Editorial

Daniel Barnett: editor

"Ninety-six per cent of all employment contracts will be illegal in a few months time!" So screamed the headline on an e-mail from a firm of employment consultants, inviting me to a seminar and pointing out that "there are 42 different ways to end up in an employment tribunal". I only know of the one way to get to the Bury St Edmunds tribunal – click my heels together three times and wish hard – so an extra 41 would come in handy.

Last week's changes to the procedural rules included the partial abolition of the register. This largely pointless document, which recorded the names and addresses of all claimants and respondents, was used by employment consultants to focus their marketing efforts on litigants. From 1 October, the register no longer contains these details, but instead will contain copies of all written final decisions issued by tribunals. The removal of these details will also reduce the unhappy practice of blacklisting, where employers pay a fee of £50 to search the register to discover whether a prospective employee has brought a tribunal claim against a previous employer. Lawyers now have two advantages over consultants. First, consultants are not entitled to claim legal professional privilege in respect of advice they have given (*New Victoria Hospital v Ryan* [1993] IRLR 202). So we can obtain disclosure of their advice files, as long as we have the right chairman, when on the other side. Second, under the new rules clients can recover their full (assessed) costs of instructing lawyers if the other side has behaved vexatiously or unreasonably. But clients generally cannot recover the fees paid to consultants from a vexatious or unreasonable opponent; the most they can obtain is an order in respect of the consultant's preparation time, at a maximum of £25 an hour.

Let us not pretend that tribunals are anything other than places of law, with concomitant formality and expense. The number of procedural rules has almost tripled this month, increasing from 23 to 61. Tribunals deal with more than 80 jurisdictions, not 42, as the learned employment consultants assert. In 1968, the Donovan Commission set out a vision for tribunals as "an easily accessible, speedy, informal and inexpensive procedure for the settlement of…disputes". By 2002, the vision for tribunals in the Employment Tribunal System Taskforce Report was similar, namely "accessible and understandable, as fast as is reasonably practicable, reliable, consistent and dependable". As Stephen Levinson points out in an article in this month's *Employment Law Journal*, where has "inexpensive" gone?

In this month's *Briefing*, Paul Statham discusses the advantages of introducing a normal 'costs-follow-the-event' regime into tribunals. Few lawyers believe this will happen. It is not in an employee's interests – many would be unable or unwilling to bring claims if there was a substantial risk of costs; nor is it in an employer's interests. Employers could face a substantial legal bill over a small dispute – the median award for unfair dismissal cases is just £3,375 – which, if issued in the civil courts, would fall within the small claims jurisdiction. It certainly isn't in a lawyer's interests; fewer claims would be issued and, of those, even fewer would fight. But it would be good for the taxpayer: the operating costs of the tribunal service were more than £70m last year, and a reduction in cases could substantially reduce this figure.

As you will see from the enclosed questionnaire, we are considering introducing two new sections into the *Briefing*. 'In transit' would summarise moves of lawyers between firms or chambers; 'In court' would give advance warning of important cases. But for these to work, we need you to contribute. Please send us your views.

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