Department for Business Innovation & Skills

EMPLOYMENT TRIBUNAL RULES:

Government response to employment tribunal rules - review by Mr Justice Underhill - final impact assessment

MARCH 2013

Contents

Title:	Impact Assessment (IA)
Employment Tribunal Rules: Review by Mr Justice Underhill	**Date:** 14/03/2013
	Stage: Final
IA No: BIS0408	**Source of intervention:** Domestic
Lead department or agency: BIS	**Type of measure:** Secondary legislation
Other departments or agencies: HMCTS	**Contact for enquiries**: **Richard Boyd/**Ivan Bishop BIS, Abbey 3.1, 1 Victoria Street, London, SW1H 0ET
Summary: Intervention and Options	**RPC Opinion:** EANCB Validated

Cost of Preferred (or more likely) Option				
Total Net Present Value	**Business Net Present Value**	**Net cost to business per year** (EANCB on 2009 prices)	**In scope of One-In, One-Out?**	**Measure qualifies as**
£m	£m 2.05	£m -0.2	Yes	Out

What is the problem under consideration? Why is Government intervention necessary?

Consultation evidence has demonstrated that the employment tribunal rules of procedure have become increasingly complex and inflexible over time, affected by a series of piecemeal revisions.[1] According to stakeholders (including the judiciary, lawyer groups and business groups) the Employment Tribunal rules have become a barrier to effective case management. An independent and judicially-led review (led by Mr Justice Underhill) was commissioned, and recommendations for improvement were sought. Following the review, it has been concluded that government intervention is necessary to streamline the rules to make the Employment Tribunal system more efficient, proportionate and flexible, and more easily understood by users. The Underhill review of the rules of procedure forms one important element of the Government's Resolving Workplace Disputes package of proposals which aims to deliver a more efficient and streamlined Employment Tribunal system.

What are the policy objectives and the intended effects?

The objective of the proposals consulted on is to facilitate more robust and effective Employment Tribunal case management. The intention of the proposals to implement the findings of the Underhill review on Employment Tribunal rules is to:

- Ensure that employment tribunal cases are dealt with more swiftly, efficiently and proportionately to reduce the costs borne by all parties;
- Support and encourage parties to make use of alternative dispute resolution options, thereby reducing the number of claims which require determination by an employment tribunal;
- When considering taking a case to a tribunal, ensuring all parties have a realistic sense of what the process will involve.

What policy options have been considered, including any alternatives to regulation? Only preferred option has been given (where one exists), see Evidence Base for full information

Will the policy be reviewed? It will be reviewed. If applicable, set review date: Month/Year

[1] In response to the Resolving Workplace Disputes consultation, 2011

Does implementation go beyond minimum EU requirements?			No		
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 options.

Signed by the responsible Minister Date:

Summary: Analysis & Evidence - Business Cost/benefits of proposal

Description: The implementation of the Underhill Review proposals on Employment Tribunal Rules

Price Base Year	**PV Base Year** 2012/13	**Time Period Years** 10	**Net Benefit (Present Value (PV)) (£m)**		
			Low:	**High:**	**Best Estimate:**

COSTS (£m)	**Total Transition** (Constant Price) Years	**Average Annual** (excl. Transition) (Constant	**Total Cost** (Present Value)
Low	0	0	**0**
High	0	0	**0**
Best Estimate	0	0	**0**

Description and scale of key monetised costs by 'main affected groups'

The proposed rule to ensure that the outcome of the lead case in a multiple claim is applied to the remaining cases in the multiple is estimated to cause some case reviews, but the annual estimated cost to employers is estimated to be below £5,000 – and

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

There are potential costs to employers from making use of alternative dispute resolution (ADR) in terms of private mediation costs and settlement costs. These have not been monetised because the extent of take up due to these proposals is uncertain and likely to be small. The proposals may lead to an increased number of reviews/reconsiderations, and associated costs for employers. These aren't monetised as the effect is unclear and likely to be slight.

BENEFITS (£m)	**Total Transition** (Constant Price) Years	**Average Annual** (excl. Transition) (Constant	**Total Benefit** (Present Value)
Low			
High			
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

Employers will benefit from reduced costs due to a) reduced number of pre-hearing reviews (PHRs), b) preliminary meetings combining PHRs and case management discussions, and c) lead case outcomes being applied to remaining cases in multiple cases. Employers will benefit from not having to request that withdrawn cases are dismissed by HMCTS. Annual benefit at 2012/13 prices of £0.28m for employers.

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

Employers could benefit from reduced costs if the proposal results in some movement to ADR away from full tribunal hearings. For reasons noted above, these have not been monetised. The slight widening of scope for reviews may lead to a reduction in appeals in those areas which become reviewable (HMCTS do not have readily available information

Key assumptions/sensitivities/risks	**Discount rate (%)**	3.5

The monetised costs and benefits assume that the proportions of cases going through various processes, with various outcomes, in the HMCTS model will remain unchanged. Costs of employment tribunal cases for employers are assumed to be evenly distributed across each day. It is assumed that recently proposed policies (fee charging, early conciliation etc) will produce a new annual average of 47,000 cases. All these assumptions are subject to risk making the estimated costs and benefits uncertain.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			**In scope of**	**Measure qualifies**
Costs: 0	**Benefits:** 0.2	**Net: 0.2**	Yes	OUT

Specific Impact Tests: Checklist

Set out in the table below where information on any specific impact tests undertaken as part of the analysis of the policy proposal can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	40
Small firms Small Firms Impact Test	No	40

Other impact tests have been carried out, but are not covered in this targeted document.

Evidence Base (for summary sheets) – Notes

References

Include the links to relevant legislation and publications, such as public impact assessments of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

No.	Legislation or publication
1	Resolving workplace disputes: Government response to the consultation https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31439/11-1365-resolving-workplace-disputes-government-response.pdf
2	The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 http://www.legislation.gov.uk/uksi/2004/1861/contents/made
3	Government response and impact assessment on consultation on the introduction of fees to Employment Tribunals and Employment Appeal Tribunals https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011
4	The Fundamental Review of Employment Tribunal Rules, Letter from Mr Justice Underhill outlining outcomes of the review https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32151/12-952-fundamental-review-employment-tribunal-rules-letter.pdf
5	Draft Employment Tribunal Rules of Procedure resulting from the Fundamental Review https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32152/12-953-fundamental-review-employment-tribunal-rules-procedure.pdf
6	Annual Tribunal Statistics 2011-12 http://www.justice.gov.uk/downloads/statistics/tribs-stats/ts-annual-stats-2011-12.pdf
7	Survey of Employment Tribunal Applicants (2008) http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008

Evidence base

Proposal – annual profile of costs and benefits (£m) constant (2012-13) prices to nearest £10,000

	Y0	Y1	Y2	Y3	Y4	Y5	Y6	Y7	Y8	Y9
Total annual costs	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01
Transition benefits	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Transition costs	0.01	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Annual recurring benefits	0.00	0.71	0.71	0.71	0.71	0.71	0.71	0.71	0.71	0.71
Annual recurring costs	0.00	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01

Total annual benefits	**0.00**	**0.71**	**0.71**	**0.71**	**0.71**	**0.71**	**0.71**	**0.71**	**0.71**	**0.71**

Problem under consideration

1. The Department for Business Innovation and Skills launched a joint consultation with the former Tribunals Service in January 2011, 'Resolving Workplace Disputes', and invited views on a rebalancing the Employment Tribunals system. A wide range of respondents, particularly from the judiciary and legal groups, felt that this rebalancing could not be achieved through further changes to the legislation. More prescriptive rules were not the answer. There was a sense that changes to the Employment Tribunal rules since 2004 had been implemented in a piecemeal fashion, and had led to the system becoming over prescriptive and bureaucratic and that cases were not being managed as quickly and effectively as they could be. Many of the respondents argued that further change would dent the ability of all parties to deal with a case in the most effective way. Government decided that a fundamental review of the Rules of Procedure that govern the running of Employment Tribunals was required.

2. The former President of the Employment Appeal Tribunal (EAT), Mr Justice Underhill was therefore asked to take a fresh look at the rules of procedure and make recommendations to Government. He was asked to consider how the Employment Tribunals rules could be simplified, to ensure that cases could be dealt with more flexibly, effectively and consistently. He was also asked to consider changes that would ensure cases were dealt with in a way that was proportionate to each claim, thereby making cost savings where appropriate.

3. Many of Justice Underhill's recommendations are around shortening and simplifying the current rules of procedure and ensuring judges can manage cases in the most effective, efficient and thereby cost effective manner possible. This should also ensure that all parties (and particularly those who choose to represent themselves), have a better understanding of what the employment tribunal process involves, and that the process works in the most effective way.

Rationale for Intervention

4. The Government launched its Growth Review on 29 November 2010. In this, it set out its long term vision for creating the right conditions for future economic prosperity, including the need to remove barriers to growth and job creation. The package of reforms contained in the Resolving Workplace Dispute consultation was one part of this, with the Underhill review of Employment Tribunal rules forming an important element of this work stream. The underpinning objective of the Underhill review, that is to remove barriers to the effective and efficient running of the Employment Tribunal process for all parties, contributes to this goal.

5. Employment law needs to be suited to the labour market which it supports. In the case of Employment Tribunals, representatives from the judiciary and legal professions told the Resolving Workplace Disputes consultation that the rules of procedure needed reform and were presenting barriers to the effective case management through piecemeal changes. Business organisations signalled that a fear of being taken to Employment Tribunals was preventing them from hiring new members of staff. But more generally, there was a sense that the costs incurred by all parties when resolving workplace disputes through an Employment Tribunal could be reduced if the rules of procedure for Employment Tribunals were simplified and improved.
6. The question of how to minimise the costs, to all parties, of employment disputes is a key part of how the case for government intervention can be framed. Early settlement of claims remains the most cost effective measure for resolving workplace disputes. The Employment Tribunal system is itself an existing Government intervention which acts as a last resort for the

7. The proposals in the rules review aim to find ways to resolve dispute at a lower cost (both through the greater use of alternative dispute mechanisms and by a more efficient Employment Tribunal system), without compromising justice. All three parties stand to gain through a simplified and more efficient and flexible approach.

8. The Department for Business, Innovation & Skills asked Mr Justice Underhill to develop these proposals in partnership with a working group made up of legal and judicial experts and an expert users group which included representatives from trade unions, business organisations, representatives for the voluntary sector and members of the legal profession. The Ministry of Justice, Her Majesty's Courts and Tribunals Service, and Acas have also been involved.

Policy objective

9. The aim of the proposals put forward in this review is to ensure that the Employment Tribunal system operates in the most effective way for all parties, whilst also providing value for money for the taxpayer.

10. By creating an improved set of rules, Mr Justice Underhill's proposals aim to allow Employment Tribunals to process, manage and determine cases in the most effective and efficient manner, in particular to:

- **Improving speed, efficiency and proportionality** of the system by ensuring that there is enough flexibility in the rules to allow Employment Tribunals to manage cases in the most appropriate way. Some of the processes involved in the current rules act as barriers to sensible handling of cases, and do not aid a swift resolution of the cases. More efficient handling of cases will reduce the costs borne by all parties; Where cases are straightforward, employment judges should be able to deal with them in a way that reflect this, rather than following procedures that are disproportionate. This will include continuing to support and encourage parties to resolve disputes earlier through mediation or Acas conciliation, thereby reducing the number of claims that require determination by an employment tribunal.

- **Promote consistency in case handling**. It is important that parties feel that employment judges across the Tribunal network are managing their cases in a consistent manner and are interpreting the rules in a uniform way. This provides certainty to all parties when preparing for a Tribunal;

- **Simplify the rules of procedure** that govern the Employment Tribunal system to ensure individuals know what to expect, and what is expected of them when pursuing a claim. Before embarking on a claim, some claimants have an unrealistic sense of what the process might involve.

Description of proposals being considered

11. Mr Justice Underhill's review concentrated on employment tribunal rules as set out in Schedule 1 of the 2004 Regulations. Many of the changes to the rules suggested by the review simply amend the rules to make them shorter, and easier to understand. In addition, the review suggests amendments to the administration of Employment Tribunals in eight areas that will have a more substantial effect, some of which it has been possible to cost in this Impact Assessment.

12. The changes recommended by the review are summarised below:

Improving the speed, efficiency and proportionality of the employment tribunal system

- **Preliminary hearings.** In order to manage a case to a point that it is ready to be heard, it is sometimes necessary for employment judges to hold interlocutory hearings to agree onward handling of the case and sometimes to determine preliminary points of law or fact. The current system, can, in certain circumstances, mean that a judge is required to hold separate case management discussions and pre hearing reviews before a claim is considered at a full hearing. Employment judges can only exercise certain powers at certain types of hearings, which can make the system inflexible. Under the new rules, all interlocutory hearings would be combined into a 'preliminary hearing', which may reduce the overall number of hearings and could lead to the quicker disposal of cases. There are potential cost savings to all parties in combining these separate considerations.

- **Initial paper sift and strike out.** These are new rules that will mean weak cases that should not proceed are identified and dealt with more effectively. Under the current system, Tribunal staff can only reject a claim when it is submitted on the wrong form; if they think that it should be rejected for another reason, they have to pass the matter to an Employment Judge for a decision. The new rule widens the powers of the Tribunal staff slightly. In addition, it will ensure that employment judges are considering the file earlier in the process, and disposing of any claims where there is no arguable complaint or response. In addition to this early sift of cases, there will be a new stand alone rule that allows judges to strike out a case at any point in proceedings that they decide should not continue. Whilst this power already exists, the new rule gives the power more prominence, and is designed to increase awareness by parties and potentially increased use by judges.

- **Withdrawals.** Under the current rules, when a claimant decides that they no longer wish to pursue a claim against their employer, the case will not be dismissed until the employer (the respondent) has applied to the Tribunal for the case against them to be dismissed. This new rule cuts out this process, and provides that in most circumstances, the claim will be considered dismissed without any action being taken by the respondent. Withdrawals made up just under 30% of all complaints that were disposed of in 2011-12.

- **Alternative Dispute Resolution.** This is a new rule that gives Employment Tribunals and Employment Judges a clear mandate to encourage and facilitate the use of alternative forms of dispute resolution at all appropriate stages of the Tribunal process. Alternatives might include mediation by a private provider or a judge, in addition to the conciliation service

- **Written reasons.** The new rules reflect the reality that in some circumstances, parties will want or need the reasons for decisions in writing. However, it is important that judges have the scope to be proportionate in the way they issue these decisions. The new rules are expressed simply and are explicit about encouraging proportionality, making it clear that they allow for short reasons to be recorded for simple decisions.

Promote consistency in case handling

- **Presidential guidance.** The 2004 rules for Employment Tribunals are lengthy, detailed and can be daunting for someone with little or no experience of the Tribunal system, particularly if they choose to represent themselves. This review has aimed to create much shorter rules to aid understanding. In addition, the rules will be supported by Presidential guidance that will be issued by the judicial Presidents of the England & Wales and Scottish. This guidance will seek to give all parties in a dispute a much better idea of what to expect from the Tribunal process and equally, what is expected of them. In addition, the guidance will seek to ensure, (insofar as possible), that employment judges across the system are managing cases in a consistent manner, providing clarity to all parties.

- **Lead case mechanism.** This is a new rule that will give a clear legal structure to the handling of 'multiple' cases or where cases raise the same point of law. A large proportion of the cases in the Employment Tribunal system in any one year are multiple claims brought by a number of individuals against the same employer on the same point of (undecided) law or fact, or cases brought against *different* employers, which raise the same point of (undecided) law. In practice, tribunals already deal with a nominated lead or head claim and 'stay' all associated claims. The result of the lead claim should then influence the outcome of the other claims without the need for separate hearings. The new rule means that where the Tribunal identifies a lead claim, the relevant decision in that claim will automatically be binding on the related claims, which removes the need for additional hearings. This brings Employment Tribunal practice into line with other types of Tribunals. It should provide a clearer process for the effective management of such cases.

Simplify the rules of procedure

- **Reviews.** Reviews will be renamed "reconsiderations" under the new rules, and the text of the rules will be simplified. The new rules make clear that reconsiderations of decisions will only be possible where the judge feels it is in the interest of justice to do so. The judge will also have to flexibility under the new rules, and can either suggest that a reconsideration goes to a hearing, or the judge will set out their provisional review on the request.

Other recommendations

13. The review makes a number of other recommendations which are designed to give judges more discretion in making case handling decisions, and ensure that individual cases are managed in a proportionate way. One example is simplified cost awards rules and the removal

14. In many instances, these changes reflect what happens informally at the moment in many Employment Tribunals, but by creating explicit rules to deal with these issues, this informal practice is given a formal legislative framework. This should help to ensure that employment judges are managing cases in a consistent manner. However, this Impact Assessment does not attempt to cost these changes, because the changes are small, and there is no existing data on how widely these informal practices are currently being followed in Employment Tribunals.

15. Other elements of the government's response to the Resolving Workplace Dispute have already been implemented, such as raising the qualifying period for someone bringing an unfair dismissal claim against their employer from one to two years. The remaining provisions will be taken forward as part of the Employment and Regulatory Reform Bill, which is currently being debated in Parliament and is likely to receive Royal Assent in early 2013. The Bill includes provisions for the introduction of early conciliation by Acas, a power for Employment Judges to impose financial penalties and a power for the Secretary of State to allow legal officers to make determinations in the Employment Tribunal. In addition, HMCTS and Ministry of Justice (MoJ) have consulted separately on the introduction of fees for Employment Tribunal cases and subsequent appeals. The Government's response to this consultation was published on 13th July 2012.

Summary of estimated impacts

16. **The eight more substantial changes have been considered in detail in the cost-benefit analysis below. Where specified, estimated annual benefits are at 2012/13 prices. A number of assumptions are made in estimating the costs and benefits, which are subject to considerable uncertainty, the figures essentially presenting an 'illustrative scenario' of potential impacts.**

Improving the speed, efficiency and proportionality of the ET system

17. The **initial paper sift** will enable judges to strike out very weak claims and responses (and parts of claims and responses) through correspondence, without the requirement of a pre-hearing review (PHR). It is estimated that around 270 whole claims or responses will be struck out each year at this point, with employers benefitting from reductions in the time they spend on the case, and in costs for advice and representation, by an estimated £95,000 each year.

18. A single **preliminary hearing** will cover the different procedures currently requiring separate case management discussions and PHRs. This results in estimated savings per year in costs, for time spent and for advice/representation, of around £15,000 for employers.

19. A substantial proportion of ET claims are **withdrawn** by claimants each year. It is estimated that HMCTS no longer requiring employers to provide a written request to dismiss a case will save employers around £113,000 per annum.

20. It is expected that the direct impact of formalising in the ET rules that judges and HMCTS should encourage and support claimants and employers to make use of **alternative dispute resolution** (ADR) will be slight. This reflects the larger changes to the ET system in relation to

21. The specification in the proposed rules that **written reasons** should be proportionate, including very short written reasons for simple procedures, should produce some slight benefits to the Exchequer from reduced time spent by judges. However, information is not available to measure the relative proportionality of written reasons produced now. The provision of proportionate written reasons should benefit employers through being clearer and to-the-point.

Promote consistency in case handling

22. The new ET rules, already drafted (see references on page 4) are shorter and clearer. When combined with the proposed **Presidential Guidance**, they should improve claimants' and employers' understanding of the ET system, and what is expected of them, so should reduce uncertainty. The new rules and guidance will also provide a clearer framework for judges, to aid consistent case management across the system, also reducing uncertainty. No costs should arise for employers.

23. It is estimated that making the **lead case decision** binding on the related cases in the multiple case will see net reduction in costs to employers. The new rule should substantially reduce the already small number of related cases that proceed through the ET system despite the lead case decision, leading to fewer tribunal hearings, and reduced time spent by the Exchequer and parties to the claims. The parties will also benefit from reduced costs for advice and representation. Estimated net benefits per year are around £55,000 for employers.

Simplify the rules of procedure

24. The change to reviews (to be renamed 'reconsiderations'), enable a wider range of decisions to be subject to potential reconsideration and allow the judge to conduct reconsiderations without a hearing, unless justice requires one. The widening in the range of decisions that can generate an immediate request for reconsideration may benefit the Exchequer, claimants and employers. As the more significant decisions and judgements can currently be subject to review, it isn't clear how many additional reconsiderations will be generated. However, enabling a request for reconsideration at the point of the decision makes the procedure more proportionate. This may result in fewer such decisions leading to a more costly ET appeal. Enabling the judge to determine whether a hearing is required for a reconsideration may also lead to a reduction in the unit costs of reconsiderations. While there may be small net benefits or costs to employers from this proposed change, it isn't possible to monetise them from the information available. However, the proposal is likely to be beneficial in enabling proportionate reconsiderations of decisions, and in not holding unnecessary hearings.

Evidence Base

25. Industrial Tribunals in Great Britain were first established by the Industrial Training Act 1964 to consider appeals by employers against training levies imposed under that Act.[2] Since then their scope, procedures and powers have changed and expanded considerably. The Employment Tribunal (ET) currently exists and operates under the Employment Tribunals Act 1996. Their procedures and constitution are currently governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004.[3] The ET is similar to a civil court in that it provides legally binding decisions in disputes between private parties.[4]

Jurisdictions

26. An individual may submit a claim to the ET in one or more "jurisdictions" – i.e., the specific grounds of the employee's complaint against the employer for example unfair dismissal or discrimination. Claims can also be amended or clarified during the course of the ET's proceedings.

Volume of claims

27. ET claims can be classified into two broad categories:
    - singles – a complaint brought by a single employee against one employer; or
    - multiples – complaints brought by a group of at least two employees against one employer on the same or very similar grounds such that a multiple claim is processed together.

28. Changes in Britain's employment law have a direct influence on the number of claims received by ETs. For instance, the number of age discrimination claims has risen from around 970 in 2006/07 to 6,800 in 2010/11 (falling back to 3,700 in 2011/12) following the creation of new statutory rights.[5]

29. Specific workplace disputes can also have an impact on the volume of claims. For example, pending a ruling by the European Court of Justice, over 10,000 multiple claims alleging a breach of the Working Time Directive were submitted every three months by a large group of claimants in the airline industry.

ET claim process

30. A party making a claim has to present a valid claim form (an ET1 form) – to a local ET office within a specified period of time[6] of the alleged event. [7] An ET1 form can be presented electronically (over the internet or by e-mail), in hard copy or by fax.

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[2] ETs and the Employment Appeal Tribunal consider claims and appeals from England, Wales and Scotland. Northern Ireland has a separate system of employment law.

[3] The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. The rules are currently under review.

[4] One of the parties may be a public sector organisation but in this capacity acts as an employer rather than a Government agency.

[5] The Employment Equality (Age) Regulations 2006 took effect in October 2006.

[6] Generally three months, though six months, for instance, for redundancy payment and equal pay claims.

[7] The office to which the claim form should be sent is, in England and Wales, determined by the location of the claimant's employment. A full list of the postcodes covered by each tribunal office in England and Wales is contained in the ET leaflet "making a claim" - http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/employment/forms/10_516_MCTS_Employment_April10_web.pdf. In Scotland all claims should be sent to the ET office in Glasgow. If the claim is submitted online it will be routed to the appropriate office.

31. A party defending a claim (called the respondent) has to present a response form (ET3) – to the ET office handling the claim within 28 days of the form being sent to them. If a respondent fails to present a valid ET3 form within that time limit, a default judgment may be issued. This means that an Employment Judge can issue a decision without the claimant having to attend a hearing.

32. The flow chart in Annex 1 illustrates how ET claims progress at present. This diagram shows that, once a claim has entered the system, the possible outcomes are:

    - the claimant withdraws the application;
    - the claim is dismissed because it is outside the ET's jurisdiction or because a Pre-Hearing Review found that there was insufficient evidence to progress the case;
    - the parties reach a conciliated settlement, where Acas is involved in ratifying the final settlement;
    - the parties reach a private settlement outside Acas, either on the basis of a legally binding Compromise Agreement or an "informal agreement";
    - the case is disposed of by way of a default judgment; or
    - there is a full ET hearing, whereupon the various elements of the claim are upheld or dismissed.

33. Most claims to the ET are brought by an employee against an employer. However, in 2010/11 there were around 500 claims with a different combination of claimant and respondent[8].

34. Case management or pre-hearing work is undertaken by the judiciary either with the parties present or via correspondence. The judge can make orders to ensure the claim progresses – such as orders for the provision of additional information, the disclosure and inspection of documents and the preparation or exchange of witness statements. It is also the method by which the main issues in dispute are identified so as to help focus the final hearing on key points and limit the length of the final hearing.

35. As noted above, the Underhill Review forms part of a range of reforms of the ET system (and workplace dispute resolution more widely). This part IA takes a similar approach to monetising the costs and benefits to employers as parties to ET cases as those followed in the Resolving Workplace Disputes IA and the IA about the introduction of fees to ET and EAT. This is summarised briefly below.

Information on Running the ET

36. Due to a lack of existing management information about costs per case by stage, HMCTS developed a new cost model specifically to support the development and analysis of the proposed fee-charging regime. The cost model is underpinned with a case model using ET statistics and case sampling. This model provides HMCTS's current best estimate of the costs per case at each main stage, and the number of ET cases going through different stages of the ET process, with the model being reviewed and updated in 2012 (though based on 2010/11 figures[9] as the most recent year for which outturn data have been made available in the cost model).

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[8] This included cases brought by employers against a) decisions of the State orb) a regulatory body, cases brought by employees against Government Departments, and cases brought by Government departments or agencies.

[9] Certain statistical data on workload levels and trends has been published by the Ministry of Justice relating to the financial year 2011/12. However, this data has not yet be applied to the costs model developed by HMCTS.

37. The core stages in the ET process are "receipt & allocation" and "hearing", in that all cases must be initially processed, and ultimately will be scheduled for resolution at a hearing if they remain in the system. Other elements are optional in that there is no obligation, for instance, to undergo mediation or to obtain written reasons.

Estimated costs to an employer when responding to an ET claim

38. Table 1 sets out the estimated median unit costs that employers face when responding to an ET claim. Employers face costs in terms of time spent by a variety of staff in an organisation on a case. They also face advice and representation costs. The estimates were based on figures from the 2008 Survey of Tribunal Applications (SETA)[10], using median cost information, uprated to 2012/13 prices using RPI. To estimate employers' labour costs from ET cases, data from the 2011 Annual Survey of Hours and Earnings (ASHE) are obtained for relevant employee groups'[11] median hourly pay, with estimated employers' non-wage labour costs added at 24%. These are converted to 2012/13 prices using average weekly earnings data, and combined with SETA information on 8-hour days spent on the case.

Table 1 Summary of Costs to an employer from an employment tribunal application

	went to Tribunal hearing	Acas settled	Privately settled	withdrawn	dismissed	total
Time spent on case Directors and senior staff	£2,286	£1,234	£1,645	£822	£1,234	£1,234
Time spent on case (other staff)	£444	£444	£444	£444	£444	£444
Costs for advice and representation post ET1	£3,488	£1,780	£3,115	£1,736	£1,780	£2,225
Total cost	£6,218	£3,458	£5,204	£3,002	£3,458	£3,903
Total cost rounded to nearest £100	£6,200	£3,500	£5,200	£3,000	£3,500	£3,900

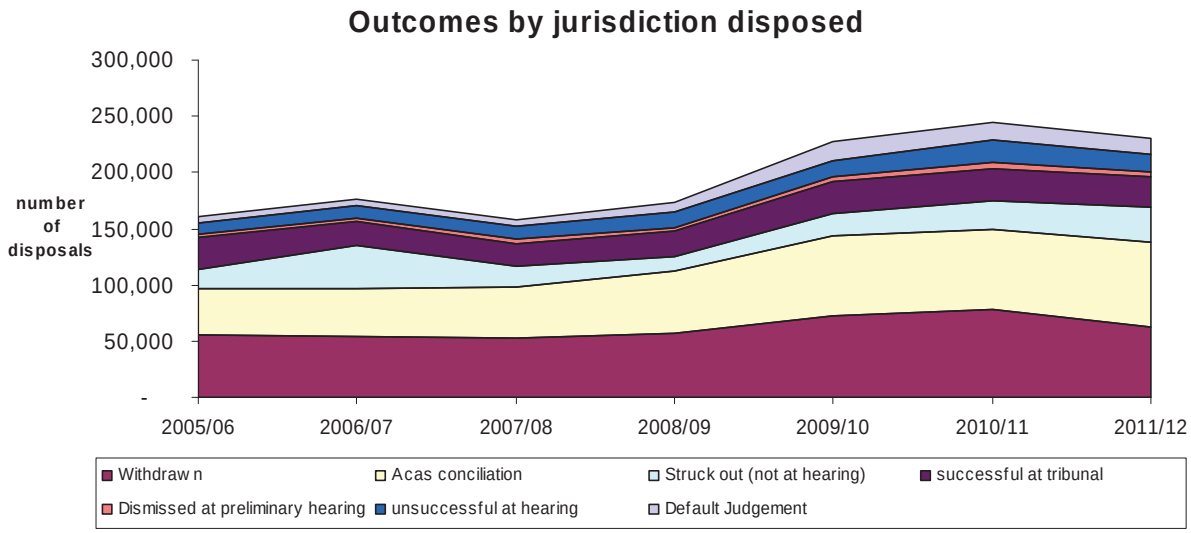
ET outcomes

39. Since 2005/06 the number of ET claims disposed has averaged about 103,000 per year and fluctuated between 80,000 and 122,000. The composition of outcomes disposed by jurisdiction is illustrated in the following graph.

[10] The data from SETA 2008 was published in *Findings from the Survey of Employment Tribunal Applications 2008*, March 2010, http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008

[11] The employers' labour costs are based on ASHE 2011 data on median hourly wages for corporate managers and senior officials and personnel, training and industrial relations managers.

Chart 3 – Outcomes by jurisdiction disposed



40. Over this seven year period, on average 20% of jurisdictional complaints were resolved at a hearing – over half of which in favour of the claimant. Of all jurisdictional outcomes, an average of 32% were withdrawn by the claimant, 30% were conciliated by Acas, 12% were struck out before a hearing, 2% were dismissed at a preliminary hearing and the remaining 5% were Default Judgments.

41. It is important to note, however, that a (single or multiple) claim can contain a number of separate jurisdictional complaints. In recent years there has been an average of 1.9 complaints disposed for every ET claim disposed. [12]

Main Affected Groups

42. The following groups would be affected by the policy proposal:

- Claimants – typically at least one employee or ex-employee, although an employer in a small minority of cases (such as in paragraph 1.18);
- Respondents – typically the employer[13];
- HMCTS – the organisation that administers the ET;
- Taxpayers – the ET are entirely subsidised by taxpayers at present[14], and
- Lawyers – claimants and respondents sometimes make use of legal advice and representation.

[12] MoJ stats have been preferred over those produced by Acas as they are believed to be more complete, as the Acas Annual Report explains:

> *"the figures [of gross claims received] include very few NHS and Local Authority equal pay claims either because they have not been passed to Acas for conciliation (because there appears presently to be little or no prospect of success in conciliation) or because the parties have not requested conciliation. Similarly a significant number of cases lodged at the Employment Tribunals concerning 'working time' and unauthorised deductions from wages are not included in these figures because they were not susceptible to conciliation and were struck out."*

[13] The employee would be the respondent where an employer chooses to make a counterclaim (which would only happen in breach of contract complaints).

[14] The Government plan to introduce fees to the employment tribunal process in the summer of 2013, which will result in some of the costs of HMCTS being met by tribunal users. A response to the Employment Tribunal Fees consultation was published in July 2012: https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011

Description of options

43. This reduced Impact Assessment identifies both monetised and non-monetised impacts on businesses in the UK, with the aim of understanding what the overall impact might be from implementing these options. The costs and benefits of the proposed option are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are important aspects that cannot readily be monetised.

Base Case - "Option 0"

44. The ET system continues with the current rules and guidance.

45. Because the do-nothing option is compared against itself, its costs and benefits are necessarily zero, as is its Net Present Value (NPV).[15]

46. The base case is the same as that set out in July's MoJ impact assessment "*Introducing a fee charging regime into Employment Tribunals and the Employment Appeal Tribunal*"[16]. It makes a number of assumptions:

    - The proposals contained in the "*Resolving Workplace Disputes*" consultation response (November 2011) will be successfully introduced and have taken effect by the start of 2013/14. The measures which have been already been introduced or will be in place by 2013/14 include:

        i. Early conciliation – the requirement that all potential ET claims to be lodged with Acas in the first instance (2014)

        ii. Changes to the ET Rules in relation to cost and deposit orders; witness statements; witness expenses and judges sitting alone in unfair dismissal cases (introduced 2012)

        iii. The extension of the unfair dismissal qualifying period from one to two years (introduced 2012)

47. The structural drivers of demand for ET services generally are not well understood at present. Therefore, a three step approach was taken to estimate the annual number of ET cases under the status quo, once the policy changes outline above have impacted:

    - Firstly, a notional equilibrium for the annual number of claims brought to the ET under current conditions was estimated: Tribunals Service data showed that there was an annual average of around 165,000 claims accepted by the ET between 2005/06 and 2009/10. This five year period roughly corresponds to the most recent complete business cycle in the UK economy.[17]

    - ET figures show that, averaged over the five year period between 2005/06 and 2009/10, 38% of accepted claims were singles and the remaining 62% were multiples. This would provide an average of 62,624 single claims and 102,176 multiples. A single claim, by definition, involves one claim per employer case. However, on average, according to

[15] The Net Present Value (NPV) shows the total net value of a project over a specific time period. The NPV is expressed in real terms and takes into account the fact that society tends to attach a decreasing weight to costs and benefits the further into the future they occur.

[16] https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011, Pages 14 – 17 of the final impact assessment.

[17] One academic study concluded that the UK business cycle lasts around 62 months on average. "An Examination of UK Business Cycle Fluctuations: 1871-1997", University of Cambridge Working Paper in Economics #24 (http://econpapers.repec.org/paper/camcamdae/0024.htm).

2009/10 ET data, there were 34 claims in each multiple submitted.[18] Stage two, applying the relevant ratio of single/multiple claims to cases, led to a current estimate for the steady state number of ET cases of 65,500 per year, of which 95% are singles and 5% multiples, as shown in the table below.

Table 2 – Number of accepted cases

Type	Singles	Multiples	Total
Claims	62,624	102,176	164,800
Cases	62,624	3,005	65,629

- The third step in specifying an appropriate base case is to reduce the steady state number of ET cases to take account of the "Resolving Workplace Disputes" (RWD) proposals. Specifically, BIS estimated in its accompanying impact assessment that:

  i. making Early Conciliation the default would reduce the annual number of ET cases by around 25%.

  ii. that the extension of the qualifying period for unfair dismissal from one to two years would further reduce the annual number of ET cases by around 2,000, taking into account the policy interaction with Early Conciliation.

48. Te overall effect is summarised in the following table. This shows that, based on the actual figures from 2005/06 to 2009/10, the imputed steady state number of ET cases in 'Option 0' is around 47,200 per year if the main "Resolving Workplace Disputes" reforms are implemented. There remains a risk that the impact on case levels arising from the RWD proposals will differ from the 'most likely' scenario modelled by BIS, and therefore that case numbers could differ significantly from the estimated case numbers used in this IA.

Table 3 Effect of RWD proposals on annual ET case numbers

Reform	No. cases
Early conciliation (-25%)	-16,407
UD time increase	-2,000
Remaining ET cases	**47,222**

49. The Government response to the RWD consultation announced some reforms that are intended to reduce the cost of the ET process to the Exchequer and to users. Such reforms will tend to lower the average total cost of administering a claim and appeal at various tribunal stages in the coming years. Analysis undertaken for the Government response to the RWD consultation concluded that the savings to HMCTS from the tribunal-focused reforms would be relatively modest – perhaps around £1 million per year in total at today's prices when they have fully taken effect. This impact assessment is based on the 2010/11 unit cost model for the ET plus explicit adjustments to take account of the aforementioned reforms.

50. The MoJ is planning to introduce a fee charging regime to the ET in the summer of 2013. The aim of this policy is to help reduce the costs to the taxpayer of the ET system, by transferring some of the costs to tribunal users. The IA accompanying the response to the consultation,

[18] The average of 34 multiple claims per case was derived as follows: there were around 164,800 multiple claims accepted in 2009/10, which equated to 4,823 cases. The ratio was therefore 34:1. The assumed total multiple cases quoted in this IA for 2010-11 has been recast down from the actual figures received. The rationale for this is to more accurately reflect how we expect claimants to behave had fees been in place i.e. we expect the fee structures to encourage multiple claimants to submit one ET1 form with a list co-claimants annexed as opposed to one ET1 per claimant. The total number of claims remains the same in both the IA and in other publications, but as the total number of cases falls the ratio of claims per multiple case rises.

published in July 2012[19], predicted that the introduction of fees would lead to a small reduction in the number of cases brought to the ET. Research undertaken previously by MoJ suggests that ET claimants are mainly concerned about "getting justice"[20]. Estimates of costs and benefits in this IA do not take account of potential impacts of the introduction of fees for ET claims. These could include a reduction in the number of cases, and a change in the case mix which could impact on the estimated average unit costs for HMCTS of processing cases. This would be likely to reduce the estimated net benefits to the Exchequer, claimants and employers monetised in this IA. Potentially, there could be an impact on requests for written reasons and reviews, as claimants that pay a fee seek to obtain a perceived return on the fee, though the ET rules proposals contain built in processes to prevent unjustified reviews and disproportionate written reasons.

Policy Proposal

51. That the recommendations of Mr Justice Underhill's ET Rules Review are introduced.

As noted above, the Underhill review recommends nine main reforms to the ET rules. The potential costs and benefits deriving from these policies are considered below, and where possible monetised, making use of the unit cost information identified above. The estimated costs and benefits are based on a number of assumptions, essentially providing an 'illustrative scenario' of the possible impact, and are thus subject to considerable uncertainty. To reflect this, the monetised costs and benefits modelled have been rounded to the nearest £10,000. Others have not been monetised as the information is not currently available to identify the extent of the potential impact, or how it can be monetised. This includes his suggestions for three amendments to primary legislation in the area of costs and deposit orders.

Wider non-monetised benefits

52. The proposed simplifying of the rules, and the new Presidential Guidance, enabling greater clarity and consistency of case management, should help reduce uncertainty among claimants and employers. This may help to reduce concerns among parties where the ET process causes emotional stress. Going through the employment tribunal process can cause emotional stress to both parties. Responses to the Resolving Workplace Disputes consultation highlighted the fear felt by those facing the prospect of having to go through an Employment Tribunal. For employers, there is also the wider impact that a dispute can have on the business – even where an employee remains with the organisation, there can be an impact on their productivity and on those around them. Where an employee leaves, there is the cost of recruiting and training a replacement.

Main assumptions made for the cost-benefit analysis

Familiarisation:

53. The proposals relate to ET procedures, which are only activated when there is an employment dispute. Each time parties go through a dispute they will be familiarising themselves with the process. Therefore the general process of familiarisation of employers (and claimants) is captured in the assessments of costs of employment tribunals to these parties.

[19] https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011

[20] "What's cost got to do with it? The impact of changing court fees on users", Ministry of Justice Research Series 4/07, June 2007 (www.justice.gov.uk/publications/docs/changing-court-fees.pdf).

54. Changes in rules and guidance can lead to some test cases being pursued to test out aspects that have been varied but not clarified. The proposed rules and guidance have been designed to mitigate against these cases, through using the same terminology as in the existing rules and guidance, while making the processes clearer to understand.

Main assumptions made for the cost-benefit analysis

- For employers, the costs per case are evenly distributed across the time in days (defined by SETA as 8 hours) spent on the case. The published SETA figures do not enable an assessment of the stages of the case at which costs are generated.
- The proportion of cases that go through various stages or processes of the ET system are derived from the recent historical data contained in the ET cost model.
- The median time spent at pre-Hearing reviews (PHRs), case management discussions (CMDs) and reviews is half a day, based on evidence from HMCTS, including ET cause lists[21]. This will include some preparation time for judges, and travel and waiting times for claimants and respondents.
- The median time for a full hearing is assumed to be a day, based on evidence from SETA 2008.

55. The main changes to the rules proposed are considered in more detail below.

Improving speed, efficiency and proportionality of ET system

56. These five proposals aim to make ET procedures more efficient and proportionate, to reduce the costs borne buy all parties. Estimated costs and benefits have been monetised (to the nearest £10,000) for the **initial paper sift**, **preliminary hearing** and **withdrawals** proposals. As noted above there are considerable uncertainties around these estimates.

Initial Paper sift/strike out and preliminary hearings

57. Currently, employment judges review the documentation lodged with the tribunal once the correctly completed ET1 and ET3 forms have been received. They then tend to set directions for the onward management of the claim/case. But this is not reflected in the current rules – it is just general practice that is usually applied. Under the proposed changes to ET rules, this will be codified more clearly. Employment judges will be able to dispose of cases (or parts of cases) where there is no arguable complaint or response at this initial stage. Under the current system, the case (of part of a case) would need to be disposed of at a PHR.

58. It is also proposed to remove the present distinction between CMDs and PHRs. A preliminary hearing may equally decide matters of case management or substantive preliminary issues, so that all aspects of a case requiring a meeting prior to the tribunal hearing can be covered at the same meeting. Currently, case management issues such as gathering further information are discussed at CMDs, while issues like whether the ET can deal with a case, or whether the case or response is arguable, are decided upon at PHRs.

[21] Evidence from HMCTS suggests between one and three CMDs of PHRs can be scheduled for a morning session – and these cases are often given as starting times the start of the morning or afternoon session.

59. The proposed revision of the ET rules may therefore lead to some cost savings or other efficiencies for HMCTS, and also for claimant and respondents. This IA does not attempt to monetise the cost savings that may result from the earlier disposal of parts of claims. As the case can continue through the tribunal system, potentially there may be little reduction in the administrative costs of the case. Neither HMCTS's currently available management data, or data from SETA (the basis for assessing claimants' and employers' costs) enables an analysis of the impact of parts of claims being disposed of early.

60. The current notice of hearing letter sent by HMCTS sets out that claims will be heard at a designated time, "*or as soon thereafter on that day as the Tribunal can hear it*"[22]. Evidence from HMCTS suggests that hearings in many cases may be allocated times at the start of morning and afternoon sessions, indicating that claimants and respondents may on average have to commit around half a day for CMDs or PHRs, including travel and waiting times.

61. The assumptions underpinning the cost-benefits analysis are listed below:
    - In cases that the judge directs straight to PHR[23], the judge has a definitive opinion, derived from the initial paper based evidence, that the complaint or response isn't arguable and should be dismissed. This enables the case to be disposed of.
    - Under the proposals, the judge will be able to similarly identify these very weak claims or responses, and be able to strike them out in correspondence.
    - After the case has been disposed of at the initial paper sift stage, some claimants or respondents will request a hearing. The estimates assume that this will be of a similar proportion to those who request reviews of decisions.
    - Some PHR disposals will only occur because information emerges at CMDs. The estimated number of initial paper sift disposals is therefore adjusted to take account of the fact that cases disposed of at PHRs would not all be candidates for dismissal at the paper sift stage.

Costs:

62. We are not anticipating any transitional or ongoing administrative or policy costs to affect employers. Employment judges already carry out an initial sift of the evidence provided for a case, and provide case management instructions via correspondence.

63. For those parties that request a hearing are receiving the judgement there may be costs resulting from submitting a request in writing. However, we expect that this will affect a small number of cases, so the costs will be marginal.

Employers' benefits:

64. The model suggests that an annual average of around 0.8% of cases that reach an initial paper sift are disposed of at PHRs. Applying this to the steady state estimate of annual case numbers (around 47,000) produces an estimate of around 325 cases that would be disposed of at a PHR. There steady state ET case model also suggests around 70 cases go from CMD to PHR, and around half of PHRs result in the disposal of the case. These should be subtracted from the estimate, as the weakness of claim or response has not, in these cases,

[22] Employment Tribunal notice of hearing letter template.

[23] Ministry of Justice, The Hearing Guidance for Employment Tribunal, http://www.justice.gov.uk/tribunals/employment/hearings#1 states that PHRs are held to a) decide whether the claim or response should be struck out, b) decide questions of entitlement to bring or defend a claim or c) decide if a deposit needs to be paid (and if so how much) to enable a claim or response that is considered weak to continue. All these issues suggest that the Judge has identified serious issues with the case/response that make it liable to be struck out. Our estimate is based on the proportion of those cases going straight to PHR that are struck out.

65. The ET cost model estimates that 8% of decisions or judgements are subject to a review, producing an annual estimate of 20 for the number of initially disposed cases that are reconsidered at a preliminary hearing. There is a risk that HMCTS receives more requests for preliminary hearings than they do for reviews. The initial disposal would come soon after HMCTS had received the claim and response forms, and neither party would have had a chance to present their arguments in person. If judges at the initial sift stage only dispose of cases where the claim or response has no reasonable chance of success, and express the reasons for this decision transparently, then this risk should not substantially materialise. However, if a written request for a hearing is made, then a preliminary hearing will be scheduled.

Number of cases currently going straight to PHR for disposal x (percentage of decisions or judgements not reviewed) x unit cost of PHR.

290 x (100-8)/100 x £900 = £240,000

66. There is a risk that HMCTS receives more requests for preliminary hearings following disposal at the paper sift than they do for reviews. The initial disposal would come soon after HMCTS had received the claim and response forms, and neither party would have had a chance to present their arguments in person. If judges at the initial sift stage only dispose of cases where the claim or response has no reasonable chance of success, and express the reasons for this decision transparently, then this risk should not substantially materialise. However, if a written request for a hearing is made, then a preliminary hearing will be scheduled.

67. As explained above, the unit costs to employers of ET claims can be estimated using SETA 2008. Unit costs can be estimated by outcome, including for those where the claim was dismissed prior to a full tribunal hearing. For employers, the SETA estimation of unit costs for those where the case was dismissed prior to a full tribunal hearing (up rated to 2012/13 prices) is £3,500.

68. Information is not available about how employers' costs are distributed across ET stages. However, assuming a PHR is usually completed within a half a day, it can be estimated that, at least, claimants and employers on average will benefit from half a day less time spent on the case including travel and preparation.

69. SETA 2008 shows that, for cases dismissed prior to a full tribunal hearing:

Employers spent 5 days working on the case.

70. Assuming unit costs were spread equally across the days, then under the proposed Rules, the estimated median reduction for employers for cases disposed of via an initial paper sift are:

Employers = £3,500 x 0.5/5 = £350

71. The estimated cost savings (at 2012/13 prices) for employers of disposing of weak cases at the initial paper sift stage is calculated by:

Number of cases currently going straight to PHR for disposal x ((percentage of decisions or judgements not reviewed) x (reduction in unit cost)

This equals (rounded to the nearest £10,000):
Employers: 290 x (100-8)/100 x £350 = £90,000

Preliminary hearings (combining CMDs and PHRs into a single hearing)

72. There will be some cases which progress from a CMD to a PHR under the current system. However, under the proposed rules, the procedures dealt with at these separate meetings will now be dealt with at the same meeting, a preliminary hearing.

73. It may be that in some cases, the preliminary meeting will reveal the need for additional information to be obtained and a further preliminary meeting to take place. However, this would be no different from those few cases which, under the current system, require two CMDs. These cases are not therefore relevant to the proposal on preliminary hearings, which will enable all preliminary discussions to take place at one type of meeting.

74. The assumptions underpinning the cost-benefits analysis are listed below:
    - That PHRs following CMDs have to be scheduled for another day
    - That between the receipt of both claim and response forms and the start of case management there is not a significant disposal of cases through withdrawal or settlement. Therefore, when estimating cost savings for claimants and employers, median costs for ET claims overall are used for this part of the proposal, as it would not be practical to distinguish by case outcome.
    - As the preliminary meeting can cover at one meeting all the issues currently covered by a separate CMD and PHR, there should be:
        - A speeding up of the tribunal process
        - One fewer meeting for the judge, the claimant and the employer to prepare for
        - Overall a reduction in meeting time – as a meeting introduction will only be required once, and there will be no need to recapitulate the discussions or actions of the previous meeting.
        - Claimants and employers will only have to travel to and from the tribunal once rather than twice, and waiting time at the tribunal before their case is called will also be halved on average.
        - Based on the above assumptions, the estimated saving for each of HMCTS, claimants and employers of moving to preliminary hearings would be around a quarter of a day (2 hours).

Costs:

75. We are not anticipating any transition costs or administrative or policy costs to arise for the Exchequer, claimants or employers. The default will be for preliminary meetings to be conducted by employment judges alone, as is the case with both CMDs and PHRs under the present Rules. As claimants and employers in these cases have to prepare for the issues arising at CMDs and PHRs, no additional costs should arise due to all the issues arising being dealt with at a preliminary meeting instead.

Employer benefits:

76. The estimated number of cases per year which go to PHR following a CMD, based on the new steady state of 47,000 cases, is 74.

77. The overall[24] unit costs (for all types of outcome, and all claim jurisdictions) are:
For employers = £3,900

Overall, the median time allocated to ET claims is:
For employers = 5 days.

78. As cases which require PHRs to follow CMDs, the meetings will be scheduled on separate days (according to HMCTS, for these cases it will generally be at the CMD that the need for a PHR will emerge). Under the proposed Rules, the meetings will be combined into a single preliminary meeting. Based on the assumptions identified above, the proposed introduction of preliminary meetings can be estimated to reduce the time spent by claimants and employers (who otherwise would have to attend both CMDs and PHRs) by a quarter of a day. The reductions in unit costs (at 2012/13 prices) for cases in this situation are estimated as:

For employers = £3,900 x0.25/5 = £195.

79. The estimated cost savings for employers from the proposed introduction of preliminary meetings is calculated by:

Number of cases that have both a CMD and PHR x reduction in unit costs

This produces estimated annual benefits, rounded to the nearest £10,000, at 2012/13 prices, of:
Employers: = £10,000.

Withdrawals

80. Under the current rules, when a claimant decides that they no longer wish to pursue a claim against their employer, the case will not be dismissed until the employer (the respondent) has applied to the Tribunal for the case against them to be dismissed. This new rule cuts out this process, and provides that in most circumstances, the claim will be considered dismissed without any action being taken by the respondent. Withdrawals made up just under 30% of all cases that were disposed of in 2011-12.

81. The assumptions underpinning the cost-benefits analysis are listed below:
    - Employers request the dismissal of all cases withdrawn by claimants (HMCTS will investigate whether they are able to provide data on this).
    - The simple request letter required will take around a quarter of an hour to write and post on average. The letter will be drafted by a personnel, training or industrial relations manager managing the case for the employer.
    - HMCTS already has procedures in place to dismiss withdrawn cases, and receives notification of withdrawal from the claimant.

Employer costs:

82. There should be no costs arising for employers from this proposed change in the Rules. The requirements for employers are reduced.

[24] HMCTS's management data has not identified which specific case types (by outcome or main jurisdiction) have CMDs followed by PHRs. Therefore, overall unit costs data has been used.

Employers' benefits:

83. Employers will benefit from no longer having to officially request that a withdrawn case is disposed of by HMCTS. For most withdrawn cases, both HMCTS and the employer will be informed that the case is no longer live. At this point, HMCTS will stop scheduling the case for hearings etc.

84. Based on the imputed steady state annual caseload of 47,222, the ET costs model estimates that there would be an annual average of 16,256 withdrawn ET cases. As shown in the Annex 3 (Table A2), the median hourly cost to an employer of a personnel, training and industrial relations manager is estimated at £27.24, at April 2011. This rises to £27.75 when uprated by the increase in average weekly earnings (excluding bonuses and arrears) between April 2011 and April 2012.

85. HMCTS are content to receive official requests in a simple letter from the employer. On average, such a letter (including case reference and reference of withdrawal letter from claimant) may take around a quarter-of-an-hour to write and post.

86. Based on the assumptions listed above the annual cost benefits for employers of the proposed change could be calculated:

Annual number of withdrawn cases x time taken in hours to write complete the request x median hourly salary of relevant employee (HR manager)

Therefore, (based on the calculation 16,256 x 0.25 x £27.75) the estimated annual cost saving for the employer, at 2012/13 prices, to the nearest £10,000):
= £110,000.

Alternative Dispute Resolution

87. Employment judges can already encourage and support parties to a claim to consider conciliation or mediation to resolve their dispute, as an alternative to continuing towards a tribunal hearing. However, by formally stating in the rules that judges should encourage and facilitate the use of alternative dispute resolution (ADR), this may increase the numbers of cases settled outside the tribunal process.

88. Other measures proposed by the Government are also likely to increase take up of ADR options. These include:
    - provisions to increase early conciliation by Acas prior to the claim being registered with the ET service, and encourage settlement agreements (contained in the Enterprise and Regulatory Reform Bill), and
    - the planned introduction of ET fees, which will transfer some of the costs of running the ET service from taxpayers to users – with charging points at the issue stage, when the ET1 form is received, and at the hearing stage, when the case is listed for a full tribunal hearing to take place 4 weeks later.

89. Potentially, therefore, the increase in use of ADR due to the change to the ET Rules formalising the employment judges' encouragement of ADR may be marginal. We have not attempted to monetise costs or benefits, as it isn't possible to estimate how many cases will be affected. Some factors which may impact on the costs and benefits to the Exchequer are discussed below.

Transition costs:

90. There should be no transition costs involved for employers. All ET cases are already routed via Acas for potential conciliation prior to the employment judge starting to consider the case, and the options for ADR already exist.

Employer costs:

91. While some conciliation services (like Acas) will be free to parties, employers may have to pay for some mediation services. SETA 2008 asked about pre-tribunal claim mediation, which is used as a proxy to estimate potential unit costs to claimants and employers who may choose to pay for mediation services. Of those who went to non-Acas pre-claim mediation, 39% of enterprises claimed they had paid for mediation. Most therefore did not pay (though SETA does not say who provided the mediation in these cases).

92. The estimated median costs of mediation for those who paid, up rated to 2012/13 prices by RPI are (rounded to nearest £100):

Employers: £2,300.

93. In some cases, ADR might result in the employer paying some money to the claimant which might not have resulted if the case had proceeded to a full hearing. It is also possible that, in some cases, which are currently withdrawn, there may be an additional cost to the employer if ADR is used and results in a settlement. However, these potential costs depend on the choices of claimants and employers, not on the proposal being discussed: the initial encouragement by HMCTS to pursue ADR.

Employer benefits:

94. It is also difficult to estimate the unit benefit for employers of going through ADR rather than continuing through the tribunal process. Where cases go through ADR and settle or withdraw, rather than proceeding to a full hearing, then the difference in median unit costs (based on SETA 2008 data up rated by RPI to 2012/13 prices) could be estimated as:

Median unit cost of cases going to full tribunal hearing – median unit cost of cases being settled prior to hearing or withdrawn

For employers, the estimated median unit costs are:
Cases going to full hearing = £6,200
Cases settling or being withdrawn = £3,900
Reduction in unit costs through completing case via ADR =£2,400.

95. Potentially, given the changes to the ET system outlined above, in the future cases that have not been successfully resolved through early conciliation may be more difficult to resolve through mediation than previously. Therefore, there is a risk that the SETA 2008 data may over-estimate the extent of the average potential benefits from ADR for those employers whose case has already reached the interlocutory stage of the ET process.

Written reasons

96. The current ET system enables parties to claims to request written reasons explaining a judgement or order. Judges may also provide written reasons when requested by a Court or Employment Appeal Tribunal, and when a judgement or order is made not at a hearing.

97. The proposed Rules largely formalise what should already happen. HMCTS accepts that in some circumstances, parties will want the reasons for judgements and decisions in writing. The new Rules will set out that judges have the scope to be proportionate in the way they issue these decisions, stating that short reasons can be recorded for simple decisions. For judgements, the written reasons under the new Rules won't have to identify any issues not determined, and explain why they weren't covered, which they currently have to include.

Employers costs and benefits:

98. There should be no impact on the costs to employers. There may be a benefit in reduced time required to assess the more proportionate written reasons.

Promote consistency in case handling

99. The **presidential guidance** and **lead case mechanism** proposals are primarily aimed at helping to make ET case management more consistent across the ET system, and making the ET system more understandable to parties involved in cases. Some estimated cost and benefits have been monetised (to the nearest £10,000) for both proposals. There are considerable uncertainties around these estimates.

Presidential guidance

100. It is proposed to shorten and make clearer the Employment Tribunal Rules. Alongside the proposed new Rules, Presidential Guidance will be issued which will clearly set out what parties to claims can expect, and what is expected of them, should contribute to a better understanding of the employment tribunal system. As the new Rules and Presidential Guidance will aim to make the process clearer, rather than suggest any change in the likelihood of a successful claim, it isn't clear that the simplification of the Rules combined with clearer Guidance will have any impact on the volume of cases.

Employer Costs and benefits:

101. As noted above, it is expected that employers have to familiarise themselves with ET Rules and procedures each time they are parties to an ET claim. Therefore, there shouldn't be any transition costs arising, as parties to claims will go through the same familiarisation process, but with the new, rather than current, Rules and Guidance.

102. There are no expected ongoing costs for employers.

103. The simpler Rules and clearer Guidance will hopefully enable parties to have a clearer understanding of the ET process and their role within it. It will therefore hopefully reduce uncertainty and stress felt by some parties when involved in a claim[25]. We have not attempted to monetise these benefits.

104. Potentially, the aim of the proposed Rules and Presidential Guidance to improve consistency of case handling may lead to some change in outcomes, though it is not possible

[25] In SETA 2008,it was reported that overall 36% of claimants found the ET process stressful/emotionally draining/or causing depression, with 10% claiming it led to physical health problems.

to predict in which direction, or to what extent (though HMCTS's expectation is that any change in outcomes resulting from these proposals is likely to be small).

Lead case mechanism

105. This new rules aims to move from the current situation where some cases in a multiple case continue despite there being a decision in that multiple's lead case. Generally, the outcome of the lead case will be applied to the remaining cases without the need for further hearings. The proposal will formalise this, so that the lead case decision will be binding.

106. Assumptions for estimating the cost and benefits of this proposal:
- Claims forming part of multiple claims will no longer be able to continue after the lead case has been decided.
- Previously, those claims that had proceeded after the lead-case has been resolved went to a full hearing.
- Those claims that continue do not involve much additional interlocutory work, so additional cost is largely generated by the hearing.
- The number of reviews generated by the proposal will be in line with the proportion of reviews that current decisions generate.
- The reviewed cases will be those that have some grounds for continuing, and will proceed to a hearing.
- The median time for a full tribunal hearing is a day (as estimated in both SETA 2003 and SETA 2008).
- The outcomes of continuing cases do not differ from the lead case outcome

107. There is a risk that the proposal will generate proportionally more requests for reconsideration than currently is the case for decisions. Claimants and employers may wish to argue that some claims involved in the multiple claim have additional issues that need to be heard separately. However, the judge will be able to deliberate on whether the request for reconsideration is in the interests of justice. This will mitigate the risk of cases proceeding when the lead case verdict reflects the issues of the case.

Employer costs and benefits:

108. If there is no change in the outcome in the continuing cases relative to the lead case verdict, then the main changes affecting claimants and employers will be changes in costs.

109. Assuming, based on the median time for hearings from SETA, that a full hearing will take a day, then both employers and claimants involved in these types of case can be estimated to benefit from a day less spent on the case.

110. The ET cost model, and HMCTS case management data, provides an annual estimate of around 80 cases continuing from multiples once the original lead case has been decided, based on the steady state case numbers. However, this proposal is likely to generate some reconsiderations about whether some individual cases should still proceed, despite the decision on the lead case. The ET costs model estimates that around 8% of ET decisions or judgements (at PHRs and final hearings) are reviewed. This would lead to an estimated 6 reconsiderations.

111. On this basis, under the proposal it is estimated that 74 of the 80 cases would not now progress, while 6 will progress to separate full hearings, following a review.

112. The median cost of a case that goes to tribunal hearing at 2012/13 prices to the nearest £100, and the median number of days spent on the case, are:

For employers: £6,200 spread over 8 days

113. The reduction in median costs due to spending one less day on the case, assuming even distribution in costs across the period spent, are therefore estimated at:

For employers: £6,200/8 =£775

114. The estimated annual benefit at 2012/13 prices is:

For employers: £775 x 80 = £60,000 (to the nearest £10,000).

115. However, if, after a review 6 cases proceeded to a hearing, this benefit would be reduced by:

For employers: £0 (under £5,000) (to the nearest £10,000)

116. There would also be an additional cost from six reviews a year, which, assuming these were held as a hearing, would involve a similar amount of time on average as a PHR or CMD, estimated above at half a day.
The estimated annual cost at 2012/13 prices for these reviews is therefore:

For employers: £0 (under £3,000) (to the nearest £10,000)

117. The estimated overall annual net benefit due to the proposal, at 2012/13 prices, rounded to the nearest £10,000, is:

For employers: £60,000

Simplifying the rules of procedure

118. The **reviews** proposal is aimed at simplifying the current rules in relation to reviews. The costs and benefits of this proposal have not been monetised, though they would be expected to be small.

Reviews

119. The proposed change to the Rules will rename reviews of decisions within the ET system, as opposed to the Employment Appeals Tribunal system, as reconsiderations. The primary changes likely to impact on costs are:

- that any decision could be subject to a request for reconsideration: under the current system, a review can be requested on a restricted set of decision types[26].
- If the judge doesn't believe a hearing is necessary in the interests of justice, the reconsideration can be conducted without a hearing. Currently, a review of a decision made at a hearing has to be conducted at a hearing.

[26] The current rules specify that a review can be requested for a decision not to accept a claim, response or counterclaim and any judgement.

120. The proposed changes therefore indicate that there could be an increase in requests for reconsiderations, relative to requests for review. However, a review can be requested already on all ET judgements and the key decisions about the acceptance of claims and responses, therefore it is expected that there would be few additional requests resulting from the slightly wider coverage.

121. The ET cost model does not estimate the cost of judges dealing with requests for review. Currently HMCTS does not make available figures on the number of requests for review refused.

122. For those decisions or orders which under the current system it is not allowed to request a review, it is possible to submit an ET appeal. Therefore, the proposed Rules will enable reconsideration of these types of decision or order at a more appropriate time and proportionate cost. The HMCTS cost models suggest that around 1% of ET cases result in an appeal, but no figures are readily available on the subject of the appeal. Therefore, it is not possible to estimate the potential benefits that may result in a movement from appeals to reconsiderations.

123. The model suggests that around 8% of ET decisions or judgements (at PHRs and final hearings) are reviewed. The annual estimate for the number of reviews, based on the cost model and for the steady state estimate of the base case, is 623.

124. Where a judge chooses to take advantage of the proposed rule change and conduct a reconsideration without recourse to a hearing, this should lower the cost of the reconsideration. If sufficient numbers of reconsiderations are conducted without a hearing then this might at least balance any rise in cost caused by increased numbers of requests for reconsiderations.

Employers costs

125. The data collected by SETA 2008 does not include any data about reviews requested or carried out. It is therefore difficult to estimate the costs of employers of having their case reviewed. A review will on average increase the costs to both parties. The ET cost model suggests that over 90% of cases do not involve a review. Therefore a broad estimate of the median cost of a review to claimants and employers could be calculated as the additional cost arrived at by increasing the number of days taken up by the case by half a day (a similar length of time for a PHR and CMD), using the overall median costs (for all types of outcome and jurisdiction). There is also a potential benefit for those cases where a review replaces an appeal.

Estimated median cost of a review (2012/13 prices, rounded to the nearest £100):

For employers = £3,900 x 0.5/5 = £400

126. It isn't clear whether the effects of the two proposed changes on reviews most likely to impact on costs will cause employers' costs to rise or fall overall. However, it is likely that the net change will be relatively small.

The main risks to the cost-benefit analysis:

- Two bits of data forming the basis of the analysis are the ET cost model and the estimate of the annual steady state of ET case numbers. The former is based on recent historical data, while the latter is based on the five year average of case numbers, 2005-06 to 2010-11, re-figured to take account of the estimated impact of policies arising from the Resolving Workplace Disputes consultation and response. There are a number of policy changes occurring around resolution of employment disputes and the ET system. Therefore, there is a risk that the historical data, and estimates made of the effect of recent or forthcoming policies, will not accurately reflect the number or type of cases that actually reach the ET system, and how they progress through this.

- The MoJ's proposed introduction of ET fees might further impact the number and type of cases, with the MoJ predicting a small reduction in case numbers. It is possible that proposed policies such as fees and early conciliation may lead to fewer weak or easily resolvable claims, which may reduce the potential benefits in terms of cost reductions from these specific policies.

Specific Impact Assessments

Competition Assessment

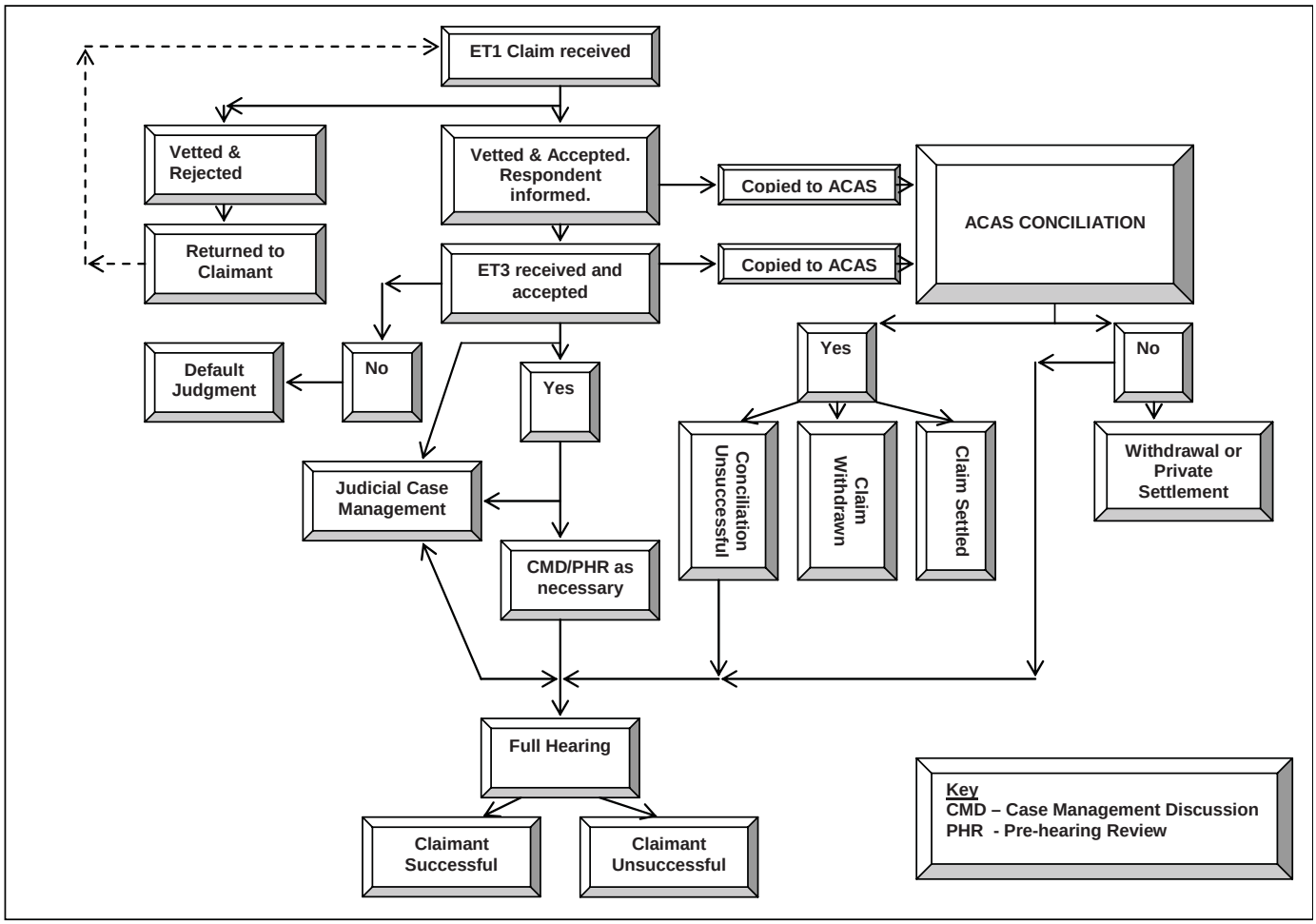
We have fully considered the questions posed in The Office of Fair Trading competition assessment test and concluded that none of the proposals outlined in this impact assessment are likely to hinder the number or range of suppliers or the ability and incentive for businesses to compete.

Small firms impact test

Any enterprise with employees could potentially have a dispute with one of its employees and end up at an employment tribunal. The proposals set out in the consultation document should benefit employers by streamlining and simplifying the employment tribunal system and so will apply to all enterprises that employ staff.

The SETA (2008) employers' survey notes that 36 per cent of cases related to organisations with less than 50 employees. BIS SME statistics show that across the whole economy, 37 per cent of employment is in enterprises with less than 50 employees.

Annex 1 Employment Tribunal process for claims that are decided at final hearing



Annex 2 Approach to estimating costs of employment tribunal cases

Estimated costs to employer when responding to an ET claim

127. The 2008 Survey of Tribunal Applications (SETA) asked employment tribunal claimants and employers whether they had incurred costs for legal advice and representation. [27] Table A1 shows the proportion of respondents that incurred these costs.

Table A1. Claimants' and Employers' survey: Free advice and representation

	Claimant	Employer	All
Whether paid for advice			
Paid for all	26%	69%	49%
Paid for some	7%	8%	8%
Paid (paid for all + paid for some)	33%	77%	57%
All free	66%	21%	42%
Don't know	1%	3%	2%
Didn't pay (all free + don't know)	67%	23%	44%

Source: BIS estimates based on SETA 2008 **Table 5.20**

128. Table A2 below sets out the median wages for all employees and for other specific categories of staff. For consideration of employer costs non-wage labour costs are added at 24 per cent. The wage costs are adjusted to account for the increase in average wages (excluding bonuses and arrears) between April 2011 and April 2012.

Table A2. Hourly pay (excluding overtime) in the UK, 2011

	SOC Code	Median	Median, including non-wage labour costs at 24%
All employees		£11.15	£13.83
Personnel, training and industrial relations managers	1135	£21.97	£27.24
Corporate managers and senior officials	111	£40.70	£50.47
Directors	1,112	£52.68	£65.32

Source: ASHE 2011 **Table 14.6a**

[27] The data from SETA 2008 was published in *Findings from the Survey of Employment Tribunal Applications 2008*, March 2010, http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008

129. SETA (2008) also establishes the median amounts spent on advice and representation (SETA table 5.24) and the median time spent by different staff members (SETA tables 10.5 and 10.6)[28]. The estimates below multiply time spent (this is given in days, but SETA assumes 8 working hours in the day) by the wage rate of the relevant staff (corporate managers and senior officials representing directors and senior staff, personnel, training and industrial relations managers representing other staff). In constructing unit cost estimates, these amounts are adjusted to account for those that do not pay for advice and representation, and hence to provide a figure averaged across all employers. the figures for costs for advise and representation are adjusted to account for RPI inflation between the survey (2008) and 2012, with the wage figures adjusted as described in paragraph 48 above.

Table A3 Summary of Costs to an employer from an employment tribunal application

	went to Tribunal hearing	Acas settled	Privately settled	withdrawn	dismissed	total
Time spent on case Directors and senior staff	£2,286	£1,234	£1,645	£822	£1,234	£1,234
Time spent on case (other staff)	£444	£444	£444	£444	£444	£444
Costs for advice and representation post ET1	£3,488	£1,780	£3,115	£1,736	£1,780	£2,225
Total cost	£6,218	£3,458	£5,204	£3,002	£3,458	£3,903
Total cost rounded to nearest £100	£6,200	£3,500	£5,200	£3,000	£3,500	£3,900

[28] The data from SETA 2008 was published in *Findings from the Survey of Employment Tribunal Applications 2008*, March 2010, http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008

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