



## **Bar Council response to the Law Commission consultation on Employment Law Hearing Structures**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation paper on Employment Law Hearing Structures<sup>1</sup>.

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

**Q1 -We provisionally propose that employment tribunals' exclusive jurisdiction over certain types of statutory employment claims should remain. Do consultees agree?**

4. Yes. The Employment Tribunal is a specialist Tribunal and is best placed to resolve employment related disputes.

**Q2- 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?**

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<sup>1</sup>[The Law Commission \(2018\) Employment Hearing Law Structures](#)

5. This is a question that is likely to produce differing responses among consultees. However, we suggest that the sensible starting point is that there is not a need for wide-ranging reform of time limits

6. Any time limit, by its very nature is arbitrary. However relatively short time limits in employment requires parties to focus on their dispute and where appropriate, to move on. We consider that this is a legitimate policy objective.

7. If there is reform, it would be sensible to direct that reform at specific issues rather than wide-ranging or sweeping reform. Specific issues could include:

- i) the simplification of the extension of time provisions as a result of ACAS Early Conciliation.

We would suggest that these provisions are simply too complex to be understood by the lay person. We are aware of cases whereby litigants have had to seek an extension of time arising out of their misinterpretation of the ACAS time limits.

A more straightforward time limit such as 'one month following date B or the original time limit', whichever is later would be more straightforward.

Current complicating factors include:

- The existence of a dual method of calculating an extension
- Parties claiming that they have not had the relevant time limit explained to them by ACAS or claiming that ACAS have explained it incorrectly.
- Differing time limits running in respect of different claims

- ii) The application of a more liberal regime relating to discrimination claims relating to pregnancy or maternity leave.

We would suggest that unlike other areas of employment law, there is a legitimate and recognisable issue that arises from the nature of the claim that is being made. An individual may be facing particular difficulties at this point in their life and the commencing of litigation may seem like one battle too many when they are juggling so many issues. With a longer time limit, the individual would be able to focus on the merits of their claim rather than have to balance the decision to make a claim against their wellbeing.

We would suggest that there is a legitimate policy issue to be addressed, namely the unique factors that relate to pregnancy and maternity leave and the particular factors faced by women experiencing discrimination relating to their pregnancy or maternity leave.

The Law Commission is asked to consider the 2018 research by the Equality and Human Rights Commission<sup>2</sup> which indicates the potential scale of such discrimination. In contrast, the September 2018 statistics in respect of claims received “suffer a detriment/unfair dismissal-pregnancy”<sup>3</sup> suggests that in one month, 120 claims were received in England, Wales & Scotland. This is obviously a complex issue and there will be more than one factor creating a barrier to a woman bringing such a claim. However, this is clearly a policy area in which there is a stark difference between the perception of discrimination and the enforcement of it and further consideration by the Law Commission of the effect of time limits on this disconnect is merited.

**Q3 -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?**

8. No. The ‘not reasonably practicable’ regime whilst arguably harsh, is generally well understood.

9. The more liberal just and equitable regime is better suited to discrimination claims because there is often (though not necessarily) different issues that occur and escalate over time, with the identification of the discriminatory act and the decision to take action about it not always being straightforward decisions. In contrast, the not reasonably practicable regime provides certainty about events that are most likely to have occurred on a specific date e.g. the effective date of termination (“EDT”).

**Q4 -We provisionally propose that the county court should retain jurisdiction to hear nonemployment discrimination claims. Do consultees agree?**

10. Yes. It is sensible for parties to have the option of commencing non employment proceedings in the County Court if they choose to do so.

**Q5 - Should employment tribunals be given concurrent jurisdiction over non-employment discrimination claims?**

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<sup>2</sup><https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings>

<sup>3</sup> ET statistics Annex C

11. Yes. In some types of claim, particularly goods and services, litigants should have the option of putting their claim before a specialist discrimination judge. A goods and services case will have a degree of similarity with an employment claim.

**Q6- 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?**

12. The issue of transfer from the Employment Tribunal to the High Court arose in the context of equal pay in ASDA Stores Ltd v Brierley & Others [2016] EWCA Civ 566. We would suggest that the approach of the Court of Appeal in this case identifies similar factors to those identified by the Law Commission in the consultation document.

13. Relevant criteria would include:

- a) The wishes of the parties;
- b) The extent to which a point of law not relating to the Equality Act arises. For example, a point relating to the interpretation of a property law statute might be better suited to a civil court familiar with the statute; and
- c) The nature of the relief sought.

14. We would be particularly concerned if a party that had legitimately issued proceedings in a limited costs jurisdiction was forced into a costs jurisdiction.

15. There is no reason in principle as to why the County Court should not have the power to refer questions relating to discrimination cases to Tribunals. In addition, for the purposes of this consultation, we assume that the power to transfer claims would apply equally to the High Court.

**Q7- 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?**

16. In any Equality Act employment claim before the Employment Tribunal the Tribunal will list the matter for a Preliminary Hearing (case Management) as a matter of course. We consider that this would be the appropriate forum for determining the correct jurisdiction in a non-employment discrimination claim.

17. It is not sensible for this issue to be dealt with on paper in a 'triage' before the matter comes before a Judge. It is common for the issues to be far from clear at an early stage in the litigation and much only becomes clearer once matters have been explored before a Judge.

**Q8-Do consultees consider that employment judges should be deployed to sit in the county court to hear non-employment discrimination claims?**

18. Yes. A limited amount of cross-ticketing as described in the consultation is not objectionable.

19. We would be opposed to any proposal that diluted the Employment Tribunal as a separate, specialist forum.

**Q9-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?**

20. Further consultation should take place with District Judges and Employment Judges in respect of the value of sitting with assessors or lay members. We understand that there may be divergent views as to the value of sitting with such assessors and whether there is added value, particularly where the Judge is a specialist discrimination Judge.

**Q10-Should employment tribunals have jurisdiction to hear a claim by an employee for damages for breach of contract where the claim arises during the subsistence of the employee's employment?**

21. We would give a cautious yes to this consultation question. In principle, the Employment Tribunal should be able to hear a contractual matter relating to employment that would be capable of being heard in the County Court. Furthermore, where a matter does not fit neatly into the wages jurisdiction, it is sensible for the Tribunal to be able to hear the matter.

22. There is some concern of a 'floodgates' point. In our experience, some litigants in person seek to litigate many poor points through the breach of contract jurisdiction where an alternative jurisdiction such as the Equality Act is not available. We would not want to support or encourage a jurisdiction in which 'general complaints' are pleaded as breach of contract and can only be resolved following a hearing.

23. One way of mitigating this risk is to restrict the extension of the jurisdiction to specific monetary claims as opposed to a broader concept of what is capable of amounting to a breach of contract.

**Q11 - Should employment tribunals have jurisdiction to hear a claim for damages for breach of contract where the alleged liability arises after employment has terminated?**

24. Yes. There is jurisdiction to consider post-employment discrimination complaints. The rationale in respect of post-employment contract claims should also be expressly provided for. The Employment Tribunal should also have the express jurisdiction to consider breach of contract claims that arise out of a COT 3 or a settlement agreement. These are matters related to employment and are suited to the specialist Tribunal.

**Q12-We provisionally propose that the current £25,000 limit on employment tribunals' contractual jurisdiction should be increased. Do consultees agree?**

25. Yes. The limit has remained in place since 1994 and has not kept pace with inflation. There is no good reason for the current £25,000 limit to remain in place and reform is long overdue.

**Q13-What (if any) should the financial limit on employment tribunals' contractual jurisdiction be, and why?**

26. In a discrimination claim, the Employment Tribunal has the jurisdiction to award the same level of damages that would be available to the County Court i.e. unlimited damages. We consider that an Employment Tribunal is well placed to deal with high value claims.

27. The main frustration with the current limit is that some parties must litigate their unfair and wrongful dismissal claims in two different forums. We consider that any limit should take into account the likely value of most notice pay claims and consider that a limit of £100,000 mentioned in the consultation would be sufficient for that purpose.

**Q14- 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?**

28. We consider that any limit should apply equally to counterclaims.

**Q15-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?**

29. Yes. The time limit should remain aligned with the time limit for unfair dismissal. A party seeking to bring a claim outside that time limit still has the option of proceeding in the County Court.

30. There may be some difficulty in calculating the time limit in some cases. It would only complicate matters to have two different employment tribunal breach of contract time limits.

31. The difficulty in respect of calculating the time limit in respect of some breach of contract claims that arise during the course of employment is a further reason for caution in extending the jurisdiction in this way.

**Q16-We provisionally propose that employment tribunals' contractual jurisdiction should not be extended to include claims for damages, or sums due, relating to personal injuries. Do consultees agree?**

32. Yes. The overlap with tort is such that such claims are better suited to the County Court for the reasons identified in the consultation. The majority of personal injury claims are unrelated to an employment dispute and the County Court is the appropriate forum for such claims.

**Q17-We provisionally propose that the prohibition against employment tribunals hearing claims for contractual breaches relating to living accommodation should be retained. Do consultees agree?**

33. No. The current restriction can cause issues which require further examination.

34. The County Court is the appropriate forum to resolve issues such as unlawful evictions, possession, or housing matters that require injunctive relief for example.

35. However, it is artificial to require an employee or employer to initiate separate civil proceedings where there is a clear monetary issue that is connected to the employment and is capable of being resolved. There is nothing inherently complicated in dealing with such issues and they would be within the competence of an Employment Judge. For example, an employer should be entitled to offset the damages arising from a breach of contract claim arising out of employment if they are owed sums in respect of rent for example.

36. We would suggest that further evidence is obtained on this point and that consideration is given to a limited reform providing the Tribunal with jurisdiction in respect of straightforward monetary points arising out of a contract relating to accommodation.

**Q18-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?**

37. Yes. This is a specialist area of law and is not suited to the Employment Tribunal.

**Q19- We provisionally propose that the prohibition against employment tribunals hearing claims relating to terms imposing obligations of confidence (or confidentiality) should be retained. Do consultees agree?**

38. Given the overlap with tort identified in the consultation, we agree that there is unlikely to be many situations in which such a claim is before the Tribunal.

**Q20-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?**

39. Yes. A more wholesale reform of the system would be required in order to extend jurisdiction in this way.

**Q21-We provisionally propose that employment tribunals expressly be given jurisdiction to determine breach of contract claims relating to workers, where such jurisdiction is currently given to tribunals in respect of employees by the Extension or Jurisdiction Order. Do consultees agree?**

40. Yes. We consider that the current position is that only employees are entitled to bring such claims and therefore if workers are to be included, the legislation needs to be amended.

41. There is no reason in principle as to why a worker should not be able to bring a breach of contract claim in the Employment Tribunal. There will inevitably be some cases in which there will be a dispute over whether or not the individual is a worker or independent contractor but the Tribunal will be well placed to deal with this.

**Q22-If employment tribunals' jurisdiction to determine breach of contract claims relating to employees is extended in any of the ways we have canvassed in consultation questions 10 to 20, should tribunals also have such jurisdiction in relation to workers? If consultees consider that there should be any differences between employment tribunals' contractual jurisdiction in relation to employees and workers, please would they provide details.**

42. No. The key point here is that both workers and employees have a contract. Disputes arising from a contract are capable of being resolved in the Tribunal if



jurisdiction were granted. There is nothing connected to the status of employee or worker that means one is more capable of being resolved in a Tribunal than the other.

**Q23- 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?**

43. There are competing policy arguments. On the one hand, an individual trading on their own account may have limited resources and it would be desirable for them to be able to bring their claim in a limited costs jurisdiction. There is an issue generally in respect of the non payment of debts to small businesses and it is likely that this issue applies equally to those individuals in business on their own account. On the other hand, an individual trading on their own account has access to the County Court in the same way that any other business does.

**Q24-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?**

44. This is an area in respect of which consultees will differ.

45. On the one hand, we have experience of employers seeking to counterclaim in the Tribunal in respect of matters where the Tribunal has no jurisdiction or in respect of matters that will never amount to a breach of contract as a means of seeking to retaliate against the employee.

46. On the other hand, we also have experience of employers who have a potential claim against an employee for a relatively modest sum choosing not to initiate civil proceedings due to the extra time and cost involved. These employers would inevitably welcome the opportunity to commence proceedings in the Employment Tribunal where the employee has not made a breach of contract claim and to join that claim with the employees claim so that both claims are heard together. At present the key factor in whether an employer makes such a claim is a matter outside the employers control mainly, whether the employee has made a breach of contract claim thereby entitling the employer to make a counterclaim.

47. Therefore, there is an argument that there are claims that could be made by employers that are currently not being made. At the same time there is also an argument that such a system could be open to abuse and to seek to deter individuals from the Tribunal who have a legitimate complaint.

48. We would suggest that if there is reform in this area the employer is restricted to a relatively low cap for such claims in the region of £5000. This would deal with the

economics issue that employers face but at the same time keep within the jurisdiction of the County Court matters that should properly be there.

**Q25-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?**

49. This will depend on the view taken on the answer to Q24 and our response to this question should be read in conjunction with our answer to the previous question. There is some case for limited reform but at the same time a risk that such reform would be used to deter those claimants who have legitimate complaints.

**Q26 -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?**

50. Yes. The current restriction does not have a sound policy basis. The construing of terms in a contract is a matter of law and falls within the proper function of an Employment Judge.

**Q27-Should employment tribunals be given the power to hear unauthorised deductions from wages claims which relate to unquantified sums?**

51. We would cautiously agree that the Tribunal should have the power to decide wages claims relating to unquantified sums such as money that could arise from a discretionary bonus. The Tribunal would have jurisdiction and the competence to consider this in a breach of contract claim post termination and therefore we consider that reform in this area is justified.

52. However, we express a note of caution that this must not become a backdoor to poorly pleaded or unclear wages claims. A party should be able to put forward the approach that they wish the Tribunal to take in making a finding in their favour.

**Q28 -Where an employment tribunal finds that one or more of the “excepted deductions” listed by section 14(1) to 14(6) of the Employment Rights Act 1996 applies, should the tribunal also have the power to determine whether the employer deducted the correct amount of money from an employee’s or worker’s wages?**

53. Yes. The Tribunal would have this power when considering a breach of contract claim. There is no good policy reason as to why it should not apply to a wages claim.

**Q29-Should employment tribunals be given the power to apply setting off principles in the context of unauthorised deductions claims? If so: (1) should the jurisdiction to allow a set off be limited to liquidated claims (ie claims for specific sums of money due)? (2) should the amount of the set off be limited to extinguishing the employee's claim?**

54. No. We consider that set-off is best left to the breach of contract regime. A specific statutory scheme for wages, with specific exceptions is easier for parties to understand. Often, the reason for the deduction is a misplaced belief in the ability to set off a contentious sum and we do not wish to weaken the wages regime.

**Q30-We provisionally propose that employment tribunals should continue not to have jurisdiction in relation to employers' statutory health and safety obligations. Do consultees agree?**

55. Yes. More evidence of failures in the current regime would be required in order to justify a significant change in this regard.

**Q31-We provisionally propose that employment tribunals should continue not to have jurisdiction over workplace personal injury negligence claims. Do consultees agree?**

56. Yes. Workplace personal injury negligence claims are a matter for the civil courts.

**Q32-We provisionally propose that employment tribunals should retain exclusive jurisdiction over Equality Act discrimination claims which relate to references given or requested in respect of employees and workers and former employees and workers. Do consultees agree?**

57. Yes. The correct forum for employment related Equality Act claims is the Employment Tribunal.

**Q33 -Do consultees consider that employment tribunals should have any jurisdiction over common law claims (whether in tort or contract) which relate to references given or requested in respect of employees and workers (and former employees and workers)?**

58. There is no reason in principle why such claims are better suited to the civil courts. The Tribunal is a more specialist forum with the necessary expertise to analyse a reference. A District Judge is less likely to have direct experience of references beyond their own personal experience. The Judge will probably need to look at the substance of a reference in order to determine whether the wrong has occurred. That is more likely to involve employment rather than civil considerations.

**Q34- Should employment tribunals and civil courts retain concurrent jurisdiction over equal pay claims?**

59. Yes. For so long as the mechanism by which equal pay claims are resolved is by the insertion of a “sex equality clause” into the contractual terms, which will always give rise to a contractual claim, in principle, there is no logical or desirable reason to remove the Court’s jurisdiction in this regard. Further, the fact of the more generous time limit, which is applicable to a claim pursued in the County or High Court, means that to remove the jurisdiction of the Court would have wider consequences. At present, given the decision in *Abdulla* it is open to a complainant to pursue an equal pay claim by reference to the six-year contractual limitation period as opposed to the six-month period in the Employment Tribunal where employment has ended.

60. As the Employment Tribunal is acknowledged to be the tribunal of expertise in claims concerning equal pay, there is no case at all for removing its jurisdiction.

**Q35- 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?**

61. No. Most claims which may be pursued in the Employment Tribunal are subject to relatively short time limits, usually three or six months from the trigger point such as termination of employment, and to introduce a six-year limitation period would be wholly out of kilter with the Tribunal system. It would also be inherently inconsistent for claims brought under the Tribunal’s jurisdiction for unlawful deductions of wages and breaches of contract (arising or outstanding on termination of employment) to be subject to very short time limits (generally three months) while equal pay claims would be subject to the six-year limitation period applicable to contract claims.

62. Given the response to Q34 above, there would be no sensible basis for increasing the time limit in the Employment Tribunal when a claim can be issued in Court and the Court is able to refer to the claim to the Employment Tribunal under its existing powers.

**Q36- What other practical changes, if any, are desirable to improve the operation of employment tribunals’ and civil courts’ concurrent equal pay jurisdiction?**

63. None. The mechanisms which exist and are available to either the Civil Courts or Employment Tribunal for managing the concurrent jurisdiction are fit for purpose in the context of the way in which equal pay claims operate i.e. by inserting a “sex equality clause” into the contractual terms of the complainant.

**Q37- 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?**

64. Yes.

**Q38- The present demarcation of employment tribunals' and civil courts' jurisdictions over the TUPE Regulations 2006 should not be changed. Do consultees agree?**

65. Yes.

**Q39- The present demarcation of employment tribunals', civil courts' and criminal courts' jurisdictions over the Working Time Regulations should not be changed. Do consultees agree?**

66. Yes.

**Q40- The present demarcation of employment tribunals', civil courts' and criminal courts' jurisdictions over the NMW should not be changed. Do consultees agree?**

67. Yes.

**Q41- 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?**

68. As only the Civil Courts may grant an injunction, and this a particularly important form of relief in cases brought under these Regulations, it is hard to escape the need to maintain concurrent jurisdiction.

69. Although a complainant can seek uncapped damages in the Civil Courts whereas he or she is capped in the Employment Tribunal (unlike, for example, in equal pay claims where there is concurrent jurisdiction, but both forums are not limited in the monetary awards they can make if the claim succeeds).

**Q42- Should the £65,300 cap applying to employment tribunal claims brought under the Blacklists Regulations be increased so 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.**

70. As a minimum the cap should be brought in line with that for compensatory awards for unfair dismissal, but there is an argument for abolishing the cap altogether as a matter of principle, by reason of (1) the concurrent jurisdiction of the Civil Courts

and Employment Tribunals, (2) the specialist expertise of the Employment Tribunal and (3) the fact that the consequences of discrimination by reason of trade union involvement may go beyond loss of one job or job opportunity. If this is seen as being more akin to discrimination than unfair dismissal, then no cap should apply.

71. We are not aware of any cases which have had to be pursued in the civil courts by reason of the cap, but these claims are generally rare in any event. This should not detract from a principled approach to reform in this area.

**Q43- 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?**

72. Yes. These are plainly distinct legal causes of action and do not trespass on each other as confirmed in *Michalak*. The Administrative Court will refuse permission where, for example, the matter is considered to be one for private law resolution or where its decision would be futile because the matter has already been considered.

**Q44- 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.**

73. Yes. The existence of a statutory appeal body ought not to oust the jurisdiction of the Employment Tribunal to consider discrimination claims. The Tribunal is the specialist and expert forum for dealing with discrimination claims. Where a statutory appeal has made findings on alleged discrimination, these may be persuasive, but should not be binding on the Employment Tribunal. As such, the Employment Tribunal's jurisdiction should be strengthened in this area to provide better protection for those claiming unlawful discrimination against qualifications bodies.

**Q45- 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 any employment tribunal? If consultees take the view that the answer is "no", what changes do they suggest?**

74. Yes. The Tribunal is the specialist and expert forum for dealing with discrimination claims. If a claim amounts to an abuse of process then steps can be taken by a respondent to have the claim struck out or apply for costs in appropriate cases where the claim to an Employment Tribunal is plainly, for example, vexatious. Qualifications bodies have been slow to grapple with the Equality Act and those

hearing appeals rarely possess the expertise of the Employment Tribunal making it especially hard for complainants to pursue allegations of discrimination.

**Q46- Our provisional view is that employment tribunals should not be given the power to grant injunctions. Do consultees agree?**

75. Yes. There is no reason why an Employment Judge could not, as in the case of a District Judge or Master, deal with claims for injunctive relief, but the Tribunal system is in no way, shape or form set up to deal with claims of this sort. Any issues arising in relation to contempt, which is an important feature of injunctive relief, would have to be referred to the Civil Courts in any event. The speed with which injunctions must be dealt with is an answer of itself given that Employment Tribunals are currently listing cases, in which claims to be heard were subject to a three-month time limit, in 2020 or even 2021.

**Q47- 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?**

76. Yes. The Employment Tribunal should be empowered to do so on a “just and equitable” basis giving it the maximum discretion to do justice on the facts of the case, but it should only do so after hearing representations from the Claimant and Respondents.

**Q48- 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.**

77. No. While we recognise that discrimination is a statutory tort, the Commission is right to identify at the outset the particular policy considerations that apply to parties who are not at arm’s length, but who are in an employment relationship.

78. It is desirable to reinforce the employer’s primary responsibility to guard against unlawful discrimination in the workplace, including as to the provision of suitable training, resources, modes or redress and sanctions for breaches of equality policies and procedures. In many cases the employer will simply accept vicarious liability for its employee and the issue of contribution simply will not arise.

79. It is undesirable for there to be prolonged or satellite litigation around contribution, which may well serve to increase the time when the aggrieved employee receives his or her compensation.

80. The Tribunal is not designed or adequately resourced to resolve complaints between Respondents.

81. Any potential injustice this may cause would be mitigated by giving the Tribunal the power to apportion liability separately on a “just and equitable” basis.

**Q49- 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 as regards common law claims brought in the civil courts, or be modified to suit the employment context? If the latter, we would be grateful to hear consultees’ views on appropriate modifications.**

82. Please see above answer. If such a right were to be given, contrary to our response, then it should be modified to suit the employment context and should certainly consider the extent to which the employer has fulfilled its obligations as to the provision of suitable training, resources, modes or redress and sanctions for breaches of equality policies and procedures.

**Q50- Should employment tribunals be given the jurisdiction to enforce their own orders for the payment of money? If so, what powers should be available to employment tribunals and what would be the advantages of giving those powers to tribunals instead of leaving enforcement to the civil courts?**

83. No.

**Q51- 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?**

84. No. The comments made by Buxton LJ in *Kwik-Fit* cited in the consultation at paragraph 7.15 are entirely apt.

**Q52- 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?**

85. Yes.

**Q53- 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?**

86. Yes. All cases in which the substantive legal rights in question concern an employee or worker (e.g. employment rights in the Equality Act 2010, Employment Rights Act 1996 or TUPE Regulations to name a few examples) and in which this requires consideration over and above ordinary common law principles of contract and tort whether as a matter of fact or law. The mere fact that a dispute is between an employer and employee ought not to merit inclusion in this list; the substantive dispute is the key.

87. This list should certainly encompass all claims for interim relief and injunctive relief including, for example, in cases concerning restrictive covenants of employees, misuse of confidential information by employees or team moves.

**Q54- What name should it be given: Employment List, Employment and Equalities List or some other name?**

88. For brevity, the Employment List though we recognise that many cases will not involve “employees” as a matter of strict interpretation.

**Bar Council<sup>4</sup>**

**7 January 2019**

*For further information please contact*

*The General Council of the Bar of England and Wales  
289-293 High Holborn, London WC1V 7HZ*

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<sup>4</sup> Prepared for the Bar Council by the Law Reform Committee.