

Title: Amendment to the Employment Tribunals Act 1996: Postponements IA No: BISLM005 Lead department or agency: BIS Other departments or agencies: Acas, Ministry of Justice, Her Majesty's Courts and Tribunals Service	Impact Assessment (IA)			
	Date: February 2016			
	Stage: Final (EANCB validation)			
	Source of intervention: Domestic			
	Type of measure: Secondary legislation			
	Contact for enquiries: Chris Wright, Chris.Wright@bis.gsi.gov.uk			
Summary: Intervention and Options				RPC Opinion: Validated (Green)

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2016 prices)	In scope of Business Impact Target?	Measure qualifies as Target?
£4.38 million	£3.70 million	-£0.41 million	Yes	Zero In (net beneficial to business)

What is the problem under consideration? Why is government intervention necessary?
One of the concerns about the tribunal system voiced by businesses and stakeholders is the time it takes. From April to June 2015, Her Majesty's Courts and Tribunals Service puts the average age of cases at the time of clearance (closure of the case) at 30 weeks for single claims and 188 weeks for multiple claims. Short notice and repeated postponements cause unnecessary delays, cost and inconvenience to all parties.

What are the policy objectives and the intended effects?
These proposals seek to reduce the delays in employment tribunals caused by postponement requests. The aim is to strengthen the current postponement and costs tests, by introducing stronger rules as to when a postponement request should be allowed and to reimburse the parties for any costs incurred as a result of a late postponement request.

What policy options have been considered, including any alternatives to regulation?
The government will regulate to:

- Ensure that a party granted two postponements in the same case, will only be allowed a further postponement in this case if there are exceptional circumstances, the parties agree or the postponement has been necessitated by an act or omission of another party or the Tribunal.
- Ensure that a postponement application presented less than seven days before the hearing date will only be granted if there are exceptional circumstances, the parties agree or the postponement has been necessitated by an act or omission of another party or the Tribunal.
- Oblige Tribunals to consider the imposition of a cost order or a preparation time order against a party that is granted a late postponement.

An alternative approach of encouraging employment judges to make greater use of their existing case management powers was ruled out. It was felt that a regulatory measure would give tribunal users more confidence that the process would not be subject to repeated and short notice delays, addressing concerns about costs which were raised during the consultation.

Will the policy be reviewed? It will be reviewed.		If applicable, set review date: 01/2021			
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? N/A			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading option.

Signed by the responsible Minister: Nick Boles

Date: 1st March 2016

Summary sheets of Costs and Benefits

Summary: Analysis & Evidence

Policy Option 1

Description: Regulate to ensure that if a party has already had two postponements in a case that a further postponement will only be granted if there are exceptional circumstances; that a postponement applied for less than seven days before a hearing will only be granted if there are exceptional circumstances; and that tribunals will be obliged to consider imposing cost orders on those granted a late postponement.

FULL ECONOMIC ASSESSMENT

Price Base Year 2015	PV Base Year 2016	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: N/A	High: 4.38	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	1	N/A	N/A
High	N/A		N/A	N/A
Best Estimate	0		0.0	0.1

Description and scale of key monetised costs by 'main affected groups'
 Familiarisation costs related to understanding the new postponement laws. This will apply to all businesses applying for a postponement of an Employment Tribunal hearing each year. Also the cost of compensating claimants for late postponements made by businesses. Costs are estimated to be £8,100 per year, giving a best estimate of total costs of £0.070 million.

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	1	N/A	N/A
High	N/A		N/A	N/A
Best Estimate	0.0		0.5	4.5

Description and scale of key monetised benefits by 'main affected groups'
 Estimated benefits for business are in terms of forgone time wasted and legal fees and the potential award of cost orders to recompense costs incurred as a result of late postponements. The estimated total benefits are £0.517 million per year, giving a best estimate of the total benefit of £4.5 million.

Other key non-monetised benefits by 'main affected groups'

Key assumptions/sensitivities/risks	Discount rate	3.5
Postponements data has limited information on the timing and motivation of postponements as well as the prevalence of repeat postponements. The calculations consider any postponement on the day of the hearing or after the hearing to be 'late' whilst the Rules will apply to any request less than 7 days before the hearing begins, and do not estimate the business impact of reducing repeat postponements.		

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OITO?	Measure qualifies
Costs: 0.0 Benefits: 0.4 Net: 0.4	Yes	Zero In

Evidence Base (for summary sheets)

Strategic overview:

Background

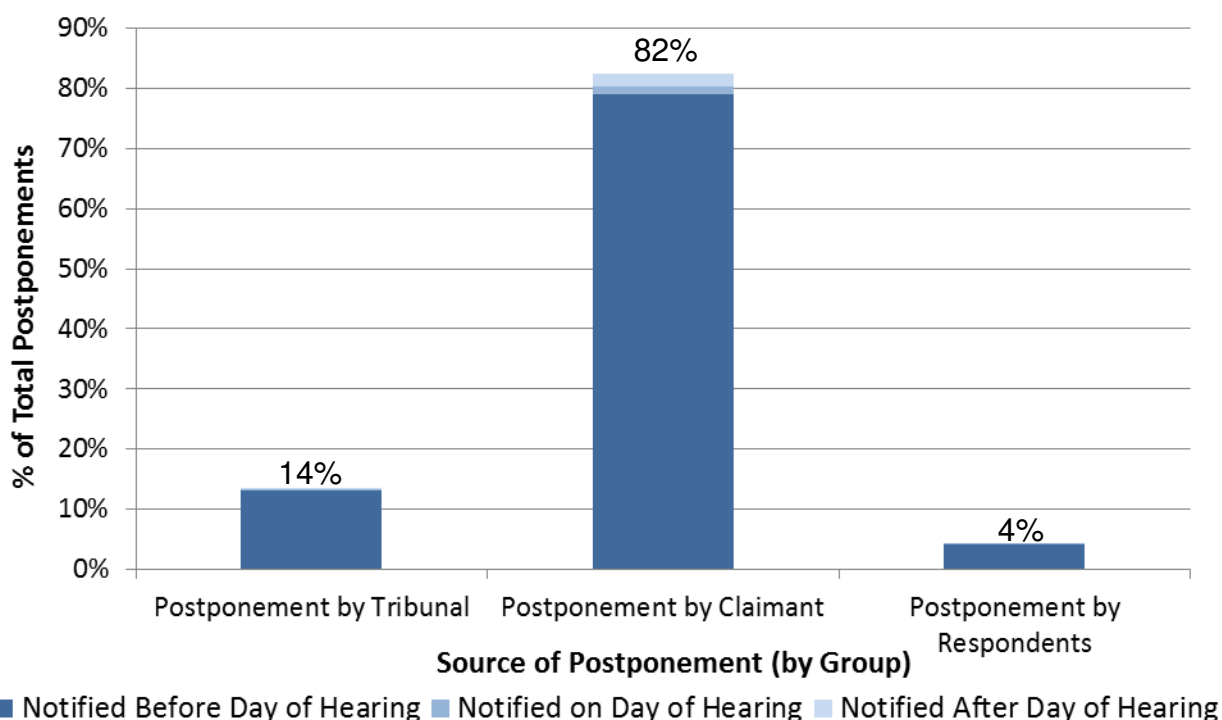
1. The Government believes that workplace disputes are best resolved outside of the time, cost and stress of an Employment Tribunal (ET). Employment Tribunals can be expensive and stressful for all participants, so providing a system that encourages early resolution and, where that is not possible, provides an efficient service with effective outcomes is essential.
2. One of the concerns about the tribunal system repeatedly voiced by businesses and stakeholders is the time it takes to come to a conclusion of the proceedings. In their consultation responses the FPB and CIPD both voiced concerns raised by their members of the wasted time and significant costs incurred by postponements. In particular, those made at short notice.
3. In response to those concerns, the Government introduced measures in the Small Business, Enterprise and Employment Act 2015 to provide additional powers to make regulations governing employment tribunal procedure. Using these together with existing powers in the Employment Tribunals Act 1996 we set out proposals to amend the Employment Tribunal Rules of Procedure in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to:
 - limit the number of postponements that can be granted to a party, in a single case, other than in exceptional circumstances, where the parties agree or the postponement was necessitated by an act or omission of another party or the Tribunal;
 - introduce a deadline after which applications for the postponement of a hearing would only be allowed in exceptional circumstances, where the parties agree or the postponement was necessitated by an act or omission of another party or the Tribunal;
 - place an obligation on ETs to consider granting costs orders where late notice postponements are granted.
4. The Government undertook a public consultation from 16 January to 12 March 2015 seeking views on the draft new rules to ensure that they supported our aims of improving the efficiency of the employment tribunal system for all users. A total of 33 responses were submitted in answer to the 10 questions put forward in the consultation. Respondents generally concurred that repeated and late postponements could be both financially and emotionally costly. It was equally acknowledged that on occasions a postponement was unavoidable or made sense, hence the need for the discretion of a judge to grant postponements. Whilst many of the responses provided anecdotal evidence rather than qualitative data of the costs involved, it was suggested that the consultation document underplayed the opportunity costs of lost business brought about by late or repeated postponements.

5. The consultation response was published on GOV.UK in February 2016.

Rationale for intervention

6. One of the concerns about the Employment Tribunal (ET) system voiced by stakeholders is the time the process takes. Internal management information from Her Majesty's Courts and Tribunals Service (HMCTS) puts the average age of cases at the time of clearance (closure of the case) at 30 weeks for single claims and 188 weeks for multiple claims from April to June 2015. Unnecessary and short notice postponements can increase the length of the process and lead to additional costs for those involved.
7. HMCTS management information shows that in the year to end March 2015, there were approximately 23,250 postponements of ETs. The vast majority of these (96%) were notified before the day of the hearing, compared with 2% notified on the day of the hearing and 2% notified after the day of the hearing (i.e. made contact to explain after failing to attend).
8. Postponements could be made by three groups: the tribunal itself, the claimant or the respondent. As a percentage of total postponements, claimants represent the largest source group (see Figure 1).

Figure 1: Postponements by Group (% of Total), April 2014 to March 2015

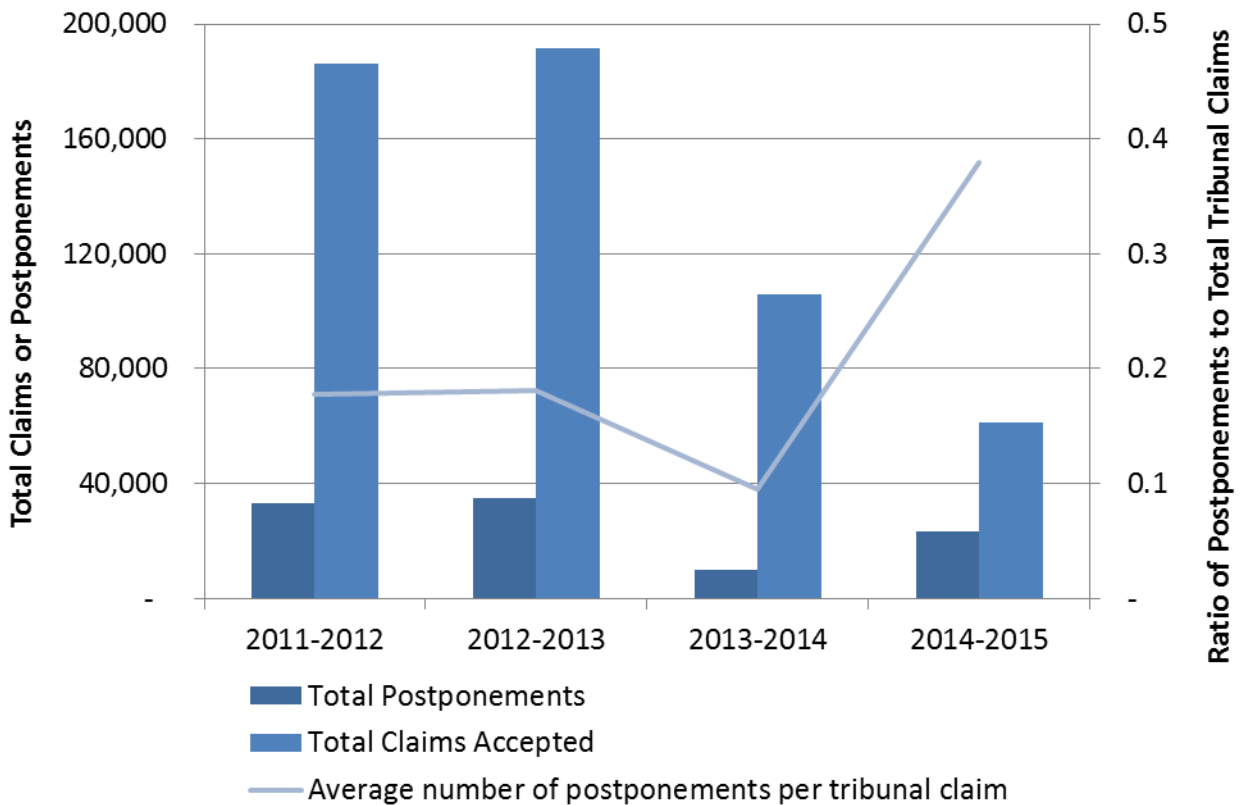


Source: HMCTS Management Information.

9. Since mid-2013 there has been a fall in the number of employment tribunal claims. The number of postponements has also fallen from the levels seen in 2011-12 and 2012-13

(of over 33,000). However, after dropping to slightly over 10,000 in 2013-14, postponements rose to 23,250 in 2014-15. To take account of the recent changes, we consider the number of postponements taking place as a proportion of the number of employment tribunal claims being brought each year. There were almost 0.4 postponements per claim in 2014-15, up from 0.2 in 2011-12 and 2012-13, and 0.1 in 2013-14 (see Figure 2). Clearly the occurrence of postponements is an ongoing problem.

Figure 2: Total Postponements and Tribunal Claims (left axis) and the Ratio of Postponements per Claim (right axis) per Year, April 2011 to March 2015



Sources: HMCTS Management Information; MoJ, 2015, 'Tribunals and gender recognition certificate statistics quarterly: April to June 2015'.

Other policy options considered

10. An alternative approach of encouraging employment judges to make greater use of their existing case management powers was considered. However, it was felt that this was not likely to achieve the same level of impact on postponements that the policy hopes to achieve. The more robust regulatory approach will reinforce the objective of reducing unnecessary postponements and discourage parties in tribunal claims to seek postponements unless they are necessary due to exceptional circumstances, the omission or an act of another party or the Tribunal or for facilitating settlement.. Whilst practice directions may have been an alternative the issuing of such directions is at the discretion of the President of the Employment Tribunal.

Policy objective

11. The Government will regulate to:

- Provide that where a party has been granted two previous postponements of hearings in the same case, any further applications by that party for a postponement will only be granted in exceptional circumstances, where the parties agree or the postponement was necessitated by an act or omission of another party or the Tribunal.
- Provide that any application for a postponement presented less than seven days before the date of the relevant hearing or made at the hearing itself shall only be granted in exceptional circumstances¹, where the parties agree or the postponement was necessitated by an act or omission of another party or the Tribunal.
- Oblige Tribunals to consider the imposition of a cost order or a preparation time order against a party that is granted a late postponement. A late postponement is a postponement which is applied for less than seven days before the date the hearing is to begin.

12. These proposals seek to reduce the delays in Employment Tribunals caused by postponement requests.

13. The aim is to strengthen the current postponement and costs tests, to introduce clearer expectations and stronger rules about allowing postponement requests and to reimburse the parties for any costs incurred as a result of a late postponement request.

Timing

14. Regulations stating the measures outlined above will be laid before Parliament in or before March 2016 and will be implemented in April 2016.

Monetised and non-monetised costs and benefits

No change option

15. Option 0 is the no change option. This provides the baseline against which the policy option is compared. Therefore its costs and benefits are not monetised.

16. Option 1 is the proposed regulation set out in the policy options section above.

Comments on measuring business impact

¹Note that exemptions and exceptional circumstances provisions will protect parties with a genuine need for a postponement and will safeguard the needs of vulnerable groups such as the disabled and those with caring responsibilities. Furthermore, the Government is satisfied that Tribunals and the judiciary will apply their discretion accordingly and ensure that access to justice is maintained.

17. It is extremely difficult to quantify the impact of the new postponement legislation on any of the groups affected. We do not have data on the current numbers of unnecessary or potentially tactical postponements that are targeted through the legislation, or accurate estimates for costs orders that may be awarded. We have taken steps to fill the evidence gap through the consultation exercise, although most of the data elicited has been qualitative rather than quantitative.
18. In terms of considering the implications under the Business Impact Target, we are concerned with the direct costs on business.
19. The analysis below weighs up the potential impacts and justifies the assumption that the introduction of these measures will at least be net beneficial for business.
20. We assume that the legislation will reduce unnecessary/tactical postponements (and wasted costs due to unnecessary delay) or that cost orders may be made to recompense the other party for costs incurred when a late postponement does occur. Since HMCTS data on postponements shows that respondents (employers) are much more likely to receive a notification of a postponement, rather than being the party to instigate the postponement (see Figure 1), the impacts of introducing the new postponement measures are likely to be a net benefit for business.
21. A public consultation was conducted from January to March 2015 seeking views from stakeholders on the draft new rules. Business representatives and trade bodies were generally supportive of the proposals, with costs and wasted time being common concerns. There was a mixed response to the question on costs where 2 or more postponements have already been granted, with only 21% of respondents saying that they had evidence to demonstrate that costs increased. However, the associated comments submitted were evenly balanced on whether costs increased or decreased in these circumstances. Such anecdotal evidence enabled us to better understand the cost and impact of postponements, with several respondents citing specific examples illustrating that the closer the postponement is to the hearing date the more expensive it is. Many businesses thought that the estimated costs of postponements outlined in the consultation were conservative in comparison to their own perception of the true costs to businesses. This supports the assumption that businesses will benefit from a reduction in postponements, including the late postponements that the policy should achieve.

Ongoing costs – familiarisation

22. Companies involved in employment tribunal proceedings may wish to familiarise themselves with the new legislation. However, there is no fundamental requirement for this – the legislation does not require them to take any action.
23. Those companies requesting a postponement are likely to familiarise themselves with the measures. We assume that the number of postponements by respondents (946 per year in the year to 31st March 2015²) is a suitable proxy for this population.

² Source: HMCTS management information on postponements.

24. We estimate that it should take an HR manager (Standard Occupation Code: 1135) 15 minutes to become familiar with this new policy. This estimation is based on the assertion that the new measures should be relatively uncomplicated and, therefore, not difficult to understand. The change will comprise three relatively short amendments, each roughly a paragraph in length, which should not be time consuming to read through. Furthermore, supporting guidance will be available so further time spent searching for this guidance will be minimal. Use of a 15-minute estimate is corroborated by evidence that this is comparable to the reported familiarisation time spent understanding other key employment law obligations, such as law around flexible working obligations³.
25. Using provisional data provided by ASHE 2015 we know that the median hourly wage excluding overtime for an HR Manager is £23.41⁴. Factoring in the non-wage labour cost uplift of 19.8% (Eurostat, 2015) this brings the hourly wage of an HR manager to £28.05.
26. We therefore estimate that with a familiarisation time of 15 minutes it will cost each employer £7.01 $((15/60) \times £28.05)$ to become familiar with the new legislation.
27. Scaling this familiarisation cost per business by the annual number of postponements by respondents stated above (946) gives an estimate of £6,633 for total annual familiarisation costs. This is assumed to be an ongoing cost since different businesses are likely to be requesting postponements each year and hence a new group of businesses will have to familiarise themselves with the legislation.

Ongoing costs – postponements not occurring and award of cost orders

28. There will be small ongoing costs to business in the instances where: businesses incur costs of being denied postponements beyond their second postponement; and where businesses are obliged to pay cost orders to claimants where they've made a late application for a postponement and that application is allowed⁵.
29. It is not possible to estimate the impact of the element of the legislation that limits the number of repeat postponements (barring the exemptions provided by the legislation) to two since HMCTS data do not currently collect detail on the number of postponements per case. Omitting the impacts of this element will almost certainly underestimate the net benefits to business because the vast majority of postponements occurring are not requested by businesses: from April 2014 to March 2015 there were over 20 claimant postponements for each respondent postponement, as shown in Figure 1. Hence it is likely that reducing multiple postponements will benefit more

³ Employment Law Admin Burdens Survey 2008: <http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file49199.pdf>. Businesses estimated that the time taken to become familiar with the regulation on approving or refusing flexible working requests was around 14 minutes.

⁴ ASHE 2015 provisional data, Table 14.6a Hourly pay – Excluding overtime.

⁵ The 'exceptional circumstances' provision should ensure that businesses are allowed well-justified postponements without penalty.

businesses (by reducing the number of multiple postponements made by claimants) than it adversely affects (by reducing the ability of businesses to use multiple postponements per case).

30. Regarding the potential award of cost orders that businesses may have to pay for requesting postponements that are deemed 'late' (within 7 days of the date the hearing is due to begin), the cost is difficult to estimate because the exact timing of notifications is unknown. HMCTS data includes figures on those notifying of a postponement on or after the day the hearing was due to commence but offers no further breakdown. Hence the costs (as well as the benefits calculated in the next section) associated with late postponements are estimated using the number of postponements on or after the day the hearing was due to commence. This assumption will reduce the magnitude of both costs and benefits related to late postponements⁶.
31. HMCTS management information shows that of the 946 postponements made by respondents from April 2014 to March 2015, a total of 8 were made on or after the day the hearing was due to commence (compared to 784 made by Claimants on or after the day the hearing was due to commence).
32. The potential costs to a business for making late postponements (that are not granted under one of the exemptions) and having to compensate claimants will be equal to the cost orders granted, which will be proportionate to the cost to claimants of a tribunal hearing.
33. The costs faced by claimants are: time spent (resulting in lost earnings); advice and representation fees; and costs of travel and communication (e.g. telephone bills and postage). The Survey of Employment Tribunal Applications (SETA) establishes the median amounts spent on advice and representation (SETA Table 3.26) and the median amount spent on travel and communications (SETA Table 6.2) on the whole case⁷. Costs to claimants of lost earnings are estimated using wage data in the 2015 provisional Annual Survey of Hours and Earnings (ASHE)⁸. To get an estimate for the costs relating to a hearing postponement, we have divided the total cost estimates by the median amount of days spent on the case by respondents (SETA Table 6.4), then multiplied by the median length (in days) of tribunal hearings (SETA Table 6.11). The calculation is illustrated in Table 1.

⁶ Since the volume of late postponements made by respondents is significantly higher (which is where the estimated benefits to business lie) this assumption has a greater absolute impact on the benefits calculation than the cost calculation and hence reduces the net benefit to business.

⁷ The data from SETA 2013 was published in *Findings from the Survey of Employment Tribunal Applications 2013*, June 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316704/bis-14-708-survey-of-employment-tribunal-applications-2013.pdf.

⁸ ASHE 2015 Table 14.6a: Hourly pay - Excluding overtime of 'All employees'.

Table 1: Summary of Costs to a Claimant relating to an Employment Tribunal Hearing

Cost	Median cost related to all outcomes
Time spent on case	£564.00 ⁹
Costs for advice and representation post ET1	£495.75 ¹⁰
Costs incurred for travel and communication	£24.68 ¹¹
Total cost	£1,084.44
Total cost rounded to nearest £100	£1,100
Average Time Spent on Case (in Days)	6
Average Length of Tribunal (in Days)	1
Cost for Tribunal Hearing rounded to nearest £1	£183

34. The estimated value of potential cost orders being made against a business (arising from a business making a late postponement) is £183.

35. Multiplying the cost per hearing by the current annual postponements made by employers on or after the day the hearing commences (since this is the most appropriate proxy for a 'late' postponement given the data available), a total of 8 from April 2014 to March 2015, the total annual cost to business for compensating claimants via cost orders is estimated to be £1,464.

Benefits to business

36. This measure aims to clarify the rules on postponements with a view to reducing the number of requests granted and ensuring that parties are reimbursed for the costs of short notice postponements.

⁹ Median time spent on case by claimants (6 days) x Hourly pay excluding overtime of all staff (£11.75) x Number of hours in a working day (8). Sources: SETA 2013 Table 6.4; ASHE 2015 Table 14.6a.

¹⁰ Total costs paid for advice and representation (£2,000) x Percentage of claimants that used advice or day-to-day representation (70%) x Percentage of claimants that paid for some or all of this advice (34%) x CPI inflation between April 2012 and April 2015 (4.1%). Sources: SETA 2013 Tables 3.26 and 3.23; Consumer Price Inflation - November 2015 release, Office for National Statistics.

¹¹ (Median reported costs of travel (£50) x Proportion of people that incur travel costs (31%) + Median reported costs of communications (£20) x Proportion of people that incur communications costs (42%)) x CPI inflation between April 2012 and April 2015 (4.1%). Sources: SETA 2013 Tables 6.1 and 6.3; Consumer Price Inflation - November 2015 release, Office for National Statistics.

37. The benefits to business are that late postponements do not occur (as Claimants will not make late or repeated applications for postponements unless they believe there are exceptional circumstances, it is agreed or it was due to an act or omission of another party, or the Tribunal and Judges shall not grant the same unless there are one of the circumstances set out), or if they do occur businesses are subsequently recompensed by costs orders (which a judge must consider following any late postponements). It is anticipated that the majority of the benefits will come through the former route as the intention of the policy is to create an environment in which the parties are dissuaded from applying for unnecessary postponements, and the system supports the granting of repeated postponements *only* in exceptional circumstances. In general, cost orders are rare and under the new legislation it is only the onus of the judge to *consider* a cost order (not automatically award one). Importantly, for the purposes of the calculations presented here, the channel of the benefit to businesses (potential costs being avoided or costs being recompensed) is irrelevant because the estimation method is the same.
38. As explained above, it is not possible to estimate the impact of limiting the number of repeat postponements (barring one of the exemptions). To estimate the potential benefit to a business from a reduction in unnecessary or tactical postponements at short notice, or the award of cost orders to businesses when they do occur, we first estimate the costs to companies arising from a tribunal hearing.
39. The costs faced by employers related to tribunal hearings are: time spent by staff for preparation and advice and representation fees. Analogous calculations to those in the previous section, making further use of SETA employer survey tables, are illustrated in Table 2. One notable distinction is that the cost of staff time (from ASHE) invested in a hearing are uplifted by Eurostat non-wage costs¹².

Table 2: Summary of Costs to an Employer relating to an Employment Tribunal Hearing

Costs	Median cost related to all outcomes
Cost of Time spent on case Directors and senior staff	£1,125.35 ¹³
Cost of Time spent on case (other staff OR HR Managers?)	£448.72 ¹⁴

¹² Eurostat, 2015: 'Labour costs per hour in EUR, 2004-2014 whole economy excluding agriculture and public administration'.

¹³ Median time spent on case by directors (3 days) x Hourly pay excluding overtime of chief executives and senior officials (£39.14) x Non-wage cost uplift (19.8%) x Number of hours in a working day (8). Sources: SETA 2013 Table 6.7; ASHE 2015 median hourly wage of 'Human resource managers and directors'; Eurostat; SETA assumes 8 hours per day.

¹⁴ Median time spent on case by other staff (2 days) x Hourly pay excluding overtime of HR managers and directors (£23.41) x Non-wage cost uplift (19.8%) x Number of hours in a working day (8). SETA 2013 Table 6.7; Sources: ASHE 2015 median hourly wage of 'All employees'; Eurostat; SETA assumes 8 hours per day.

Costs	Median cost related to all outcomes
Costs for advice and representation post ET1 (changed to £3,000)	£1,754.71 ¹⁵
Total cost	£3,328.79
Total cost rounded to nearest £100	£3,300
Average Time Spent on Case (in Days)	5
Average Length of Tribunal (in Days)	1
Cost for Tribunal Hearing	£660.00

40. £660 is the estimated cost currently imposed on businesses per postponement. Hence this is the estimated benefit to a business from the proposals because either the postponement will not occur (and so these costs are not incurred) or the costs will be recompensed through a cost order.
41. As in the costs calculation, the number of notifications on or after the day the hearing was due to commence is used to estimate the number of 'late postponements' eligible to result in a cost order since more accurate data is not available. So, analogously to the costs calculation, this is likely to be a low estimate given a 'late postponement' is considered to be a postponement granted less than 7 days before the date the hearing was due to commence.
42. Of the 22,250 postponements in the year to March 2015, 82 per cent were by claimants (19,147) and 4 per cent of these were on or after the day the hearing was due to commence (784). Hence approximately 784 respondents per year would potentially benefit from these postponements not occurring or being considered for a cost order. A fraction of these postponements will still be permitted by judges under the exemption provisions without subsequent cost orders but it is not possible to accurately model this proportion¹⁶. By definition the exemption of 'exceptional circumstances' is likely to be granted only in a minority of postponement cases, and a judge will then use their discretion to award cost orders where unnecessary costs have been incurred. Hence it is assumed that the fraction of late postponement requests granted without cost orders is negligible¹⁷.
43. Assuming the benefit to business for each avoided or compensated postponement would be equal to the cost of the tribunal hearing for the employer (calculated above) this would give an annual benefit to business of £0.517m.

¹⁵ Total costs paid for advice and representation (£2,500) x Percentage of employers that paid for some or all advice (78%) x CPI inflation between April 2012 and April 2015 (4.1%). Sources: SETA 2013 Tables 3.27, 3.23; Consumer Price Inflation - November 2015 release, Office for National Statistics.

¹⁶ This provision is partly intended to avoid unfairly impacting upon protected groups such as those with disabilities, long term illnesses or caring responsibilities.

¹⁷ An approximate sensitivity analysis, presented in the 'Risks and assumptions' section, shows that an unrealistic proportion of claimant postponements (over 98%) would have to be classed as 'exceptional' and not worthy of a cost order for the legislation to be a net cost to business.

Summary

44. The estimated annual benefits are £0.517m whilst the estimated annual costs are £8,100¹⁸. The magnitude of these figures shows that the benefits to business are highly likely to outstrip the costs. This is even when using the following cautious assumptions:

- The impact of reduced repeat postponements is not accounted for. It is highly likely that the total benefits to business from the reduction in repeat postponements by claimants (which are currently costly to business) will be greater than the total costs of inconvenience to those businesses which may be denied repeat postponements. This is due to the significantly higher prevalence of postponements due to a request by claimants. Hence a reduction of repeat postponements is highly likely to be a further net benefit to business.
- Only counting those notifying of a postponement on or after the day of the hearing as ‘late’ postponements. This is likely to be a significant underestimate of both costs and benefits given the legislation considers a ‘late postponement’ to be a postponement granted within 7 days of the date of the hearing. Since short notice postponements appear to be considerably more likely to be made by claimants, this assumption reduces the magnitude of benefits more than it reduces the magnitude of costs.

45. These cautious assumptions are highly likely to outstrip the comparatively minor upward bias in the magnitude of the estimated costs and benefits due to the assumption that all postponements occurring on or after the day the hearing was due to commence will either not occur or will be compensated through cost orders.

46. A summary of total net costs and benefits is given in Table 3. This discounts figures over a ten year time horizon from 2016 (the legislation will come into force in April 2016) and takes account of the proportion of tribunal claimants that are involved in disputes with employers in the public sector (17 per cent¹⁹).

Table 3: Summary of Costs and Benefits to Business

	Estimated costs and benefits (£ million)
Costs – <i>Annually recurring costs (2015 prices)</i>	
Employer familiarisation with Employment Tribunal legislation	0.007
Ongoing costs to business of cost orders to claimants to compensate for making late postponements	0.001
Benefits – <i>Annually recurring benefits (2015 prices)</i>	

¹⁸ £6,633 + £1,464 = £8,097. Rounding to the nearest £100 gives £8,100.

¹⁹ Source: SETA 2013 Table 8.9.

	Estimated costs and benefits (£ million)
Forgone time wasted and legal fees, and the award of cost orders to recompense costs	0.517

47. The overall economic annual net cost to business in 2016 prices is estimated to be -£0.41 million, or an annual net benefit of £0.41 million.

Risks and assumptions

Direct costs and benefits to business calculations

48. Postponement numbers include initial rejection of hearing dates due to availability. Claimants and respondents are not in general consulted on their availability prior to offering the initial date. In assessing the rationale for intervention, these administrative postponements would not be considered to be part of the issue to address but we are unable to strip them from the data.
49. For postponements notified prior to the day of the hearing, it is not possible to determine from the data how far in advance of the hearing these postponements were notified. Under the new legislation, applications for postponements less than seven days prior to the date the hearing is to begin are more likely to be refused, or, if granted, to result in a cost order. As such, costs and benefits due to the 'late' postponement clauses are likely to underestimate the scale of impact.
50. Additionally, HMCTS data do not cover how many postponements relate to an individual case so it is unknown how many postponements beyond the second postponement are occurring. For this reason, the benefit to business due to the clause of the legislation stating that postponements beyond the second will only be granted where one of the listed exemptions applies cannot be accurately estimated. Hence the benefits from this particular clause are not estimated and so the magnitude of costs and benefits to business presented are likely to be underestimates.
51. For reasons of equality of access and in the interests of justice, a fraction of late claimant postponements will still be permitted by judges under the exemptions without awarding cost orders to the adversely affected respondent. However, the volume is unknown and so not accounted for. By definition this is likely to only be a minority of postponement cases. Given the magnitude of benefits to business compared to the magnitude of the costs, the proportion of claimant postponements which are still granted under the exemptions without cost orders would have to be around 98% for the benefits to not exceed the costs²⁰. Such prevalence of the exempted circumstances without subsequent cost orders is very unlikely.

²⁰ This is in combination with the implicit assumption that 0% of respondent postponements are granted under the exemptions without cost orders.

52. The costs to businesses for requesting short notice postponements that are not granted under the new legislation are not included in the cost estimate. This is because these will only occur when a judge has used their discretion to decide that the exempted circumstances do not apply (and so implying that the need for a late postponement could have been avoided).
53. The current number of cost orders awarded due to late postponements could be deducted from the future costs and benefits to businesses presented (as this is the counterfactual). This has not been deducted in the methodology because HMCTS data does not indicate the proportion of current cost orders that are due to late postponements and anecdotal evidence suggests that awards due to postponements (regardless of whether they are late or not) are very rare. This evidence is corroborated by comparing the estimated number of late postponements with the number of cost orders currently awarded: HMCTS data indicate that 8 postponements were made by respondents on or after the day the hearing was due to commence over the last financial year, whilst respondents were ordered to pay 536 cost orders to claimants²¹. The respective figures for claimants are 784 and 334. Hence there is no reason to believe that a significant amount of cost orders currently being awarded relate to late postponements. For this reason, and due to the lack of data availability, the counterfactual number of costs orders due to late postponements is considered to be negligible.
54. Costs order data from HMCTS show that in 2014/15, the median costs order was £1,000, which is significantly higher than the estimates presented here²². We chose not to use this estimate for several reasons. Firstly, the evidence in the previous paragraph suggests that costs orders relating to postponements are rare and so this is unlikely to be representative of the value of costs orders relating to postponements. Costs orders can be applied for reasons other than postponement and no breakdown of reasons is available, hence the average may be highly skewed²³. Secondly, common values of costs orders awarded to claimants appear to be quite different to the values of those awarded to respondents, but there are not usable breakdowns of average award value by claimant or respondent.
55. The fall in tribunal cases since the introduction of tribunal fees in July 2013 has subsequently reduced the number of postponements. Hence the postponement data used to estimate the benefits is for the most recent period since this change for which data is available, which is the last complete financial year (2014-15). This is the most applicable estimate for the current 'baseline' volume of postponements.

²¹ MoJ, 2015, 'Employment Tribunal and Employment Appeals Tribunal Annual Tables', Table E.12.

²² Ministry of Justice, 2015, 'Tribunals and gender recognition certificate statistics quarterly: April to June 2015', ET and EAT Annual Tables, Table E.12.

²³ For example, some may relate to vexatious behaviour throughout the entire duration of the tribunal.

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