Eleventh Meeting of European Labour Court Judges

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New initiatives to make Labour Court hearings more efficient: use of alternative disputes methods, collective (class) action

Questionnaire
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I. NEW INITIATIVES TO MAKE LABOUR COURT HEARINGS MORE EFFICIENT.

Preliminary Remarks

I am President of the Employment Appeal Tribunal and therefore do not deal with nor (otherwise than by being kept occasionally informed) am involved in the present discussions in relation to any initiatives to make 'Labour Court Hearings' more efficient, in the sense that our first instance hearings are before Employment Tribunals and my Appeal Tribunal only hears appeals from Employment Tribunals. Since my appointment in October 2002 I have been intimately concerned with implementing new procedures for making our Appeal Tribunals more efficient, but that is not directly your question. There are proposed changes to the Employment Tribunal Rules, but I am not personally involved in them, as discussed above. I have obtained from those involved, and attach to these answers as Annex A, a short summary of the motivation behind and main proposals of the intended reforms in relation to Employment Tribunals.

My answers to your questions will thus be double-barrelled: short and second hand by reference to what you really want to know about, namely the Employment Tribunals, and lengthier, but perhaps of less direct interest to you, by reference to the Employment Appeal Tribunal.

1. **Employment Tribunals and the Employment Appeal Tribunal**

We are insistent on oral hearings, without guillotine. Thus each party can have a fair opportunity to put its case over at the evidential first instance level in oral evidence both in examination in chief and cross-examination, and at both levels in oral submissions probed and tested by the tribunal as appropriate. That is not however to say that there is not a full comprehension of the advantages of case management, including jockeying matters on: and in any event the norm now is for witnesses who give oral evidence to have first provided a witness statement, much, if not all, of which can be taken as read: and again in most if not all cases (although litigants in person will not always be in a position to comply) oral submissions are limited by the fact that there will have been

preceding service of written submissions, in the form of what are colloquially called 'skeleton arguments' (which are rarely in the event skeletal).

I have no statistics as to the proportion of parties before the Employment Tribunal who are litigants in person, although I would imagine it is high. At the Employment Appeal Tribunal we do have litigants in person, although there is a system for providing them with pro bono representation, a facility which is fairly frequently taken up. We apply the principles of case management as much to those who are represented as to litigants in person, although inevitably, always within the limits of fairness, there has to be assistance to and allowance made for litigants in person.

We do have in, I believe, most cases in the Employment Tribunals and in all cases at the Employment Appeal Tribunal pre-hearing directions. At the EAT these are now mostly done on paper, with liberty to the parties to apply, on paper on notice to each other, to discharge or vary any directions made.

2. (a) to (c):

Employment Tribunal: There are, I believe, preliminary or interlocutory hearings, giving directions, only in the more complex or lengthy cases.

Employment Appeal Tribunal: We have preliminary hearings if, on a preliminary perusal ('sift') by a judge of the Notice of Appeal, it is unclear whether the appeal has sufficient merit to proceed (approximately one quarter of all cases). Otherwise directions are made on paper by the judge (see above).

(d) Costs are not normally awarded in the Employment Tribunals and rarely in the Employment Appeal Tribunal.

(e) There is no effect on prescription or limitation because such procedures all occur after the commencement of proceedings, which is the date at which prescription is tested.

3. **Employment Tribunals**: I am afraid I do not know.

Employment Appeal Tribunal: There is, as set out above, the possibility of the provision of pro bono services by barristers, at least in relation to the preliminary hearings referred to above. Sometimes, in the course of the preliminary hearing, by virtue of an exchange between the tribunal and the party, a new way of putting the case becomes clear: but before any amendment of a Notice of Appeal is permitted, the response of the respondent (who would not normally be present at the preliminary hearing) must be sought, particularly if the original six-week time limit for a Notice of Appeal has expired.

4. **Employment Tribunals**: see my general Preliminary Remarks above. The main test is prejudice to the other party.

Employment Appeal Tribunal: The six week time limit for a Notice of Appeal is already generous, and so is strictly enforced. Because it is not a matter of jurisdiction, i.e. as to the originating of the appeal, the similar time limit for the respondent's answer is slightly more sympathetically approached.

New evidence is only admissible on appeal with the permission of the Employment Appeal Tribunal, and on the basis of a fairly stringent test as to whether it is (i) material, in the sense of likely to affect the outcome of the appeal (ii) not reasonably available by the exercise of reasonable diligence before the original hearing. There is the possibility of an application to the original Employment Tribunal for a review.

5. As referred to in the Preliminary Remarks, we prefer not to impose time limits or guillotines, and in the Employment Tribunals and Employment Appeal Tribunal do not do so. However of course, by dint of ordinary case management, and the expression of judicial impatience, a similar effect can be achieved. The best course is to make sure that the hearing is properly directed and prepared in advance. So far as the Employment Appeal Tribunal is concerned, by introducing the 'sift', i.e. the practice referred to above of every Notice of Appeal being considered by a judge when it is lodged, to see what steps should be taken, we have very considerably reduced the waiting time for hearings, and we are better able to estimate the time required, which is rarely more than a day.

6. We have a statutory provision for interest payable on awards made by the Employment Tribunals, backdated, at the discretion of the tribunal, but usually to the date when the loss is originally suffered. The (rather extraordinarily generous) rate of interest prescribed as at 1 February 2003 (and I do not think changed since), which has in fact been the rate which has continued ever since 1 April 1993, is 8%.

7. The tribunals are not empowered to enforce mediation. Of course, at any stage, the Employment Tribunal or the Employment Appeal Tribunal could suggest to the parties mediation, or indeed could suggest that they attempt to settle the case themselves, if appropriate giving them time to do so (although ensuring that the tribunal, if it is to be the tribunal hearing the eventual case, do not know the content or outcome (unless it is successful!) of such settlement negotiations).

8. There are no procedural regulations for mediation presently applicable in the Employment Tribunals. I have myself, before becoming a judge, acted as a mediator, and have some experience of it (though never in the employment field). I am also Chairman of what is called the Central Arbitration Committee (effectively the Industrial Court) which decides questions of trade union recognition, in which, prior to any contested hearing, there is facility for informal approaches and discussions. The most relevant body, from the point of view of the Labour Courts, which involves itself in out-of-court consultations and mediations and is wholly independent of the court system, is ACAS (the Advisory Conciliation and Arbitration Service). This has a statutory role, and has recently established an Arbitration Scheme, as an alternative to the use of Employment Tribunals. ACAS trains its arbitrators, who are experienced practitioners in the field of labour law or industrial relations. Similarly those who practise as mediators are trained by the various bodies which offer a mediation service, which, as I have already indicated, so far as I know, does not really feature in the employment field.

9-11. I really am unable to help in this area as I do not deal with the first instance. My experience outside labour law, is that mediation is not of great assistance because it 'takes two to tango' and if the parties are willing to mediate then they ought to be equally willing to negotiate through their respective legal advisers, and if not, not. As to question 11, see my answer to question 7 above, although I do not know whether, in practice, Employment Tribunals ever follow this course.

12. A decision at first instance would ordinarily be enforceable, unless a stay of execution is granted. Normally it would not be enforced pending appeal, particularly now that appeals can be brought on so much more speedily – our waiting list (reduced as discussed above) is between 3 and 6 months. Of course the matter may be different if there were an appeal up from the Employment Appeal Tribunal to the Court of Appeal, involving a further delay.

13-14. For the reasons discussed above, I am afraid I am unable to answer in relation to Employment Tribunals. Employment Appeal Tribunal files are indeed managed electronically, so I assume they must also be at the lower level. I am not sure I understand what is meant by paragraph 14. All Employment Tribunals, and the Employment Appeal Tribunal itself, have a considerable administrative staff. At the Employment Appeal Tribunal, each appeal is assigned to a particular case manager/associate, who is thus enabled to have a degree of familiarity with the files allocated to him.

15. These figures relate to the period April 2002 to March 2003:

(a) Employment Tribunal (first instance): Cases per year per 100,000 employees: 400 [98,617 applications registered].

(b) Employment Tribunal judgments per year per 100,000 employees: 291 [59,267]

(c) Appeals per year per 100,000 employees: 10 [1938 received]

16. These figures relate to the period April 2002 to March 2003:

(1) Employment Tribunal: 17% of cases pending for longer than one year.

(2) Employment Appeal Tribunal: 4%

17. 23 (the scheme is not popular). 36,287 however (37% of the total of cases lodged at the Tribunals) were settled by compromise.

II. COLLECTIVE CLASS ACTION

1. We have in the High Court provision for representative actions (one or more representing others) and (rather more successfully) for group actions (where large numbers of claimants are gathered together and assigned to a nominated judge, who then makes orders which apply to all claimants), with rules which have developed very dramatically over the last few years [we do not have at present, and I hope never have, class actions in the US sense]. However none of this applies to Employment Tribunals. In Employment Tribunals we would expect every claimant to launch his own application, but there can then be consolidation and collection up of similar cases to be heard together and at the same time. We attempt to have a similar process in the Employment Appeal Tribunal, whereby judgments on similar or identical facts or law, being appealed by the one side or the other, can be directed to be heard together. An alternative of course is for all parties to agree that one particular case is to go forward as a test case, with all other cases being stayed until final resolution of the test case.

2-8. Accordingly these are not applicable.

9. No

10. I have found great advantage in the High Court in relation to cases involving alleged medical or pharmaceutical negligence or consumer product liability or financial negligence for there to be group actions. I do not believe that we have suffered from a lack of a similar approach in the Employment Tribunals.

III. EUROPEAN EQUALITY LAW IN LABOUR COURT PROCEEDINGS

1. We have, apart from the Equal Pay Act 1970, three specific lines of legislation dealing with both direct and indirect discrimination: in each case the originating Act has been amended and supplemented on numerous subsequent occasions. The originating statutes are: Sex Discrimination Act 1975, Race Relations Act 1976 and Disability Discrimination Act 1995. We are about to bring in provisions relating to sexual orientation discrimination and religious discrimination and, subsequently, age discrimination.

2. The three Acts, to which reference is made above, all provide for protection in respect of discrimination, not only for existing employees but also in relation to the arrangements made for the purpose of determining who should be offered employment, the terms on which it may be offered and the refusal or omission to offer such employment. Discriminatory advertisements are specifically unlawful and the subject of a criminal offence.

3. There is specific provision for proceedings to be taken for an injunction to restrain discriminatory practices by the Commission for Racial Equality or the Equal Opportunities Commission in the local County Court. But so far as claims by individuals are concerned there are no specific speedy remedies in the Employment Tribunals.

4. The ordinary time limit for unfair dismissal and discrimination cases is a period of three months from the date when the act complained of was done (or in the case of dismissal the effective date of termination). In both cases there is provision for the extension of that period, although in the case of unfair dismissal it is considerably more restrictive (the tribunal must be 'satisfied that it was not reasonably practicable for the complaint to be presented' before the end of the three-month period) than in respect of discrimination (where the question is simply whether an extension would be 'just and equitable'). However in the case of discrimination, there is an additional concept of a 'continuing act', derived from the fact that the facts of discrimination can be seen as continuous, by which (if such be established) the three months does not run until the latest such act: this has led to a considerable amount of jurisprudence.

5. The burden of proof is on the claimant in all cases of discrimination. However in the case of sex discrimination (to be extended to other cases of discrimination as from later this year) s63A of the Sex Discrimination Act 1975 (introduced as from 12 October 2001) provides:

   "*Where, on the hearing of the complaint, the complainant proves facts from which the Tribunal could, apart from this section, conclude, in the absence of an* ***adequate explanation,*** *that the respondent –*

   (a) has committed an act of discrimination against the complainant which is unlawful …

   the tribunal shall uphold the complaint unless the respondent proves that he did not commit … that act."

   There can thus be a transfer of the onus.

6. Naturally any European law provision with direct effect, as being part of UK law, applies automatically, and it is to be hoped that, if relevant, one party or the other will refer to or rely upon it. However in the discrimination field reliance on it would not

ordinarily be relevant or necessary, as the UK national legislation is complete and sufficient.

7. The ordinary remedies for discrimination are compensation (ordinarily on a basis intended literally to compensate, but capable of including an element of 'aggravated damages'), declaratory orders and, if appropriate, recommendations for change: the last are rare, but if made, and not complied with, they can result in an increase in the amount of compensation. There is no upper limit on compensation but there have been recent Court of Appeal decisions which have emphasised that compensation for mental distress, humiliation, etc. must not be excessive and must be in line with awards made in the ordinary courts for damages for personal injury. This has led to a considerable reduction in the kind of awards that were being made. Only in the most serious cases will awards approach £50,000. There are some restrictions on the circumstances in which compensation can be awarded for innocent (i.e. non-deliberate) indirect sex discrimination (s65(1)(B).

8. See answers to I 7-11 above. The Advisory, Conciliation and Arbitration Service (ACAS) has an Arbitration scheme in existence, of which parties can (but rarely do) make use, and tribunals can recommend settlement or conciliation, but I rather assume infrequently do.

   From the point of view of the Employment Appeal Tribunal, discrimination cases represent probably the most appealed decisions. Employers may be prepared to accept a decision against them on an issue like unfair dismissal or redundancy, but (at least save where discrimination is obviously explicable by reference to a rogue fellow employee) are rarely prepared to accept what has become the stigma of an adverse finding of discrimination. Unsuccessful employees similarly appear to wish to appeal, more so than in respect of unsuccessful claims for unfair dismissal etc.: but there is the significant additional contributing factor that, whereas in unfair dismissal they have possibly moved on to other jobs, or lost interest in making claims, in relation to a discrimination claim they very often remain in the same employment, and have no disincentive from appealing because they are protected (some might say positively encouraged) by the anti-victimisation laws.

9. No.

10. There is, as a result of a recent decision of the Employment Appeal Tribunal, some greater protection in respect of the making of a Restrictive Reporting Order i.e. limiting publication of evidence at hearings, for those pursuing an equality claim, compared with ordinary claimants.

ANNEX A

Changes to Employment Tribunal Procedures

The Employment Tribunal (ET) Regulations and Rules of Procedure, which govern how employment tribunals handle cases are currently being revised. A public consultation is scheduled to take place in late Autumn 2003 on a draft of the new Regulations and Rules. The intention is that the changes will come into force in October 2004. There has already been a pre-consultation with the judiciary and other key stakeholders (August – September 2003).

The changes arise from provisions of the Employment Act 2002, from recommendations of the ET System Taskforce, and suggestions offered by the ET Presidents to help make the tribunal system run more efficiently. These changes include rewriting and re-ordering the regulations to make them easier to understand and to use.

Proposed changes

- More user-friendly ET claim and response forms in plain English. These forms will be prescribed from April 2005 and fuller information disclosure will be required to assist early dispute resolution.

- The time limit for submission of response forms (currently notices of appearance) to be more rigorously enforced.

- Fixed conciliation periods for most cases to be introduced to encourage parties to settle at the earliest opportunity rather than the night before the hearing.

- A default judgment to be given by a tribunal in an uncontested case if it considers this appropriate and where the applicant agrees.

- Powers for the ET Presidents to issue practice directions to ensure that tribunals adopt a consistent approach to procedural issues and to the interpretation of their powers under the rules.

- Cases to be struck out at a pre-hearing review, but only within the grounds on which tribunals may currently strike out claims or responses outside such a review.

- Two substantial changes to be made to the present costs rules: "For profit" representatives will be liable to incur a costs award on account of their unreasonable conduct, and a new provision for awards in respect of preparation time will be introduced in some circumstances.

The Rules will also set out a pre-acceptance / registration procedure.

In seeking to incorporate the relevant provisions of the Act into the ET Regulations, DTI has been working closely with both ET Presidents, the Employment Tribunals Service and ACAS. Representatives of small businesses, the CBI and the TUC, amongst others, are also being consulted.

The revised ET rules will also take account of, and dove-tail with new dispute resolution regulations, designed to encourage settlements in the workplace before the tribunal stage is reached. A Consultation document on these proposals can be found at www.dti.gov.uk/er/individual/dis_res_consdoc.htm.

A public consultation document on the proposed changes to the ET Regulations will be available on the DTI website and in hard copy from late Autumn 2003.