A view from the Chair of the Employment Lawyers Association

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A view from the Chair of the Employment Lawyers Association

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I write this column in the aftermath of the political conference season. If a year ago, I had asked you to guess the political party of the person who said, *‘Existing workers’ legal rights will continue to be guaranteed in law – and they*

will be guaranteed as long as I am Prime Minister … We're going to see workers' rights not eroded, and not just protected, but enhanced under this Government,' you may not have said Conservative. But this is a new world, and the Tories now claim to be the party of the workers.

Of course, the one thing we did not get from the speech was any policy announcements and time will tell whether words will become actions. After all, George W Bush claimed to be a compassionate conservative.

Theresa May says that tackling injustice is her passion in life. If her conference speech is not to be empty rhetoric, then that surely means not just changes to employment law but addressing impediments to access to justice.

You know where I am going – employment tribunal fees are a block to justice, and certainly when they are so high and are not automatically recoverable when a claim succeeds and the remission process remains obstructive. But it does not stop there either; the Jackson reforms effectively keep the vast majority of employees and a good number of employers locked out of the civil justice system when it comes to the enforcement of employment rights heard in the civil courts.

But we also have our own part to play. Ask yourself this: if you were fired, could you (as probably one of the more affluent employees in this wealthy country) afford to instruct a competent lawyer to take the case through to a trial? If you were not an employment lawyer, could you really do it without representation? For many of us, the answer is no. How have we let justice become so unaffordable?

Hospital doctors complain about managers stopping them performing a complex, innovative operation or telling them they need to get a patient out of his hospital bed within 24 hours when they know the patient would benefit from a longer stay. However, hospital managers would say that while a doctor

is focused on his patient in the operating theatre, they have a wider responsibility to all patients. They may add that in striving to offer top-quality treatment to one patient, the doctor is depriving many others, given that resources are limited.

Are we not like the hospital doctor? Lauding a system and our part in it that generally delivers just results to the litigants who appear before the employment tribunal, who are usually accepting of the result because they know it has been considered with diligence and impartiality by skilled judges. Yes, the system is good at delivering just results for those who use it but, for it to work, it needs a lot of lawyers concentrating on just a few litigants, and it means that much of the rest of the populace is priced out of legal assistance and justice.

Every once in a while, someone comes up with an initiative that could offer a path to quicker, cheaper justice for the many, inevitably at the price of purity. Take Brian Doyle's Judicial Assessment procedure, under which an employment judge will, with the consent of the parties, following a case management hearing, opine on the merits of a case.

Many will question the value of such judicial thoughts being voiced before disclosure and witness statements, expert cross-examination and the like. And, of course, if outcomes are achieved as a result, that will in some ways be rougher justice.

But is not impure justice for all better than purer outcomes for an elite of high net worth individuals, employers who can afford to take a principled stance, union members and those with insurance?
Let's play our part and really give this initiative a chance .

Gareth Brahams

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Party refusing to mediate ordered to pay indemnity costs

The defendants in a case refused to mediate a dispute until judgment was due to be given after a 4 day trial. The defendant was ordered to pay the claimant’s costs on an indemnity basis (i.e. a more extensive basis than the standard basis) because the defendants had unreasonably failed to mediate.