



# Unhappy New Year

**Chris Bryden & Michael Salter** start 2011 by batting off derogatory claims

As the clock turns to 2011 yet another salvo is fired in the ongoing battle against lawyers and their kind. This time the target was firmly trained on employment lawyers, with an article in *The Times* on 4 January 2011 by Helen Giles, an HR director, which was excoriating in its account of the “legal extortion” practised by employment tribunals and the “parasitical” lawyers bringing claims therein.

The authors make no secret of the fact that one of them practises exclusively in the field of employment while employment law represents a significant part of that of the other. It is perhaps not surprising therefore that the “parasites” might wish to respond. However, notwithstanding the vested interest of the authors in the practice of employment law, the position set out by Ms Giles in her article is not recognised by these practitioners.

## False

In parts the article is simply wrong. For instance in proposing reform it advocates that “the burden of proof in discrimination claims should be placed on the employee and there should be stronger prima facie evidence of discrimination before allowing a claim to progress”.

It should not be necessary to point out that the burden of proof is already placed on the claimant in such cases, who is required to show some evidence from which a tribunal could conclude, in the absence of any explanation from the employer, that the claimant had been treated less favourably. This is not some

radically new concept introduced in October 2010 by the Equality Act 2010, but has been in place for some time, and was introduced because in practice it was very difficult for claimants evidentially to demonstrate both less favourable treatment and that that treatment was on the ground of, eg race or sex. The development of the law to balance this unfairness by partly reversing the

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burden of proof (but still requiring prima facie evidence) came about to address unfairness against claimants and not, as implied by Ms Giles, to simply make it easier to claim.

The claimant still has to show prima facie evidence on the balance of probabilities. Only if they are able to do this will the employer be called to give an explanation for the conduct complained of. Effectively therefore the employer has two bites of the cherry: firstly in rebutting the prima facie evidence from which discrimination could be concluded in the absence of an adequate explanation; and secondly, if that is shown, by proving that that act was not committed or can adequately be explained.

## Assessment

Ms Giles further proposes that there should be some form of assessment or sift of tribunal claims akin to the assessment that is carried out by legal expenses insurance firms when assessing merits

of claims; we assume as the point is not developed that this would be some sort of administrative summary assessment. Ms Giles does not even venture to suggest who carry out this process, or when it should take place. Should it be after claim and response are entered? If so the suggestion is ludicrous. How would an employment judge, who we assume Ms Giles would want to conduct this exercise, conduct such an assessment when all they have in front of them is the ET1 and ET3? No-one in any system of open justice could argue such a system would be fair to either party. To require

the presentation of further material (such as documents to support the case) would then require disclosure; such documents would be need to be placed into context by, say, witness statements, and then the other side would want to respond to such statements and documents, the evidence of which would need to be tested. In such circumstances the tribunal system already has a procedure for the assessment of merits of a claim; the hearing of the matter.

In any event the tribunal retains the power to strike out claims on the grounds, inter alia, that the case is scandalous or vexatious, or has no reasonable prospect of success. Thus, a tribunal can be prevented from “allowing unrepresented claimants to ramble on for days on the weakest of grounds” by the respondent making such an application, if the claim is as weak as suggested. Costs orders can also be sought in such circumstances.

Further, the insurance or union-backed claims complained of by Ms

Giles are likely to have gone through an assessment of merits; usually greater than 51% prospects of success is a requisite percentage.

Ms Giles continued to outline her position on the *Today* programme on Wednesday 5 January 2011 where she blamed the wholehearted adoption of European law “with bells on” by the British government for the problems with employment tribunals. Such shrill and improperly reasoned contentions do little to advance the cause of justice and much to damage the reputation of tribunals.

### Concerns

Factual errors and limited reasoning aside, Ms Giles does, however, identify a real concern that is held by the majority of employment lawyers. There does appear in general to be too little assessment of prospects conducted by claim-farming companies, who take volume over quality of cases to balance their books. Time and again the authors have fought cases where the opponent is not a lawyer but an “adviser”, who



civil courts are choked with litigation. Further, the system requiring the payment of fees for each stage of litigation is subject to a means assessment, and parties are able to obtain relief from such fees if they are unable to pay. Obviously in employment tribunals many claimants are complaining they have lost their jobs and so have no

## “The introduction of fees must also herald a move towards a more civil-based costs system”

does not demonstrate the provision of a quality service. Examples include: clearly not having read the papers in the case; attending a tribunal with three colleagues, one of whom simply held a volume of a textbook but took no further part in the proceedings; arguing points that were authoritatively decided 20 years ago; or worst of all, simply making up the law as they go along! This may also be a fair criticism of poor lawyers, and as in any profession there are rotten apples. However, to address such ills, better regulation of advisers is required, not the disenfranchisement of litigants (as it is also the employer who may get poor advice and be fighting an unwinnable case).

### Response

Ms Giles’s opinion elicited a number of responses on the letters pages of *The Times*. One called for fees to be introduced, to present employment claims. Superficially attractive while this is, it is a flawed approach.

Proponents of such schemes point to the civil courts as an example, but the same

money. We accept that some “parasitical creatures” accept cases knowing they will never get to tribunal, and may be forced to refocus their sights if they are to pay issue fees, but necessarily these fees are going to be assessed on accordance with the claimant’s means and not those of their adviser. Most importantly, the introduction of fees must also herald a move towards a more civil-based costs system, which takes tribunals even further from the spirit in which they were established, as otherwise a claimant with a genuine claim would in effect be paying to obtain justice.

The core of truth at the heart of Ms Giles’s opinion piece and radio broadcast is that all participants in employment litigation need to improve their understanding of how it actually works, and prepare and advise accordingly.

Claimants do need to understand that the average award for unfair dismissal is in the region of £4,000, and that simply saying “I am a man, and I am dismissed” is not the same as saying “I am dismissed because I am a man and therefore I have a discrimination claim”. Advisers need to be rigorous in their assessment of cases early on.

The tribunals need to consider how best to allocate resources, as often valuable judicial resources are used simply hearing two one-hour case management discussions (CMDs) a day, rather than lengthier hearings. It might instead be possible to create a cadre of employment lawyers who might want to consider a position as an employment judge later in their career and who would give up some of their practice time to hear blocks of these CMDs each day, thus freeing up the experienced part time and full time judges to hear pre-hearing reviews and final hearings. This (may) also reduce the curse of the “floating case” where all parties attend the tribunal to find that they are not allocated a tribunal to hear their claim, so they sit there for a day or more until they are told to go away and the matter will be re-listed.

### Grievances

There are genuine grievances that can be levelled at the employment tribunal system. There are, undoubtedly, claimants who chance their luck at a settlement payoff, and lawyers and advisers who play the system. However, there are also very many claimants who properly bring claims in order to obtain compensation for an actionable wrong committed against them. There are many lawyers who, along with the judiciary, work hard to ensure that hearings happen efficiently and that time and costs are not wasted. The tribunal system exists to provide a remedy to claimants who have been wronged by employers. If Ms Giles’s argument truly is that such remedies should not exist, her argument is political, disguised as an attack on the system. If her argument is that claimants should not be entitled to present claims where they have been wronged, on the grounds of the cost to employers, this argument is foolish.

If her argument is that too many claims proceed when they have no merit, she should instead be encouraging her fellow HR directors to use the tools that already exist, such as seeking to strike out vexatious claims or seeking costs orders or deposit orders where claims are felt to be dubious, rather than simply attacking claimants and professionals for daring to seek to bring claims.

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