EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT TRIBUNALS ACT 1996 (TRIBUNAL COMPOSITION) ORDER 2009

2009 No. 789

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

2. Purpose of the Instrument

2.1 This Order will enable employment tribunal proceedings, in respect of payments relating to leave entitlement under certain Working Time Regulations to be heard by an Employment Judge sitting alone.

2.2 A full panel of three tribunal members does not sit in all employment tribunal cases. Since 1996, in a number of jurisdictions an Employment Judge has normally heard cases sitting alone. The Employment Judge reviews the papers before the hearing and unless there are particular reasons for convening a full panel (for example, because the case raises particularly complex issues, or where a party to the case has requested this) hears the case sitting alone.

2.3 The Government proposes that Holiday Pay (under the Working Time Regulations) should be added to this list of jurisdictions. The Government considers this appropriate as entitlement to holiday pay is an absolute right, akin to the national minimum wage, where cases are routinely heard by an Employment Judge sitting alone.

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

3.1 None

4. Legislative Context

4.1 This Order amends section 4(3) of the Employment Tribunals Act 1996 which details the proceedings which may be heard by an Employment Judge when sitting alone. This will enable proceedings, in respect of payments relating to leave entitlement, under certain Working Time Regulations[1] to be heard by an Employment Judge alone. It is part of a package of measures to implement the Dispute Resolution Review (see 7.1 below).

4.2 The issues of employment tribunal composition and the role of lay members were raised in both Houses during the course of debates on the Employment Act 2008. The

[1] Working Time Regulations 1998 (S.I. 1998/1833); Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 (S.I. 2003/3049); Civil Aviation (Working Time) Regulations 2004 (S.I. 2004/756); and Fishing Vessels (Working Time: Sea-fisherman) Regulations 2004 (S.I. 2004/1713).

Government provided assurance that it strongly supports the important role of all the members of the employment tribunal and Employment Appeals Tribunal.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

The Minister of State for Employment Relations and Postal Affairs has made the following statement regarding Human Rights:

In my view the provisions of The Employment Tribunals Act 1996 (Tribunal Composition) Order 2009 are compatible with the Convention rights.

7. Policy background

7.1 This amendment is part of a package of legislative and non-legislative measures to simplify and enhance the framework for effective dispute resolution in the workplace. This is the result of an independent review of employment dispute resolution in Great Britain undertaken by Michael Gibbons[2] and a public consultation[3] by the Government in 2007 which identified key problems with the current dispute resolution system.

7.2 The Employment Act, which received Royal Assent on 13 November 2008 paves the way for important and simplifying reforms to make the system of employment dispute resolution work better for employers and employees. These include repeal of statutory dispute procedures and associated legislation on procedural fairness in unfair dismissal. The Act also gives employment tribunals discretionary powers to adjust awards by up to 25% if either party acts unreasonably in complying with a relevant statutory code; Acas has consulted on a revised principles based and concise code of practice on discipline and grievance procedures[4] to reflect the new regime. The Act also contains provisions to enable Acas to target conciliation resources on cases with most likelihood of early resolution, and removes the time restrictions on Acas conciliation after an employment tribunal claim is made.

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

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[2] "A Review of employment dispute resolution in Great Britain", published 21 March 2007

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

[4] http://www.acas.org.uk/index.aspx?articleid=2114

7.4 The Government believes that some tribunal cases, which revolve around the determination of facts in cases of monetary disputes, could be dealt with more quickly and simply. Holiday Pay claims often involve straightforward monetary issues. The amendment proposed will result in claims to an employment tribunal being routinely determined by an Employment Judge sitting alone to hear the case.

7.5 The Government is grateful for the valuable contribution made by lay members to tribunal proceedings. However, Employment Judges already routinely sit alone in a number of jurisdictions but must have regard to the individual circumstances of such cases, including the likelihood of a dispute arising on the facts, which may require they be heard by a full tribunal. This ensures that complex cases will be dealt with appropriately. In addition, an Employment Judge will have to have regard to the views of any parties as to whether or not the proceedings ought to be heard by a full tribunal.

8. Consultation outcome

8.1 The Government published a further consultation (*Dispute Resolution – Secondary legislation consultation*) [5] on 30 June 2008 seeking views on a number of measures to complement the investment in Acas services and the legislative reforms in the Employment Act. This further consultation closed on 26 September 2008. The Government response to this consultation, is available on the BERR website.[6]

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

8.3 Two thirds of responses were in favour of adding holiday pay to the jurisdictions in which an Employment Judge can sit alone. The proposal was seen as "sensible streamlining". However, there was some opposition from employee organisations.

8.4 Most responses agreed that holiday pay cases usually involve a clear issue of law, requiring no deliberation in simple cases. Many responses agreed that this change would result in a faster, more efficient process. The similarities between holiday pay and national minimum wage cases (currently routinely heard by an Employment Judge sitting alone) were highlighted, and several responses argued that this was an anomaly that should be corrected.

8.5 It was felt that safeguards should ensure that complex cases would be dealt with in an appropriate way, and some responses caveated their support with the condition that if the issue was complex, or the claimant requests, the option of a full tribunal should be retained. This complexity raised concerns from some trade unions, who commented that holiday pay cases often involved complex cases of whether an individual has employee and/or worker status. The valuable contribution of lay members was also highlighted.

8.6 Given the support for this proposal, and the safeguards within the system, The Government proposes that secondary legislation should be amended to enable Working Time (holiday pay) cases to be heard by an Employment Judge sitting alone.

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[5] http://www.berr.gov.uk/consultations/page46889.html
[6] http://www.berr.gov.uk/files/file49216.pdf

9. Guidance

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

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

10. Impact

10.1 A full regulatory impact assessment has not been produced for this instrument as no impact on the private and voluntary sectors is foreseen.

11. Regulating small businesses

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

12. Monitoring and review

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

13. Contact

Ruth Henrywood at the Department for Business, Enterprise and Regulatory Reform e-mail: Ruth.Henrywood@berr.gsi.gov.uk can answer any queries regarding the instrument.