



## **Amicus Section of Unite the union response to the DTI Consultation on Dispute Resolution**

**This response is submitted by Unite Amicus Section. Unite is the UK's largest trade union with 2 million members across the private and public sectors. The union's members work in a range of sectors including manufacturing, financial services, print, media, construction, local government, education, health and not for profit.**

### **Executive Summary**

- a) Unite Amicus Section supports the principle underpinning the dispute resolution legislation introduced in 2002 and 2004 which requires all employers, regardless of the number of staff employed, to follow minimum statutory procedures when handling any grievances or dismissals in their workplace.
- b) All workers should have access to effective and fair disciplinary and grievance procedures.
- c) The right to be represented, rather than accompanied, throughout all grievance and disciplinary procedures should be established in line with the ECHR Decision.<sup>1</sup>
- d) Section 32 of the Employment Act should be repealed and the pre-acceptance stage removed. It is noted that this may be given effect to by order of the Secretary of State pursuant to s. 32 (8) (a).
- e) The position in relation to the ACAS Code of Practice for disciplinary and grievance procedures should be clarified to make it clear that it is mandatory and to ensure appropriate recourse for workers where employers fail to adhere to Code.
- f) ACAS must be adequately resourced to meet the needs of employers and employees in the resolution of disputes at the earliest opportunity.

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<sup>1</sup> Wilson, NUJ & Others -v- UK ECHR 1996

- g) Amicus has made separate representations to the Gibbons' review on the matter of representative, (or class), actions on behalf of employees to employment tribunals and this recommendation is repeated in this submission.<sup>2</sup> Two additional issues relevant to that are added to this response (below at 9.10 et seq.)
- h) Unite Amicus Section would be happy to join with others to advise on the content of guidelines aimed at encouraging and promoting early resolution of disputes.
- i) Unite Amicus Section would support the simplification of the Employment Tribunal forms.
- j) Unite Amicus Section would be in favour of a single time limit for all tribunal applications and would propose that this be 6 months.
- k) Unite Amicus Section has set out in the text of this submission a number of suggestions relating to the conduct of Employment Tribunals. One improvement in a minority of cases would be to permit the Official Solicitor to act in appropriate cases, as when the claimant is under a disability and cannot give proper instruction.

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<sup>2</sup> <http://www.epolitix.com/NR/rdonlyres/0FA8DCD5-1274-49E6-8286-90115E5ED7DE/0/Submissiononrepresentativeactionandtradeunions.pdf>

## **I) Introduction**

- 1.1. Unite Amicus Section welcomes the opportunity to comment upon the DTI Consultation document and the issues raised in it. The union has taken note of the Gibbons Review<sup>3</sup> and the recommendations contained therein. This response will address the questions posed by the consultation document but will be based on fundamental principles which Unite Amicus Section believes must be adhered to in order to ensure the maintenance and promotion of social justice within an employment framework.
- 1.2. The test of any social justice criteria must be that the rights of individuals meet the core labour standards established by International bodies to which the UK Government is a signatory. These include the ILO and the EU Social Charter. This response asserts that the right to individual and collective representation is a fundamental principle necessary to ensure social justice and that any system for resolution of disputes in a workplace must provide access to such representation for all workers.
- 1.3. Unite Amicus Section further believes that mechanisms designed to assist the process of resolution must be accessible, understandable and enforceable. Unite Amicus Section does not believe that these principles can or should be diluted on the basis of cost.
- 1.4. Unite Amicus Section will respond on the basis that all employers must be required to have in place procedures which meet the fundamental criteria of social justice. Unite Amicus Section will address the failings of the current systems by suggesting adjustments which it believes will assist in addressing the issues at the heart of this consultation:
  - a) Resolution of disputes at the earliest opportunity in the workplace;
  - b) Improved advice for dealing with disputes not resolved in the workplace; and
  - c) An improved system for more effective employment tribunals.

## **2. Statutory Disputes Resolution Procedures**

- 2.1. Unite Amicus Section welcomed the introduction of statutory requirements which ensured that appropriate procedures were followed by employers and employees when disputes arose in the workplace. The union's experience over the last 30 years has been that progressive employers have always sought to make clear the channels through which employee complaints should be made and how they, the employer would progress complaints against the employee (i.e. disciplinary action). However, it was equally clear from our experience that many employers did not make procedures clear to

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<sup>3</sup> A Review of Employment Dispute Resolution in Great Britain, Michael Gibbons, March 2007

employees or did not apply a consistent approach to such matters in the workplace.

- 2.2. Unite Amicus Section believes that the treatment of all workers must be cognisant of the fundamental rights which international law has determined appropriate and to which the UK government has signed up. This means ensuring that workers have the right to fair treatment free of discrimination of any kind. The nature of employment is such that reliance upon voluntary codes without the force of law has patently shown that many workers will suffer unfair treatment in the workplace. A more litigious approach to employment relations has arisen over a period of time where regulation of workplace rights has been extended and where the conduct of employee relations has rightly been placed under scrutiny. Evidence exists to support the contention that the existence of trade unions in the workplace contribute to the resolution of disputes at the earliest stage thus mitigating the need for litigation. (See also 2.4 below).
- 2.3. Sir Michael Gibbons in his report has acknowledged the clarity which the Dispute Regulations has brought to the procedures to be followed in specified circumstances. The government's failure to extend these procedures to all disputes has, in our view, caused some of the negative consequences to which the Gibbons Report alludes.
- 2.4. Unite Amicus Section, and to our knowledge, other trade unions do not rush to seek to progress cases to employment tribunals, a method of resolution which is costly and often unsatisfactory to all parties. However, the removal of statutory dispute resolution procedures will in our opinion not reduce cases proceeding to tribunal, will not bring about earlier resolution to cases which are capable of resolution in the workplace and will certainly not provide adequate protection to employees.
- 2.5. Experience in handling grievance and disciplinary matters in the workplace clearly demonstrates the desirability to have effective and clear procedures in place. The absence of such procedures is more likely to delay resolution due to misunderstanding and/or misrepresentation than prolong disputes in the way suggested by the Gibbons Report.

### **3. Consequences of repeal**

- 3.1. If the Government decides to repeal the statutory grievance and disciplinary procedures, Unite Amicus Section believes that it is essential that the Government takes steps to ensure that employers maintain or introduce effective grievance and disciplinary procedures.
- 3.2. These steps should include strengthening the ACAS Code of Practice on handling grievances and disciplinaries; increasing funding for

ACAS to provide effective dispute resolution services and advice, in particular for small firms; extending the existing right to be accompanied and reinstating the *Polkey* principle in unfair dismissal law.

#### **4. Early resolution of grievances in the workplace**

- 4.1. Unite Amicus Section accepts that it is preferable for disputes to be resolved in the workplace at the earliest stage subject to the principles of fairness and equity. Unite Amicus Section has consistently advised members to seek to resolve complaints wherever possible at the earliest stage with a line manager. Unite Amicus Section recognises that inevitably that is not always achievable and that access to fair procedures is an essential component to ensure justice for the employee.
- 4.2. Unite Amicus Section supports the guidance provided in the ACAS Code of Practice on the resolution of workplace grievances and notes that the Code advocates similar procedures for handling grievances as those contained in the statutory provisions. Unite Amicus Section wishes to see the ACAS Code of Practice made clearer so that employers have no doubt that a failure to follow the code will result in an appropriate sanction and remedy.
- 4.3. The current statutory procedures do inhibit the early resolution of grievances due to the application of s. 32 of the Employment Act 2002 which introduces the concept of a pre-acceptance stage. This provision drives employees and employers to focus on procedure rather than resolution as the employee is conscious of the removal of their ultimate right to pursue a tribunal claim in the event of an employer failing to respond satisfactorily to a legitimate complaint if the statutory procedure has not been followed.
- 4.4. **Unite Amicus Section would support any measures designed to ensure that reasonable procedures for handling grievances are followed by both employers and employees but would argue that this should be accompanied by the repeal of s. 32 of the Employment Act 2002 to ensure that access to justice for employees is not compromised. Unite Amicus Section notes that this may be given effect to by order of the Secretary of State pursuant to s. 32 (8) (a).**
- 4.5. **Unite Amicus Section calls for increased funding for ACAS to enable them to support the measures and greater promotion of the role and contribution that trade unions make to the resolution of disputes in the workplace.**
- 4.6. **Reasonable employers and their representatives appreciate the role of trade unions in assisting with dispute resolution and avoiding frivolous and poor claims.**

## 5. Right to be represented

- 5.1. In both grievance and disciplinary procedures Unite Amicus Section strongly holds the view that an employee should have a statutory right to be represented. This view is supported in law by the decision by the European Court of Human Rights in *Wilson, NUJ and others -v- UK* in 1996.
- 5.2. The current provisions offer only the right to be accompanied and whilst the interpretation of this status has been extended by the Employment Relations Act 2004, s. 37, the failure to provide a statutory right to be **represented** by a fellow worker or trade union representative undermines the basic universal standards which should apply to all workers.

## 6. ACAS

- 6.1. Unite Amicus Section would welcome the resources allocated to ACAS being increased to enable them to assist in the provision of services aimed at resolving disputes at the earliest opportunity. Such services should remain available as now on a voluntary basis and should not be part of a mandatory process. Alternative measures for resolution have to be appropriate to the nature and circumstances of each case and Unite Amicus Section does not believe that this can be prescriptive.
- 6.2. It is not clear from the consultation document the nature of any other help line or advice service which is being suggested, (Clause 3.2 of DTI consultation document). Unite Amicus Section believes that dispute resolution advice should be sourced from one central body which has established the confidence of all parties and experience over many years. ACAS is such a body and to introduce alternative sources is only likely to confuse and lead to potential inconsistency which this review is seeking to minimise or eliminate completely.
- 6.3. It is apparent to Unite Amicus Section that for ACAS to assume this wider role increased resources would be essential. Increased expenditure would be outstripped by savings to the Tribunal Service, employers and others. Unite Amicus Section also takes the view that all cases which have the potential to proceed to tribunal hearing have an equal standing and that ACAS should not be asked to target or prioritise but should be provided with the resources necessary to carry out its conciliation function.
- 6.4. Unite Amicus Section supports proposals to remove the fixed term conciliation periods which place time limits on ACAS' duty to conciliate employment tribunal claims. There is evidence that ACAS' success rate in conciliating claims covered by the fixed conciliation period

arrangements has fallen marginally since the legislation was introduced in 2004.

## **7. Unfair Dismissal Law**

7.1. in the event that the statutory procedures are repealed a wide review of the unfair dismissal laws would be required to include at the very least the re-instatement of the principles of 'Polkey' and the introduction of an automatic unfair dismissal remedy where reasonable procedures had not been followed.

## **8. Employment Tribunals**

8.1. It is important to adhere to the principle that wherever possible disputes should be resolved in the workplace. It is therefore important to recognise that changes to the tribunal system are unlikely in themselves to assist the process of increasing the number of disputes resolved in the workplace. Unite Amicus Section supports the TUC view of opposing powers to impose a 'costs' regime into tribunals. Such regimes are likely to be heavily weighted in favour of the employer, would apply even where the claimant loses and may be used by employers to intimidate employees into dropping claims.

8.2. Recognising that the purpose of any employment tribunal system is to ensure justice is delivered in an appropriate and effective manner, Unite Amicus Section would be concerned if the main driving force for change was to achieve cost reductions. However, Unite Amicus Section supports the view that where the only resolution to a dispute is to be through the tribunal system the process should be as simple as possible whilst ensuring that all relevant information is presented in a clear and concise manner.

8.3. The current mandatory ET1 form is too complex and may deter individual applicants from proceeding or force them to seek legal assistance in its completion. Due to the complexities of the form and the amount of information required it has the potential for applicants to omit relevant information and delay the claim or, at worst, to have the claim rejected due to it falling out of time. The respondent's form on the other hand is more concise, easier to complete and had no additional requirements added to it when last revised.

8.4. Unite Amicus Section would therefore support the simplification of the mandatory ET1 Form and would be happy to contribute suggested amendments to the format.

8.5. The consultation document refers to "straightforward" claims raising the possibility of a new swift approach for dealing with these. Unite Amicus Section would question the term straightforward and the number and definition of such cases. Monetary disputes are in our

experience rarely simple and are frequently associated with other aspects of claim e.g. redundancy and dismissal. A swift approach suggests that these would not involve lay people in the process of adjudication and that issue is addressed later in this document, (see paragraph 9.10)

8.6. Unite Amicus Section would be opposed to the claimants being asked to provide an estimate or statement of loss when making claims. Such a process is likely to disadvantage non-represented employees.

8.7. Unite Amicus Section supports the proposal that there should be a single unified time limit for all tribunal claims. This would certainly simplify the process which has become unnecessarily confusing and complex particularly for unrepresented applicants and small employers.

8.8. Likewise the approach to grounds for extension could also be simplified. Given the objective of the process is the fair and equitable delivery of justice then Unite Amicus Section believes that the grounds for an extension should reflect this. The 'just and equitable' formula which currently exists for cases brought under the equality legislation should be applied to all cases.

**8.9. Unite Amicus Section believes that the time limit set for all applications should be 6 months as this would address some of the problems currently encountered where the statutory dispute resolution procedures are applicable. There is nothing wrong with justice and equity and extensions should be granted where they are just and equitable.**

8.10. Collective actions

Unite Amicus Section has already made a submission on this specific point<sup>4</sup> to Michael Gibbons and for completeness a copy is attached as an appendix to this document. There is now an Office of Fair Trading discussion document<sup>5</sup> recognising that “representative actions should be more broadly available” and there will be an EU White Paper on damages actions for breach of the EC anti-trust rules that re-affirms this need. This should be extended to recognise trade unions as representing consumers and as representatives of members, who are consumers of legal services generally. Further, the recently expressed concerns of members of the Employment Appeal Tribunal<sup>6</sup> about deductions of up to 30% of damages, which also act a deterrent from settling cases, would be alleviated by the extension of representative actions.

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<sup>4</sup> **Representative Action and Trade Unions - 27<sup>th</sup> February 2007**

<sup>5</sup> [http://www.offt.gov.uk/shared\\_offt/reports/comp\\_policy/oft916.pdf](http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf)

<sup>6</sup> Bainbridge and Ors v Redcar & Cleveland Borough Council UKEAT/0424/06/LA (23 March 2007)

#### 8.11. Procedures and case management

One improvement in a small minority of cases would be to permit the Official Solicitor to act in appropriate cases, as when the claimant is under a disability and cannot give proper instruction. The employment of Legal Officers in Tribunal office to deal with routine tasks could assist. This would depend on the level of training. Witness orders could be dispensed readily. Orders for extensions and adjournments could be granted on merit and on consideration of the issues, but should not be refused to satisfy targets for the progression of cases. However, whilst orders for further particulars and disclosure should not be automatic, neither should they be too restrictive in the interests of justice.

#### 8.12. Management of vexatious or weak claims

Unite Amicus Section believes that the current powers are sufficient. They should be applied in a consistent and just manner. All parties should be discouraged from acting in an unreasonable way. Guidance to chairs of tribunals would be useful in this regard.

#### 8.13. Chairs sitting alone

As long as the Employment Tribunals seek to function as an “industrial court”, the use of lay members should be encouraged.

#### 8.14. Widening powers of Tribunals in recommending practices in areas of discrimination

It is illogical to suggest that “the policy aim [of helping employers understand their obligations under the law] can be better addressed through advice and guidelines for employers on employment law”. When a Tribunal finds that the employer has failed to act properly, as they do, the advice and guidelines have failed. Better that the Tribunal has the power and is encouraged to address particular shortcomings, in order to prevent recurrence. Further the exercise of such powers is to be encouraged as consistent with the McCrory principles. Indeed there is argument to be had to extend the powers to include, for example, “naming and shaming” paid for by the employer in appropriate circumstances. No doubt the CEHR can enhance this trend and should be able to promote compliance and exercise enforcement powers of its own. Business should not seek to resist in order to defend those who behave badly.

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## Appendix

See also paragraph 9.10 above

### **Representative Action and Trade Unions – an issue for the “Root and branch review of the framework for settling disputes between employers and employees”**

**To: Michael Gibbons**

**23 February 2007**

**Amicus is the UK’s second largest trade union, with a greater number of members in the private sector than any other union and it is the fastest growing in the public sector. Now with 1.2 million members, Amicus has members in a range of industries including financial services, manufacturing, print, media, the voluntary and not for profit sectors, local government and NHS health professionals. We are now on track to merge with the Transport and General Workers Union – to create a union of some 2 million members.**

#### **Responsible Unions**

Amicus members, in common with many other citizens have a need for legal support. Trade Unions are in a unique position to provide advice and assistance particularly in the field of labour law. This paper focuses on the issue of representative (or class) actions.

We recognise the aim of Government, consistent with the Tribunal Service overriding objective, to keep disputes away from tribunals and to avoid unnecessary time being spent and costs incurred. This is, of course, also in the interests of businesses and potential respondents.

It is in the nature of the role of trade unions not to resort to courts or tribunals to resolve workplace disputes affecting individuals or groups of workers in the first instance. We have no financial incentive to bring claims before the Employment Tribunals. We have an interest in the collective good of our members as well as their individual rights.

Attending the DTI workshop on 8 January our representative was encouraged by the apparent consensus that:

1. trade unions are a force for good in relation to the employment tribunal system, not least by weeding out poor claims and encouraging the responsible conduct of claims;
2. representative or class actions, including those brought in the name of the union, can have their place.

We would like to extend our involvement in assisting the tribunal services and access to justice by encouraging representative actions. That they may be provided for should not necessarily have a downside for others involved in the process.

#### **Reasons for representative actions**

The saving of time and costs for both parties and the Tribunal Service is a major consideration. In practice the use of representative actions should achieve this, without any reduction in access to justice.

Often workplace disputes affect more than one individual in relation to the same or a very similar argument. Industrial relations can be adversely affected when individuals have to be named.

There are very significant logistical issues in taking cases on behalf of a number, even a relatively small number of named individuals. These difficulties are time consuming and costly for the parties and the Tribunal Service. Not only are there multiple actions, but one or more of the claimants may drag the others back.

As an example, the very real problems faced by women, often elderly, who were entitled to a pension as part time workers, were substantial. Many simple lost out as a result, in relation to a case that took 6 years to progress. A class action could have given them perhaps 6 years from judgment to enforce their individual entitlement.

There are moves to promote and exploit the benefits of representative actions elsewhere – within the Civil Justice Council, for example, and in other jurisdictions, such as Australia and Canada<sup>1</sup>.

### **Particular Circumstances for the use of Representative Actions**

We do not envisage this as being a matter confined to trade unions, but we can obviously speak with some authority about the circumstances when they come into play in connection with union related matters.

One way in which a representative action could be brought by the union on behalf of a number of members, with inevitable consequences for non-members, would be in relation to a contract interpretation issue. Such an action may be brought before the Tribunal in the form of a declaration (under s11 Employment Rights Act, or by a contract claim following termination).

Evidence may still be adduced from by individuals and their particular facts. The respondents would have an opportunity convince the Tribunal, if their view was that the facts relating to individuals were too were idiosyncratic to make the action meaningful, or to apply for parameters to be set or questions posed.

It is possible to imagine a variety of other circumstances when a representative action could helpfully come into play – over redundancies, or pension issues, for example.

There are a variety of time off provisions, such as the right of an employee to seek a reasonable amount of time off to consult his Union Learning Representative under s 170(2B) of the Trade Union and Labour Relations Act 1992. Even if only one individual is affected at one time, an error on the part of the employer affects all who would wish to exercise that right and a representative action may be appropriate.

Further, when the right for an employee representative, or for public duties, the right applies to an individual in a representative capacity, which of itself would justify representative action.

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<sup>1</sup> The Civil Justice Council held a Forum on Multi-Party Litigation on 16 November 2006 and there was a report back at the Council earlier this month. We can assist in relation to contact with the CJC and supply of relevant materials, including those relating to other jurisdictions, if required.

The most substantial positive impact of representative actions could turn out to be in relation to Equal Pay cases. There are often many individuals affected and there is a collective element in most instances. The Employment Tribunal Service is already overloaded by equal pay matters, for example, arising from Local Authorities' Single Status and back pay issues. *Indeed the parties and the Tribunal Service might find great benefit from ratifying a collective agreement that the Tribunal was in a position to approve.*

### **The Effect of Representative Actions in Practice**

Some comments have been mentioned above – like those relating to evidence and parameters. We would be happy to assist in relation to other practical issues and concerns.

However, whilst a representative action by a union would not necessarily preclude an individual taking a case, even in relation to an equal pay order that ratified an agreement, the inclination to and the scope for would be greatly diminished in practice.

The effect on time limits from an application being brought by the union, if the Tribunal declines to treat the case as a representative action, is another matter that requires attention, but it is easy to see that suspension of the normal time limit affecting the individual in such circumstances would do the trick.

### **Existing examples of representative actions**

There are a number of instances in which some form of representative action is already permitted and useful experience and jurisprudence has developed. The Civil Procedure Rules permit representative actions in some circumstances where there are claims that 'have the same interest' (CPR r 19.6). However, these rules are not as expansive as those that have developed in Canada and Australia in particular. (Useful work on this has been undertaken by Rachael Mulheron published in Civil Justice Quarterly 2005, 24(OCT), 424-449<sub>2</sub>).

There is already a form of representative action under the current Employment Tribunal system action may be brought by a union that is not consulted, for example, over redundancies. (See s189 Trade Union and Labour Relations Act 1992).

Another example of representative action is the "super complainer status" brought in by the Enterprise Act 2002 for consumer bodies to raise issues with the Office of Fair Trading.

### **Conclusion**

We strongly support the extension of representative actions in the Employment Tribunal Service – in the interests of the employers, the tribunals, claimants, and their representatives.

We have an opportunity now to provide for this in the context of the UK Employment Tribunal Service. Perhaps there will even be such an opportunity to raise this in the Tribunals Courts and Enforcement Bill, currently before Parliament.

We can clearly envisage circumstances when other bodies can also use the facility of a representative action to deliver justice more effectively for all concerned. We understand this is a position endorsed by the TUC. We will be happy to assist with further comment and information at any time to progress this matter.