



## **Law Commission Consultation – “Employment Law Hearing Structures”**

**A Response by**

**The Chartered Institute of Legal Executives (CILEX)**

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## **1. Summary of Recommendations**

- 1.1. The primary time limitations for bringing claims within the employment tribunal should be extended as three months would not be sufficient in many cases. (Para 3.1)
- 1.2. The current hearing structure should be better streamlined to prevent duplication of claims, which can lead to inconsistencies in judicial interpretation and conflicting outcomes. (Para 3.2)
- 1.3. Legal aid should be available for litigants having their case heard in the employment tribunal, especially if in instances where there is concurrent jurisdiction with the county courts. (Para 5.1)
- 1.4. The county courts jurisdiction over non-employment discrimination cases should not be fettered as this would impede upon access to justice. (Para 4.1)
- 1.5. Flexible deployment should be introduced as it shall enable employment judges to attend county court hearings for non-discrimination matters where relevant. (Para 4.2)
- 1.6. Outdated and arbitrary barriers for Chartered Legal Executives to apply for circuit judge roles should be removed. (Para 4.2.2)
- 1.7. In circumstances where employment tribunals enjoy jurisdiction over contractual matters, this should be extended to claims arising during subsistence of employment. (Para 5.2)
- 1.8. Any limitation on the value of contractual damages that may be awarded should not be arbitrarily determined. (Para 5.3)
- 1.9. Distinctions in the time limitations for bringing claims within the employment tribunal and the county courts should be amended. (Para 5.1.1, 5.4)
- 1.10. Employment tribunals should have jurisdiction to hear cases where an unauthorised deduction from wages is neither significant nor quantifiable. (Para 5.5)
- 1.11. Arbitrary technicalities preventing 'workers' from having their case heard before an employment tribunal should be removed. (Part 5.6)
- 1.12. Employment tribunals should be granted powers to enforce their own orders. (Para 6.1)
- 1.13. Employment tribunals should be entitled to apportion liability between co-respondents in discrimination cases. (Para 6.2)

## **2. Introduction**

- 2.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers. Amongst these approximately 1,250 specialise in employment law.
  
- 2.2. CILEx continually engages in the process of policy and law reform. At the heart of this engagement is public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform these developments.
  
- 2.3. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.

### **3. General Points**

- 3.1. CILEx recognises the expertise of Employment Tribunals and welcomes the decision to retain their exclusive jurisdiction over certain employment related claims. However, the current time limits for initiating claims needs to be lengthened to ensure greater streamlining between the procedures of the County Courts and those of the Tribunal. CILEx does not see the primary time limit of three months, starting from the date of termination of employment or alleged conduct, as fit for purpose in many instances.
  - 3.1.1. Although this primary time limit could be benefitted by relaxing powers of extension alone, CILEx would prefer for the maximum timeframe to be generally extended to a longer period. This would provide litigants, who are already facing pressurised and emotional circumstances, with greater clarity and peace of mind that their claim shall not be dismissed purely on a procedural contingency.
  - 3.1.2. Nevertheless, in addition to extending the general time limits, CILEx would welcome relaxation of the powers for extension to take account of situations in which it would be just and equitable to do so.
- 3.2. To further facilitate better streamlining, CILEx additionally encourages that opportunities for duplicating claims in two different hearing venues ought to be removed. As such, CILEx is concerned about the potential impacts of the *Michalak* and *P v Metropolitan Police Commissioner* decisions, on the basis that duplicating claims can lead to inconsistencies in judicial interpretation and conflicting outcomes.

### **4. Non-Employment Discrimination Cases**

- 4.1. CILEx welcomes the decision to retain the county court's jurisdiction in hearing non-employment discrimination cases. To relocate this jurisdiction solely to employment tribunals would equate dissimilar cases and have significant ramifications to access to justice. This is in light of: a). the differences in remedies available to litigants; b). the financial limits for damages that can be recovered in the employment tribunal; c). differences in court fees, and significantly d). the fact that legal aid cannot be accessed for cases heard within the tribunal.
  - 4.1.1. It is imperative that access to justice is provided for those who need it and CILEx strongly encourages that, short of providing legal aid for cases heard in the tribunals<sup>1</sup>, access to legal aid for discrimination cases should not be fettered by these reforms.
- 4.2. CILEx provisionally recommends that flexible deployment should be adopted to enable employment judges to sit in the county court as a means for facilitating the resolution of cases in non-employment discrimination matters. This would enable the expertise that employment judges have on discrimination law and principles to be effectively utilised.
  - 4.2.1. CILEx concurs with the Law Commission's finding that the practical benefits of this approach include the absence of changes to primary legislation, given current pressures on legislative time. In addition, CILEx highlights the ability of this approach to compliment the discussions that are already underway with regards to Judicial Flexible Deployment.

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<sup>1</sup> Please see para 5.1 below.

4.2.2. As referenced by the Law Commission, flexible deployment recognises the expertise and experience that employment judges possess<sup>2</sup>, acknowledging greater parity between tribunal and county court judges. Herein, CILEx would like to draw the Law Commission's attention to the outdated restrictions which have prevented Chartered Legal Executives from becoming circuit judges to date.<sup>3</sup> Should flexible deployment be introduced, this restriction would result in absurd outcomes whereby Chartered Legal Executives are deployed to county courts, fulfil the same function as circuit judges, but would be unable to apply for the official position of a 'circuit judge'. Such barriers cause grievances in practice with no underlying rhyme or reason and continue to create hierarchical distortions within the legal profession. Much in the same way that these reforms aim to eradicate anomalies that have prevented cases from being determined by judges well equipped to handle them, CILEx urges that these barriers for Chartered Legal Executives need to be removed.

## **5. Restrictions on Employment Tribunals for Employment Contract Cases**

5.1. CILEx believes that legal aid should be made accessible for those without means to resolve their case in the employment tribunal. Concurrent jurisdiction for the county court and tribunals over certain contractual claims, should not expect claimants to compromise between having access to much needed funding which would help in bringing their case, and having that case heard by specialist judges so that they may obtain a just outcome. CILEx asserts that access to justice encompasses the bringing, hearing and resolution of legal disputes and that a person should in no way be made to choose between them.

5.1.1. On the same premises it is encouraged that the time limits in the tribunal for bringing equal pay claims (of which the tribunal and county courts have concurrent jurisdiction) should be extended to match the longer limitations enjoyed in the county courts.

5.2. CILEx does not see why the jurisdiction of employment tribunals over certain contractual matters are limited to claims arising after termination of employment. This creates a fragmented and overly complex framework for practitioners and litigants. As such, it is hoped that this jurisdiction shall be extended to claims which arise during subsistence of employment.

5.3. Any limitation on the value of contractual damages that may be awarded should not be arbitrarily determined. It is imperative that the remedies available to claimants are proportionate and relevant. CILEx recommends that when updating the current £25,000 limit, a mechanism should be put in place to future proof the system, by which this limit may be reviewed and updated routinely with independent judicial guidelines.

5.4. As previously articulated<sup>4</sup> CILEx would welcome greater streamlining between the procedures of the County Courts and those of the Tribunal to simplify the system where parallel claims are being sought. Extending the current time restrictions for

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<sup>2</sup> Consultation paper para 3.37-3.38.

<sup>3</sup> Eligibility is currently restricted under the Tribunals, Courts and Enforcement Act 2007.

[http://www.legislation.gov.uk/ukpga/2007/15/pdfs/ukpga\\_20070015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2007/15/pdfs/ukpga_20070015_en.pdf)

<sup>4</sup> Please see para 3.1 above.

bringing contractual claims to the employment tribunal, so that it is better aligned with the six-year limit for county courts, seems both sensible and pragmatic.

5.5. Current limitations on the employment tribunals jurisdiction to hear cases where an unauthorised deduction from wages is neither significant nor quantifiable is considered by CILEx to be somewhat capricious. As such CILEx sees no reason why the jurisdiction of employment tribunals should not be extended to encompass these types of claim.

5.5.1. Given that employment tribunals have jurisdiction to interpret contractual terms for the purposes of unauthorised deductions, CILEx further endorses that this right be extended for tribunals exercising jurisdiction under Part I of the Employment Rights Act 1996. CILEx believes that the current restriction which entitles the tribunal to identify but not interpret terms to be included within a written statement of particulars is both unnecessary and unrealistic in practice.

5.6. CILEx hopes that alongside streamlining the current hearing structure, these reforms shall remove any arbitrary technicalities which prevent 'workers' from having their case heard before an employment tribunal. This is needed in appreciation of the changes that have taken place to the general employment landscape, where greater numbers of 'workers' now operate.

## **6. Powers of Enforcement**

6.1. To facilitate judicial outcomes, CILEx encourages that employment tribunals should be granted the powers to enforce their own orders. The current system, by which litigants must go through the county court to enforce tribunal orders, unnecessarily complicates processes and is likely to be frustrating for litigants who are expected to navigate an entirely new set of procedures, coupled with travelling to new locations, simply to enforce the outcomes of their case.

6.2. In addition, CILEx sees no substantive reason why employment tribunals should not be entitled to apportion liability between co-respondents in discrimination cases. It seems that the tribunal would be best placed to exercise this power given the knowledge that it would already possess on the merits of the case along with equitable considerations that might impact upon how contributions and apportionment are ordered.