

Law Commission

Consultation on Employment Law Hearing Structures

Consultation response from Lewis Silkin LLP

About us

Lewis Silkin is a commercial law firm with approximately 60 partners. Our main office is in London, with smaller offices in Oxford, Cardiff, Dublin and Hong Kong. We have 23 partners in our Employment, Immigration and Reward division, which is one of the largest and most highly rated in the UK, with top tier ratings in Legal 500 and Chambers & Partners. We are also the current Who's Who Employment Team of the Year (a global award). This response is submitted on behalf of Lewis Silkin LLP, rather than our clients, based on our experience in practice advising predominantly medium to large-sized employers across a variety of sectors.

We are responding only to those questions where we have specific views based on our experience as a firm of solicitors specialising in employment law.

Chapter 2: the exclusive jurisdiction of employment tribunals

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

Yes. As noted, the employment tribunal is a specialist forum for determining industrial disputes, heard by experts in the field. We would also note that employment and discrimination law is legally complex area with a large number of statutes and precedent caselaw, making it particularly important that hearings are chaired by specialist judges.

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 6 months or some other period?*

We would not support a general extension of the primary time limit for making a complaint to employment tribunals. Although three months is short compared to limitation periods in the courts, tribunals are still conceived as a forum for more speedy and informal resolution of employment disputes. Issues are more complex and waiting times for hearings are often longer than in the 1970s, but the tribunal system remains more informal and (in most cases) quicker than a court claim. A current increase in waiting times for hearings has been caused by lack of judicial resources following the abolition of fees for bringing a claim, and we anticipate that this will reduce following recruitment of new judges this year.

It is also worth noting that the primary time limit in most cases is no longer three months, due to the Acas early conciliation process. Prospective claimants now only need to contact Acas before the end of this period – not formulate and submit their full claim. Claimants always have at least one month after the end of early conciliation to submit their claim. This means that the primary time limit has become a minimum of four months, and can be longer if there is an extended conciliation process.

The exception to this view is the legal requirement to bring discrimination and whistleblowing claims within three months of the date of the detriment. Where the detriment is a decision taken by the employer, the employee may not know when that decision was taken. The employee may only be notified of this decision shortly before the time limit expires, or even after it has expired. Although the just and equitable extension is available in discrimination cases, this relies on the tribunal's discretion and may not provide three months from the date of notification – potentially leaving the employee with little time to take advice and formulate a complex claim. And, in whistleblowing cases, the time limit is more strict and subject only to the "not reasonably practicable" extension. The solution in these cases

would be to have a time limit which runs from the date on which the employee becomes aware of the detriment.

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?*

No. We do not think this would be appropriate, as it would create too much uncertainty and lead to delays in the system. The "just and equitable" test is appropriate for discrimination claims as these cases are generally more complex, and they involve the fundamental human right not to be discriminated against so that some discretion on the part of the tribunal is desirable. Claims that are subject to the "not reasonably practicable" test are essentially about industrial relations and dismissal. It would create considerable uncertainty for employers to make the current time limit subject to discretion. It is in the interests of both parties that disputes of this nature are brought and resolved quickly, so that the claimant can move on with his/her working life and the employer can be sure whether or not it is likely to face a claim.

Chapter 3: restrictions on the jurisdiction of employment tribunals - discrimination

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

Yes, based on the argument that some types of discrimination may arise in areas where Employment Judges have limited experience – but subject to the jurisdiction being shared.

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

Yes. The employment tribunal is a specialist forum for determining the majority of discrimination claims. We would favour a power to transfer non-employment discrimination claims between jurisdictions so that the most appropriate forum can be used, but agree that a compulsory transfer to the county court would not be appropriate due to the potential costs consequences for both parties. We would be in favour of flexible deployment of employment judges as an alternative means of ensuring expert judicial resources for discrimination cases, but feel that concurrent jurisdiction would be preferable as the pool of judges available for flexible deployment would inevitably be limited by administration and resourcing constraints.

Chapter 4: other restrictions on the jurisdiction of employment tribunals

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

Yes. We agree that the current £25,000 limit causes complexity and confusion in practice. As noted, the financial jurisdiction of the employment tribunal is unlimited in many other types of claim. To deal with the concern that exceptionally high value claims should not be brought in a no-costs jurisdiction, we would propose a limit of £100,000.

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?*

Yes, for the reasons set out in the consultation paper. In particular, this would not work unless employment tribunals also have the power to grant injunctions, as this is the most usual remedy in such cases.

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?*

Yes, for the reasons set out in the consultation paper. In particular, this would not work unless employment tribunals also have the power to grant injunctions, as this is the most usual remedy in such cases.

Chapter 5: concurrent jurisdiction

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

We would be in favour of all equal pay claims being heard in employment tribunals, for the reasons set out in paragraph 5.33 of the consultation document. In particular, the High Court does not have the necessary rules of procedure to deal with equal pay claims, particularly equal value claims where expert reports are used and there are specific “equal value” hearings.

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 would not support increasing the time limit to 6 years. As noted in the consultation paper, this would run counter to the general policy of requiring employment tribunal claims to be issued within relatively short time limits. The time limit is already 6 months after the end of the relevant contract, which is longer than most limitation periods in the employment tribunal. Also as noted in the consultation paper, most equal pay claims are already commenced in the employment tribunals. There is no clear evidence or explanation as to why the 6 month time limit is not adequate for claimants – taking into account that this is extended by the Acas early conciliation process, and the rules also allow for an extension in concealment and incapacity cases (see section 130 of the Equality Act 2010).

Chapter 6: restrictions on orders which may be made in employment tribunals

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

Yes. We agree for the reasons set out in the consultation paper.

Chapter 7: the Employment Appeal Tribunal’s jurisdiction

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 agree that it would make a lot of sense for appeals on points of law in relation to trade union and derecognition disputes to go to the EAT instead of parties having to challenge the CAC’s decisions through judicial review.

- The EAT already has jurisdiction in relation to other decisions of the CAC.
- The EAT is also a specialist appeal court which is used to dealing with issues relating to employment and industrial relations.
- The formal judicial review process is not suited to how the appeals happen in practice. Although the CAC is technically the respondent to the appeal, it has a general policy of not intervening in or appearing at the hearing. This means that the judicial review hearing is run in practice in the same way as an EAT hearing, with the two parties represented rather than the CAC.

- A judicial review appeal means that the losing party is generally liable for the other parties' costs in full. In the EAT costs are only payable in specific circumstances. The costs risks of a judicial review are a significant deterrent to an appeal. This is particularly anomalous as the EAT already has jurisdiction in relation to other CAC decisions.

However, we also agree that appeals should be limited to points of law, as opposed to opening wider labour relations questions up to appeal. The EAT's jurisdiction is already limited in this way in relation to appeals from the Employment Tribunals and in those areas in which decisions of the CAC may already be appealed to the EAT. The CAC should remain the specialist decision-maker in this area (as indicated by the quoted caselaw).

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

We agree that there is no need to change this. In particular, removal of the EAT's jurisdiction to hear applications that penalty notices should be issued would presumably mean that financial penalties would be dealt with by the CAC. This would not be appropriate as it would risk making cases at the CAC about financial issues rather than simply industrial relations. This would be counter-productive as the CAC is primarily about finding effective ways for parties to work together in future -given the ongoing nature of relationships in labour relations as compared to most Employment Tribunal cases (see for example para 171 of schedule A1 to TULRC(A) 1992 and [41] and [69] of the CAC's decision in *ManpowerGroup* [EWC/15/2017]).

Lewis Silkin LLP

January 2019