



**Law
Commission**
Reforming the law

Employment Law Hearing Structures

Summary of report

LC No 390

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The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Green, Chair

Professor Sarah Green

Professor Nick Hopkins

Professor Penney Lewis

Nicholas Paines QC

The Chief Executive of the Law Commission is Phil Golding.

The Law Commission is located at 1st Floor, Tower, 52 Queen Anne's Gate, London SW1H 9AG.

The terms of this report were agreed on 16 March 2020.

This is a summary of the full report. The text of this report is available on the Law Commission's website at <http://www.lawcom.go.uk/project/employment-law-hearing-structures/>

Employment Law Hearing Structures: summary of report

CHAPTER 1: INTRODUCTION

1. Since their creation in 1964, the jurisdiction of employment tribunals has been greatly extended by a series of statutory changes. As tribunals have no jurisdiction other than that conferred by statute, this has produced anomalies. Jurisdiction is constrained in certain contexts, and there are a number of discrepancies between the extent of the jurisdiction of civil courts on the one hand and employment tribunals on the other. The Civil Courts Structure Review described an “awkward area” of shared and exclusive jurisdiction in the fields of employment and discrimination law which has generated boundary issues.¹
2. The Law Commission’s 13th programme of law reform included a project to review the jurisdictions of employment tribunals, the Employment Appeal Tribunal (“EAT”) and the civil courts in employment and discrimination matters and to make recommendations for their reform. The terms of reference agreed with the Ministry of Justice, as the sponsoring department, stipulated that the project would consider areas of shared jurisdiction between the civil courts and tribunals in relation to certain employment and discrimination matters (including equal pay), the restrictions on the employment tribunals’ existing jurisdiction, the exclusive jurisdiction of the county court in relation to certain types of discrimination claim, and the handling of employment disputes in the civil courts. The objective was to propose the removal of discrepancies. The terms exclude any major re-structuring of the employment tribunals system.
3. In conducting this review, our starting point has been that employment tribunals were designed to have different characteristics to the civil courts. We are of the view that these characteristics should be preserved. These differences are:
 - (1) the employee or worker is almost invariably the claimant;
 - (2) the employment tribunal is generally a no-costs jurisdiction;
 - (3) many cases, including discrimination and equal pay claims, are heard by a judge and two lay members;

¹ Judiciary of England and Wales, *Civil Courts Structure Review: Interim Report by Lord Justice Briggs*, December 2015, available online at <https://www.judiciary.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf> (last visited 14 September 2018), at para 3.61. See also Judiciary of England and Wales, *Civil Courts Structure Review: Final Report*, July 2016, available online at <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (last visited 14 September 2018). Some of the suggestions made to the Briggs review were far reaching, for example that the Employment Appeal Tribunal be given first instance jurisdiction to hear the heavier cases at present coming before employment tribunals. Another was that a new “Employment and Equalities Court” be created with non-exclusive but unlimited jurisdiction in employment and discrimination cases, including claims of discrimination in the provision of goods and services. Either of these proposals would require significant primary legislation. Our terms of reference preclude changes of this kind.

- (4) the proceedings tend to be less formal than in civil courts;
 - (5) parties' representatives do not need to be legally qualified; and
 - (6) the employment tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.
4. A consultation paper was published on 26 September 2018 setting out our analysis and provisional proposals in relation to these matters, and asking consultees for their views. The consultation period closed on 31 January 2019. We received responses from 72 consultees. Our report outlines these responses, and sets out our recommendations for reform.

A note on terminology

5. Our report and this summary use the terms "employee", "worker" and, on occasion, "self-employed independent contractor". "Employee" and "worker" are defined in legislation, with employees enjoying the full set of statutory employment law rights and other workers (an intermediate category between employees and the self-employed) enjoying a more limited set of statutory employment law rights. "Self-employed independent contractor" is not defined in legislation and is a label used to describe individuals who are in business for themselves and providing a service to clients and who are therefore neither employees nor workers. We use the term "worker" to refer to an individual who is a worker but not an employee.
6. The default forum for employees and workers who seek to enforce their statutory employment law rights is the employment tribunal. Disputes relating to a genuinely self-employed person are predominantly dealt with by the civil courts.

CHAPTER 2: THE EXCLUSIVE JURISDICTION OF EMPLOYMENT TRIBUNALS

7. Employment tribunals have exclusive jurisdiction over certain types of claims. This means that those types of claims can only be initiated and litigated in an employment tribunal. The principal areas of employment tribunals' exclusive jurisdiction are: unfair dismissal, discrimination in employment, detriment of various specified types, redundancy, maternity and parental rights, flexible working, time off work for study or training, various matters concerning trade union membership and activities, written statements of employment particulars, itemised pay statements, and the Agency Workers Regulations 2010.
8. Our consultation paper looked at these types of claim and reached the provisional view that the exclusive jurisdiction of employment tribunals should remain as it is. Consultees were almost unanimous in their support for this proposal. Many responses emphasised the expertise of employment tribunals in these areas. Consultees agreed with us that the special characteristics of employment tribunals make them a uniquely appropriate and effective forum for resolving disputes of this kind.
9. We went on to ask if time limits should be extended for employment tribunal claims. The primary time limit for bringing an employment tribunal claim is generally three months. A substantial majority were in favour of doing so. We are persuaded by consultees' responses that bringing a claim within this period may be difficult for a significant number of claimants. This is particularly the case where there is a wish to pursue internal grievance procedures, and a need to obtain legal advice and representation. We also agree with arguments that

increasing the time limit too much would be to the detriment of employers. We note that the three-month limit dates back to the original conception of tribunals as a speedy and informal forum for resolving employment disputes, but that today claims take longer to be resolved and are often more complex and may involve large sums. We conclude that an extension of the time limit for bringing a claim to six months for all employment tribunal claims would strike an appropriate balance between facilitating access to justice for employees and providing certainty for both parties, and recommend this extension accordingly.

10. We also asked if changes should be made to the test for extending time limits. We asked whether, in those types of claim, such as unfair dismissal, where time can be extended only where it was “not reasonably practicable” to bring the complaint in time, employment tribunals should be given discretion to extend time where they consider it “just and equitable” to do so. Over two thirds of consultees favoured the “just and equitable” test. Many of the minority who opposed the adoption of the test argued that the test is less certain and gives judges too wide a discretion. We consider case law which has explored the parameters of the “just and equitable” test and makes it clear that the discretion is not unfettered. In our view, the test is sufficiently flexible to allow judges to take into consideration a variety of factors, including the balance of prejudice between the parties, and any evidence of deliberate delay. We also note that the burden is on the claimant to prove that the limitation period should be extended.
11. We conclude that the sharp edges of the “not reasonably practicable” test risk producing arbitrary and unjust outcomes by preventing some deserving cases from proceeding. We find that the “just and equitable” test is better suited to consideration of the many reasons why a claim may be brought outside the limitation period. We recommend accordingly that, in the types of claims where at present time can be extended only where it was “not reasonable practicable” to bring the claim in time, employment tribunals should have the discretion to extend time limits in cases where they consider it just and equitable to do so.

CHAPTER 3: RESTRICTIONS ON THE JURISDICTION OF EMPLOYMENT TRIBUNALS – DISCRIMINATION

12. The Equality Act 2010 gives the county court exclusive jurisdiction to hear discrimination claims arising in contexts outside the workplace: the provision of services; the exercise of public functions; the disposal and management of premises (such as granting leases); membership associations (such as sports clubs); and education. Employment tribunals hear employment discrimination cases.
13. There is therefore a relatively hard boundary between the civil courts and employment tribunals. But this boundary relates to the factual context in which a discrimination claim arises, not the substance of discrimination law. That remains governed by the Equality Act 2010 and the principles of discrimination law apply irrespective of whether a judge hearing a claim sits in the civil courts or an employment tribunal.
14. We considered in our consultation paper whether it would be feasible or desirable to soften the boundary between employment tribunals and the civil courts. We looked at two options: formally sharing jurisdiction, and deploying employment judges to hear discrimination cases in the county courts. We tested views as to an alternative position, the outright removal of the jurisdiction of the county court to hear non-employment discrimination claims, at the

outset. Most consultees agreed with our provisional view that the county court should retain its jurisdiction in this area.

15. Consultees gave a mixed response to both the options we had identified. They were relatively evenly split over the shared jurisdiction option. Those in favour focused on the potential for improvements in efficiency and the benefits of the less formal, more user-friendly employment tribunal setting. Some saw it as a step towards a distinct Employment and Equalities Court. Those opposed thought that concurrent jurisdiction would create complexity, and overstretch tribunal resources.
16. If concurrent jurisdiction were established, a majority of consultees thought that there should be a power to transfer claims, and most thought that the wishes of the parties should be one criterion in making a transfer decision. Half of those supporting concurrent jurisdiction thought that there should be a power to refer questions relating to discrimination issues to employment tribunals. A small majority supported the idea of a triage system to allocate a claim between the county court and the employment tribunal, with most of the view that allocation was a task for a judge.
17. We are concerned about how well concurrent jurisdiction could be made to work in practice. The majority of responses revealed doubts and no clear idea emerged about what the parameters of a power to transfer would be. In any allocation system the factors militating in favour of one jurisdiction or the other will require discretionary assessment. We envisage a risk of delay, contentious procedural hearings and satellite litigation. We conclude, in the light of these considerations and the tenor of responses, that the case for concurrent jurisdiction or a referral system has not been made out.
18. The second “cross-ticketing” option gained more support, and attracted less opposition. Some consultees noted that flexible deployment is already happening informally and to a limited extent, and has been successfully trialled in the Property Chamber of the First-tier Tribunal. There was agreement that the court system would benefit from expert discrimination judges hearing non-employment discrimination claims, and that flexible deployment was a pragmatic and low risk means of achieving this. On the other hand, there were concerns that this would overstretch employment tribunals’ limited resources, and that such a system would not ensure that all discrimination cases in the county court were heard by an expert employment judge.
19. We are persuaded that employment judges with experience of hearing discrimination claims should be deployed to sit in the county court to hear discrimination cases, and that it would be desirable for them to sit with one or more assessors where appropriate.
20. In discrimination claims where it is uncertain which forum has jurisdiction, we suggest the Government and, as appropriate, the Civil Justice Council should consider what lessons can be learnt from the ongoing property chamber deployment project, with a view to investigating the extent to which “concurrent sitting” in both the employment tribunal and county court might also be desirable. This would permit a single judge to hear, for example, cases where the court and the tribunal each have partial jurisdiction, or where jurisdiction is unclear at the outset.

CHAPTER 4: RESTRICTIONS ON THE JURISDICTION OF EMPLOYMENT TRIBUNALS: THE EXTENSION OF JURISDICTION ORDER 1994

21. A claim that a term of an employment contract has been breached may be brought in the civil courts. Legislation has extended this contractual jurisdiction to employment tribunals in limited ways. Under article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (the “Extension of Jurisdiction Order”), tribunals may hear certain breach of contract claims brought by employees against employers. Under article 4, tribunals may hear certain breach of contract claims brought by employers against employees who have claimed under article 3 (counterclaims). Where legislation gives employment tribunals contractual jurisdiction, this does not remove the civil courts’ jurisdiction. Where employment tribunals have not been given contractual jurisdiction by legislation, the civil courts retain exclusive jurisdiction.
22. The Extension of Jurisdiction Order restricts the jurisdiction of employment tribunals in a number of ways:
- (1) temporal – employment tribunals’ jurisdiction is limited to breach of contract claims which arise or are outstanding on the termination of an employment. An employee wishing to claim while still employed (or “stand and sue”) must use the civil courts; equally a former employee may only claim damages and sums due on or before employment was terminated;²
 - (2) financial - the contractual damages which employment tribunals may award are limited to £25,000. An employee who wishes to claim damages above £25,000 must do so in the civil courts;
 - (3) substantive – employment tribunals’ contractual jurisdiction does not extend to claims relating to personal injury, provision of living accommodation, intellectual property, confidentiality or restraint of trade. Such claims must be brought in the civil courts;
 - (4) workers - it may be that the Order does not extend to workers (as distinct from employees) at all; and
 - (5) counterclaims - employers cannot initiate a contractual claim against employees in employment tribunals, though they can make a counterclaim if the employee makes a breach of contract claim.
23. Consultees provided views as to whether each of these restrictions was justified.

Temporal

24. We asked in our consultation paper for views on whether an employee should be able to make a breach of contract claim while still employed. Consultees were almost unanimous in supporting this extension of jurisdiction. The few consultees who opposed the measure expressed the view that such an extension would tend to damage relationships between employer and employee. We are not persuaded by this objection. We view it as anomalous that employment tribunals have wide-ranging jurisdiction over matters such as deductions

² This restriction does not apply to claims for unpaid or underpaid wages, which may be brought in employment tribunals while the claimant remains employed, as a result of the statutory right not to suffer unauthorised deduction from wages.

from wages arising during employment and contractual claims arising during employment where the claim is outstanding upon termination, yet lack jurisdiction over other contractual claims. Including contractual claims brought during employment fits well with the wider policy objective evident in legislation of providing employment tribunals as a forum for resolving disputes arising out of employment relationships. We therefore recommend that employment tribunals should have jurisdiction to determine claims by an employee and counterclaims by an employer for damages for breach of, or a sum due under, a contract of or connected with employment notwithstanding that the employee's employment has not terminated.

25. Similarly, a large majority of consultees supported extending jurisdiction to permit tribunals to hear contractual claims where liability arises after employment has ended. As the extension would apply only to claims under a contract of employment or a contract connected with employment, we can see no policy reason not to include this narrow category of claims within the employment tribunals' jurisdiction. We recommend accordingly that employment tribunals should have jurisdiction to determine claims by an employee and counterclaims by an employer for damages for breach of, or a sum due under, a contract of or connected with employment notwithstanding that the alleged liability arises after employment has terminated.
26. The time limit for bringing a breach of contract claim in an employment tribunal is three months from the date of termination of employment. This is aligned with the time limit for unfair dismissal claims. If claims can be brought during the subsistence of employment, and in respect of liabilities which fall due only after the employment has terminated, the question arises of what time limit should apply. The question also arises of whether the time limit for breach of contract claims as a whole should be changed in line with our recommended change to the time limit for unfair dismissal claims considered in chapter 2.
27. We provisionally proposed in our consultation paper that the time limit for breach of contract claims should be aligned with the unfair dismissal time limit. Almost all consultees agreed. Some who disagreed favoured aligning the time limit with the six-year limit for breach of contract claims in the civil courts. While we can see the logic of both positions, we conclude that there is more logic in aligning the tribunal time limit with the unfair dismissal limit, as short time limits for invoking the jurisdiction of the employment tribunal are one of its characteristics.
28. The consensus implicit in responses concerning the time limit for "stand and sue" breach of contract claims was that the time limit should run from the date of the breach, or, where it has extended over a period, from the ending of the alleged breach. More than half of those responding thought that the time limit should be six months. We agree. In the interests of consistency, we also think that the six-month time limit should run from the date on which liability falls due in the case of liabilities which arise after the termination of employment.
29. We are aware that the effect of this will in some cases be that claims which become time-barred in the tribunal once the employee's employment has continued for more than six months following the breach will cease to be time-barred if they are still outstanding upon the termination of the employment. We considered whether to recommend a uniform time limit of six months from breach for contractual claims brought in an employment tribunal whether during or after employment. We decided not to do so. We conclude that such a reform would bar a number of claims that would be in time under the present law. It would also prevent an employee who brings, for example, an unfair dismissal claim on the termination of their

employment from adding a contractual claim that was still outstanding if the breach had occurred more than six months earlier.

Financial

30. Our provisional proposal that the £25,000 limit on the employment tribunals' contractual jurisdiction should be increased was supported by the overwhelming majority of consultees. Some consultees went on to say that there should be no limit, while others thought that it should be £50,000, £100,000 or above, and some suggested aligning the limit with the maximum compensatory award for unfair dismissal.
31. We think that there should continue to be a limit on the value of contractual claims, as across much of civil litigation cases are assigned to "tracks" designed to deal with cases of different monetary value or complexity. While there is a case for all the various limits proposed, we recommend an increase in the limit to £100,000. This has the logic of tying the figure to the financial jurisdiction of the county court.
32. We also asked consultees if the same increased limit should apply to counterclaims by employers to a breach of contract claim by an employee. Almost all agreed, for reasons of logic and fairness, that the limit should be the same. Those who disagreed mostly pointed to the imbalance of power between the employer and the employee. We are not persuaded that this justifies different limits. We recommend that the same financial limit should continue to apply to claims by employees and counterclaims by employers.

Substantive restrictions

33. The provisional view expressed in our consultation paper was that each type of contractual dispute specifically excluded from the jurisdiction of employment tribunals should continue to be excluded. After consideration of all the views expressed, both for and against our proposal, we conclude that there should be no change to jurisdiction in these areas with the exception of living accommodation. While there was a difference of view on the part of consultees on this point, we are persuaded on balance that the jurisdiction should be extended to include claims and counterclaims for damages or sums due in respect of living accommodation.

Exclusion of claims by workers and the self-employed

34. An overwhelming majority of consultees supported our provisional proposal that express provision should be made for employment tribunals to have jurisdiction to determine breach of contract claims relating to workers. We recommend that the Extension of Jurisdiction Order be amended accordingly. We also recommend that, if jurisdiction is extended in any of the ways we have recommended, these extended areas of jurisdiction should expressly include workers.
35. A substantial majority of consultees also supported our provisional proposal that employment tribunals should not be given jurisdiction to determine breach of contract disputes relating to genuinely self-employed independent contractors. We maintain our view, but we note that "concurrent sitting", considered in our discussion of flexible deployment in the context of discrimination claims in chapter 3, may have a role in this area too. This would be the case where it is difficult at the outset of a claim, such as in some cases arising from the "gig economy", to decide whether the parties in dispute are in a labour or a commercial services relationship.

Claims that a defendant has induced a breach of contract by the employer

36. After the consultation closed, our attention was drawn to the decision in *Antuzis v DJ Houghton Catching Services Ltd*⁶ with the suggestion that the jurisdiction of employment tribunals should be extended to include claims for inducing an employer's breach of contract. We concluded that we could not reopen consultation in order to canvass views on this suggestion, and noted the risk that such an extension could embroil employment tribunals in difficult issues of what may amount to the tort of inducing a breach of contract. We relay the suggestion to the Government for consideration.

Restrictions on tribunal claims by employers against employees

37. The majority of consultees supported our provisional proposal that employment tribunals should continue not to have jurisdiction to hear claims originated by employers. We maintain our position. The issues raised by such claims are generally outside the expertise of employment tribunals. Even where they are not, permitting employer claims would be a major departure requiring significant primary legislation. We are of the view that the primary purpose of employment tribunals remains to hear claims brought by those who think that an employer has treated them unlawfully.
38. Most consultees also supported our provisional proposal 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. We maintain our view. We consider that the ability of employers to bring a contractual counterclaim should be limited to cases where the employee has chosen to ventilate a contractual dispute in the tribunal.

CHAPTER 5: OTHER RESTRICTIONS ON THE JURISDICTION OF EMPLOYMENT TRIBUNALS

39. In this chapter we consider other restrictions on the jurisdiction of the employment tribunals beyond those contained in the Extension of Jurisdiction Order: the tribunal's lack of power to construe written statements of particulars of employment and the extent of its jurisdiction in respect of unauthorised deductions from wages claims. We also examine whether personal injury and employers' references might properly be the subject of shared jurisdiction with employment tribunals.

Power to construe written statements of particulars of employment

40. Part I of the Employment Rights Act ("ERA") 1996 allows an employer or an employee to ask an employment tribunal whether a particular term should or should not be included in a written statement of particulars. Case law has determined, however, that a tribunal has no jurisdiction to interpret or construe contractual terms and conditions contained or referred to in a statement of particulars. We asked consultees whether Part I should be amended to allow employment tribunals to go beyond identifying the terms of the contract and rule on the interpretation of terms where their meaning is disputed. Consultees were almost unanimous in supporting such an amendment. We recommend accordingly that employment tribunals

³ [2019] EWHC 843 (QB), [2019] IRLR 629. The case concerned claims against an employer company for breach of contractual terms relating to working hours and minimum pay and claims against directors of the company on the basis that they had induced the company's breaches of its contractual obligations to the claimants.

should be given the power to interpret or construe terms in contracts of employment in order to exercise their jurisdiction under Part I.

Unauthorised deductions from wages claims

41. Although employment tribunals currently have no jurisdiction under the Extension of Jurisdiction Order to hear a claim for breach of an employment contract while the contract is still running, they do have exclusive jurisdiction to hear the statutory claim of “unauthorised deductions from wages”. Employees’ and workers’ rights in this context were previously enacted in the Wages Act 1986 and are now contained in Part II of the ERA 1996. Case law has decided that such a deduction must be for a “significant, identifiable sum”.⁴
42. We asked consultees whether employment tribunals should be given the power to hear unauthorised deductions from wages claims which relate to unquantified sums. Almost all those responding to this question thought that tribunals should be given such a power. In discussing these responses, we noted that our recommendation in chapter 4 permitting employees to “stand and sue” would allow employees to bring contractual claims in relation to remuneration of a kind that can currently be litigated in an employment tribunal only under Part II of the ERA 1996. For this reason, and in order to retain the straightforward, swift and summary character of Part II claims, we do not recommend the extension of jurisdiction under Part II to unquantified sums.

Excepted deductions

43. Section 14(1) to 14(6) of the ERA 1996 sets out a number of “excepted deductions” which employers may make from wages without breaching the Act, for example where an employee has previously been overpaid. In these cases, an employment tribunal may only decide whether one of the excepted reasons for the deduction applies; if so, it may not determine whether the employer deducted the correct amount. This limited scope for inquiry under section 14 of the ERA 1996 can be contrasted with the position under section 13(1)(a) of that Act, where employment tribunals must determine whether a deduction is in accordance with a statutory provision or a provision of the worker’s contract. When doing so, it is not sufficient that the contractual or statutory authority exists; it must also be shown that the deduction is justified on the facts.
44. Our consultation paper asked whether employment tribunals should also have the power under section 14 of the 1996 Act to determine whether the employer deducted the correct amount of money from the employee or worker’s wages. Almost all consultees thought that they should. Many commented that the difference in tribunals’ powers in respect of deductions under sections 13 and 14 was anomalous. We recommend accordingly.

No setting off

45. Some employees who claim sums owed by an employer under the employment contract may themselves have breached obligations owed to the employer under that employment contract. If so, the employer may wish to rely on the doctrine of set-off to reduce or extinguish the amount it would otherwise be liable to pay to the employee. An employer can use this doctrine to set sums off when contractual claims are heard by employment tribunals under the Extension of Jurisdiction Order, but they cannot do so when an employee brings an unauthorised deductions from wages claim under Part II of the ERA 1996. Our

⁴ *Coors Brewers Ltd v Adcock* [2007] EWCA Civ 19, [2007] IRLR 440.

consultation paper asked whether that should continue to be the law, and if not, whether an employer relying on set-off principles should be limited to liquidated claims, and whether the amount claimed should be limited to extinguishing the employee's claim.

46. A majority of consultees, 36 out of 55, favoured granting employment tribunals the power to apply set-off principles in the context of unauthorised deductions claims. In doing so they focused on the need to do full justice to both employer and employee. The minority who opposed altering the law emphasised the longstanding policy underlying Wages Act legislation to require unpaid wages to be paid to employees, and to restrict the reasons for making deductions to an exhaustive list. A majority of those supporting a set-off power in this context thought that it should be limited to liquidated claims. A similar proportion thought that set-off should be limited to extinguishing the employee's claim.
47. We have already recommended that an employer should not be able to counterclaim against an employee who has brought a purely statutory claim. We think that this applies equally to statutory claims under Part II of the ERA 1996. On the other hand, it also makes sense that justice should be done in one forum, and that there would be little practical sense in preventing an employer with an established claim against an employee for a quantified sum of money from having the cross-liabilities taken into account.
48. We recommend for these reasons that employment tribunals should have the power to apply set-off principles in an unauthorised deduction from wages claim, but that this should be limited to established liabilities for quantified amounts, and to extinguishing the Part II claim.

Other areas of shared jurisdiction

Personal injuries

49. Workplace personal injuries can lead to legal action arising from implied terms in employment contracts, health and safety legislation and the tort of negligence. In our consultation paper we provisionally proposed that employment tribunals should not have jurisdiction over breach of contract claims relating to personal injury; our conclusion that the tribunals should not have that jurisdiction is explained in chapter 4. We also provisionally proposed that employment tribunals should continue not to have civil jurisdiction in relation to employers' statutory health and safety obligations or the tort of negligence. Almost all consultees agreed with our proposals in relation to both statutory health and safety obligations and the tort of negligence, and we conclude that there should be no change to jurisdiction in this area.

Employer's references

50. Employees and workers can bring proceedings alleging that their current or former employer has provided an inaccurate, misleading or discriminatory reference in respect of them. Such claims can include claims for negligent misstatement, defamation, malicious falsehood, and discrimination under the Equality Act 2010. Employment tribunals have exclusive jurisdiction over claims alleging unlawful discrimination. Other reference-related claims, such as those outlined above, involve common law causes of action over which the civil courts have exclusive jurisdiction.
51. Our consultation paper provisionally proposed 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. We

asked whether consultees agreed. We also asked whether employment tribunals should have any jurisdiction over common law claims (in tort or contract) relating to references.

52. There was almost no support from consultees for giving civil courts jurisdiction over Equality Act aspects of such claims, and opinion on whether employment tribunals should be given jurisdiction over common law aspects of claims was divided and nuanced. We note that tribunals are already able to take into consideration the wording of a reference in a claim of unfair dismissal, or of discrimination, where it illuminates issues relevant to liability or is relevant to the loss suffered in consequence of a dismissal. We conclude that no change should be made to the demarcation of jurisdictions in this area.

CHAPTER 6: CONCURRENT JURISDICTION OVER CLAIMS FOR EQUAL PAY AND EQUALITY OF TERMS

53. There are a number of employment law claims that can be brought either in the civil courts or in employment tribunals. These include claims for equal pay and equality in occupational pension schemes.
54. “Equal pay” law refers to the area of law which provides that women and men are entitled to receive equal pay where they are doing equal work, unless there is a non-discriminatory reason for the difference. The law requires that a “sex equality clause” and a “sex equality rule” be read into an employee’s contractual terms and occupational pension scheme (if they are a member of one) respectively to ensure that the contract or scheme is not less favourable than that of a person of the opposite sex.

Equal pay

55. An equal pay claim may be brought either in an employment tribunal or in the civil courts. In the employment tribunal, there is, in practice, no time limit so long as the claimant remains employed in the relevant employment. A time limit of six months runs from the date that the claimant ceases to be so employed. There is no discretion for the Tribunal to extend the deadline save in limited circumstances set out in the Equality Act 2010. In the High Court or county court, the time limit is six years from the date of the breach. Both jurisdictions enable claimants to claim arrears of pay going back six years; this means that a claimant who delays in making a claim may receive less compensation as a result.
56. Equal pay claims are most commonly pursued in employment tribunals, save where they are brought more than six months after the end of employment, which would have been out of time in an employment tribunal. In such cases, they are presented as breach of contract claims in the civil courts.
57. Section 128 of the Equality Act 2010 gives the civil courts the powers to:
- (1) transfer the determination of aspects of an equal pay claim to an employment tribunal; and
 - (2) strike out a claim if it appears to the court it could more conveniently be determined by an employment tribunal, effectively causing a claimant to re-issue the claim in an employment tribunal.

58. In *Abdulla v Birmingham City Council*,⁵ the Supreme Court held that it can never be “more convenient” for proceedings to be determined by an employment tribunal if the proceedings would be out of time in the tribunal.
59. Implicit in the section 128 powers is recognition of the specialist knowledge, procedures and expertise of employment tribunals in determining equal pay claims. In our consultation paper, our provisional view was that the concurrent jurisdiction of the civil courts and employment tribunals over equal pay claims should be retained. We also provisionally considered that there was a stronger case for aligning the time limits for bringing equal pay claims in employment tribunals with the six-year time limit in the civil courts. This would prevent equal pay claims being “artificially” pushed into the civil courts due to an employee missing the relatively short deadline for bringing a claim in the tribunal. On the other hand, we recognised that such a move would run counter to the general policy of requiring employment tribunal claims to be issued within relatively short time limits.
60. Just over half of consultees were in favour of retaining concurrent jurisdiction over equal pay claims. While there was agreement amongst consultees that employment tribunals are the expert forum for determining such claims, they thought that there were important reasons for retaining the civil courts’ jurisdiction. The civil courts may be better suited to hearing certain types of claim, such as pension matters. It was also Parliament’s choice to give a contractual remedy in equal pay law, and it would be artificial to exclude a breach of contract claim from the civil courts’ contractual jurisdiction. We agree with these views, and recommend that concurrent jurisdiction is retained.
61. Consultees were also quite evenly divided over the question of whether there should be parity between the time limits for equal pay claims in the different jurisdictions. We are persuaded by arguments that a six-year time limit in the employment tribunal would be contrary to the concept of the tribunal as a low-cost forum for the speedy resolution of disputes, and that such a limit would be inconsistent with the short time limits for other contractual claims. We acknowledge that a six-month time limit from the end of employment may not be sufficient, but conclude that the better approach is the introduction of a discretionary power to extend the tribunal limitation period on “just and equitable” grounds. It also remains possible in practice to bring claims in the civil courts outside the tribunal time limit.
62. Consultees gave a range of responses to our question about practical changes which could be made to improve the operation of the concurrent equal pay jurisdiction. The answers to this question influenced the conclusion expressed above in relation to time limits.
63. Responses included a proposal to give civil courts the power to transfer entire cases to employment tribunals, operating on a presumption in favour of transfer. Others suggested using flexible deployment to allow employment judges with experience of hearing equal pay claims to sit in the civil courts. Many consultees supported giving employment tribunal judges discretion to extend the limitation period for equal pay claims on a case-by-case basis, and the majority thought that the “just and equitable” test was the most appropriate to apply. Some consultees suggested that the procedural rules which apply in employment tribunal equal value claims should also apply in the civil courts.

⁵ [2012] UKSC 47, [2013] IRLR 38.

64. We support the flexible deployment of judges in this area, as expressed in our recommendation in chapter 3. Although we consider that the need to transfer cases to the employment tribunal would be reduced by this measure, we also support the extension of the section 128 power discussed above to permit the transfer of entire cases to employment tribunals. We recommend the amendment of section 128(2) of the Equality Act 2010 accordingly. We also recommend that employment tribunal judges be given a discretionary power to extend the limitation period for equal pay claims where it is just and equitable to do so.

The non-discrimination rule in occupational pension schemes

65. Occupational pension schemes are deemed to include, in addition to an equality rule, a "non-discrimination rule" which overrides other provisions of the scheme.⁶ This rule requires that "responsible persons" must not, in carrying out their functions relating to the scheme, discriminate against any scheme members or other interested parties on grounds of protected characteristics set out in the Equality Act 2010.
66. Employment tribunals have jurisdiction to hear discrimination claims arising from breach of the non-discrimination rule. Such claims may be brought against an employer or the trustees of the pension scheme, and must normally be brought within three months of the act complained of ceasing to have effect. The ordinary jurisdiction of the High Court and county court to hear claims relating to occupational pension schemes is expressly preserved in claims relating to the non-discrimination rule.⁷ Similarly to equal pay claims, civil courts are empowered to strike out a civil claim, or refer a question to the employment tribunal.
67. Four fifths of consultees thought that there should be no change to the current allocation of jurisdictions in this area. There was a general consensus that the current allocation does not cause any problems in practice, and that there can be benefits in giving parties a choice of forum, as other issues can be raised by the litigation to which the civil courts are better suited. We agree with these views, and see no reason for changing the current position.

CHAPTER 7: CONCURRENT JURISDICTION OVER OTHER EMPLOYMENT CLAIMS

68. In this chapter we consider the other types of employment law claim with concurrent jurisdiction discussed in our consultation paper.

Transfer of Undertakings (TUPE Regulations)

69. The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE Regulations") contain rules designed to protect employees when a business or part of a business is transferred from one legal person to another by one or other of the two types of "relevant transfer". Employment tribunals have exclusive jurisdiction to hear a number of claims that might arise out of a TUPE transfer, but there are other cases in which the civil courts may be required to hear and determine TUPE transfer issues.
70. We provisionally proposed that there should be no change to the demarcation of jurisdiction in this area. Nearly 90% of consultees who responded on this issue considered that the

⁶ Equality Act 2010, s 61.

⁷ Equality Act 2010, s 120(6).

existing system works well and could see no justification for change as the current system works well. We maintain our view.

Working Time Regulations

71. The Working Time Regulations 1998 (“Working Time Regulations”) limit employees’ and workers’ working hours and provide for rest breaks and paid holidays.
72. The Working Time Regulations are enforced in two main ways: by way of a tribunal claim and by state enforcement action, but they have also been held to create contractual rights within the jurisdiction of the civil courts. This means that the High Court has jurisdiction to hear employees’ claims seeking a declaration of their rights under regulation 4(1) and enforcement of those rights by means of injunctions.⁸
73. With regard to state enforcement, the Health and Safety Executive (“HSE”) and other agencies can enforce various provisions of the Working Time Regulations, backed by criminal penalties. The provisions include those limiting the working week, limiting working time for night workers and providing for health assessments.
74. Our provisional proposal was that there should be no change to the present demarcation of jurisdiction in this area. Only one fifth of consultees disagreed with this view, but they gave forceful reasons why they thought that change was needed. The main issue highlighted was enforcement. They viewed the current demarcation as confusing, leading to a lack of awareness of enforcement mechanisms. Some consultees also pointed to evidence that there is insufficient proactive enforcement by state enforcement agencies. They suggested that the solution was an extension of employment tribunals’ jurisdiction to hear claims in relation to provisions for which currently the primary mechanism for enforcement is through an enforcement agency. This would create a “dual channel system of enforcement”.
75. We consider there may be disincentives for employees to enforce these rights, and think that there are good reasons for enforcement agencies to retain their powers. We agree, however, that there are good reasons for civil claims based on breach of the contractual rights created by the Regulations to be heard within the specialist employment tribunals’ jurisdiction. This would occur as a result of our recommendation to allow employees to bring claims for breach of contract during employment, but we also recommend that employment tribunals’ jurisdiction be extended formally so as to enable them to hear complaints by workers that they are working hours in excess of the maximum working time limits contained in regulations 4(1), 5A(1), 6(1) and 6A of the Working Time Regulations 1998⁹ and to give declaratory relief. We also suggest that an employment tribunal that rules in favour of such a complaint should consider referring the matter to the relevant enforcement agency.

The National Minimum Wage

76. Under section 1 of the National Minimum Wage Act 1998, employees and workers must not be paid less than the National Minimum Wage (“NMW”).
77. Employees and workers who do not receive the NMW can either claim the difference in an unauthorised deduction from wages claim brought in an employment tribunal under section

⁸ *Barber and Ors v RJB Mining (UK) Ltd* [1999] IRLR 308.

⁹ These provisions set the maximum weekly working time for workers and young workers, and the maximum length of night work for workers and young workers.

13 of the Employment Rights Act (“ERA”) 1996, or bring a breach of contract claim to recover the money owed.¹⁰ Such contract claims may be brought either in the county court up to six years from the breach (in England and Wales) or in employment tribunals if they fall within the Extension of Jurisdiction Order.

78. The NMW is also enforced by HMRC. Enforcement measures available to HMRC include serving notices of underpayment; bringing claims to recover underpayments either in employment tribunals or county courts; "naming and shaming"; civil penalties, and criminal prosecution for the most serious cases.
79. The provisional view expressed in our consultation paper was that the demarcation of employment tribunals’ and courts’ jurisdictions in this area should not be changed. Consultees agreed almost unanimously, and we maintain our original view.

Trade Union Blacklists

80. Under regulation 3 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 (“the Blacklists Regulations”), it is unlawful to compile, use, sell or supply lists of people who are or have been trade union members, or who are taking part or have taken part in trade union activities, if the list was compiled to help employers or employment agencies to discriminate against them in relation to recruitment or in relation to the treatment of employees and workers.
81. A complaint may be made to an employment tribunal if, in relation to a blacklist, a person is refused employment, refused services provided by an employment agency, or subjected to other detriment. The primary time limit for bringing these tribunal claims is three months. The compensation which a tribunal may award for the first two complaints is capped at £65,300. The cap corresponds to the maximum compensatory award for most types of unfair dismissal claim that was in force at the time the Blacklists Regulations were made, but it has not been raised since.
82. A breach of regulation 3 may be challenged in the civil courts (but not in employment tribunals) as a breach of statutory duty. The remedies available are damages, an injunction, or both. The time limit in England and Wales in the civil courts is six years from the breach. Recoverable damages are uncapped.
83. The provisional view expressed in our consultation paper was that the present demarcation of employment tribunals’ and civil courts’ jurisdictions over the Blacklists Regulations should not be changed. We also sought views on the discrepancy between the compensation cap for breach of the Blacklists Regulations and the compensation cap for unfair dismissal.
84. Four fifths of consultees agreed that the current demarcation should remain unchanged, and we conclude that our provisional view should be maintained.
85. In relation to the level of the cap, a substantial majority supported increasing the cap on awards in employment tribunals or removing it entirely. Most of this group favoured parity with compensatory awards for unfair dismissal. We explore the intention behind the cap, and remind ourselves that in general it is not appropriate for the tribunals’ shared jurisdiction to exceed that of the courts. We conclude that the policy of linking the cap to the unfair

¹⁰ This is because the effect of section 17 of the National Minimum Wage Act 1998 is to amend employees’ and workers’ contracts to provide a minimum rate per hour.

dismissal cap has some logic, in that a wrongful refusal of employment has some affinities with an unfair dismissal.

86. We recommend accordingly that the maximum award applying to employment tribunal claims brought under the Blacklists Regulations is increased to, and maintained at, at least the level of the maximum award for unfair dismissal under section 124(1ZA) of the ERA 1996.

Qualifications bodies

87. A “qualifications body” is an authority or body which confers qualifications (and/or other forms of authorisation and certification) needed in certain trades or professions. Under section 53 of the Equality Act 2010, such a body must not discriminate against a person.
88. Employment tribunals’ jurisdiction to hear such claims is conferred by the Equality Act 2010. That jurisdiction is residual in that the existence of a statutory appeal body serves to oust employment tribunals’ jurisdiction to hear discrimination claims arising from the qualifications body’s decision. The availability of judicial review in relation to a qualifications body’s decisions and actions does not deprive employment tribunals of jurisdiction.¹¹
89. We noted in the consultation paper that the availability of judicial review (in the High Court) as well as a discrimination claim (in an employment tribunal) may lead to complexity. We noted that some stakeholders had questioned whether it is sensible for the claimant to be able to challenge the same decision in two different forums, one after another, and asked for consultees’ views on whether this should remain the law. We also asked whether any other changes should be made to the jurisdictions.
90. The majority of consultees thought that the current position in law should stay the same, emphasising that the two claims are distinct types of legal challenge to which different legal tests apply and different remedies are available. We agree with this reasoning and propose no change to the current position. In terms of other changes, we also reject a suggestion that employment tribunals should have jurisdiction even where there is a statutory right of appeal.

Police misconduct panels

91. Employment tribunals have jurisdiction to hear discrimination claims brought under the Equality Act 2010 arising from the decisions of police misconduct panels, despite the existence of an appeal to the Police Appeals Tribunal (“PAT”).¹²
92. In our consultation paper, we sought consultees’ views on whether a police officer who is aggrieved by the decision of a police misconduct panel should be able to challenge that decision by way of statutory appeal to the PAT and separately be able to complain that the decision is discriminatory in an employment tribunal. A majority of consultees favoured retaining the dual route, arguing that the claims involve the application of different legal tests with different legal remedies. We agree, and do not recommend any change in this area.

¹¹ *Michalak v General Medical Council* [2017] UKSC 71, [2018] IRLR 60.

¹² *P v Metropolitan Police Commissioner* [2017] UKSC 65, [2018] 1 All ER 1011.

CHAPTER 8: RESTRICTIONS ON ORDERS WHICH MAY BE MADE IN EMPLOYMENT TRIBUNALS

93. We consider three restrictions upon the types of orders which may be made in employment tribunals; these relate to the granting of injunctions, apportioning liability between respondents in discrimination claims, and enforcing tribunals' awards.

Injunctions

94. Employment tribunals do not have the power to grant injunctions and it is very rare for a tribunal to have such a power. Any proposal to give employment tribunals jurisdiction to grant injunctions (for example to prevent industrial action) would require primary legislation in a highly contentious area. The provisional view expressed in our consultation paper was that employment tribunals should not be given such powers.
95. A majority of consultees agreed with our view. Those in favour of giving the tribunal the power to grant injunctions emphasised the benefits this would give to employees seeking to enforce their rights. We recognise that this will be the case in some circumstances, but we do not think that the considerable additional training and extensive administrative machinery required to bring this about would be justified. For this reason, we maintain our original view.

Contribution and apportionment in discrimination claims

96. More than one legal person may be responsible for the same act of unlawful discrimination under the Equality Act 2010. The most obvious example of this is where the alleged discrimination was carried out by a fellow employee of the claimant (or "individual discriminator") in the course of their employment. If so, a claimant may choose between:
- (1) just claiming against the employer, who will often be liable for the discriminatory acts of employees;
 - (2) proceeding against the individual discriminator(s) but not the employer; or
 - (3) proceeding against the employer and one or more individual discriminators. Compensation will normally be awarded on the basis that they are "jointly and severally" liable to the claimant for 100% of the award. This means that the whole of the liability may be enforced against any one of them.
97. Where a claim is brought in the High Court or county court against two defendants (A and B) who are jointly liable for the same damage, and the successful claimant chooses to recover damages only against A, A may claim a fair contribution from B under the Civil Liability (Contribution) Act 1978. However the 1978 Act does not apply to employment tribunals, so if an employment discrimination claim is brought against an employer and one or more individual discriminators, these respondents may not recover contribution from one another in the employment tribunal. They would also not be able to seek contribution from one another by using the 1978 Act in the civil courts.

Apportioning liability

98. Until recently, employment tribunals had developed a practice of ordering that liability be "apportioned" between employer and individual respondents in discrimination cases so that each was separately liable to the claimant for part of the compensation. This was not the same as a contribution order under the 1978 Act because the claimant could only claim the apportioned part from each respondent; but as between the respondents, it had the same effect.

99. However, the EAT has now held that that an employment tribunal does not have the power to apportion liability unless the harm caused by the two respondents is genuinely different and hence divisible. If each respondent has contributed to the same harm, the tribunal must make an award against them on a joint and several basis and may not apportion liability.
100. We sought views on whether tribunals should be given the power to apportion liability between respondents in discrimination cases so that each is separately liable for part of the compensation. A majority of consultees thought that employment tribunals should have such a power. Some of those opposed emphasised the greater protection offered to claimants by joint and several liability. Others thought that there were public policy reasons to ensure that employers were not able to shift liability for discrimination to others, as this would blunt the incentive for them to take steps to eliminate unlawful discrimination.

Contribution between respondents

101. We also sought views on whether employment tribunals should be given the power to make orders for contribution between respondents and, if so, whether this right should precisely mirror the position in the civil courts or be modified to suit the employment context. Our provisional view was that employment tribunals should be given the power to make orders for contribution between respondents. We recognised, however, that difficult policy issues might arise in cases where an employer seeks contribution against an individual employee whose conduct had rendered the employer liable for discrimination.
102. About three quarters of consultees agreed with our view, for reasons similar to those supporting a power of apportionment. Those opposing again emphasised the primary responsibility of the employer to guard against discrimination, and some thought that such a power would be complex and difficult to apply in practice. It was also suggested that the availability of the power should depend on the relationship between the respondents, permitting contribution where discriminators are at arm's length, but not between an employer and another employee ("the individual discriminator").
103. We are persuaded that the current system needs improvement, and that employment tribunals ought to be able to allocate responsibility between respondents. As between a power of apportionment, a power to award contribution or a choice between the two, we have concluded that a power to award contribution is the best remedy. This would also bring the position into line with that of discrimination claims in the civil courts.
104. We also asked for views as to criteria which should be used to determine whether an order for contribution should be granted. The majority who responded to this part of our consultation question thought that the test of "just and equitable" contribution should be adopted. This is the same test as found in section 2(1) of the Civil Liability (Contribution) Act 1978. We agree. In reaching this view, our starting position is that discrimination claims in employment and non-employment contexts ought to be treated in the same way. Adopting the test in the 1978 Act would minimise the differences between the two types of claim.
105. We went on to ask consultees whether the right to claim contribution should precisely mirror the position at common law, or whether it should be modified to suit the employment context. About two thirds thought that the position should be the same. Some of those who thought it should be modified were of the view that claims should only be permitted against a co-respondent who was already a party to the proceedings. Some thought that a contribution claim should not be possible by an employer against an employee, the "individual

discriminator”, for whose conduct the employer is vicariously liable under section 109 of the Equality Act 2010. They pointed to the policy reasons which seek to reinforce the employer’s responsibility to prevent discrimination in the workplace, and the “all reasonable steps” defence open to the employer which, if successful, eliminates all liability.

106. We consider these views in the light of the conclusions we have already reached. In relation to claims against non-parties, we conclude that it would be anomalous if the ability of a respondent to claim contribution from someone else who was also liable for the injury to the claimant depended on the claimant’s choice of respondents.
107. In relation to claims against individual discriminators for whose action the employer is vicariously liable, we accept that employers will only be vicariously liable at all if they have failed to take all reasonable steps to prevent the individual discriminator from discriminating. The possible options are excluding such contribution claims entirely or leaving it to tribunals to decide on a case by case basis whether it is just and equitable to require the individual discriminator to contribute to the employer’s liability. We consider that the better course is not to exclude such contributions claims entirely, for two reasons. The first is that we cannot rule out the possibility of cases where, despite the employer’s failure to take all reasonable steps to prevent the discrimination, the individual discriminator ought in justice and equity to make some contribution to the employer’s liability. The second is that we consider that individual discriminators should be entitled to claim contribution from employers who have failed to take all reasonable steps to prevent them from discriminating; a further anomaly would be created if individual discriminators were entitled to seek contribution from their employers, but not the other way round.
108. In sum, we recommend that respondents to employment-related discrimination claims should be able to claim contribution from others who are jointly and severally liable with them for the discrimination. The test to be applied should mirror that in section 2(1) of the Civil Liability (Contribution) Act 1978.

Enforcement

109. Although employment tribunals have many of the characteristics of civil courts, including the power to determine disputes between citizen and citizen and to make financial awards, they have no power to enforce their own judgments. If the respondent (usually an employer) does not pay a sum ordered to be paid to an employee or worker, the employee or worker has to register the decision in the county court. ACAS-conciliated settlements may be enforced in the same way.
110. In our consultation paper, we asked whether employment tribunals should be given the jurisdiction to enforce their own orders for the payment of money and, if so, what powers should be available to them. About four fifths of consultees thought that employment tribunals should be given this jurisdiction. In doing so, many pointed to current statistics showing that just over a third of employment tribunal awards remain unpaid. Some also emphasised the additional burden imposed on claimants by the need to go to the county court to enforce orders. Those opposed to this change highlighted the complex machinery needed to enforce orders, and the difficulties of establishing this in employment tribunals. Some suggested that a preferable approach would be to focus on improving enforcement mechanisms in the civil courts and their interface with employment tribunals.

111. While recognising that the enforcement of tribunal awards is not satisfactory, and the extent of the difficulties faced by claimants, we conclude that giving enforcement powers to employment tribunals is not the solution. Duplicating the civil court infrastructure would be expensive, and significant additional training would be required. We think that more could be done to streamline the interface between employment tribunals and the county courts' enforcement mechanisms. We suggest that a fast track for enforcement could be created which allows the claimant to remain within the employment tribunal structure when seeking enforcement. We also conclude that more needs to be done to inform claimants of how awards can be enforced.
112. In addition, the Department for Business, Energy and Industrial Strategy ("BEIS") penalty scheme, under which the government fines and publicly names respondents for late payments, could be extended. We think that it should be triggered automatically by the issuing of a tribunal award, that a notice should be sent with the judgment to inform the employer of the deadline by which a financial penalty for non-payment will become payable, and that a copy of the judgment should be sent to the BEIS enforcement team. We recommend that the Government should investigate the possibility of extending the scheme in these ways.

CHAPTER 9: THE EMPLOYMENT APPEAL TRIBUNAL'S JURISDICTION

113. The EAT has a limited jurisdiction to hear appeals on points of law from certain decisions of the Central Arbitration Committee ("CAC") and the Certification Officer, and a very rarely invoked original jurisdiction, which is essentially to impose penalties on organisations which fail to comply with certain workforce democracy or employee participation requirements derived from EU law.
114. Our consultation paper considered one current limitation of the EAT's jurisdiction in respect of the CAC, in relation to trade union recognition or derecognition disputes, and its original jurisdiction in respect of penalties.

Trade union recognition or derecognition disputes

115. The EAT does not have jurisdiction to hear appeals from the CAC's decisions regarding trade union recognition and derecognition; the CAC's decisions in such cases may be challenged in an application for judicial review in the Administrative Court. In the consultation paper, we sought views on whether the EAT should be given jurisdiction to hear appeals from the CAC in these disputes. Our provisional view was that if the EAT was given appellate jurisdiction in this area, it should be confined to issues of law.
116. Just over half of consultees thought that the EAT should be given such jurisdiction. The main argument in favour was that the EAT has the necessary expertise, that the exclusion of trade union recognition and derecognition disputes was anomalous, and that judicial review was costly and operated as a deterrent to bringing a challenge. Those against the extension of jurisdiction emphasised that the CAC has a unique role and unique procedures in this area, particularly in its duty to facilitate agreement between the parties, and has specialist knowledge which is not shared by the EAT. Increased judicial intervention was considered to be undesirable.
117. Almost all consultees agreed that, if the EAT jurisdiction were to be extended, appeals should be limited to questions of law. They expressed the view that there was very little

difference between an appeal on a question of law and judicial review. We agree, and in any event it would be straightforward for the EAT to be directed by statute to apply the principles of judicial review. We conclude that the real question is whether it is better for the judicial review function to be retained by the Administrative Court.

118. While we recognise the benefits of EAT specialism in this area, we consider on balance that transfer of the jurisdiction would not be justified. The creation of the jurisdiction in the EAT would require primary legislation. EAT judiciary who are not familiar with judicial reviews would need training. Above all, we note how rare these challenges have been: on average there has been one every 18 months since the CAC began to decide these applications.

The EAT's original jurisdiction

119. The EAT has original jurisdiction to hear applications for penalty notices following determinations by the CAC that an organisation has failed to comply with the employee-participation provisions of five EU-derived regulations. In each case the penalty is payable to the Secretary of State. Very few cases are brought under this jurisdiction. Our provisional view was that the EAT's current jurisdiction to hear original applications in these limited areas should not be altered or removed. All respondents to this question agreed. Where reasons were given, the general view was that there was no need for change. Accordingly, we maintain our view.

CHAPTER 10: AN EMPLOYMENT AND EQUALITIES LIST?

120. At present, an employment-related claim may be issued either in the Queen's Bench Division or the Chancery Division of the High Court and, in theory, come before any one of their permanent judges or the large number of deputy High Court Judges, who may or may not have appropriate experience.
121. Our consultation paper noted the recommendation made to the Civil Courts Structure Review that a new "Employment and Equalities Court" be created with non-exclusive but unlimited jurisdiction in employment and discrimination cases, including claims of discrimination in the supply of goods and services. We observed that the establishment of a new court would require significant primary legislation and that we did not view it as a practicable proposal at present. We therefore considered what other measures might be available to ensure that cases concerning employment and/or discrimination law in the High Court are heard by judges with relevant specialist experience.
122. Some formal solutions would require secondary legislation and risk being inflexible. A more informal method of encouraging allocation to judges with appropriate experience is for a specialist list of cases to be created within a Division of the High Court as an administrative measure. Our provisional view was that an informal specialist "employment" or "employment and equalities" list should be established. This list could be supervised by a High Court Judge who is a recognised specialist in the field and judges nominated for inclusion on the list by the President of the Queen's Bench Division.
123. About 70% of respondents supported our proposal, with many highlighting the practical benefits of an informal list. A further group gave a range of views as to the subject matter that should come within its remit. There was broad support for the types of claim we had listed in the consultation paper, although a limited divergence of opinion as to whether discrimination appeals from county courts in non-employment cases should be included. Consultees also proposed including equal pay claims and "employee competition" cases.

124. We maintain our view that the specialist list should be established, and recommend that the subject matter within the remit of the new list should be:
- (1) employees' claims for wrongful dismissal or other breach of contract where the sum claimed exceeds the limit on tribunals' jurisdiction under the Extension of Jurisdiction Order;
 - (2) employees' equal pay claims;
 - (3) employers' claims to enforce covenants in restraint of trade;
 - (4) employers' claims for breach of confidence or misuse of trade secrets;
 - (5) employers' claims against trade unions for injunctions to prevent industrial action or for damages following what is alleged to be unlawful industrial action;
 - (6) claims arising in "employee competition" cases such as team moves and garden leave;
 - (7) appeals from county courts in claims for discrimination in goods and services; and
 - (8) appeals from county courts in employment-related cases.
125. We asked finally for views on what name should be given to the list. Just under half of respondents were in favour to "Employment and Equalities List". A much smaller number preferred "Employment List". There were a number of different suggestions made by individual respondents which reflected their particular view of what the list should contain and which were not repeated by other consultees. We conclude, in light of the remit for the list which we have recommended, and the views expressed by consultees, that the best name for the list is the "Employment and Equalities List".

CHAPTER 11: RECOMMENDATIONS

Recommendation 1.

126. We recommend that the time limit for bringing a claim should be six months for all employment tribunal claims.

Paragraph 2.57

Recommendation 2.

127. We recommend that in types of claim where the time limit for bringing the claim can at present be extended where it was "not reasonably practicable" to bring the complaint in time, employment tribunals should have discretion to extend the time limit where they consider it just and equitable to do so.

Paragraph 2.95

Recommendation 3.

128. Employment judges with experience of hearing discrimination claims should be deployed to sit in the county court to hear non-employment discrimination claims.

Paragraph 3.101

Recommendation 4.

129. We recommend that employment tribunals should have jurisdiction to determine claims by an employee and counterclaims by an employer for damages for breach of, or a sum due under, a contract of or connected with employment notwithstanding that the employee's employment has not terminated.

Paragraph 4.18

Recommendation 5.

130. We recommend that employment tribunals should have jurisdiction to determine claims by an employee and counterclaims by an employer for damages for breach of, or a sum due under, a contract of or connected with employment notwithstanding that the alleged liability arises after employment has terminated.

Paragraph 4.27

Recommendation 6.

131. We recommend that the current £25,000 limit on employment tribunals' contractual jurisdiction in respect of claims by employees be increased to £100,000 and thereafter maintained at parity with the financial limit upon bringing contractual claims in the county court.

Paragraph 4.42

Recommendation 7.

132. We recommend that the same financial limit on employment tribunals' contractual jurisdiction should apply to claims by employees and counterclaims by employers.

Paragraph 4.48

Recommendation 8.

133. We recommend that:

- (1) the time limit for claims for breach of contract brought in an employment tribunal during the subsistence of an employee's employment should be six months from the date of the alleged breach of contract;
- (2) the time limit for claims for breach of contract brought in an employment tribunal after the termination of an employee's employment should be six months from the termination, but
- (3) where the alleged liability arose after the termination of the employment, the time limit should be six months from the date upon which the alleged liability arose.

Paragraph 4.66

Recommendation 9.

134. We recommend that employment tribunals should have jurisdiction to determine claims and counterclaims for damages or sums due in respect of the provision by an employer of living accommodation.

Paragraph 4.90

Recommendation 10.

135. We recommend that it be made clear that employment tribunals have the same jurisdiction to determine breach of contract claims in relation to workers within the meaning of section 230(3)(b) of the Employment Rights Act 1996 as they have in relation to employees within the meaning of section 230(1) of the Act.

Paragraph 4.113

Recommendation 11.

136. We recommend that the extensions of the employment tribunals' jurisdiction that we have recommended in Recommendations 4, 5, 6, 7 and 8 should apply equally to workers within the meaning of section 230(3)(b) of the Employment Rights Act 1996.

Paragraph 4.118

Recommendation 12.

137. Employment tribunals should have the power to interpret or construe terms in contracts of employment in order to exercise their jurisdiction under Part I of the Employment Rights Act 1996.

Paragraph 5.11

Recommendation 13.

138. Employment tribunals should have power to hear claims of unlawful deductions from wages that relate to unquantified sums. This power is sufficiently conferred by Recommendation 4.

Paragraph 5.25

Recommendation 14.

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

Paragraph 5.32

Recommendation 15.

140. We recommend that employment tribunals should have jurisdiction to apply set-off principles in an unauthorised deduction from wages claim under Part II of the Employment Rights Act 1996, limited to established liabilities for quantified amounts and to extinguishing the Part II claim.

Paragraph 5.50

Recommendation 16.

141. We recommend that section 128(2) of the Equality Act 2010 be amended to provide a power to transfer equal pay cases to employment tribunals, with a presumption in favour of transfer.

Paragraph 6.56

Recommendation 17.

142. We recommend that employment tribunal judges be given a discretionary power to extend the limitation period for equal pay claims where it is just and equitable to do so.

Paragraph 6.59

Recommendation 18.

143. Employment tribunals should have jurisdiction to hear complaints by workers that they are working hours in excess of the maximum working time limits contained in regulations 4(1), 5A(1), 6(1) and 6A of the Working Time Regulations 1998.

Paragraph 7.33

Recommendation 19.

144. We recommend that the maximum award applying to employment tribunal claims brought under the Employment Relations Act 1999 (Blacklists) Regulations 2010 is at least increased to, and maintained at, the level of the maximum award for unfair dismissal under section 124(1ZA) of the Employment Rights Act 1996.

Paragraph 7.80

Recommendation 20.

145. We recommend that respondents to employment-related discrimination claims should be able to claim contribution from others who are jointly and severally liable with them for the discrimination. The test to be applied should mirror that in section 2(1) of the Civil Liability (Contribution) Act 1978.

Paragraph 8.46

Recommendation 21.

146. We recommend that the Government should investigate the possibility of:

- (1) creating a fast track for enforcement which allows the claimant to remain within the employment tribunal structure when seeking enforcement; and
- (2) extending the BEIS employment tribunal penalty scheme so that it is triggered automatically by the issuing of a tribunal award.

We recommend that consideration be given to:

- (1) sending a notice with the judgment to inform an employer that if it does not pay the award by a set date, it will be subject to a financial penalty;
- (2) sending a copy of the judgment to the BEIS enforcement team; and
- (3) improving the information sent to successful claimants on how to enforce awards.

Paragraph 8.78 and 8.79

Recommendation 22.

147. An informal specialist list should be established to deal with employment and discrimination-related claims and appeals within the Queen's Bench Division of the High Court.

Paragraph 10.35

Recommendation 23.

148. The subject matter within the remit of the new List should be:

- (1) employees' claims for wrongful dismissal or other breach of contract where the sum claimed exceeds the limit on tribunals' jurisdiction under the Extension of Jurisdiction Order;
- (2) employees' equal pay claims;
- (3) employers' claims to enforce covenants in restraint of trade;
- (4) employers' claims for breach of confidence or misuse of trade secrets;
- (5) employers' claims against trade unions for injunctions to prevent industrial action or for damages following what is alleged to be unlawful industrial action;
- (6) claims arising in "employee competition" cases such as team moves and garden leave;
- (7) appeals from the county court in claims for discrimination in goods and services; and
- (8) appeals from the county court in employment-related cases.

Paragraph 10.36

