

The Law Commission’s Employment Law Hearing Structures Project
– Consultation Paper No. 239 –
RESPONSE FROM THE EMPLOYMENT APPEAL TRIBUNAL

INTRODUCTION

1 The stated purpose of the Law Commission’s review is to identify aspects of the areas of jurisdiction of the Employment Tribunal, Employment Appeal Tribunal and Civil Courts which could be adjusted “so as to bolster their ability to resolve as much of a dispute as effectively and justly as possible in one venue.”

2 We agree with the Briggs Review and the Law Commission, that this is an area where many of the boundaries that have grown up piecemeal over the decades now look anomalous. This consultation provides a valuable opportunity to consider changes that would improve the delivery of justice in the field of employment and discrimination disputes, for Court and Tribunal users alike. Rationalising the allocation of jurisdictions will also enable the administration of Courts and Tribunals to deploy appropriate judiciary more effectively to the progression and resolution of such claims.

3 We are mindful that the question of what, if any, changes there should be to the substantive content of employment and discrimination legislation from time to time is a matter for Parliament and not for the judiciary. However, we note that, reflecting the nature of the Law Commission’s own role, these proposals focus on questions relating to the allocation of jurisdictions between (or among) the Civil Courts and Tribunals, with the objective of improving the effective administration of justice. We have refrained from commenting on areas which might be perceived as trespassing into substantive law.

4 Our comments draw on the collective experience of Judges who sit in the Employment Appeal Tribunal. Some have also sat, in the Employment Tribunal and/or in the Civil Courts (including the Administrative Court) on employment and discrimination disputes.

5 As the consultation paper recognises, and our experience confirms, the Employment Tribunal is a mature jurisdiction in which highly trained and seasoned specialist judges (and lay members) sit. The complexity and extensive range of modern employment and discrimination law, and the significant expertise which Employment Tribunals bring to bear in their daily work, have been specifically recognised and commended in a number of appellate decisions in recent years, including at Court of Appeal and Supreme Court level.

6 The Employment Appeal Tribunal, for its part, is a long- established specialist appellate Court. Its judiciary, both full and part-time, are drawn from a cadre of High Court and Circuit Judges, all of whom are appointed on the basis of their particular expertise in the employment and discrimination-law field. EAT Judges continue to sit with lay members who have specialist experience on certain appeals, where lay members’ experience will enhance the decision-making. The great majority of appeals that come to the EAT also end there, and the EAT’s decisions form the bedrock of the modern case law in the field.

7 For all these reasons, we suggest that a guiding principle underpinning the rationalisation of jurisdictions should be that, other things being equal, the Employment Tribunal and Employment Appeal Tribunal should be the preferred choice for the determination of disputes in this field. Consistently with that approach, the consultation paper does not propose any *reduction* in their current areas of jurisdiction, and nor do we.

8 Finally, we observe that the consultation paper provides a truly comprehensive and detailed analysis of the background history, relevant legislation, and key case law in the areas covered by each of its chapters. It will, we believe, prove to be a valuable resource for those working or interested in the field, in its own right. We gratefully adopt, and endorse, its analysis of the underlying current state of the law; we do not need to repeat all of it here, but draw on it in setting out our responses to the particular consultation questions, below.

RESPONSES TO CONSULTATION QUESTIONS

Chapter 2: The Exclusive Jurisdiction of Employment Tribunals

Question 1

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

Yes. We consider that there is confidence in the Employment Tribunal system (only a very small percentage of ET judgments are appealed, and an even smaller percentage successfully) and their exclusive jurisdiction over statutory employment claims should be maintained. We agree with the consultation paper that maintaining this exclusive jurisdiction goes to the heart of their role as the specialist, low cost tribunal for determining workplace disputes.

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?

We see the benefit of consistency but also acknowledge that the primary time limits for ET claims are well known and provide clarity for employees and employers alike. This is also likely to involve questions of substantive law. We consider that it is not appropriate for the EAT to engage with the policy issues that underlie these questions.

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?

See answer to Question 2.

Chapter 3: Restrictions on the Jurisdiction of Employment Tribunals - Discrimination

Question 4.

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

Yes, we agree with the points made in the consultation paper (and see responses to questions 5-7 below).

Question 5.

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

Yes. There are discrimination claims that raise no significant issues of law deriving from other fields where ETs may be better-equipped to resolve them. This might be particularly true of cases concerned with the provision, or non-provision, of goods/services under the Equality Act 2010, Part 3. We consider it would afford greater flexibility and better use of specialist judges for there to be extensions to the present concurrent jurisdiction of the ET and County Court in non-employment discrimination cases.

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?

Others are likely to be better placed to respond on the detail of the criteria that might be used for transfer. However, first, we agree with the consultation paper that a transfer should not be made against the wishes of the claimant. Secondly, we tentatively suggest that such claims should be capable of being initiated in either forum, but with any party having the right to seek transfer to the other forum, and the Court or Tribunal also having the power to do so of its own initiative, by reference to a series of relevant factors including complexity, cost and the interests of justice in all the circumstances of the case.

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?

See answer to question 6. When all claims are issued on-line, it may be easier to ensure that all relevant information is collected at the outset so that an initial assessment for allocation purposes can be done.

Question 8.

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

Yes. This would improve flexibility and better use of this specialist judicial resource; it would also have the benefit of broadening the perspective of ET judges, assisting in their career development and (we believe) improving morale.

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.

Chapter 4: Other Restrictions on the Jurisdiction of Employment Tribunals

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?

Yes. This would provide consistency of approach given that such claims can already be brought in the ET for debts (as unauthorised deductions from wages) and sex-based pay differences (equal pay). The current restrictions are anomalous and quite technical distinctions are drawn between contract and debt claims, leading to situations where claimants can be denied the right to pursue their claims because they have mischaracterised their case as the former rather than the latter.

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?

Where the breach in question relates back to the contract of employment, yes.

Question 12.

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

Yes, for the compelling reasons identified in the consultation paper. Employment Tribunals are well-used to dealing with high-value claims, whether for wages, discrimination, equal pay or unfair dismissal in those types of case where there is no cap on the compensatory award.

Question 13.

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

Although ETs are undoubtedly capable of dealing with high value awards, we recognise that there may be an argument for some kind of cap to be retained given that ET's are generally a no-costs jurisdiction. Linking any cap to the minimum value for High Court contract claims might provide a sensible limitation and would allow increases as/when changes are made to the threshold for High Court claims.

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?

Yes. We agree that there should be parity of approach, both in terms of any financial limit and the level at which it is set.

Question 15.

Do consultees agree that the time limit for an employee's claim for breach of contract under the Extension of Jurisdiction Order 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?

See our response to question 2. Subject to that, we see the force of maintaining the alignment of time limits for breach of contract claims and unfair dismissal claims; and preserving

consistency by having the same time limits for breach of contract claims during the subsistence of the employment if this jurisdiction is extended.

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?

We agree for the reasons identified in the consultation paper.

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?

We agree for the reasons identified in the consultation paper.

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?

We agree for the reasons identified in the consultation paper.

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?

We agree for the reasons identified in the consultation paper.

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?

We agree for the reasons identified in the consultation paper.

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?

Yes. This would achieve greater consistency of approach by bringing the jurisdiction in line with the jurisdiction relating to wage deductions claims which can be made by workers. It would also remove a technical and potentially confusing distinction between employee status and worker status, and in cases where status is contested or uncertain, a fertile area for satellite litigation.

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.

No. There should be no differences.

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?

Yes, we agree for the reasons identified in the consultation paper. We consider the distinction between workers/employees on the one hand and those who are genuinely self-employed on the other, arguably marks the line between disputes of a work-related nature and disputes of an essentially commercial nature, for which the Civil Courts are the more natural forum. This demarcation reflects the scope of the ET's jurisdiction in other areas, and we consider it should be maintained.

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?

Yes, for the reasons identified in the consultation paper.

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?

Yes.

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?

Yes. This would provide consistency with the approach to Part II claims. It is natural territory for ETs, and it is anomalous that they can and do carry out this exercise in other contexts (eg. claims for deductions from wages), but presently cannot do so in this area of jurisdiction.

Question 27.

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

Yes. Again, we consider that there should be consistency of approach and note that ETs regularly determine claims relating to unquantified sums in other contexts (unfair dismissal, discrimination claims, and claims for breach of contract).

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?

Yes. This would correct an anomaly, and achieve consistency with s.13 ERA claims.

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?

As employers may bring a contract counterclaim in response to a worker/employee's contract claim, such a change would provide consistency. This accords with our given our general view that consistency of approach should be achieved where appropriate and possible.

However, bearing in mind that we are here concerned with deductions from wages a worker may need to live on, on balance we take the view that the set-off jurisdiction should be limited to liquidated claims and the amount should be limited to extinguishing the employee's claim, but no more.

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?

Yes, for the reasons identified in the consultation paper.

Question 31.

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

Yes, for the reasons identified in the consultation paper.

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?

Yes, for the reasons identified in the consultation paper.

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)?

No. The demarcation reflects the specialism of the two jurisdictions. It does not appear to have generated any significant dual-forum litigation, and we are unaware of any call for an extension to ET jurisdiction in this regard. We agree with the points made in the consultation paper as to how an extension here may lead to confusion between the different jurisdictions in relation to disputes about references.

Chapter 5: Concurrent Jurisdiction

Question 34.

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

Yes. We consider the consultation paper captures the competing arguments in this highly complex area well. We agree with the provisional conclusion reached.

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?

We consider that in principle, the time limit for bringing the same type of claim should be the same in both jurisdictions. Further, in our view, the argument for altering the time limit for bringing an equal pay claim in the ET so as to achieve parity with the time limit for bringing a claim in the civil courts is stronger. We can see benefits in such a change, both for claims brought during employment and those brought after employment has ended: it is not unusual for a claimant to realise that the factual foundation for a claim exists only well after employment has ended. Further, equal pay claims often involve groups of workers, and rationalisation of the time limits would reduce the incidence of a group claim being run simultaneously in two different fora.

Question 36.

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

The primary safeguards for the efficient administration of claims in concurrent jurisdictions are the powers to stay claims or transfer them. Those apart, others are better placed to respond on the detail required to answer this question.

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?

Yes. We are unaware of any reasons to change this position.

Question 38.

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

Yes. Again, we are unaware of any reasons to change this position.

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?

Yes, for the reasons identified in the consultation paper.

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?

Yes, for the reasons identified in the consultation paper.

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?

Yes, for the reasons identified in the consultation paper.

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?

We are not aware of any specific cases that have been adversely affected by the £65,300 compensation cap for claims under the Blacklists Regulations but see no reason for this anomalous cap. We consider that the cap should be increased to achieve parity with the cap on compensatory awards for ordinary unfair dismissal claims (linking this with the automatic review and index-linking applicable to unfair dismissal compensation), as appears was originally intended.

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.

We do not think it desirable effectively to reverse *Michalak* by removing the jurisdiction of ETs in a case where the decision is also amenable to judicial review. Nor do we think that the availability of an ET claim provides sufficient reason to curtail the right to seek judicial review where that is also available.

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?

We are not aware of any reason to make changes in this respect.

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?

We have noted the observations of the Supreme Court in *P v MPC*, but do not think it desirable effectively to reverse *P v MPC* by removing the jurisdiction of ETs in relation to unlawful discrimination claims against police misconduct panels. In any event, as long as UK courts are required to apply EU equal treatment law, we consider that would not be a viable option. Nor do we think that, where an ET claim is possible, the availability of an appeal to the PAT should be curtailed on that account. To curtail it would mean that officers whose complaint includes an element of discrimination would be compelled to litigate in the ET when they might wish only to appeal to the PAT.

Chapter 6: Restrictions on orders which may be made in Employment Tribunals

Question 46.

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

Yes, for the reasons identified in the consultation paper.

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?

While we recognise that the ability of ETs to make compensation awards on a joint and several liability basis for the same harm is important to claimants where an employer goes into administration, we can envisage circumstances where the ability to apportion liability between co-respondents would provide a more just result having regard to the extent of their respective responsibilities for the harm caused to the claimant, and we consider that the option of apportioning liability for indivisible harm should be available to ETs on a just and equitable basis. This would preserve flexibility and enable ETs to achieve a just result.

It would also achieve a degree of consistency (notwithstanding that the situations are not wholly analogous) with powers under reg 18(9) Agency Workers Regulations 2010 and reg 14(4) Blacklists Regulations 2010, as described by the consultation paper, which expressly enable ETs to identify the degree to which two or more respondents are responsible for a relevant infringement and to apportion compensation accordingly.

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.

We agree that where joint or concurrent discriminators are at arm's length, the situation is indistinguishable from that of tortfeasors at common law, and it is anomalous that in such a case concurrent respondents to unlawful discrimination claims cannot seek a contribution order from one another. Empowering ETs to make contribution orders in such cases would remove that anomaly. The criterion should be what the ET considers to be just and equitable having regard to the extent of the concurrent discriminator's liability. This would preserve flexibility and enable ETs to achieve a just result.

We also agree that different issues arise in cases where an employer might wish to seek a contribution against an employee whose conduct has rendered him liable for unlawful discrimination. In addition to the policy issues that arise, the absence of arm's length dealing and the ability of the employer to run an "all reasonable steps" defence which, if successful, eliminates liability entirely, are strong arguments for maintaining the no contribution principle in this sort of case.

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.

See answer to question 48 above.

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?

No. Although there is a superficial attraction in giving ETs the power to enforce their own orders, once a financial award has been made by the ET, its specialist expertise has no bearing on the practicalities of enforcement. Further, there is currently no infrastructure or resource available for enforcement. We consider that the goal of more effective enforcement is likely to be better served by maintaining the current focus on improvements to existing registration and enforcement processes in the County Court (including moving online as part of the Reform Programme).

Chapter 7: The Employment Appeal Tribunal's Jurisdiction

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?

We have seen in draft the response of the Central Arbitration Committee to this proposal, and consider that it raises a number of policy issues on which we do not consider it appropriate to express a view. That said, we see the force of the points made on behalf of the CAC.

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?

We agree. Such applications are rare and no practical concerns in relation to the operation of the jurisdiction appear to have arisen.

Chapter 8: An Employment and Equalities List

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?

To the extent that this may be suggested, we do not favour a list that deals *both* with employment appeals (ie. the EAT's jurisdiction) and first instance employment related claims and non-employment related discrimination appeals. We consider that the role of the EAT and the role of the High Court in employment law cases is fundamentally different. The expertise of the administrative and support staff in the EAT is also different from the equivalent expertise of staff in the Queen's Bench Division. If the EAT were to be merged with a new 'list' within the QBD, its status as an appellate court would be reduced, its expertise and efficiency diminished, and accordingly we consider that it should retain its separate status as a stand-alone, exclusively appellate court.

On the other hand, we consider that the creation of an informal specialist list in the QBD, to deal with employment related claims and non-employment discrimination appeals, would enable such cases to be more efficiently and consistently allocated to Judges with appropriate expertise than occurs at present. The list should include all specialist judges authorised to sit in the EAT.

We would adopt the list set out at paragraph 8.5 of the consultation paper as broadly identifying the scope of work to be covered by the informal specialist list (all work currently dealt with in the High Court) including:

- (1) employees' claims for wrongful dismissal in breach of contract where the sum claimed exceeds the limit on ETs' jurisdiction;
- (2) employers' claims to enforce covenants in restraint of trade;
- (3) employers' claims for breach of confidence or misuse of trade secrets;
- (4) employers' claims against trade unions for injunctions to prevent industrial action or damages following what is alleged to be unlawful industrial action;
- (5) appeals from county courts in claims for unlawful discrimination in goods and services;
and
- (6) appeals from county courts in employment-related cases.

Question 54.

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

Although the name 'Employment List' would probably reflect the vast majority of work undertaken in this area, it may be that if non-employment discrimination appeals are to be included, the name, 'Employment and Equalities List' would better reflect the broader scope of work potentially included.

Mrs Justice Simler DBE
on behalf of the Judges of the EAT

21 December 2018