

Title: Employment Law Hearings Structures IA No: LAWCOM0066 RPC Reference No: Lead department or agency: Law Commission Other departments or agencies:	Impact Assessment (IA)			
	Date: 16/03/2020			
	Stage: Development/Options			
	Source of intervention: Domestic			
	Type of measure: Primary legislation			
	Contact for enquiries: Henni.Ouahes@lawcommission.gov.uk			
Summary: Intervention and Options				RPC Opinion: RPC Opinion Status

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out	Business Impact Target Status
£m	£m	£m	Not in scope	Qualifying provision

What is the problem under consideration? Why is government intervention necessary?

Employment tribunals, first created as “industrial tribunals” in 1964, were initially intended to deal with appeals by employers against industrial training levies. From that small beginning their jurisdiction has been greatly extended. Unlike the civil courts, tribunals have no inherent jurisdiction. This means that a tribunal has no authority to hear any matter which comes before it unless specifically provided by statute. It has long been observed that this creates anomalies and boundary issues, particularly in relation to the demarcation of jurisdiction in the fields of discrimination and employment law. This can cause delay and prevent cases being determined by the judges best equipped to handle them. In some types of proceedings, related claims have to be brought in two different courts. Government intervention is required to address these issues and ensure that judicial expertise is properly utilised and that undue delays and unnecessary complexities are avoided.

What are the policy objectives and the intended effects?

The policy objectives are to (without a major re-structuring of the employment tribunals system):

- (1) remove unnecessary anomalies, discrepancies and issues which arise from the demarcation of jurisdictions in the fields of discrimination and employment law;
- (2) increase efficiency by ensuring that employment and discrimination cases are, where possible, determined by the judges who are best equipped to hear them; and
- (3) review overall whether the demarcation of jurisdictions and the restrictions on employment tribunals’ jurisdiction are fit-for-purpose and in the interests of access to justice.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0: Do Nothing

Option 1: Reforms to employment tribunal jurisdiction to improve efficiency and access to justice by, for example:

- (1) Increasing time limits for bringing employment tribunal claims; introducing a just and equitable test to extend time; introducing flexible deployment of judges to permit employment judges to hear discrimination claims in the civil courts; creating a specialist list in the High Court;
- (2) Increasing the jurisdiction of employment tribunals to hear claims for damages for breach of contract by employees and counterclaims by employers during the currency of a contract of employment and to hear claims in relation to alleged liability arising after employment has terminated; increasing the financial limits on contractual claims; extension of jurisdiction to hear breach of contract claims from workers as well as employees.

Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope?		Micro Yes/No	Small Yes/No	Medium Yes/No	Large Yes/No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description: Reforms to employment tribunal jurisdiction to improve efficiency and access to justice.

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

Transitional costs: Training of legal practitioners, expected to be negligible as can be accommodated in CPD. Establishment of new fast track enforcement mechanism.
 On-going costs: Increased employment tribunal case numbers as jurisdiction expands. Cost of maintenance of new fast track enforcement mechanism. Increased tribunal administrative costs. Loss of fee income in county courts as cases divert to tribunals.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

Transitional benefits: None identified

Other key non-monetised benefits by 'main affected groups'

On-going benefits: Decreased number of county court cases frees up resources; Improved decision-making as expertise is flexibly deployed; Enhanced access to justice as employment tribunals perceived as more user-friendly and proceedings can be pursued in a single forum; Improved clearance rates as clearance rates in employment tribunals are better than in county courts; Improved enforcement of awards; Health benefits arising from enhanced access to justice and improved clearance rates; Increased pay out on tribunal awards

Key assumptions/sensitivities/risks	Discount rate	3.5%
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Assumption of some spare capacity (including in terms of staffing and physical location) in employment tribunals. Risk that tribunals will not be able to accommodate changes, which may increase backlogs.
 Assumption that the increase in numbers generated by our changes will be moderate, and hence the risk of build-up of backlog is low. There are no figures available to allow us to estimate how many extra cases will be generated. Assumption that current increases in tribunal caseload and backlogs will stabilise once the impact of the removal of fees has fed through the system.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

Evidence Base

1. Introduction

Terminology

The subject matter of this reform means that the use of technical terms is sometimes unavoidable. These terms are well understood by the courts and the legal professions. To avoid loss of precision we use some of these technical terms in this Impact Assessment. We explain below the meaning of these terms.

“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 a client 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.

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.

Glossary

“ACAS” – the Advisory, Conciliation and Arbitration Service, an independent body offering conciliation services to parties and prospective parties to employment tribunal claims; it also provides guidance on workplace issues to individuals and employers.

“BEIS” – Department for Business, Energy and Industrial Strategy

“EAT” – Employment Appeal Tribunal.

“Employee” – for the purposes of Employment Rights Act 1996, an individual who has entered into or works (or, where the employment has ceased, worked) under a contract of employment.

“Employment judge” – judge appointed to sit in employment tribunals.

“Jurisdiction” – a court or tribunal’s power to make legal decisions and judgments. The extent of jurisdiction (i.e. the cases a court or tribunal can hear) may be limited by, for example, geographic area, causes of action, and the limitation period in which a claim may be brought.

“Setting off” – where a defendant brings a debt it is owed by a claimant into account to reduce or extinguish damages it is liable to pay to the claimant.

“Statute” – a written law passed by a legislative body.

“Worker” – section 230(3) of the Employment Rights Act 1996 provides that in that Act this term means an individual working either (a) under a contract of employment, or (b) under a contract for the personal performance of work or services, with certain exceptions. People in the second category are often referred to as Limb (b) workers. In this report we use the term “worker” to refer to this second category, that is to say a non-employee.

Background

Employment tribunals (before 1998 called “industrial tribunals”) were created in 1964, initially to deal with appeals by employers against industrial training levies. From that very small beginning their jurisdiction has been greatly extended. Notable additions were claims for statutory redundancy payments (in 1965),

for unfair dismissal (introduced by the Industrial Relations Act 1971), and for various types of discrimination in employment, now brought together in the Equality Act 2010.

Employment tribunals have deliberately distinct characteristics from civil courts. Among these are:

(1) an employee or worker is almost invariably the claimant (there are some very minor exceptions);

(2) the employment tribunal is generally a no-costs jurisdiction;

(3) while it is no longer universal for tribunals to consist of one judge and two lay members, the three-member composition of the tribunal is still a feature of discrimination and equal pay claims;

(4) the proceedings tend to be less formal than in the civil courts;

(5) there is a right for any party to have lay representation; and

(6) the employment tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.

In addition, there is no fee to bring a claim in an employment tribunal.¹

Unlike the civil courts, employment tribunals have no inherent jurisdiction; their entire jurisdiction is provided by statute. It has long been observed that this creates anomalies. For example, until 1994 employment tribunals had no jurisdiction to consider claims for breach of contract even when arising on a dismissal. A dismissed employee could, therefore, bring claims both for unfair dismissal and wrongful dismissal, but the first could only be brought in the tribunal and the second only in the county court or High Court.

In two cases in 1990 this distinction was deplored. In *Barlow v Whittle*,² Wood J, President of the Employment Appeal Tribunal (“EAT”), said “at present an applicant finds it difficult to understand why he cannot recover all that is due to him in the one court. It must tend to bring the law into disrepute”. In *Delaney v Staples*,³ Lord Donaldson of Lynton, Master of the Rolls, described what Wood J had said as “unanswerable” and asked “can nothing really be done?” This plea for action resulted in the Extension of Jurisdiction Order,⁴ but many anomalies remained.

In 2001, the Leggatt report⁵ found that employment tribunals and EAT had “demonstrably acquired the status and authority for them to be the initial, as well as the principal, forum for the resolution of all employment and discrimination disputes”. They found there to be a good case for extending their jurisdiction, but noted that a “completely impermeable division” would not be possible. For this reason, flexible arrangements for transfer would be necessary.

The Civil Courts Structure Review led by Lord Justice (now Lord) Briggs from 2015 to 2016 noted that there is what he described as an “awkward area” of shared and exclusive jurisdiction in the fields of discrimination and employment law, which has generated boundary issues between the courts and the

¹ In July 2017, the Supreme Court held that the legislation which had previously required employees to pay up to £1,200 to make a claim in an employment tribunal was unlawful: *R (UNISON) v Lord Chancellor* [2017] UKSC 51. There are no longer any fees to be paid to lodge a case at an employment tribunal or to attend a final hearing.

² [1990] ICR 270.

³ Decided in December 1990 but reported at [1991] 2 QB 47.

⁴ Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623.

⁵ Sir Andrew Leggatt, *Tribunals for Users – One System, One Service: Report of the Review of Tribunals by Sir Andrew Leggatt* (2001), paras 26 to 28.

employment tribunal system.⁶ He considered that these issues, which are well known amongst employment law experts, judges and practitioners, can cause delay and prevent cases being determined by the judges best equipped to handle them.

Some solutions considered by the Briggs review were far-reaching, for example that the EAT 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.⁷ Either of these proposals would involve significant and possibly contentious primary legislation in a period when Parliamentary time is under almost unprecedented pressure.

The Law Commission’s 13th Programme of Law Reform included a review of employment law hearing structures.⁸ The terms of reference were to review the jurisdictions of employment tribunals, the EAT and the civil courts in employment and discrimination matters and make recommendations for their reform. The project did not extend to major re-structuring of the employment tribunal system or to reforms requiring significant primary legislation.

Work on the project began in April 2018. The consultation paper was published in September 2018⁹ and the consultation period closed on 31 January 2019. We received 72 responses to the consultation paper.

2. Problem under consideration

This project explores solutions to the issues arising from the demarcation of shared and exclusive jurisdiction over employment and discrimination matters without a major re-structuring of the employment tribunals system or, where possible, the passing of primary legislation. The main issues under consideration are:

1. the disparity between the way in which the same or similar types of cases are dealt with in the civil courts as compared to employment tribunals;
2. the restrictions on the jurisdiction of employment tribunals preventing the most expert and qualified judges hearing cases and giving rise to unnecessary inconsistency, complexity and costs; and
3. the divergence of the time limits and the tests for extension applicable in employment tribunals as compared to the civil courts.

We consider each of these issues in more depth below.

Disparity between the way in which the same or similar types of cases are dealt with in the civil courts as compared to employment tribunals

There are a number of areas of substantive employment law which can give rise both to claims in employment tribunals and causes of action in the civil courts. Shared jurisdiction can give rise to a number of issues, particularly when there is a large disparity between how cases are dealt with in the civil courts as compared to employment tribunals. One area of shared jurisdiction we consider is equal pay law. Some problems with the civil courts jurisdiction in this area are that:

1. some employment tribunals will have more experience and expertise of equal pay law and of handling equal pay claims than civil courts;
2. where the claim is specifically one of “equal value”, tribunals have dedicated rules of procedure and access to independent experts sourced through ACAS;

⁶ 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), 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).

⁷ 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), para 3.62.

⁸ Thirteenth Programme of Law Reform (2017) Law Commission No 377.

⁹ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239.

3. although the civil courts already have the power to transfer questions relating to equal pay cases to employment tribunals, this process may cause delay and increase legal costs;
4. many stakeholders dislike employment disputes needing to be litigated partly in employment tribunals and partly in the general courts and resolving the totality of a dispute in one forum may lead to reduced costs for the parties and for Her Majesty's Courts and Tribunals Service ("HMCTS");
5. some litigants in equal pay claims may perceive a tactical advantage in exploiting boundary issues to run up costs; and
6. for reasons to do with judicial expertise, fees, procedure and costs, many claimants prefer to issue equal pay claims in the employment tribunal but the six-month time limit for doing so may prove too short for some claimants. In contrast, the time limit in the civil courts is six years.

Other areas over which both the civil courts and employment tribunals have jurisdiction which we consider in the report are: the non-discrimination rule in occupational pension schemes; transfer of undertakings; working time; national minimum wage; trade union blacklists; qualifications bodies and police misconduct panels.

Restrictions on the jurisdiction of employment tribunals preventing the most expert and qualified judges hearing cases and giving rise to unnecessary inconsistency, complexity and costs

The jurisdiction of employment tribunals is arguably, in certain areas, artificially, or unhelpfully, constrained and this can prevent cases from being heard by the most expert and qualified judges in the most cost and time-efficient way. These restrictions can give rise to problems in a range of areas, some of which are outlined below.

Employment judges with expertise in discrimination restricted from hearing non-employment discrimination claims

Employment tribunals do not have jurisdiction to hear a variety of discrimination claims arising in contexts outside the workplace. The Equality Act 2010 gives the county court exclusive jurisdiction to hear discrimination claims arising in a range of non-employment contexts.¹⁰ There is therefore a relatively hard boundary between the civil courts and employment tribunals. It is important to note, however, that 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.

The allocation of discrimination claims between employment tribunals and county courts could be criticised on two grounds. The first concerns expertise. Most circuit and district judges are generalists who, due to their professional and judicial backgrounds and training, may not have had an opportunity to develop the expertise in discrimination law that employment judges have. The second, related point is that employment judges have developed practices to manage and determine discrimination claims, and that there is no concomitant standard practice in the county court. There is a risk that inconsistent judicial approaches may develop between employment judges and county court judges, and that county courts' case law may diverge from settled interpretations of the law by employment tribunals and the EAT.

It is desirable that, so far as practicable, discrimination disputes can be determined efficiently (both in terms of time and costs) by specialist judges. Given that discrimination claims are generally accepted to be part of the "stock-in-trade" of employment judges, this points to the latter being able to hear at least some suitable non-employment discrimination claims. Employment judges have significant training in and exposure to discrimination law, and are often current or former practising employment lawyers with significant experience of discrimination law concepts. By contrast, a circuit or district judge may have little or no experience of discrimination law. While there is a presumption that circuit or district judges hearing discrimination claims in the county court will sit with one or more assessors who have relevant

¹⁰ Equality Act 2010, s 114(1). The contexts are: the provision of services; the exercise of public functions; the disposal and management of premises (covering, for instance, those who provide premises for rent, and also the sale of property); membership associations (such as sports clubs or organisations established to promote the interests of their members); and education.

experience (and are often employment tribunal lay members), it is arguably preferable and less costly for the judge to have specialist knowledge and experience.¹¹

Claimants unable to resolve their whole dispute (particularly when it is a contractual claim) in one forum

A claim that a term of an employment contract has been breached may be brought in the civil courts. Legislation has extended contractual jurisdiction to employment tribunals in limited ways. These limitations are temporal (dependent on when the claim arises, i.e. on termination of employment as opposed to during employment), financial (the amount of damages which can be awarded), substantive (the subject-matter of a claim, for example, personal injury), and standing (who can advance a claim). A widely held view among stakeholders is that some (but not all) of these restrictions on employment tribunals' contractual jurisdiction are undesirable because they cause confusion among litigants and potential litigants and may lead to some disputes being litigated partly in employment tribunals and partly in the civil courts.

Employment tribunals' lack of power to issue injunctions and enforce their own judgments

The orders and remedies which employment tribunals may grant claimants are limited to those specifically set out by legislation. Accordingly, employment tribunals do not have at their disposal a variety of discretionary remedies available to civil courts, notably injunctions.

The jurisdiction of the civil courts to grant injunctions is conferred by primary legislation.¹² Employment tribunals do not have the power to grant injunctions and it is very rare for tribunals to have such a power.¹³ An employment tribunal does have the power to make an interim relief order in respect of certain dismissals which are alleged to be automatically unfair,¹⁴ for example where it is alleged that the reason or principal reason for the dismissal was the claimant's participation in trade union activities. But such interim relief orders, which are rarely made, are not injunctions and do not carry the sanction of contempt of court.

In addition, it may be considered anomalous that 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. Accordingly, if an employment tribunal orders an employer to pay a sum to an employee or worker but the employer demurs, the employee or worker will have to go to the civil courts to try to force the employer to pay. The Department of Business, Innovation and Skills' estimated in their 2013 Payment of Tribunal Awards Study that 35% of claimants who obtain awards from an employment tribunal do not receive payment.¹⁵

Divergence of the time limits and the tests for extension applicable in employment tribunals as compared to the civil courts

For the majority of claims to employment tribunals, the primary time limit for bringing a claim is three months from the alleged unlawful conduct (or, where applicable, from the "effective date of termination" of employment) and a strict test for extending the time limit applies. Less commonly, the time limit for bringing a claim is six months and/or a more liberal "just and equitable" test for extension applies. By contrast with the time limits applying to employment tribunal claims, the time limit for bringing a contractual claim in the civil courts is six years.¹⁶

The generally short time limit for bringing an employment tribunal claim and the relatively strict test in many cases for extending the time limit derive from the original concept of tribunals as a forum for the

¹¹ Equality Act 2010, s 114(7) refers to the County Courts Act 1984, s 63, which in turn empowers a judge to "summon to his assistance one or more persons of skill and experience in the matter to which the proceedings relate". We have been informed that it is common for only one assessor to sit.

¹² S 37 of the Senior Courts Act 1981 (for the High Court) and s 38 of the County Courts Act 1984 (for the county court).

¹³ See also Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, para 4.48(2).

¹⁴ This remedy is only available if the employment tribunal decides, at an interim hearing, that the claimant is likely to win at the final hearing (Employment Rights Act 1996, s 128; Trade Union and Labour Relations (Consolidation) Act 1992, s 161).

¹⁵ Payment of Tribunal Awards (2013), Department for Business Innovation and Skills, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf (last accessed 03 July 2019).

¹⁶ Limitation Act 1980, s 5.

speedy and informal resolution of employment disputes. This concept remains valid to some extent. But many employment tribunal cases are far more complex (and of much higher value) than such cases were in the 1970s.

Given the increased complexity of claims and the circumstances which give rise to a claim, it may be considered that three months is an inadequate length of time for an employee to bring a claim and the application of a strict test for extension is unjust. This may particularly be the case where, for example, an employee is dismissed for automatically unfair reasons relating to pregnancy or maternity, and the time limit for claims of sexual harassment. Moreover, the inconsistent time limits and tests for extension create complexity within the system which can be confusing for the parties to a claim.

3. Rationale for intervention

The conventional economic approach to Government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are failures in existing Government interventions (e.g. waste generated by misdirected rules). In both cases the proposed intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and re-distributional reasons (e.g. to reallocate goods and services to the more deprived groups in society).

The current system introduces inefficiencies through the inflexible deployment of judicial expertise. As a consequence, hearings risk being longer and/or not producing optimal results. Lengthier hearings are particularly problematic as there are existing court backlogs which further delay the timely delivery of judgments. Resources are misdirected, imposing adverse cost implications on the public purse.

To the extent that tribunal hearings represent a more accessible venue for applicants than court proceedings, there may be equity concerns. Applicants may be unwilling to pursue a case. In addition, where claimants are faced with the need to bring proceedings in different forums, this is an additional burden which impedes access to justice. The issue is of unfairness.

4. Policy objective

The project aims (without a major re-structuring of the employment tribunals system) to:

- (1) remove unnecessary anomalies, discrepancies and issues which arise from the demarcation of jurisdictions in the fields of discrimination and employment law;
- (2) increase efficiency by ensuring that employment and discrimination cases are, where possible, determined by the judges which are best equipped to hear them; and
- (3) review overall whether the demarcation of jurisdictions and the restrictions on employment tribunals' jurisdiction are fit-for-purpose and accessible.

5. Scale and Scope

Legally binding decisions regarding employment law disputes are handled by three main bodies – employment tribunals, civil courts and the Employment Appeal Tribunal. The bulk of the work of the EAT is the consideration of onward appeals from employment tribunal decisions. Our report does not consider this aspect of the EAT's work. We look only at its jurisdiction to hear appeals from certain decisions of the Central Arbitration Commission, and a rarely invoked original jurisdiction in relation to certain workforce democracy requirements derived from EU law. We do not make recommendations in respect of either of these functions. For this reason, the scale and scope of this impact assessment is confined to civil courts and employment tribunals.

Current distinctions between the civil courts and employment tribunals

Our recommendations principally concern the demarcation of jurisdictions in employment and discrimination cases between civil courts and employment tribunals. The recommended changes are

likely to lead to an increase in the number of cases brought in employment tribunals, and a reduction in the number of employment cases brought in the civil courts. We consider the principal distinctions between the civil courts and employment tribunals below.

Fees:

Currently there are no fees to bring a claim in employment tribunals. In the civil courts, the level of fee depends on the value of the claim, and the type of claim. For example, to issue a claim for a sum of money between £1000 and £1500, the fee is currently £115. For a claim between £5000 and £10,000, it is £455. For claims between £5000 and £200,000, the fee is 5% of the value of the claim. The fee for a hearing of a claim between £1000 and 1500 is £115. The fee for the enforcement of an employment tribunal judgment is £44.¹⁷ Those with income and/or savings below certain levels may apply in the civil courts for help with fees.

Cost recovery:

Employment tribunals are generally a no-costs jurisdiction. In the civil courts, the small claims track, which currently deals with money claims of £10,000 or less, has a relatively neutral costs regime. In higher value claims, it is possible for a winning party to recover their legal costs.

Time limits:

Most claims in employment tribunals currently have a time limit of three months. Some types of claim, such as equal pay and redundancy pay, have a six-month limit. In the civil courts, the time limit for breach of contract claims, which include equal pay claims, is six years from the date of the breach. Non-employment discrimination claims under the Equality Act 2010 usually have a six-month limitation period.

Procedural Rules:

Different procedural rules apply in civil courts and employment tribunals. In general, procedures in employment tribunals are less formal and more flexible, and the jurisdiction is considered to be more “user-friendly”.

Legal aid:

Legal aid is available in civil courts in relation to discrimination cases. It is not available at all in employment tribunals.

Early Conciliation procedure:

Early conciliation conducted by ACAS is mandatory for most types of claim in employment tribunals.

This next section of the report is divided into two main sub-sections examining the type / number and cost of disputes settled by the employment tribunal and those settled by the civil courts.

Employment Tribunal

Claims to employment tribunals can be divided into categories as follows:

- single claims made by sole employee/worker relating to alleged breaches of employment rights;
- multiple claims where two or more people bring proceedings arising out of the same facts, usually against a common employer, and where the lead multiple claim is listed for hearing; and
- both single and multiple claims may involve one or more jurisdictional complaints.

¹⁷ See HMCTS, Civil and Family Court Fees EX50, applicable from March 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789201/ex50-eng.pdf (last accessed 16 December 2019).

Number of claims

The volume of claims received / disposed of by employment tribunals reveals a distinct divide marked by the introduction of user fees in July 2013. Following the successful challenge to the Supreme Court in *R (UNISON) v Lord Chancellor*, fees were abolished in July 2017 and a fee refund scheme was set up in October 2017. See Table 1 below for receipts/disposals of single/multiple claims from 2010/11 to 2018/19, covering the period both before, during and after fees.

Table 1: Employment Tribunals: Total Number of receipts / Disposals, 2010/11 – 2018/19

Financial Year	Claims Received			Claims Disposed		
	Single claims	Multiple Claims	Total Claims	Single claims	Multiple Claims	Total Claims
2010/11	60,591	157,505	218,096	62,887	59,905	122,792
2011/12	59,247	127,084	186,331	59,402	51,367	110,769
2012/13	54,704	136,837	191,541	56,011	51,409	107,420
2013/14	34,219	71,584	105,803	42,165	106,222	148,387
2014/15	16,420	44,888	61,308	18,839	293,934	312,773
2015/16	16,935	66,096	83,031	15,342	34,187	49,529
2016/17	17,005	71,471	88,476	14,755	30,422	45,177
2017/18	27,916	81,782	109,698	17,221	21,450	38,671
2018/19	34,974	86,101	121,075	24,200	19,394	43,594

Source: ET1 and ET2 accessed at Tables – Gov uk¹⁸

Multiple claims account for a significantly greater share of total claims, averaging just over 70% of total claims throughout the period within a fairly narrow range of between 68 to 81%.

Receipts and disposals

Fees were introduced in quarter 2 of 2013/14. Annual claims for that year [single and multiple] recorded a significant decline from the previous three-year average [just under 199,000 claims] to just over 105,000. Thereafter, following the suspension of fees in Quarter 2 of 2017/18, there was a marked increase in annual receipts to just over 120,000 claims by 2018/19. Multiple claims [receipts] account for a significantly greater share of total claims, averaging just over 70% throughout the period.

Claims disposed reveal a declining trend prior to the implementation of user fees. In the period after fees were imposed, there was a fall in numbers to match the decline in receipts.¹⁹ Generally proportions disposed, relative to receipts, have varied within a fairly narrow range between 51-

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¹⁹ 2014/15 appears to be somewhat of an anomaly as it was overtaken by claims around the working time directive – a spill-over effect may also be apparent in the previous year.

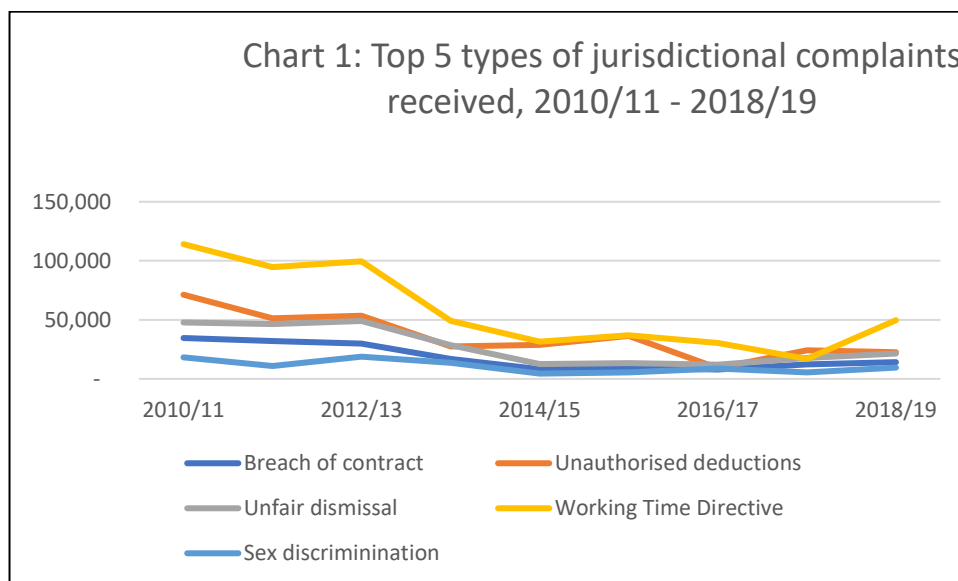
60%. Whilst some cases may not be completed within the year they were initiated, it is possible to gain insight on the potential for backlogs based on the volume of cases disposed relative to receipts. In the most recent two years, this proportion has fallen to about 35%.

Types of claims

The types of claims fall within 22 categories covering:

- Age discrimination
- Breach of contract
- Disability discrimination
- Equal pay
- National minimum wage
- Part time workers regulation
- Redundancy pay
- Religion or belief discrimination
- Sex discrimination
- Sexual orientation discrimination
- Suffer a detriment / Unfair dismissal – pregnancy
- Transfer of an undertaking- failure to inform and consult
- Unauthorised deductions
- Unfair dismissal
- Working Time Directive
- Written pay statement
- Written statement of reasons for dismissal
- Written statement of terms and conditions
- Others

On average, between 1.6 to 2.1 jurisdictional complaints per claim were received during the nine-year period from 2010/11. The top five claim categories are unauthorised deductions, unfair dismissal, breach of contract, working time directive and sex discrimination. See Chart 1 below.



Source: ET1²⁰

Timeliness

The time taken to complete an employment dispute varies significantly depending on whether it is a single or multiple claim and the complaint type. In general, over the two-year period 2017/18 to 2018/19, single claim cases averaged about 23 weeks to clear whilst multiple claims averaged about 123 weeks. However, multiple claims recorded a significant decrease from 180 weeks in 2017/18 to 65 weeks the following year. See Table 2 below for a more detailed breakdown across complaint type for the first quarter 2019/2020. Indications are that clearance times with respect to both single and multiple claims are rising relative to the previous two-year average.

²⁰https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=2ahUKEwjzpdSTzrznAhW1RxUIHdSLC5gQFjADegQIAhAB&url=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F644444%2Ftribunal-and-GRC-main-tables-1718q1.xlsx&usg=AOvVaw3l2sN-i4ru2eUnWM63TXDk

Table 2: Percentage of clearances that took place April to June 2019, by age of case at clearance

	Single Claims [median]	Multiple Claims [median]
Equal pay	48 weeks or less	324 weeks or less
Disability Discrimination	34 weeks or less	41 weeks or less
Race Discrimination	36 weeks or less	51 weeks or less
Sex Discrimination	35 weeks or less	273 weeks or less
Religious Belief	35 weeks or less	27 weeks or less
Sexual orientation	35 weeks or less	22 weeks or less
Age Discrimination	31 weeks or less	48 weeks or less
Working Time Regulations	21 weeks or less	188 weeks or less
Insolvency and Redundancy	21 weeks or less	21 weeks or less
Unfair Dismissal	29 weeks or less	35 weeks or less
Breach of Contract	25 weeks or less	36 weeks or less
Unauthorised Deductions	21 weeks or less	172 weeks or less
Others	28 weeks or less	35 weeks or less

Source: T3 Percentage of Clearances

Cost of a case

In 2019 the average cost per sitting day for employment tribunals was £1,820.²¹

Civil Courts

Claims to the civil courts which fall within the scope of our report are:

- Non-employment discrimination claims under the Equality Act 2010 (for example in the context of education or the provision of services);
- Breach of contract claims in the context of employment, both those for which there is concurrent jurisdiction with employment tribunals under the Extension of Jurisdiction Order 1994, and those over which the civil courts have exclusive jurisdiction, for example because the value of the claim is over £25,000, because the claim arises before the

²¹ Data provided by HMCTS. Figure relates to staffing costs only.

termination of employment or the breach occurs after the date of termination, or because the claim is for unliquidated damages;

- Areas of shared or concurrent jurisdiction with employment tribunals:
 - Equal pay
 - Discrimination in occupational pension schemes
 - Certain TUPE (Transfer of Undertakings (Protection of Employees) Regulations) claims
 - Working Time Regulations claims
 - National Minimum Wage Act 1998 claims
 - Claims for breach of regulation 3 of the Blacklists Regulations 2010
 - Some claims arising from the decisions of qualifications bodies and police misconduct panels
- Claims in relation to workplace personal injury
- Common law claims in tort or contract which relate to references
- Applications to the county court for the enforcement of an award made by an employment tribunal.

Cost of a case

The average cost of a case in the county courts is £3700.²²

6. Main Stakeholders

- HM Courts and Tribunals Service
- Employment Appeal Tribunal
- Legal Aid Agency
- Legal practitioners within the employment law sphere [including Judges / Solicitors / Barristers]
- Members of the public
- All businesses that employ staff
- Trade Unions

7. Description of options considered

This impact assessment compares Option 1 against the do nothing [option 0]:

Option 0 – Do nothing

Option 1 –Reforms to employment tribunal jurisdiction to improve efficiency and access to justice.

²² Estimate provided by HMCTS. There are no case numbers available from the county courts which break down cases into the types of claim which fall within the scope of our report. We are not for this reason able to provide figures for the county court which compare with those given above for employment tribunals.

The recommendations outlined below are not a complete list. The focus here is on those recommendations we believe to be of particular public interest or likely to have key costs or benefits.

- (1) Increase in time limit for bringing a claim in employment tribunals to six months for all claims, with the introduction of a “just and equitable” test for extensions of time beyond this **[Recommendations 1 and 2]**;
- (2) Deployment of experienced employment judges to sit in the county court to hear non-employment discrimination claims, with the creation of a specialist list in the Queen’s Bench Division of the High Court to hear employment and discrimination-related claims **[Recommendations 3 and 22]**;
- (3) Increase in the jurisdiction of employment tribunals to hear claims for damages for breach of contract by employees and counterclaims by employers during the currency of a contract of employment, and to hear claims and counterclaims in relation to alleged liability arising after employment has terminated; Increase in the limit on contractual claims from £25,000 to £100,000; Extension of jurisdiction to hear breach of contract claims from workers as well as employees **[Recommendations 4, 5, 6, 10 and 11]**;
- (4) Increase in the jurisdiction of employment tribunals to interpret terms in contracts of employment when exercising jurisdiction under Part I of the Employment Rights Act 1996, to determine whether the correct amount has been deducted from an employee/worker’s wages in relation to an “excepted deduction”, to apply set off principles to such claims, to a limited extent, and to hear complaints of breaches of maximum working limits under the Working Time Regulations 1998 **[Recommendations 12, 15 and 18]**;
- (5) Amendment of the Equality Act 2010 to provide a power to transfer equal pay cases to employment tribunals, with a presumption in favour of transfer **[Recommendation 16]**;
- (6) Changes to permit respondents in employment-related discrimination claims to claim contribution from others who are jointly and severally liable with them for the discrimination **[Recommendation 20]**;
- (7) Improvements to enforcement mechanisms to streamline the interface between employment tribunals and civil court enforcement mechanisms in order to ease the burden on claimants and increase payment of awards; enhancement of the BEIS employment tribunal penalty scheme by triggering it automatically on the issue of a tribunal award **[Recommendation 21]**.

8. Public Consultation Exercise

The responses to the consultation were positive, with many consultees broadly supportive of our provisional proposals. This includes our proposals regarding the demarcation of the jurisdictions of employment tribunals and the civil courts over various employment and discrimination matters.

A substantial majority of consultees expressed support for an extension of the time limit to bring a claim to an employment tribunal to six months, and the replacement of the strict “not reasonably practicable” test for extending the time limit for the more liberal “just and equitable” test.

There was also support for the introduction of mechanisms designed to enable discrimination and employment matters to be heard by judges with relevant expertise and experience. These mechanisms were: the flexible deployment of judges and an Employment and Equalities informal list in the Queen's Bench Division of the High Court.

Consultees gave almost unanimous support to our proposal to permit employment tribunals to have jurisdiction to hear breach of contract claims notwithstanding that the contract of employment has not yet terminated: this is known as "stand and sue". Those strongly in favour included the President of Employment Tribunals, regional employment judges, EAT judges and the Council of Employment Judges.

One issue on which consultees were more divided was whether employers should be able to rely on the doctrine of set off in employment tribunals in response to a claim for an unauthorised deduction of wages claim. We conclude that employment tribunals should have jurisdiction to apply set off principles in this context, but that this should be limited to established liabilities for quantified amounts and to extinguishing the claim. We consider this to be in line with the principle that justice should wherever possible be done in the same forum.

Consultees emphasised the extent to which employment tribunal awards remain unpaid and viewed this as undermining the integrity of tribunals and of justice itself. To remedy this, a majority favoured giving employment tribunals the enforcement powers currently available in civil courts. We conclude that duplicating the civil court infrastructure would be too complex and expensive, but recommend a series of measures to improve the interface between employment tribunals and enforcement mechanisms, including a fast track to enforcement accessible directly from employment tribunals. In addition, we ask the Government to consider enhancing the BEIS penalty scheme.

9. Monetised and non-monetised costs and benefits

This Impact Assessment identifies both monetised and non-monetised impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the "do nothing" option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are important aspects that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or produces changes in equity and fairness, either positive or negative.

When calculating the net present value ("NPV") for the impact assessment we have used a time frame of ten years, with the present being year 0. We have assumed that the transitional costs and benefits occur in year 0, the current year, unless otherwise indicated. Ongoing costs and benefits accrue in years 1 to 10. We have used a discount rate of 3.5%, in accordance with HM Treasury guidance. Unless stated all figures are in 2018/19 prices, and have been uprated using the GDP deflator to adjust for inflation.

Option 0: Do nothing [base case]

Because the "do nothing" option is compared against itself, its costs and benefits are necessarily zero, as is its NPV.²³

Option 1: Minor reforms to Employment Law Hearing Structures

Reforms to employment tribunal jurisdiction to improve efficiency and access to justice.

²³

The NPV shows the total net value of a project over a specific time period. The value of the costs and benefits in an NPV are adjusted to account for inflation and the fact that we generally value benefits that are provided now more than we value the same benefits provided in the future.

Costs

Transitional Costs

1. Training

We anticipate that training on the application of new rules and procedure can be incorporated within the time allocated to continuing development for all affected parties to include the judiciary, legal practitioners and administrative staff. The changing landscape is part of the day-to-day routine and those that operate within the area are required to keep abreast of developments.

2. New fast track enforcement mechanism

Recommendations for a fast track enforcement mechanism seek to reduce the high proportion of tribunal awards which remain unpaid. We are unable to determine the cost of this mechanism. There are two recommended options. The more expensive option requires building a new fast track for enforcement between employment tribunals and the county courts, whilst the less expensive option requires expanding the existing BEIS penalty scheme. Both require careful evaluation to identify the option best suited to business needs including budgetary allocation.

On-going Costs

1. Increased administrative demands

We anticipate negligible additional administrative resources will be required as new procedures reflect the tribunals' expanded jurisdiction. However, to the extent that this cannot be accommodated through existing spare capacity, there may be additional cost implications. Flexible deployment, for example, may require dedicated personnel to monitor and facilitate timely roll-out.

2. Maintenance of enforcement mechanism

The selected fast track enforcement option will incur annual administrative costs.

3. Increased demand for employment tribunals

A number of our recommendations are likely to increase the number of employment tribunal hearings. In particular, this is likely to occur as a result of recommendations to increase the time limit to bring a claim to six months and the increased jurisdiction of tribunals to hear

contractual claims brought before the contract of employment has ended. It is not possible to estimate what this increase may be.

By way of illustrative example of the cost impact, consider the following scenario for every 1% increase in the number of annual hearings:

The estimated cost per sitting day in the employment tribunal is £1820.²⁴

Provisional estimates of the annual average number of tribunal hearings is 26,400.²⁵

The total cost is just over £480,000 for every 1% increase in hearing numbers. This figure assumes there is sufficient spare capacity to accommodate further hearings using the existing infrastructure.

4. Loss of fee income following re-direction from civil courts to employment tribunals

Currently cases in the county courts attract a fee dependent on the amount claimed. There is no breakdown of cases from the county courts by type / claim value available so we are not able to give a breakdown of what the total sum lost might be.

5. Increased demand for ACAS conciliation

As the number of applications made to employment tribunals increase, there is the knock-on effect of an increase in the number of cases going for mediation. This will in turn give rise to increased costs for ACAS in providing conciliation services.

Benefits

Transitional benefits

None identified

On-going benefits²⁶

1. Decreased demand for employment-related cases in the civil courts

The increase in jurisdiction of employment tribunals potentially moves cases from the High Court/county courts and frees space to deal with the backlog of cases. Whilst both the county courts and tribunals are experiencing case backlogs, those created within the tribunals are a more recent occurrence following the cessation of tribunal fees.

Additionally, the cost per sitting day in the county courts is estimated to be £3,700.²⁷ By contrast the tribunal cost per sitting day is £1820. County courts are more than twice as expensive as tribunals and have the added disadvantage of considerable backlogs.

2. Improved decision-making

The deployment of experienced employment judges on discrimination cases in county courts improves decision-making and potentially reduces the time taken on cases. Similarly, a power to transfer equal pay cases to employment tribunals, with a presumption in favour of transfer, would provide enhanced expertise.

3. Enhanced access to justice

The increased role for employment tribunals potentially improves access to justice as applicants are less daunted by the relative informality of the tribunal in comparison with civil

²⁴ Provided by HMCTS. The cost refers solely to staffing requirements.

²⁵ The provisional estimate is provided by HMCTS and is subject to further change. The latest available figures for 2019/20 suggest there were just over 25,000 employment tribunal hearings at the end of December 2019. Indications are that the current average is likely to be an underestimate.

²⁶ The absence of data means that we are unable to monetise potential efficiency savings in the areas we have identified.

²⁷ The unit cost is provided by HMCTS and refers to the average cost of all cases. No information is available on the timings or types of cases.

court procedures. Reforms to jurisdiction boundaries will also reduce the need to bring proceedings in two forums. Reforms to the enforcement process reduce the burden on claimants in employment tribunals by removing the need to go themselves to the county court to enforce an award and by making more of the enforcement process automatic.

4. Improved clearance rates on employment cases

On average the clearance rate of single claims within employment tribunals was 31 weeks for the first quarter of 2019/20 [23 weeks for the previous two-year period]. By contrast the clearance rate within county courts was 37 weeks for small claim trials and 59 weeks for fast and multi-track trials.

5. Health benefits

Employment grievances are well-documented to be high stress events. To the extent that cases can be dealt with more expeditiously, this brings with it improved health benefits.

6. Improved cost efficiency extends to applicants

Court delays have cost implications that extend beyond the court system to fall on applicants as well. A more efficient system reduces the number of re-scheduled appointments and the commensurate loss in productivity through absenteeism.

7. Reduced demand for court space as tribunals have more flexible provision

Civil courts face a permanent backlog of cases whereas tribunals have a temporary backlog built up during the introduction of fees. With the gradual disposal of cases, the backlog is shrinking and providing increased capacity.

8. Increased pay-out on employment tribunal awards

With the implementation of a fast track enforcement mechanism and/or an enhanced BEIS scheme, there is the potential for more awards to be paid, and for these to be paid more quickly. This has a deterrent effect on would-be transgressors and ensures quicker resolution through compensation to claimants.

9. Wider labour market benefits

Robust workforce protection provides for a happier workforce and concomitantly a more productive workforce.