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Employment Law Hearing Structures

Law Commission consultation
September 2018

January 2019

Consultation Question 1.

We provisionally propose that employment tribunals' exclusive jurisdiction over certain types of statutory employment claims should remain. Do consultees agree?

Yes, the Committee agree it makes sense to retain this exclusive jurisdiction. This allows specialist expertise in relation to adjudicating on statutory rights to be concentrated. In addition, employment tribunals' relatively informal rules of procedure contribute significantly towards access to justice for employees.

Consultation Question 2.

Should there be any extension of the primary time limit for making a complaint to employment tribunals, either generally or in specific types of case? If so, should the amended time limit be six months or some other period?

The Committee thinks that the time limit should be amended to 6 months, including ACAS early conciliation. This would remove confusion and any alleged harshness around the current time limit being too short. The "just and equitable" extension for discrimination claims should be removed and the "reasonably practicable" test should apply to all cases.

Consultation Question 3.

In types of claim (such as unfair dismissal) where the time limit can at present only be extended where it was "not reasonably practicable" to bring the complaint in time, should employment tribunals have discretion to extend the time limit where they consider it just and equitable to do so?

The Committee believes that in light of our answer to question 2, only the "not reasonably practicable test" should apply in all cases.

Consultation Question 4.

We provisionally propose that the county court should retain jurisdiction to hear non-employment discrimination claims. Do consultees agree?

The Committee firmly believes that employment judges are well placed to hear many non-employment discrimination claims. However, the Committee would not suggest that the county court jurisdiction should be removed entirely, since there will be some circumstances in which the county court would be the most appropriate forum.

Consultation Question 5.

Should employment tribunals be given concurrent jurisdiction over non-employment discrimination claims?

Yes. As the Law Commission's paper points out, employment judges in most cases will have greater experience in applying the basic principles of discrimination law than their county court counterparts.

Consultation Question 6.

If employment tribunals are to have concurrent jurisdiction over non-employment discrimination claims, should there be power for judges to transfer claims from one jurisdiction to the other?

If so, what criteria should be used for deciding whether a case should be transferred:

(1) from county courts to employment tribunals; and/or

(2) from employment tribunals to county courts?

Should county courts be given the power to refer questions relating to discrimination cases to employment tribunals?

Yes, there should be such a power, subject to costs being dealt with by the County Court at the end of a case. The Committee believes that the Employment Tribunal should be dealing with all cases relating to Employment, Pension and Education, with the County Court dealing with Premises, Public functions and transport.

The Committee are not in favour of the power to refer questions to employment tribunals. The Committee think this would build further delays into an already slow system. We think that transferring the whole case to the employment tribunal in circumstances where they are best placed to deal with the legal issues that arise in a particular case would be a better solution.

Consultation Question 7.

If employment tribunals are to have concurrent jurisdiction over non-employment discrimination claims, should a triage system be used to allocate the claim as between the county court or the employment tribunal? If so, what form should this triage take?

The Committee thinks the most effective mechanism would be to leave the initial choice to the claimant, and allow either party to apply to transfer. Unless the application is agreed, we think the issue should be decided by a judge at a case management discussion/directions hearing.

It would also make sense to retain a residual power in both county court and the employment tribunal rules of procedure for a transfer to be initiated by the court/tribunal of its own motion, with specific safeguards so that both parties would have the opportunity to make representations before any order to transfer proceedings is made.

Consultation Question 8.

Do consultees consider that employment judges should be deployed to sit in the county court to hear non-employment discrimination claims?

Yes, subject to capacity issues

Consultation Question 9.

If consultees consider that employment judges should be deployed to sit in the county court, should there be provision for them to sit with one or more assessors where appropriate?

Yes, where appropriate. The Committee understands that tribunal wing-members are frequently approached to sit as assessors in the County Court in discrimination cases and we see no reason why this practice should not be continued if an employment judge is sitting.

Question 10

The Committee believes that employment tribunals should have jurisdiction to hear a claim by an employee for damages for breach of contract where the claim arises during the subsistence of the employee's employment. Employees should not be forced to resign to seek more immediate redress or the risk the additional cost and formality of the civil courts. This would promote greater access to justice and resolution at an earlier stage in a dispute between employer and employee. In cases of non-payment of bonus or commission for example where the amount owed is unclear, a claim for unlawful deduction for wages may not be available– the payment must be capable of quantification in order to constitute *wages properly payable* under section 13(3) ERA. Thus the employee would have to issue in the county/High Court and the formality and costs regime is prohibitive.

Question 11

The Committee believes that employment tribunals should have jurisdiction to hear a claim for damages for breach of contract where the alleged liability arises after the employment has terminated, for consistency. The examples demonstrate that the termination date is an arbitrary watershed, and does not serve justice in resolving disputes between employer and employee. But for certainty there should be some time restraint on how far after the employment has ended an employee may use the tribunal to pursue the employer. We suggest a period of up to 12 months, to recover annual bonus entitlement for the year in which the employee left. If the Tribunals are to deal with post termination restrictions, commonly those restrictions apply for up to 12 months, a similar limitation period for a breach of contract claim may be considered consistent.

Question 12

The Committee agrees that the current £25,000 limit on employment tribunals' contractual jurisdiction should be increased. There are significant disadvantages in employees having to seek redress across the employment tribunals and civil courts. Tribunals are experienced in dealing with significant financial claims. It would avoid considerable confusion, cost and complexity.

Question 13

The Committee believes that the financial limit on employment tribunals' contractual jurisdiction should be either £100,000 or the same as the unfair dismissal limit. These figures are considered to be sufficient to deal with the vast majority of contract claims and low enough not to be subject to a cost regime.

Question 14

The Committee believes that the same limit should apply to counterclaims by the employer as the original breach of contract claim brought by the employee.

Question 15

The Committee believes that 3 months from breach is the right limitation period in the Tribunal to ensure certainty and expediency for resolving the dispute.

Question 16

The Committee agrees that that employment tribunals' contractual jurisdiction should not be extended to include claims for damages, or sums due, relating to personal injuries. Civil courts have considerable experience of these claims, the cases are often complex, require the involvement of various experts and require decisions over interim awards with final award perhaps needing to await the outcome of treatment /rehabilitation etc. making the process protracted and the ability to recover costs particularly important.

Question 17

The Committee does not agree that the prohibition against employment tribunals hearing claims for contractual breaches relating to living accommodation should be retained. Such matters should fall to be dealt with in the same forum as other issues between employer and employee. It does not require any additional expertise.

Question 18

The Committee agrees that the prohibition against employment tribunals hearing breach of contract claims relating to intellectual property rights should be retained. We understand that employment judges have limited experience of this complex area.

Question 19

The Committee agrees that the prohibition against employment tribunals hearing claims related to terms imposing obligations of confidence (or confidentiality) should be retained in the short term but with additional resources in the tribunal system it should be a medium to long term aim to expand the jurisdiction to accommodate such claims.

Question 20

The Committee agrees that the prohibition against employment tribunals hearing claims related to terms which are covenants in restraint of trade should be retained in the short terms but with additional resources in the tribunal system it should be a medium to long term aim to accommodate such claims but only in relation to restrictions in an employment contract not a shareholders or sale and purchase agreement.

These types of claims are often linked to claims of constructive unfair dismissal and wrongful dismissal where determination of a repudiatory breach will impact on the enforceability of the restrictions.

Question 21

The Committee agrees that employment tribunals should expressly be given jurisdiction to determine breach of contract claims relating to workers, where such jurisdiction is currently given to tribunals in respect of employees. The tribunal have jurisdiction to deal with statutory claims by workers and this would avoid the worker having to bring separate proceedings in the civil courts and would reflect the changing face of the labour market.

Question 22

The Committee agrees that if employment tribunals' jurisdiction to determine breach of contract claims relating to employees is extended in any of the ways canvassed in consultation questions 10 to 20, tribunals should also have such jurisdiction in relation to workers. We see no reason for a disparity in treatment.

Question 23

The Committee agrees that employment tribunals should not be given jurisdiction to determine breach of contract disputes relating to genuinely self-employed independent contractors. The same issues regarding statutory rights and a dual court/tribunal regime do not apply.

Question 24

The Committee believes that employment tribunals should have jurisdiction to hear claims originated by employers against employees and workers. The Committee believes the playing field is uneven at present. Access to justice and opportunities to resolve disputes between employers and employees should be equal. Not all employers have significantly greater resources than the employee in order to pursue their legitimate claim. An option may be a small employer exemption. There would be a benefit to employees in that the civil costs regime does not apply, the lack of formality would enable the employee to represent themselves.

Question 25

The Committee believes that employers should be able to counterclaim in employment tribunals against employees and workers who have brought purely statutory claims against them. Although there is a risk of deterring claimant claims, on balance, it is preferential to allow the parties to resolve all matters between them in one jurisdiction.

Question 26

The Committee believes that employment tribunals should not have jurisdiction to interpret or construe terms in contracts of employment in order to exercise their jurisdiction under Part 1 of the ER 1996 because that is not the purpose of part 1.

Question 27

The Committee believes employment tribunals should be given the power to hear unauthorised deductions which relate to unquantified sum. The distinction can be difficult to make causing confusion for the employee in terms of where to issue the claim and the costs regime in the civil courts is prohibitive. The tribunal is experienced in dealing with complex breach of contract issues. It would be in the interests of access to justice.

Question 28

The Committee believes that where an employment tribunal finds that one or more of the "excepted deductions" listed by section 14(1) to 14(6) of the Employment Rights Act 1996 applies, the tribunal should also have the power to determine whether the employer deducted the correct amount of

money from an employee's or workers wages. If the tribunal is not able to determine this, the employee will be required to bring a separate contractual claim in the civil courts to obtain redress where the employee believes the amount deducted is not lawful. The sums of money involved may not justify civil proceedings and it is detrimental to the ongoing employment relationship not to determine the issues.

Question 29

The Committee believes that the tribunals should be given the power to apply set off. Tribunals having that power would not necessarily encourage employers to deduct from wages, but would allow all issues between the parties to be resolved in the tribunal. That aim would potentially be difficult to achieve if the power was limited to liquidated damages or the value of the employee's claim.

Question 30

The Committee agrees that employment tribunals should continue not to have jurisdiction in relation to employers' health and safety obligations, and our comments in relation to personal injury cases apply here also.

Question 31

The Committee agrees that employment tribunals should continue not to have jurisdiction over workplace personal injury negligence claims.

Question 32

The Committee believes that employment tribunals should not retain exclusive jurisdiction over Equality Act discrimination claims which relate to references given or requested in respect of employees and workers and former employees and workers. Civil courts have experience of discrimination claims, where the Claimant intends to bring an alternative claim of defamation/misrepresentation/malicious falsehood, the claims would be better brought as one claim.

Question 33

The Committee believes that in the immediate term employment tribunals should not have any jurisdiction over common law claims (whether in tort or contract) which relate to references given or requested in respect of employees and workers (and former employees and workers). Giving the Tribunal jurisdiction would remove the issue of the Claimant having to potentially issue in the tribunal and civil courts in connection with a reference claim however we would be concerned regarding the experience of the employment tribunal to deal with claims of misrepresentation etc. however employees who are concerned regarding the content of references are often deterred from taking any action due to the formality and costs regime in the civil courts.

Question 34

The Committee believes that concurrent jurisdiction should be retained. Equal pay claims are breach of contract claims and it would be artificial to exclude them from the High Court. In any event, there

are some cases which it makes more sense for the High Court to hear, such as those which overlap with a contractual claim that does not arise from a sex equality clause. Furthermore, pensions claims such as the recent Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank Plc [2018] EWHC 2839 Ch D can involve aspects of pensions law as well as equal pay law and might more conveniently be dealt with in the High Court.

Question 35

The Committee believes that time limit for bringing an equal pay claim in the Employment Tribunal should not be extended. Such a change could lead to an unnecessary multiplication of proceedings in cases where an equal pay claim is brought alongside another claim with a shorter time limit, or cases where there is both a High Court contractual claim and an equal pay claim. However, there is an anomaly that the Employment Tribunal has no power to extend time for presentation of an equal pay claim on a just and equitable basis whereas they do in relation to a sex discrimination claim in respect of pay (such as where the claimant compares herself with a hypothetical man doing like work) or a race discrimination claim in respect of pay. Giving the Employment Tribunal the discretion to extend time where it is just and equitable to do so may be the simplest way of dealing with the ramifications of Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank Plc [2018] EWHC 2839 Ch D where it was held that six year limitation period in s.134 of the Equality Act 2010 offended against the European principle of equivalence and that the effectively unlimited limitation period for breach of trust claims should apply.

Question 36

The Committee suggest that the process of referral from the High Court to the Employment Tribunal should be streamlined, and that the costs regime should be simplified. This could be done by having a presumption that equal pay claims will be referred to the Employment Tribunal unless one party objects, and a rule that, if there is a referral, the parties will bear their own costs in the High Court.

If this approach is applied, there will be no need for the case to return to the High Court to consider costs, and costs will only arise if a party applies for the case to remain in the High Court.

Question 37

The Committee agrees that the current allocation of jurisdiction should remain unchanged.

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Question 41

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Question 42

There does not appear to be a logical reason for the difference in caps on compensation. We therefore believe that the cap applying to employment tribunal claims brought under the Blacklist Regulations should be increased so that it is the same as the compensatory award for unfair dismissal, as amended from time to time.

The Committee is not aware of any examples of cases where the cap led to cases being brought in the civil court.

Question 43

The Committee believes that individuals should be able to pursue both proceedings both by way of judicial review and in the Employment Tribunal. Judicial review proceedings will provide a plaintiff with a declaration that the decision of their qualification body is unlawful. However, there is no general right to compensation in judicial review proceedings. In a matter as serious as unlawful discrimination, individuals should have the right to claim appropriate compensation.

Question 44

The Committee agrees that the current allocation of jurisdiction should remain unchanged.

Question 45

The Committee believes that a police officer should be able to pursue proceedings both in the Police Appeals Tribunal and the Employment Tribunal. This will allow claimants both to: a) overturn any discriminatory outcome of a police misconduct panel and b) obtain appropriate compensation.

Question 46

The Committee agrees that Employment Tribunals should not be given the power to grant injunctions. Given the potentially serious consequences of the granting of this type of remedy, we believe that this should take place in a more formal setting with an appropriate costs regime.

Question 47

The Committee believes that the current position in respect of joint and several liability should be maintained. This will provide protection to claimants in the event of the insolvency of one of the respondents. Given that over one-third of Employment Tribunal awards go unpaid, the Committee believes that it would be appropriate for claimants to be given the benefit of this protection.

Question 48

The Committee agrees that employment tribunals should be given the power to make orders for contribution between respondents in appropriate circumstances and subject to appropriate criteria, namely only in cases in which the person from whom a contribution is sought is already a party to

the litigation, and in circumstances where joint and several liability has been found.

Question 49

The Committee believes that parties at the Employment Tribunal should be given the right to claim contribution from one another on the basis of a "just and equitable" test, because the range of possible scenarios is so wide that the legal test applied to common law claims will not always be useful. The Committee believes that it would be appropriate for respondents not to be permitted to bring freestanding claims as they can in the civil courts, but to allow claims for a contribution to be brought only in cases in which the person from whom a contribution is sought is already a party. One such scenario might be where an employer applies to join as a co-respondent one of their own employees in order to be able to seek a contribution from them. The Committee considers that this is likely to be a rare occurrence and will most commonly occur where the employer is already relying upon the defence available to them under s.109(4) of the Equality Act 2010 in respect of that employee.

Question 50

The Committee believes that the Employment Tribunal should be given limited additional responsibilities in relation to enforcing its own judgments. The Committee believes that it would be most appropriate for the Employment Tribunal to be given power to issue a judgment similar to that of a CCJ. There is clearly an issue with the enforcement of Employment Tribunal judgments, with one-third of awards going unpaid. There would be advantages for unrepresented parties in particular in allowing parties to obtain an enforceable judgment in the less formal environment of the Employment Tribunal, using a process with which the parties will already have some familiarity.

However, it would be inappropriate for the Employment Tribunal to be given the other enforcement powers of the civil courts and costly to duplicate the infrastructure available in the County Court. It is not clear that it would make the judgments easier to enforce.

Question 51

The Committee agrees that the Employment Appeal Tribunal should be given appellate jurisdiction over the CAC's decisions in respect of recognition/derecognition disputes. This should be limited to appeals on questions of law only.

The Employment Appeal Tribunal is a specialised industrial court, and it is a far more suitable forum for challenging decisions of the CAC than is the High Court.

Question 52

The Committee agrees that the position should remain unchanged.

Question 53

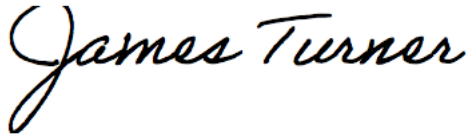
The Committee agrees that there should be an informal specialist list within the QBD to deal with employment-related claims and appeals. We believe that this would help ensure that cases are dealt with by judges with relevant experience. However, this would still require leaving some flexibility to ensure that urgent cases (such as injunctions) are dealt with quickly.

It is less obvious that appeals from goods and services discrimination cases should be covered by the same list. Most employment law cases heard in the High Court are not about discrimination, while there are discrimination cases heard by a range of other High Court judges, in areas such as housing, education and public law.

Question 54

The Committee believes that it should be called the Employment List.

10 January 2019



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