

Enhancing consumer protection, reducing regulatory restrictions

A response by the Judiciary of the Employment Tribunals in England & Wales to the Legal Services Board Discussion Document

Whilst we have read the whole discussion document we have focussed our response on those questions, or parts of questions, which we consider impact upon the work of employment tribunals.

1. We should start by explaining that Employment Tribunals were set up to allow a degree of informality and most importantly to allow any party to have a choice whether to conduct their own claim or response and to act as advocates for themselves at any hearing, or to engage representation. That assistance and representation is unlimited in its form or content, and therefore encompasses the widest range of such representation. This includes qualified and experienced lawyers, Trade Union officials, employer's organisations, advice centres, pro bono facilities, inexperienced friends, relatives and colleagues. Only a few of those categories are regulated. Even where the Claims Management Regulations apply they are extremely limited (for Claimant only and only if charging). A large volume of assistance and representation is unregulated. It is a common feature for employment advice to be provided by consultants acting on a commercial basis, which in the case of Respondent advice/representation is unregulated. The quality of training and ability is likely to be variable.
2. We will comment on Questions 1 & 2 together. They ask:-

Question 1- What are your views of the 3 themes that we have put at the core of our vision for the legal services market? Question 2- What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of options for consumers at different prices?

We endorse the aim of ensuring that consumers of employment advice and representation have adequate protection and redress. Any regulation must be sufficient to ensure that they can be confident of receiving a good service in respect of both advice on employment matters and representation at tribunal.

We are concerned to ensure that parties have a good quality of advice and representation so that parties who bring and defend claims have and feel they have had a fair hearing. The Judiciary and effective operation of the Tribunal Service is impacted upon by poor quality advice, preparation, representation and advocacy. Because the nature of proceedings before us is adversarial there are constraints on how much we can "descend into the arena" and

redress the balance when one party has poor advice and representation. Poor quality advice, preparation and representation can lead to claims and defences being inadequately defined or specified, unnecessary claims being pursued or defended, hearings being lengthened, Case Management Orders and directions not being completed with properly, or at all, a party being put at risk of costs and ultimately to justice not being allowed to be done.

Of course the most serious impact is on the individual who experiences the poor advice or representation and who is impeded from advancing a meritorious claim or defence and who is thereby prevented from enforcing their legal rights and achieving a just outcome. But there is also a very real impact on the cost to public funds of the time wasted on administering justice in such cases, in addition to the substantial increase in stress and cost to the other parties.

3. Question 3 *In the light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?*

As the discussion paper indicates advice on employment is not currently a reserved activity and therefore dissatisfied clients of providers have no redress to the legal ombudsman unless the provider is a member of the legal profession or subject to the limited terms of regulatory control referred to earlier in this response. What is of primary concern is the lack of consistency.

The quality of service provided to the consumer is hugely variable and using a member of the legal profession is not even a guarantee of quality or expertise. A real concern is the lack of effective redress for a consumer whose representative is not covered by statutory legal services regulation. The current system provided by the Claims Management Regulator does not appear particularly effective and there is a lack of public awareness about the requirement for registration if a provider is acting for profit.

We would welcome consideration being given to including the provision of all employment services within the remit of the Legal Ombudsman and to equalising the protection for all consumers of employment advice and representation. It would be regrettable, however, if greater regulation reduced choice in an area where there already considerable difficulties in obtaining affordable advice and representation for consumers. In the current political and economic climate one way forward would be to encourage further provision of skilled and trained pro bono facilities. However, we would not wish that facility to be discouraged by greater regulation.