

**EXPLANATORY MEMORANDUM TO
THE EMPLOYMENT TRIBUNALS (CONSTITUTION AND RULES OF
PROCEDURE) (AMENDMENT) REGULATIONS 2008**

2008 No. 3240

1. This explanatory memorandum has been prepared by the Department for Business, Enterprise and Regulatory Reform and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 These Regulations amend the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, as amended, (“the main Regulations”) to:

- make consequential amendments resulting from the Employment Act 2008, which repeals the existing statutory workplace dispute resolution procedures (“the statutory procedures”), and make changes to conciliation by officers of the Advisory, Conciliation and Arbitration Service (Acas);
- make minor clarifications to, and correct drafting errors in, the main Regulations;
- clarify and make procedural changes to tribunal practice, including:
 - providing that, when the Lord President or Lord Chief Justice appoints someone to discharge the functions of a President, where he is unable to act, or during any vacancy, they must consult the Senior President of Tribunals beforehand;
 - provide for the power to appoint (and therefore remove) employment tribunal lay members to be vested in the Lord Chancellor rather than the Secretary of State;
 - removing Employment Judges’ discretion not to issue a default judgment in certain circumstances;
 - providing that, where electronic communications are used in public hearings, and oral evidence is given, the public must be able to see and hear all parties to the communication, and where the hearing is to be held in private and oral evidence is given the tribunal or Employment Judge must be able to see and hear all parties to the communication;
 - clarifying provisions on the withdrawal and dismissal of proceedings, and a new rule to provide for the automatic dismissal of proceedings, where the parties to an Acas settlement have confirmed in writing their understanding that the proceedings covered by the settlement will be dismissed and the claimant has withdrawn the claim;

- enabling an Employment Judge, in specified circumstances, to review a default judgment on his own initiative, and providing for preliminary consideration of an application to review a default judgment;
- enabling an Employment Judge sitting alone to hear Stage 1 equal value claims;
- providing for appropriate transitional arrangements.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

Changes consequential on the Employment Act 2008

4.1 Sections 29 to 33 and Schedules 2 to 4 of the Employment Act 2002 provide for statutory workplace disciplinary, dismissal and grievance procedures. Section 1 of the Employment Act 2008 repeals these provisions, thus removing the statutory procedures in their entirety. These Regulations make consequential amendments to the main Regulations, in relation to the arrangements for making a claim (Schedule 1, Rule 1), the handling of a claim by the Tribunals Service (Schedule 1, Rule 2) and procedures relating to the acceptance of a claim (Schedule 1, Rule 3).

4.2 Section 18(2A) of ETA 1996 provides that, where employment tribunal rules provided for the postponement of employment tribunal hearings for a fixed period, to allow an opportunity for conciliation and settlement, Acas's duty to conciliate continues during that postponement but then becomes a discretionary power. Section 19(2) of ETA 1996 requires, additionally that, where employment tribunal rules provide for such a postponement, those rules must also provide that the parties be notified of the possibility that conciliation services may be withdrawn after expiry of the postponement. Section 6 of the Employment Act 2008 repeals section 18(2A) and 19(2) of ETA 1996, with the effect that Acas's duty to conciliate in employment tribunal cases subsists throughout the proceedings until the tribunal delivers a judgment. Regulation 16 of these Regulations, makes consequential amendments to the main Regulations, removing references to fixed periods of conciliation and the related requirement to notify.

Change to align employment tribunal procedure with that of the wider Tribunals Service

4.3 Paragraph 6(1) of Schedule 4 of TCEA allows the Senior President of Tribunals, in respect of a particular chamber of the First-tier or Upper Tribunal where there is no-one appointed to preside over that chamber, to appoint an acting President for the duration of the vacancy. At present, Regulation 4(6) of the main Regulations provides for the appointing office holder where that is the Lord President or, where the appointing office holder is the Lord Chancellor, the Lord Chief Justice, after consulting the Lord Chancellor, to

nominate someone to discharge the ET President's functions if he is unable to act, or during a vacancy. Regulation 3(1) of these Regulations amends Reg.4(6) to provide that, where the Lord President or Lord Chief Justice appoints someone to discharge the functions of a President, where the President is unable to act, or during any vacancy, they must first consult the Senior President of Tribunals;

4.4 Section 118(2) of the Constitutional Reform Act 2005 (CRA) provides that Judicial Office Holders (JOHs) may only be covered by the CRA disciplinary procedures if the Lord Chancellor has power to remove those JOHs. At present, Regulation 8 of the main Regulations provides that the Secretary of State has the power to appoint employment tribunal lay members. Regulation 3 of these Regulations therefore makes the necessary amendments to the main Regulations to provide the Lord Chancellor, rather than the Secretary of State, with the power to appoint, and thereby to bring them within the scope of the CRA disciplinary procedures.

Other amendments to the main Regulations

4.5 In addition, the opportunity is being taken to make some changes for the purpose of clarifying or improving employment tribunals procedure, addressing issues which have arisen since the main Regulations were made, and to effect some minor drafting changes, either to increase the accessibility of, or to correct drafting errors in, the main Regulations.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

Repeal of statutory procedures and changes to conciliation

7.1 This instrument is part of a package of legislative and non-legislative measures to simplify and enhance the framework for effective dispute resolution in the workplace. This is the result of an independent review of employment dispute resolution in Great Britain undertaken by Michael Gibbons¹ and a public consultation² by the Government in 2007 which identified key problems with the current dispute resolution system.

¹ "A Review of Employment Dispute Resolution in Great Britain" published 21 March 2007.

² Alongside the Gibbons Report, the Government published a consultation paper, "Resolving Disputes in the Workplace". The Government response to this consultation was published on 19 May 2008 and can be found at www.berr.gov.uk.

7.2 The Employment Act, which received Royal Assent on 13 November 2008 paves the way for important and simplifying reforms to make the system of employment dispute resolution work better for employers and employees. These reforms include repeal of the statutory procedures and associated legislation on procedural fairness in unfair dismissal. The Act also gives employment tribunals discretionary powers to adjust awards by up to 25% if either party acts unreasonably in complying with a relevant statutory code; Acas has consulted on a revised principles based and concise code of practice on discipline and grievance procedures³ to reflect the new regime.

7.3 The Employment Act also repeals the restrictions on Acas's duty to conciliate in recognition of the findings by the Gibbons Review that the introduction in October 2004 of fixed periods for conciliation to take place had not achieved their objective of encouraging parties to employment disputes to settle early on in the tribunal process. Parties were continuing to realise close to the hearing date that they wished to settle, but finding that Acas conciliation was no longer available. The new provision will allow disputes to be conciliated at any point in the process prior to the issuing of judgment. The amendments to these Rules removes the requirement to postpone tribunal hearing dates which allowed for the fixed periods during which conciliation previously took place.

7.4 In addition, the Government is making additional investment in Acas to improve the advice they provide people in dispute and provide additional conciliation assistance. There will be an enhanced helpline with extended opening hours and Acas will be offering employers and employees more early conciliation for problems which could otherwise develop into employment tribunal claims.

Change to align employment tribunal procedure with that of the wider Tribunals Service

7.5 One of the policy objectives of the Tribunals, Courts and Enforcement Act 2007 was to create a new, simplified statutory framework for tribunals, to deliver a more efficient and effective service to users. The employment tribunals form a 'separate pillar' within this structure. They share a common administration, and the leadership of the Senior President of Tribunals, but their jurisdiction has not been transferred. Nonetheless, where it is appropriate to do so, changes will be made to the Employment Tribunals Rules of Procedure to provide greater harmonisation across all tribunals and the aim of the amendment made by Regulation 3(1) is to reflect the leadership role the Senior President now has in relation to employment tribunals.

Other amendments to the main Regulations

7.6 Some of the amendments are minor drafting improvements and corrections.

³ <http://www.acas.org.uk/index.aspx?articleid=2114>

7.7 In other cases, for example Regulation 4(15) (the handling of interim relief applications), Regulation 4(5)(b) (the time limit for submitting a response in State Immunity Act cases), and Regulation 4(17)(a) (the redrafting of the provisions on the withdrawal of claims) the purpose of the amendments is to clarify or make express existing procedures.

7.8 The purpose of other amendments, for example, Regulation 4(7) (default judgments), Regulation 4(13) (the use of electronic communications), Regulation 4(17)(b) (automatic dismissal of a claim following withdrawal of a claim where an Acas settlement has been reached) and Regulation (7) (providing for an Employment Judge to sit alone for a Stage 1 equal value hearing) is to build on or adapt existing provisions to facilitate the delivery of justice, variously by increasing certainty for the parties, by providing greater flexibility in proceedings or by streamlining procedures.

- ***Consolidation***

7.9 As the amendments effected by these Regulations do not constitute a major redrafting of the main Regulations, the decision has been taken not to consolidate the relevant legislation on this occasion, but this will be kept under review and considered again when further procedural changes are required.

8. Consultation outcome

8.1 The Government published a further consultation⁴ on 30 June 2008 seeking views on a number of measures to complement the investment in Acas services and the legislative reforms in the Employment Act. This further consultation closed on 26 September 2008. The Government response to this consultation is available on the BERR website.⁵

8.2 The Government received 92 responses to this consultation and is grateful to everyone who took the time and trouble to comment. These responses came from a broad spectrum of interests ranging from individuals and micro businesses to central government.

8.3 The consultation proposed a number of clarifying and procedural changes. Over 44% of those who replied to the question of whether these clarifying and procedural changes would be helpful, replied in the affirmative. Around 20% either agreed, but raised objections or made suggestions, or replied in the negative, but raised objections to only some of the proposals, whilst the remaining respondents replied neither yes nor no, but raised points on various matters. The Government carefully considered these detailed comments in developing the amendments affected by this instrument.

9. Guidance

⁴ "Dispute Resolution Secondary Legislation Consultation"

<http://www.berr.gov.uk/consultations/page46889.html>

⁵ At: <http://www.berr.gov.uk/files/file49216.pdf>

9.1 The changes planned to the dispute resolution system will have an impact on all employees and employers in Great Britain. In light of this, the Government has put in place a comprehensive communications strategy to ensure that employees and employers understand the changes to the law, and know where to go for further information and advice.

9.2 The Government is working closely with key partners, most particularly Acas, but also trade associations, business groups, trade unions and other organisations to ensure readiness for the new system from April 2009. Information on the changes will be appearing in key trade publications, journals and national and regional press in the approach to April 2009. Employers and employees will be able to find out more about the impact of the changes to dispute resolution at the annual conferences of major trade associations and in tailored seminars and workshops. Guidance and advice will be available on businesslink.gov.uk and direct.gov.uk.

10. Impact

10.1 The estimated impact on business is a saving of £0.043m. There will also be a saving to individuals estimated at £0.013m.

10.2 The estimated impact on the public sector is a net cost of £0.58m.

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small business, but the changes to procedure that will take place as a result of this instrument will not impose any additional costs or regulatory burden on business.

12. Monitoring & review

12.1 The benefits arising from this instrument will be captured as part of the benefits monitoring of the Dispute Resolution Review programme. The planned changes to the Acas advice service and the additional pre-claim conciliation services will be tested through regional piloting before implementation. BERR is developing detailed benefits realisation plans for these services during the set-up phase. The overall volume of tribunal claims will also be an indicator of the effectiveness of the changes, although this is of course influenced by external factors including the introduction of new employment rights.

13. Contact

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Tel: 020 7215 3859 or email: Gail.Davis@berr.gsi.gov.uk can answer any queries regarding the instrument.