



**Law
Commission**
Reforming the law

Employment Law Hearing Structures

Summary of Consultation Paper

Consultation Paper 239

26 September 2018

INTRODUCTION

- 1.1 The Law Commission's 13th Programme of Law Reform includes a review of employment law hearing structures. The terms of reference are:

To review the jurisdictions of the employment tribunal, Employment Appeal Tribunal and the civil courts in employment and discrimination matters and make recommendations for their reform.

To consider in particular issues raised by:

- (1) the shared jurisdiction between civil courts and tribunals in relation to certain employment and discrimination matters, including equal pay;
- (2) the restrictions on the employment tribunal's existing jurisdiction;
- (3) the exclusive jurisdiction of the county court in certain types of discrimination claim; and
- (4) the handling of employment disputes in the civil courts.

The project will not consider major re-structuring of the employment tribunals system.

- 1.2 In September 2018 we published a consultation paper containing 54 questions and provisional proposals on which we are seeking views. The full consultation paper, together with other information on the project, can be found at <https://www.lawcom.gov.uk/project/employment-law-hearing-structures/>. We are asking for responses by 11 January 2019. This is a summary of the paper.
- 1.3 Employment tribunals (before 1998 called "industrial tribunals") were created in 1964, initially to deal with appeals by employers against industrial training levies. From that very small beginning their jurisdiction has been greatly extended. Notable additions were claims for statutory redundancy payments (in 1965), for unfair dismissal (introduced by the Industrial Relations Act 1971), and for various types of discrimination in employment, now brought together in the Equality Act 2010.
- 1.4 Employment tribunals have deliberately distinct characteristics from civil courts. Among these are:
- (1) an employee or worker is almost invariably the claimant (there are some very minor exceptions);
 - (2) the employment tribunal is generally a no-costs jurisdiction;
 - (3) while it is no longer universal for tribunals to consist of one judge and two lay members, the three-member composition of the tribunal is still a feature of discrimination and equal pay claims;
 - (4) the proceedings tend to be less formal than in the civil courts;
 - (5) there is a right for any party to have lay representation; and

- (6) the employment tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.
- 1.5 These are important characteristics of employment tribunals which we think should be preserved.
- 1.6 Having been created by statute, tribunals have no inherent jurisdiction. It has long been observed that this creates anomalies. For example, until 1994 employment tribunals had no jurisdiction to consider claims for breach of contract even when arising on a dismissal. A dismissed employee could, therefore, claim that their dismissal was both unfair and a breach of contract, but the first claim could only be brought in the tribunal and the second only in the county court or High Court.
- 1.7 In 2001, Sir Andrew Leggatt published the report of his review of tribunals under the title *Tribunals for Users – One System, One Service*. Many respondents had suggested that the division of jurisdiction between the employment tribunals and the courts was anomalous and that the powers of the tribunals should be extended. Leggatt considered that the tribunals had “demonstrably acquired the status and authority” to be the principal forum for the resolution of all employment and discrimination disputes.
- 1.8 The Civil Courts Structure Review led by Lord Justice (now Lord) Briggs from 2015 to 2016 noted what he described as an “awkward area” of shared and exclusive jurisdiction in the fields of discrimination and employment law, which has generated boundary issues between the courts and the employment tribunal system. He considered that these issues, which are well known amongst employment law experts, judges and practitioners, can cause delay and prevent cases being determined by the judges best equipped to handle them.
- 1.9 Some of the suggestions made to the Briggs review were far reaching, for example that the Employment Appeal Tribunal be given first instance jurisdiction to hear the heavier cases at present coming before employment tribunals. Another was that a new “Employment and Equalities Court” be created with non-exclusive but unlimited jurisdiction in employment and discrimination cases, including claims of discrimination in the provision of goods and services. Either of these proposals would require significant primary legislation. Our terms of reference preclude changes of this kind. They would involve significant and possibly contentious primary legislation in a period when Parliamentary time is under almost unprecedented pressure. The scope of this project is to propose the removal of discrepancies in the light of several decades of experience of the employment tribunals system.
- 1.10 Many matters relating to the jurisdiction of employment tribunals are not matters for the Law Commission but are policy choices which should be left to Parliament, such as the limits on compensatory awards for unfair dismissal. Where to set such limits is not a boundary issue between the tribunals and the courts but rather a matter of policy. We do, however, consider that the limits on employment tribunals’ contractual jurisdiction contained in the 1994 Extension of Jurisdiction Order are within the scope of the project, since they impose limits on contractual claims which apply only in the tribunals and not in the civil courts which have concurrent jurisdiction.

A note about terminology: employees and workers

- 1.11 The consultation paper and this summary use the terms “employee”, “worker” and, on occasion, “self-employed independent contractor”. “Employee” and “worker” are defined in legislation, with employees enjoying the full set of statutory employment-law rights and other workers (an intermediate category between employees and the self-employed) enjoying a more limited set of statutory employment-law rights. “Self-employed independent contractor” is not defined in legislation and is a label used to describe individuals who are in business for themselves and providing a service to a client and who are therefore neither employees nor workers. We use the term “worker” to refer to an individual who is a worker but not an employee.
- 1.12 The default forum for employees and workers who seek to enforce their statutory employment-law rights is the employment tribunal. Disputes relating to a genuinely self-employed person are predominantly dealt with by the civil courts.

CHAPTER 2: THE EXCLUSIVE JURISDICTION OF THE EMPLOYMENT TRIBUNALS

- 1.13 Employment tribunals have exclusive jurisdiction over certain types of claims. This means that those types of claims can only be initiated and litigated in an employment tribunal. Chapter 2 of the consultation paper outlines which types of claims fall into this category. There are also a number of rights and issues which can be litigated in both civil courts and employment tribunals; these areas of shared jurisdiction are explored in Chapters 4 and 5.
- 1.14 The entire jurisdiction of employment tribunals is conferred by statute. A range of legislation governs which claims employment tribunals can adjudicate, the restrictions and limitations on their jurisdiction, the remedies they may award, and how their judgments may be enforced.
- 1.15 Employment tribunals do not have the power to award the full range of remedies available to civil courts. The vast majority of successful employment tribunal cases result in an award of financial compensation. However, employment tribunals may, in some cases, make an order for non-financial remedies, for example re-instatement or re-engagement in cases of unfair dismissal.
- 1.16 The principal areas of employment tribunals’ exclusive jurisdiction are: unfair dismissal, discrimination in employment, detriment of various specified types, redundancy, maternity and parental rights, flexible working, time off work for study or training, various matters concerning trade union membership and activities, written statements of employment particulars, itemised pay statements, and the Agency Workers Regulations 2010. The consultation paper summarises the relevant law concerning these areas.
- 1.17 Our provisional view is that there should be no change to the areas where employment tribunals’ jurisdiction is exclusive. If consultees disagree, we are particularly interested in knowing which, if any, area of tribunals’ exclusive jurisdiction should be shared with the county court and/or the High Court.
- 1.18 The consultation paper also seeks views on the time limits that apply to these claims.
- 1.19 The primary time limits for bringing an employment tribunal claim are short (generally three months). The test in many cases for extending the primary time limit is relatively

strict, namely that it was not reasonably practical to bring the claim earlier. These derive from the original concept of tribunals as a forum for the speedy and informal resolution of employment disputes. This concept remains valid to some extent. But many employment tribunal cases are far more complex (and of much higher value) than was the case in the 1970s, and the waiting times for hearings are often significantly longer. It could be considered anomalous that there should be such strict time limits for some employment tribunal claims, notably unfair dismissal, when a claimant who issues the complaint in time may still have to wait many months for a hearing.

- 1.20 We seek consultees' views on whether the various time limits should be rationalised into a more consistent, and perhaps slightly more generous, time limit of six months, and/or whether the power to extend the time limit should afford tribunals greater discretion, as the "just and equitable" test does in discrimination cases, in most or all claims.

CHAPTER 3: RESTRICTIONS ON THE JURISDICTION OF EMPLOYMENT TRIBUNALS - DISCRIMINATION

- 1.21 Chapter 3 of the consultation paper considers the restrictions upon employment tribunals' jurisdiction to adjudicate claims of discrimination. As noted above, employment tribunals may only hear claims if specifically authorised to do so by legislation and have no jurisdiction to hear a variety of discrimination claims arising in contexts outside the workplace.
- 1.22 The Equality Act 2010 gives the county court exclusive jurisdiction to hear discrimination claims arising in the following non-employment contexts: the provision of services; the exercise of public functions; the disposal and management of premises (such as granting leases); membership associations (such as sports clubs); and education.¹
- 1.23 There is therefore a relatively hard boundary between the civil courts and employment tribunals. But this boundary relates to the factual context in which a discrimination claim arises, not the substance of discrimination law. That remains governed by the Equality Act 2010 and the principles of discrimination law apply irrespective of whether a judge hearing a claim sits in the civil courts or an employment tribunal.
- 1.24 Some stakeholders have criticised this way of allocating discrimination claims between employment tribunals and county courts. The criticisms put forward have two strands:
- (1) the first concerns expertise. Most circuit and district judges are generalists who, due to their professional and judicial backgrounds and training, may not have had an opportunity to develop expertise in discrimination law as employment judges have; and
 - (2) the second, related point is that employment judges have developed practices to manage and determine discrimination claims, and that there is no concomitant standard practice in the county court. There is concern about inconsistent judicial approaches developing between employment judges and county court judges. There is also a concern that the county courts' case law may diverge from settled

¹ Equality Act 2010, s 114(1). Some claims regarding school pupils, however, must be brought in specialist education tribunals (Equality Act 2010, s 116).

interpretations of the law by employment tribunals and the Employment Appeal Tribunal (“EAT”). A frequently cited example is *London Borough of Lewisham v Malcolm*,² where the results of the courts’ interpretation of a piece of anti-discrimination legislation was, broadly put, subsequently reversed by statute.

- 1.25 There are arguments in favour of enabling employment tribunals and/or employment judges to hear non-employment discrimination cases. The argument which some stakeholders derive from the *Malcolm* example emphasises the need to minimise the risk of inconsistent judicial approaches developing in non-employment discrimination claims (heard in the county court) and employment discrimination claims (heard in employment tribunals).
- 1.26 A distinct argument put to us is the principle that so far as practicable discrimination disputes should be determined efficiently (both in terms of time and costs), by specialist judges. Given that discrimination claims are generally accepted to be part of the “stock-in-trade” of employment judges, this points to them being able to hear at least some non-employment discrimination claims. Employment judges have significant training in and exposure to discrimination law, and are often current or former practising employment lawyers with significant experience of discrimination law concepts. By contrast, a circuit or district judge may have little or no experience of discrimination law. While there is a presumption that circuit or district judges hearing discrimination claims in the county court will sit with one or more assessors who have relevant experience (and are often employment-tribunal lay members), it is arguably preferable and less costly for the judge to have specialist knowledge and experience.
- 1.27 Some stakeholders, however, have made counter-arguments or offered cautionary notes regarding expanding the jurisdiction of employment tribunals to encompass non-employment discrimination claims. These include the following:
- (1) that the “problem in *Malcolm*” was the way the legislation at the time (the Disability Discrimination Act 1995) was drafted;
 - (2) given that the case went to the House of Lords, the extent to which it demonstrates problems arising from employment tribunals having no jurisdiction over non-employment cases is open to question - it might, for instance, be said that regardless of where a case is heard at first instance, the appellate courts have available to them case law from all jurisdictions to aid their interpretation of the legislation;
 - (3) while employment judges typically have more experience of general discrimination-law concepts than county court judges, employment judges may have no particular experience of non-employment areas such as education, insurance, housing or policing. If, for instance, an individual alleges discrimination under the Equality Act in the context of a possession or wrongful arrest claim, it seems unlikely that this would in itself make an employment tribunal a better forum than the civil courts in which to determine the dispute; and

² [2008] UKHL 43, [2008] IRLR 700.

- (4) legal aid is available, for example, to a tenant defendant in a county court possession claim, but is not available in employment tribunals.
- 1.28 The arguments are finely balanced. In our preliminary exploration of this issue, stakeholders have told us that they think some non-employment discrimination cases could usefully be heard by employment judges. But few would argue that *all* cases in which a discrimination issue arises should be moved to the employment tribunal.
- 1.29 We therefore provisionally propose that the civil courts should retain jurisdiction to hear non-employment discrimination claims, with district and circuit judges receiving appropriate training regarding discrimination law concepts.
- 1.30 We welcome consultees' views, whether they agree or disagree, and are particularly interested in whether there are any arguments either way on this issue which we have not touched upon.
- 1.31 The next issue is whether this jurisdiction of the county court should be shared, in at least some circumstances, with the employment tribunal, or continue to be exclusive. The paramount consideration here is the strength of arguments that employment judges are, in at least some cases, better equipped to hear and determine non-discrimination claims justly and efficiently. Two solutions are particularly worth exploring. The first is concurrent (shared) jurisdiction, with a power to transfer appropriate cases to or from the employment tribunal. The second is for the county court to retain its exclusive jurisdiction allied with flexible deployment of employment judges to the county court.
- 1.32 Legislation could give shared jurisdiction to the employment tribunal and county court over non-employment discrimination claims. Giving employment tribunals concurrent jurisdiction over non-employment discrimination claims offers opportunities to allocate discrimination cases to the most appropriate forum and so determine them more efficiently.
- 1.33 For concurrent (shared) jurisdiction to achieve the above benefits, there would need to be a mechanism to enable claims to be appropriately allocated as between the employment tribunal and county court. One such mechanism would be to give judges powers to transfer discrimination cases from court to tribunal or vice versa. This could be done as part of a triage process at the case management stage, where a judge could decide in which forum the case should be heard.
- 1.34 We do not think that cases should be transferred against the wishes of the claimant. There are significant differences between litigating in the county courts and employment tribunals: subject to any new fees legislation, claimants are not obliged to pay fees to bring claims in employment tribunals³ and the losing party is not generally ordered to pay the winner's legal costs; legal aid is not available in employment tribunals; and different procedural rules apply in county courts and employment tribunals (respectively, the Civil Procedure Rules and the Employment Tribunals Rules of Procedure).

³ Following the Supreme Court's decision in *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] IRLR 911, [2017] ICR 1037.

- 1.35 We therefore think that any power to transfer would require guidance as to the criteria for deciding which cases are appropriate for a transfer. We welcome views from consultees as to what those criteria might be.
- 1.36 Bringing about concurrent jurisdiction over non-employment discrimination claims would require primary legislation at a time when available parliamentary time is scarce. Another option is to retain the hard boundary between the jurisdictions of the county court and employment tribunal, but to use flexible deployment of judges (also known as cross-ticketing) so that an employment judge could where appropriate be deployed to hear a discrimination case in the county court. The flexible deployment option can be viewed either as an alternative to concurrent jurisdiction, or as a temporary measure to achieve a similar aim while primary legislation is pending.
- 1.37 It seems that flexibly deploying more employment judges to hear cases in the county court would reduce (but not eliminate) the possibility of a county court judge with little or no discrimination experience having to hear a discrimination case. If appropriately managed, it should improve the chances of allocating the most expert judicial resources to appropriate non-employment discrimination cases. We therefore ask consultees whether they consider this option to be a good alternative to concurrent jurisdiction conferred by statutory amendment.
- 1.38 Chapter 4 of the consultation paper discusses other restrictions upon the jurisdiction of employment tribunals; these relate to their jurisdiction to hear contractual disputes, claims about written statements of terms of employment and claims of unauthorised deductions from wages.

CHAPTER 4: OTHER RESTRICTIONS ON THE JURISDICTION OF EMPLOYMENT TRIBUNALS

Contractual jurisdiction

- 1.39 A claim that a term of an employment contract has been breached may be brought in the civil courts. Legislation has extended this contractual jurisdiction to employment tribunals in limited ways. Under article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994⁴ (the “Extension of Jurisdiction Order”), tribunals may hear certain breach of contract claims brought by employees against employers and under article 4, tribunals may hear certain breach of contract claims brought by employers against employees who have claimed under article 3 (counterclaims). Where legislation gives employment tribunals contractual jurisdiction, this does not remove the civil courts’ jurisdiction. Where employment tribunals have not been given contractual jurisdiction by legislation, the civil courts retain exclusive jurisdiction.
- 1.40 The main restrictions on employment tribunals’ contractual jurisdiction under the Extension of Jurisdiction Order are:
- (1) temporal – employment tribunals’ jurisdiction is limited to breach of contract claims which arise or are outstanding on the termination of employment. An employee who wishes to bring a claim while still employed must use the civil

⁴ Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623.

courts (it should be noted, however, that claims for unpaid or underpaid wages may be brought in employment tribunals while the claimant remains employed, as a result of the statutory right not to suffer unauthorised deduction from wages);

- (2) financial - the contractual damages which employment tribunals may award are limited to £25,000. An employee who wishes to claim damages above £25,000 must do so in the civil courts;
- (3) substantive – employment tribunals’ contractual jurisdiction does not extend to claims for personal injury, claims concerning the provision of living accommodation, nor claims relating to intellectual property, confidentiality nor restraint of trade. Such claims must be brought in the civil courts;⁵
- (4) employers cannot initiate a contractual claim against employees in employment tribunals, though they can *counterclaim* in contract; and
- (5) it may be that the Order does not extend to workers (as distinct from employees) at all.

The temporal limit

1.41 Employment tribunals only have jurisdiction over claims that arise, or are outstanding, upon the termination of employment. This means that contractual claims cannot be brought (except under the separate jurisdiction over deductions from wages) whilst the employment relationship continues and that claims cannot be brought for sums (such as certain commission payments) that become due after the relationship has ended. We ask whether this restriction should be removed.

The £25,000 limit on contractual damages

1.42 Employment tribunals cannot award more than £25,000 under the Extension of Jurisdiction Order. We understand that the £25,000 limit generates complexity and confusion in practice, pushing some cases into the civil courts which would otherwise have been litigated in employment tribunals, and splitting across employment tribunals and the civil courts some disputes which might otherwise have been disposed of in a single forum. This can happen where, for instance, an employee has claims of both unfair dismissal (which must be litigated in the tribunal) and wrongful dismissal (a contractual claim which may be litigated in the civil court or tribunal, but subject to the £25,000 cap in the tribunal).

1.43 In this context, we have heard concerns about matters including: the occurrence of satellite litigation between parties as to which claim should be issued and heard first, and the wasting of time and money for both the parties and the courts and tribunals service.

1.44 The figure of £25,000 seems out of date and anomalous to many stakeholders:

- (1) even by reference to inflation since the Extension of Jurisdiction Order was enacted in 1994, the limit would now be in the region of £50,000; and

⁵ Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, arts 3 and 5.

- (2) in discrimination, equal pay and certain types of automatically unfair dismissal claims, the financial jurisdiction of employment tribunals is unlimited, and occasionally tribunals hear claims valued in millions of pounds.

1.45 Stakeholders have suggested a range of options for dealing with this issue:

- (1) raising the limit to £100,000 (to align with the High Court threshold for breach of contract claims);
- (2) raising the limit in line with inflation since 1994;
- (3) raising it to the maximum compensatory award which tribunals may make in ordinary unfair dismissal cases (currently £83,682); or
- (4) having no limit at all, bearing in mind that there is no statutory cap on the employment tribunal in some other areas.

1.46 Our provisional view is that the £25,000 limit on employment tribunals' contractual jurisdiction should be increased. We ask consultees what (if any) financial limit there should be on this jurisdiction, and whether the same limit should apply to counterclaims by the employer.

Time limits

1.47 The time limit for bringing a claim in the civil courts is six years from the alleged breach of contract. In the employment tribunal it is three months from the termination of employment – clearly chosen to align with the time limit for an unfair dismissal claim. We ask whether, if the time limit for unfair dismissal claims is altered, the time limit for contractual claims should be altered likewise, and whether a different time limit is required if the jurisdiction is extended to cover claims brought during employment.

Substantive restrictions on employment tribunals' contractual jurisdiction under the Extension of Jurisdiction Order

1.48 Regardless of the financial value of the claim and when it arises, employment tribunals may not hear the following types of contractual dispute:

- (1) claims for damages, or sums due, in respect of personal injuries;
- (2) claims for breach of a contractual term requiring the employer to provide living accommodation for the employee;
- (3) claims for breach of a contractual term imposing an obligation on the employer or the employee in connection with the provision of living accommodation;
- (4) claims for breach of a contractual term relating to intellectual property;
- (5) claims for breach of a contractual term imposing an obligation of confidence; and
- (6) claims for breach of a contractual term which is a covenant in restraint of trade.

1.49 We provisionally propose that these types of contractual dispute should continue to be excluded from the jurisdiction of employment tribunals.

Jurisdiction over breach of contract claims by workers and self-employed independent contractors

- 1.50 There is some doubt as to whether the Extension of Jurisdiction Order gives employment tribunals any contractual jurisdiction in respect of claims involving workers as distinct from employees.
- 1.51 We provisionally propose 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* by the Extension of Jurisdiction Order.
- 1.52 Our current view is that the contractual jurisdiction of employment tribunals should not be expanded to encompass breach of contract claims relating to self-employed independent contractors. This is partly because the genuinely self-employed are not covered by statutory employment rights (so the undesirable scenario where parties need to use both employment tribunals and civil courts to litigate the totality of their dispute does not arise). It is also the case that disputes involving self-employed individuals would not sit comfortably in employment tribunals because such individuals are in business on their own account (that is, they are “their own bosses”).

Jurisdiction over claims by employers

- 1.53 Employment tribunals have no jurisdiction to hear claims against employees or workers originated by employers (though employers can in some circumstances bring counterclaims for breach of contract). This restriction reflects the fact that the primary purpose of employment tribunals is to hear claims from people who think someone such as an employer or potential employer has treated them unlawfully.
- 1.54 We provisionally propose that employment tribunals should continue not to have jurisdiction to hear claims originated by employers against employees.

Written statements of terms of employment

- 1.55 Employees can ask an employment tribunal to determine what terms should be included in a written statement of the particulars of their employment. The Court of Appeal has held that when exercising this statutory jurisdiction employment tribunals are limited to identifying the terms of the contract and cannot rule on the interpretation of terms whose meaning is disputed.⁶ We ask whether the statute should be amended to give them this jurisdiction.

Unauthorised deductions of wages

- 1.56 Although employment tribunals have no jurisdiction under the Extension of Jurisdiction Order to hear a claim for breach of an employment contract while the contract is still running, they do have exclusive jurisdiction to hear the statutory claim of “unauthorised deductions from wages” during employment. Employees’ and workers’ rights in this context were previously enacted in the Wages Act 1986 and are now contained in Part II of the Employment Rights Act 1996.

⁶ *Southern Cross Healthcare Ltd v Perkins* [2010] EWCA Civ 1442, [2011] IRLR 247 (CA).

- 1.57 The Court of Appeal has held that an unauthorised deduction from wages claim must be for a “significant, identifiable sum”.⁷ Accordingly, a claim relating to an unquantified discretionary bonus fell outside the employment tribunals’ “Wages Act” jurisdiction.
- 1.58 In other words, unquantified claims may not be brought as unauthorised deductions from wages claims and must be brought as breach of contract claims; this can be either in the civil courts or an employment tribunal, but in the latter case only after termination of employment and subject to the £25,000 limit discussed above.
- 1.59 We ask consultees whether employment tribunals should be given the power to hear claims for unauthorised deductions from wages which relate to unquantified sums.

CHAPTER 5: CONCURRENT JURISDICTION

- 1.60 Chapter 5 of the consultation paper looks at a number of employment law claims that can be brought either in the civil courts or in employment tribunals. The first is claims for equal pay.

Equal pay

- 1.61 Where they are doing equal work, women and men are entitled to receive equal pay (and be treated equally in respect of other contractual terms) unless there is a non-discriminatory reason for any difference. The law in this area is commonly referred to as “equal pay” law but the relevant equality entitlement extends to contractual terms generally and not just to pay. The legislation governing equal pay (and equality of terms) is found in the Equality Act 2010 at Part 5, Chapter 3 and Part 9, Chapter 4. An equal pay claim may be brought either in an employment tribunal, where there is generally a rigid six-month time limit for bringing the claim, or in the High Court or county court, where the time limit is six years. Both jurisdictions allow claimants to claim arrears of pay going back six years.
- 1.62 The statutory mechanism for achieving the equality entitlement is to import a “sex equality clause” into employees’ contractual terms and a “sex equality rule” into their occupational pension scheme, if they are a member of one. The sex equality clause operates by modifying the employment contract so that it is not less favourable than the contract of a person of the opposite sex. The sex equality rule does the same for occupational pension schemes, and also prevents discretions from being exercised in ways which are less favourable to one sex.
- 1.63 Equal pay claims are most commonly pursued in employment tribunals, under section 127(1) of the Equality Act 2010, which states that “an employment tribunal has jurisdiction to determine a complaint relating to a breach of an equality clause or rule”.
- 1.64 Under section 127(2) and 127(3) respectively, employers and pension scheme trustees or managers can ask employment tribunals to make declarations as to the rights of the parties in any dispute about the effect of an equality clause (which, as described above,

⁷ *Coors Brewers Ltd v Adcock* [2007] EWCA Civ 19, [2007] IRLR 440.

is automatically implied into employment contracts) or an equality rule (automatically implied into occupational pension schemes).

- 1.65 Since equal pay law operates by way of sex equality clauses implied into employment contracts, a breach of equal pay law also amounts to a breach of contract which can be pursued in the civil courts.⁸ The civil courts may transfer the determination of aspects of the claim to an employment tribunal and, in certain circumstances, may in effect cause a claimant to re-issue the claim in an employment tribunal.
- 1.66 There is an argument that employment tribunals are acknowledged as being the specialist forum for determining equal pay claims. The existence of provisions for transferring equal pay questions from the civil courts to employment tribunals implicitly recognises this expertise and paragraph 419 of the Notes accompanying the Equality Act 2010 does so explicitly.⁹
- 1.67 We are aware of some (by no means universal) support for the proposition that all equal pay claims should be heard in employment tribunals, but also that claimants should not lose the six-year contractual limitation period which applies if bringing equal pay cases in the civil courts.
- 1.68 Arguments in favour of investigating the merits of this position include the following:
- (1) some employment tribunals will have more experience and expertise of equal pay law and of handling equal pay claims than civil courts;
 - (2) where the claim is specifically one of “equal value”, tribunals have dedicated rules of procedure and access to independent experts sourced through ACAS;
 - (3) although the civil courts already have the power to transfer questions relating to equal pay cases to employment tribunals, this process may cause delay and increase legal costs;
 - (4) many stakeholders dislike employment disputes needing to be litigated partly in employment tribunals and partly in the general courts and resolving the totality of a dispute in one forum may lead to reduced costs for the parties and for the courts and tribunals service;
 - (5) some litigants in equal pay claims may perceive a tactical advantage in exploiting boundary issues to run up costs; and
 - (6) for reasons to do with judicial expertise, fees, procedure and costs, many claimants prefer to issue equal pay claims in the employment tribunal but the six-month time limit for doing so may be prove too short for some claimants.
- 1.69 There are several arguments against *requiring* all equal pay claims to be brought before employment tribunals. These include the following:

⁸ *Abdulla v Birmingham City Council* [2012] UKSC 47, [2013] IRLR 38.

⁹ “Employment tribunals have the specialist knowledge and procedures to handle claims relating to equality of terms and this section gives a court power to refer such issues to a tribunal”.

- (1) the civil courts have an inherent jurisdiction to hear breach of contract claims, from which equal pay claims cannot always effectively be severed;
- (2) we understand that most equal pay claims are already commenced in employment tribunals. There are costs risks associated with starting a claim in the civil courts, where (in contrast with the tribunal) the losing party often pays the other party's legal costs;
- (3) the current shared jurisdiction offers claimants a choice of forum and there may be instances where one or all parties to an equal pay claim wish to litigate in a costs forum governed by the Civil Procedure Rules; and
- (4) many cases dealing with the sex equality rule in occupational pension schemes raise issues involving technical pensions expertise which we understand employment tribunals may not have. If that is the case, it would be undesirable to require that all such cases which involve the sex equality rule should be heard by employment tribunals.

1.70 Our view at present is that it may be preferable for the concurrent jurisdiction of the civil courts and employment tribunals to be retained. If it is retained, it should be considered what may be done to deter litigation tactics which cost parties and the court system time and money. If, however, consultees do consider that concurrent jurisdiction should cease, we would be grateful for their views as to what changes should be made.

1.71 There appears to us to be a stronger case for aligning the time limits for bringing equal pay claims in the tribunal with those applying in the civil courts. This would prevent equal pay claims being "artificially" pushed into the civil courts due to the employee missing the relatively short deadline for bringing a claim in the tribunal. On the other hand, such a move would run counter to the general policy of requiring employment tribunal claims to be issued within relatively short time limits. We ask consultees for their views.

The non-discrimination rule in occupational pension schemes

1.72 Occupational pension schemes are also deemed to include a "non-discrimination rule" which overrides the other provisions of the scheme. Employment tribunals have jurisdiction to hear discrimination claims arising from breach of the non-discrimination rule. Such claims may be brought against an employer or the trustees of the pension scheme and must normally be brought within three months of the act complained of ceasing to have effect.

1.73 The High Court's and county courts' ordinary jurisdiction to hear claims relating to occupational pension schemes is expressly preserved in claims relating to the non-discrimination rule. Similarly to equal pay claims, civil courts are empowered to strike out a civil claim, or refer a question to the employment tribunal.

1.74 Pension scheme members may also seek redress by making a complaint to the Pensions Ombudsman.

1.75 We are not aware of any calls to change this allocation of jurisdictions regarding pension schemes' non-discrimination rules, but welcome consultees' views.

Transfer of Undertakings (TUPE Regulations)

- 1.76 The Transfer of Undertakings (Protection of Employment) Regulations 2006¹⁰ (“TUPE Regulations”) contain a set of rules and rights designed to protect employment when a business or part of a business is transferred from one legal person to another.
- 1.77 Employment tribunals have exclusive jurisdiction to hear a number of claims that might arise out of a TUPE transfer. These include:
- (1) unfair dismissal claims which arise in the context of a TUPE transfer;
 - (2) claims by a transferee employer that the transferor employer failed to comply with its obligation to supply employee liability information; and
 - (3) complaints that an employer has failed to carry out its informing and consulting obligations.
- 1.78 There are, however, cases in which the civil courts may be required to hear and determine TUPE transfer issues. For example:
- (1) if an employer purports to change a transferred employment contract in a way which is rendered void by the TUPE Regulations, it seems to us an employee might seek a contractual remedy in the civil courts; and
 - (2) civil courts are sometimes required to determine TUPE issues in the context of other litigation. For instance, in *Marcroft v. Heartland (Midlands) Ltd*,¹¹ whether restrictive covenants were enforceable against an employee depended on whether the employee had TUPE transferred. It was therefore necessary for the High Court (whose decision was upheld by the Court of Appeal) to consider and apply the TUPE Regulations.
- 1.79 We are not aware of any calls to alter the demarcation of employment tribunals’ and civil courts’ jurisdictions in relation to the TUPE Regulations, and are not minded to propose that the law be changed.

The Working Time Regulations

- 1.80 The Working Time Regulations 1998 contain rules limiting employees’ and workers’ working hours and providing for rest breaks and paid holidays, prominent amongst which are rights: not to work more than 48 hours a week on average, subject to an agreement to opt out of the limit; limiting the length of night work and providing for health assessments in respect of night work; to daily and weekly rest periods and to rest breaks; relating to annual leave; and rights relating specifically to young workers.
- 1.81 The Working Time Regulations are enforced in two main ways: by way of a tribunal claim and by state enforcement action, but they have also been held to create contractual rights within the jurisdiction of the civil courts.¹²

¹⁰ Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246 (as amended).

¹¹ [2011] EWCA Civ 428, [2011] IRLR 599 (CA).

¹² *Barber v RJB Mining* [1999] 2 CMLR 833, [1999] IRLR 308.

- 1.82 We are not aware of any calls to alter the demarcation of employment tribunals' and courts' jurisdictions over the Working Time Regulations and are not minded to propose that the law be changed.

The national minimum wage

- 1.83 Employees and workers who do not receive the national minimum wage ("NMW") have two options for bringing a claim. First, they can claim the difference via an unauthorised deduction from wages claim brought in an employment tribunal under section 13 of the Employment Rights Act 1996. Second, they can bring a breach of contract claim to recover the money owed (because the effect of section 17 of the National Minimum Wage Act is to amend employees' and workers' contracts to provide a minimum rate per hour). Such contract claims may be brought either in the county court up to six years from the breach (in England and Wales) or in employment tribunals if they fall within the Extension of Jurisdiction Order.
- 1.84 The NMW is also enforced by HMRC. Enforcement measures available to HMRC include serving notices of underpayment; bringing claims to recover underpayments either in employment tribunals or county courts; "naming and shaming"; civil penalties, and criminal prosecution for the most serious cases.
- 1.85 We are not aware of any calls to alter the demarcation of employment tribunals' and courts' jurisdictions in relation to the NMW and are not minded to propose that the law be changed.

Trade union blacklists

- 1.86 Under regulation 3 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 ("Blacklists Regulations"), it is unlawful to compile, use, sell or supply lists of people who are or have been trade union members, or who are taking part or have taken part in trade union activities, if the list was compiled to help employers or employment agencies to discriminate against them in relation to recruitment or in relation to the treatment of employees and workers.
- 1.87 A person may complain to an employment tribunal if, in relation to a blacklist and in contravention of regulation 3, she or he is: refused employment (regulation 5); refused services provided by an employment agency (regulation 6), or subjected to other detriment (regulation 9).¹³ The primary time limit for bringing these tribunal claims is three months. The compensation which a tribunal may award for breaches of regulations 5 and 6 is capped at £65,300 (regulation 8(7)). The compensation a tribunal may award under regulation 9 is not subject to a general cap but if the claimant is a worker (as opposed to an employee) and the detriment complained of is that her or his contract was terminated, then the £65,300 cap applies (regulation 11(10)).
- 1.88 The £65,300 cap corresponds with the maximum compensatory award for most types of unfair dismissal claim that was in force at the time the Blacklists Regulations were introduced. The £65,300 cap, however, has not been raised in line with subsequent

¹³ An employee who is dismissed in reliance on a blacklist which contravenes regulation 3 may not claim detriment under regulation 9 because she or he will have separate unfair-dismissal protection (available to employees but not workers) under the Employment Rights Act 1996; dismissal in reliance on a blacklist which contravenes regulation 3 is automatically unfair.

increases to the maximum compensatory award for unfair dismissal (which is currently £83,682, or 52 weeks' gross pay if lower). The unfair dismissal figure is reviewed annually and index linked (section 34 of the Employment Relations Act 1999) but the £65,300 under the Blacklists Regulations is not.

- 1.89 Under regulation 13, a breach of regulation 3 may also be challenged in the civil courts (but not in employment tribunals) as a breach of statutory duty. The remedies available are damages, an injunction, or both.¹⁴ The time limit is 6 years in England and Wales and recoverable damages are uncapped. A claimant may seek damages from a civil court or compensation from an employment tribunal but may not seek both.
- 1.90 We are not aware of any calls to alter the demarcation of employment tribunals' and civil courts' jurisdictions over the Blacklists Regulations. We invite consultees' views, however, on the discrepancy between the compensation cap for breach of the Blacklists Regulations and the compensation cap for unfair dismissal, and on whether there are blacklists cases affected by the £65,300 cap which have to be brought in the civil courts.

Qualifications Bodies

- 1.91 A "qualifications body" is an authority or body which confers qualifications (and/or other forms of authorisation and certification) needed in certain trades or professions. Under section 53 of the Equality Act 2010, such a body must not discriminate against a person in relation to, for instance, the arrangements which the body makes for deciding whether to confer qualifications; by withdrawing qualifications, or by subjecting the person to any other detriment.
- 1.92 Employment tribunals' jurisdiction to hear such claims is conferred by the Equality Act 2010. That jurisdiction is residual in that it is conferred unless the act complained of is subject to a statutory appeal or proceedings in the nature of a statutory appeal. The existence of a statutory appeal body therefore serves to oust employment tribunals' jurisdiction to hear discrimination claims arising from the qualifications body's decision.
- 1.93 This is illustrated by *Khan v General Medical Council*¹⁵, in which the Court of Appeal found that an employment tribunal did not have jurisdiction to hear a discrimination claim against the General Medical Council because (unlike in the case of *Michalak v General Medical Council*¹⁶ mentioned below), the claimant had the right to apply to a statutory review board under the Medical Act 1983, a right which the Court of Appeal considered was "in the nature of an appeal".
- 1.94 However, the Supreme Court held in *Michalak* that the availability of judicial review in relation to a qualifications body's decisions and actions does not mean that employment tribunals are deprived of jurisdiction by section 120(7). Some stakeholders consider that the availability of judicial review (High Court) as well as a discrimination claim (employment tribunal) may lead to regrettable complexity and they question whether it is sensible for the claimant to be able to challenge the same decision in two different forums, one after another.

¹⁴ Employment Relations Act 1999 (Blacklists) Regulations SI 2010 No 493, reg 13(3).

¹⁵ [1996] ICR 1032.

¹⁶ [2017] UKSC 71.

- 1.95 We accordingly seek consultees' views on whether members of trades or professions who are aggrieved by the decisions of their qualifications bodies should be able to challenge such decisions on public law grounds in the High Court and separately be able to claim unlawful discrimination in the employment tribunal.

Police Misconduct Panels

- 1.96 Employment tribunals have jurisdiction to hear discrimination claims brought under the Equality Act 2010 arising from the decisions of police misconduct panels, despite the existence of an appeal to the Police Appeals Tribunal.¹⁷
- 1.97 We seek consultees' views on whether a police officer who is aggrieved by the decision of a police misconduct panel should be able to challenge that decision by way of statutory appeal to the Police Appeals Tribunal and separately be able to complain that the decision is discriminatory in an employment tribunal.

CHAPTER 6: RESTRICTIONS ON ORDERS WHICH MAY BE MADE IN THE EMPLOYMENT TRIBUNALS

- 1.98 Chapter 6 of the consultation paper discusses three restrictions upon the types of orders which may be made in employment tribunals; these relate to the granting of injunctions, apportioning liability between respondents, and enforcing tribunals' awards.

Injunctions

- 1.99 An injunction is an order of a court prohibiting a respondent from doing something or requiring a respondent to do something. Disobeying an injunction is punishable as contempt of court.
- 1.100 Employment tribunals do not have the power to grant injunctions and it is very rare for tribunals to have such a power. An employment tribunal does have the power to make an interim relief order in respect of certain dismissals which are alleged to be automatically unfair, for example where it is alleged that the reason or principal reason for the dismissal was the claimant's participation in trade union activities. However, such interim relief orders, which are rarely made, are not injunctions and do not carry the sanction of contempt of court.
- 1.101 Any proposal to give employment tribunals jurisdiction to grant injunctions (for example to prevent industrial action) would require primary legislation in a highly contentious area. We doubt whether such a proposal would fall within our terms of reference. In any event we are not aware of any substantial body of opinion that employment tribunals should be given the power to grant injunctions.

Contribution and Apportionment

- 1.102 More than one legal person may be responsible for the same act of unlawful discrimination under the Equality Act 2010. The most obvious example of this is where the alleged discrimination was carried out by another employee (or "individual discriminator") in the course of their employment. If so, a claimant may choose between:

¹⁷ *P v Metropolitan Police Commissioner* [2017] UKSC 65, [2018] 1 All ER 1011.

- (1) just claiming against the employer, who will often be liable for the discriminatory acts of its employees;¹⁸
- (2) proceeding against the individual discriminator(s) but not the employer (this is only occasionally done, reflecting the fact that the employer will normally have deeper pockets); or
- (3) proceeding against the employer and one or more individual discriminators. Compensation will normally be on the basis that they are jointly and severally liable to the claimant for 100% of the award. This means that the whole of the liability may be enforced against any one of them.

1.103 Where a claim is brought in the High Court or county court against two defendants (A and B) who are jointly or otherwise liable for the same damage, and the successful claimant chooses to recover damages only against A, A may claim a fair contribution from B under the Civil Liability (Contribution) Act 1978. However:

- (1) the 1978 Act does not apply to employment tribunals, so if an employment discrimination claim is brought against an employer and one or more individual discriminators, these respondents may not recover contribution from one another in the employment tribunal; and
- (2) the EAT has concluded (on a non-binding basis) that they would not be able to seek contribution from one another by using the 1978 Act in the civil courts.

1.104 We ask consultees whether employment tribunals should have the power to apportion liability between respondents in discrimination cases so that each is separately liable for part of the compensation.

1.105 We also ask consultees whether employment tribunals should be given the power to make orders for contribution between respondents and, if so, whether this right should precisely mirror the position in the civil courts or be modified to suit the employment context. Our provisional view that it is very hard to defend the fact that concurrent respondents to workplace discrimination claims in the employment tribunal may in no circumstances seek contribution from one another. We recognise, however, that difficult policy issues might arise in cases where an employer seeks contribution against an individual employee whose conduct had rendered the employer liable for discrimination. We welcome consultees' views.

Enforcement

1.106 In the view of some stakeholders, it is anomalous that although employment tribunals have many of the characteristics of civil courts, including the power to determine disputes between citizen and citizen and to make financial awards, they have no power to enforce their own judgments. If the respondent (usually an employer) does not pay a sum ordered to be paid to an employee or worker, the employee or worker has to

¹⁸ Under the Equality Act 2010 section 109, unless the employer has taken all reasonable steps to stop those acts occurring.

register the decision in the county court. ACAS-conciliated settlements may be enforced in the same way.

- 1.107 We ask whether employment tribunals should be given the jurisdiction to enforce their own orders for the payment of money and, if so, what powers should be available to them.

CHAPTER 7: THE EMPLOYMENT APPEAL TRIBUNAL'S JURISDICTION

- 1.108 Chapter 7 of the consultation paper considers one aspect of the jurisdiction of the Employment Appeal tribunal ("EAT"). We are not seeking views on the mainstream work of the EAT hearing appeals on questions of law from employment tribunals.

Appeals from the Central Arbitration Committee to the EAT

- 1.109 We do, however, seek views on the issue of appeals from the Central Arbitration Committee ("CAC"). The EAT has a limited jurisdiction to hear appeals on points of law from certain decisions of the CAC and the Certification Officer. The EAT does not, however, have jurisdiction to hear appeals from the CAC in trade union recognition and derecognition disputes, although the CAC's decisions in such cases may be challenged by an application for judicial review in the Administrative Court.
- 1.110 We invite views on whether the EAT should be given jurisdiction to hear appeals on issues of law from decisions of the CAC in respect of trade union recognition and derecognition disputes.

CHAPTER 8: AN EMPLOYMENT AND EQUALITIES LIST?

- 1.111 We have mentioned the suggestion that a new "Employment and Equalities Court" be created with non-exclusive but unlimited jurisdiction in employment and discrimination cases, including claims of discrimination in goods and services. This would require significant primary legislation and it is not, in our view, a practicable proposal at present. We consider in our consultation paper what other measures might be available to ensure that cases about employment and/or discrimination law in the High Court are heard by judges with appropriate specialist experience.
- 1.112 One method of encouraging allocation to judges with appropriate experience is for an informal specialist list of cases to be created within one Division as an administrative measure. For example, the Media and Communications List in the Queen's Bench Division is supervised by a High Court Judge who is a recognised specialist in the field and judges who sit in the list are nominated by the President of the Queen's Bench Division. Claimants bringing cases related to this field of work generally issue them in the Media and Communications List, although they cannot be compelled to do so.
- 1.113 Our provisional view is that the creation of an Employment List or an Employment and Equalities List within the Queen's Bench Division would be a useful step. We invite the views of consultees.

List of consultation questions

This appendix brings together all of the consultation questions contained in the consultation paper. We particularly invite consultees to comment on all or some of these, as appropriate. This will greatly assist us in formulating our recommendations for reform.

CHAPTER 2: THE EXCLUSIVE JURISDICTION OF EMPLOYMENT TRIBUNALS

Consultation Question 1.

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

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?

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?

CHAPTER 3: RESTRICTIONS ON THE JURISDICTION OF EMPLOYMENT TRIBUNALS – DISCRIMINATION

Consultation Question 4.

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

Consultation Question 5.

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

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?

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?

Consultation Question 8.

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

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?

CHAPTER 4: OTHER RESTRICTIONS ON THE JURISDICTION OF EMPLOYMENT TRIBUNALS

Consultation Question 10.

Should employment tribunals 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?

Consultation Question 11.

Should employment tribunals have jurisdiction to hear a claim for damages for breach of contract where the alleged liability arises after employment has terminated?

Consultation Question 12.

We provisionally propose that the current £25,000 limit on employment tribunals' contractual jurisdiction should be increased. Do consultees agree?

Consultation Question 13.

What (if any) should the financial limit on employment tribunals' contractual jurisdiction be, and why?

Consultation Question 14.

If the financial limit on employment tribunals' contractual jurisdiction is increased, should the same limit apply to counterclaims by the employer as to the original breach of contract claim brought by the employee?

Consultation Question 15.

Do consultees agree that the time limit for an employee's claim for breach of contract under the Extension of Jurisdiction Order 1994 should remain aligned with the time limit for unfair dismissal claims? Should a different time limit apply if tribunals are given jurisdiction over claims that arise during the subsistence of an employee's employment?

Consultation Question 16.

We provisionally propose that employment tribunals' contractual jurisdiction should not be extended to include claims for damages, or sums due, relating to personal injuries. Do consultees agree?

Consultation Question 17.

We provisionally propose that the prohibition against employment tribunals hearing claims for contractual breaches relating to living accommodation should be retained. Do consultees agree?

Consultation Question 18.

We provisionally propose that the prohibition against employment tribunals hearing breach of contract claims relating to intellectual property rights should be retained. Do consultees agree?

Consultation Question 19.

We provisionally propose that the prohibition against employment tribunals hearing claims relating to terms imposing obligations of confidence (or confidentiality) should be retained. Do consultees agree?

Consultation Question 20.

We provisionally propose that the prohibition against employment tribunals hearing claims relating to terms which are covenants in restraint of trade should be retained. Do consultees agree?

Consultation Question 21.

We provisionally propose that employment tribunals 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 by the Extension or Jurisdiction Order. Do consultees agree?

Consultation Question 22.

If employment tribunals' jurisdiction to determine breach of contract claims relating to employees is extended in any of the ways we have canvassed in consultation questions 10 to 20, should tribunals also have such jurisdiction in relation to workers? If consultees consider that there should be any differences between employment tribunals' contractual jurisdiction in relation to employees and workers, please would they provide details.

Consultation Question 23.

We provisionally propose that employment tribunals should not be given jurisdiction to determine breach of contract disputes relating to genuinely self-employed independent contractors. Do consultees agree?

Consultation Question 24.

We provisionally propose that employment tribunals should continue not to have jurisdiction to hear claims originated by employers against employees and workers. Do consultees agree?

Consultation Question 25.

We provisionally propose that employers should continue not to be able to counterclaim in employment tribunals against employees and workers who have brought purely statutory claims against them. Do consultees agree?

Consultation Question 26.

Should employment tribunals have jurisdiction to interpret or construe terms in contracts of employment in order to exercise their jurisdiction under Part I of the ERA 1996?

Consultation Question 27.

Should employment tribunals be given the power to hear unauthorised deductions from wages claims which relate to unquantified sums?

Consultation Question 28.

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, should the tribunal also have the power to determine whether the employer deducted the correct amount of money from an employee’s or worker’s wages?

Consultation Question 29.

Should employment tribunals be given the power to apply setting off principles in the context of unauthorised deductions claims? If so:

- (1) should the jurisdiction to allow a set off be limited to liquidated claims (ie claims for specific sums of money due)?
- (2) should the amount of the set off be limited to extinguishing the employee’s claim?

Consultation Question 30.

We provisionally propose that employment tribunals should continue not to have jurisdiction in relation to employers’ statutory health and safety obligations. Do consultees agree?

Consultation Question 31.

We provisionally propose that employment tribunals should continue not to have jurisdiction over workplace personal injury negligence claims. Do consultees agree?

Consultation Question 32.

We provisionally propose that employment tribunals should 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. Do consultees agree?

Consultation Question 33.

Do consultees consider that employment tribunals should 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)?

CHAPTER 5: CONCURRENT JURISDICTION

Consultation Question 34.

Should employment tribunals and civil courts retain concurrent jurisdiction over equal pay claims?

Consultation Question 35.

Should the time limit for bringing an equal pay claim in employment tribunals be extended so that it achieves parity with the time limit for bringing a claim in the civil courts?

Consultation Question 36.

What other practical changes, if any, are desirable to improve the operation of employment tribunals' and civil courts' concurrent equal pay jurisdiction?

Consultation Question 37.

Should the current allocation of jurisdictions across employment tribunals and the civil courts regarding the non-discrimination rule applying to occupational pension schemes remain unchanged?

Consultation Question 38.

The present demarcation of employment tribunals' and civil courts' jurisdictions over the TUPE Regulations 2006 should not be changed. Do consultees agree?

Consultation Question 39.

The present demarcation of employment tribunals', civil courts' and criminal courts' jurisdictions over the Working Time Regulations should not be changed. Do consultees agree?

Consultation Question 40.

Do consultees agree that the present demarcation of employment tribunals', civil courts' and criminal courts' jurisdictions over the NMW should not be changed?

Consultation Question 41.

We provisionally propose that the present demarcation of employment tribunals' and civil courts' jurisdictions over the Blacklists Regulations should not be changed. Do consultees agree?

Consultation Question 42.

Should the £65,300 cap applying to employment tribunal claims brought under the Blacklists Regulations be increased so that it is the same as the cap on compensatory awards for ordinary unfair dismissal claims, as amended from time to time? Are consultees aware of any cases affected by the £65,300 cap on compensation which have had to be brought in the civil courts?

Consultation Question 43.

Should members of trades or professions who are aggrieved by the decisions of their qualifications bodies be able to challenge such decisions on public law grounds in the High Court and separately be able to claim unlawful discrimination in the employment tribunal? If not, please would consultees explain why and what changes they would make.

Consultation Question 44.

Should any other changes be made to the jurisdiction of employment tribunals or of the civil courts in respect of alleged discrimination by qualifications bodies?

Consultation Question 45.

Should a police officer who is aggrieved by the decision of a police misconduct panel be able to challenge that decision by way of statutory appeal to the Police Appeals Tribunal and separately to complain that the decision is discriminatory in an employment tribunal? If consultees take the view that the answer is “no”, what changes do they suggest?

CHAPTER 6: RESTRICTIONS ON ORDERS WHICH MAY BE MADE IN EMPLOYMENT TRIBUNALS

Consultation Question 46.

Our provisional view is that employment tribunals should not be given the power to grant injunctions. Do consultees agree?

Consultation Question 47.

Should employment tribunals have the power to apportion liability between co-respondents in discrimination cases, so that each is separately liable to the claimant for part of the compensation? If so, on what basis should tribunals apportion liability?

Consultation Question 48.

We provisionally propose that employment tribunals should be given the power to make orders for contribution between respondents in appropriate circumstances and subject to appropriate criteria. Do consultees agree? If so, we welcome consultees' views as to appropriate circumstances and criteria.

Consultation Question 49.

If respondents are given the right to claim contribution from one another in employment tribunals, do consultees consider that this right should precisely mirror the position in common law claims brought in the civil courts, or be modified to suit the employment

context? If the latter, we would be grateful to hear consultees' views on appropriate modifications.

Consultation Question 50.

Should employment tribunals be given the jurisdiction to enforce their own orders for the payment of money? If so, what powers should be available to employment tribunals and what would be the advantages of giving those powers to tribunals instead of leaving enforcement to the civil courts?

CHAPTER 7: THE EMPLOYMENT APPEAL TRIBUNAL'S JURISDICTION

Consultation Question 51.

Should the EAT be given appellate jurisdiction over the CAC's decisions in respect of trade union recognition and derecognition disputes? If such an appellate jurisdiction were created, do consultees agree that it should be limited to appeals on questions of law?

Consultation Question 52.

We provisionally propose that there is no need to alter or remove the EAT's current jurisdiction to hear original applications in certain limited areas. Do consultees agree?

CHAPTER 8: AN EMPLOYMENT AND EQUALITIES LIST?

Consultation Question 53.

We provisionally propose that an informal specialist list to deal with employment-related claims and appeals should be established within the Queen's Bench Division of the High Court. Do consultees agree? If so, what subject matter should come within its remit?

Consultation Question 54.

What name should it be given: Employment List, Employment and Equalities List or some other name?