

Response ID ANON-N9WN-TUGB-X

Submitted to **Law Commission Consultation on Employment Law Hearing Structures**

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About you

What is your name?

Name:

[REDACTED]

What is the name of your organisation?

Organisation:

COUNCIL OF TRIBUNAL MEMBERS ASSOCIATIONS (CoTMA)

What is your email address?

Email:

[REDACTED]

What is your telephone number?

What is your telephone number?:

[REDACTED]

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

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The exclusive jurisdiction of employment tribunals

Consultation Question 1: We provisionally propose that employment tribunals' exclusive jurisdiction over certain types of statutory employment claims should remain. Do consultees agree? (Please see paragraph 2.57 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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? (Please see paragraph 2.61 of the consultation paper.)

Yes, generally

Please expand on your answer. :

CoTMA strongly supports an extension of the time limit for lodging a complaint to an ET for the following reasons:

- a. There are fewer organisations "on the ground" to provide free advice and legal guidance to individuals when issues in employment occur.
- b. Many individuals whose employment is terminated often do not have the financial, IT, emotional or intellectual ability to seek legal advice, deal with ACAS, adequately complete an ET1, collate relevant paperwork etc. within the existing 3 month time scale.

Giving individuals more time to prepare a complaint relating to core employment issues should be viewed as a fundamental right in terms of fairer and less pressured access to justice.

If so, should the amended time limit be six months or some other period?:

Given the response above, CoTMA believes that six months is a just and pragmatic time limit for lodging a complaint to an ET.

Consultation 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? (Please see paragraph 2.62 of the consultation paper.)

Yes

Please expand on your answer. :

CoTMA Non Legal Members (NLMs) regularly see many claimants who have good reasons to justify an extension to current statutory time limits and therefore we believe ETs must always have discretion to extend time limits where it is just and equitable to do so.

However, if time limits were to be extended to six months as the norm (please see our response to Q2 above), we believe that any further extension should only be granted in exceptional circumstances.

Otherwise, CoTMA believes that some respondent Employers could be disadvantaged in their potential defence - six months time limit to lodge a claim plus currently at least six months to then arrange a hearing of the claim = 12 months +.

A long time for parties to accurately recall facts and key witnesses may no longer be easily available. Any extension to a six month limit could therefore be difficult other than if truly exceptional circumstances applied.

Restrictions on the jurisdiction of employment tribunals - discrimination

Consultation Question 4: We provisionally propose that the county court should retain jurisdiction to hear non-employment discrimination claims. Do consultees agree? (Please see paragraph 3.24 of the consultation paper.)

Other

Please expand on your answer. :

CoTMA believes that the sector in which discrimination may occur should not be the defining factor as to whether such claim is heard in the County Court or ET.

The fundamental law on discrimination (primarily 2010 Equalities Act) applies irrespective of whether the discrimination has occurred in employment, access to housing, provision of public services etc.

CoTMA considers the key driver on this aspect of jurisdiction should be an independent assessment to identify in which arena the greater understanding of discrimination itself may reside.

We do not have sufficient knowledge of the County Courts to reasonably assess their understanding of discrimination (particularly unconscious discrimination) - however huge expertise in this area clearly already resides in ETs

Consultation Question 5: Should employment tribunals be given concurrent jurisdiction over non-employment discrimination claims? (Please see paragraph 3.32 of the consultation paper.)

Yes

Please expand on your answer. :

As outlined in Q 4 above, CoTMA believes that discrimination itself is the key constant across many sectors.

The depth of understanding of discrimination which we consider resides in the ET system surely suggests that ETs should be given concurrent jurisdiction over non employment claims.

If the intention is to ensure that the public receive better access and fair remedy in all instances of discrimination, it is relatively unimportant where their case is heard as long as it is heard by those who have the best knowledge, experience and understanding of the many forms of discrimination which clearly still exist in many different arenas.

Consultation 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? (Please see paragraph 3.33 of the consultation paper.)

Yes

Please expand on your answer. :

As per Q5 above, the key driver for justice here is to ensure that the discrimination claim is heard in whichever jurisdiction is best suited, in terms of its core understanding, to hearing a particular claim and correctly resolving it

If so, what criteria should be used for deciding whether a case should be transferred: (1) from county courts to employment tribunals; :

CoTMA does not believe it has sufficient expertise to comment on which criteria should be used

and/or (2) from employment tribunals to county courts?:

As above

Should county courts be given the power to refer questions relating to discrimination cases to employment tribunals? :

Yes

Consultation 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? (Please see paragraph 3.34 of the consultation paper.)

Yes

Please expand on your answer. :

As per our Q5 response, CoTMA believes that a triage system should be implemented to assess which judicial forum has the better expertise, knowledge and understanding to aid the fairest and most equitable outcome for the claimant

If so, what form should this triage take?:

CoTMA does not consider it has sufficient judicial or administrative expertise to recommend how such a triage system be best implemented.

Consultation Question 8: Do consultees consider that employment judges should be deployed to sit in the county court to hear non-employment discrimination claims? (Please see paragraphs 3.40 of the consultation paper.)

Yes

Please expand on your answer. :

As previously stated, CoTMA considers that an in depth understanding of discrimination itself is the key requisite skill to best adjudicate on all claims be they brought to County Court or ETs

Employment Judges have considerable expertise in and experience of these matters and could make a significant contribution if they were deployed in the County Court.

Consultation 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? (Please see paragraph 3.41 of the consultation paper.)

Yes

Please expand on your answer. :

CoTMA believes that Employment Judges generally value the additional insights and experience which Assessors and/or Non Legal Members can provide.

Other restrictions on the jurisdiction of employment tribunals

Consultation 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 subsistence of the employee's employment? (Please see paragraph 4.14 of the consultation paper.)

Yes

Please expand on your answer. :

CoTMA considers it is an unwanted and confusing anomaly that damages for breach of (employment) contract can be brought to the County Court.

It is our firm view that if a claim is primarily linked to an employment issue, be it to have occurred during or after the employee's employment, it should be heard by the ET.

Consultation 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? (Please see paragraph 4.16 of the consultation paper.)

Yes

Please expand on your answer. :

As per Q. 10 response above.

Consultation Question 12: We provisionally propose that the current £25,000 limit on employment tribunals' contractual jurisdiction should be increased. Do consultees agree? (Please see paragraph 4.28 of the consultation paper.)

Yes

Please expand on your answer.:

CoTMA believes that the current £25000 limit on ET's contractual jurisdiction is anomalous both in terms of its core arithmetic justification (it is simply too low) and also in contrast to the vastly different limit (£50,000) currently applied to claims heard in the County Court.

Consultation Question 13: What (if any) should the financial limit on employment tribunals' contractual jurisdiction be, and why? (Please see paragraph 4.30 of the consultation paper.)

Please provide your answer below. :

CoTMA can see no reason why the financial limit on ET's contractual jurisdiction should not be the same as existing compensation limits on unfair dismissal cases ie up to 1 year's salary (likely with existing statutory cap)

Consultation 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? (Please see paragraph 4.31 of the consultation paper.)

No

Please expand on your answer. :

CoTMA believes that the incidence and potential validity of employer breach of contract counterclaims is in a very small minority of BOC cases as they heard in the County Court or Employment Tribunal.

Consultation 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? (Please see paragraph 4.39 of the consultation paper.)

Yes

Please expand on your answer. :

CoTMA believes that the time limit for submission of claims for BOC must remain aligned with time limits for unfair dismissal claims.

However, and as stated earlier in these submissions, CoTMA believes that the time limit for any and all claims should be increased to 6 months

Should a different time limit apply if tribunals are given jurisdiction over claims that arise during the subsistence of an employee's employment? :

No

Consultation 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? (Please see paragraph 4.44 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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? (Please see paragraph 4.46 of the consultation paper.)

Other

Please expand on your answer. :

In general yes except in circumstances where the contractual breach relating to living accommodation may be directly linked to an employment termination and or discrimination.

Consultation 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? (Please see paragraph 4.49 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation Question 19: We provisionally propose that the prohibition against employment tribunals hearing claims relating to terms imposing obligations of confidence (or confidentiality) should be retained. Do consultees agree? (Please see paragraph 4.59 of the consultation paper.)

No

Please expand on your answer. :

CoTMA believes that most confidentiality agreements, including NDAs, relate to the fundamental Employment Contract and therefore should rightfully belong within the jurisdiction of the Employment Tribunal

Consultation 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? (Please see paragraph 4.60 of the consultation paper.)

No

Please expand on your answer. :

CoTMA believes that restrictive covenants primarily relate to the employment contract and that any disputes over such covenants are most likely to have arisen because of a cessation of the employment contract.

Responsibility for assessing the validity and reasonableness of such covenants and whether they may have been breached should rightfully belong within the jurisdiction of the Employment Tribunal

Consultation 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? (Please see paragraph 4.64 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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? (Please see paragraph 4.65 of the consultation paper.)

Yes

Please expand on your answer. :

If consultees consider that there should be any differences between employment tribunals' contractual jurisdiction in relation to employees and workers, please provide details.:

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? (Please see paragraph 4.67 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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? (Please see paragraph 4.70 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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? (Please see paragraph 4.73 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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? (Please see paragraph 4.78 of the consultation paper.)

Yes

Please expand on your answer. :

Differences in interpreting the precise intent and meaning of a term within the Contract of Employment and /or the Statement of Terms and Conditions is a regular feature of employment issues.

The expertise and work place experiences which ET Judges, and NLMs in particular, possess in this area contribute to a very strong argument, supported by CoTMA , that ALL cases requiring an interpretation of employment contract terms should be under the jurisdiction of Employment Tribunals.

Consultation Question 27:Should employment tribunals be given the power to hear unauthorised deductions from wages claims which relate to unquantified sums? (Please see paragraph 4.99 of the consultation paper.)

Other

Please expand on your answer. :

CoTMA has no firm view on this question.

Consultation 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? (Please see paragraph 4.105 of the consultation paper.)

Other

Please expand on your answer. :

As per response to Q.27 above

Consultation Question 29: Should employment tribunals be given the power to apply setting off principles in the context of unauthorised deductions claims? (Please see paragraph 4.108 of the consultation paper.)

Other

Please expand on your answer. :

As per response to Q's 27 & 28 above

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?:

Consultation 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? (Please see paragraph 4.116 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation Question 31: We provisionally propose that employment tribunals should continue not to have jurisdiction over workplace personal injury negligence claims. Do consultees agree? (Please see paragraph 4.118 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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? (Please see paragraph 4.124 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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)? (Please see paragraph 4.125 of the consultation paper.)

Not Answered

Please expand on your answer. :

CoTMA's position is neutral on this suggestion

Concurrent jurisdiction

Consultation Question 34: Should employment tribunals and civil courts retain concurrent jurisdiction over equal pay claims? (Please see paragraph 5.36 of the consultation paper.)

Other

Please expand on your answer. :

CoTMA's position on this is neutral.

Consultation 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? (Please see paragraph 5.38 of the consultation paper.)

Other

Please expand on your answer. :

As per our response to Q.34 above.

Consultation Question 36: What other practical changes, if any, are desirable to improve the operation of employment tribunals' and civil courts' concurrent equal pay jurisdiction? (Please see paragraph 5.39 of the consultation paper.)

Please provide your views below. :

CoTMA has no agreed view on this.

Consultation 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? (Please see paragraph 5.49 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation Question 38:The present demarcation of employment tribunals' and civil courts' jurisdictions over the TUPE Regulations 2006 should not be changed. Do consultees agree? (Please see paragraph 5.58 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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? (Please see paragraph 5.67 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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? (Please see paragraph 5.79 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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? (Please see paragraph 5.87 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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? (Please see paragraph 5.88 of the consultation paper.)

Yes

Please expand on your answer. :

Are consultees aware of any cases affected by the £65,300 cap on compensation which have had to be brought in the civil courts?:

No

Consultation 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? (Please see paragraph 5.94 of the consultation paper.)

Other

Please expand on your answer. :

CoTMA believes that the principle of maximising access to justice is key.

To this extent, CoTMA is supportive of individuals who are aggrieved by decisions of their Qualifications and/or Professional Bodies being able to challenge such decisions EITHER on the grounds of public law (= High Court) OR on the grounds of unlawful discrimination (= Employment Tribunal).

While it is right that individuals in these circumstances may elect in which jurisdiction they wish to pursue such claims, CoTMA does not believe that simultaneous claims should be pursued in two or more jurisdictions.

Should it be maintained that simultaneous claims can be pursued in 2 jurisdictions, it is CoTMA's firm view that the first decision reached in either jurisdiction is binding - res judicata should immediately apply to any other claim still outstanding.

If not, please would consultees explain why and what changes they would make.:

Consultation 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? (Please see paragraph 5.95 of the consultation paper.)

Not Answered

Please expand on your answer. :

Our views are primarily reflected in the response to Q. 43 above.

If however, the issue to be decided is discrimination (as broadly defined in the 2010 Equalities Act) by Qualifying Bodies, then CoTMA would reiterate its earlier arguments that the most experienced and extensive knowledge of discrimination resides in the Employment Tribunal.

Consultation 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? (Please see paragraph 5.97 of the consultation paper.)

Other

Please expand on your answer. :

CoTMA believes that the response given to Q's 43 &44 above applies in full to the Police Officer scenario raised in this question.

If consultees take the view that the answer is "no", what changes do they suggest?:

Restrictions on orders which may be made in employment tribunals

Consultation Question 46:Our provisional view is that employment tribunals should not be given the power to grant injunctions. Do consultees agree? (Please see paragraph 6.7 of the consultation paper.)

Yes

Please expand on your answer. :

Consultation 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? (Please see paragraph 6.13 of the consultation paper.)

Yes

Please expand on your answer. :

If so, on what basis should tribunals apportion liability? :

CoTMA NLMs experience is that apportioning individual liability between co respondents in discrimination cases is only necessary in a minority of situations - many Employers accept responsibility for the actions of their employees if it is found as fact that they acted in a discriminatory fashion.

CoTMA believes that, in such instances, the Employment Tribunal already has sufficient existing processes and experience to be able to apportion levels of liability between co respondents

Consultation 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? (please see paragraph 6.20 of the consultation paper.)

Not Answered

Please expand on your answer. :

Yes but to be read within the parameters of the fuller response to Q.47 above

If so, we welcome consultees' views as to appropriate circumstances and criteria.:

Consultation Question 49:If respondents are given the right to claim contribution from one another in employment tribunals, do consultees consider that... (Please see paragraph 6.21 of the consultation paper.)

this right should precisely mirror the position as regards common law claims brought in the civil courts?:

As stated above , CoTMA considers that, on the relatively rare occasions that it is necessary in discrimination cases to apportion individual liability (and thereby possible individual contribution to final compensation) between co respondents, the Employment Tribunal already has the necessary processes and legal guidelines (Vento and others) to be able to do so in a just and equitable manner.

As already explained in this submission, CoTMA believes that all claims relating to discrimination in the workplace should be heard in the ET jurisdiction.

If this is not to be the case, CoTMA nevertheless considers that in the scenario described in Q's 47 & 48 above, the civil courts should mirror existing practise in the ET.

or be modified to suit the employment context? If the latter, we would be grateful to hear consultees' views on appropriate modifications.:

Consultation Question 50:Should employment tribunals be given the jurisdiction to enforce their own orders for the payment of money? (Please see paragraph 6.28 of the consultation paper.)

Other

Please expand on your answer. :

The reputation and the status of Employment Tribunals (and generic justice itself) is recklessly and unnecessarily damaged by the high incidence of respondent

Employers who do not pay the specified award to successful claimants.

This problem has been identified in many arenas not least the recent excellent Taylor Report which has already triggered a "name and shame" BEIS sponsored procedure against those Employers who fail to pay the agreed compensatory awards. Although this is a useful start, CoTMA believes that additional and more vigorous enforcement powers are required to maximise the prompt payment of all compensatory awards.

CoTMA has no fixed view on whether such (yet to be legislated) powers should be given to Employment Tribunals, or even HMRC, but urges that the necessary powers are vested with both weight and speed.

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 employment appeal tribunal's jurisdiction

Consultation Question 51: Should the EAT be given appellate jurisdiction over the CAC's decisions in respect of trade union recognition and derecognition disputes? (Please see paragraph 7.18 of the consultation paper.)

Other

Please expand on your answer. :

CoTMA does not feel qualified to express a view on this matter.

If such an appellate jurisdiction were created, do consultees agree that it should be limited to appeals on questions of law?:

Consultation 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? (Please see paragraph 7.22 of the consultation paper.)

Other

Please expand on your answer. :

As per response to Q.51 above

An employment and equalities list?

Consultation 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? (Please see paragraph 8.8 of the consultation paper.)

Yes

Please expand on your answer. :

If so, what subject matter should come within its remit?:

Consultation Question 54: What name should it be given: Employment List, Employment and Equalities List or some other name? (Please see paragraph 8.9 of the consultation paper.)

Employment and Equalities List

Please expand on your answer. :

In this submission, CoTMA has already articulated its core view that legal issues of equality (in this instance primarily the right not to be discriminated against on the basis of a protected characteristic) and employment are closely linked and should be adjudicated upon in a more unified forum and consistent manner

CoTMA strongly supports the formation of a specialist Employment and Equality Court as mooted by Lord Briggs and others.