Response to BIS consultation on Employment Tribunal postponement rules

Free Representation Unit

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Opening Remarks

This is a thoroughly disappointing consultation.

It appears to be based on a belief that there is a serious problem with the way the Employment Tribunal deals with postponements. No evidence is produced to establish such a problem exists. It is not even made clear exactly what perceived problem the consultation attempts to grapple with.

Having failed to identify or evidence a problem the consultation then sets out a number of solutions. None of which appear likely to make any significant difference in practice, beyond making the tribunal process marginally more cumbersome.

At a time when the introduction of fees has crippled the tribunal as a mechanism for securing employment rights, it is dispiriting to be faced with a consultation demonstrating such lack of understanding of the tribunal's work in practice.

This response deals with a number of points arising from the consultation, before turning to the questions asked. But, in short, we would urge the government to abandon these plans.

Where is the evidence?

In so far as the consultation identifies the problem it is dealing with it says:

> 19. One of the concerns about the Tribunal system voiced by ET users, is the time it takes. Unnecessary and short notice postponements can increase the length of the process and lead to additional costs for those involved.
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> 20. It is in the interest of all parties that tribunals proceed as efficiently as possible without unnecessary delays. These measures are aimed at reducing delays by encouraging parties to think carefully about the need for a postponement.

Most of this, taken individually, is unobjectionable. Nobody wants unnecessary postponements. Everybody is in favour of efficiency. Nobody wants additional costs or delay.

But the implication of these points, taken together, and in the context that rules changes are being proposed, is that there is some sort of serious problem with the way in which postponements are currently dealt with by the tribunal.

If that is the case, we would expect the consultation to set out what that problem was.

Does the government believe that tribunals are currently granting postponements in circumstances where they should not? Does it believe that judges are not considering the right factors? Does it believe that parties are applying for postponements in a frivolous manner? None of this is made clear.

Nor is any real evidence set out. The consultation tells us that there were 67,750 postponements between 1st April 2011 and 31st March 2013. Without context this tells us nothing. Over the same period there were 113,951 single claims presented to the tribunal.[1] Very roughly then there are .6 postponements for each single claim.[2] This hardly suggests a major problem.

No information is given about the number of applications made, so it is impossible to say how robust judges are being in relation to postponement applications.

The consultation says that 80% of the postponement applications are made by claimants. Frankly, this does not reflect FRU's experience and we doubt the accuracy of the figure. Even if it is accurate, without information on the success rate of applications it tells us nothing about which party normally bears the responsibility for postponements.

[1] The two statistics are not directly comparable, but the number of claims presented give a general idea of the tribunal's workload at the relevant time.

[2] Since some postponements will occur in multiple claims the true figure will be lower.

There is also no information about the extent to which postponements are caused by the tribunal itself. FRU's experience is that a relatively small, but significant, minority of postponements are the result of 'lack of judicial availability'. Such postponements are inevitably at short notice, either of the day of tribunal or the afternoon of the day before. It is worth noting that this was much more frequent in 2011 and 2012 (i.e. the period from which the consultations statistics were drawn) than it is now.

Postponements in practice

As noted above, the consultation appears to be based on a belief that tribunals are overly permissive in the granting of postponements or are not taking relevant matters into account.

This is simply not FRU's experience. Our experience is that postponements requests are dealt with sensibly and proportionately. There will inevitably be occasions where one party believes that the judge has got it wrong. But we do not believe there is anything resembling a systematic problem requiring a rules change.

It is also our experience that tribunals always consider the factors that the consultation is concerned about. Judges will always take into account the history of a case, including how long it has been before the tribunal, whether there have been previous applications for postponement and who made them. And tribunals will always consider the proximity of a hearing. It is, and has always been, much easier to obtain a postponement when an application is made promptly rather than at the last minute.

Question 1

Is a limit of 2 successful postponement applications per party, per case, appropriate? Please provide your reasons.

No. First, as noted above, the consultation fails to set out any evidence to suggest that there is a problem that requires a rules change. The number of previous postponements is already considered by judges making postponement decisions.

Decisions about postponements are a quintessential example of a discretionary judicial judgment that requires subtle judgement across a multitude of facts.

Judges need to weigh a number of different factors, including, but not limited to, the previous conduct of the case, how close it is to hearing, the disadvantage to other parties if a postponement is granted, the likelihood the a postponement will

effectively address whatever problem has led to the application. Elevating a single factor to a particular rule is cumbersome and bureaucratic. It will do nothing to improve the quality of judicial decision making in this area.

Introducing rules unnecessarily is not without cost. It adds to the length and complexity of the rules, making them harder for parties to understand. It makes applications and decisions more difficult, because they are forced to follow a strictly defined approach, regardless of the particular circumstances in a case. It also encourages technical points, such as wrangling over the definition of exceptional circumstances.

Second, a single figure is arbitrary and fails to distinguish between different types of cases. Two postponements is a great many in the context of a simple wages claim. It is not nearly as many in the context of a long and complex discrimination claim. Applying a single rule is foolish – and attempting to distinguish between different claims in order to apply different limits will only worsen an already overly bureaucratic process.

Third, the limit fails to take into account that applications for postponement often arise from failures by the other side. For example, where one side has failed to comply with the tribunal's case-management orders for disclosure etc. the other may apply for a postponement because that failure means that the case cannot fairly go ahead. In these circumstances, why should the sanction fall on the innocent party? The draft rules attempt to deal with this possibility by having an exception to the limit where the tribunal considers the the postponement was the result of a failure by the tribunal or the other party. But this creates a ridiculous situation where how the tribunal deals with a series of applications will depend on the order in which they are made. A party who requests two postponements on the basis of illness, followed by one on the basis of failure to disclose relevant documents will be in a better position than one who is granted two postponements on the basis of failure to disclose, followed by one on the basis of illness.[3]

Fourth, the rule is likely to lead to perverse incentives. It will encourage them to 'play chicken' when both believe a postponement is desirable in order to try to avoid using up a postponement request. It will also encourage parties to delay applications in the hope they turn out to be unnecessary or the other side makes their own application, rather than being guided simply by the overriding objective.

It will also discourage cooperation between parties. For example, it is quite

[3]The answer to this point may be that the tribunal will use their 'exceptional circumstances' discretion to see that justice is done. But this only further underlines the pointlessness of the suggested rules.

common for represented parties to make postponement applications, 'on behalf' of litigants in person where it is clear that a postponement is necessary.[4] This practice will disappear if, by doing so, the representative will disadvantage their client by using up an postponement request.

Question 2

Is a deadline for postponement applications of no less than 7 days before the Employment Tribunal hearing reasonable? Please provide your reasons.

No. For much the same reasons set out in response to Question 1. These are properly matters of discretion for the tribunal who must balance a number of different factors. Elevating a single one of these factors to a particular rule is cumbersome and bureaucratic. It will do nothing to improve the quality of judicial decision making in this area.

Judges already take into account the proximity of hearing and are – quite rightly – reluctant to grant late postponements without a very good reason.

Question 3

Do you agree with the two specified exemptions to the new rules on postponements? Please provide your reasons.

Yes.

The need to provide for both a general exemption and further specific exemptions further highlights the difficulties in introducing these rules. The decision process should be a flexible one, based on a judge's discretion and common-sense. If this is removed in favour of strict rules, exceptions then have be introduced to in order to avoid injustice. The end result is a much longer set of rules, which are harder to understand and apply.

However, if the rules are introduced as suggested, we agree that these exceptions are appropriate.

We would note that, in FRU's experience, judges are reluctant to postpone hearings for the purposes of settlement. In many cases, judges take the view that an impending hearing acts to concentrate the minds of the parties in negotiation and that granting a postponement application is more likely to derail settlement than encourage it. Such an attitude can be frustrating to parties in individual cases

[4]For example, where a litigant in person has fallen seriously ill or suffered an accident.

and should certainly not be a strict rule. But it would be unfortunate if cases were routinely postponed whenever the parties indicated it might help settlement. The overall impact of that approach would almost certainly be to introduced delay in a significant number of cases that did not then settle.

Question 4

Do you agree that a postponement or adjournment granted less than 7 days before the Tribunal hearing should be regarded as 'late' for the purposes of considering a Cost Order or Preparation Time Order? Please provide your reasons.

No. There should be no obligation on tribunals to consider costs in these circumstances. The present power to award costs, together the ability of parties to apply, is sufficient.

The tribunal should, in general, be a jurisdiction where parties bear their own costs (except in relation to tribunal fees). The most frequent further exception to this general rule is where costs are applied as a sanction because a party has acted unreasonably. The rule that tribunals must then consider costs is somewhat prescriptive, but can be justified.

Requiring tribunals to consider costs in every case where there is a late postponement is a significant departure from the general principle. There is no good reason to do so. There is no evidence that either the tribunal is reluctant to consider or parties reluctant to pursue costs following a late postponement where it is appropriate.

Late postponements will only be granted where there is a good reason to do so. This is the same as the current position. There is therefore no reason to think that costs orders will become routine in relation to late postponements.

Requiring tribunals to consider making a costs order would mean that tribunal would need to spend time making that consideration and the parties would need to spend time preparing evidence and submissions. This is a waste of time where it is readily apparent that costs are not appropriate and neither side is requesting them. Where significant evidence needed to be prepared (such as evidence of a parties means) the costs of preparing for the consideration would often be disproportionate to the likelihood and value of any award of costs.

It is also worth noting that there is no requirement on tribunals to consider making a costs order in respect of a tribunal fee. It would be odd if there was such a requirement in relation to late postponements, despite the fact that costs awards in those circumstances will be much rarer than those in respect of tribunals fees.

Question 5-7

Do you agree with the basis of the cost elements that have been identified due to a postponement? Please explain.

Do you have any evidence to clarify whether the cost of a postponement to any party changes if 2 or more postponements have already been granted? Please explain.

Do you have any evidence to clarify whether the cost of a postponement to any party changes if the postponement is requested less than 7 days prior to a hearing? Please explain.

No.

First, it seems remarkable that the consultation appears entirely uninterested in the cost of the proposals to employees / claimants, in addition to the potential cost to business.

Second, the cost calculation is asinine. It assumes that the cost of the average postponement is equal to the cost of the average tribunal hearing. This is quite obviously wrong.

Second, it assumes that, if the average cases takes an employer five days in total and one of these days is spent at a tribunal hearing, the tribunal will account for one fifth of the costs. Again, this is quite obviously wrong. Tribunals are, by some way, the most expensive element of the process both in management time[5] and legal costs.[6]

Attempting to calculate the true costs of postponements to parties is a difficult task. Different postponements in different circumstances will involve radically different costs. For example, the postponement of a fast-track case as the point that an employer receives the ET1 and hearing date will involve little to no costs. The postponement of a multi-day case, where a party is professionally represented, on the first day of the hearing will involve substantial costs.

FRU does not have the sort of information that would allow us to make any sort of estimate. Nor are we aware of information in the public domain that could be used to do so. But the attempt in the consultation is self evidently useless and cannot form the basis of a sensible estimate.

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[5]Because the hearing is a single block of non-discretionary time outside the workplace.

[6]Because lawyers, in general, charge more for representation than for advice or preparation.

Question 9-10

Can you identify any particular impacts that the proposed changes to the Rules of Procedure for postponements would have, on people with Protected Characteristics as defined in the Equality Act 2010?

Can you identify any additional costs associated with a Tribunal postponement that would be incurred by people with Protected Characteristics? Please provide your reasons.

The changes are likely to have a disproportionate impact on parties who are more likely to require postponements on health grounds. Most notably, those who are disabled, pregnant or elderly.

The introduction of a limit on the number of postponement in a case will also disproportionately impact parties involved in longer and more complex litigation. Since discrimination cases tend to be longer and more complex than other jurisdictions this is likely to disproportionately impact those bringing discrimination claims.

These disproportionate impact will mean that parties in these groups will be likely to incur additional costs, including legal costs, in dealing with the problems created by the proposed changes.

About FRU

FRU is a charity that has been providing representation in social security and employment tribunals since 1972. We help people who are not eligible for legal aid and cannot afford lawyers. Our work is done by volunteers, mostly law students and legal professionals in the early stages of their career. All FRU's representatives are trained and supervised by our legal officers.

About the author

This consultation response has been prepared by Michael Reed, FRU's Principal Legal Officer, Employment.

Since 2005 Michael has been responsible for supervising FRU's volunteers in the Employment Tribunal as well as his own cases. He is the co-author, with Naomi Cunningham of *Employment Tribunal Claims: Tactics and Precedents* and `etclaims.co.uk`. He writes on employment law and policy at `workingtheory.co.uk`. He is a member of the Tribunal Procedure Committee; the Discrimination Law Association and Adviser's Editorial Board.