deposit orders at every opportunity. Although these may be unsuccessful, it increases the pressure on claimants who then have to respond to such applications.

**Q27**

No

**Q28**

No. As mentioned, claimants, particularly those who have been dismissed, are often in financial hardship. Increasing deposit levels simply impacts negatively upon their access to justice. This in itself appears to be the stated aim of the consultation document which says of the proposed increase "...would increase the disincentive effect of the deposit regime ...". This brings into question whether the proposal would fall foul of Article 6 of the European Convention on Human Rights which states:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

In any event, we consider that the disincentive in continuing with a claim upon which a deposit order of £500 has been made will not significantly change if that order becomes £1000 - we consider that the fact of a deposit order being made is often sufficient disincentive in itself.

**Q29**

We do not consider that deposit orders should be introduced. We note that the number of unsuccessful cases appealed is very low. Between April 2009 and March 2010 1963 appeals were received by the EAT, and 839 were rejected at the initial sift stage.<sup>5</sup> Thus the EAT already uses its existing powers, and in 2009/2010, disposed of nearly half of all appeals referred to it without a hearing. In our view, this demonstrates that the sift process already in existence to identify and remove unmeritorious appeals is effective and sufficient. There is no need for an additional requirement for deposit orders in the EAT.

**Questions 30 -33 Costs**

**Q30**

The Union does not agree with this proposal for the following reasons.

First, there are very few cases in which there is any likelihood of the Tribunal believing that it is appropriate to award costs in excess of £10,000.

Secondly, the assessment of costs is a specialised area of law. Given that costs are only awarded in a very small minority of cases, it is unrealistic to expect Employment Judges to become expert in their assessment. It is therefore appropriate that, where substantial sums are involved, the assessment is conducted by a judge in the County Court who will be more experienced in dealing with costs issues.

Thirdly, any increase in the maximum amount of costs to be awarded will deter yet more claimants with claims which do have reasonable prospects of success from pursuing them, as some respondents' representatives will make inappropriate costs threats and will make them by reference to the increased maximum award.

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<sup>5</sup> ET and EAT Annual Statistics 2009-2010

Fourthly, lawyers tend to work to limits. If respondent solicitors believe that costs of up to £20,000 may be recovered via relatively informal tribunal proceedings, they will in some ways “work towards” that maximum, so increasing the cost of litigation for all involved.

### **Q31**

The Union has no doubt that where the claimant is unrepresented the threat of costs sanctions is used by some respondents as a means of putting undue pressure on the claimant. It is the experience of our solicitors that this occurs in many cases when *they* are acting for our members.

It is, however, difficult to address this issue because how reasonable or unreasonable a threat of costs is can only properly be judged with the benefit of hindsight, after the judgment has been given.

### **Q32**

Yes.

Evidence: the Union considers that it would be appropriate for there to be a sanction applied when the Tribunal concludes that:

- (1) at the time when the costs threats was made, there was no reasonable prospect of a costs application being successful; or
- (2) there was no reasonable prospect of a costs award being made in the amount suggested by the threatening party; or
- (3) a party has misrepresented the likelihood of costs being awarded in any particular case, whether or not a costs threat has been made;
- (4) a party has misrepresented the nature of the costs regime in the Tribunal, whether or not a costs threat has been made.

Sanction: the Union believes that the sanction should be:

- (1) an uplift to any financial compensation awarded to the party who received the threat; and, in any event,
- (2) an award which would be subject to both a maximum and a minimum, with the Tribunal deciding the amount to be awarded by reference to the extent to which undue pressure was applied.

Compliance: the Union believes that it is unrealistic for any external body to be involved. The Tribunal which deals with the claim concerned will be best placed to assess the extent to which a costs threat was reasonable or unreasonable.

### **Q33**

No. The Union believes that it is entirely inappropriate for the Tribunal to have a financial interest in the proceedings before it. In any event, how would such costs be calculated? Further, it is quite regularly the case that Tribunals cancel cases late in the day (for example, because insufficient hearing rooms or Employment Judges are available) and cause the parties to incur costs (for example, brief fees). If this proposal is to be considered further, (and we believe it should not be), then it should be complemented by a proposal for the Tribunal to always pay costs incurred by a party as a result of last-minute cancellations etc by the Tribunal.

## **Questions 34 – 41 Statements of loss**

### **Q34**

No. Given the time limits which apply to most claims, a statement of loss provided at the outset would have little significance. The Union believes that the information

sought in questions 4.6, 4.7 and 4.8 in the existing ET1 is sufficient. Further, many claimants are unrepresented and will have little idea of how to calculate their losses. For example, they will not be informed about how pensions' losses are calculated or of how awards for injury to feelings are assessed. If they are required to put a "price" on these matters at the outset that may well put them at a disadvantage in settlement negotiations, even if they can in theory "amend" the initial statement of loss.

**Q35**

There are no benefits.

**Q36**

No. Increasing the amount of information which must be included in the ET1 before it can be "accepted" under rule 3 (1) will make access to justice more difficult, whilst serving no real purpose.

**Q37**

No.

**Q38**

Unite believes that the current ET1 is unnecessarily long and unclear. It contains much information that employers will have to hand and which is not relevant to the Employment Tribunal's initial review of the claim. Given what Unite has said above about the undesirability of having two ET1s, and the Government's view that a shorter ET1 should be used for the PCC stage, the existing ET1 should be shortened and simplified. For example:

- Boxes 1.6 and 1.7 are irrelevant when the Claimant is represented and this should be stated.
- Box 4 (Earnings and Benefits) could be reduced in length and simplified (e.g. box 4.9 serves no purpose at all).

**Q39**

No. We consider that this proposal may lead to more offers of settlement being made, but that these are more likely to be unreasonable offers, made for tactical reasons by respondents seeking to put undue pressure on claimants to under-settle their claims. It is likely that claimants, particularly (but not exclusively) unrepresented claimants, will be daunted by risks of compensation being reduced etc and will in effect be bullied by certain unscrupulous respondents into accepting offers far below the value of their claim.

The very essence of this proposal gives cause for concern, in the Union's view, in that judging what a 'reasonable' offer is, will be an extremely difficult task. A tribunal will be required to consider offers after the event. If a claimant was unsuccessful in their claim, then it is arguable that it would have been reasonable for them to accept virtually any offer that was made to them. However, this is obviously with the benefit of hindsight, which the claimant would not have had at the time of rejecting the offer. How can the lack of hindsight at the time be factored into this process? Employment tribunals can already take offers into account when they are considering the award of costs against a party, therefore this proposal seems superfluous.

**Q40**

Yes. However, we consider that this will be for inappropriate reasons, in that it will be because of an increase in the number of claimants being pressurised into under-settling their claims - as above.

**Q41**

It should not be introduced at all, as mentioned, but if it is to be introduced, then it should be limited to those cases in which both parties are legally represented. It is completely unrealistic to expect an unrepresented claimant to be able to assess what constitutes a reasonable offer of settlement.

**Questions 42 – 44 Financial compensation where offer of settlement refused****Q42**

No. As mentioned above, we consider that the problem of claims being under-settled will be rife - claimants will be put under undue pressure to accept low offers. This proposal also takes no account of the fact that in some situations, disputed legal issues are being and need to be tested and claimants should not be penalised in such situations. In addition, the proposal takes no account of the value of recommendations in discrimination claims or declarations by tribunals that an individual has, for example, been unfairly dismissed. These can be very valuable to the individual claimant, in order to assist them in, for example, securing alternative employment, and claimants should not be penalised for refusing a settlement offer on the basis that they set more store by a recommendation or declaration from a tribunal than by a financial offer. Indeed, penalising claimants in such circumstances would seem to be a completely retrograde step in that it would in effect deny claimants the opportunity of seeking certain remedies that the relevant statutes provide an opportunity to them to seek.

We also note that the provisions would not provide a strong incentive for a financially secure respondent to settle a claim pursued by a low paid claimant - even if there was an uplift in compensation, this would probably not be sufficiently high to deter them from continuing to defend an meritorious claim. We note that the consultation paper refers to the fact that similar processes are already in operation in the county court and therefore, it is implied, that the extension of such processes would bring employment tribunals into a uniform position.

However, we would make two points in response to this. In the first instance, we would point out that a greater number of claimants in the county court are legally represented, and therefore the negative impact that such proposals have on unrepresented claimants will impact upon a much smaller number of individuals. In addition, we would point out that remedies such as declarations and recommendations are specific to employment tribunals and therefore different considerations need to apply to this jurisdiction. Finally, we would point out that the consultation paper seems to fail to distinguish between claims that are lost and claims where no financial award is made, but are still successful - these proposals, if implemented (which we do not consider they should be), should only apply to the former.

**Q43**

Given our comments above in relation to the value of tribunal declarations, which can assist claimants in securing alternative employment, and recommendations in discrimination claims, which can assist in addressing more systemic and wide-ranging problems of discrimination in an organisation, we do not consider that it is possible to identify what constitutes a reasonable offer of settlement.

**Q44**

n/a

## **Questions 45 – 48 Witness statements**

### **Q45**

No. Whilst it is self-evidently the case that the parties will spend more time in the presence of the Tribunal if statements are read aloud rather than being taken as read, we do not believe that cases are “unnecessarily prolonged”. Unite believes that the reading out of witness statements is something which should be determined by the tribunal members in each case and not normally be taken as read by regulation. Our experience would suggest that this is the current practice in all regions bar one of the tribunal service.

Whilst Unite accepts that the proposal may assist in the speeding up of the hearing without detriment to either party, in many instances this saving in time would only be marginal given the length of some statements. Unite has also received anecdotal evidence from lay members of tribunal who find the opportunity to consider the demeanour and presentation of a witness whilst reading their statement helpful in assessing the reliability of the witness and their understanding of the issues contained in the statement.

We believe that witnesses reading statements aloud has the following advantages:

- (1) witnesses have got used to their surroundings by the time they have to deal with cross-examination (which is for many the most daunting aspect of the Tribunal experience);
- (2) the evidence on which they are to be cross examined is very much in the minds of **all** present in a way that it would not be if the statements were taken as read; and
- (3) given that hearing bundles are not generally filed in advance of hearings, it is often the case that the most convenient way to introduce the Tribunal to relevant documents is by pausing when they are referred to in the first witness statement read aloud.

On balance, Unite would recommend the retention of current practice in this matter.

### **Q46**

No. Further, if witness statements were taken as read, it will be necessary for the Tribunal to have a period of reading time in every case. Given that many claims are settled the day before, in all but the most complicated cases such reading time would have to be on the morning of the hearing.

### **Q47**

None. The Union refers to its answers to questions 45 and 46.

## **Questions 49-51 Expenses**

### **Q49**

No. It is incredibly difficult for claimants to persuade witnesses to attend tribunal hearings under the existing regime, given that witnesses will often be employees of the respondent. Even for those witnesses who are not, there is often a reluctance to get involved in such matters, given the need to take time off work/day to day responsibilities, travel to a tribunal, and voluntarily undergo what can be quite a stressful process of giving evidence. As a result, our experience is that it is almost universally difficult to persuade witnesses to attend on behalf of claimants and we do not accept the suggestion in the consultation paper that a large part of tribunal hearing time is unnecessarily taken up by hearing evidence of irrelevant witnesses, at least as far as claimant witnesses are concerned.

Increasing the number of hurdles that a claimant needs to jump to enable witnesses to attend, by requiring the claimant to subsidise their attendance, would in our view completely undermine the ability of claimants to persuade witnesses to attend on their behalf. As mentioned previously, it is often the case that claimants are financially constrained, particularly where they have lost their employment. This proposal would be a complete disincentive to claimants to bring any witnesses at all.

On the other hand, employers are generally in a better financial position than claimants, and this proposal will prove insufficient, in our opinion, to deter them from calling both relevant and irrelevant witnesses where they choose to do so. This would have an extremely negative impact upon access to justice. In relation to the expenses of claimants themselves, again we would point out that claimants, particularly those who have lost their employment or are on long-term sick, are likely to be financially constrained and it is important that their access to justice is not impeded by the fact that they could not afford to pay travelling expenses to attend a tribunal.

#### **Q50**

Voluntary representatives such as those from CABs/law centres are also often in extremely financially constrained circumstances themselves, and this proposal may mean that they are unable to attend hearings. This could have the effect of lengthening hearings, given that one party will then be unrepresented and therefore additional tribunal time will need to be spent assisting that unrepresented party. The Union reiterates its view in relation to the expenses of witnesses and claimants as set out at question 49 above and overall considers that expenses should be payable to all parties attending hearings.

#### **Q51**

No. As set out above, we do not consider that irrelevant witnesses are often called by claimants, and we do not consider that this proposal will be a disincentive to respondents to call irrelevant witnesses. The proposal will lead to relevant witnesses for the claimant not being called, which will mean that the analysis and investigation undertaken by the tribunal will be less robust and possibly less effective. As also mentioned, the withdrawal of expenses for voluntary representatives may well result in longer hearings. Overall, we consider that this proposal will have a significant negative impact upon access to justice, poorer decisions by and therefore less confidence in the employment tribunals, and will not result in any significant resource saving in the employment tribunal process.

### **Questions 52 – 54 Judges sitting alone ET and EAT**

#### **Q52**

No.

With regard to this issue within Employment Tribunals, Unite sees no reason to change existing practice which as the consultation document rightly points out makes provision in a wide range of cases where Judges may sit alone and extends that to other areas where all parties agree to a judge sitting alone.

The requirement for a panel of three has been eroded over the years. Employment judges now sit alone on case management discussions, most pre-hearing reviews, and claims relating to unlawful deductions, unpaid holiday pay and redundancy payments. Unite sees no merit in the deliverance of justice to extend this list and believes that the default position should be a full tribunal panel.

Unite rejects the suggestion that speed is a key element in dispensing justice and considers that the notion of unfair dismissal claims in particular being heard in this fashion is totally inappropriate, save in exceptional circumstances. Unfair dismissal claims, whilst subject to legal parameters, frequently rely upon the members of the tribunal having an understanding and knowledge of workplace practices and industrial relations and, with no disrespect to employment judges generally, they are by definition practising lawyers of at least 7 years' standing and, in most cases, have never worked outside of the law.

Unite understands that many employment judges share our view that unfair dismissal claims should be heard by a panel apart from those times when the parties agree otherwise. The whole basis of the unfair dismissal legislation is founded upon reasonableness and fairness in applying workplace procedures and rules. The experience brought to this consideration by lay members of the tribunal cannot be replicated by judges sitting alone. The facts of each case will determine the appropriate application of the law and to place less weight on the facts would, in Unite's view, seriously undermine the unfair dismissal provisions.

Wing members are typically highly capable and experienced small business owners, HR professionals or union representatives. They add a very real benefit to tribunal hearings. They provide perspective as to what is (and is not) acceptable in the workplace. They act as a fetter to an occasionally overbearing employment judge never in public, but often behind the scenes. And the need for structured panel debate before reaching a conclusion avoids a swift rush to judgment.

Employment tribunals were established on the basis of a tri-partite panel which provides a balanced mechanism for determining the outcome of claims made by applicants. To remove this balance in cases where facts play such a significant part would seriously undermine the access to and the application of justice.

The public has a significant amount of confidence in the current employment tribunal system, and much of this can be attributed to the involvement of lay members with a wide range of industrial experience. This involvement enables parties to put their trust in the system and also encourages them to believe that they will have a fair hearing and that their complaint/defence will be listened to, whether or not they have legal representation. This confidence in the system should not be undervalued, and is another reason why panels of tribunals should sit in unfair dismissal hearings.

A further point which needs to be considered is the potential for claimants to seek to pursue their cases under other legislation (e.g. discrimination claims) which are themselves more complex and time consuming and would continue to require a panel of three.

The consultation document suggests that the removal of wing members in unfair dismissal hearings will make it easier for cases to be listed. In fact, most listing difficulties only arise in those cases that go part-heard and then need to be re-listed, as that is when the same panel needs to reconvene. In such cases, the availability of witnesses, parties, their representatives and the employment judge are all just as much a part of the difficulty in reconvening the hearing as the availability of the panel members. As a result, we do not consider that the removal of panel members from unfair dismissal hearings will in fact make listing easier.

### **Q53**

No. In the Union's experience, decisions of the EAT are often informed by the industrial experience and knowledge of its lay members. Employment law is not a

field in which the construction of statutes and contracts is paramount. The correct legal analysis of events often needs to be underpinned by a proper industrial understanding of those events. With all due respect to them, the judges who sit in the EAT often have very little recent experience of the world of work.

The principle of a tri-partite forum is fundamental to the tribunal system and Unite believes that to remove lay people from the EAT would seriously undermine that principle. Unite would further emphasise the calibre of wing members at the EAT who are primarily drawn from experienced HR Directors of major companies, trade union general secretaries and leading academics in the field of industrial relations and employment law.

Unite also believes that there is no evidence that such a move would speed up the process of appeal hearings and therefore little would be gained by the change.

#### **Q54**

In the view of the Union, there are no other categories of case which would be suitable for a judge to hear alone.

#### **Questions 55-56 Interlocutory work**

##### **Q55**

No. Interlocutory work is part and parcel of the judicial process. Interlocutory decisions can substantially affect how, and indeed whether, a case progresses. Such decisions are not of an administrative nature and should not be delegated to administrative staff.

##### **Q56**

We do not believe that interlocutory work should be delegated to legal officers.

#### **Questions 57 – 60 Qualifying period for unfair dismissal claims**

##### **Q57**

Unite is totally opposed to the suggestion that the qualifying period for unfair dismissal claims be extended to two years. Unite also believes that were such a change to be made this would lead to additional claims under other jurisdictions being added where the qualifying period does not apply. This will therefore have the opposite effect of the one desired: what would have been a straightforward 1-day unfair dismissal claim turns into a 5-day discrimination claim, with all of the consequent effect on the resources of the ETs and the parties.

When the unfair dismissal provisions were first introduced in 1971 claims were permitted after a period of 6 months. This was extended to 12 months by the conservative government in 1980 and further increased to two years in 1985. It was subsequently reduced back to 12 months by the Labour government in 1999.

It is inconceivable that employers would not have determined whether an employee was suitable for their post within a period of 12 months and Unite rejects the suggestion that the current qualification period is in some way an obstacle to employers taking on additional employees. Unite would suggest that possibly the government should invest more in ensuring that employers manage their employees better from day one thus preventing the likelihood of claims of unfair dismissal arising in the first place.

The consultation document also seeks to suggest that this increase in the qualifying period does nothing to undermine the employee's right to day one protection. Whilst this is true when claims are made relating to trade union membership, discrimination and whistle blowing as examples, it is disingenuous to suggest that this does not undermine the basic tenet of fairness in procedures given that the remedy for such claims is extremely limited.

#### **Q60**

This proposal will remove statutory employment rights from 12% of the UK working population based on the Labour Force Survey statistics for August – October 2010. In the view of Unite it creates a revolving door labour market which does nothing to address the real problems facing 2.5 million unemployed people in the UK.

The government estimates that this change would lead to a reduction of between 3,700 and 4,700 ET claims for unfair dismissal. According to the official statistics<sup>6</sup> there were 57,400 claims for unfair dismissal so raising the qualification time bar would reduce the application rate by something like 7% per annum, not a great saving to the system but a denial of justice to those approximately 4,000 applicants.

The same source shows just 10% of unfair dismissal cases were settled in favour of the applicant. In 2009/10, for 2,200 successful cases no award was made by the Tribunal and in 93 cases the remedy was left to the parties. In a further 2,900 cases the Tribunal made an award of compensation. In only 6 cases did the worker get his or her job back through an award of reinstatement or re-engagement.

In other words, in only about half of the successful unfair dismissal cases the Tribunal made a financial award and in an infinitesimally small number did the applicant regain his or her job.

Unite believes that the interests of justice would be more greatly served if procedures were introduced that would significantly increase the currently very small number of applicants that regain their employment.

Unite has a further concern that the government in considering this change has failed to establish that the effect of this change would not have a detrimental impact on women. The decision in the Seymour-Smith and Perez case at the ECJ recognised "that if a considerably smaller percentage of women than men is capable of fulfilling the requirement of two years' employment imposed by the disputed rule, it is for the member state, as the author of the allegedly discriminatory rule, to show that the said rule reflects a legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex, and that it could reasonably consider that the means chosen were suitable for attaining that aim."<sup>7</sup>

The House of Lords held by a majority of three to two that the extension of the qualifying period in 1985 had had a considerable disparate impact on women. However, the majority of their Lordships were agreed that there had been a sufficient objective justification by the government, namely encouraging recruitment by employers, to pass the 1985 Order. However, Lord Nicholls concluded: "It is apparent that obtaining hard evidence, including evidence of employer perceptions, is essentially a difficult task in this field."

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<sup>6</sup> ET and EAT Annual Statistics 2009-2010

<sup>7</sup> R (Seymour-Smith) v Secretary of State for Employment [2000] UKHL 12 and (1999) C-167/97

Whilst the impact assessment document for this consultation addresses the requirement that the public sector equality duty be demonstrated in the decision making process, Unite is not satisfied that the Impact Assessment has adequately addressed the issue in so far as the disproportionate impact on women by extending the qualifying period to two years taking into account the growth in part-time and temporary work.

### **Questions 61 - 62 Financial penalties**

#### **Q61**

We agree with this proposal, but consider that the penalty should be payable to the claimant and not to the Exchequer.

#### **Q62**

We would simply point out that there should be no exemptions for small businesses and that, where multiple breaches are committed, an employer should not be excused from repeat payments, as has been suggested. Neither do we accept that there should be any cap on this proposed penalty. One possible approach would be to relate the penalty to the award(s) made by way of a percentage figure.

### **Questions 63 - 64 Up-rating of tribunal awards**

#### **Q63**

Unite is in favour of a continuing annual up-rating of tribunal awards and statutory redundancy payments. The failure over past years to apply such a system has resulted in the current level of unfair dismissal awards falling far short of the average earnings level and disproportionately disadvantaging those employees who have progressed through their skills and endeavour to higher positions in their organisations.

Unite has previously argued and would continue to support the removal of any cap on the level of earnings to be used in calculating statutory redundancy payments and tribunal awards. However, given the current system and the proposal outlined in the consultation document Unite would favour the continuation of an annual up-rate and that this continues to be rounded up in line with current practice. By retaining this approach some progress may be made at times of low inflation to correcting the under valuing of these awards. Unite notes that the current maximum of £400 per week is below the current figure for average weekly earnings (excl. bonuses) of £432.<sup>8</sup>

Unite notes the current provision which can result in a negative award being made in times when the inflation rate is a negative. Whilst we would not anticipate that this situation would arise very often Unite agrees that some provision should be made to prevent this anomaly affecting the relative values of awards. However, Unite does not agree that this should be through the exercise of discretion in ill defined terms such as when “prevailing economic or employment conditions can be taken into account”. This would offer no protection to the maintenance of a fair level of award over time. Unite suggests that by applying a simple proviso that levels of award will not decrease and placing a bottom level of zero percentage increase the issue will be dealt with.

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<sup>8</sup> Office for National Statistics – Labour Market Statistics 16<sup>th</sup> March 2011

As to the method used for calculating the adjustment in levels of award, Unite rejects the suggestion that the current practice of applying the Retail Price Index should be replaced by the Consumer Price Index. It remains our experience that wage bargaining in the private sector is based upon the RPI rather than CPI and that this is accepted practice of both employers and employees. This does not mean that wages automatically rise in line with the RPI but it does provide a common measure that is understood by all parties.

The RPI provides a measurement based on a basket of goods and services which best measures the value of workers' income over a given period. Government is currently trying to substitute the CPI across the public services in terms of both pension increase and pay.

The Consumer Prices Index (CPI) and the Retail Prices Index (RPI) are both measures of the cost of living. One important difference between them is the basket of goods and services upon which they are based, with only the RPI including housing costs. So whenever housing costs increase faster than other prices, increases in the RPI will be higher than those in the CPI. But the reverse also applies, and the CPI can be higher than the RPI. In the long term the effect should be neutral, except to the extent that people consistently spend more (or less) on housing. In the short-term housing costs are expected to increase faster than the average, as interest rates return to more normal levels, so the RPI is likely to be higher for some years to come.

But there is also a significant technical difference in the way that the RPI and the CPI are calculated. The RPI is an arithmetic mean of price changes (the increases are added together and divided by the number of increases), while the CPI is a geometric mean (the increases are multiplied together and the nth root is taken – where n is the number of increases). While this appears obtuse, of interest only to mathematicians, the Treasury have estimated that:

“... the CPI annual rate would typically have been about 0.5 percentage points higher if the elementary aggregates had been calculated using arithmetic means as in the RPI.”<sup>9</sup>

#### **Q64**

Unite accepts that both methods are genuine measures but in the case of determining the up-rating level for tribunal awards which reflect earnings it is our view that the Retail Price Index is more appropriate.

**Unite General Secretary**  
**April 2011**  
**Unite**  
**128 Theobald's Road**  
**Holborn**  
**London**  
**WC1X 8TN**

#### **Contact for further information:**

**Roger Jeary, Director of Research**  
[roger.jeary@unitetheunion.org](mailto:roger.jeary@unitetheunion.org)

**Tel: 0207 611 2630**

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<sup>9</sup> The Treasury, Consumer Price Indices – Technical Manual – 2007 Edition