ELA Survey

The Future of Employment Tribunals

EMPLOYMENT
LAWYERS
ASSOCIATION

SURVEY RESULTS

April 2015

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The Future of Employment Tribunals

Survey Results - April 2015

Introduction

David Latham, the former President of the Employment Tribunals in England & Wales gave a speech to the Law Society in August 2014 giving his personal views on possible reform to the ET system. During the party conference season and in the lead up to the General Election some of the main political parties have also indicated that they will be looking at this following the General Election. Accordingly, the Employment Lawyers Association ('ELA') considered that this would be a timely opportunity to commission a survey of its members to gain their views on this subject.

We conducted the survey of all ELA members (5,969) between 16 March and 2 April 2015. We received 719 responses, which is a healthy 12%. This response rate means that we can be confident that the results are within 3 - 4 percentage points of the "real" result if all members had responded. Moreover, this understates the strength of the response because 7% of the sample responded on behalf of their teams within their firm/chambers/organisation. The results therefore could be said to represent approximately 1,015, or 17% of ELA members.

A detailed report setting out all the findings from the survey begins on page 9. We have summarised the key findings to come from this survey on page 3.

We are very grateful to the 719 ELA members who took time to complete this important survey and represent the views of their profession. We would also like to extend our thanks to Neil Barber at NEB Research who has given us invaluable advice on the survey questions, and in analysing and evaluating the survey data, as well as to our survey partner Infocorp for their efficient service.

Last but by no means least, we thank the ELA Working Party, whose members are listed below, for the huge amount of time and work they have put into this major project.

Jonathan Chamberlain, Wragge Lawrence Graham & Co LLP
Paul McFarlane, Weightmans LLP
Co-Chairs of ELA Future of Employment Tribunals Working Party

Working Party

Lucy Bone, Littleton Chambers
Karen Bristow, Phillips Law
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Sally Gold, Cheshire East Local Authority
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Antonio Michaelides, Covington & Burling LLP
Ijeoma Omambala, Old Square Chambers
Joanne Owers, Fox Williams LLP
Jude Shepherd, 42 Bedford Row
Paul Statham, Your Employment Settlement Service
Brigitta Tokhai, Weightmans LLP

The survey covered the following areas:

- The New Rules impact since July 2013;
- Should there be an Employment and Equalities Court?
- The impact of the introduction of fees to the ET system (ET Funding)
- Early Conciliation and ADR;
- Effective enforcement of Employment Tribunal awards.

A. The New Rules impact since July 2013

1. The reaction amongst members to the New Employment Tribunals rules (introduced in 2013) was mixed. 44% of our members thought the initiative of combining the former case management discussions and pre-hearing reviews into one preliminary hearing, (in terms of improving case management efficiency) has been "Very/somewhat successful" - whereas only 24% thought it was "Not very/not at all successful".

Comments from members which illustrate the divergent views on this issue are below:

The New Rules are an improvement over the Old Rules. But they have made very little difference in the way that the Tribunal approaches cases. Their improvement is primarily in being better expressed rules - easier to understand and apply - rather than introducing procedural innovation.
Voluntary sector barrister, Primarily claimant, England & Wales

The Judiciary have failed to exercise the greater power given to them to strike out claims/responses.
Private practice solicitor, Primarily respondent, England & Wales

B. Should there be an Employment and Equalities Court?

2. Interestingly, whilst most members believe a new Court would be an improvement on the current system (64%), the vast majority (80%) believe the ET system was effective before the ET Tribunal Fees Order in July 2013.

3. If such a Court were created 71% of members would like cases reserved to Judges who were 'ticketed specialist'.

4. Opinion was divided amongst members on the question of the costs regime that should apply in the new Court. 52% preferred a single costs regime in the new Court. However, a significant minority (39%) said that the costs regime would depend on the case before the Court.

The following comment illustrates the mixed feelings on this issue:

I am a little conflicted over the costs regime as I can see the merit in the adverse costs regime, but would be concerned it will prevent people from taking legal action. I also see that certain types of claims and remedy (injunctions/search orders) may not be appropriately dealt with by the same judge as say discrimination.
Private practice solicitor, Primarily claimant, England & Wales

C. Impact of the introduction of fees to the ET system (ET Funding)

5. Funding of ETs was the issue that attracted the greatest percentage of comments from members (41%). The overwhelming majority of members (whether they act mainly for employees or employers) were very concerned about the current regime and the impact it is having on access to justice. Below is a comment from a member, which illustrates their concerns:

Employment tribunals are now the preserve of the wealthy, including those who have funding via trade unions or insurance. The fees are a disaster for the low paid and good for employers who don't pay their staff.

Private practice solicitor, Mix of respondent and claimant, England & Wales

6. The survey found that since July 2013, fee introduction has dramatically decreased the number of inquiries and the number of instructions for at least 8 in 10 ELA members.

7. 85% of members thought that the introduction of fees had been either detrimental or very detrimental to access to justice.

8. 71% of members thought that fees should either be abolished (30%) or reduced to a small flat rate (41%).

9. 57% of members state that the number of ET cases proceeding to hearing has decreased.

10. 24% of members assisted clients applying for remission. Of those who did assist 79% found the application for remission very difficult.

D. Early Conciliation and ADR

11. Members expressed disparate views as to the effectiveness of Early Conciliation and Judicial Mediation. 39% of members said that Early Conciliation was working "well or very well" compared with 24% saying the same for Judicial Mediation. 43% of members thought that there ought to be compulsory Early Conciliation or mediation prior to the commencement of proceedings

12. Further ADR ideas, including an early "one-stop-shop" Court, would be agreeable to 53% of ELA Members but a sizeable minority (29%) disagree.

The following comment provides a note of caution regarding how ADR may be used going forward:

To be effective, Early Conciliation needs to encourage all Claimants to list all of their claims and provide sufficient details of their complaints at the outset so that the Respondent knows what they are facing and can properly assess whether or not they wish to settle. I would be in favour of Early Conciliation commencing after the ET1 has been submitted. This would also simplify time limits by reverting back to the three month time limit, which is much easier for Claimants to calculate.

Chambers based barrister, Mix of respondent and claimant, England & Wales

E Effective enforcement of Employment Tribunal awards

13. Only 29% of members had "Lots/Some" experience of enforcing ET awards. Very few (10%) had any experience of advising on the ACAS and ET Fast Track for the enforcement of ACAS settlements and tribunal awards. A similar figure (13%) had experience of dealing with the County Court for the enforcement of ACAS settlements and tribunal awards.

14. Of those that do have experience of advising on the above methods of enforcement the majority, around 6 in 10, believe they are effective.

15. 67% of members were in favour of the new power enabling ET to impose financial penalties on employers who had not paid an ACAS settlement or ET award. Further, a majority of members (62%) appear to support the suggestion of paying financial penalties to Claimants who haven't had their ET award paid in full.

16. Naming and shaming Respondents failing to pay ET awards largely divides our membership's opinion (50% in favour and 40% against). But the suggestion of giving the power to ETs to make a deposit order against employers who the ET considers may not pay an award made against them, was seen as potentially more effective (58%).

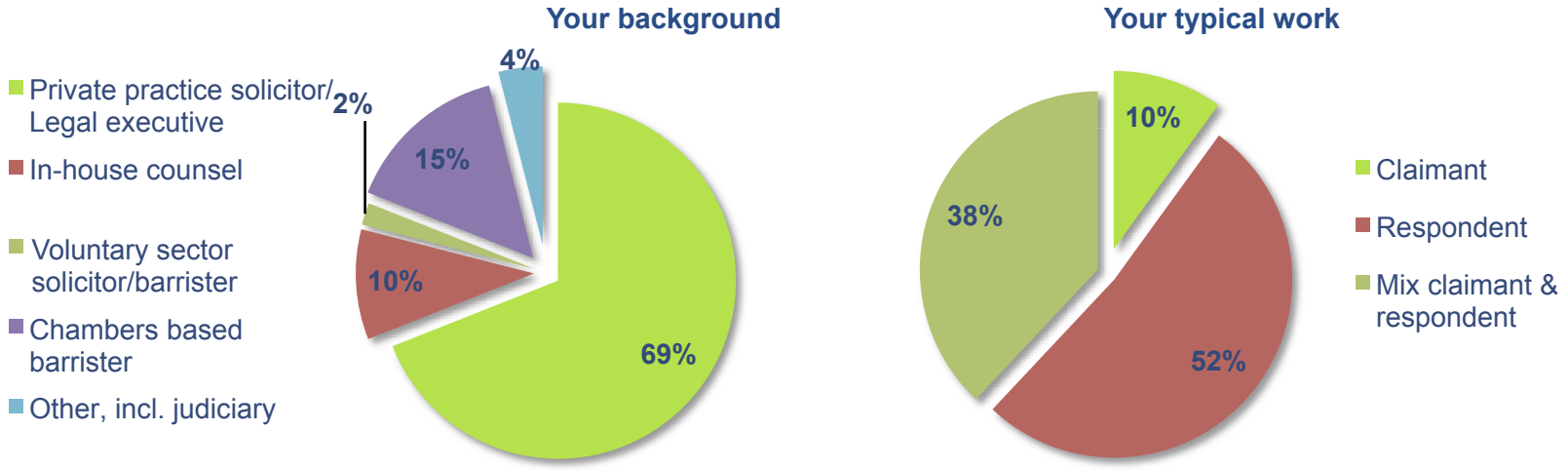
Comments we received on this issue included:

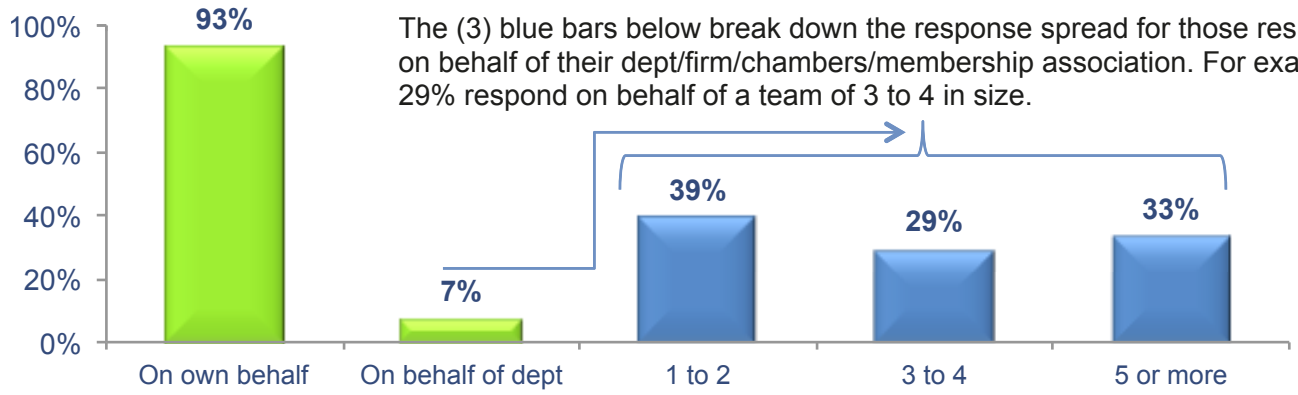
There should be stronger enforcement for awards which should lead not only to a greater number being paid but possibly a deterrent against others in the future.

Private practice solicitor, Primarily claimant, England & Wales

Who responded? Survey sample information

The sample reflects the make-up of Employment Law professionals; that is many act as Respondent solicitors in private practice in England & Wales. Their views of Employment Tribunals ('ET') are, by and large, representative of the overall ELA response, however, Chambers based barristers are most likely of the groups to reverse the trend here and there. The results make note of this where appropriate.





The (3) blue bars below break down the response spread for those responding on behalf of their dept/firm/chambers/membership association. For example, 29% respond on behalf of a team of 3 to 4 in size.

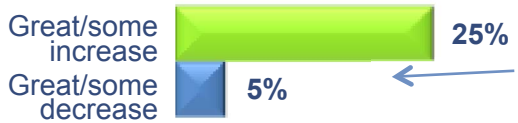
New Rules impact on ET since July 2013*

* The introduction of the 2013 Rules has impacted ET case management, judicial decision-making and with **mixed** success, the preliminary hearing

Q5a. ***Have initial judicial consideration and dismissal powers improved decision-making early in the Tribunal process?***

Q5b. ***Have initial judicial consideration and dismissal powers improved case management early in the Tribunal process***

Q6. ***Thinking about a response (or claim) which has little reasonable prospect of success, have you experienced an increase, or decrease in willingness on the part of Employment Judges to make deposit orders in respect of "any allegation or argument"***



Many couldn't give a clear view, 37% said in-between & 33% don't know. The 25% reporting an increase rises to 38% for chambers based barristers.

Q7. ***Prehearing reviews and case management discussions have been combined into one "preliminary hearing". How successful has this initiative been in improving case management efficiency?***

* Lengthy questions have been abbreviated for presentation purposes

Q8. ***Thinking about the changes made to the Rules of Procedure which came into force in July 2013 and the Presidential Guidance that followed, please use this space for any other brief comments you wish to make.***

184 people (26%) wrote in a comment. Each comment is likely to have contained more than one of the below categories/codes. Only the top 6 categories of answer are shown below:	**Number of Mentions**
Tribunals/judges not using their power to strike out claims / issue deposit orders / letting cases proceed when they should not,	24
Sift not utilised effectively / need more scrutiny at sift stage / claims getting through with no prospects of success,	23
Not noticed any improvement in way claims are handled / no change in way cases are managed,	18
Inconsistency amongst judges / some more proactive than others / inconsistency in approach between different tribunals,	16
Nothing changed in practice / little difference / nothing more than a name change / not much has changed,	15
Case management hearings taking longer / cumbersome / judges reluctant / slow to deal with case management matters,	13

Q8. ***Thinking about the changes made to the Rules of Procedure which came into force in July 2013 and the Presidential Guidance that followed, please use this space for any other brief comments you wish to make.***

The New Rules are an improvement over the Old Rules. But they have made very little difference in the way that the Tribunal approaches cases. Their improvement is primarily in being better expressed rules - easier to understand and apply - rather than introducing procedural innovation.

Voluntary sector barrister, Primarily claimant, England & Wales

I have not seen a difference in judicial willingness to determine claims as having no reasonable prospect of success at an early stage without consideration of the evidence but case management has substantially improved in terms of identifying the issues and preparing the case for trial.

Chambers based barrister, Mix of respondent and claimant, England & Wales

The Judiciary have failed to exercise the greater power given to them to strike out claims/responses.

Private practice solicitor. Primarily respondent, England & Wales

I have not noticed any marked improvement in the way ET's handle claims. I have not yet had a claim where a judge has struck out at the initial consideration stage (despite successfully getting claims struck out later on application) and I have experienced ET's insisting on having separate preliminary hearings to deal with separate issues (e.g. CMD, strike-out, consideration of applications) rather than combining at a single hearing.

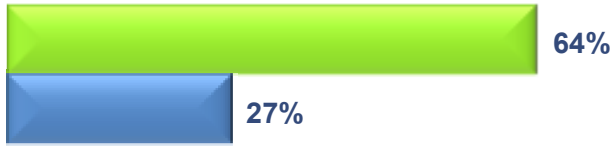
Private practice solicitor, Primarily respondent, England & Wales

Employment and Equalities Court

ET effectiveness *before* July 2013 and one Court for all Claims*

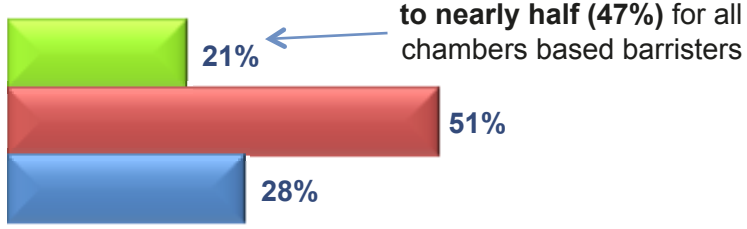
Section C began with a detailed description of the proposal to have all claims heard in one Court, covering statutory claims, common law/contractual and non-employment too.

Q9. Claims heard in one Court would be an improvement on the current system



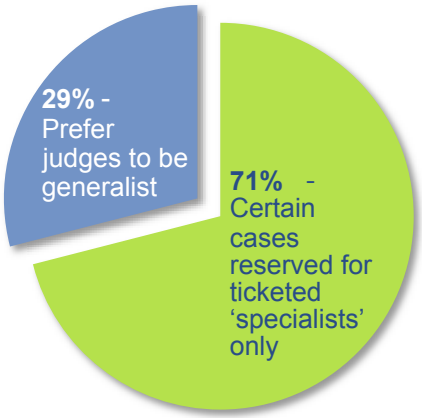
Q10. Prior to July 2013, i.e. before the introduction of fees, in your opinion how effective was the Employment Tribunal system?

Q11. If the new Court was to consider cases formerly heard before the High/County Court and Court of Session/Sheriff Court, should there be a minimum requirement so far as rights of audience are concerned?

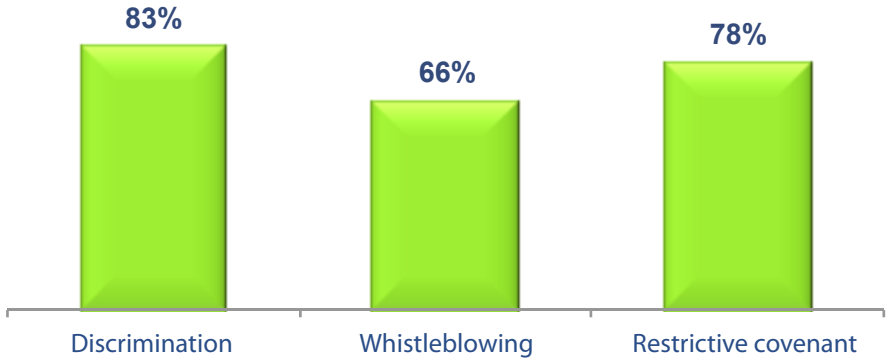


*Lengthy questions have been abbreviated for presentation purposes.
**Agree=Strongly/tend to agree combined, similarly for disagree

Judges to take on a generalist or certain cases requiring a ticketed specialist?



Q12* Would you like to see judges taking on a generalist role (hearing all cases) or a ticketed specialist role for certain categories of cases?



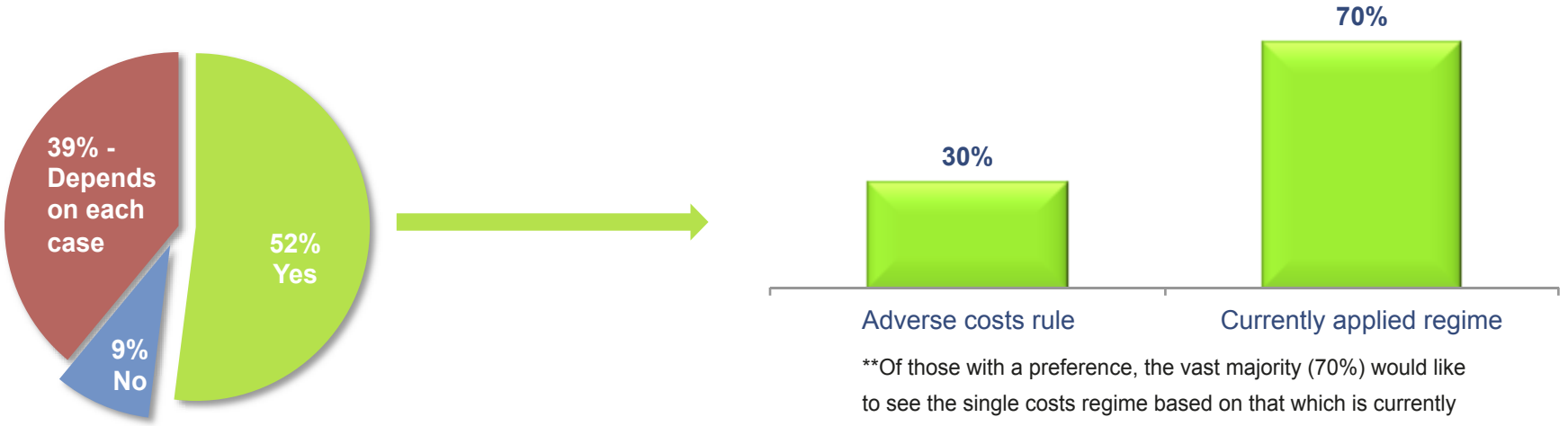
**Of those wishing to see a ticketed specialist judge, 8 in 10 prioritise discrimination and restrictive covenant cases for this role. Half (50%) ticked all 3 categories.

Q13. Would you approve of Restrictive Covenant / Breach of Confidentiality cases being heard in the proposed new Court?	78% Yes	22% No	Chambers barristers 62% Y
Q14. Would you approve of applications for Search Orders (fka "Anton Pillar Orders") being heard before the proposed new Court?	58% Yes	42% No	Chambers barristers 44% Y/56%N
Q15. Would you like to see the retention of lay members in the proposed new Court?	23% Yes (38% for Claimants	13% No	65% Depends
Q16. In selected cases (such as in financial services or health authority/medical cases) would you approve of appointing specialist assessors where their expertise may assist the judge?	14% Always	9% Never	77% Sometimes

*Base: All (n=719

**Base: All indicating a preference for a ticketed specialist judge for certain cases (n=508)

Q17. ***Would you want a single costs regime (in Scotland, expenses) for all cases before the proposed new Court?***



**Of those with a preference, the vast majority (70%) would like to see the single costs regime based on that which is currently applied before the Employment Tribunal.

Q18. ***Which of the following do you prefer? Tick up to 2 only***	%	**Comment**
For all cases heard in the new court, using the costs regime that currently applies in Employment Tribunals,	34	The 2nd adverse costs rule is the least preferred of the 4 presented options – with minimal statistical difference between across the respondents for the remaining 3 options. Only 7% ticked "none of the above"
For all cases heard in the new court, using the adverse costs regime that applies in the High Court/County Court only,	17	
Using the Employment Tribunal costs regime only for those cases which were formerly heard in the Employment Tribunal,	39	
Using the adverse costs regime only for those cases which were formerly heard in the High Court/County Court,	32	

*Base: All (n=719

**Base: All indicating Yes or Depends to Q17(n=654)

Q19. ***Thinking over this section concerning the potential changes in the Employment and Equalities Court, please use this space for any other brief comments you wish to make.***

155 people (22%) wrote in a comment. Each comment is likely to have contained more than one of the categories/codes below. Only the top 6 categories of answer are shown below.	**Number of Mentions**
Fairer costs regime / need a modified fee regime / costs to help fund the system / lower cost for claimants	20
Consider good idea / improvement an advantage / good idea in theory / issues dealt with by a single court	18
No unifying link between / too far wide ranging / do not sit together / specialism's / not equipped to deal with all cases	17
Avoid / foolish proposal / no logic / not satisfactory / separate jurisdictions work reasonably well	17
Access to justice should be preserved / not to lose tribunal ethos / access to court for claimants	17
Training would need to increase / level of knowledge / need for specialist judges / higher legal skills / experience	16

Q19. Thinking over this section concerning the potential changes in the Employment and Equalities Court, please use this space for any other brief comments you wish to make.

I am a little conflicted over the costs regime as I can see the merit in the adverse costs regime, but would be concerned it will prevent people from taking legal action. I also see that certain types of claims and remedy (injunctions/search orders) may not be appropriately dealt with by the same judge, as say, discrimination.

Private practice solicitor, Primarily claimant, England & Wales

Adverse costs can be really large for restrictive covenants because of the need for injunctions rather than damages claim. There is a huge need to ensure they are in place to be a disincentive to breach the covenant. However, I do not agree with adverse costs generally for employment matters because of the risk to the employees.

Private practice solicitor, Primarily respondent, England & Wales

Whilst change is sometimes good, the potential changes would lose the whole spirit behind Industrial Tribunals - developments over the years have made the new Employment tribunals much more like any other court with more rigid rules and procedures.

Private practice solicitor, Mix of respondent and claimant, England & Wales

The proposal to use the combined court for restrictive covenant and confidentiality litigation does not take into account the scope for third party companies to become involved as co-defendants. It is very concerning to suggest that the ET system is anywhere near being able to cope with urgent applications, or applications for searches/seizures etc.

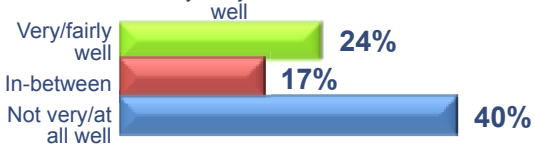
Chambers based barrister, Mix of respondent and claimant, England & Wales

ELA Conciliation and ADR

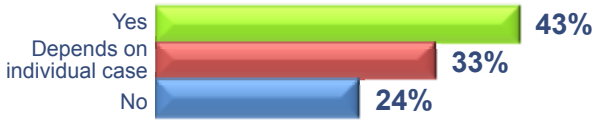
How well is Early Conciliation/Judicial Mediation working?

Q20. How well do you believe Early Conciliation is working?

Q21. How well do you believe Judicial Mediation is working?



Q22. Do you believe that some form of Early Conciliation or mediation prior to the commencement of proceedings should be compulsory?



Comment

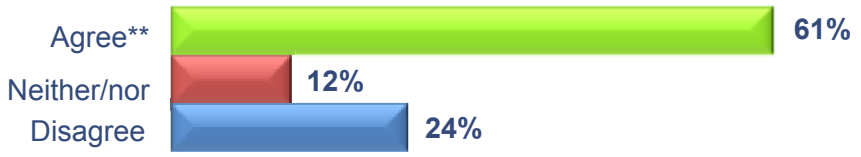
- There is relatively divided opinion over the performance of Early Conciliation.
- Of those whose typical work is Claimants, 42% say Early Conciliation isn't working for them (compared to the 28% average)
- There is a clearer picture turning to Judicial Mediation, two in five (40%) stating that it is not working very well.
- Compulsory mediation/conciliation is generally accepted by many (43%) and most strongly by In-house counsel (51%) and the Voluntary sector (50%)

Comment:
Of those able to give an opinion, Judicial Mediation has likely stayed the same as decreased and ADR has remained the same

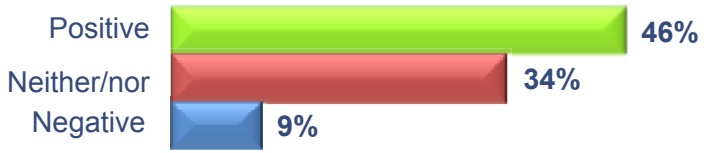
	Increased	Stayed same	Decreased	Don't know
Q23. Following the introduction of fees, has participation in **Judicial Mediation** increased or decreased?	5%	22%	24%	50%
Q25. Rule 3 placed ADR on a formal footing/centre of ET Rule. Has participation in ADR increased or decreased since this has occurred?	10%	42%	3%	45%

ADR Options and availability of Judicial Mediation

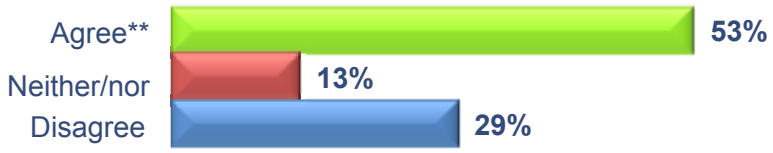
Q24. ***Where a claim has been lodged, and irrespective of whether or not the employment relationship is continuing, Judicial Mediation should be available in all cases.***



Q26. ***What impact do you believe that the currently available conciliation, mediation and ADR options have on employment litigation?***



Q27. ***Thinking about the further ADR ideas e.g. judges giving an 'early indication', having a 'one stop shop' court, by how much do you agree or disagree that they be introduced?***



Lengthy questions have been abbreviated for presentation purposes.
**Agree=Strongly/tend to agree combined, similarly for disagree

Comment

- Most (61%) agree Judicial Mediation should be available in all cases and nearly half (46%) believe ADR/Early Conciliation has had a positive impact while a third (34%) are ambivalent.

- Further ADR ideas, including an early "one-stop-shop" court would be agreeable to half (53%) of ELA Members but a sizeable minority (29%) disagree. Voluntary sector solicitors/barristers (43%) and Chambers based barristers (47%) are most likely to disagree that further ADR options should be introduced.

Q28. ***Thinking over this section concerning the proposals concerning Early Conciliation and ADR, please use this space for any other brief comments you wish to make.***

173 people (24%) wrote in a comment. Each comment is likely to have contained more than one of the below categories/codes. Only the top 6 categories of answer are shown below.	**Number of Mentions**
Early Conciliation/Judicial mediation are undermined by fees / decreased due to introduction of fees / fees need to be restructured	17
Early Conciliation process is ineffective / unnecessary admin / waste of time/money / unconvinced of value	14
In favour of mediation / option of judicial mediation is good / should be more readily available	13
Could lead to unfair pressure to settle / needs to be monitored more to avoid pressure to settle	13
Early Conciliation working well / effective / positive experience / successful / in favour of ACAS scheme	12
Judicial mediation has been disappointing / doesn't work / waste of time/money / external mediation more effective	12

***Q28.** Thinking over this section concerning the proposals concerning Early Conciliation and ADR, please use this space for any other brief comments you wish to make.*

To be effective, Early Conciliation needs to encourage all Claimants to list all of their claims and provide sufficient details of their complaints at the outset so that the Respondent knows what they are facing and can properly assess whether or not they wish to settle. I would be in favour of Early Conciliation commencing after the ET1 has been submitted. This would also simplify time limits by reverting back to the three month time limit, which is much easier for Claimants to calculate.

Chambers based barrister, Mix of respondent and claimant, England & Wales

While the introduction of an Early Neutral Evaluation or decision on the paperwork may be helpful, particularly for cases such as unlawful deduction of wages and breach of contract, safeguards will have to be put in place to ensure that parties are not disadvantaged, particularly lay representatives. Further if a Judge provides an Early Neutral Evaluation and the case progresses to a merits hearing, I suggest that judge would not be able to hear the case and that the Early Neutral Evaluation is not retained with the main file in the Tribunal office in the same way that tenders are filed separately in personal injury cases.

In-house solicitor, Primarily respondent, Scotland

***Q28.** Thinking over this section concerning the proposals concerning Early Conciliation and ADR, please use this space for any other brief comments you wish to make.*

Employers with deep pockets tend not to want to bother with early conciliation or only give it lip service and are quite happy to proceed with the case to the bitter end so that they can seek costs against the unfortunate litigant employee.

Voluntary sector solicitor, Mix of respondent and claimant, England & Wales

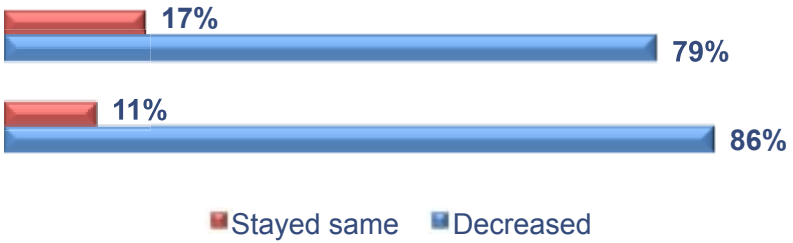
I'm not convinced Early Conciliation has had a significant impact on reducing claims. The Employment Tribunals more widely exercising their strike out powers and considering issues regarding prospects of success at an early stage would be of assistance.

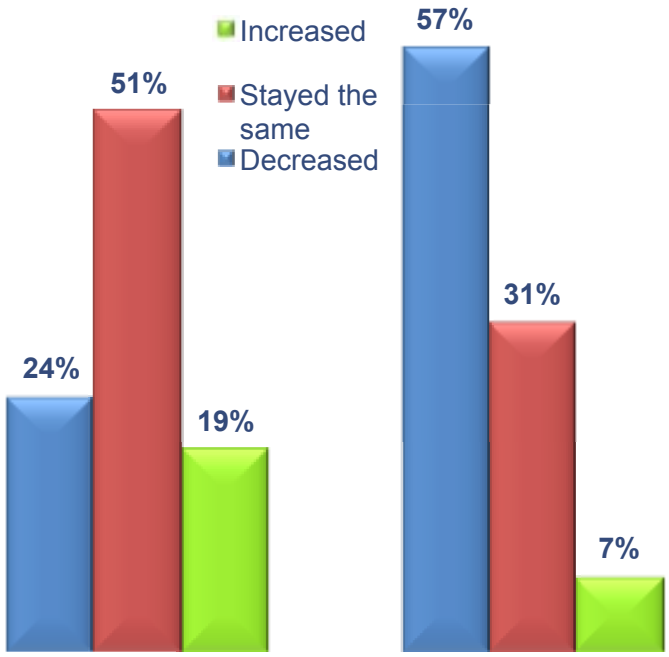
Private practice solicitor, Primarily respondent, England & Wales

Funding of Employment Tribunals

Q29. Since the introduction of tribunal fees in July 2013, has the number of inquiries relating to potential employment tribunal proceedings:

Q30. Since the introduction of tribunal fees in July 2013, has the number of instructions relating to ET cases:





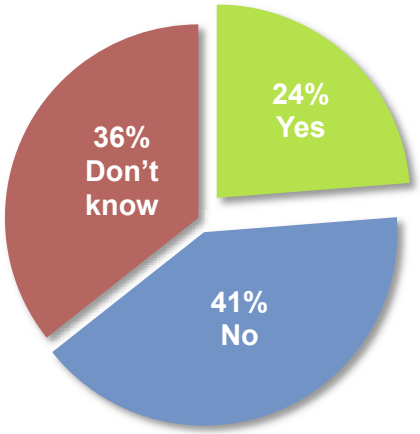
Q33. The number of settled ET cases has..?

Q32. The number of ET instructed cases proceeding to hearing has…?

Comment

- Since July 2013, fee introduction has dramatically decreased the number of inquiries and the number of instructions for at least 8 in 10 ELA members.
- The introduction of fees appears to have equally affected ELA members no matter where they work or what type of work they perform.
- 6 in 10 (57%) state that the number of ET cases proceeding to hearing has decreased and,
- Half (51%) believe the number of **settled** cases has remained the same as before fees were introduced in July 2013.

***Q31.** Since the introduction of tribunal fees in July 2013 has there been a change in the way in which claims are funded?*



Comment

- A quarter (24%) believe there has been a change in the way claims are being funded now. However, considerably more (41%) do not feel there has been a change and almost as many (36%) do not know and this latter figure rises to 61% for in-house counsel.

- Of the 165 writing in a comment (Q31b) expanding on the changes they have directly experienced; typical categories of response are noted below:

169 people (24%) wrote in a comment. Each comment is likely to have contained more than one of the categories/codes below. Only the top 3 categories of answer are shown below:	**Number of Mentions**
Claimants less likely to take claim forward unless they have LEI / increase in insurance backed claims	60 (36%)
Reduction in the amount of cases / claims reduced in numbers / decline of privately funded claimant work	40 (24%)
Increase in a fixed fee structure / capped fees / fixed package due to the removal of legal aid	33 (20%)

***Q31.** Since the introduction of tribunal fees in July 2013 has there been a change in the way in which claims are funded?*

We have 3,500 employees. We used to run at around 6-8 live ET cases at any one time. Since the introduction in fees in July 2013 we have only had 3 new cases in total. This is a significant decrease.

In-house solicitor, Primarily respondent, England & Wales

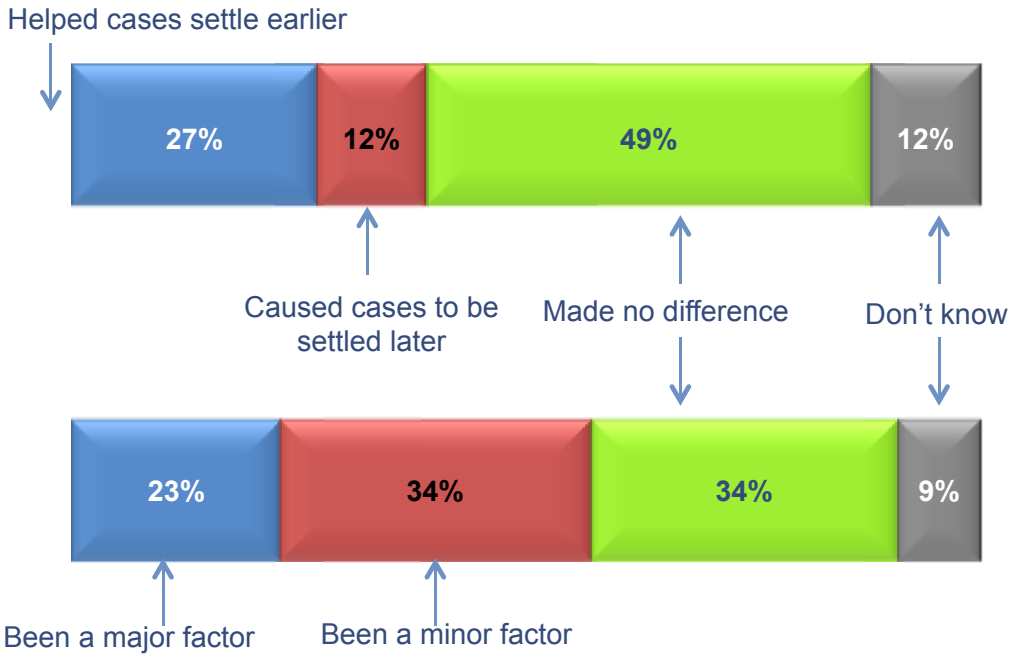
There is a lack of access to justice for those on lower based income. Less funding of claims through DB agreement due to fees and lack of fee remission for some employees. Fixed fee now has to factor in ET fees in addition.

Private practice solicitor, Mix of respondent and claimant, England & Wales

The changes have brought a dramatic drop in cases, far more time wasted with potential clients who eventually decide not to proceed. Whilst there are fewer clients bringing 'spurious' cases significant numbers of claimants with viable and morally defensible claims are being put off.

Private practice solicitor, Primarily claimant, England & Wales

Q35.** Since the introduction of tribunal fees in July 2013, which of the following statements best reflects your viewpoint about how fees have affected **the point at which cases settle?



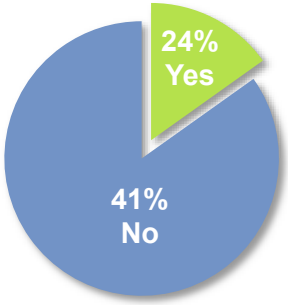
Q35.** Since the introduction of tribunal fees in July 2013, which of the following statements best reflects your viewpoint about how fee introduction has affected **case settlements?

Comment

- Turning our attention to how fees have affected the settlement of cases, we see opinion more divided across ELA members. 1 in 3 each feel fees have played only a minor role or made no difference, but nearly one quarter (23%) feel fees have played a major role.

- Most (49%) perceive that fees have made no difference to the point at which cases settle but a sizeable minority (27%) think they've helped to settle cases earlier. Regarding the point at which cases settle, it may be of interest to note that 30% of chambers based barristers don't know if fees have helped. Q35 'Made no difference' scores are slightly apart for Claimant specialists (39%) and Respondents (55%

This section of Funding questions examined the challenges of applying for remission of fees. Pertinent in particular to those whose typical work is on behalf of Claimants (10% of ELA members).



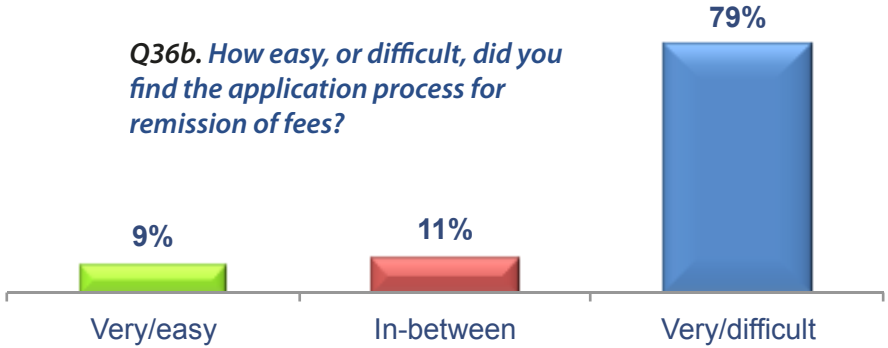
Base: All (n=719)

***Q36.** Have you helped any client apply for remission of fees?*

Typical Work

"n" refers to the number in the sample and the %age refers to the proportion of the 110 helping clients with fee remission

***Q36b.** How easy, or difficult, did you find the application process for remission of fees?*

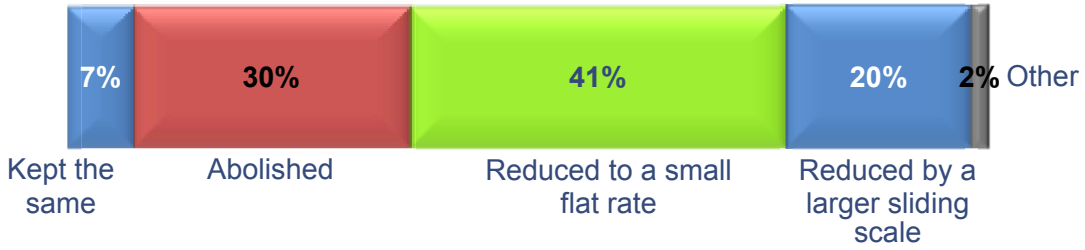


Base: All indicating Yes to Q36 (n=110); Have you helped client with fee remission application?

	Claimant	Respondent	Mix claimant & respondent	Comment
***Q37.** What proportion of the applications for remission in which you have been involved have resulted in*:*	n=44; 40%	n=19; 17%	n=19; 17%	Only a quarter (24%) have helped any client apply for fees remission. The majority (79%) of whom find this a difficult process.
Full remission	72%	78%	60%	But, at least 6 in 10 gain full remission; and this applies in particular to those typically working with Claimants.
Partial remission	28%	22%	40%	

Q38. In your direct experience what effect has the introduction of tribunal fees had on access to justice?

Q39. Do you think that the employment tribunal fees should be?



Comment

- By far the majority (57%) state that fees have had a very detrimental effect on access to justice. This is a clear measure of the depth of feeling on this subject arena.

- The solution appears to most (around 61%) to investigating reducing fees; either to a flat fee or a sliding scale. A tiny minority 2% (n=17) chose to write in an "Other" comment – an example of which is as follows:

Fees should be dependent on the value of the compensation that the Claimant is seeking. Most problems caused by Claimants who are looking for unrealistic settlement figures. Respondent should also pay small hearing fee.

Chambers based barrister, Mix of respondent and claimant, England & Wales

***Q40.** Thinking over some of the previous questions regarding the introduction of tribunal fees in July 2013, please write in the comment box provided, about the impact this has had on ensuring effective access to justice.*

294 people (41%) wrote a comment. Each comment is likely to have contained more than one of the below categories / codes. The top 7 categories of answer are shown below.	**Number of Mentions**
Access to justice is being denied / detrimental affect on ensuring access to justice	72
Fees are too high / fees need to be reduced / made fairer	67
A lot of good / viable / meritorious cases are now not being pursued	61
Claimant cases are down / the number of ET claims has fallen / because they cannot afford the fees	55
It has prevented a lot of small / low value claims	39
Fees do have a place / fees are needed to dissuade vexatious meritless claims	36
Poorer people / those on low wages have suffered the most / because they can't afford the fees	32

***Q40.** Thinking over some of the previous questions regarding the introduction of tribunal fees in July 2013, please write in the comment box provided, about the impact this has had on ensuring effective access to justice.*

Employment tribunals are now the preserve of the wealthy, including those who have funding via trade unions or insurance. The fees are a disaster for the low paid and good for employers who don't pay their staff.

Private practice solicitor, Mix of respondent and claimant, England & Wales

Increase in employers just refusing to pay small amounts of money on the basis they don't expect claimant to go to ET because of the fees. Puts undue pressure on claimant at various stage especially with the very high hearing fee.

Private practice solicitor, Primarily claimant, England & Wales

I think it should be right that we follow other Civil areas of law - by having a PAP Protocol - which is what Early Mandatory Conciliation is . I don't believe in fees - but if a fee structure is to remain - it should be a small flat fee and payable also by the Respondent in defending a case

In-house barrister, Primarily respondent, England & Wales

Fees have been an utter disgrace. The claims most deterred have, probably, been small claims for unpaid wages, holiday pay, notice pay and redundancy pay. They have equally deterred other perfectly meritorious claims. They are a cynical exercise in protecting business.

Chambers based barrister, Primarily claimant, England & Wales

***Q40.** Thinking over some of the previous questions regarding the introduction of tribunal fees in July 2013, please write in the comment box provided, about the impact this has had on ensuring effective access to justice.*

Tribunal fees have had a devastating effect on access to justice. This is particularly so in maternity / pregnancy cases where the claimant has run out of money at the point of issuing proceedings because maternity pay has been exhausted or is on SMP. Many of the new family friendly rights will be unenforceable in practice for this reason. As for the argument that the fees regime has weeded out vexatious or unmeritorious claims, this is misplaced from my experience. Weak claims are still being pursued post-fees regime and I have experienced no discernible drop in the volume of unmeritorious cases that cross my desk. The concern is that after decades of progress in developing employment rights that, on the whole, strike a balance between employee / employer, the coalition is reversing the clock by erecting cost barriers that render those rights, for the majority of workers who have limited means, practically meaningless.

Chambers based barrister, Mix of respondent and claimant, England & Wales

It has had a tremendous impact on low level wages claims; such claims are rarely brought and this plays into the hands of unscrupulous employers.

Private practice solicitor, Primarily respondent, England & Wales

Those most at risk of recurrent discrimination cannot afford to litigate. This undermines the Equality Act and has resulted in zero protection.

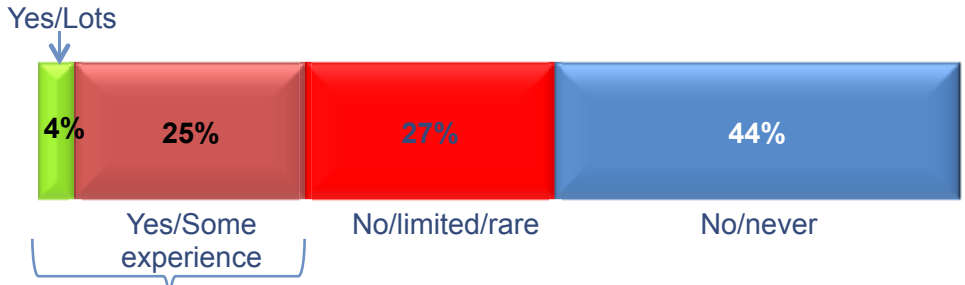
Private practice solicitor, Mix of respondent and claimant, England & Wales

I am concerned about the great reduction in small money claims, e.g. unlawful deductions claims and straightforward unfair dismissal claims, since the introduction of fees, suggesting that people are struggling to enforce their basic rights to challenge employer decisions or refusal to pay accrued earnings.

Member of the judiciary, Mix of respondent and claimant, England & Wales

Effective enforcement of Employment Tribunal awards

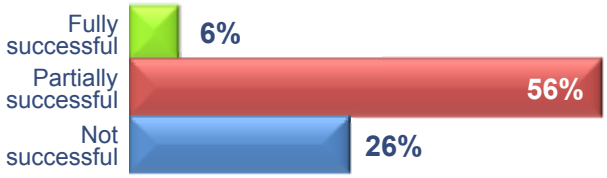
*Q41. Have you experience of successful claimants receiving no or partial payment of tribunal awards?**



29% average for ELA overall Yes/Lots/Some experience (n=208)	
ELA Category/key breakdown	
Voluntary sector solicitor/barrister**	79%
Chambers based barrister	43%
Claimants	70%
Mix claimant & respondent	36%

*Q41b. Were enforcement proceedings taken?****

*Q41c. Typically speaking, how successful were the enforcement proceedings?*****



*Base: All (n=719) **Small base: (n=14)

***Base: All with at least some experience of successful claimants receiving no, or partial, payment of awards (n=208)

****Base: All who say enforcements proceedings were taken (n=185)

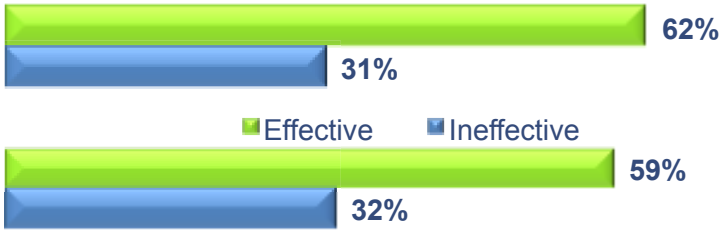
Effective enforcement of Employment Tribunal awards

*Q42i. Have you had any experience of dealing with the: ACAS and ET Fast Track for the enforcement of ACAS settlements and tribunal awards? (only applicable to England & Wales)**

*Q42ii. Have you had any experience of dealing with the: County Court for the enforcement of ACAS settlements and tribunal awards? (Sheriff Officers in Scotland)***

*Q42b. Now, think about the level of effectiveness in dealing with the: ACAS and ET Fast Track for the enforcement of ACAS settlements and tribunal awards? (only applicable to England & Wales)****

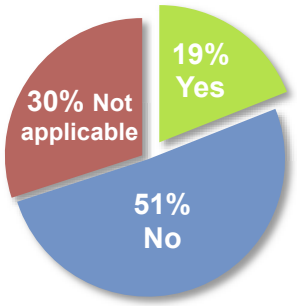
*Q42b. Now, think about the level of effectiveness in dealing with the: County Court for the enforcement of ACAS settlements and tribunal awards? (Sheriff Officers in Scotland)*****



Comment

- The vast majority have limited, or no experience, in dealing with the County Court or ACAS/ET Fast Track for enforcement of awards. Of those that do, the majority, around 6 in 10, believe they are effective.
- Regarding ACAS/ET Fast Track ineffectiveness, the average (31%) increases marginally to 43% for those typically working with Claimants. And in County Court, ineffectiveness (32%) increases to 70% in the voluntary sector and 53% for those working typically with Claimants.

*Base: All (n=719) **Small base: (n=14) ***Base: All with experience dealing with ACAS/ET Fast Track for the enforcement of ACAS settlements and tribunal awards (n=125) ****Base: All with experience dealing with County Court for the enforcement of ACAS settlements and tribunal awards (n=239)



Base: All (n=719)

***Q42c.** Has any client of yours chosen not to enforce an Employment Tribunal award?*

***Q42d.** Was cost a factor in the client's decision*	
Cost a small factor	16%
Cost a major factor	**49%**
Cost the entire reason	21%

Base: All saying 'yes' at Q42c; (n=140)

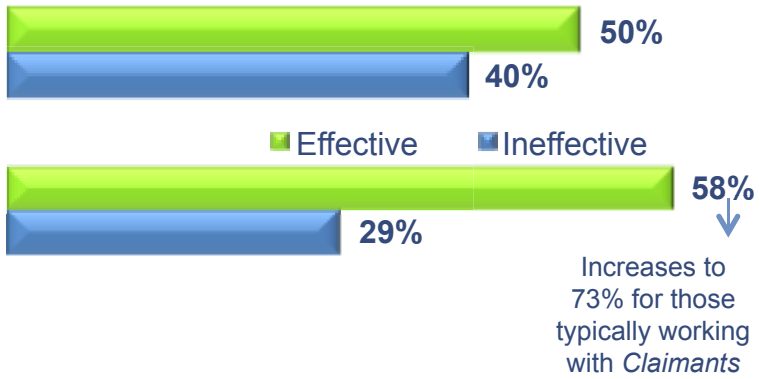
The Government is proposing imposing financial penalties upon respondents who fail to pay ACAS settlements and tribunal awards in clause 148 of the Small Business, Enterprise and Employment Bill.

***Q43.** How effective, if at all, do you think this proposal will be in increasing the number of respondents who pay the ACAS settlement or tribunal award?*		***Q44.** Where do you think any financial penalties should go?*		***Q45.** Do you think Enforcement Officers should be given power to recover sums due to the claimant as well?*	
Effective	**67%**	To the Consolidated Fund as the Bill currently suggests	8%	Yes	**85%**
Ineffective	21%	Ring-fenced to be spent on improvements to the tribunal service	28%	No	7%
Don't know	11%	To the claimant if they have still not received their full amount of compensation	**62%**	Don't know	8%

Ministers originally suggested they were considering…….

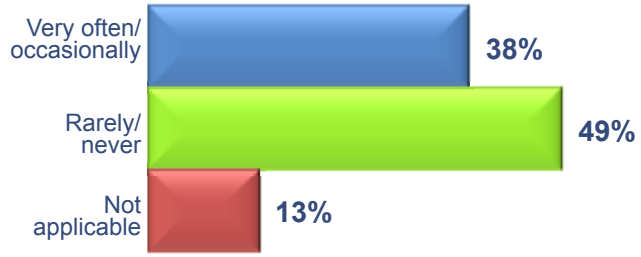
… a system of naming and shaming respondents who failed to pay ACAS settlements or tribunal awards as happens with employers who fail to pay the National Minimum Wage. How effective in increasing payment of settlement/award?

… a system of naming and shaming respondents who failed to pay ACAS settlements or tribunal awards as happens with employers who fail to pay the National Minimum Wage. How effective would this be in increasing payment of settlement/award?



A respondent company goes into insolvency and then a new company is set up trading under a similar name with the same Directors or persons closely connected to the Directors of the old company (so called "Phoenix companies" or "prepacks").

Q49. Have you experienced the above situation where a successful claimant then receives no or partial payment of a tribunal award?



Comment

- *Naming & shaming* respondents failing to pay largely divides ELA member opinion. But deposit order power is seen as potentially more effective (58%).

- *Phoenix co. scenario's* cause issues for many (38%); this is particularly the case for those typically working for Claimants (66%). For Respondents (57%) are more likely to say rarely/never compared the average (49%).

Q50. ***Thinking over some of the previous questions regarding changes to the enforcement of tribunal awards, please use this space to write in your comments.***

123 people (17%) wrote a comment. Each comment is likely to have contained more than one of the below categories / codes. Only the top 6 categories of answer are shown below:	**Number of Mentions**
Personal liability of directors / cases where phoenix companies are set up to avoid payment should result in directors being required to meet the award	15
Fines / deposit orders / naming & shaming won't work / make any difference / will refuse to pay whatever the sanctions	14
Needs stronger enforcement / need resources to ensure enforcement is quick / effective	13
It should be unlawful to 'phoenix' a company to avoid paying an award / it's a big problem that should be addressed	12
Anything to improve the payment of awards is welcome	8
Further / higher penalties / limitations should be imposed / with phoenix companies being used to avoid paying	8

***Q50.** Thinking over some of the previous questions regarding changes to the enforcement of tribunal awards, please use this space to write in your comments.*

Enforcement in the County Court is complex - almost inevitably so. It would be no different in a single Employment and Discrimination Court. If the Crown had an incentive to collect a financial levy against unsuccessful Respondents, it would be a very significant improvement in recovery and enforcement if the Crown also enforced the Claimant's award. The majority of Respondents would be encouraged to pay and those that do not, could face further fees and costs. Whilst it would be of considerable benefit for Claimants to deal with phoenix companies, the reality of any solution would be an almost impossible rewrite of the insolvency laws. I doubt it could be achieved. One issue that should be considered is whether tribunal judgments and wages should be considered priority debts in an insolvency.

Chambers based barrister, Primarily respondent, England & Wales

Deposit orders for respondents at risk of not paying could produce an onerous additional step for respondents, particularly if they are required to provide some sort of proof of ability to pay in order to avoid being consider 'at risk' of not paying.

Private practice solicitor, Primarily claimant, England & Wales

The reason for non-payment is usually that the company becomes insolvent and then does a prepack avoiding liability. This is immoral and the law should be changed to stop this.

In-house barrister, Primarily respondent, England & Wales

There should be stronger enforcement for awards which should lead not only to a greater number being paid but possibly a deterrent against others in the future.

Private practice solicitor, Primarily claimant, England & Wales

Final Thoughts

***Q51.** Do you have any final brief comments about the survey, or the challenges facing the future direction of Employment Tribunals?*

169 people (24%) wrote a comment. Each comment is likely to have contained more than one of the below categories/codes. Only the top 6 categories of answer are shown below.	**Number of Mentions**
Fees are a barrier to justice / have hindered access to justice / have reduced the number of claims	39
Review fees scales / level of fees / reduce fees	26
Actually have access to justice / for all members of society	16
Tribunal system / service is inefficient / ineffective / need for more effective case management	14
Employees are unable to enforce their employment rights / no benefit to having rights if one cannot afford to access them	12
The introduction of fees / when access to justice is hard has seen employers taking much greater risks	10

It is a dreadful state of affairs where in a civilised society - in a developed country - in the twenty first century so many people are treated badly at work and have no recourse simply because they do not have the money to enforce their legal rights. The balance is tipping back too much in favour of the employer particularly in a climate of underemployment and a lack of good jobs. The public purse needs to be managed much more efficiently with proper scrutiny of the enormous waste of resource in the public sector (engagement of management consultants, analysts, managers for the sake of managers, accountants, agency staff at all levels etc) but this ought not to be at the expense of individual citizens who ought to be able to rely on the law to protect them in their employment. The provision of education, health and access to justice cannot become a private enterprise.

Private practice solicitor, Mix of respondent and claimant, England & Wales

Many claimants have been discouraged from pursuing legitimate, albeit, small claims. There would be more sense in a two tier system where claims that do not involve discrimination and which are less than £10,000 are dealt with in a more informal and less legalistic way and in which the Claimant does not have to pay fees. The absence of lay members is something to be regretted in cases where there are factual disputes.

Chambers based barrister, Primarily claimant, England & Wales

I think it is important to allow access to justice even for the smallest amount of unpaid wages. When access to justice is hard, employers take more risks as they know it will be too difficult for an employee to make a claim. Overall, and in the long run, it leads to less fair and reasonable treatment of workers.

In-house solicitor, Primarily respondent, England & Wales

The system used to work quite well, particularly in the North West from my experience. Now we have a system decimated simply by the use of fees, rather than through a balance of appropriate fees and proper and more robust case management of weak cases.

Private practice solicitor, Primarily respondent, England & Wales

Conclusion

The Survey makes clear that the dominant issue in the Employment Tribunal system is the fees payable in order to access it. At the time of writing, the Business Secretary responsible for their introduction, Vince Cable, is stating publically that fees were a mistake. He thus appears to be agreeing with our members, who (and whether acting for employers or employees) the Survey shows are greatly concerned that the introduction of fees has restricted access to justice.

It is in this context that the overwhelming view (80%) that the ET system was more effective before the introduction of fees in July 2013 must be read. Most members (64%) in fact welcomed the idea of a specialist Employment and Equalities Court, albeit (71%) with specialist 'ticketed' judges dealing with employment cases.

Even if such radical reform is not on the judicial or political agendas, there is much here on members' views on the existing system that will help ELA work with other agencies to build and improve. For example, whilst it is clear that many members (64%) welcome the combination of CMD's and PHR's, a significant minority (24%) thought the change 'not very/not at all successful' and the comments on the apparent lack of change in the Tribunals' approach to case management suggest more work needs doing.

Whatever the outcome of the election, and with nearly all the major parties pledging further reform to Employment Tribunals in one way or another, the detailed results in the survey are hugely valuable. ELA now has time to consider the results in their entirety and lead a strategy for pressuring for change, and improve ET justice.

Appendix - Survey methodology

- ELA appointed Infocorp Ltd to host the survey and collect and collate the response data. ELA also appointed NEB Research to analyse and evaluate the response data.

- ELA provided their survey partner, Infocorp Ltd. a list of 5,969 ELA members containing the individual's name, company name and email address.

- Each ELA member received a personal invitation and URL link to complete the online survey.

- The survey was "open" for completion during 16 March – 02 April 2015. Two reminders were sent to (non) respondents during fieldwork.

- 719 responses were received, which is a healthy 12% response.
    - 39 (7%) of the sample responded on behalf of 335 people across their firm/chambers/organisation. Their team (average=7) sizes varying from 2 to 70 people.
    - An argument therefore could be made that the results 'represent' approximately 1,015 [(719-39)+335] employment law practitioners.

- Using industry standard statistical estimates, the results of any particular question within this survey would be within 3.4% points (+/-) reach of the result if all 5,969 members had responded.

- Open-ended answers were 'coded' and typical responses categorised, with example verbatim comments extracted.

Survey methodology (continued) - Notes about verbatim comments

- Survey respondents had the opportunity to comment on 9 questions. Typically 25% wrote a comment; this percentage ranging from 17% writing a comment about tribunal awards (Q49), to 41% regarding the introduction of Tribunal Fees (Q40).

- Since July 2013, 9 in 10 (86%) of ELA members have seen a decrease in the number of instructions relating to employment tribunal cases and Fees, Opinion naturally elicited more written-in comments (41%) when compared to the 25% writing a response to another topic.

- But, it is imperative to note that 25% is still considered a "minority" in statistical terms. The minority that take their time and choose to write-in should, of course, be noted and their views considered against the sounder footing of the quantitative findings to questions across that particular survey section.

- Easily accessible, verbatim comments can often attract an unfair and disproportionate amount of thought and analysis-time. Powerful and insightful statements of course help bring to life the sometimes "dry" numerical statistics. But this should not be at the expense of key findings held and put forward (to closed or open questions) by the majority (ie. at least 50% to 60%+) of the respondents.

ELA Survey

The Future of Employment Tribunals

EMPLOYMENT
LAWYERS
ASSOCIATION

SURVEY RESULTS

April 2015

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