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Law Commission Consultation on Employment Law Hearing Structures

Response from the Employment Lawyers Association

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Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law. We include those who represent both claimants and respondents/defendants in the courts and employment tribunals. It is not our role to comment on the political merits or otherwise of proposed legislation , rather we make observations from a legal and practical standpoint. Our Legislative & Policy Committee is made up of both barristers and solicitors who meet regularly to consider and respond to proposed new legislation.

The members of the working party that prepared this paper are listed at the end of this paper, at Appendix 1.

ELA very much welcomes the opportunity to comment on the Law Commission's Paper. It focuses on issues that are of particular importance and interest to our members. As you may be aware, we were heavily involved in commenting upon Lord Justice Briggs' (as he then was) proposals in 2015/16 as part of the Civil Courts Structure Review. These included dealing with various comments that had been made as part of the Enquiry as regards the location of Employment Tribunals and the Employment Appeal Tribunal in relation to existing civil courts and other tribunals. There were, as it will be recalled, various references to the "uncomfortable split of jurisdiction", "awkward areas of shared and exclusive jurisdiction" and "their rather lonely existence", "the present unsatisfactory isolation of that tribunal", "the desirability of finding the right home for the Employment Tribunal… and the Employment Appeal Tribunal". There was also a comment that Employment Tribunals were "uncomfortably stranded between the civil courts and the main Tribunal Structure".

These comments made for uncomfortable reading for Employment Lawyers. Then in April 2016, we submitted a detailed Response to Proposals that had been put forward for a Single Employment Court. At the time we said this of the idea:-

"The proposal for there to be a single employment court has potentially hugely significant ramifications. We do currently seem to be moving at an extremely rapid pace in terms of the time being given to consider this development, and also to respond to related specific proposals, as have, most recently been put forward by Lord Justice Briggs. We would exercise real caution here, and respectfully suggest that those charged with responsibility for these reforms take proper time to consider their proposals, and consult properly within reasonable time limits, before making changes which could, if insufficiently thought through, result in further disruption as they are undone or redone."

We were also fully engaged in commenting upon the Department for Business, Energy & Industrial Strategy (BEIS)'s proposals entitled "Reforming the Employment Tribunal System". These were designed to "transform the way that tribunal users engage with the system". The programme was to apply to all courts and tribunals managed by the Courts and Tribunals Service, including Employment Tribunals and the Employment Appeal Tribunal.

We have been aware for some time that the structure and the role of the Employment Tribunals may become an area of focus for the Law Commission. We think it fair to say that in light of the Government's plans for a radical overhaul of our Justice System, and the attention given to the jurisdiction of the Employment Tribunals and the common law courts to hear employment related cases in recent years, we were anticipating something more radical and far reaching than perhaps we have seen in the Law Commission's paper. That being said, we do understand the limitations upon the Law Commission in this respect, and we appreciate they will not be keen to make proposals that may be controversial or politically sensitive.

So on that basis we do welcome the current consultation. We hope it may lead to a wider debate amongst stakeholders and that it will help modernise and make more efficient our employment law jurisdiction as part of the Government's wider Programme of Reform to the Justice System. It could not have come at a better time. The repercussions caused by the introduction of Employment Tribunal fees in July 2013, and then subsequently the Supreme Court decision in July 2017 to declare

Employment Tribunal fees unlawful, are still being felt, and that is why the Employment Tribunal system as currently constituted and resourced is unsurprisingly struggling to cope.

ELA Response

Chapter 1

We do not comment specifically on Chapter 1 (your introduction) but begin our response by dealing with Chapter 2.

EMPLOYMENT LAWYERS ASSOCIATION

Chapter 2

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

We note that the Commission is not aware of any body of opinion among the employment law or employment relations community which suggests that any of the exclusive jurisdictions of the employment tribunals should become an area of concurrent jurisdiction with the County Court and/or High Court. We too are not aware of any such views and endorse the Commission's provisional proposal accordingly.

We would add that we would regard it as undesirable to give the County Court or High Court jurisdiction over any of the areas of law, such as unfair dismissal, employment discrimination and redundancy rights, in respect of which the employment tribunals have built up, over many years, a considerable body of expertise, and in the determination of which they generally command the respect of both employer and employee/worker litigants and their respective representatives. We consider that any change reducing the exclusivity of the employment tribunals' jurisdiction would be a retrograde step.

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?

Not all of our members agree, but some believe that the balance of advantage is in favour of making the time limit six months in all cases in which the employment tribunals have exclusive jurisdiction.

For many of our members the present position is that it is somewhat of a patchwork, likely to confuse and mislead prospective claimants, particularly those who lack access to professional advice.[1] As examples:

(a) Whilst most claims under provisions contained in the Employment Rights Act 1996 must be presented within three months of the act or omission, or last act or omission, complained of, claims for redundancy payments have a time limit of six months (which we note has applied since the first introduction of rights to such payments in 1965, without, as far as we are aware, any difficulty arising from this more generous time limit).

(b) Claims in relation to written particulars of employment can be brought at any time during the claimant's employment or within three months after the effective date of termination; in practice such claims may be brought many years after the employer's obligation to issue particulars first crystallised. Again we are not aware that this has caused any particular difficulty.

(c) Claims in respect of unlawful deductions have a three month time limit, but time only runs from the last date on which the employer could lawfully have made the payment in issue, which may be later than the date of termination of employment. Moreover if a claim is brought which is in time in relation to any unlawful deduction, the claim may embrace earlier deductions forming part of a series, subject to a longstop introduced in 2015 of two years back from the date of the claim.[2]

[1] The time limits for almost all claims in employment tribunals are now subject to the additional complication that if a claim is referred to ACAS for Early Conciliation before the primary limitation period for the claim has expired, the time between that referral and the issue of an Early Conciliation Certificate does not count against the claimant, and time is automatically extended if necessary so that a claim need only be presented within a month of the issue of the certificate. This means that in practice a three month limit may be as long as five months, and a six month limit as long as eight months, depending on the duration of the Early Conciliation period. Given the Early Conciliation regime is likely to remain, some of our members believe this mitigates against allowing the Employment Tribunals to have discretion to extend time.

[2] See the Deduction from Wages (Limitation) Regulations 2014, applying to claims first presented on or after 1Jjuly 2015.

(d) For contractual claims, the time limit is three months from the date of termination, but claims may be brought which are 'outstanding' at the date of termination, which may therefore have arisen from a breach of contract, or relate to money owed under the contract, at any time within the contractual limitation period of six years prior to the date of termination.

(e) Equal pay claims may be brought at any time during the currency of the claimant's employment, or within six months of the date of termination or transfer to another employer; in any case claimants can seek arrears of pay for the full six-year contractual limitation period. Equal pay claims are doubly anomalous; claims may be made in the County Court at any time within the six year limitation period, and thus up to six years after the date of termination (although with diminishing value over time).

(f) By contrast discrimination claims have a time limit of three months from the date of the act or omission, or last such, complained of. The division between contractual pay issues (equal pay) and non-contractual benefit issues (sex discrimination) may mean that the question whether a claim is in time can only be determined by resolution of a disputed question concerning the contractual status of, say, a bonus.

These differences may mean that where more than one claim is brought by the same individual in the same proceedings, different limitation rules mean that one or some claims are in time and justiciable, whilst others are not.

Whilst a tribunal is permitted to exercise its discretion to extend time limits in certain circumstances, such preliminary matters are likely to extend the time taken for a case to be heard; and it is unlikely that Parliament intended that this discretion should be relied upon as a matter of course to remedy a short limitation period.

There are also concerns that the more common three month time limit causes serious injustice in a significant number of cases in which individuals who may have a genuine claim fail to start proceedings in time. There may be any of a number of

reasons for this in individual cases, including not being aware of time limits at all, not having access to legal or other professional advice and assistance, awaiting the outcome of an appeal (appeal procedures are often quite protracted in the public sector in particular) or being too preoccupied with the consequences of losing their job and income. We appreciate that many of these reasons operated more effectively to curtail access to justice whilst employment tribunal fees were in place, but the abolition of fees does not mean that these problems no longer cause claimants to miss the deadline for instituting claims; moreover it cannot be assumed that the government will not seek to reintroduce a fees regime, which would inevitably create some risk of aggravating the factors leading to claims not being made in time.

As a further point, time limits go to jurisdiction, with the consequence that even marginal lateness of a day, or even less, is an absolute bar to the claim being heard, regardless of its merits and of whether there has been any prejudice to the respondent as a result of the late presentation of the claim, unless the tribunal is persuaded that the conditions for an extension of time are met. This in turn leads to considerable numbers of preliminary hearings simply to determine whether the case can be heard at all. This has undesirable consequences which include expense to the claimant and the respondent, additional burdens on the tribunal system, and delay in those cases in which an extension of time is granted, in the substance of the case reaching trial. These are disadvantages to both parties. We accept that the problems outlined are particularly associated with those jurisdictions where an extension of time requires that the tribunal is persuaded that it was not reasonably practicable to present the claim in time, and that the 'just and equitable' test for an extension of time affords more opportunity to mitigate the strictness of the primary time limit (a point to which we return in our response to Question 3). However even where there is a facility to extend time on a just and equitable basis, the initial time limit is relatively short, and the problems outlined above all in our experience do arise regularly.

We recognise that employers may benefit from there being a relatively short time limit for claims, in two ways in particular; the first is that it is not necessary to retain records relating to former employees, disciplinary processes etc., for an unduly long

period, an important consideration given the much stricter controls on the retention of personal data under the General Data Protection Regulation and the Data Protection Act 2018[3]; the second is that the longer the delay before an employer becomes aware of proceedings, the more likely there will be problems with witnesses' recollection of events, and indeed with witness availability.

However these points have to be balanced against the very serious prospect of claimants with genuine claims being prevented from having their claims heard at all. Endemic delays in the hearing of cases resulting from the under-resourcing of tribunals create at least as many problems of witness availability and reliability of evidence as the possibility of up to three months more elapsing before claims are instituted, as has been the recent experience of employment law practitioners, with listings for hearings being set over a year after the claim was lodged. Some of our members therefore, do believe the balance is in favour of enabling claims to be brought within a standard time limit of six months from the date of the act or omission, or last act or omission, relied on in the claim.

Importantly, in this respect, support may be drawn from the conclusions and recommendations of the June 2016 Parliamentary Justice Select Committee - Courts and Tribunal Fees Report, where at paragraph 79, it states that, "*further special consideration should be given to the position of women alleging maternity or pregnancy discrimination, for whom, at the least, the time limit of three months for bringing a claim should be reviewed"*. There are also the conclusions of the House of Commons Women and Equalities Report into Pregnancy and Discrimination published in August 2016[4] at paragraphs 141 – 143 which state that "*t*here *is clear evidence of a need to extend the limit for new and expectant mothers. We therefore endorse the Justice Committee's recommendation that the Government review the three-month time limit for bringing a claim in maternity and pregnancy discrimination cases. We suggest that six months would be a more suitable time limit"***.**

[3] Although in reality, employers are likely to keep employee information for at least 6 years, in case of breach of contract claims in the civil courts.

[4] https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/9008.htm#_idTextAnchor054

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?

Many of our members consider that it would be a significant improvement on the present position to have a single test, and that the 'just and equitable' test better serves justice, as it allows the tribunal to balance the prejudice to both parties in deciding whether to grant an extension of time.

To many of our members the present position has three serious disadvantages. The first is that in cases where both tests apply to different claims brought in the same proceedings, the outcome may be that those claims to which the just and equitable test applies are permitted to proceed, but those to which the not reasonably practicable test applies are dismissed as time barred. Not infrequently the factual issues for both claims are the same, as where the claimant complains of unfair dismissal and that the dismissal was an act of unlawful discrimination. There is no additional burden on or prejudice to the Respondent in these circumstances. Therefore, in such cases it is hard to justify the tribunal not being able to give a decision on the unfair dismissal claim, but that is the necessary consequence of a finding that it was reasonably practicable to present the claim in time.

The second disadvantage is that the tests for reasonable practicability operate in many cases arbitrarily and with little correspondence to the intrinsic merits of the claimant's position or the balance of prejudice between the parties. Thus claims presented a day out of time may be time barred despite the lack of any prejudice to the respondent from the delay.

The third is that the body of case law on when it is to be considered not reasonably practicable to have presented the claim in time is both large and complex, and exhibits a number of unsatisfactory features. The most unsatisfactory is the rule that a claimant must bear the consequences of negligence on the part of a professional

adviser. The rationale for this is that the claimant has alternative redress against the adviser, but we doubt in practice whether this is often pursued, given the additional costs to the claimant; and when it is, the rule is a recipe for yet more satellite litigation. Moreover the case law on who counts as a professional adviser lacks coherence. The consequences of an adviser's negligence can in our view be better dealt with as a factor in assessing whether it is just and equitable for the claim to be heard.

Harmonising the conditions for an extension of time could reduce the number of preliminary hearings tribunals currently have to hold on this issue. Whether a claim subject to the not reasonably practicable test is within the jurisdiction of the tribunal is a point that, once raised, will almost always require a separate preliminary hearing. This is because the point goes to jurisdiction and does not require the merits of the case to be considered in order to determine it. In discrimination cases, by contrast, the question whether it is just and equitable to extend time may be better addressed after the merits of the case have been heard, and this is often, in our experience, the approach tribunals adopt. This is particularly beneficial where the claim covers a number of matters and time is only an issue for the earlier matters.

We do not suggest that tribunals should never need to hold preliminary hearings on time points; clearly there are many cases where the claim was presented well out of time and it is reasonable to deal with the time point before subjecting the respondent to the burden and cost of defending the claim at a full merits hearing. However, in cases where the merits of the claim may be a decisive factor in whether an extension of time would be just and equitable, it seems to many of us sensible for tribunals to be in a position to hear the case before deciding whether to extend time. In addition there will be cases where it is sufficiently clear that there is no real prejudice to the respondent to balance against the fact of the claim having been presented a few days late; in such cases, respondents may not seek to contest an extension of time, or at least may not seek a preliminary hearing on the point, thereby saving both tribunal time and the expense of an additional hearing.

Many of our members therefore believe that standardising the test for extending time around whether it is just and equitable to do so, will bring advantage to respondents and to the timely and efficient operation of the Employment Tribunals. In particular this will enable Tribunals to avoid having to deny access to claimants in cases where there is no prejudice to the respondent and only a minor, and perhaps excusable, delay in the presentation of the claim.

For the foregoing reasons the Commission's proposal in Question 3 does enjoy support from many of our members.

Chapter 3

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

ELA do not agree with this position.

Firstly, discrimination cases form a significant part of the jurisdiction of the Employment Tribunal and of the work that employment lawyers undertake. The tribunal judges hearing discrimination matters have developed considerable expertise in dealing with the complexities and nuances of these cases, in particular in relation to drawing inferences and the shifting burden of proof.

By contrast, there are far fewer claims for discrimination brought in the civil courts. We would contend that this cannot be because discrimination largely occurs in the employment sphere. Rather, discrimination outside of employment does not appear to be taken as seriously. There is a real difficulty therefore for judges who sit in the county courts. The volume of discrimination work is limited and they do not have the opportunity to develop the relevant expertise in it. Anecdotally we are aware that many civil judges are uncomfortable when dealing with discrimination matters because they are viewed as specialist and complex, and they lack the necessary experience confidently to address them. The role of assessors remains unclear and peripheral, whereas lay tribunal members make a valued contribution to the decision. As lived experience is often an influencer in discrimination cases, the role of lay members is considered vital to discrimination cases.

Secondly, many of our members would welcome the idea of an Employment and Equalities Court. As we noted in response to Proposals for a Single Employment Court, we highlighted a survey of our members that we undertook in April 2015 showing that 64% agreed that claims heard in a single court would be an improvement on the current system.

Thirdly, were a single Employment and Equalities Court to be introduced, it would assist claimants and respondents/defendants for the following reasons:

(a) The single point of contact would remove the muddled and unclear delineation of jurisdictions;

(b) The no costs jurisdiction would enable these matters of important public interest to be aired and adjudicated (costs orders are made in fewer than 1% of cases before the Employment Tribunal);

(c) If it were modelled on the Employment Tribunal system, it would allow a relative informality to be used enabling many litigants to appear in person.

There is, in our view, a very real need to re-consider the idea of having a single Employment and Equality Court. We would encourage the Law Commission to give further thought to this matter, in relation to both England and Wales whilst, at the same time, bearing in mind the impact in Scotland and the potential divergence of practice in an area of law that remains a reserved matter.

Question 5: Should employment tribunals be given concurrent jurisdiction over non-employment discrimination claims?

We would agree with this proposal as a first step towards establishing a single Employment and Equalities Court. This would at least allow judges who are well versed and trained in the area of discrimination to take over the case.

Were the proposal to be pursued however, care would be required to ensure that the benefits of the Tribunal system were made equally applicable to non-employment discrimination matters. In particular, the more flexible procedural rules and the no costs jurisdiction should apply equally to all types of claim. We also believe legal aid should be retained for non-employment discrimination matters, even where they are brought before the Tribunal.

However, in the longer term, we urge further consideration be given to establishing a single court to hear all these matters.

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?

We consider that there should be this power and there should be a simple and transparent procedure for such a transfer for be exercised, to enable a specialist and experienced judge to hear the claim(s). Judges should raise this with parties at the outset of case management / procedural hearings in the same way that mediation is suggested for consideration by judges in the employment tribunal.

There should be a presumption towards transferring cases to the Employment Tribunal subject to:

(a) The views of the parties, and
(b) The extent to which the discrimination claim forms a material and substantial part of the claim. Where the discrimination element is very limited, then this should operate against the presumption applying.

That having been said, we consider that this is unlikely to be workable given the factual sensitivity of most discrimination matters. We consider the proposal in question 8 to be a better resolution.

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?

We consider that the proper jurisdiction for the claim should be addressed by the relevant judge at the first procedural hearing.

Question 8: Do consultees consider that employment judges should be deployed to sit in the county court to hear non-employment discrimination claims?

We consider that this may be a good workable proposal, although our preference would be for a single Employment and Equalities Court or alternatively, for a presumption that discrimination matters will be transferred to the Employment Tribunal. Where it has not been appropriate to transfer a matter, the deployment/secondment of an Employment Judge (EJ) to hear a matter in the County Court would meet the concern relating to the specialist expertise of the judge.

Consideration would need to be given to a) how procedural hearings would be dealt with to ensure that this was administratively and practically possible and (b) the training required for the EJ to address the other matters involved in the civil claim. It should be noted that most EJs come from a specialist background in employment law and may not have a more general background for the handling of other civil court work. We would encourage the Commission to consider proposing that more EJ's become dual-ticketed as district judges able to sit in the county court.

A concern with asking EJs to sit in the County Court is that there is a serious shortage of EJs at present which is causing significant issues with listing and

progressing employment cases. Accordingly, we believe this is only a workable solution if sufficient numbers of EJs are recruited and trained. Given the particular nature of discrimination claims, EJs do not sit on discrimination cases immediately upon appointment and additional training is required. This lead in time should also be borne in mind.

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?

Currently in the Employment Tribunal, all discrimination cases are considered by a panel (an EJ and two lay members) and we consider that this approach should be continued. One of the reasons for having lay members sit in discrimination cases is to give a more rounded outcome. We believe their input is invaluable in terms of bringing a real world view to factually sensitive and nuanced situations.

Chapter 4

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 substance of the employee's employment?

It is unclear why the 1994 Order only applies to claims on termination of employment. The answer may be that it was thought that the power under the relevant provision, namely Section 131 of the Employment Protection (Consolidation) Act 1978, was limited to claims on termination of employment. Section 3(2) of the Employment Tribunals Act 1996 is not so limited and extends to a claim for damages for breach of contract or other contract connected with employment or a claim for sums due under such a contract.

In principle this could cover claims for breach of contract such as non-payment of outstanding wages or benefits. Whilst it is correct that there is some overlap with claims that could be brought under Part II of the Employment Rights Act 1996, as an unlawful deduction from wages, such claims are limited to payments which fall within the definition of 'wages' in Section 27(1) of the Employment Rights Act 1996 and are not excluded by Section 27(2) of the Employment Rights Act 1996.

For example, there is an issue whether discretionary commissions can be recovered under these provisions because such payments are not for an identified sum (*New Century Cleaning Company* v *Church* [2000] IRLR 27) or damages for loss of benefits. In *Delaney* v *Staples* [1992] IRLR 191 the House of Lords ruled that a failure to make a payment in lieu of notice does not fall within the scope of the definition of wages. Expenses are specifically excluded. The non-payment of an enhanced redundancy payment is excluded. The non- payment by way of pension, allowance or gratuity in connection with retirement is excluded. These provisions mean that currently such claims can only be brought in the County Court or High Court.

Employment judges already have considerable experience and expertise in determining claims of this kind as they are often required to quantify such claims in

order to assess compensation for unfair dismissal and/or unlawful discrimination. Furthermore, such claims can be brought in employment tribunals if the total claim is less than £25,000 and the payments are due on termination of employment.

We therefore believe that employment tribunals should have jurisdiction to determine claims of this kind.

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?

In general, tribunals do not consider claims which post-date the termination of employment. There is an exception under Section 108 of the Equality Act 2010 where the discrimination post-dates the termination of employment relationship but is closely connected with it.

It could be argued that the same principle could apply to the examples given in paragraph 4.15 of the Consultation Paper, particularly where the settlement agreement relates to a settlement of proceedings originally brought in the employment tribunal itself.

The contrary argument is that the distinction between claims which pre-date employment and/or relate to the termination and claims which post-date employment is a logical distinction and broadly reflected in the employment tribunal's jurisdiction.

On balance, however, we believe that employment tribunals should have jurisdiction to determine claims of damages for breach of contract which post-date the termination of employment provided those claims are connected with the employment relationship.

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

Yes, we do agree that the current limit should be increased for the reasons set out in the Consultation Paper and for the additional reasons set out below.

Employment judges have considerable experience and expertise of determining claims for wrongful dismissal and constructive dismissal and subject to what we say below in reply to Question 13 there is no reason to believe that any proposed increase in jurisdiction to £50,000 would cause any particular problem. As with unfair dismissal compensation, this amount should be reviewed and increased annually in line with the Retail Price Index (RPI). It is not understood why the £25,000 cap has not been uplifted when it has been recognised for some time that other capped compensation limits should be reviewed.

It is also not clear why the figures of £25,000 was chosen in the first place, although Lord Henley, the government minister at the time, suggested in the House of Lords debates on the draft order that it was linked to 'highest amount normally payable in an unfair dismissal case'. (This is itself rather difficult to understand as the limit on compensatory awards was then £11,300). The £25,000 limit was challenged by Lord Lester of Herne Hill who thought it *"inadequate"* and suggested that *"a figure of £50,000"* as being *"more appropriate"* (this being the then minimum value of a High court claim). Lord Meston also questioned *"the need for any such limits"* pointing out that *'larger claims are not necessarily more difficult"*.

The failure to increase the limit in line with inflation means that in practice claims for breach of contract on termination of employment (normally arising as a result of a failure to pay notice or make a payment in lieu) is limited to those on relatively low earnings with short periods of notice. It was said by the government minister introducing the contract jurisdiction in the House of Lords that the intention was to deal with the issue prudently "*until we have had the chance to assess how this new, somewhat experimental jurisdiction is working out in practice*" but we are not aware of any subsequent review prior to the Law Commission's Consultation Paper.

The £25,000 limit can also give rise to further anomalies not referred to in the Consultation Paper. The first relates to the rule in *Henderson* v *Henderson* (1843) that it may be considered an abuse of process if the Claimant does not advance all outstanding claims in Employment Tribunal proceedings. This rule is applied with some flexibility by tribunals given the £25,000 limit (*Parker* v *Northumbrian Water Ltd* (2011) ICR 1172) but a related issue can arise where the Claimant commences proceedings in the tribunal and then wishes to bring proceedings in the County Court or High Court. Sometimes in these circumstances it is argued that the Claimant is estopped from bringing proceedings for breach of contract in the High Court or County Court as a result of a decision to withdraw those proceedings in the employment tribunal, particularly where the earlier claims have been dismissed by the employment tribunal. The most recent illustration of this problem is the Court of Appeal's ruling in *Srivatsa* v *Secretary of State for Health and the Practice Surgeries Ltd* [2018] EWCA Civ. 936 (the argument having succeeded before the High Court Judge whose decision was overturned by the Court of Appeal). Prior to the amendment of the Tribunal Rules in 2013, the case law drew a distinction between those cases where withdrawal and subsequent dismissal of the ET proceedings showed an intention to abandon the claim and those cases where that was clearly not the intention of the Claimant. The matter is now addressed in Rule 52 of the 2013 Employment Tribunal Rules but this provision is conditional on the Claimant expressing a wish to reserve the right to bring a further claim in another forum. This may still cause difficulty for unrepresented litigants. Furthermore, the present limit increases the risk of a multiplicity of proceedings in both tribunals and the courts. This has led to applications for one or other proceedings to be stayed. The relevant principles are set out in *First Castle Electronics Ltd* v West [1989] ICR 72 at page 78 and more recently by the Court of Appeal in *Halstead* v *Paymentshield Group Holdings Ltd* [2012] IRLR 586. We do not propose to set out those principles in our response to the Consultation Paper but would suggest that such applications would become less frequent if the tribunal's jurisdiction was increased.

In paragraph 4.27 of the Consultation Paper it is asked how frequently issues arise of problems being caused by the existing cap. We do not have any statistics so can only

answer on the basis of our collective experience which is that such problems are met in a significant minority of cases justifying the changes we propose.

Question 13: What (if any) should the financial limit on an Employment tribunals' contractual jurisdiction be and why?

As stated in our response to Question 12, we believe that the limit should at least be increased to the level it would have been had it been uprated in line with inflation to £50,000 and then increased annually by the RPI in the same way as other employment protection awards (see below).

However, it can also be argued that there should be no limit at all on the basis that Employment Judges are quite familiar with the principles which underlie the assessment of damages and, albeit exceptionally, make very substantial awards in discrimination cases where there is no statutory cap on the amount of an award. Additionally, provided the High Court (and County Court) continue to have parallel jurisdiction, it may be said that it is a matter for the parties to determine their choice of forum rather than have it 'artificially' decided by rules on jurisdiction.

The principal objection to this approach is that the rules in employment tribunal are very different from the CPR. The Rules (including the nature of the pleadings) are less formal in employment tribunals. There is no provision for payments into court or Part 36 Offers and perhaps most importantly, costs do not follow the event. Some consider that in terms of policy Senior Directors or Chief Executive Officers whose damages claims can amount to 'five' figure sums (or more) should be treated in the same way as comparable disputes of a commercial nature. Similarly in recent years substantial damages claims have been brought in the High Court for loss of contractual commission and/or bonus. This line of thinking argues that such claims are not suited to the 'cost free' environment of employment tribunals.

Theoretically, it may be possible to create a specific and different tribunal rules which apply to a breach of contract claim in excess of a specified figure but this would add a tier of complexity to the existing tribunal rules. It would also mean that two different

regimes apply to claims up to the specified figure up to £50,000 and those above that amount. The assessment of costs in such circumstances, would be difficult to apply in practice.

Additionally, at the time of writing this response to the Consultation Paper, no fees are payable for bringing a claim in an employment tribunal, whereas the fees for bringing a claim in High Court depend on the value of the claim and can be significant sums. In public policy terms, if the employment tribunal's jurisdiction is unlimited, this could lead to undesirable 'forum shopping' as a means of avoiding the payment of fees. For all these reasons, we believe that there should be some upper limit to tribunal's jurisdiction.

Turning to the alternatives, we do not believe that the upper limit should be linked to the tribunal's power to make a compensatory award in an unfair dismissal case. Historically, whatever the merits of the £25,000 limit, that figure was unrelated to the maximum level of unfair dismissal compensation which in 1994 was £11,300. The limit on unfair dismissal compensation was substantially increased by the Employment Relations Act in 1999 and thereafter has been reviewed annually and increased in line with the RPI. The current maximum as set out in Section 124 (1ZA) of the Employment Rights Act is the lower of £83,682 or 52 multiplied by a week's pay of the person concerned. We would suggest that, rightly or wrongly, this represents a policy decision that awards for unfair dismissal should be subject to a maximum limit. Currently a different policy choice is made in cases of unlawful discrimination where there is no cap because of the influence of European law. There is no upper cap in claims for wrongful dismissal or (assuming the jurisdiction is extended) other claims of damages for breach of contract. Different policy considerations apply to claims for breach of contract: the issue, we would suggest, is whether any limit should be placed on an employment tribunal's jurisdiction to determine such claims.

For the reasons given above, we believe that there should be a limit. Taking into account all relevant factors, (including those set out in the Consultation Paper) we believe that a better limit than £50,000 would be an increase to £100,000, which, as

pointed out in Paragraph 4.22(1) of the Consultation Paper, is the minimum value of a High Court claim. We believe that a £100,000 limit would reflect the competing policy considerations set out above. It would mean that most (if not all) employees employed in senior management positions would be able to litigate all employment-related claims in an employment tribunal and would address the issues raised in Paragraph 4.22, 4.23, 4.24 and 4.25 of the Consultation Paper. We acknowledge that any cap above £50,000 would deprive potential claimants and respondents of the ability to recover costs other than in cases where an award can be made under Rules 74 to 80 of the Employment Tribunal Rules (2013). Former employees would, however, retain the choice of bringing their claims in employment tribunal or the High Court. We would suggest that in exceptional circumstances an employer should be able to apply for a transfer to the High Court, for example where the issues are exceptionally complex or where the value of a potential counterclaim exceeds the value of the claim or where it may be fair to do so having regard to the overriding objective. Interestingly a lack of power to transfer in appropriate cases was raised by Lord Lester in the debate on the draft 1994 Order.

We also acknowledge that any cap is to some extent arbitrary and recommend that some further research be undertaken into the 'rationality' of the figure we propose. The time allowed for this consultation and the absence to us of available data prevents us from carrying out this research at present.

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?

We believe that the answer to this is generally yes as there is no reason to suppose that employment tribunals, subject to the exclusions discussed below, do not have the expertise to deal with such counterclaims. We have a slight concern that 'spurious' counterclaims could be raised if the tribunal's jurisdiction is extended to cover claims arising during employment but on balance we think that the tribunal's existing powers to award costs where such claims are 'misconceived' or 'unreasonable' is probably sufficient to deal with this issue.

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?

We do agree. Our experience does not give us reason to consider that any change in the time limits for an employee's claim for breach of contract is required. We believe it should remain aligned with the time limit for unfair dismissal claims. The 6 week period for counterclaims did not give rise to any serious problems in practice. However in 2013 the Employment Tribunal Rules of Procedure (SI 2013/1237) provided in Rule 23 that any counterclaim by an employer had to be made as part of the employers response to the claimants claim, and must be presented in accordance with the time limit for a response under Rule 16, i.e. within 28 days of the date that a copy of that claim was sent by the tribunal. Again we have not experienced any general problems with the reduction of this time limit. Moving to different time limits for unfair dismissal and breach of contract claims would, we believe, add an unnecessary layer of complexity. So if the time limit for unfair dismissal is increased to 6 months, for example, we suggest the time limit for a breach of contract claim should likewise be increased to 6 months.

We note that Article 8(c) (ii) of the Extension of Jurisdiction Order provides for a reasonable extension of time in the event that it was not reasonably practicable for a contractual complaint to be brought within the time limit. As a safeguard we would be in favour of retaining that discretion. We have assumed that there is no intention of changing the provisions relating to an extension of time limits because of mediation in certain cross-border disputes and to facilitate conciliation before the institution of proceedings (See Articles 8A and 8B of the Extension of Jurisdiction Order). We would add that whilst some argue that the strictness of the 'reasonably practicable' test for extending time in cases of unfair dismissal should be relaxed and aligned with the 'just and equitable' basis used in discrimination cases, others believe there is merit in encouraging promptness in bringing unfair dismissal claims which remain the

highest category of claims in employment tribunals. That having been said, we are aware that the majority of our members looking at Chapter 2 of the Law Commission's Paper took a different view on this point.

The question of the time limit to apply if tribunals are given jurisdiction over claims that arise during the course of an employee's employment is more complex. Whilst we think this jurisdiction should be widened, some remain of the view that similar time limits should apply. The ethos of Employment Tribunals is quite different to the Civil Courts and discourages lengthening of such time limits. However one problem that may occur is that where breaches are continuing, there could be a need to reissue proceedings every 3 months. This is something that currently happens in many claims involving holiday pay or deductions from wages. This is an unnecessary administrative burden, for the parties and the Tribunal Service. It seems to us, on balance, that a compromise is called for and that a longer period would be appropriate for such contract claims. To balance the ethos of tribunals and avoid additional work we suggest a 12 month limitation period to bring claims or within 3 months of termination of employment, whichever is earlier.

Question 16: We provisionally propose that Employment tribunal's contractual jurisdiction should not be extended to include claims for damages, or sums due, related to personal injuries. Do consultees agree?

We agree with one qualification. Our experience is that there is no current demand for such a change in jurisdiction. Generally employment judges do not have the training or expertise to hear these claims. Very occasionally an alleged breach of the duty of care may give rise to a constructive dismissal claim, although the test is different when one is considering an assessment of damages in, say, a stress case, and in a claim for a repudiatory breach which has to be fundamental to trigger damages for unfair dismissal (See: *Marshall Specialist Vehicles Ltd* v *Osbourne* [2003] IRLR 672).

In addition the Employment Tribunal Rules of Procedure are not designed to deal with workplace injury claims, other than the limited claims for personal injury arising

from discrimination. The Civil Procedure Rules and Pre Action Protocols have been fine tuned to deal with workplace injury claims, with provision for pre action Letters of Claim, pre action disclosure and instruction of joint experts. The system of Part 36 Offers encourages settlement because it is supported by sanctions in costs: something that would not be possible in the employment tribunal, where costs do not usually follow the event.

Our qualification relates to the width of interpretation that tribunals have applied to this exclusion. We refer to the case of *Flatman* v *London Borough of Southwark* [2003] EWCA Civ. 1610 which concerned an employer's refusal to pay an allowance from a scheme that related to injuries sustained during the course of work. The Court of Appeal held that this was a claim for damages in respect of personal injuries, and was excluded from a tribunal's jurisdiction. Commentators have observed that this exclusion is also likely to apply in respect of benefits under long-term disability and permanent health insurance schemes. A recent example occurred in *Awan v ICTS UK Limited* (UKEAT/0087/18/RN) concerning a long term disability benefit plan. The rationale for such a wide-ranging interpretation seems dubious to us. It was stated in the judgment of the Court of Appeal in *Flatman* that "such claims typically involve the calling of doctors and psychiatrists as witnesses and raise matters which might be thought to be unsuitable for resolution by an employment tribunal". However tribunals now regularly deal with such evidence in discrimination claims.

Accordingly we believe that there may be merit in allowing employment tribunals to deal with such claims when the case does not concern negligence or fault by the employer e.g. when it concerns a non-payment of a contractual payment in cases akin to *Flatman*.

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. We are not aware of any demand for such a change and also consider that there is a risk that such an extension of jurisdiction may be beyond the experience of many of the current cohort of employment judges. It would require a greater knowledge of property and housing law, something about which many will not have had experience or training.

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. The reasons given not to extend jurisdiction in this way are cogent particularly the point about inability to grant an injunction. Intellectual property litigation has become a specialised area and we agree that many employment judges will have insufficient experience of such cases.

Questions 19: We provisionally propose that the prohibition against Employment Tribunals hearing claims relating to terms imposing obligations of confidence bracket (or confidentiality) should be retained. Do consultees agree?

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 both provisional proposals. In either case it seems to us that the inability to grant an injunction, and the requirement for primary legislation to make this change are conclusive arguments against such extensions of jurisdiction. Breach of confidence can cover a whole range of employee behaviour or misbehaviour. In

addition a breach of confidence may sound in damages and could form the basis of a counterclaim but the principles applied to calculate such damages are different from the principles that apply in unfair dismissal or unlawful race discrimination.

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 of Jurisdiction Order. Do consultees agree?

The issue of the full extent of rights that should be extended to workers is clearly a significant policy issue and our general approach is that such issues are for government to determine and on which we usually do not respond as we would expect our members' views to be as divergent as in any other forum. For example we would express no view on whether unfair dismissal rights should extend to workers as well as employees.

In this narrow area, however, we believe it is appropriate that we express a view because of the changing nature of the workforce as illustrated in recent case law and we agree that jurisdiction in breach of contract cases should be extended to workers. When the Extension of Jurisdiction Order was made in 1994, no-one could have imagined the scale of the "gig economy" as we now see it. A much larger proportion of the workforce now works flexibly and would therefore find it hard to establish status as an employee, but as we have seen from Pimlico Plumbers, Uber drivers, Addison Lee cycle couriers and taxi drivers, they are increasingly turning to the employment tribunals for redress on the basis of worker status. According to figures published in February this year by the Department for Business, Energy and Industrial Strategy the number is roughly 2.8 million people. (https://tinyurl.com/y8ccpqua). (Accessed 29/11/18).

Workers are already able to use the employment tribunal to bring claims relating to unlawful deductions from wages and holiday pay. There seems to us to be a justification to extend jurisdiction to claims for breach of contract, which they would otherwise bring in the county court. This would enable claims to be brought in the

same forum rather than requiring workers to choose which claim to bring based on their preferred forum: a statutory complaint in the employment tribunal or a breach of contract claim in the county court.

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 10-20, should tribunals also have such jurisdiction in relation to workers? If consultees consider that there should be any difference between employment tribunals' contractual jurisdiction in relation to employees and workers, please would they provide details.**

Subject to our reservations expressed in the answer to question 21 we believe the same jurisdiction (including restrictions on jurisdiction) should apply to workers. It would be overly complex to have different rules based on employment status.

Extending jurisdiction to cover claims during the subsistence of employment may be all the more important for workers given the difficulty in determining whether there is an umbrella contract or discrete periods of obligation and so whether the worker relationship is continuing. Removing the distinction would negate the need to determine that issue for this purpose (though that may be relevant to determine the time limit for claims brought more than 3 months from date of breach).

The same considerations regarding restrictions on jurisdiction apply to workers as to employees: claims relating to personal injuries, living accommodation, IP, breach of confidence and restraint of trade are not suitable for the employment tribunal.

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?**

Genuinely self-employed independent contractors cannot bring any of the statutory complaints for which the employment tribunal has exclusive jurisdiction. Extending the right to hear breach of contract claims to the self-employed would not therefore

have the benefit intended by the original Extension of Jurisdiction Order, namely to allow one dispute with both statutory and contractual causes of action to be heard in the same forum.

Extending jurisdiction to the genuinely self-employed would lead to the employment tribunal hearing a commercial dispute between two parties in business on their own account. This is not the purpose of the employment tribunal.

We therefore agree that employment tribunals should not be given jurisdiction for breach of contract claims brought by genuinely self-employed independent contractors.

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?**

We agree, and not just because this would require primary legislation.

Employment tribunals were designed as a low cost forum to allow employees (and latterly workers) to obtain redress against their employers. Extending jurisdiction to allow claims by employers against employees and workers would change the character of employment tribunals.

Further, allowing employers to bring claims in employment tribunals does not remedy the issue that brought about the Extension of Jurisdiction Order (which was having different causes of action arising out of the same dispute dealt with in one forum). If employers are initiating claims (as opposed to counterclaims), the employee has not brought a claim against the employer for which the employment tribunal has exclusive jurisdiction. There is no benefit to having the claim heard in the Employment tribunal, save perhaps in relation to costs.

However, if an employer is confident of success, it would opt for a forum where costs can be recovered. Extending jurisdiction in this way could lead to speculative

employment tribunal claims against employees or workers designed to place pressure on or "punish" them either for resigning employment or some other action the employer does not like.

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?

There is an intellectual argument for allowing employers to counterclaim in any circumstances where employees bring a claim against them, not just where that claim is contractual. It would enable the employment tribunal to determine the whole dispute, removing the need for yet further litigation in the county court to determine any claim. It would also allow the employment tribunal to order set off (e.g. for an overpayment).

The distinction between a statutory and contractual complaint can be artificial, particularly in relation to a claim for unlawful deduction from wages that could also be characterised as a breach of contract claim. There is a perverse incentive on claimants not to bring breach of contract claims, as this could expose them to a counterclaim.

Nevertheless, we believe that an extension of jurisdiction to allow counterclaims against statutory as well as contractual complaints could change the character of employment tribunals as we discussed in the answer to Question 24. For that reason we agree that jurisdiction should not be so extended.

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?**

As discussed in the consultation paper, the *Southern Cross* ([2011] ICR 285) principle led to uncertainty and conflicting EAT decisions until it was resolved by the Court of

Appeal in *Agarwal* ([2018] EWCA Civ. 20) that employment tribunals can construe contractual terms in order to resolve claims for unlawful deductions from wages. We note in particular the remark of Lord Justice Underhill in *Agarwa*l that the distinction that has previously been applied was incoherent and led to highly unsatisfactory procedural demarcation disputes. We gratefully adopt a similar approach to this question.

There appears to be no good reason for a distinction between the powers of the employment tribunal to interpret or construe terms in a claim for unlawful deductions but not a claim under Part I ERA: either the employment tribunal is capable of interpreting or construing contractual terms, or it is not. In our view, the employment tribunal is the most appropriate forum to interpret or construe terms contained in contracts of employment, employment judges being specialists in employment law whereas many county court judges are not.

Further, the employment tribunal was set up to be a forum that can be used by litigants in person. Whilst many claims now involve lawyers, there remains a large percentage of litigants in person using the Employment Tribunal Service in the region currently of 20% of claims (https://tinyurl.com/y8ccpqua) (Accessed 29/11/18). Those litigants may well not understand the *Southern Cross* principle and the difference between determining contractual terms as opposed to interpreting or construing them. Allowing employment tribunals to interpret or construe contractual terms removes this rather artificial distinction and gives employees the opportunity to have disputes over terms determined in the low cost forum set up to resolve employee/employer disputes.

We therefore believe that jurisdiction should be extended to allow employment tribunals to interpret or construe terms in contracts of employment.

Question 27: Should Employment Tribunals be given the power to hear unauthorised deductions from wages claims which related to unquantified sums?

There are certainly arguments in favour of opening up an employee's ability to recover "unquantified sums" as an unlawful deduction from wages claim, not least those set out in Paragraph 4.97 of the consultation paper. Further, this would align with the overall broadening of ET judge's discretion in this area under *Agarwal* and would be within the capabilities of experienced employment judges.

That said, in our experience in practice when issues of this type arise, they are likely to do so in the context of more complex, higher value claims (e.g. in relation to disputed bonus payments) where adjudication of the dispute would require the employment tribunal to engage in exercising significant discretion and judgement to arrive at a quantified sum. We are mindful of the original intention of Wages Act claims as reflected in the Court of Appeal in *Coors Brewers v Adcock* namely that this jurisdiction in the employment tribunal is there to deal with "straightforward claims where employees can point to quantifiable loss" and provide "a swift and summary procedure". We agree with these sentiments and consider that overall it provides an effective way for employees to recover unpaid wages and should not be extended to cover unquantified sums beyond the scope of the existing statutory provisions and case law in a costs free jurisdiction. We are conscious that in our answer to question 13 we recommended a cap of £100,000 on the jurisdiction on contractual claims. However we have taken into account that claims under the Wages Act and its predecessor the Truck Acts were devised to deal with much more modest claims and also that unquantified claims for deductions have no ceiling. These factors have influenced us to reach the decision we have.

Question 28: Where an Employment tribunal finds that one of 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 or not the employer deducted the correct amount of money from an employee's or worker's wages?

In our view, the duality of remedy is unhelpful here and on the rare occasions these issues arise in practice and are litigated before the employment tribunal it should be competent to decide upon the amount of the deduction (being capable of precise quantification) as well as whether one of the "excepted deductions" provisions applies to the case in hand.

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 set off be limited to liquidated claims (i.e. claims for specific sums of money due)?

(2) Should the amount of the set off be limited to extinguishing the employee's claim?

Yes. We agree that this particular anomaly between the position as regards contractual claims and that relating to unlawful deduction from wages claims should be eliminated.

(1) Yes for the reasons set out in our response to question 27 above.

(2) Yes: in our view having an unlimited set off would open the way to claims being made in employment tribunals by employers that offend against the principles we discussed in the answer to Question 24 and may result in an undesirable change in the character and function of employment tribunals.

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 – see response in relation to personal injury claims above. We see no legal or practical need to expand the jurisdiction of the employment tribunal in this way. We consider that its focus and resource should remain in dealing with core employment disputes under the Employment Rights Act 1996 and Equality Act 2010.

Question 31: **We provisionally propose that employment tribunals should continue not to have jurisdiction over workplace personal injury negligence claims. Do consultees agree?**

Yes – see responses above.

Question 32: We provisionally propose that employment tribunals should retain exclusive jurisdiction over Equality Act discrimination claims which related to references given or requested in respect of employees and workers and former employees and workers. Do consultees agree?

Yes. We consider that such matters should remain within the exclusive jurisdiction of the employment tribunals and are not aware of any difficulties arising in practice from the current delineation of jurisdiction between the civil courts and employment tribunals in this regard.

Question 33: Do consultees consider that employment tribunals should have any jurisdiction over common law claim (whether in tort or contract) which related to references given or requested in respect of employees and workers (and former employees and workers)?

No. In our view the matters raised in Paragraph 4.119 should remain within the jurisdiction of the civil courts to determine and that there is no legal or practical imperative to grant the employment tribunals jurisdiction in this regard.

Chapter 5

Question 34: Should employment tribunals and civil courts retain concurrent jurisdiction over equal pay claims?

ELA agrees that the concurrent jurisdiction over equal pay claims should be retained even though the limitation periods remain more advantageous to claimants in the civil courts. Notwithstanding, as employment tribunals are acknowledged as being the specialist forum for determining some aspects of equal pay claims, the process to transfer claims or ask questions of the employment tribunal where claims are issued in the civil courts should be made clearer.

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?

Extending the time limit for equal pay claims brought in the Tribunal would on the face of it be a sensible step forwards to allow claimants to bring claims within the tribunal's more relaxed and specialist jurisdiction. This would ensure that the forum is chosen as necessary (e,g complex pension issues) as opposed to for reasons of limitation. Claimants should not be disadvantaged if the Tribunals are given exclusive jurisdiction.

That said, there is a coherent set of shorter time limits generally for statutory claims in the tribunal, and we are not aware of any evidence that claimants have difficulty bringing or do not bring their claims in the tribunal within the current time limits. The two concurrent jurisdictions ensure that there is no disadvantage save for upfront costs and costs are recoverable more easily in the civil courts in any event. We would not advocate tribunals being given exclusive jurisdiction for equal pay claims. Instead, we suggest that the process for transfer of a civil court equal pay case be made less opaque, and court Judges be reminded of the ability to make the transfer for application of the equal value procedure and of Employment Tribunal Judges to be transferred to the civil courts to hear the equal pay claims given the specialism

involved in these cases. The power to transfer a claim from the County/High Court to the Employment Tribunal, however, is inevitably compromised by the problem of limitation in the Tribunal. It must be likely that, by the time this issue comes to be considered by the courts, the Tribunal 6 month period will have expired. Consideration could be given to expressly permitting the Employment Tribunal to extend time in such circumstances.

Question 36: What other practical changes, if any, are desirable to improve the operation of employment tribunals' and civil courts' concurrent pay jurisdiction?

As for practical changes, ACAS should be informed of all cases (civil courts and employment tribunal) so they can manage the need for independent experts and ensure that there is adequate resourcing. As also stated above, the process to transfer issues to the tribunal (as per section 128(2) Equality Act 2010) should be clarified to ensure that full transfers can occur particularly where there are similar cases being heard in the Tribunal.

If the civil court is dealing with an equal pay claim, the employment tribunal equal value procedure should be applied. There may be a good case to transfer Employment Judges to the civil courts to hear equal pay claims given the specialism involved in these cases, judicial resource notwithstanding.

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?

ELA does not consider that there is any reason to change the current allocation of jurisdictions regarding the non-discrimination rule applying to occupational pensions schemes.

We agree the current jurisdictions should be preserved. The case of *Lloyds Banking Group Pensions Trustees limited v Lloyds Bank PLC and others [2018] EWHC 2839*

(Ch) illustrates the merits of having the High Court able to deal with issues, partly out of the desire to consider trustee concerns. In the judgement (paragraphs 423 to 448, 452) there are passages dealing with rules on recovery and limitation which the Law Commissioners may wish to review, albeit the concerns are not central to the jurisdictional focus of this consultation. Under the Equality Act there is a six year limitation period for claims for back payments, whereas under the Limitation Act 1980 there is no time limit. In this case Morgan J held the six year limit in the Equality Act to be ineffective as contrary to the European law principle of equivalence.

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: TUPE related claims most generally relate to unfair dismissal and collective consultation. Both sets of rights are at the core of the experience of tribunals.

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?

In relation to the Working Time Regulations we have considerable concerns about how the three jurisdictions operate together. The rationale for the demarcation, particularly between the ET and civil courts on one hand and criminal enforcement on the other, is muddled and complex and for employees (and employers) it is not straightforward which rights are to be enforced in which jurisdiction. There is also limited awareness of the enforcement mechanisms amongst both employees and employers: see Barnard, Ludlow and Fraser Butlin, *Beyond Employment Tribunals: Enforcement of Employment Rights by EU8 Migrant Workers* [2018] ILJ 226.

Moreover, the inability of an individual to bring a claim to enforce the maximum weekly work or night work provisions, and to have to rely on the HSE to enforce this, is a significant problem. This is particularly so when the HSE Public Register of Notices is considered and analysed in relation to working time interventions: over the last five years there are just 9 entries mentioning Working Time. In those

circumstances, criminalisation becomes a two edged sword for victims: they lose their right to bring an individual claim, yet the power of the criminal law is not being utilised either. We would encourage the Law Commission to consider recommending concurrent jurisdiction for all working time provisions so that individuals can enforce rights in the ET and civil courts, as well as having the possibility of criminal sanctions for very serious breaches.

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?

Similar concerns arise in relation to the NMW jurisdictions, although to a lesser extent because the civil law remedies sit in parallel with the criminal provisions.

In terms of the interplay between the ET and civil courts, we would agree that there is no need to change the current system. The majority of claims are brought in the ET but it is important to retain the civil courts' jurisdiction to ensure an effective remedy is available to those who cannot bring their claim within the very limited time limits of the ET.

It remains to be noted that there is a fourth regulatory jurisdiction also covering the area of working time and NMW, that under the supervision of the Director for Labour Market Enforcement ("DLME") whose enforcement strategy is published annually. Working with agencies such as HMRC, inspections can result in multi-party settlements of NMW and other claims that might be brought by individuals in tribunal, but for their small individual amounts and the impact of limitation periods. In no sense do we advocate the reduction of DLME's remit, but the multiplicity of recovery and enforcement strategies already existing for NMW claims illustrates how it could be consistent to extend to individuals their own right to enforce all working time claims in the tribunal and civil courts as in 6.2 above.

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?

It is very difficult to assess whether the demarcation is of importance or not because it is unclear whether there have been any successful claims brought under the 2010 Regulations. This is, we consider, largely because of the very limited definition of Blacklist in the Regulations. In reality, this forces claimants to litigate in the civil courts for alternative causes of action, such as defamation, conspiracy and breach of the DPA. Therefore we would not disagree with the proposal, though there is little evidence either way.

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 cases affected by the cap but can see no reason in principle why it should not be raised in line with the unfair dismissal award cap. There appears to be no logical basis for any distinction and losses can be longstanding and significant.

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.

On the face of it, there seems to be no reason for there to be a separate challenge of unlawful discrimination available in costs neutral tribunals, when the decisions of qualifications bodies can often be appealed to higher courts and/or subject to challenge (again at a higher level) in judicial review proceedings, where costs follow the case and matters are disposed of more swiftly. In respect of the latter, the 3

grounds are: (a) Illegality; (b) Fairness; and (c) Irrationality and proportionality. Discrimination could readily fall into any of these grounds and so there is the availability of redress of any allegation of unlawful discrimination under public law, without the requirement of the involvement of an employment tribunal.

However, it does not seem right that professionals such as accountants, surveyors, actuaries and lawyers would not have the same access to justice as individuals who can challenge their regulators within the tribunal arena.

ELA's view is that an individual should be able to challenge their qualifications body separately within the employment tribunal where there has been an allegation of unlawful discrimination. There has been concern for some time that discriminatory decisions made by qualifications bodies, which often have a serious impact on an individual's ability to work, should be open to scrutiny under the anti-discrimination provisions which is often not a consideration as part of a public law challenge.

There appears to be some indication that BAME members of trades or professions are more likely to be sanctioned by qualifications bodies. In 2014, the Law Society Gazette reported findings from a report by Professor Gus John that:

"*Black and ethnic minority (BME) solicitors are disproportionately represented among those investigated by the Solicitors Regulatory Authority and received harsher sanctions when convicted…BME solicitors are more likely than whites to be subject to investigation, comprise a higher proportion of those against whom action is taken and are subjected to more severe sanctions."*

It has also been reported that the GMC will be launching a review of the high level of complaints against BAME doctors in comparison to white doctors.

While these are just two examples of qualifications bodies, the concern is that BAME professionals and tradespersons are more harshly treated by their qualifications bodies more widely and this should be challengeable under the Equality Act 2010 within the employment tribunals.

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?

As with our previous answer, ELA does not support any changes to the jurisdiction of the employment tribunal in respect of claims of acts of unlawful discrimination; the tribunal should have sole jurisdiction to hear these claims. The volume of discrimination work in the civil courts is limited and judges do not have the opportunity to develop the relevant expertise in it. Anecdotally we are aware that many civil judges are uncomfortable when dealing with discrimination matters because they are viewed as specialist and complex, and they lack the necessary experience confidently to address them. We do not suggest the tribunal be the only forum to deal with discrimination cases generally as, e.g. consumer cases or landlord and tenant matters draw on other disciplines than employment law (leaving aside the adequacy of tribunal resources). But it should be easier to "inject" the expertise of employment judges into civil courts.

However, again as noted above , we would suggest that the mechanisms for transferring of a civil court cases to the tribunal be made less opaque/easier, and there be ability to second Employment Tribunal Judges to the civil courts to hear the discrimination claims given the specialism involved in these cases. An article by John Bowers QC in *ELA Briefing November 2018* suggests that "triage" system could be staffed by an employment judge also qualified as a recorder. We concur.

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?

On the issue of police misconduct/discrimination, the heading of paragraph 5.96 of the paper is "Police Misconduct Panels" although the suggestion/issue raised within the paragraph relates to the Police Appeals Tribunal. These are two different bodies, just to be clear:

(a) Police disciplinary panels are statutory bodies, consisting of a legally qualified chair (since 2015), a senior officer from the force in which the officer charged is based, and an independent lay person. They are a fact-finding tribunal and they are force-specific. They only deal with issues of alleged serious misconduct by police officers.

(b) The Police Appeals Tribunal (PAT). This is also a statutory body, constituted under Sch 6 of the Police Act 1996, governed by the Police Appeals Tribunal Rules (currently 2012, SI 2012/2630). It consists of a legally qualified chair (usually a criminal/police misconduct lawyer by background – the two go hand-in-hand), a senior police officer from a different force to the appellant, and a retired officer who was a member of the Police Federation at the time of retirement.

The PAT deals with appeals, primarily against dismissal although also against reduction in rank, on the grounds of **both** misconduct and "performance" (which includes both poor performance dismissals and dismissals on grounds of attendance). The remit of the PAT is therefore broader than that of a police misconduct panel. The PAT is not, however, a fact-finding body. This is clear from the PAT rules and case law. For instance, under Rule 4(4), which deals with misconduct appeals:

(4) The grounds of appeal under this rule are—

(a) that the finding or disciplinary action imposed was unreasonable; or

(b) that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action; or

(c) that there was a breach of the procedures set out in the Conduct Regulations, the Police (Complaints and Misconduct) Regulations 2012 or Schedule 3 to the 2002 Act, or other unfairness which could have materially affected the finding or decision on disciplinary action.

The rule in relation to performance appeals is similarly worded in all material respects. Beatson J in *R (on the application of Chief Constable of the Derbyshire Constabulary) v Police Appeals Tribunal* [2012] EWHC 2280 (Admin) held that the issue of whether a finding or sanction was unreasonable should be determined by asking the question whether the panel in question had made a finding or imposed a sanction which was within the range of reasonable findings or sanctions upon the material before it.

The PAT is therefore primarily tasked with reviewing the evidence before the misconduct/performance panel below and assessing whether the decision was within a range of reasonable responses. It is not a complete re-hearing. If an appeal is successful, the usual remedy is reinstatement, with or without back pay. The PAT does not award compensation.

ELA's view is that the answer to the question should be "yes"[5]; presumably it is not suggested that such officers should be without any remedy, given the conclusions in the above noted case and therefore the alternative to removing ET jurisdiction seems to be instead giving the PAT jurisdiction to decide discrimination claims brought by police officers aggrieved at dismissal decisions (or reductions in rank). This is undesirable given ELA members' experiences of the PAT.

The task of deciding a discrimination claim, including hearing often extensive and highly contested evidence and complex legal submissions and deciding sometimes substantial issues of remedy and loss, is quite far removed from the task normally undertaken by a PAT panel. Such panels, including a current and a former police officer, are likely to have limited experience of issues of discrimination law, including even the chair; contrast that with the ET regime. They are not used to making findings of fact. There is no reason why the PAT cannot continue to assess the reasonableness of the decision of the panel below, based on the evidence heard below, and any discrimination issues can continue to be dealt with separately in the ET regime.

[5] Which would accord with the Supreme Court's decision in ***P v Commissioner of Police for the Metropolis*** ***[2017] UKSC 65*** which held that the Police Misconduct Board (a creature of statute) was not immune from suit in relation to disability discrimination proceedings

PATs also only hear appeals against misconduct or performance findings at the top end of the scale. The circumstances of the large majority of discrimination claims by police officers do not entail any right to concurrently appeal to the PAT and presumably it is not intended that PATs should now hear all police officer discrimination claims, where there is no appeal otherwise. Extending PAT jurisdiction for a very limited number of discrimination claims seems disproportionate to the issue.

Chapter 6

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

In our view there are some areas of employment law currently the exclusive jurisdiction of the Employment tribunals where the concept of an order prohibiting the continued commission of a wrong might be appropriate. We have in mind, for example, cases where employment subsists but in circumstances where a claim is advanced that the employee is being subjected to a continuing detriment by reason of unlawful discrimination or (in particular) having made a protected disclosure.

The procedure available for an Interim Order under s 128 of the Employment Rights Act 1996 is analogous in that it enables employment to be preserved in the short term (in the sense that employees are reinstated on full pay until the final disposal of their unfair dismissal litigation) while the substantive claim is litigated. If it were thought as a matter of policy that employees who are subjected to actionable detriments should be able to remain in employment in a similar way and with the specified detriment at least halted rather than having to leave and plead constructive dismissal then relief akin to an injunction would be an effective means of achieving this. There would not appear to us to be any reason why the same test and standards required to obtain injunctive relief in the High Court could not be applied in the Employment Tribunal with a referral procedure devised to deal with instances of contempt of court for breach of an order.

This would be subject to two important provisos. First, Employment Judges would require specific training. Second, the resources to enable what would likely be complex and time consuming hearings would need to be made available. Conceptually that must currently be the case for s128 applications so in principle the Tribunal system must be able to accommodate urgent hearings. We have not been able to obtain any statistics as to how many such applications are made but anecdotally we suspect it is a little used procedure.

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?

Case law has established broad vicarious liability for the actions of individual co-workers or managers. Claims are sometimes made against individuals as well as the employer, partly in case vicarious liability is not applied, and partly, no doubt, so as to ensure that evidence is given by the individual respondent or to assert tactical pressure. It is relatively rare to find a number of individual respondents being named in discrimination cases, although in the wake of #metoo and other associated reports of historic or ongoing issues concerning discrimination in the form of harassment, more claims against a number of respondents may be anticipated. These could relate not just to protagonists of direct actions, but those with responsibility in management roles for the investigation or disposition of issues.

We agree with the provisional view of the Law Commission that it is hard to defend the current status quo, preventing concurrent respondents seeking contributions from each other. In situations where individual respondents may have liability, the ability to claim a contribution may assist the availability and quality of personal evidence in proceedings. The same point arises in relation to the possibility of apportionment claims between corporate respondents. In relation to the relationship between an employer respondent and individuals, we suspect that, given the broad extent of vicarious liability, it will be relatively rare that an employer sees any benefit in seeking an apportionment from individual respondents. However, in circumstances where it seeks to deny liability for actions on the basis that they are outside the employment context, we would regard the policy issues as being relatively straightforward: the ability to seek a contribution in the same set of proceedings, rather than successive proceedings elsewhere (e.g. perhaps, arising from disciplinary action against an individual respondent if found guilty of discrimination) may be useful and cost-effective.

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.

For similar reasons to those given in our response to question 47, we think it would be useful for tribunals to be given the power to make orders for contribution. Examples where contribution orders may be useful include for failure to inform and consult in connection with collective redundancies or TUPE, or where there are claims related to whistleblowing allegations with multiple corporate respondents or, potentially, against individual respondents (see *(1) Timis (2) Sage v Osipov* [2018] EWCA Civ 2321).

So far as the criteria are concerned, as regards individuals those would include, we suggest:

1.1.1 the seniority of the individual and their influence over decision making and practice within an employment environment;

1.1.2 the skills and experience of the individual, including the degree of training given to them and the discretion they have as to work conduct and the matters complained of;

1.1.3 the degree of support available to the individual including size of their employing organisation and its human resources, financial, legal, risk and other management functions;

1.1.4 the extent to which the individual was in a junior position and subject to direction or instruction from other respondents; and

1.1.5 the extent to which the person derived actual or potential personal advantage from any discriminatory actions.

So far as corporate respondents are concerned we would suggest these criteria:

- the degree of responsibility for the matter;
- the extent to which the respondent was the instigator or facilitator of the matter;
- any formal corporate legal relationship between respondents (so that, where they are members of the same group, it may be appropriate to allocate joint and several liability);
- in relation to corporate respondents which are not members of the same group, relative bargaining power and the degree to which one party had effective contractual or other decision making power over the conduct of the other; and
- the extent to which the entity derived actual or potential benefit from its own discriminatory actions or the actions of others.

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 the appropriate modifications.

Yes: on the basis that the argument for giving the right to claim contributions is consistent with common law claims in the civil courts, we see no basis for deviation from the general rules.

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 advantage of giving those powers to tribunals instead of leaving enforcement to the civil courts??

The statistics released in connection with the consultation on the Matthew Taylor report by the Department of Business, Energy and Industrial Strategy disclosed a surprising (to us) and concerning level of delinquency on the part of employers in

paying Employment Tribunal awards. There would appear to be no compelling reason why enforcement should require an individual to have commence fresh proceedings in a different forum with all of the logistical difficulties (real and perceived) that that entails. If the current level of apparent non-compliance is to be changed (which we suggest the efficient administration of justice demands) then unnecessary barriers should be removed. We would therefore support the Tribunal being given powers to enforce its own orders. We would suggest that those powers be co-extensive with those of the civil courts. That said it must be acknowledged that providing Employment Tribunals with the jurisdiction to enforce their own orders for the payment of awards will require a significant investment in resources and this should not diminish the resources currently available.

Chapter 7

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?

The EAT's jurisdiction should be extended to include appeals from the CAC in trade union recognition and derecognition disputes. The EAT has expertise in matters relating to collective disputes as it hears appeals relating to collective redundancy consultation, inducements relating to collective bargaining (notably *Kostal v Dunkley* [2018]), trade union membership and activities. A specialist CAC tribunal is best reviewed by a specialist EAT judge, restricted as usual, to a point of law or perversity and not by an Administrative Court judge who may have no knowledge of the reality or politics of collective bargaining and industrial relations generally as well as recognition disputes.

Giving the EAT appellate jurisdiction over trade union recognition disputes would not lead to more intervention of the courts and indeed may influence some potential appellants that it is not worthwhile to bring a speculative appeal on the basis the Administrative Court judge would be the luck of the draw.

We agree that appeals should be limited to questions of law as opposed to being in any way a rehearing.

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?

The original jurisdiction of the EAT is rarely, if ever, exercised and so there is little utility in making any changes to such a little used jurisdiction. The EAT remains the correct forum for such unusual applications.

Consideration should be given to whether a new jurisdiction should be introduced for employment tribunal claims of exceptionally high value or significance. Employment tribunals occasionally have to determine cases where the individual award is very high (e.g. £415,227 in 2017/18 for unfair dismissal; £1,744,575 in 2016/17 for unfair dismissal; £1,762,130 in 2015/16 for sex discrimination; see ET annual statistics) perhaps with loss arising from complex equity participation or other incentive based schemes and sometimes have to decide large multiple claims where the aggregate claims run into millions. There would be real benefit in there being a case management discretion in the Employment Tribunal to list such exceptional cases to be heard by a judge of the EAT (sitting alone or with members) applying the Employment Tribunal Rules of Procedure.

This would mean that the claim would be case managed and heard in an identical manner, but that a senior specialist judge would decide the case. This is analogous to lower value claims being heard by a Circuit Judge in the County Court whereas high value or complex claim must be heard by a High Court Judge particularly one sitting in a specialist list. We propose that this discretion be used only in exceptional circumstances where the Employment Tribunal decided the case was of sufficient complexity or value that the justice of the case required it to be heard by an EAT judge.

Chapter 8

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?

We note that the Commission's terms of reference preclude changes to significant primary legislation and therefore that the creation of an Employment and Equalities Court ('EEC') is not within scope. ELA supported the idea of an EEC in our response to Proposals for a Single Employment Court, April 2016, and it is therefore disappointing that this idea has not yet been considered further. We hope that any measure adopted as an interim step, such as the Law Commission's current proposal, will be seen only as a stop-gap until the EEC proposal can be considered.

As set out in our response to Proposals for a Single Employment Court, April 2016, we accept and support the logic of having employment law specialists deal with employment and discrimination cases in the High Court. Given that many key concepts of discrimination law apply equally in the employment sphere and the provision of goods and services, it is strongly preferable that these concepts should be interpreted and applied consistently and with understanding of the impact on the other area of law. [The case of *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] UKHL 43 illustrates clearly the potential impact of a ruling in one area on the other (leading in that case to legislative change).] Equally, legal principles specific to employment contracts and the unequal bargaining strength between employer and employee mean that specialist experience is also advantageous in cases concerning restrictive covenants, confidential information and breach of contract as well as matters involving industrial action.

It can be frustrating for employment claims to be listed in the Queen's Bench Division or Chancery Division before a judge with limited experience of employment contracts, employment disputes, industrial relations, restrictive covenants or confidentiality, or the conventional implied terms of a contract of employment. Employment injunction

claims in particular must sometimes be determined at short notice and with considerable speed.

In our survey of members carried out in 2015 and included in our response to Proposals for a Single Employment Court, April 2016, 83% were in favour of discrimination cases being reserved to specialist judges and 78% were in favour of restrictive covenant cases being heard by a specialist judge. (This was in the context of the proposal for an Employment and Equalities Court sitting as a distinct division of the High Court.)

We can see that a formal solution such as a specific division or formal 'specialist list' could give rise to inflexibility and problems of definition, given the breadth of employment-related and discrimination-related claims that can be brought in the High Court. There may sometimes be no clear delineation between an employment claim and other related claims, particularly where a worker providing a service is claiming for unpaid sums and it is arguable whether or not she is an employee or worker, or an independent contractor. It could be problematic to try to draw a clear line in a statutory instrument.

We note that the informal media and communications list has been viewed as a success.

We believe that it may assist the parties and the efficient use of judicial time for an informal specialist list to be created within the Queen's Bench Division. We agree that it should be supervised by a High Court Judge who is a recognised specialist in the field and judges who sit in the list can be nominated by the President of the Queen's Bench Division. An informal list would still allow claimants to bring claims within the general list; we support this flexibility at least during the initial period of running such a list. We would also support the establishment of a user group as has been created for the media and communications list to evaluate how it is working.

We consider that the subject matter listed at paragraph 8.5 of the Law Commission's Consultation Paper should come within the remit of the specialist list, namely:-

(1) employees' claims for wrongful dismissal in breach of contract;
(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 for damages following what is alleged to be unlawful industrial action (but see paragraph below);
(5) appeals from county courts in claims for discrimination in goods and services; and
(6) appeals from county courts in employment-related cases.

We should note that, in the context of the proposal for an Employment and Equalities Court to include employment cases currently heard by the Employment Tribunal as well as those claims heard by the High Court, some members of the committee drafting ELA's response (who predominantly acted for trade unions) considered that employment cases should not be heard by the same judges as those hearing industrial action cases. This was because they felt that legislation in relation to industrial action and balloting may be seen by some as very 'political', so that judges determining such cases could be perceived as 'biased' on one side or another. Others disagreed with this view, considering that the benefits of specialist expertise outweighed the small risk of such a perception. In any case, we consider that this issue is less significant in the context of the Law Commission's current proposal, under which judges on the specialist list would only hear those cases currently heard in the High Court and not the standard employment tribunal claims.

Question 54: What name should it be given: Employment List, Employment and Equalities List or some other name?

The name should reflect the remit of the list. Assuming this will include discrimination in goods and services, we consider that "Employment and Equalities List" is an appropriate name.

Scotland

The consultation is being undertaken by the Law Commission for England and Wales. There is a separate body, the Scottish Law Commission, which performs the equivalent role for Scotland. Often when issues affect both jurisdictions, the two Commissions hold a joint consultation. However in this case the Scottish Law Commission is not involved at all and the Consultation document states that it is only applicable to England and Wales.

With minor exceptions not affecting the issues covered in the consultation, the Employment Rights Act 1996, the Employment Tribunals Act 1996 and the Equality Act 2010 are statutes which apply equally to England and Wales and Scotland. This reflects the fact that employment law is a reserved area under the Scotland Act 1998 (i.e. reserved to the Westminster Parliament and therefore not within the legislative competence of the Scottish Parliament).

The Scotland Act 2016, s 39, makes provision for the transfer of legislative competence over the 'functions' of a number of tribunals, including employment tribunals and the EAT, to the Scottish Parliament by an Order in Council. Issues which such orders may cover include the definition of what are to be treated as 'Scottish cases'. The Act does not provide for the devolution of substantive areas of employment law. A draft Order was published by the Scottish Government for consultation in March 2017; it was very critically received, and the Government has still not published any response to the submissions received from consultees. It is understood that the transfer of functions is unlikely to take place before 2020.

One issue which arose during the 2017 consultation is the possibility that if the employment tribunals north and south of the border adopt different procedures, or appear to have different status, there is room for forum shopping by claimants (potentially a particular issue in multiple cases and those with trade union support). Rule 8(3) of the Employment Tribunals Rules of Procedure 2013 confers jurisdiction in England and Wales (E & W) in any case where the respondent resides or carries on business in E & W, the contract to which the claim relates is one under which work

has been performed partly in E & W, or one or more of the acts complained of took place in E & W; there are mirror provisions for Scotland. The effects of these provisions are that claims may be brought against any entity which operates both in E & W and Scotland in either jurisdiction. The same applies if the claimant works on both sides of the border.

This will be of major significance if some of the changes canvassed by the Law Commission are introduced for E & W but not for Scotland. Examples are:

- Extension of time limits for claims (e.g. of unfair dismissal) to six months.
- Changing the test for extending time for late claims from 'not reasonably practicable' to 'just and equitable'.
- Giving tribunals jurisdiction in contract claims arising whilst the employee is still in employment.
- Increasing or removing the £25,000 limit on tribunals' contractual jurisdiction.
- Extension of tribunals' contractual jurisdiction to workers.
- Conferring jurisdiction to construe contracts in claims under s11 Employment Rights Act 1996 (ERA).
- Conferring jurisdiction to hear claims for unquantified amounts under Part II of the ERA.
- Giving tribunals power to enforce monetary awards.

The first two of these are particularly important because there would be cases which could *only* be brought in E & W, such as unfair dismissal claims by employees who worked in Scotland but the claim has not been intimated to ACAS within the primary three month time limit under s 111 ERA; if the claim would be time barred in a Scottish ET there is no alternative forum, so being able to pursue a remedy might depend on whether the employer happened also to be in business in E & W. In the other cases alternative options in the civil courts would be available, but there would still be a disparity of access to justice between the two jurisdictions. Employers in business on both sides of the border will include for instance almost all major retailers, most utility companies and many major public bodies as well as many of the larger private sector employers.

It may be thought that given the imminent devolution of the employment tribunals and EAT, it should be left to the Scottish Government to take forward any proposals for equivalent changes applying in Scotland. However it is not at all clear whether the power to do so will be devolved. The question is whether the changes are substantive changes in the law, of e.g. unfair dismissal, or purely procedural matters which will fall within the scope of 'functions' of tribunals and thus be within the devolved powers once an order under the Scotland Act 2016 is made. It is at least arguable that the power to amend s 111 ERA will not fall within the intended devolution. Matters may be clearer once the final draft of the Order in Council is published but this cannot be assumed. Additionally, even if the Scottish Government and Parliament do get sufficient powers to address the issues covered by the Law Commission paper, there will be a time lag before any legislation can be formulated, during which the problems highlighted may apply (depending on how quickly any final recommendations of the Law Commission are implemented for E & W).

It should also be noted that whilst the definition of 'Scottish cases', and thus the jurisdiction of the Scottish tribunals over particular disputes, will be within the scope of devolution, there will be no power for the Scottish Parliament to restrict the jurisdiction of tribunals in E & W. This is therefore a point the Law Commission needs to consider as a potential consequential exercise if it proceeds with its provisional recommendations.

Some of the issues canvassed by the Law Commission are plainly only directly relevant to E & W, in particular the organisation of employment business in the High Court and the question whether employment judges should preside over non-employment discrimination cases in the County Court. However even in these and other such areas (such as the question of enforcement of monetary orders, where the system in Scotland is different to that in E & W) have implications for Scotland, and if changes result for E & W there will inevitably be pressure for Scotland to follow; it would therefore be unfortunate if there is no opportunity for Scottish input, but it appears that nothing is being done to seek this.

Appendix 1

Members of Working Party

Co-chairs:

Richard Fox – Kingsley Napley LLP
Joanne Owers – DAC Beachcroft LLP
David Widdowson – Abbiss Cadres LLP

Members:

Andrew Burns QC – Devereux Chambers
Sarah Fraser Butlin - Cloisters
Kiran Daurka – Leigh Day
Shantha David - UNISON
Anna Henderson – Herbert Smith Freehills LLP
Howard Hymanson – Harbottle & Lewis LLP
Harini Iyengar – 11 KBW
Anthony Korn – No. 5 Chambers
Stephen Levinson – Keystone Law
Eleanor Mannion – MacRoberts LLP
Paul McFarlane – Weightmans LLP
Sean Nesbitt – Taylor Wessing LLP
Jennifer Sole – Curzon Green Solicitors
Louise Taft – Freemans Solicitors
Professor Peter Wallington
David Williams – Kemp Little LLP