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

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About you

What is your name?

Name:

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Organisation:

Peninsula

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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. :

The exclusive jurisdiction is clear and understood. Maintaining this helps to ensure that specialist experience is available for addressing this issues whilst keeping them within an environment that does not require parties to instruct legal representatives. The less formal nature of the employment tribunals compared to the courts makes them more accessible to both parties and helps to reduce the risk of denying justice to either party.

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.)

No

Please expand on your answer. :

The principle behind the employment tribunal system is to provide a speedier resolution to a dispute for both parties. The proposal to extend time focusses exclusively on the delay faced by the claimant from the date of filing the claim to the date of hearing. Extending the time limit will not speed up this process and will, in all likelihood, actually extend the delays faced by tribunal users in having matters dealt with promptly by the tribunal. A balance has to be struck between the wishes of the claimant to bring a claim and the rights of the employer to defend the claim. Employers have to be given equal consideration in this matter and it needs to be recognised that the working landscape has changed significantly from when tribunals were first established. The vast majority of UK employers are small to medium enterprises and do not have dedicated HR departments who can address claims that arise. Fading recollections of witnesses impact on the ability of respondents to defend cases, particularly if they are not aware of the nature of a claim that is coming. The impact of early conciliation means that employers already face a situation where a claimant could submit a claim 5 months after the events complained of without the respondent even being aware that a claim is being considered or the nature of it. The delays in processing claims and notifying the respondent of them means that it could be 6 months before an employer is even aware of a claim and significantly longer before they receive clearer details where the claim is not well particularised. A longer period in which to submit a claim only puts the respondent at greater prejudice without benefiting the claimant in respect of the speed that their claim is dealt with.

Both parties have a right to have matters dealt with swiftly but given adequate time to be able to prepare their position. A claimant who believes they have been mistreated is aware of that quickly and is signposted towards the ability to bring a claim at tribunal by multiple sources. Justice is served by disputes being identified promptly and there is no reason why, in normal circumstances, a claimant cannot pursue a claim within the time limits currently set. If there is a valid reason why the claim could not be pursued in time then the time limit can be extended under the current rules.

It must be recognised that the disparity between employees and employers has changed and that it may well be that the respondent is the more vulnerable of the two parties in dispute. This is particularly evident where the respondent is an employer by virtue of employing their own carers through the direct payments scheme. The prejudice faced by respondents in extending time to bring claims when there is no requirement on claimants to notify the respondent in advance of the potential nature of any such claims exceeds the prejudice on claimants who are prevented from bringing a claim because they do not act within the current time limits without a good reason for not doing so. The delay in bringing a claim to resolution due to the resource issues within the tribunal has no bearing on the time to present a claim.

The current time limits fairly balance the rights of both parties. The desire of claimants to have more time within which to bring a claim when they are capable of bringing them within the current time limit does not justify the prejudice to respondents caused by this added delay and it will just delay the length of time to bring matters to a final resolution.

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

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.)

No

Please expand on your answer. :

The current time limits are already sufficient and the basis for extending time already works effectively. It must be recognised that tribunals were intended to be used by those without any legal training. The difference between the reasonably practicable test and the just and equitable test was to recognise the added significance of discrimination claims. However, even allowing for that, the extension of time on the basis of just and equity should still be the exception rather than the rule.

Claimants, particularly unrepresented litigants in person, generally do not understand the just and equitable test. They believe that because they allege they have been mistreated then the interests of justice should allow them to pursue a claim irrespective of the nature of that claim. Widening the test is likely to increase the number of claimants who do not comply with the time limits as they will believe that their perceived injustice will mean that it will be waived on their account.

The tribunals are already able to apply the current test fairly and appropriately to ensure that no-one who was genuinely unable to present their claim in time is not prevented from pursuing it. Maintaining the reasonably practicable test for the majority of claims helps to ensure that claims are filed promptly and gives both parties an equal chance in proceedings. That best serves the interests of justice rather than muddying the waters in respect of the time limits for claims where claimants were able to present them within the relevant time limits but simply failed to do so without a good reason.

Widening the discretion goes against the interests of justice which are that set time limits must be complied with. It is also likely to increase the problems with case management and resolution as the case progresses as claimants will have the view that they have a good case as the tribunal has decided that they should be able to bring it and that they will be forgiven for non-compliance with orders as the interests of justice have already indicated that they should be allowed to bring their claim even if they do not obey time limits.

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.)

Yes

Please expand on your answer. :

The employment tribunals service has a clear remit, namely to deal with matters connected to employment, and were structured in order to provide a less formal, cheaper and faster alternative to the courts for resolving matters within the employment arena. Employment judges are specialists in relation to employment matters. Widening the scope to address non-employment related matters defeats the purpose of having specialist employment judges while increasing the demands on the service and delaying the time to deal with employment matters.

The case of London Borough of Lewisham v Malcolm does not support moving the jurisdiction given that the House of Lords ruled that the county court had made the correct decision and that the approach taken by the employment tribunals up to that point and the Court of Appeal was wrong.

The Malcolm decision shows the advantage of a different court looking at a matter afresh and the role of case law in identifying drafting issues and encouraging future legislation to accurately reflect what was intended. It should also be noted that the legislative change introduced by the Equality Act did not return the position to what it was before the Malcolm decision but instead confirmed that there should be grounds for defence of treatment in relation to matters arising from disability.

While county court judges may not have experience with discrimination claims they are trained legal professionals and should be able to apply the legislation, something Malcolm confirms that the county court judges did correctly. Judges with specialist discrimination training or experience may be useful but the experience of lay members on interpreting the principles is equally useful in giving a balance between the law and its application.

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

No

Please expand on your answer. :

It is noticeable that again the consultation paper identifies issues for claimants and that it would be inappropriate to transfer matters from one jurisdiction to another against the claimant's wishes. No recognition is given to the rights of the respondent who should be given equal consideration. Similarly, while there is

the acknowledgement of the lack of legal aid available to claimants in the employment tribunal there is no recognition of the lack of legal aid, or even no win, no fee assistance, to respondents in any jurisdiction.

If it is inappropriate to transfer a case from one jurisdiction to another without the agreement of the claimant then the same should hold true for the respondent, particularly where such a change could significantly impact on the respondent's costs and choice of representative. Either the claim is transferred to the most appropriate jurisdiction irrespective of the wishes of the parties or the agreement must be given by both.

The tribunals were established to address employment issues. Where the dispute is not in the employment arena then the employment tribunal is not the appropriate jurisdiction.

It should also be recognised that conduct of proceedings in the employment tribunal is considered unreserved activity unlike the county courts. It is important to avoid confusion over who can act as representative in a case that changes jurisdiction or to create a situation where some matters before a tribunal require rights of audience where others do not.

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.)

No

Please expand on your answer. :

While we do not believe that there should be concurrent jurisdiction, if this was to be granted then we do not think there should be the power to transfer claims. Where there is concurrent jurisdiction then, like breach of contract claims, the claimant needs to choose their preferred jurisdiction and then stick with it, having made the choice in consideration of the benefits and risks of pursuing the claim in the different jurisdictions.

There are different costs implications in respect of claims in the county courts as opposed to the employment tribunals which can affect the choice of representative and the approach to the case. There should be no transfer without the agreement of all the parties to the proceedings.

One significant factor has to be the question of fees. It would be inappropriate to allow claimants to bypass the costs consequences of pursuing a claim in the county court by commencing it in the employment tribunal and then having this shifted over to the county courts. Any transfer to the county court would have to require the claimant to meet the costs of bringing the claim in the county court had that been the initial route and accepting the costs switching risks in the event of a loss.

A second criteria in relation to cases changing jurisdiction is whether or not any representative is required to have rights of audience. Where rights of audience are required for the case type then this should never be transferred to the Employment Tribunal as this goes against the principle of the Employment Tribunal Service. Where rights of audience are not required and a party is represented by a lay representative then this should not be transferred to the county court as it prevents a party from continuing with the representative of their choice.

While, in principle, there is no issue in referring questions relating to discrimination to an employment tribunal for a view, this is unlikely to be a productive use of time and resources. Discrimination claims require consideration of the facts of the case, from deciding whether or not the individual is disabled in accordance with the Equality Act 2010 through to identifying relevant provisions, criteria and practices and deciding if they had a disproportionate, adverse impact that was not an objective means of achieving a legitimate aim. In effect this would mean that the tribunal and court would both have to hear the same evidence. This is an inefficient use of resources, given the duplication of effort, whilst also raising the possibility of giving parties a second bite of the cherry as they adjust the way the evidence is presented in the second forum to address any findings that went against them in the first hearing.

There is little to be gained by passing non-employment discrimination matters to the Employment Tribunals because the benefits of experience in understanding and applying the Equality Act is offset by the lack of experience and understanding in applying the law relating to the non-employment elements of the claim where that experience is within the county courts.

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? :

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.)

Other

Please expand on your answer. :

We do not agree that there should be concurrent jurisdiction and would question the effectiveness of any triage system. Ultimately, discrimination claims rest on specific facts and those are rarely contained within the original claim and response forms. Most employment tribunals, when considering discrimination claims, organise a preliminary hearing to determine the relevant issues and give any specific orders to ensure that the matters of dispute are fully identified in advance. This can include the provision of a 'Scott schedule' that clarifies what the alleged discriminatory acts were, who was supposed to have carried them out, identifying any relevant witnesses and confirming the type of discrimination the act was alleged to be.

This sort of more detailed information would be necessary in order to carry out any useful form of triage. The likelihood is that, to be effective, the triage system would have to be operated by someone with experience of discrimination claims. Given that a significant consideration in extending the jurisdiction to the tribunals is because of the shortage of such experience within the county courts it is unclear how such a triage system could effectively operate without someone able to carry out these initial assessments.

If so, what form should this triage take?:

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.)

No

Please expand on your answer. :

While we recognise the considerable experience employment judges could bring to bear in the county courts in relation to discrimination cases it has to be acknowledged that employment judges are already an extremely restricted and scarce resource. The shortage of judicial resources is a major factor in the significant delays in listing matters in the employment tribunal, particularly on complex cases that would run for multiple days, which would cover the majority of discrimination claims. Reducing the availability of judges to sit on any hearings, and particularly on multi-day hearings, due to diary commitments in the county court would only further exacerbate the listing difficulties within the employment tribunals, increasing the delays on cases.

If we were in a position where the employment tribunal had a surplus of judges so judicial time was under-utilised then deploying judges to sit in the county court would be a good use of judicial resources. However, given the current position this is not advisable given the significant detrimental impact it would have on tribunal listings.

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.)

Other

Please expand on your answer. :

We do not believe that judges should be deployed to sit in the county court. However, if this was to take place then there should be provision for them to sit with one or more assessors as appropriate to ensure that matters outside of their experience and expertise were properly addressed.

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.)

No

Please expand on your answer. :

The jurisdiction of the employment tribunal in respect of breach of contract was extended specifically to deal with situations where the contract had ended. While the breach may be connected to the employment contract it is not perceived as interfering with the operation of the contract given that it is not a fundamental breach. The cost implications of pursuing a breach of contract claim where it is only minor, discourages frivolous claims. This would not be the case where minor breaches can be pursued for free. The remedy available from employment tribunals is clear, limited as it is to loss. Damages are not available for claims of breach of contract. Where there is any actual loss this can be pursued under existing legislation without constituting a breach of contract claim.

Additionally, there is no track system, differentiating between small claims and those of higher value at the employment tribunal. Giving the ability to pursue a claim for damages for breach of contract, where they cannot be awarded for other claims, for free with no requirement to identify in advance the amount claimed would bypass the established and effective system in place within the country courts for dealing with contractual disputes.

Opening up the ability to bring claims of this kind is likely to damage the working relationship based on comments and actions in an adversarial setting. The purpose of the grievance procedure is to allow for any disputes that will not break the contract to be resolved within the work place.

The ability to be able to pursue a breach of contract claim in the employment tribunal where the employment contract remains in force is likely to have a severely detrimental effect on effective employment relations, running contrary to the entire principle behind the establishment of the employment tribunals. Claimants would be able to lodge a claim in any instance where they incorrectly believed that a contractual disciplinary or grievance procedure was not being followed or that their rights were being infringed. That would effectively halt that entire process until that claim was resolved and would prevent effective management of the working relationship.

An unintended consequence of such an extension is the potential for undermining claims for discrimination and constructive dismissal. Where the claimant has the ability to bring a claim for a breach of contract during the subsistence of the contract but does not do so it would raise significant questions as to how the events could be considered a series of breaches leading to a final straw at a later date.

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.)

No

Please expand on your answer. :

There is no need to give this option to the employment tribunal when it is something that can be pursued in county court. Damages are not available in the employment tribunal except in very limited circumstances and it would create unnecessary confusion to have different remedies available.

Additionally, it must be remembered that employment tribunals were intended to be used by individuals without the need for representation. Many litigants in person are not able to correctly assess the value of their claims and have significantly exaggerated views as to the merits and value of their claims. Giving the opportunity to pursue a claim for damages for breach of contract opens the claimant up to a counterclaim in circumstances where this would not otherwise be the case if they were not trying to pursue damages that are unlikely to be granted.

The position in *Peninsula v Sweeney* has been misstated. It was not held that the employment tribunal did not have jurisdiction to hear the claim because the payment did not fall due until after employment ended. It was held that the employee was not able to make this claim as part of his originating application as the disputed monies were not due at the time of termination. What must be recognised was that *Sweeney* still had, and exercised, the right to pursue the monies he believed were owed to him under the contract once the date on which they would have fallen due for payment had been reached and he was always able to pursue these claims as unlawful deduction of wages which is not subject to the breach of contract cap. The limitation does not prevent valid claims from being pursued, particularly as awards from the employment tribunal are limited to actual loss and not wider damages.

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.)

No

Please expand on your answer.:

It is unnecessary and again is only considering the position of claimants whilst assuming that the behaviour of a minority of large employer respondents is indicative of the behaviour of the majority of others. The principle behind the employment tribunal was to give claimants an alternative route for pursuing disputes which would be quicker, less formal and not subject to the costs risks in the event of losing. Where claimants anticipate a breach of contract claim to be valued in excess of £25,000 they should be expected to at least pay a fee to pursue recovery of that amount rather than expecting it to be funded by the taxpayer. The identified scenarios fail to take a fuller look at the jurisdiction within the tribunal and risk undermining the limits set on other claims unnecessarily. Scenario one mooted a claim for unfair dismissal and a dispute over final bonus. However, where the bonus was due as part of the earnings in the forthcoming year then this would already be incorporated within the higher cap in the unfair dismissal award as part of the claim for loss of earnings. Scenario two mooted a discrimination claim and contractual claim. If the breach of contract was connected to the discrimination then it would be treated as a loss under that head of claim and not subject to a cap in any event. Scenario three is unaffected by a proposed change in the limit. This option remains open if any limit is placed on the amount that can be claimed as breach of contract as the claimant can still choose to pursue the breach of contract claim in the county court and the parties will still have to argue the unfair dismissal claim. However, if the employment tribunal were to find that the claimant were in any way the author of their own destruction or that dismissal was likely to occur in any event then this will affect the likelihood of the time and cost of litigation on the contractual issue. All jurisdiction issues run the risk of satellite litigation but the employment tribunals are already able to effectively manage issues over the order of claims in different jurisdictions through existing case management procedures. This is no different from where claimants are pursuing a personal injury claim in the county courts and a monetary or unfair dismissal claim in the employment tribunals. There still has to be a decision on which case runs first and what is being claimed in respect of liability and remedy in both cases to ensure that the claimant is not seeking to give different reasons for losses and seek double recovery. This proposal seeks to increase the limit for all breach of contract claims based on the issues in connection with claims for wrongful dismissal. However, this overlooks the changes to the amounts of compensation available now at the employment tribunals. Wrongful dismissal relates solely to notice. The loss of earnings connected to any failure to give notice is already incorporated into the potential award for unfair dismissal and the cap for unfair dismissal claims far exceeds the cap for breach of contract. The disadvantage faced by Fraser was because he chose not to withdraw the wrongful dismissal case and pursue it in the right jurisdiction. In this instance he was seeking to take advantage of the no costs environment of the tribunal with the intention to pursue for a set amount in the High Court to reduce his costs in taking any such action. The cap only applies to breach of contract claims where the monies are not due under any other form of claim and this occurs very infrequently. The county courts are set up to effectively deal with matters of breach of contract. Where this element of claim is anticipated to exceed £25,000 then this should be pursued in the county court. This level is already significantly above the small claims limit and anyone seeking to pursue purely contractual amounts beyond this amount that fall outside of wages should pursue this in the county court which, in our experience, they are financially able to do. Making changes in the way proposed creates a further imbalance in the treatment of claimants and respondents and risks undermining faith in the justice system. Employers are already prevented from bringing breach of contract claims in the employment tribunal and can only pursue a counterclaim where an actual claim of breach of contract is filed. This results in an increasingly common situation where a claimant pursuing a monetary claim in the tribunal admits that they owe money to the respondent but the tribunal cannot award it or take it into account when deciding remedy. It would be unfair to allow claimants to pursue high value breach of contract claims in the employment tribunal in a no costs environment while denying that same option to respondents. Many employers are in the position of having to write off valid breach of contract claims against former employees because of the costs of pursuing them in the county courts and the low likelihood of the amount being repaid for amounts far below the current breach of contract limit at the employment tribunal. Increasing the amounts claimants can claim just widens this perceived inequity in treatment.

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. :

It should remain as it is. There is already the scope to pursue claims for breach of contract beyond this amount in the county court. There is no need to give an additional route to recover these monies while simultaneously avoiding the filing fee and costs risk. Changing this limit increases the disproportionate treatment of respondents in these cases who will be forced to incur significant costs in defending such claims where a claimant has not had to make any payment upfront and is unlikely to face costs where the claim is unsuccessful. The consultation focuses on suggestions that some employers seek to use the jurisdiction issue as a costs tactic. However, it completely ignores the costs tactic by a number of claimants' and/or their representatives in racking up costs in employment tribunal claims with a view to encouraging employers to settle cases that can be defended simply because of the costs involved in doing so. It should be recognised that the costs for pursuing contract claims in the county courts was increased to reflect an appropriate percentage of the amounts sought and a recognition that the loser paid the winners costs. Claimants have a choice of jurisdiction when pursuing breach of contract claims, deciding between the lack of fees and absence of costs shifting compared to the limit on awards. The employment tribunals' resources are already strained. It is inappropriate to use those limited resources and the public purse to fund contractual disputes for amounts in excess of £25,000. The impact on the service will disproportionately affect those who have no other route of redress by tying up the resources for people who can and should pursue the claim through alternate established channels. No system is perfect, but a limit of £25,000 strikes a balance between the needs of the parties and the relative merits of pursuing a case in different jurisdictions. Where a claimant genuinely believes that they have a breach of contract claim separate from all other monetary, dismissal and discrimination claims in excess of £25,000 then it is entirely appropriate that they pursue that in the county court. There has to be confidence in the fairness of the system to both parties. The current limit goes some way towards offsetting the disproportionate treatment of employees and employers in relation to disputes surrounding employment contracts. It would be unreasonable for claimants to be able to pursue significantly higher value claims through the employment tribunals when employers are not granted the same option at any level. If the limit is to change using the unfair dismissal cap as a guidance then it should be recognised that Parliament identified that the set amount subject to annual updating should be tempered by a further cap to better match the employee's actual circumstances. If the intention is to follow the approach for unfair dismissal awards then any cap should utilise both strands and be the lower of the set figure or 52 weeks' gross pay.

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.)

Other

Please expand on your answer. :

Any limit on the value of a counter claim should be set at the limit for a claimant's claim if any limit is to be applied at all. The Respondent is already prevented from initiating a claim for breach of contract in the employment tribunal. Limiting the value of a counterclaim to any amount lower than the limits for claimants puts the respondent at a disadvantage in respect of defending the claim and forces them to choose between jurisdictions while at the same time deciding that forcing such a choice is unfair to claimants. If this position is unfair, then it is unfair to both parties. However, we would suggest that the limit on the award for any counterclaim should only be applied after the full calculation has been used to offset any remedy awarded to the claimant. This would help to ensure that any award made is fair in all the circumstances of the case and prevent the need for secondary litigation by the employer to pursue the full value of the counterclaim.

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. :

There is no exceptional circumstance warranting that claims for breach of contract need more time to be identified or are any harder to submit than other claims subject to the same time limit. Three months, not counting the extension granted by any early conciliation period, is more than sufficient to identify a claim to bring before the employment tribunal. An employee who has a valid claim but chose not to act promptly can still bring a claim through the county court but it is reasonable that on those circumstances they should forfeit the opportunity to bring such a claim in a no costs jurisdiction where they cannot show that it was not reasonably practicable to bring a claim within the time limit.

We do not believe that the tribunals should be given jurisdiction over claims that arise during the subsistence of an employee's employment but if such jurisdiction were given then the time limit should be the same as for unfair dismissal running from the date of the alleged breach.

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

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. :

The current system is effective, there is no need to change it.

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.)

Yes

Please expand on your answer. :

The current system is effective, there is no need to change it.

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. :

The current system is effective, there is no need to change it.

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.)

Yes

Please expand on your answer. :

The current system is effective, there is no need to change it.

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.)

Yes

Please expand on your answer. :

The current system is effective, there is no need to change it.

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.)

No

Please expand on your answer. :

Employment status is an extremely complex area with the concept of worker being undefined. Where tribunals are to have jurisdiction, the definition of employment has been specified or the relevant legislation giving the new rights expressly gives jurisdiction to the employment tribunal. The role of the tribunal is to deal with matters arising out of the employment relationship. Extending this jurisdiction, particularly if coupled with earlier suggestions to increase the amount that can be claimed for breach of contract, to the workers and self-employed contractors is likely to significantly increase the amount of tribunal time taken up in determining worker status, particularly differentiating between a worker and the truly self-employed. That is a test that is not necessary for claims in the county court and workers still have a route to redress. The employment tribunals have jurisdiction on relevant statutory matters and legislation has been amended or drafted where it was the will of Parliament that the tribunals would have jurisdiction in relation to workers. Any extension of this nature should be decided by Parliament through primary legislation.

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.)

No

Please expand on your answer. :

The extent of the jurisdiction employment tribunals were intended to have by Parliament is set down within primary legislation. This should not be changed without parliamentary approval. The employment tribunals can address relevant disputes over statutory entitlements. Contractual disputes that are not already within the purview of the employment tribunals should remain in the county court.

It is important that worker status is considered equally and consistently across the board. There are already situations where the HMRC and both parties in the working relationship have agreed on worker status. Contractual disputes outside of what is deemed employment should be dealt with by the county courts.

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. :

Where individuals are truly self-employed then this is purely a commercial relationship and any disputes should be resolved within the county courts.

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.)

Other

Please expand on your answer. :

Not entirely and not if the intention is to increase the breach of contract compensation limit. It should be recognised that there has been a fundamental change in the nature of employers since the employment tribunals were initially set up. There are a significant number of small and micro employers, as well as individuals who are employers by virtue of employing their own carers. Employers should have the same access to justice as employees including being able to pursue it in a no costs jurisdiction. Many small employers do not pursue legitimate breach of contract claims against former employees because of the costs which would be different if they had equal access to a no costs jurisdiction. If the cap on breach of contract claims is increased or removed, and if the ability for workers to pursue claims in the employment tribunals is widened, then giving employers the opportunity to pursue such claims in a no costs jurisdiction would help balance the inequity that the system would otherwise create.

There should be limited ability to bring a claim against employees which would help to ensure a fairer overall outcome. An employer should be able to bring a breach of contract claim in circumstances where they are defending any claim, rather than only as a counter claim for breach of contract. This would help to ensure that any awards at tribunal accurately reflect the true situation and prevents employees from avoiding their responsibilities. It would encourage claimants to be more reasonable in respect of resolving matters and should help to ensure that those starting litigation only do so with clean hands.

Separately, it should be possible for individuals to bring discrimination claims against their employees where appropriate. We are aware of circumstances where vulnerable employers have been bullied and harassed by their employees who have taken advantage of the employer's vulnerability. Those employees have then intimidated those employers when they have tried to address the issues and have continued that treatment using the employment tribunals to do so. Where an employee has been dismissed for harassment of a vulnerable employer, any challenge of that dismissal by the employee should allow the employment tribunal to consider if the employee had acted in breach of the Equality Act and if the bringing of the challenge constituted the latest in a series of discriminatory acts.

It should, potentially, also be open to a tribunal to consider in any discrimination claim if the discrimination is actually by the claimant. The reality of the work environment is that bullying and harassment can be carried out upwards as well as the more traditionally recognised top down approach. It should also be recognised that claimants can make wholly unfounded allegations of discrimination, rather than take responsibility for their own behaviour, on the basis that this is generally consequence free and knowing that the time and cost of defending such a claim, along with the concurrent reputational damage while the claimant engages in trial by social media, will force the respondent to settle a claim that they can legitimately defend. There is a difference between a mistaken belief in allegations of discrimination and those that are made maliciously or by applying an unjustified stereotype, for example assuming that someone holds a discriminatory attitude because they are white and male without any evidence to support it.

We are not in any way seeking to discourage claimants from bringing legitimate claims. What we are saying is that the interests of justice require that any challenges, particularly those taking advantage of a no costs jurisdiction, be based on a reasonable belief in that mistreatment and that unjustified allegations of discrimination should be discouraged as they negatively impact on the ability to address genuine instances of discrimination.

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.)

No

Please expand on your answer. :

While ideally we would prefer that respondents be able to initiate claims for breach of contract in the employment tribunal, we consider that if the tribunal is already considering the relevant issues the restriction on employers being able to claim breach of contract runs contrary to the interests of justice. The current situation results in circumstances where a claimant pursues a monetary claim in the employment tribunal, fully admits that they owe the respondent more money than they are claiming and yet the tribunal cannot take it into account.

The unreasonableness of this restriction can be best illustrated by a recent event in the news concerning an apparent dispute between a worker and his employer in relation to a building contract at a Travelodge in Liverpool. It is being reported that the worker believes that he is owed £600 in wages by the contractor and in retaliation for not being paid this, he drove a mini-digger through the reception of the building causing significant amount of damage that the employer will have to correct. Under the current provisions, the worker could pursue a statutory unauthorised deduction claim and the cost to the employer of putting right the damage that the worker caused would be disregarded.

By allowing respondents to claim breach of contract in relation to statutory claims seeking monetary compensation this will help to encourage employees to take responsibility for their actions and potentially reduce the workload of the tribunals. This would be in keeping with the overriding objective and avoiding the need for claims in multiple jurisdictions.

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.)

No

Please expand on your answer. :

It was not the intention of Parliament to give employment tribunals this power and this should not be changed without parliamentary involvement.

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.)

No

Please expand on your answer. :

Again this consultation focuses on the potential difficulty faced by employees but overlooks the principle of equal treatment of both parties at the employment tribunal. Ultimately, the respondent has the right to know what claim they are defending and is put at significant prejudice when faced with a claim that the claimant is pursuing an unspecified and unlimited sum in a no costs jurisdiction, particularly as wages claims are generally run through the fast track giving little preparation time.

If a claimant believes that monies are properly payable then they should be able to quantify those. They must have some reason to believe that the amount would be in excess of £25,000 to be concerned about the limit. If claimants have genuinely attempted to resolve matters with their employer prior to commencing proceedings then they should be able to quantify the claim to a sufficient level so that the calculation the tribunal would have to make would not reach the "very difficult" threshold.

For the amounts to be properly payable they must be express within the contract and so capable of quantification. If the claim relies on the claimant's belief that the contractual terms should be different then that should properly be brought as a breach of contract claim.

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. :

The position should only be changed if the employment tribunal had the power to determine that the deduction was too little as well as too high and make an award accordingly. It should be noted that both cases cited predate the Employment Rights Act 1996 so would have been a consideration of Parliament when setting down the jurisdiction. Parliament decided to limit the employment tribunal's jurisdiction in these matters and this should not be changed without consideration by Parliament.

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.)

Yes

Please expand on your answer. :

They should be allowed to apply setting off principles in keeping with the interests of justice to ensure that the final decision is fair to both parties in all the circumstances of the case. The claim should be limited to liquidated claims but should not be limited to the value of the employee's claim.

Any setting off limitation should be without prejudice to the employer's right to pursue a breach of contract claim in the county court.

If claimants know that the pursuit of a deduction from wages claims will not allow them to bypass their contractual obligations it is likely to increase the chances of active and genuine participation in early conciliation and a reduction in the demands on the courts system with this type of case. This will encourage employees to recognise their responsibilities as well as their rights and help concentrate the employment tribunals' limited resources to where they are most needed.

If so: (1) should the jurisdiction to allow a set off be limited to liquidated claims (ie claims for specific sums of money due)? :

The claim should be limited to liquidated claims but should not be limited to the value of the employee's claim.

Any setting off limitation should be without prejudice to the employer's right to pursue a breach of contract claim in the county court.

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

The claim should be limited to liquidated claims but should not be limited to the value of the employee's claim.

Any setting off limitation should be without prejudice to the employer's right to pursue a breach of contract claim in the county court.

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. :

The potential wide ranging and criminal consequences of these cases mean that they should remain within the county court.

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. :

The current system is effective, there is no need to change it.

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. :

The current system is effective, there is no need to change it.

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.)

No

Please expand on your answer. :

The existing system deals with this effectively and there is no basis for believing that any change is warranted.

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.)

Yes

Please expand on your answer. :

The existing system deals with this effectively and there is no basis for believing that any change is warranted.

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.)

No

Please expand on your answer. :

Of significance is that the trade-off between the civil courts and the tribunals is the shorter time period in which to bring a claim in a no costs jurisdiction. If the jurisdiction is to be moved to the employment tribunals then the existing time limit should remain. As indicated, the current time limit does not appear to create any specific difficulty for claimants wishing to pursue claims in the employment tribunal and there is no advantage to extending the period of time within which a claim can be made as it will simply reduce the amount of remedy available. It is to the benefit of all parties that any proceedings be commenced promptly although with the potential for consideration of a claim out of time if there are good grounds why it was not reasonably practicable to submit the claim earlier. Any change to time limits would be better served by reducing the period to bring claims in the civil courts in order to allow matters to be brought to a swifter conclusion.

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. :

It may assist if there was a panel of lay members available to assist in equal pay claims that could be called on equally by both the employment tribunals and the civil courts. This would give the courts the ability to draw on the expertise developed in the employment tribunals tempered with practical experience in the wider field of work without adding to existing resource pressures in respect of employment tribunal judges.

Alternatively, consideration could be given to the civil courts referring a question to the employment tribunals for a specialist opinion to give non-binding guidance. This would reduce the time scale for matters being addressed by the employment tribunal if referred, would be easier to timetable and gives the ability to benefit from specialist expertise without having to have the case presented twice.

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. :

The existing system works well and there is no reason to change it.

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. :

The existing system works well and there is no reason to change it.

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. :

The existing system works well and there is no reason to change it. Parliament chose to limit the jurisdictions as currently set and this should not be changed without Parliamentary consideration.

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. :

This was a conscious decision of Parliament when introducing the legislation and should not be changed without Parliamentary consideration.

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. :

This was a conscious decision of Parliament when introducing the legislation and should not be changed without Parliamentary consideration.

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.)

No

Please expand on your answer. :

If the cap is to be brought in line with the unfair dismissal cap then it should match both strands of that cap, namely the set figure (subject to annual uprating) or 52 weeks' gross pay, whichever is the lower.

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

We are not aware of any cases affected by the cap.

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.)

Yes

Please expand on your answer. :

The challenge should be able to be brought in either jurisdiction, subject to the relevant time limits for doing so. However, the claimant has to choose their jurisdiction and cannot utilise both for the same dispute.

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.)

No

Please expand on your answer. :

Further changes puts cases beyond the intended remit of the 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.)

Yes

Please expand on your answer. :

In so far as the remedies sought are clearly divisible.

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. :

For the reasons set out in the consultation paper.

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.)

Not Answered

Please expand on your answer. :

To a degree dependent upon the nature of the findings. Employers should hold joint and several liability in respect of any awards for discrimination found to have been carried out by their employees for whom they are vicariously liable. The individuals should have their liability limited to the extent to which they are personally liable for the situation in the event that the monies cannot be recovered from the employer. Making individuals liable for the debts of the company beyond the limit to which they have personally contributed goes against the principle of limited liability in setting up companies and is likely to stifle business. By the same principle, employers should not be jointly and severally liable for any awards against other respondents where they are not vicariously liable. Considerations should be given to limiting liability when there is more than one respondent company who are not associated. Similarly, consideration should be given to limiting the liability for respondents who have inherited responsibility as the employer through the operation of a transfer but has not inherited the staff responsible for the actions. While this consultation paper concerns itself with the claimants it does not give any consideration to respondents who may have been wholly uninvolved in the discrimination but find themselves liable for the actions of the previous employer. The tribunals should apportion liability when there is more than one respondent company to ensure that an employer should not carry more than their fair share.

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

Tribunals should apportion liability to the extent to which they believe each party is liable but should clarify if any company is accepting responsibility for the actions of individuals so that recovery of the individual's personal liability should only occur if the monies could not be recovered from the company.

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.)

Yes

Please expand on your answer. :

Apportionment should be based on the extent to which the separate respondents have caused the situation and whether or not respondent companies are accepting liability for respondent employees. This is particularly important where there are multiple companies involved who are not associated to ensure that liability is fairly split between those responsible for it.

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

We would suggest that this should be approached in the same way as those claims deliberated on in the civil courts in accordance with the 1978 Act.

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?:

It should mostly follow the position in the civil courts but would need some modification to suit the employment context.

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

It should mostly follow the position in the civil courts but would need some modification to suit the employment context. Modifications would be needed to take into account vicarious liability and where the actions of an individual are carried out in the course of their employment but clearly not on the direction of the employer.

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.)

No

Please expand on your answer. :

When employment tribunals make awards in relation to claims they do not give any consideration to the respondent's ability to pay or what is an appropriate time scale. Enforcement of the decision at the civil courts gives a consideration from those uninformed so far as to what enforcement should be granted as well as allowing for setting off to be given in relation to any monies owed by the claimant in breach of contract, something currently outside the jurisdiction of the employment tribunal.

Once an award is made it falls to be considered alongside any other debts of the company and that needs to be considered by the civil courts to determine what order for enforcement will be made in all the circumstances of the company. As this requires consideration of issues outside the jurisdiction and expertise of the employment tribunal it should remain in the civil courts.

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.)

No

Please expand on your answer. :

The decision was taken by Parliament not to give a right of appeal over the CAC's decisions in these areas and the will of Parliament should not be overruled. Giving the right of appeal to the EAT would also have the impact of downgrading these decisions to the equivalent of first instance decisions.

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

If this jurisdiction was to be created, although we do not believe it should be, it should be limited 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.)

Yes

Please expand on your answer. :

The existing position works well and there is no basis to change it.

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. :

This should cover subjects that fall within the jurisdiction of the employment tribunals along with breach of contract claims raised either by employers against employees or by employees during the subsistence of the employment contract. Claims that were, or could have been, brought at the employment tribunal would fall to be heard by these specialists.

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

This should cover subjects that fall within the jurisdiction of the employment tribunals along with breach of contract claims raised either by employers against employees or by employees during the subsistence of the employment contract. Claims that were, or could have been, brought at the employment tribunal would fall to be heard by these specialists.

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 List

Please expand on your answer. :

This makes it clear that the focus is on claims that have arisen from the employment relationship without causing confusion in relation to non-employment related equalities cases.