

Briefing



Employment Law Hearing Structures

TUC Response to the Law Commission consultation

Introduction and summary

The Trades Union Congress (TUC) is the voice of Britain at work. We represent more than 5.5 million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

The TUC and our affiliated unions believe that, wherever possible, it is preferable to resolve employment disputes at work, using internal workplace procedures. Unions are very experienced in using their collective bargaining influence and the right to accompany individuals in grievance and disciplinary hearings to find early and amicable solutions to disputes in the workplace. But where it is not possible to reach a settlement, unions will also support union members to pursue merited claims in the courts or tribunals. Through this work, Unions have played a key role in the development of employment and personal injury law in the UK, through their willingness to run test cases which set precedents benefiting members and the wider workforce.

Summary

- The employment tribunal system has inadequate resources to provide an effective, swift, enforcement route for claimants. Average waiting times between filing and hearing a claim have increased. The number of employment tribunal claims has significantly increased. According to the latest MoJ figures 109,698 claims were filed in 2017/18, compared with 88,476 in 2016/17. Any proposed reforms to the employment tribunal system should, first and foremost, address this issue. Any subsequent proposals should be viewed through this lens and not considered if they are going to place further burdens on the limited tribunal resources.
- The TUC believes there is a clear and compelling case for retaining employment tribunals' exclusive jurisdiction over certain types of statutory employment claims.
- Standard time limits for bringing an employment tribunal claim should be harmonised. A uniform six-month time limit should apply to all employment tribunal claims.
- The legal process for obtaining statutory recognition is overly bureaucratic, lengthy and poses significant obstacles for unions seeking to represent their members. There are fears that the statutory recognition process would get clogged up with employer challenges, if the EAT was given appellate jurisdiction. The TUC considers that this proposed change would further undermine the fundamental right to freedom of association. It would restrict working people from collectively bargaining with their employers.

Employment Tribunals exclusive jurisdiction

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

Yes.

In our opinion, employment law is a distinctive and highly complex field of law which warrants the retention of a specialist tribunal and specialist judiciary. Employment Tribunals are specialist forums for determining employment law disputes. The TUC is concerned that this expertise could be diluted if the employment tribunals were transferred into the civil court system.

We are concerned that any transfer of employment cases to the civil courts would undermine the principal of 'tripartism', which has underpinned the employment tribunal system since its creation in the 1970s. There is great value in the unique setup of the employment tribunal. Having an employee representative on the panel, perhaps with a trade union background, brings a grounded, realistic perspective to workplace disputes, which would be lost if the more claims were heard in the civil courts. It may also lead to the use of more formal legal rules and procedures in employment cases, which would disadvantage unrepresented claimants and respondents.

The employment tribunals and the Employment Appeal Tribunal provide a specialist, swift and comparatively informal forum for the adjudication of employment related disputes.

The TUC believes there is a clear and compelling case for retaining employment tribunals' exclusive jurisdiction over certain types of statutory employment claims.

Time Limit extension

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?

Standard time limits for bringing an employment tribunal claim should be harmonised upwards. A uniform six-month time limit should apply to all employment tribunal claims, thereby giving parties further time to complete all stages of internal workplace procedures before an application must be made to an employment tribunal.

The time limits for filing claims with an employment tribunal are shorter than for many other legal proceedings.

Many prospective claimants will not be ready to bring a claim soon after a workplace incident which has caused them considerable stress. The current 3-month time limit for many employment tribunal claims seems an unreasonable time period for people to consult with legal representatives, trade unions and sort out their finances to facilitate a claim. Claimants may also be unaware of the 3 month time limit.

Many prospective claimants may try and take time to resolve issues in the workplace and feel it is too early to bring a claim within the 3-month time period. In many cases a 3-month time limit is prohibitive to resolving disputes in the workplace.

Three-month time limits have a disproportionate impact on women – for example those who are considering bringing discrimination claims relating to pregnancy and maternity.

Evidence given to a recent Women and Equalities Select Committee¹ demonstrates that the 3-month time limit does not give claimants enough time to prepare. Witnesses suggested that time limits are particularly unjust for new and expectant mothers, given the physical and emotional pressures on them at this time.

“I didn’t know about [employment tribunals] and I would never have been able to contemplate pursuing this within the short timeframe. I was in no way able to write down let alone speak about what had happened so immediately afterwards.”

Written evidence from a member of the public¹³²

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?

Yes. We believe this would give ETs wider discretion to extend time limits.

In our view, tribunals should have the discretion to extend time limits in all cases where they consider it is just and equitable in the circumstances.

Concurrent jurisdiction for non-employment discrimination claims and employment judges sitting

Employment Tribunals and breach of contract claims

Question 10. Should employment tribunals have jurisdiction to hear a claim by an employee for damages for breach of contract

¹ Paragraph 86 -

<https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>

where the claim arises during the subsistence of the employee's employment?

Yes.

The circumstances in which an employment tribunal can hear breach of contract claims are too limited. Employment tribunals' jurisdiction is limited to breach of contract claims which arise or are outstanding on the termination of employment.

At the moment an employee would have to resign and claim constructive dismissal to have their claim heard in an employment tribunal.

Employment tribunals should be able to hear claims, *from claimants*, relating to the employment relationship/contract between the individual and the employer.

The current enforcement landscape could be confusing for prospective claimants as it leads to some disputes being litigated partly in employment tribunals and partly in the civil courts.

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?

Yes.

The TUC believes that if a claim is being made regarding a breach of contract that has arisen from the employment relationship then the employment tribunal is the appropriate forum to hear this claim.

The cases flagged up in the consultation document illustrate why prospective claimants should be able to bring a claim in an employment tribunal for breaches of contract where the liability arises after the employment has terminated. For example, currently, an employee would not be able to bring a claim in an employment tribunal for any unpaid commission payments or benefits which were due to be paid at a date in the near future² (but not due to be paid upon termination of the employment relationship).

As flagged up in the consultation document, this change in the law would also enable employees to bring a claim in an employment tribunal, to recover an unpaid sum under the terms of a settlement agreement, which was made post termination of an employment relationship. Currently, employees are unable to do so. An employee who resigns or is dismissed but then agrees a settlement with the employer, would have to enforce this agreement in the county court.

Also, bringing a claim to an employment tribunal is a more cost-effective route for prospective claimants to take.

² Peninsula Business Services Ltd v Sweeney, the Employment Appeal Tribunal

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

Yes.

As well as expanding employment tribunal's jurisdiction to hear a wider range of breach of contract claims, the £25,000 limit should also be increased.

Currently prospective claimants may be incentivised to bring claims in both employment tribunal and the civil courts. The £25,000 ceiling for breach of contract claims in the employment tribunal encourages claimants to bring claims in the civil court. The TUC has a number of concerns about the £25,000 cap:

This can waste the time and resources of claimants who may have to bring claims in both the employment tribunal and civil courts.

The £25,000 ceiling for breach of contract claims can encourage costly satellite litigation between the claimant and respondent as to which claims should be issued and heard first.

Unions have reported that some respondents use jurisdiction as a costs tactic, running up costs in one forum to make it difficult for the claimant to bring their claim in another forum.

The £25,000 limit is too low. The figure was determined under the Extension of Jurisdiction Order that was enacted in 1994. Taking into account inflation this figure should have been adjusted to around £50,000.

Tribunals hear claims worth millions of pounds. The cap of £25,000 for contractual damages seems out of place in the modern tribunal system.

The legal concept of estoppel may also cause claimants to miss out on higher levels of awards. If a claimant brings their claim to employment tribunal first and obtains the first £25,000 of a larger contractual claim for wrongful dismissal, a claim in the civil courts for the balance would then be barred by cause of action estoppel.

Question 13. What (if any) should the financial limit on employment tribunals' contractual jurisdiction be, and why?

There should be no financial limit on employment tribunals' contractual jurisdiction.

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?

As we set out above, all time limits for bringing a claim to employment tribunals should be extended to 6 months.

Question 16. We provisionally propose that employment tribunals' contractual jurisdiction should not be extended to include claims for damages, or sums due, relating to personal injuries. Do consultees agree?

Yes.

Employment tribunals don't have sufficient legal expertise, or day to day experience to deal with these claims.

It's also easier and more likely that claimants will receive costs awards in the county court.

Question 21. We provisionally propose that employment tribunals expressly be given jurisdiction to determine breach of contract claims relating to workers, where such jurisdiction is currently given to tribunals in respect of employees by the Extension or Jurisdiction Order. Do consultees agree?

Yes.

It's absolutely vital that all workers have the same enforcement routes as employees.

Workers are more likely to be low paid and in insecure employment – they need a relatively low cost, informal route to enforcement.

Question 22. If employment tribunals' jurisdiction to determine breach of contract claims relating to employees is extended in any of the ways we have canvassed in consultation questions 10 to 20, should tribunals also have such jurisdiction in relation to workers? If consultees consider that there should be any differences between employment tribunals' contractual jurisdiction in relation to employees and workers, please would they provide details.

Yes, as above.

Consultation Question 23. We provisionally propose that employment tribunals should not be given jurisdiction to determine breach of contract disputes relating to genuinely self-employed independent contractors. Do consultees agree?

Yes.

Business to business relationships can settle contractual disputes in the civil courts.

ETs have expertise in handling disputes that arise in an employment relationship and in-depth knowledge of employment law.

Any changes in this area could place a large burden on ETs and result in them hearing a large volume of contractual disputes.

Question 24 - We provisionally propose that employment tribunals should continue not to have jurisdiction to hear claims originated by employers against employees and workers. Do consultees agree?

Yes, the primary purpose of an employment tribunal is to give workers a route to enforce their rights.

Having an effective enforcement route is one of the ways to address the power imbalance that exists in the employment relationship.

Question 25 - We provisionally propose that employers should continue not to be able to counterclaim in employment tribunals against employees and workers who have brought purely statutory claims against them. Do consultees agree?

Yes

Employers already have a route to bring breach of contract claims.

This change could see a further drain on limited ET resources.

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?

An employment tribunal can, currently, determine “what particulars ought to have been included or referred to” in the written statement of particulars. If the tribunal determines particulars as those which ought to have been included or referred to in a statement of written particulars, the employer is deemed to have given the employee a statement containing those particulars - Employment Rights Act 1996, s 12(1). However, the tribunal has no jurisdiction to interpret or construe contractual terms and conditions contained or referred to in the statement of particulars.

We believe that the ETs should be able to look at the reality of the relationships and draw conclusions about contractual terms.

They can already infer terms and conditions into the written statement of particulars. It seems an anomaly that ETs are unable to construe terms referred to in the statement of particulars.

This development would be in line with the Tribunal's legal duty in employment status cases, such as *Autoclenz*, where they have a duty to look at the reality of the employment relationship.

Question 27. Should employment tribunals be given the power to hear unauthorised deductions from wages claims which relate to unquantified sums?

Employment tribunals should be able to go further and **quantify** the amount of wages which have been unfairly deducted from a worker's wages.

This would benefit workers in situations where they have suffered a financial loss but are unable to put an exact amount on that loss.

The current situation could lead to a claimant being confused about where to bring their claim as they may be unsure about where an employment tribunal has jurisdiction to hear their claim.

Question 28. Where an employment tribunal finds that one or more of the "excepted deductions" listed by section 14(1) to 14(6) of the Employment Rights Act 1996 applies, should the tribunal also have the power to determine whether the employer deducted the correct amount of money from an employee's or worker's wages?

Yes. It seems to be an anomaly that an employment tribunal may only decide whether one of the excepted reasons for the unauthorised deduction applies; but it cannot determine whether the employer deducted the correct amount.

As flagged up in the consultation document, this could result in a situation where an employer can deduct one day's wages for half a day of industrial action.

For an employee to contest a decision they then have to pursue a claim in the civil courts. Again, this is a confusing and costly enforcement route for a claimant to take.

Question 29. Should employment tribunals be given the power to apply setting off principles in the context of unauthorised deductions claims? If so: (1) should the jurisdiction to allow a set off be limited to liquidated claims (ie claims for specific sums of money due)? (2) should the amount of the set off be limited to extinguishing the employee's claim?

No.

Employment Tribunals are a forum for employees to bring claims.

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?

We agree that the current jurisdiction should remain the same. Employment Tribunals lack expertise and experience in these areas.

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

The jurisdiction should remain the same. Employment Tribunals lack expertise and experience in these areas.

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

Yes, this clearly falls within the remit of the ET and their area of expertise.

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

The jurisdiction should remain the same. Employment Tribunals lack expertise and experience in these areas.

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

Yes.

Concurrent jurisdiction confers various benefits on potential claimants.

Crucially, the tribunal cannot exercise a discretion to extend limitation periods in equal pay claims. The option to pursue an equal pay claim in the civil courts acts as a safeguard for claimants who have missed the employment tribunal limitation period.

The civil court does however, have the power to strike out an equal pay claim if it could have been "conveniently" determined by an ET. The *Abdulla* case did provide protection from this to the extent that the court found that where an equal pay claim was out of time in the ET, it could not be "conveniently" disposed of. So in accordance with *Abdulla*, the civil

courts should not strike out an equal pay claim that is out of time in the ET. Nonetheless, there is still be a degree of risk that equal pay claims issued in the civil courts will be challenged on the basis that they should have gone through the ET instead.

Question 37. Should the current allocation of jurisdictions across employment tribunals and the civil courts regarding the non-discrimination rule applying to occupational pension schemes remain unchanged?

Yes

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.

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?

The TUC believes the Employment Tribunal's remit, in relation to the WTR, should be widened.

Currently, rights relating to the 48-hour week, the night work limit and the entitlement to a health check for night workers can only be enforced via an enforcement agency, the Health and Safety Executive. Whereas, rights relating to minimum holiday entitlements and daily, weekly and in-work rest breaks can only be enforced via employment tribunal.

In our view, the current system has not worked. There is abundant evidence, including from the business department, the HSE and academic reports, that workers are not able to enforce their WTR rights effectively. The enforcement agencies (HSE, local authorities, MCA, CAA and VOSA) never enforce proactively and worse still, have often even declined to investigate direct WTR complaints from workers, as they see the issue as a low priority. Indeed, in the case of local authorities, who enforce the rules in retail, offices and gymnasiums, there is also a very low awareness that enforcement is their responsibility. Thus, the TUC has heard a stream of anecdotes about complaints who have correctly contacted their local authority being wrongly directed to the HSE.

The TUC believes there should be a robust dual channel system of enforcement. Workers should be able to bring a claim via employment tribunal and be able to rely on a well resourced enforcement agency to investigate their complaint.

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?

We are happy with the present demarcation between civil and criminal courts.

Question 41. We provisionally propose that the present demarcation of employment tribunals' and civil courts' jurisdictions over the Blacklists Regulations should not be changed. Do consultees agree?

Yes, the current dual route useful, due to the longer 6 year time limit for bringing a claim in the civil court.

Keeping the civil court route also enables a claimant to apply for an injunction which could be used to prevent the compilation, use, sale or supply of a blacklist.

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?

When the cap was introduced it matched the level of compensation available for unfair dismissal. However, the blacklist compensation cap has not been reviewed on a regular basis like the unfair dismissal compensation cap. Therefore, the TUC believes that the cap should be abolished. If a new, increased cap is established, legislation should be introduced, similarly to unfair dismissal, to ensure the cap is raised on a regular basis.

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?

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

Question 49. If respondents are given the right to claim contribution from one another in employment tribunals, do consultees consider that this right should precisely mirror the position in common law claims brought in the civil courts, or be modified to suit the employment context? If the latter, we would be grateful to hear consultees' views on appropriate modifications.

TUC supports the principle of joint and several liability:

- Organisations should take greater responsibility for the people that do work for them
- Joint liability opens up multiple avenues for a worker to seek compensation
- Joint liability ensures that where a company goes insolvent, in phoenix cases or where the employer disappears, workers still have a course of action to enforce their rights
- Widened liability would make contractors more diligent and careful in choosing their subcontractors
- Widened liability would strongly incentivise the lead contractor to risk assess and tackle potential breaches of employment standards in their supply chains.

Joint and several liability already operates under the Equality Act. Claimants can choose who to bring their discrimination claims against, thus choosing who they want to seek compensation from for the alleged breach of discrimination.

The TUC believes that the law already provides a route for claimants to seek compensation from respondents they believe to have contributed to the loss they've suffered as a result of being discriminated against.

Therefore we oppose changes which enable ETs to:

- Apportion liability
- Make orders for contribution between respondents.

Question 50. Should employments 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?

The current system for enforcing employment tribunal awards is not fit for purpose. Successful claimants must take further action to receive their award if the employer chooses not to pay. 35 per cent of successful claimants do not receive any compensation³. It can

³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf, Payment of Tribunal Awards, IFF report for BIS, 2013

cost a successful claimant over £320 to pursue the compensation they have been awarded. The BEIS Penalty Scheme, created in 2016, is inadequate as it fails to recoup any award for the claimant. Instead, penalties issued against non-compliant employers are paid to the state.

There should be proactive enforcement of unpaid tribunal awards. Enforcement of employment tribunal awards should not be dependent on a claimant having to make an application to recover their tribunal award. The current enforcement system places a further cost and time burden on a claimant who has had their claim upheld.

Employment Tribunals should be responsible for monitoring the payment of tribunal awards and should be given the powers and responsibility for enforcing awards. New powers should be introduced enabling employment tribunals to recover compensation owed to workers and to impose sanctions on employers who do not pay tribunal awards.

However, failing this, it would be a positive step for all judgments to be defaulted to the High Court for enforcement. This would mean that the enforcement process of tribunal awards would be undertaken automatically by the High Court and would not rely on a claimant having to jump through further costly and bureaucratic hoops.

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?

No.

The recognition scheme that operated in the 1970's became mired in legal challenges. When the current recognition scheme was set up those who created wanted to learn from that experience and avoid giving employers an open route to run challenges to the process by having appeals.

Thus the employer is limited to judicial review and by and large there have been relatively few applications for review. There are fears that the statutory recognition process would get clogged up with employer challenges, if the EAT was given appellate jurisdiction.

There are a number of reasons why the TUC opposes this proposal:

- Giving the EAT appellate jurisdiction over CAC decisions would have the inevitable consequence of increasing uncertainty, especially for trade unions running statutory recognition campaigns. The legal process for obtaining statutory recognition is overly bureaucratic, lengthy and poses significant obstacles for unions seeking to represent their members.
- An application for recognition or de-recognition of a trade union by an employer is a process with a number of stages. The CAC is required to apply specific statutory tests at each stage.

- Each decision point is, theoretically, open to challenge, but the rigour of the judicial review procedure deters many hopeless challenges to CAC decisions. The EAT procedure would be insufficient to deter tactical and spurious appeals which could have the effect of derailing valid applications.
- This change would have a detrimental impact on worker's who are seeking unions to represent them and negotiate on their behalf.
- The TUC considers that this proposed change would further undermine the fundamental right to freedom of association. It would restrict working people from collectively bargaining with their employers.
- We support many of the arguments put forward by the CAC. They've flagged up that one of the reasons that judicial review, rather than the EAT, was chosen as the appropriate route for challenges to CAC decisions under Schedule A1 to the 1992 Act when the Employment Relations Act 1999 was implemented (unlike its other jurisdictions) was because the CAC functions in Schedule A1 are different in kind to its other jurisdictions. For example, the exercise of gauging likely support for recognition or de-recognition within 10 days after the receipt of the application for recognition or de-recognition, which is a pre-requisite of the application being able to proceed, has no parallel in other areas of employment law and is outside the expertise of the EAT.
- We support the CAC's view that there has been a greater emphasis on procedure and an increased formalism around the Employment Tribunal's work. For example, the law of unfair dismissal has developed, to a certain extent, into a limited review mechanism around tests of reasonableness over which lay members have, since 2012, have had little or no say. Introducing a general right of appeal to the Employment Appeal Tribunal (EAT) could make proceedings more legalistic and adversarial, and undermine the CAC's unique lack of formality, speed and focus on problem solving, that is so highly regarded by both employers and employees.
- Again, there is a question about whether the current system has adequate resources to take on this additional burden.

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?

Yes.

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

Employment and equalities list.

The TUC would be happy to discuss the responses to this consultation in further detail.

Please contact [REDACTED]