These notes refer to the Employment Act 2002 (c.22) which received Royal Assent on 8 July 2002

EMPLOYMENT ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Tribunal Reform

Miscellaneous
Conciliation

66. The Advisory Conciliation and Arbitration Service's (ACAS) present role is, among other things, to provide an independent and impartial service to prevent and resolve disputes between employers and employees. ACAS conciliators currently have a statutory duty to promote settlements of a wide range of employment rights complaints, which have been made or could be made to an employment tribunal. Section 24 establishes a fixed period of conciliation for claims to the employment tribunal.

Section 24: Fixed period of conciliation

67. At present, ACAS has a duty to continue to seek a conciliated settlement between the employer and employee for as long as the two parties to the dispute want to carry on. This can sometimes lead to an ACAS-brokered settlement being reached at the very last moment before the case comes before an employment tribunal. The Government believes that on occasions this is the result of the parties being unwilling to focus on the importance of agreement until the reality of the tribunal hearing is upon them. But delayed settlements cost time and resource to the parties involved, to ACAS and to the tribunal services. The objective, therefore, is to introduce a system that encourages earlier conciliated settlement where this is possible, without preventing last minute settlements if there is good reason for them.

68. This section therefore provides a power for the employment tribunal procedure regulations to introduce a fixed period for conciliation. This is achieved by amending section 7 of the Employment Tribunals Act 1996 to allow for regulations to be made enabling the postponement of the fixing of a time and place for a hearing in order for the proceedings to be settled through conciliation. It is intended that the regulations will set out the length of the conciliation period and will provide for its extension only in cases where the conciliator considers that settlement within a short additional timeframe is very likely.

69. The section provides that ACAS's duty to conciliate cases reverts to a power to conciliate after the conciliation period has ended. This preserves ACAS's conciliation role in all of the jurisdictions for which it currently has a duty to act, but means that once the conciliation period is over, this duty becomes a power. The effect will be that once the conciliation period is over, the conciliation officer can judge whether to continue to conciliate the case, or to pass it back to the Employment Tribunal Service (ETS) so that a time and place can be fixed for a hearing.

Section 25: Power to delegate prescription of forms etc.

70. Section 7(2) of the Employment Tribunals Act 1996 provides that proceedings must be instituted in accordance with employment tribunal procedure regulations. Currently, the main Employment Tribunal Rules of Procedure stipulate that tribunal applications must be in writing and include the applicant's and respondent's details and the grounds on which relief is sought. A respondent's notice of appearance must be in writing and must give the respondent's details, state whether or not he intends to resist the application and if so, the grounds for doing so. The ETS produces two forms, one for use as an originating application (IT1) and one for use as a notice of appearance (IT3). However, the forms have no particular status under the rules.

71. This section amends section 7 of the Employment Tribunals Act 1996 by inserting a new subsection (3ZA). It provides a power for the rules to delegate to the Secretary of State the authority to prescribe a form, which is required to be used to institute proceedings in a tribunal. Alternatively, the section enables the Secretary of State to include the requirements of the form partly in the rules and partly outside the rules. (Existing powers would enable a form to be prescribed in the rules themselves). The same powers apply in relation to the appearance to be entered by the respondent to the proceedings. It is anticipated that the mandatory form and notice will provide more information to the tribunal, and to the other side, at an earlier stage. This will help the tribunal in deciding whether the application would benefit from a pre-hearing review, preliminary consideration or case management hearing, and the length of time required for the hearing. An assessment of the strength of the other side's case could also be made, which could encourage settlement. The section also enables the rules to delegate to the Secretary of State the power to prescribe that certain documents (such as the written statement of particulars of employment) must accompany either form.

72. Finally, the section enables the rules to include provision to ensure the publication of any requirements prescribed by the Secretary of State by virtue of this section.

Section 26: Determination without a hearing

73. This section provides for employment tribunal procedure regulations to authorise cases to be determined without a hearing in the circumstances prescribed by the regulations. It is intended that the circumstances in which a case may be determined in this way would be where both parties have given their consent, by signing a form waiving their rights to an oral public hearing, following independent advice. This would be subject to the tribunal deciding that there should be an oral public hearing notwithstanding the parties' agreement to the contrary. This is achieved by substituting a new subsection (3A) for the existing subsection (3A) in section 7 of the Employment Tribunals Act 1996.

Section 27: Practice directions

74. Unlike the President of the Employment Appeal Tribunal (EAT), the Employment Tribunal Presidents do not have the power to issue practice directions. That was confirmed by the EAT in the case of *Eurobell Holdings Plc v Barker*. However, the EAT noted that it was undesirable that employment tribunals should adopt different practices and procedures in different regions and that, if need be, the President should be given statutory power to make practice directions which apply countrywide. It was noted in the 1994 Green Paper 'Resolving Employment Disputes – Options for Reform' that some tribunal chairmen favoured the issuing of formal practice directions by Tribunal Presidents, to guide them on how discretions ought to be exercised. Examples of such discretions include rule 4 of the main Employment Tribunal Rules of Procedure, which says that a tribunal *may* issue directions, or rule 17 where it *may* extend certain time limits.

75. By providing Tribunal Presidents with the power to issue practice directions, the Government's objective is to ensure that tribunals adopt a consistent approach to procedural issues and to the interpretation of their powers under the Employment

Tribunal Rules of Procedure. It is believed that such consistency will lead to an increase in confidence among users of the tribunal system that cases are being dealt with in a uniform way regardless of where they are heard.

76. This section inserts a new section 7A into the Employment Tribunals Act 1996, giving a power to amend the employment tribunal procedure regulations so that Tribunal Presidents can issue practice directions. There are currently two Presidents in Great Britain – one for England and Wales and one for Scotland. The Presidents will be able to issue these directions in respect of Employment Tribunal Rules of Procedure and the exercise by tribunals of powers under them. In addition, the procedure regulations may contain provisions about securing compliance with practice directions and their publication. The procedure regulations may also refer to provision made or to be made by practice directions, instead of making such provision themselves.

Section 28: Pre-hearing reviews

77. Employment tribunals may currently carry out preliminary considerations (pre-hearing reviews) and if it is found at the review that the party's case has no reasonable prospect of success, a deposit of up to £500 can be required as a condition of proceeding to a full hearing. Only on refusal to pay the deposit can the case be struck out. Although rule 4 and 15 of the main Employment Tribunal Rules of Procedure permits the strike out of proceedings in certain circumstances, it is arguable that these do not apply to the pre-hearing review stage.

78. At present the power to strike out is limited and rarely used. This section therefore clarifies that rules may permit tribunals to strike out a case at the pre-hearing review on grounds which do not go beyond those applicable to other stages of proceedings. Such grounds include when the originating application or notice of appearance (or anything in it) is scandalous, misconceived or vexatious. The objective is to limit the number of such cases reaching a full hearing by confirming the tribunals' power to strike cases out at this stage in the process. The aim is to improve the efficiency of case handling and restrict the amount of time that tribunals spend on considering cases which are obviously misconceived etc. However, the power to demand a deposit remains and is likely to continue to be the main sanction used against weak cases at pre-hearing reviews.

79. Examples of cases where it could be appropriate to exercise the strike out power include:

- Cases in which the facts have already been litigated and the applicant has no fresh or different evidence but insists on pursuing the case;
- Cases where the facts are not in dispute, but the interpretation placed on those facts by one party is clearly wrong;
- Cases in which a party's application is not itself sufficient to lead to a successful outcome for him, and the party has stated at the pre-hearing review that no further evidence or witnesses would be called.

80. As the sanctions of imposing a deposit or making a costs order are also available, the power to strike out will only be used where it is appropriate. Since evidence is not considered at the pre-hearing review, the strike-out option will only be appropriate in cases where the tribunal is satisfied that there is no need to consider the evidence, or where there is no conflict of evidence.

81. This section amends section 9 of the Employment Tribunals Act 1996. It works by removing from section 9(1)(a) the implication that pre-hearing reviews are "preliminary" hearings, and therefore necessarily followed by a full hearing. It makes it clear that a pre-hearing review will not necessarily be preliminary, so that the powers which the tribunal can exercise in connection with the pre-hearing review may include a power to strike out the claim. It also provides that a tribunal may not strike out at a pre-hearing review on grounds which do not apply outside such a review