Explanatory Memorandum

1.(i) **Title of the Instrument:** The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. No.1861

(ii) **Laying authority and purpose:** this explanatory memorandum is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

(iii) **Department responsible:** Department of Trade and Industry.

2. **Description**

These Regulations implement changes to Employment Tribunal procedures introduced by sections 22 and 24 to 28 of the Employment Act 2002 (c. 22) in relation to costs, conciliation, prescribed forms, determination without a hearing, practice directions and pre-hearing reviews. They also re-enact and amend the current Rules of Procedure in order to make the workings of Employment Tribunals more transparent and effective. The current Rules of Procedure have been re-expressed in plain English wherever possible.

3. **Matters of special interest to the Joint Committee on Statutory Instruments:**

These Regulations extend to England, Wales and Scotland, whereas previously there were separate Regulations for Scotland and for England and Wales. These Regulations revoke The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001/1171 and The Employment Tribunals (Constitution and Rules of Procedure) (Scotland) Regulations 2001/1170.

Schedule 1 to these Regulations contains Rules of Procedure which apply to all types of proceedings brought before Employment tribunals. Schedules 2 to 5 to these Regulations contain Rules of Procedure for different types of proceedings (eg. national security proceedings, levy appeals etc.) and they each modify Schedule 1 in relation to the particular type of proceedings to which they apply.

The Regulations referred to above which are revoked by these Regulations, contained an additional Schedule (previously Schedule 3) which has not been re-enacted in these Regulations. Schedule 3 in the revoked Regulations applied to equal value claims. It is intended that a Schedule to apply to equal value claims, which will re-enact and amend the revoked Schedule 3, will be added (as Schedule 6) by an amendment to these Regulations. It is intended that the amendment will be made before these Regulations come into force on 1st October 2004. The amending Regulations are intended to come into force on the same date. Should something unforeseen occur to prevent this happening, Schedule 1 to these Regulations would apply to equal value claims.

4. **Legislative Background**

Sections 22 and 24 to 28 of the Employment Act 2002 amended various sections of the Employment Tribunals Act 1996 (c.17) relating to powers to make Employment Tribunal procedure regulations. Those amendments allow tribunal reform to be implemented on the following matters: costs, conciliation, prescribed forms, determination without a hearing, practice directions and pre-hearing reviews.

Section 23 of the Employment Act 2002 also made similar provision in relation to costs applicable to the Employment Appeal Tribunal procedure rules. A separate instrument will be implementing those changes.

Sections 29 to 40 of the Employment Act 2002 introduced new statutory dispute resolution procedures. Those powers have been implemented by the Dispute Resolution Regulations 2004 [SI 2004/752]. The Regulations to which this memorandum relates also reflect changes introduced by the Dispute Resolution Regulations 2004. This is necessary due to section 32(6) of the Employment Act 2002 which provides that an Employment Tribunal shall be prevented from considering a complaint where there has been a breach of the statutory disciplinary or grievance procedures to which the Dispute Resolution Regulations 2004 relate.

5. **Extent**

These Regulations apply to England, Wales and Scotland.

6. **European Convention on Human Rights**

In my view the provisions of these Regulations are compatible with the Convention rights (as defined in section 1 of the Human Rights Act 1998).

7. **Policy background**

Changes to the Employment Tribunal procedures are being introduced to make the system run more smoothly and efficiently and improve the service provided, for the benefit of all users. In 2003/04, there were 115,042 claims made to employment tribunals. The changes arise from provisions of the Employment Act 2002, from recommendations of the Employment Tribunals System Taskforce, and from suggestions offered by the Employment Tribunal Presidents (for England and Wales and for Scotland). One of the policy objectives of the Employment Act 2002 was to improve the legal framework for the resolution of employment disputes in Great Britain, and these Regulations form part of a package of implementing measures. (Other parts of the package include the Employment Act 2002 (Dispute Resolution) Regulations 2004 and the revised Acas Code of Practice on disciplinary and grievance procedures, currently before Parliament.) Public consultation was carried out on the proposed changes. More than 500 paper copies of the consultation document were distributed, and it was also made available to view on the DTI website. A total of 106 replies were recorded. A Government response to the consultation has been published on the DTI website. The changes are not, in themselves, of special legal or political importance.

8. **Impact**

The Regulatory Impact Assessment at Annex A sets out the costs and benefits of these Regulations in relation to employers, individuals and taxpayers. The Regulatory Impact Assessment Certificate is attached at Annex B.

9. **Contact**

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Date: 19/07/04

Full Regulatory Impact Assessment

Employment Relations Directorate

Amendment of Employment Tribunal Regulations

July 2004

http://www.dti.gov.uk/er

Purpose and intended effect

1. The overriding intention of the reform of the Regulations, and their accompanying Rules, is to render the Employment Tribunal system more efficient and to streamline procedures. This in turn should deliver a better service and swifter justice for parties in Tribunal cases whilst lessening the burden on the Employment Tribunals Service (ETS). Meanwhile, new dispute resolution measures – currently being introduced in separate regulations – are intended to create a framework to encourage resolution of workplace disputes without recourse to litigation. Significant attention has been paid to ensuring that the two sets of regulations (dispute resolution and Employment Tribunal) dovetail appropriately with each other. For example, the dispute resolution regulations will address the need in certain circumstances (where extra time would be helpful for workplace procedures to run their course) for an extension of the time limit for presenting a Tribunal claim. It is intended that the two sets of regulations will come into force at the same time – on 1 October 2004.
2. The proposed changes to the current Employment Tribunal Regulations and Rules will implement the Tribunal reform provisions of the Employment Act 2002.[1] They also seek to address some of the recommendations of the Employment Tribunal Systems Taskforce which reported in July 2002.[2] In addition, the opportunity is being taken to make a number of other amendments, many of them incorporated at the suggestion of the Employment Tribunal Presidents. These include a significant re-structuring of the Rules, intended to ensure that they more closely follow the stages in the Tribunal process itself. In addition, the opportunity has been taken to recast the Rules in plain English.

[1] For information on the Employment Act 2002 see http://www.dti.gov.uk/er/employ/index.htm#Dispute
[2] For information on the findings of the Employment Tribunal Systems Taskforce and the Government response see http://www.dti.gov.uk/er/individual/taskforce.htm

Risk assessment

3. There are currently perceived to be a number of inefficiencies relating to the procedures of the Employment Tribunals, which, if addressed, should provide a better service and speedier justice for the parties and, where possible, better prospects for the settlement of cases before the hearing stage is reached.
4. The new provisions are intended to streamline current Tribunal procedures. The intended changes in some instances remove potential risks of legal uncertainty or of unnecessary delay or cost that can arise from current Tribunal/conciliation procedures.

Options

5. The Government has considered and adopted a number of different ways of improving the efficiency of the Employment Tribunal System, so as to reduce the costs to users and the taxpayer. These range from
    a. doing nothing;
    b. non-regulatory approaches (such as the development of better IT and more training for ETS staff);
    c. regulatory approaches (such as the introduction, in the new Rules, of a pre-acceptance procedure for 'sifting out' flawed claims or responses at an early stage); and
    d. a regulatory approach that will enable more consistent use of best practice and more transparent processes (such as allowing the Presidents to issue practice directions).
6. Where a regulatory approach has been judged necessary, the draft revised legislation has been designed to be consistent with the Employment Tribunal System Taskforce's vision for the service. That is, to be even-handed and responsive to the needs of its users; accessible and understandable; as fast as reasonably practical; reliable, consistent and dependable; and properly resourced and organised in an accountable fashion.
7. This Regulatory Impact Assessment considers the costs and benefits of the regulatory approaches.

Business sectors affected

8. Employees and employers in all sectors are liable to become involved in Employment Tribunal cases, and hence to be affected by these proposals to reform the system.
9. Table 1 shows that, given the numbers employed in these industries, enterprises in the public administration, education, health etc, social and personal services have a disproportionate number of Tribunal claims made against them. These sectors therefore stand to benefit more than other sectors. The converse is true for enterprises in the wholesale/retail and hotels/restaurants industries.
10. The number of claims made to the Employment Tribunals varies by jurisdiction. Table 2 shows the proportion of claims per jurisdiction and by industry.

1. Propensity to be subject to an Employment Tribunal claim

	Proportion of claims (%)	Proportion of employment* (%)
Agriculture, fishing, mining, utilities	6	3
Manufacturing	21	22
Construction	5	5
Wholesale/retail, hotels/restaurants	21	30
Transport, storage, communications	8	7
Financial, renting, business	17	19
Public admin, education, health etc	23	15
Total	100	100

Source: Survey of Employment Tribunal Applications 1998 and SME statistics for 1998, Office of National Statistics (www.statistics.gov.uk) * for firms with employees

2. Percentage of claims made by jurisdiction and industrial sector

Industrial Sector	Unfair Dismissal	Breach of Contract	"Wages Act"	Discrimination	Redundancy Payments
Agriculture, fishing, mining, Utilities	54	8	19	6	14
Manufacturing	69	8	12	4	7
Construction	48	9	22	2	19
Retail, hotels, Restaurants	63	7	19	6	5
Transport, Storage, Communication	68	7	18	3	4
Financial, renting, Business	56	8	19	7	9
Public Admin, health, education	63	9	11	10	7

Source: SETA 1998

11. The table shows that there are sectoral differences in cases by main jurisdiction. For instance, the majority of cases came under the unfair dismissal heading. Of this group, a higher proportion occurred in the manufacturing sector and the least in construction. However, the opposite is true of claims for unpaid wages.
12. Those industries (construction; agriculture, fishing, utilities and mining) that have proportionally more cases under the redundancy payments, unpaid wages and breach of contract jurisdictions will be affected more from the introduction of the shorter, 7

week period for Acas conciliation. Those with more cases under unfair dismissal (manufacturing and transport and communications) will be more affected by the standard, 13 week period.

Assumptions

13. To estimate the costs and benefits of the legislation we have to make assumptions about the numbers of Tribunal cases in the future, taking into account the impact of legislation that will be introduced over the next few years.
14. We estimate that, given 100% compliance, the dispute resolution at work regulations will, in the longer term, reduce the number of tribunal claims by about 35-40,000. In the shorter term we assume 80% compliance, which would mean a reduction of 28,000 to 32,000 in the first year (2005/06) rising gradually to the full reduction in the fifth year of implementation in year 5 (2010/11).[3] Increases in the order of 6,000 in 2005/06 rising to 14,000 in 2007/08 would come from the introduction of other new jurisdictions.[4]
15. So, assuming that the current underlying trend in applications is flat at 100,000 per year[5] then in 2005/06 the number of tribunal cases is likely to be between 74-78,000 rising to between 74-79,000 in 2010/11, with the effect of the increase in compliance on the dispute resolution regulations offsetting the effect of the introduction of more jurisdictions. Rounding to the nearest 5,000 we will use an assumption of between 75-80,000 cases per year from 2005/06, when the regulations are likely to start impacting.

Costs and benefits

16. The Employment Act 2002 paved the way for reforms to the Employment Tribunals and to the procedure for making a claim. The new measures seek to encourage parties (via the fixed period for conciliation) to resolve workplace disputes before the need for a full and costly Tribunal Hearing.
17. The measures assessed in this consultation aim to streamline the existing process to make it run more efficiently both for the ETS in terms of cost savings, and for claimants and employers in terms of increased clarity of procedures and methods and speed of access to justice.

Implementation costs

18. When new legislation is introduced, in order to comply, people usually have to become familiar with it. This bears a cost. For these regulations the main burden of compliance will fall to the ETS and to Acas.
19. The ETS estimate that the new regulations will need a new case handling system at a cost of about £320,000, and extra staff to implement change at a cost of about

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[3] The Regulatory Impact Assessment can be found in the consultation document 'Dispute resolution: consultation on draft regulations'. http://www.dti.gov.uk/er/individual/dis_res_consdoc.htm

[4] This includes changes and extensions to the law on discrimination and the new right to ask for flexible working introduced in April 2003.

[5] In 2002/03 there were 98,617 applications registered by Employment Tribunals (Source: Employment Tribunal Service 2002-03 Annual Report and Accounts).

£120,000. In addition they will need to train 500 members of staff for 3 days to become familiar with the new system. This is estimated to cost at least £144,000.[6] They will also need to run workshops for Chairmen at a total cost of about £155,000.[7] This would take the total implementation costs for the ETS to about £740,000.

20. There will also be familiarisation costs for Acas. Conciliators and managers will need to attend meetings to help them understand the new regulations and to discuss behavioural changes that need to be introduced. This is estimated to cost about £104,000.[8] Helpline staff and senior advisers will also need to be trained at an estimated cost of about £10,000. [9] The total implementation costs to Acas will therefore be about £114,000.
21. This makes a total one-off implementation cost to the Exchequer of about **£850,000**.
22. Business will need to be aware of the processes of the Employment Tribunal system once a claim is made against them. Their role will be laid out clearly once they are asked to respond to a claim. This is the case at the moment and we envisage that reading the instructions will take no longer than it does at present. We therefore envisage no additional compliance costs to business.

Policy costs

Practice directions

23. The revised Regulations will give the Employment Tribunal Presidents the power to issue practice directions – directions on matters concerning Tribunal practice and procedural requirements.
24. This proposal aims to reduce any inconsistencies in Employment Tribunal practices and procedures between regions, and in the interpretation of their powers. The cost to the ETS of issuing each practice direction is assumed to consist of two days of legal and administrative time, coupled with consultation with senior members of the judiciary. This cost is estimated to be around **£53,000 per practice direction.**[10] In

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[6] The cost of administrative staff for the year 2002/03 was £15.076 million. There were 713 full-time equivalent staff. The daily cost of each member of staff is therefore about £15,076,000/713/220 = £96. The cost of training 500 staff for three days would then be about £96 x 3 x 500 = £144,000.

[7] If each chairperson would need to discuss changes in a workshop lasting six hours, this would cost £70 (hourly cost of a Chairman) x 6 x 368 (number of full and part-time Chairmen in 2002/03) = £154,560.

[8] For conciliators the aggregate cost will be £280 (the daily cost of a conciliator) x 330 (the number of conciliators) = £92,400. For managers the aggregate cost will be £380 (the cost of a manager) x 30 (the number of managers) = £11,400. The total cost is therefore £103,800.

[9] For helpline staff the aggregate cost will be £180 (the daily cost of helpline staff) x 100 (number of staff) x 0.25 days = £4,500. For advisers the aggregate cost will be £380 (the cost of advisers) x 60 (the number of advisers) x 0.25 days = £5,700. The total cost will be £10,200.

[10] The decision stage is estimated to consist of one meeting in each office with on average 8 Tribunal Chairmen. Including meeting preparation, this will take half a day of Chairmen's time and one day of an administrator's time. The cost of the 118 full-time Chairmen was £12,943,000 for 2002/03 or £109,686 each. This makes a cost of about £70 per hour. The cost per meeting will therefore be £70 x 3.5 (the cost of half a day of a Tribunal Chairman) x 8 + £96 (estimate of the daily cost of administrative staff) = £1,960 + £96 = £2,056. If one meeting takes place in each office (there are 25 offices) then the total decision cost will be £51,400. We add to this the cost of drawing up the practice direction, which is assumed to consist of two days time for one Chairman, at a total cost of £1,000 and two days time of administrative staff at a cost of £192. The total cost per practice direction is therefore £51,400 + £1,000 + £192 = £52,5924.

addition we assume that there will be a familiarisation cost to ETS and Acas staff of about **£36,000** for each practice direction.[11]

25. The net benefits to be derived from this proposal are an increase in the efficiency and transparency of Tribunal procedure, together with increased certainty, more consistent outcomes and a reduced risk of challenge on the grounds of inconsistency. We would expect the benefits to more than offset the costs.

New forms

26. At present applicants and respondents can complete a form (currently called IT1 and IT3 forms) when they are submitting or defending a claim. This is not compulsory, they can write a letter. The new regulations will make completing a form compulsory. The forms will also be changed, requiring more information up-front from both claimant and respondent. The obligation to give the required information will impact on all claims after the new regulations come into effect, and use of the forms themselves will become obligatory from 6 April 2005.
27. When forms (or letters) are received by the Employment Tribunal Office, many contain insufficient information to enable them to be properly dealt with. This leads to lengthier Tribunal proceedings than might otherwise be necessary, with costs to the parties and to the ETS. In some instances the form needs to be returned to the claimant or respondent (as the case may be) for additional information before it can even be accepted. The introduction of prescribed forms, containing some mandatory questions, aims to address this information deficiency and better inform the Tribunal ahead of a hearing. The new forms may also help parties to determine the strength of each side's case and lead to more settlements prior to a hearing. In addition, it may lead to a slight reduction in Tribunal claims as it would help claimants to assess whether their case has a reasonable prospect of success.
28. The net cost to claimants and respondents is estimated to be zero at the most, with possibly a saving, because the information required would have to be given anyway, and it is more efficient to do so in one go at the outset.
29. The ETS will have to make sure that more forms are printed as it will be compulsory to fill these in. They will also be longer. Estimates for higher printing costs are in the order of £30,000 per annum. We have not made an estimate of the cost savings to the ETS as we have not been able to quantify the extent of the reduction in Employment Tribunal cases (if any).

Pre–acceptance procedures

30. Under this proposal, ET Chairmen will be obliged to 'knock back' at the application stage any claim that fails to meet certain conditions set out in the revised Rules.[12] When a claim is sent by a claimant to the ETS, one of two outcomes will be possible:

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[11] We assume that each practice direction takes staff and Tribunal Chairmen in the ETS one hour to become familiar with and Acas staff half an hour. This will cost the ETS (£15.076 million (administrative staff costs) + £12.943 million (cost of full-time Chairmen))/220/ 7 + £12.943 million/220/7*250/118 (cost of part-time chairmen) = £36,000 and Acas (£27.27 million x 0.64 (approximate proportion of Acas resources devoted to working with individual accounts)/ 220 /14) = £5,666. Total costs for the Exchequer will be £41,666.

[12] For details of the pre-acceptance procedure, see Chapter 2.

i. The claim is assessed by ETS staff, is accepted, and proceeds to the next stage.
ii. ETS staff believe there is doubt over whether the claim can be accepted into the system and place it before a Tribunal Chairman, who decides whether or not it meets the specified conditions and should be accepted as a case.

31. In the first scenario, the cost to the ETS arises from having to review the claim to determine whether or not it is properly presented and satisfies the conditions for acceptance. Currently, all claims are assessed, although the current assessment process is not as robust as the one in the draft revised Regulations and claims cannot be refused acceptance if they do not meet the criteria. It is envisaged that the new forms will make it clear whether or not the criteria have been met and if they have not been met the claim will not be accepted. We envisage that additional cost to staff will be modest, say in the order of an extra 10 minutes of staff time per case. This will cost about £2 per case or about **£0.2 million per year**.[13]
32. The second scenario involves the use of a Tribunal Chairman. Assuming that the Chairman takes 15 minutes to consider the claim and make a decision, this would cost £17.50.[14] Currently the number of cases that do not comply with the present criteria runs to about 2,000 per annum. With the extension of the list of criteria and in particular with the introduction of new statutory grievance procedures this number is likely to increase. If we assume that initially as the new dispute resolution regulations bed down 10%[15] of cases (8,200-8,800) have to be reviewed by a Tribunal Chairman this will cost up to about **£0.2 million** in aggregate in 2005/06. If this rate falls to 5% (about 4,000 cases) then the costs will fall to less than **£0.1 million** per year by 2010/11.
33. If the Chairman's decision is the subject of an application for review[16], this could cost the ETS about two hours of a Chairman's time to review the case and about one hour of an administrator's time or about £154 per case or in aggregate about **£30,000 per annum falling to about £15,000 per annum**. We assume that up to five cases a year are then taken to the Employment Appeal Tribunal.
34. The total cost to the new procedure to the ETS would therefore be about **£0.3 million per year**.
35. The benefits of the measure are that a significant number of claims that would ultimately be unsuccessful in any event will be 'weeded out' at this initial stage, thus reducing the burden on the ETS, the claimant and the respondent (the latter of whom need not even be troubled by service of the case papers). Many would be re-

[13] The hourly wage of an hour of ETS administrative staff is estimated to be £14. Therefore the cost of 10 minutes time is £14/6 = £2.33. The aggregate cost is therefore 75,000 to 80,000 x £2.33 = £174,750 to £186,400.

[14] The cost of the 118 full-time Chairmen was £12,943,000 for 2002/03 or £109,686 each. This makes a cost of about £70 per hour. The cost of a Chairman looking at the application and making a decision on whether it should proceed will equate to a quarter an hour of a Chairman's time. This will cost £17.50.

[15] If we assume that the number of cases that needs to be reviewed by Chairmen doubles and add to this the number of claims that are made without going through the statutory grievance procedures this comes to about 8,200-8,800, or about 10% of the expected claims.

[16] We assume that this takes place in 2% of cases that are seen by Chairmen or about 170 cases per year initially falling to about 100 cases.

submitted and will get through the pre-acceptance procedures. If we assume that about 25-50% do not get re-submitted[17], this would initially represent 2,050 to 4,400 fewer cases going through the system, falling to 1,000 to 2,000 after five years. This will mean cost savings to employers and to the Exchequer. Employees will, as a result of not bringing a claim that has no chance of success, benefit from reductions in stress, as well as less time spent on the case. We do not attempt to quantify the opportunity cost to employees.

36. Costs to business of each case are estimated to be about £2,000. Therefore aggregate cost savings to business would be about **£4.1-8.8 million falling to £2.0-4.0 million per annum in 2010/11.**
37. It will also save costs to the ETS and Acas. The marginal cost of a tribunal application to the Exchequer is about £580[18], giving an aggregate saving of **£1.2-2.6 million in 2005/06 falling to £0.6-1.2 million by 2010/11.**
38. There will also be a new pre-acceptance procedure for *responses* to claims, but this will entail the ETS (and, if necessary, a Chairman) establishing only that the response is entered on the correct form, that the time limit has been complied with and that it contains all the required information specified in the Rules. This measure is not expected to have more than a modest impact, and the benefits cannot be readily quantified.

Introduction of fixed periods for Acas conciliation

39. Acas' role is to offer help in resolving disputes before they reach the Tribunal hearing stage. This can lead to an Acas-brokered settlement being reached at the very last moment before the case comes to a hearing. This prolonged process can cost time and money to all concerned, including the Employment Tribunals.
40. To encourage early resolving of disputes, new rules have been drafted to introduce a fixed period for conciliation which will apply in most cases, with the aim of reducing the number of cases in which there is a need for a Tribunal hearing. The aim would also be to save on administration costs to the ETS.
41. There are three categories for fixed period conciliations:
    - Cases where no fixed period applies. Therefore Acas will have an ongoing duty to conciliate for an unlimited period of time. This category will include claims brought under the Sex Discrimination Act, the Equal Pay Act, the Race Relations Act and the Disability Discrimination Act.
    - A thirteen week fixed period (the standard conciliation period) that covers all claims that do not fall within the other two categories.
    - A seven week fixed period (the short conciliation period). This covers five jurisdictions identified as 'fast track' jurisdictions. These are: unauthorised deduction of wages, breach of contract, redundancy payment[19], unpaid guarantee pay and unpaid medical suspension pay.

[17] This could be because once the applicant has filled in a form they realise they do not have a case, or maybe because once they have started a formal grievance procedure they reach an agreement with their employer.
[18] Source: The ETS 2002/03 Annual Report and Accounts and Acas.
[19] Where the claim is made against an employer, not the Secretary of State.

42. After the period for conciliation has ended (or sooner if the outcome is apparent), Acas will inform the ETS either that the case has settled, or that the case has not settled, allowing for it to proceed if necessary, to a hearing. Where, at the end of the standard fixed period (in cases brought under the relevant jurisdictions), a settlement is regarded as very likely, there will be some limited discretion for the period to be extended, by two weeks only.
43. Over the period 2002/03, ETS data shows that Acas-conciliated settlements accounted for 38% of applications.[20] Around a third of all applications are withdrawn (this could be because of a private settlement or because the case is abandoned). Around 24% of cases go to a hearing.
44. All claims will be affected by these measures (although where cases brought under the discrimination jurisdictions are concerned, the legal position in this regard will be effectively unchanged).
45. The fixed period proposal will put pressure on both parties to resolve the dispute through Acas more quickly. The intention is that this will increase the number of Acas settlements and decrease the number of hearings, as well as saving time.
46. We assume that the number of Acas settlements increases by 2-5% and that this results in a reduction in Tribunal hearings.
47. We also assume that even where there is no increase in the number of Acas settlements, there will be a reduction on the average time to reach settlement, which will save on ETS administration costs. Costs tend to rise as each case reaches closer to its hearing date. We assume a saving in ETS administrative costs of between 2-4%.

<u>Cases where no fixed period applies</u>

48. ETS data shows that around 17,000 cases came under this category in 2002/03. We expect that the number of cases will rise to about 25,000 in 2010/11. For these cases, because they can continue as normal, there is no direct cost saving/imposition arising from these proposals. Indirectly, there may be some modest benefits in reducing the waiting time for a hearing due to a reduction in the number of hearings that follow from cases that fall within the other two fixed period categories.

<u>Thirteen week fixed period for conciliation</u>

49. ETS data show that about 48,000 cases would come under this category in 2002/03. We estimate that this will fall to about 31 -33,000 in 2010/11.
50. In cases which would attract a 13 week fixed period for conciliation, ETS data shows that in 2002/03 around 43% settled as a result of Acas conciliation. Applying this proportion to future cases and assuming 2-5% more cases settle this will result in about 300-700 more cases settling before a hearing and 300-700 fewer cases going to a hearing. This represents 4-9% fewer hearings.
51. Fewer Tribunal hearings will mean savings to business on management time and legal fees. A case that is settled in advance of a hearing absorbs 19 hours less management

[20] Acas reports a higher settlement rate. One of the reasons for this is that Acas does not conciliate in all jurisdictions handled by the ETS.

time and about half the legal fees than a case that goes to a hearing.[21] The cost saving is therefore about £1,000 per case.[22] The cost saving to employers for reduced hearings is estimated to be about **£0.3-0.7million.**

52. The average marginal cost to ETS of a hearing is estimated to be at least around £1,300.[23] A reduction in the number of hearings of around 300-700 therefore implies a cost saving of about **£0.4-0.9 million**.
53. The average administrative staff cost to the ETS of each case is about £160.[24] A two to four percent saving in administration costs from quicker settlements would be equivalent to a saving of £3 to £6 per case. The aggregate saving on administration costs for the 13 week jurisdictions would therefore be about **£0.1-0.2 million.**[25]
54. The aggregate saving to the ETS would therefore be between **£0.5-1.1 million per year.**
55. Employees would benefit from reductions in the time spent in dealing with the case.

Seven week fixed period for conciliation

56. ETS data shows that over 2002/03, there were around 35,000 applications made that would fall within this category. We estimate that by 2010/11 this will fall to between 20,000 and 22,000 cases.
57. In cases which would attract a 7 week fixed period for conciliation, ETS data shows that in 2002/03 around 34% settled as a result of Acas conciliation. Applying this proportion to future cases and assuming that 2-5% more cases settle this will result in about 150-350 more cases settling before a hearting and therefore 150-350 fewer cases going to a hearing. This represents 2-6% fewer Tribunal hearing cases.
58. Fewer Tribunal hearings will mean savings to business on management time and legal fees. The cost saving for an average hearing is about £1,000 per case. However cases in this category typically absorb fewer hours of management time (25-50% less) and lower legal fees (50-75% less). We therefore assume that the average cost saving for these types of hearing is £500. The aggregate cost saving to employers for reduced hearings is estimated to be about **£0.1-0.2million per year.**[26]
59. The aggregate cost saving to the Exchequer from 150-350 fewer cases going to a hearing will be **£0.2-0.5 million per year.**[27]
60. The savings to the ETS on administrative staff costs from quicker settlements would be about **£0.1 million per year.**[28] This would bring the total saving to the ETS to **£0.3-0.6 million per year.**

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[21] See Department of Trade and Industry (2002) 'Findings from the 1998 Survey of Employment Tribunal Applications' Employment Relations Research Series No. 13, tables 8.5 and 8.6

[22] Savings on management time are 19 x £25 (cost of one hour of management time) = £475. Savings on legal costs are £1188 - £590 = £598.

[23] In the year 2002/03 full-time Chairmen cost the ETS £12.943 million and other fees (such as for part-time Chairmen) cost £15.256 million. This is a total cost of £28.199 million or given 22,263 hearings and average cost per hearing of £1,267. This does not include administrative staff time and cost of premises.

[24] The total cost of administrative staff in 2002/03 was £15.076 million. The total number of cases dealt with was 95,554. This comes to a cost of £158 per case.

[25] 31,000 to 33,000 x £3 to £6 = £93,000 to £198,000.

[26] Calculated as £500 x 150 to 350 = £75,000 to £175,000.

[27] Calculated as £1,300 x 150 to 350 = £195,000 to £455,000.

[28] Calculated as 20,000 to 22,000 x £3 to £6 = £60,000 to £132,000.

61. Employees would benefit in a reduction in time spent in dealing with the case.

Summary

62. Table 3 summarises the benefits of the introduction of fixed periods for conciliation.

3. Summary of benefits of the introduction of a fixed period for conciliation

	Benefits annual
Employers	
13 week period	£0.3-0.7 m
7 week period	£0.1-0.2 m
Total	£0.4-0.9 m
Exchequer	
13 week period	£0.5-1.1 m
7 week period	£0.3-0.6 m
Total	£0.7-1.7 m

Note: figures may not add up due to rounding.

Introduction of default judgments without a hearing

63. The intention here is to provide for the Employment Tribunals to make default judgments in cases that are uncontested – i.e. cases where an employer has not entered a response within the time limit for doing so – without a hearing. This should, in such cases, mean a cost saving for the ETS (who will not have to list for a full Hearing), and time savings for claimants who will not have to prepare for and attend the Hearing.
64. We assume that between 15 and 20% of cases that reach the hearing stage are likely to be uncontested.[29] This means that on the basis of our expectations for future cases by the year 2010/11, about 2,000-3,000 would be uncontested, although it is likely that there will be more default judgement hearings initially as respondents get used to the tighter application of the time limits.
65. The cost of preparing a written determination is estimated to be £84.[30] We assume that the cost of taking such a case to a hearing would be £168[31] , therefore the net saving to the ETS per case would be about £84 or in aggregate **£0.2-0.3 million per year**.

Written reasons

66. There will be changes to the Rules on reasons for decisions, so that in future reasons that have been given orally at the end of the hearing will be given in writing only on request by one or other of the parties, and will all be in a similar form (ending the current distinction between summary reasons and extended reasons). We assume that

[29] DTI estimate. Note, this is an upper bound estimate.
[30] This consists of one hour of administrative staff's time (£14) and one hour of a Chairmen's time (£70).
[31] Based on two hours of administration staff's time (£28) and two hour of Chairmen's time (£140).

in 60 to 70% of cases, reasons are provided orally at the end a hearing and that in future in 75% of these cases written reasons will be requested.

67. We estimate that the number of cases going to a hearing in the future will be about 15,000 to 16,000. The number of cases where written reasons are given at the end of a hearing will be about 9,000 to 11,200. A quarter will no longer require a written reason. This amounts to 2,250 to 2,800. The cost per written reason is estimated to be about £100.[32] The aggregate cost saving is therefore between **£0.2-0.3 million per annum**.
68. There will also be costs savings from no longer having to provide extended reasons - all written reasons will be of the same format. We have not attempted to cost this saving.

Awarding costs against representatives

69. Two changes are to be made to the present costs rules: (i) a new provision for awards in respect of preparation time will be introduced in some circumstances; (ii) it will be possible for representatives to incur a 'wasted costs' order on account of their unreasonable conduct (this will apply only to *paid* representatives and not to those in the 'not for profit' sector). The effect will be to encourage more reasonable behaviour of parties and, in a very few instances, representatives, and to ensure that those who behave unreasonably bear the cost.

Unintended consequences

70. The main concern in the above costs and benefits is that parties subject to a fixed period for conciliation adapt their behaviour in such a way that there is no difference in the proportion of Acas settlements after the new regulations come into place. This would mean no reductions in hearings, although there would still be benefits in terms of faster settlements and a shorter lead-time to hearings. Another possibility would be that, rather than encouraging Acas settlement, constraining the time for conciliation may mean fewer settlements and more hearings.[33] This could mean increased rather than decreased costs to both employers and the Exchequer. Given these risks, monitoring will be particularly important.

Monitoring and review

71. This will be done through continuous consultation with officials in the ETS and Acas and the monitoring of administrative databases to see what effect the changes to the regulations are having, looking at the balance between applications, Acas conciliations, hearings (together with results), and withdrawals. There will be a more formal review of the impact of the fixed period aspect of the regulations about 18months after they have been implemented to see how this is working. In the longer term there will be a survey of Tribunal applications which will look at how the system is working (as well as costs to employers) compared with the present. A baseline survey is currently in the field.

[32] One hour of a Tribunal Chairman (£70) and two hours of administrative staff (£28).
[33] This is more likely to occur when the hearing date is not close to the conciliation window.

Impact on small business

72. Small firms will also benefit from the proposals analysed in this impact assessment. Taking into account the size of the workplace, small firms are more likely to be taken to an Employment Tribunal than larger firms.[34] They will therefore benefit disproportionately.
73. The Department had informal discussions with small firms and representatives from small firms, which showed that they were broadly content with the main thrust of the Government's approach, although they did make suggestions on the detail. Responses from small/medium enterprises to the *Routes to Resolution* consultation revealed no concerns towards the proposals in this RIA.

Competition assessment

74. We have applied the Competition Filter and we believe that the competition impact is likely to be negligible. The costs of the proposals are negligible and unlikely to impose a significant and disproportionate burden on firms. In addition, the proposals seek to make the Tribunal system more efficient for all firms concerned and apply only when a firm is involved in an Employment Tribunal case. There are therefore no anticipated anti–competitive effects.

Equity and fairness

75. The 1998 Survey of Employment Tribunal applications (SETA 1998) shows that the majority of applications were from 'white' claimants (around 93% for all jurisdictions).[35] Economic data shows that around 6% of employees in the UK are of an ethnic minority origin.[36] This suggests therefore that ethnic minorities are not likely to benefit proportionately more from the proposals in this impact assessment. SETA 98 shows that, with the exception of discrimination cases, the majority of applications were from male claimants (around 60% across all jurisdictions). Around 49% of all employees in the UK labour market are female.[37] Even though there are relatively more applications from men than women, we do not expect there to be any significant difference in the impact of the proposals on male and female employees.

Enforcement and sanctions

76. If awards are made but not paid, these penalties can be enforced through the civil courts in England and Wales. In Scotland they can be enforced without recourse to the civil courts.

Consultation

77. The Department of Trade and Industry has consulted a number of other government organisations, including Acas, the ETS and other Whitehall Departments.

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[34] See M. Cully, S.Woodland, A. O'Reilly and G.Dix "Britain at Work" Routledge, London 1999, table 11.6.
[35] SETA 1998, table 3.1.
[36] Labour Force Survey, Office of National Statistics, March – May 2003.
[37] Labour Market Trends, August 2003.

78. The Dispute Resolution Advisory Group with representatives from key stakeholders, including business, small business and unions, met in June 2003 to discuss the Employment Tribunal Regulations.
79. The measures set out in the consultation document have already been the subject of an initial 'pre-consultation' with the ET Presidents and judiciary and other key stakeholders. Views received at that stage have been fully considered and taken into account in finalising the draft revised Regulations and Rules.
80. At an earlier stage, the Department launched a formal consultation (Routes to Resolution) prior to the introduction of the primary legislation that these revised Regulations and Rules are (in part) designed to implement. That earlier consultation finished in October 2001.[38]

Summary and recommendation

81. This partial Regulatory Impact Assessment finds that the proposals are likely to incur modest costs to the Exchequer. However there are likely to be relatively larger benefits to all parties involved, including employees.
82. The benefits stem primarily from increased efficiency in the way the ETS operates, the manner and speed in which claims are processed, and the increased consistency in the way Tribunal cases are conducted and written reasons provided.
83. Table 4 outlines the quantifiable costs and benefits for employers and the Exchequer that are expected in the longer term – by 2010/11. Some costs and benefits may be higher in the shorter term.

4. Summary of longer term costs and benefits

	Annual benefits	Annual costs	One-off costs
Employers			
Pre-acceptance procedures	£2.0-4.0 m		
Fixed period of conciliation	£0.4-0.9 m		
Total	£2.4-4.9 m		
Exchequer			
Implementation costs		£30,000	£850,000
Pre-acceptance procedures	£0.6-1.2 m	£0.3 m	
Fixed period of conciliation	£0.7-1.7 m		
Default judgements	£0.2-0.3 m		
Written reasons	£0.2-0.3 m		
Total	£1.7-3.4 m	£0.3 m	£850,000

Note: figures may not add up due to rounding

Ministerial declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed by the responsible Minister: *Gerry Sutcliffe,*

[38] The Government response is at http://www.dti.gov.uk/er/individual/etresponse.htm

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