



**Law
Commission**
Reforming the law

Employment Law Hearing Structures: Report

HC308

Law Com No 390



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Employment Law Hearing Structures: Report

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

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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.

AWR – The Agency Workers Regulations 2010 (SI 2010 No. 93).

BEIS – Department for Business, Energy and Industrial Strategy.

Blacklist Regulations – The Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010 No. 493).

CAC – the Central Arbitration Committee, an independent non-departmental body with responsibilities regarding:

- (1) statutory recognition and de-recognition of trade unions by employers for collective bargaining purposes;
- (2) disclosure of information for collective bargaining; and
- (3) applications and complaints related to various employee information and consultation arrangements, and employee-involvement provisions, derived from EU law.

Certification Officer – an official appointed under the Trade Union and Labour Relations (Consolidation) Act 1992 to deal with various issues relating to trade unions, including the certification of their independence.

Civil Courts Structure Review – a review of the structure of the civil courts commissioned by the Lord Chief Justice and the Master of the Rolls in July 2015 and led by Lord Justice (now Lord) Briggs.

Civil Procedure Rules - the rules of civil procedure used by the Court of Appeal, High Court and county courts in civil cases in England and Wales.

EAT – the Employment Appeal Tribunal.

Employee – for the purposes of the 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 – a judge appointed to sit in employment tribunals.

ERA – Employment Rights Act 1996.

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

GEO – the Government Equalities Office, the unit of British government with lead responsibility for gender equality within the UK Government, together with a responsibility to provide advice on all other forms of equality to other UK Government departments.

HMRC – Her Majesty’s Revenue and Customs.

ICE Regulations – The Information and Consultation of Employees Regulations 2004 (SI 2004 No. 3426).

Jurisdiction – a court or tribunal’s power to make legal decisions and judgments. The extent of jurisdiction (ie 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.

Lay members – for certain types of hearing, members of employment tribunals selected from two panels, one comprising representatives of employers and the other representatives of employees.

Occupational pension scheme – a pension scheme set up by an employer to provide retirement (and often death) benefits and for its employees. Occupational pension schemes are “trust based”, meaning that they have a trustee or trustees who hold the scheme’s assets and use them to provide benefits for the members.

“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.

Taylor Review – *Good Work: The Taylor Review of Modern Working Practices*, July 2017.

TICE Regulations – The Transnational Information and Consultation of Employees Regulations 1999 (SI 1999 No. 3323).

TUPE Regulations – The Transfer of Undertakings, Protection of Employment Regulations 2006 (SI 2006 No. 246).

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 only to this second category, that is to say a non-employee.

Working Time Regulations – The Working Time Regulations 1998 (SI 1998 No. 1833).

Employment Law Hearing Structures: Report

To the Right Honourable Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice

Chapter 1: Introduction

1.1 The Law Commission's 13th Programme of Law Reform included a review of employment law hearing structures. On 26 September 2018 we published a consultation paper.¹ The consultation period closed on 31 January 2019 and we received responses from 72 consultees. This report outlines the responses to the provisional proposals we made and the questions we asked, and sets out our recommendations for reform.

ISSUES UNDER REVIEW

1.2 Employment tribunals, which until 1998 were 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.

1.3 Employment tribunals have different characteristics from civil courts and were intended to do so. They are:

- (1) the employee or worker is almost invariably the claimant (there are some very minor exceptions relating to declaratory relief but they do not detract from the general principle);
- (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.

1.4 These are in our view important characteristics of employment tribunals which should be preserved.

1.5 Employment tribunals, being created by statute, have no inherent jurisdiction. It has long been observed that this creates anomalies. The jurisdiction of employment

¹ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239.

tribunals may be considered as artificially, or unhelpfully, constrained in certain contexts, and there are a number of discrepancies between the extent of the jurisdiction of the civil courts on the one hand, and employment tribunals on the other, in relation to the same or similar types of claim. Moreover, the demarcation of the civil courts' and employment tribunals' jurisdictions over employment and discrimination matters can mean that claimants cannot resolve their whole dispute in one forum, and their claims are not necessarily heard by a judge with relevant expertise and experience.

- 1.6 The Civil Courts Structure Review led by Lord Justice (now Lord) Briggs from 2015 to 2016 noted 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 employment tribunal system.² Some of the suggestions made to the Briggs review were far-reaching, including the creation of a new “Employment and Equalities Court” with non-exclusive but unlimited jurisdiction in employment and discrimination cases, including claims of discrimination in the provision of goods and services.³ This would require significant and possibly contentious primary legislation. The Government has indicated that it has no plans to re-structure the employment tribunal system. Therefore, the focus of this project from the outset has been on how to improve the existing system and remove any illogical anomalies arising from the demarcation of the jurisdictions of employment tribunals and the civil courts, without a major re-structuring of the employment tribunal system.

TERMS OF REFERENCE

- 1.7 The project's terms of reference were:

To review the jurisdictions of the employment tribunal, Employment Appeal Tribunal and the civil courts in employment and discrimination matters and make recommendations for their reform.

To consider in particular issues raised by:

- (1) the shared jurisdiction between civil courts and tribunals in relation to certain employment and discrimination matters, including equal pay;
- (2) the restrictions on the employment tribunal's existing jurisdiction;
- (3) the exclusive jurisdiction of the county court in certain types of discrimination claim; and

² 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 9 January 2020) 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 9 January 2020).

³ 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 9 January 2020) at para 3.62.

(4) the handling of employment disputes in the civil courts.

The project will not consider major re-structuring of the employment tribunals system.

DEVOLUTION AND TERRITORIAL EXTENT

- 1.8 The Law Commission for England and Wales may make recommendations for changing the law in England and Wales. Under the Government of Wales Act the subject matter of this report is reserved to the UK Government,⁴ who through the Ministry of Justice have asked us to conduct this review. The recommendations in this report do not, however, extend to Scotland or Northern Ireland. We have nevertheless had the benefit of responses from outside England and Wales; the President of the Industrial and Fair Employment Tribunal (Northern Ireland) endorsed the response to us of the President of Employment Tribunals (England and Wales) and the Regional Employment Judges, and the President and Vice-President of Employment Tribunals (Scotland) agreed with the response of the Council of Employment Judges, while adding some observations on the extent of devolution.
- 1.9 Our consultation paper stated that the subject matter of the paper was due to be devolved to the Scottish Parliament and Government under the Scotland Act 1998, as amended by the Scotland Act 2016.⁵ These amendments followed the Smith Commission's proposal in 2014 that powers over the management and operation of reserved tribunals should be devolved to the Scottish Parliament.⁶ While employment rights and industrial relations would continue to be reserved matters outside the competence of the Scottish Parliament,⁷ paragraph 2A of Part 3 of Schedule 5 to the Scotland Act 1998 makes the functions of employment tribunals and the Employment Appeal Tribunal ("EAT") in Scottish cases subject to a "qualified transfer". This means that an Order in Council must be made in order for the transfer of responsibility to the Scottish Parliament to take effect.
- 1.10 A draft order was the subject of a consultation by the Scottish Government in 2016. It proposed that Scottish employment cases would be dealt with by the First Tier Tribunal for Scotland. The draft Order was subjected to criticism from, among others, the Employment Lawyers Association ("ELA") and the Law Society of Scotland. In a statement on 4 December 2017 the Scottish Government indicated that it awaits a further draft Order from the UK Government in respect of employment tribunals and a first draft Order covering the EAT.
- 1.11 Three consultees – the Council of Employment Judges,⁸ Employment Tribunals (Scotland) and ELA – told us that what we had said in the consultation paper did not

⁴ Government of Wales Act 2006, sch 7A, pt 1, para 9.

⁵ Scotland Act 1998, sch 5, pt III, para 2A; Scotland Act 2016, s 39.

⁶ The Smith Commission, "Report of the Smith Commission for further devolution of powers to the Scottish Parliament" (27 November 2014), available at https://webarchive.nationalarchives.gov.uk/20151202171029/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf (last visited 17 February 2020), para 63.

⁷ Scotland Act 1998, sch 5, pt II, para H1.

⁸ The Council's response included an appendix written by its Scottish Sub-committee.

fully capture the nuances of devolution in this context. In essence their view was that, although it is unclear when the transfer of functions will take place and precisely what will be devolved,⁹ some issues within the scope of this project will remain reserved to the UK Parliament. There is an expectation that the management and operation of tribunals will be devolved, but substantive employment rights and duties will remain reserved. For example, Employment Tribunals (Scotland) said:

We are unaware of any suggestion that control over provisions governing qualification for access to substantive rights, such as time limits for bringing claims and the test to be applied to extend time etc., or provisions relating to compensation limits for breach of those rights, will devolve ... [and] a significant number of the proposals in this consultation paper appear to relate to legislative provisions which, as we understand it, will remain reserved following devolution of functions.

- 1.12 We are grateful for these comments and have endeavoured above to describe the devolutionary picture in more detail. We accept that there is, at present, only an expectation that an Order in Council will in due course transfer, to Scottish Tribunals, the operation of management of Scottish cases currently determined by the Employment Tribunals (Scotland). In many respects, the recommendations in this report also touch upon matters which will remain reserved under Heading H1, as they deal with employment rights.

The need for further consideration of implications for Scotland

- 1.13 Aside from the question of devolved competence, consultees made the point that some of the proposals in our consultation, while they were confined to the law in England and Wales, should be considered in a manner that took into account whether similar measures should be considered for Scotland. For example, ELA commented:

Some of the issues canvassed by the Law Commission are plainly only directly relevant to [England and Wales (“E & W”)], in particular the organisation of employment business in the High Court and the question whether employment judges should preside over non-employment discrimination cases in the County Court. However even in these and other such areas (such as the question of enforcement of monetary orders, where the system in Scotland is different to that in E & W) have implications for Scotland, and if changes result for E & W there will inevitably be pressure for Scotland to follow

- 1.14 The Council of Employment Judges, Employment Tribunals (Scotland) and ELA emphasised the importance of maintaining consistency in relation to employment tribunal claims north and south of the Scottish border. The Council of Employment Judges and ELA identified specific changes discussed in the consultation paper which, if introduced in England and Wales, would have significant implications if they

⁹ For reserved matters, see Scotland Act 1998, sch 5, pt I, Head H, para H1. For devolved matters, see Scotland Act 1998, sch 5, pt III, para 2A.

were not also introduced in Scotland.¹⁰ The risks included encouraging “forum shopping” and a situation in which “litigants in Scotland ... have less beneficial rights than those in England & Wales in exactly the same type of employment dispute”.¹¹

1.15 We can see the case for maintaining consistency in relation to certain aspects of employment tribunals in both England and Wales and Scotland. It is for that reason that we were keen to receive input, both before and during consultation, from experts in Scotland, and we have endeavoured to reflect their views in this report. If our recommendations, which are necessarily limited to the law in England and Wales, are accepted by the UK Government, it will be necessary for it to consider the extent to which the same or similar measures should be taken as respects Scotland (and, for that matter, Northern Ireland). It will equally be a matter for the Scottish Government to consider similar measures in relation to employment tribunal claims in Scotland if these have been the subject of a qualified transfer.

OUTLINE OF THIS REPORT

1.16 Our objectives for this project were, 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 and ensure consistency of approach 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 in the interests of access to justice.

1.17 Unlike our consultation paper, this report does not seek to set out the law in detail. Instead, each chapter provides an outline of the particular area of jurisdiction at issue, and then considers the response to our questions and provisional proposals, before making recommendations for reform.

¹⁰ These were: extension of time limits for claims (e.g. of unfair dismissal) to six months; changing the test for extending time for late claims from ‘not reasonably practicable’ to ‘just and equitable’; giving tribunals jurisdiction in contract claims arising whilst the employee is still in employment; increasing or removing the £25,000 limit on tribunals’ contractual jurisdiction; extension of tribunals’ contractual jurisdiction to workers; conferring jurisdiction to construe contracts in claims under s11 Employment Rights Act 1996 (“ERA”); conferring jurisdiction to hear claims for unquantified amounts under Part II of the ERA; and giving tribunals power to enforce monetary awards.

¹¹ Employment Tribunals (Scotland). In a joint letter from the President of Employment Tribunals (Scotland) and the President of Employment Tribunals (England and Wales), following sight of a draft of this report, the Presidents emphasised the close alignment between the two systems and the importance of retaining it, adding that “we co-operate closely on a range of matters, not least because we are conscious that many of our system users operate on a cross-border basis. Changes made in England and Wales almost inevitably impact on the Scottish jurisdiction and vice-versa”. They expected employment judges on both sides of the border to be very supportive of the Commission’s recommendations. We hope that, if the recommendations in this report are accepted, it will be possible to implement them simultaneously in England, Wales and Scotland.

- 1.18 Chapter 2 looks at the areas of exclusive jurisdiction of employment tribunals. Consultees agreed with our provisional proposal that the exclusive jurisdiction should remain as it is, as the special characteristics of employment tribunals make them a uniquely appropriate and effective forum for resolving these types of claims. A substantial majority of consultees agreed that time limits for bringing such claims should be extended, and that changes should be made to the test for extending time limits. We conclude that the time limit for bringing all types of employment tribunal claims should be six months. We also conclude that, where currently time can be extended where it was “not reasonably practicable” to bring the claim in time, employment tribunals should have the discretion to extend time limits where they consider it “just and equitable” to do so.
- 1.19 Chapter 3 looks at restrictions on the jurisdiction of employment tribunals in discrimination claims. We consider the alternative approaches canvassed in our consultation paper to the softening of the relatively hard boundary between the civil courts and employment tribunals. Consultees were fairly evenly split over the option of formally sharing jurisdiction between them. The majority of responses revealed doubts about how concurrent jurisdiction could work in practice. We have concluded that the case for concurrent jurisdiction has not been made out. Consultees were more positive about the option of “cross-ticketing” or flexible deployment of judges. We conclude that employment judges with experience of hearing discrimination claims should be deployed to sit in the county court to hear discrimination cases.
- 1.20 Chapter 4 reviews the areas in which the jurisdiction of employment tribunals is restricted by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. In relation to temporal restrictions, we conclude, with the support of a large majority of consultees, that an employee should be able to bring a breach of contract claim in an employment tribunal while still employed, and also where liability arises after employment has ended. We also conclude that the time limit for breach of contract claims should be aligned with the unfair dismissal limit, which we have already recommended be increased to six months. This should run from the date of the breach in the case of a claim brought during employment, from the termination of employment in the case of a liability outstanding at that point, and from the date on which liability falls due in the case of liabilities arising after the termination of employment.
- 1.21 In relation to financial restrictions, we recommend an increase of the current £25,000 limit on contractual jurisdiction in employment tribunals to £100,000, and that the same limit should apply to employers’ counterclaims. In relation to substantive restrictions, we recommend that the exclusion of jurisdiction relating to living accommodation should be removed.
- 1.22 With the support of almost all consultees, we recommend that express provision should be made for employment tribunals to have jurisdiction to determine breach of contract claims relating to workers other than employees, but not in relation to genuinely self-employed independent contractors.
- 1.23 Finally in this area, we conclude that employment tribunals should continue not to have jurisdiction to hear claims originated by employers, and that employers should not be able to counterclaim against employees and workers who have brought purely statutory claims against them.

- 1.24 Chapter 5 looks at other types of restriction on the jurisdiction of employment tribunals. We recommend that tribunals should be given the power to interpret or construe terms in contracts of employment in order to exercise their jurisdiction under Part I of the ERA 1996. We recommend that employment tribunals should have power to hear claims of unlawful deductions from wages that relate to unquantified sums pursuant to the expanded contractual jurisdiction that we recommend employment tribunals should have under the Extension of Jurisdiction Order.
- 1.25 In relation to excepted deductions under section 14 of the 1996 Act, we recommend that employment tribunals should have jurisdiction to determine whether the employer deducted the correct amount of money from the employee's or worker's wages. Consultees' support for these conclusions was almost unanimous.
- 1.26 Views were mixed on whether employers should be able to rely on the doctrine of set off where an employee brings an unauthorised deduction from wages claim under Part II of the ERA 1996. A majority favoured applying set off principles, while those who opposed the measure argued that this would undermine the policy underlying the Wages Act legislation. We conclude that there should be a limited power to apply set off principles in these claims, confined to established liabilities for quantified amounts, and to extinguishing (but not exceeding) the Part II claim.
- 1.27 We do not recommend any changes to jurisdiction in relation to workplace personal injuries and employer's references.
- 1.28 Chapter 6 considers the concurrent jurisdiction of the civil courts and employment tribunals over claims for equal pay and equality of terms. We look at views as to whether there should be parity between the time limits for equal pay claims in the different jurisdictions. We conclude that the time limit in employment tribunals should remain at six months, despite the disparity with the time limit in the civil courts, on the grounds that a six-year time limit for a tribunal claim would be distinctly out of line with other tribunal time limits; but we recommend a power to extend the tribunal limitation period on "just and equitable" grounds. We also recommend retaining the ability to bring equal pay claims in the civil courts but that section 128 of the Equality Act should be amended to include a power to transfer an equal pay claim outright to an employment tribunal. In relation to the non-discrimination rule in occupational pension schemes, we find no reason to change the current jurisdiction.
- 1.29 In chapter 7 we consider other types of employment law claims with concurrent jurisdiction. In relation to TUPE Regulations claims, we recommend no change. We look at the Working Time Regulations and the interaction of tribunal claims and state enforcement action. We recommend a formal extension of employment tribunals' jurisdiction to enable them to hear complaints by workers that they are working hours in excess of the maximum working time limits and to give declaratory relief. In relation to claims relating to the National Minimum Wage, we recommend no change.
- 1.30 We look at the Employment Relations Act 1999 (Blacklists) Regulations, and conclude that the demarcation of jurisdiction in this area should also remain unchanged, but that the maximum award applying to employment tribunal claims brought under the Regulations should be increased to, and maintained at, at least the level of the maximum award for unfair dismissal.

- 1.31 In relation to qualifications bodies and police misconduct panels, we conclude that the current jurisdiction works well and that there should be no change.
- 1.32 Chapter 8 considers the restrictions on the types of orders which may be made in employment tribunals, and examines in particular the granting of injunctions, the apportioning of liability between respondents in discrimination claims, and the enforcement of tribunals' awards. We maintain our original view that employment tribunals should not be given a power to grant injunctions. In relation to powers to order contribution and apportionment, we conclude on balance that contribution orders are to be preferred over apportionment. 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, and that the test to be applied should mirror that in section 2(1) of the Civil Liability (Contribution) Act 1978.
- 1.33 We acknowledge the serious problem of non-payment of tribunal awards, but conclude that giving enforcement powers to employment tribunals is not the solution. We suggest the creation of a fast track for enforcement which allows the claimant to remain within the employment tribunal structure when seeking enforcement. We also recommend that the Government should investigate the extension of the BEIS penalty scheme, for example by triggering it automatically on the issue of a tribunal award.
- 1.34 Chapter 9 looks briefly at aspects of the jurisdiction of the EAT. In relation to appeals from Central Arbitration Committee decisions, we consider the current exclusion of trade union recognition or derecognition disputes. We conclude that transfer of the Administrative Court's judicial review function would not be justified. In relation to the EAT's original jurisdiction to hear applications for penalty notices arising from EU-derived employee participation provisions, we also conclude that there is no need for change.
- 1.35 Chapter 10 evaluates responses to our proposal that an employment and equalities list should be created within the High Court to ensure that employment-related claims are heard by judges with sufficient expertise. We recommend that such a list be established, and set out its remit. We also recommend that the best name for the list is the "Employment and Equalities List".

IMPACT ASSESSMENT

- 1.36 An impact assessment and equality and health impact assessment accompanies this report. We rely in part on publicly available statistics. We are grateful to HM Courts and Tribunals Service for their assistance in providing data on the relative costs of proceedings in the county court and employment tribunals.

ACKNOWLEDGEMENTS

- 1.37 Our thanks go to all those who took part in the consultation process, both for participating in consultation events or meeting with us to discuss the consultation paper, and for submitting formal written responses. We are grateful for the work, time and careful thought they have given to the issues covered in this report. Finally, we are grateful to Greg Chambers who provided valuable assistance over the course of the preparation of this report.

PROJECT TEAM

- 1.38 The following members of the public law team have contributed to this report: Henni Ouahes (team manager), Lisa Smith (team lawyer), Sarah Smith (team lawyer), Marina Heilbrunn (research assistant), Rose Ireland (research assistant) and Jagoda Klimowicz (research assistant).

Chapter 2: The exclusive jurisdiction of employment tribunals

- 2.1 Employment tribunals have exclusive jurisdiction over certain types of claim. This means that those types of claim can only be initiated and litigated in an employment tribunal. This chapter considers those claims and the time limit for bringing them.

THE SCOPE OF EMPLOYMENT TRIBUNALS' EXCLUSIVE JURISDICTION

- 2.2 Our consultation paper outlined which types of claim fall into this category, notably including unfair dismissal, discrimination in employment, detriment of various specified types and redundancy.¹²
- 2.3 The jurisdiction of employment tribunals is wholly conferred by statute. A range of legislation governs which claims employment tribunals can adjudicate, the restrictions and limitations on their jurisdiction, the remedies they may award, and how their judgments may be enforced. Employment tribunals do not have the power to award the full range of remedies available to civil courts. Successful employment tribunal cases overwhelmingly result in an award of financial compensation. But tribunals may, in some cases, make an order for non-financial remedies, for example re-instatement or re-engagement in cases of unfair dismissal.¹³
- 2.4 Our provisional view was that the exclusive jurisdiction of employment tribunals should remain as it is. We asked consultees whether they agreed.

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

- 2.5 Consultees were nearly unanimous in their support for this provisional proposal, with 58 out of 61 consultees agreeing that employment tribunals' exclusive jurisdiction over these types of statutory employment claim should remain. Two consultees had no firm view, and the one consultee who disagreed with the proposal did not offer detailed reasons.
- 2.6 Our consultation paper emphasised how employment tribunals' areas of exclusive jurisdiction go to the heart of their function as specialist, low cost forums for

¹² See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, ch 2. Other types of claim include 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. The consultation paper summarises the relevant law concerning these areas: Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 2.5 to 2.45.

¹³ These orders cannot be specifically enforced; failure to comply results in an increased financial award to the claimant. See Employment Rights Act 1996, s 117 and Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 6.22 to 6.25. See also the discussion of employment tribunals' enforcement powers at paras 8.47 to 8.77 below.

determining industrial disputes.¹⁴ That sense of the purpose of employment tribunals – and their areas of exclusive jurisdiction – was echoed by the consultees who agreed with the proposal. Many referred to the significant expertise employment tribunals have developed in the areas over which they have exclusive jurisdiction. As the Employment Lawyers Association (“ELA”) put it:

We would regard it as undesirable to give the County Court or High Court jurisdiction over any of the areas of law, such as unfair dismissal, employment discrimination and redundancy rights, in respect of which the employment tribunals have built up, over many years, a considerable body of expertise, and in the determination of which they generally command the respect of both employer and employee/worker litigants and their respective representatives. We consider that any change reducing the exclusivity of the employment tribunals’ jurisdiction would be a retrograde step.

- 2.7 Some consultees highlighted that, in contrast to civil courts, the informality of employment tribunals combined with the fact that they generally operate as a no-costs jurisdiction (and therefore claimants can bring a claim without the risk of being liable for the legal costs of defendants) make them more accessible to both parties. In addition, consultees considered that it could create unnecessary confusion and complexity for the parties if employment tribunals’ jurisdiction over these areas was shared with civil courts.

Discussion

- 2.8 Employment tribunals possess a number of characteristics which make them a uniquely appropriate and effective forum for resolving disputes in the areas over which they currently have exclusive jurisdiction. This formed the basis of our provisional view expressed in the consultation paper that the law in this regard should not change. We agree with the point raised by consultees that to extend civil courts’ jurisdiction over these matters could cause unnecessary confusion and complexity, and we cannot conceive any strong policy reasons for doing so.
- 2.9 In the light of responses from consultees, we remain of the view that employment tribunals should retain the exclusive jurisdiction which they currently have over certain types of employment claim.

THE TIME LIMITS FOR BRINGING CLAIMS

- 2.10 Our consultation paper also sought views on the time limits which apply to employment tribunal claims, and the test for extending those limits.¹⁵ The primary time limits for bringing an employment tribunal claim are short (generally three months). The test in many cases for extending the primary time limit is relatively strict, namely that it was not reasonably practicable to bring the claim earlier. Where this

¹⁴ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 1.3, 2.54 and 2.58.

¹⁵ We discuss the time limits for bringing a claim and the tests for extending time in more detail in the consultation paper: Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 2.46 to 2.53.

requirement is satisfied, the tribunal can extend the limit for such period as it considers reasonable.

- 2.11 This feature of tribunal claims derives from the original concept of tribunals as a forum for the speedy and informal resolution of employment disputes. While this concept remains valid to some extent, there is no doubt that many employment tribunal cases are far more complex (and of much higher value) than was the case in the 1970s. The waiting times for claims to proceed to a hearing are now much longer than they were. Our paper noted that arguably the short, strict time limits (notably in unfair dismissal cases) are anomalous when claims may take as long as 10 or 12 months to proceed to a hearing. We therefore sought consultees' views on whether the various time limits should be rationalised into a more consistent, and perhaps slightly more generous, time limit of six months.¹⁶

Consultation Question 2: Should there be any extension of the primary time limit for making a complaint to employment tribunals, either generally or in specific types of case? If so, should the amended time limit be six months or some other period?

- 2.12 This consultation question had two parts: first, asking whether the primary time limit for making a complaint should be increased at all and in what circumstances, and secondly, asking what its length should be. We will deal with each part separately. Following that, we discuss a discrete issue raised by some consultees in their responses: the impact of the Advisory, Conciliation and Arbitration Service ("ACAS") early conciliation procedures ("Early Conciliation") on limitation periods.

Should there be any increase of the primary time limit for making a complaint to employment tribunals?

- 2.13 Of the 69 consultees who responded to this question, 43 thought that the primary (three-month) time limit should be increased in all types of case. Eight said that there should be an increase in specific types of case, and 15 argued that there should be no increase. Three consultees expressed no firm view. Consultees focussed their attention on the three-month time limit that currently applies to the majority of employment tribunal claims, though four argued for a new time limit of one year, involving an increase of the six-month time limit also.

Views in support of the current time limit

- 2.14 Around one fifth of consultees were of the view that the primary time limit for making a complaint to employment tribunals should not be increased. These consultees considered that the three-month time limit was generally sufficient for employees to bring a claim, with some referring to existing ways in which the limitation period can, in effect, be extended, such as engaging in ACAS Early Conciliation.
- 2.15 The main reason cited by the consultees who were against an increase of the three-month time limit was the further delays that a longer time limit would cause in processing and dealing with claims. They argued that this was contrary to the intended function of employment tribunals as speedy arbiters of disputes, and

¹⁶ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 2.54 to 2.60.

emphasised the importance to both parties of the speedy resolution of claims in an employment context. The Bar Council,¹⁷ for example, stated:

Any time limit, by its very nature is arbitrary. However relatively short time limits in employment requires parties to focus on their dispute and where appropriate, to move on. We consider that this is a legitimate policy objective.

- 2.16 These consultees emphasised the impact that increasing the time limit would have on respondents to a claim (ie employers). Some consultees argued that increased delay could put the respondent at an unfair disadvantage, primarily because it could have a negative impact on witness recollection. Peninsula, for example, stated that:

Employers have to be given equal consideration in this matter and it needs to be recognised that the working landscape has changed significantly from when tribunals were first established. The vast majority of UK employers are small to medium enterprises and do not have dedicated HR departments who can address claims that arise. Fading recollections of witnesses impact on the ability of respondents to defend cases, particularly if they are not aware of the nature of a claim that is coming.

- 2.17 Cheryl Moolenschot (on behalf of Employee Management Ltd) argued that claimants with a strong personal interest in the event which give rise to their claim “will be able to recollect detail for a longer period and in greater depth than those whose involvement is purely professional, especially those who carry out a number of formal processes due to their position in the company”.
- 2.18 Peninsula suggested that, in the absence of a requirement for claimants to notify the respondent of the potential nature of a claim in advance of the claim being submitted, a “longer period in which to submit a claim only puts the respondent at greater prejudice” and means that they may not have adequate time to prepare for the case.
- 2.19 In response to Consultation Question 3, Employment Judge Chris Purnell argued that the solution to the problems caused by a short time limits could be addressed not by extending the limitation period, but by applying the more liberal “just and equitable” test for extension of the time limit to all types of employment tribunal claim. We discuss the tests for extension under Consultation Question 3.

Views supportive of a longer time limit

- 2.20 Nearly three quarters of consultees thought that there should be a longer time limit. The majority of these consultees thought that a longer time limit should apply to all types of claim, but a small minority submitted that it should only apply in certain circumstances.

In certain circumstances only?

- 2.21 We first look at the views expressed by the minority. These consultees considered that the three-month time limit was adequate in ordinary cases, but recognised some special circumstances in which the short time limit is more likely to give rise to

¹⁷ The Bar Council was against extending time limits generally, but supported extension in pregnancy and maternity cases.

injustices. The main context identified was pregnancy and maternity cases. Professor Owen Warnock (University of East Anglia) took the view that the time limit should only be extended in relation to pregnancy and maternity cases, and that although “there are other groups who will from time to time suffer injustices ... too many special rules would cause excessive complexity”. Other contexts identified were claims involving discrimination, long-term sickness or bereavement.

- 2.22 Other consultees supported a general increase of time limits but highlighted certain types of claim for which they viewed an increase as being particularly important, and for which the time limit should be increased even if it were not increased across the board; these were claims involving discrimination, unfair dismissal, harassment, and pregnancy and maternity.
- 2.23 Many consultees gave a detailed explanation of why the time limit should be extended for pregnancy and maternity cases. The organisation Pregnant Then Screwed explained:

The short time limit means that women have to consider their options, seek legal advice and take highly stressful action during a very vulnerable period of their life. This is a stressful and emotional time for women; they may be in the later stages of pregnancy or looking after a very young baby. They may be coming to terms with the complexities of new motherhood and will be extremely time poor, exhausted and possibly lacking in confidence Therefore, we are forcing women to take on highly stressful tribunals when they are mentally and physically very vulnerable.

- 2.24 The Bar Council suggested that these factors make pregnancy and maternity cases stand out from other areas of employment law:

We would suggest that unlike other areas of employment law, there is a legitimate and recognisable issue that arises from the nature of the claim that is being made. An individual may be facing particular difficulties at this point in their life and the commencing of litigation may seem like one battle too many when they are juggling so many issues. With a longer time limit, the individual would be able to focus on the merits of their claim rather than have to balance the decision to make a claim against their wellbeing.

- 2.25 The Trades Union Congress also placed particular emphasis on the impact the time limit has on women who are considering bringing claims related to pregnancy and maternity. They referred to evidence from the Women and Equalities Select Committee that demonstrates that the time limits are particularly unjust for new and expectant mothers, given the physical and emotional pressures on them at this time.¹⁸
- 2.26 Some consultees cited evidence showing the disparity between the occurrence of pregnancy and maternity discrimination and the small number of claims made in employment tribunals, indicating the existence of barriers to access to justice. Pregnant Then Screwed referred to a report by the Equality and Human Rights Commission (“EHRC”), where it was recorded that 0.6% of women who experience

¹⁸ Sexual harassment in the workplace, Report of the Women and Equalities Committee (2017-19) HC 725, para 86, <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf> (last visited 9 January 2020).

this type of discrimination raise a claim.¹⁹ The Bar Council compared another survey by the EHRC with employment tribunal statistics from September 2018 in respect of claims made in the tribunal regarding pregnancy-related detriment or unfair dismissal: 120 claims were made in that month, while the EHRC found that one in nine mothers felt forced to leave their job, which scaled up could mean as many as 54,000 mothers a year.²⁰

2.27 Many consultees referred to the fact that both the Women and Equalities Select Committee and the EHRC have previously recommended that the time limit for bringing a claim in maternity and discrimination cases should be extended to six months.²¹

2.28 As well as pregnancy and maternity-related claims, a number of consultees thought it especially important that the time limit was extended for harassment claims, particularly but not exclusively sexual harassment claims. The EHRC explained how a three-month time limit can hamper access to justice in this context:

For many people, three months will not give them sufficient time to recover, consider what has happened to them, make a decision to pursue the claim, seek legal advice and start the legal process. Employees are also often faced with a choice of allowing the limitation period to expire while they pursue an internal grievance, or issuing a claim before they have exhausted internal procedures.²²

2.29 Other consultees emphasised how it may take time for victims of sexual harassment to process the situation and find the courage to speak up about their experience. Some suggested that this reasoning also applies to other types of harassment claim. In a 2018 report, the EHRC recommended that the time limit be extended, for all types of harassment claim, to six months from the act of harassment, the last in a series of incidents of harassment, or the exhaustion of any internal complaints procedure.²³ Some consultees referred to and supported that recommendation in their response to our consultation paper. Consultees also referred to the recommendation by the

¹⁹ *Estimating the financial costs of pregnancy and maternity-related discrimination and disadvantage*, EHRC Research Report 105, p 13, <https://www.equalityhumanrights.com/sites/default/files/research-report-105-cost-of-pregnancy-maternity-discrimination.pdf> (last visited 1 August 2019).

²⁰ EHRC, *Pregnancy and Maternity-Related Discrimination and Disadvantage: Summary of key findings*, p 5, <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings> (last visited 21 August 2019); Official Statistics, *Tribunals and gender recognition certificate statistics quarterly: July to September 2018, Annex C: Employment Tribunal Receipts Tables* (September 2018), <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-july-to-september-2018> (last visited 4 November 2019).

²¹ See *Pregnancy and maternity discrimination*, Report of the Women and Equalities Committee (2016-17) HC 90, para 143, <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/90.pdf> (last visited 21 August 2019). EHRC, *Pregnancy and maternity discrimination in the workplace: Recommendations for change* (March 2016), p 15, <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/our-recommendations-tackle-pregnancy-and-maternity> (last visited 9 January 2020).

²² The EHRC's response supported extending the time limit for all types of discrimination and harassment claims.

²³ EHRC, *Turning the tables: Ending sexual harassment at work* (March 2018), p 18, <https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf> (last visited 9 January 2020).

Women and Equalities Committee that the time limit be extended to six months for cases of sexual harassment.²⁴

- 2.30 Jonathan Dunning, of the UNISON Norfolk County Branch, supported a longer time limit for any type of claim which is expected “to be raised and pursued with the employer via a grievance procedure”. Alternatively, he suggested that the relevant starting point for the time limit should not be the date of the incident, but the date of the final appeal within the grievance procedure (where such procedures are used).²⁵

Extending the time limit for all claims

- 2.31 Next, we turn to the consultees who thought that there should be an extension which applies to all types of claim. The general consensus amongst these consultees was that the three-month time limit was unrealistic in most cases. A number of reasons were offered to justify this.
- 2.32 One common reason put forward was that, in practice, employees are likely to attempt to resolve a complaint through an internal grievance process first, only opting to lodge a complaint with an employment tribunal as a last resort. The Disability Law Service commented that “it is not uncommon for grievance processes to be still ongoing at the end of the three-month period”, and the Liverpool Law Society Employment Law Committee stated that “it could be an advantage in some cases to allow further time for internal processes to be finalised”. Alice Walder thought that “in some cases employers deliberately hold out on an appeal process to prevent an employee from applying to the tribunal”.
- 2.33 In addition to the use of internal grievance processes, the Council of Employment Judges (with whom Employment Tribunals (Scotland) agree) outlined a number of other factors which can, in practice, lead employees to delay making an employment tribunal claim:

A fact continually seen in practice is that employees are very often reluctant to pursue claims against their employer, or against a recent ex-employer. They will often have perfectly sound reasons for delaying before bringing complaints. They might be reluctant to take legal action which might sour the relationship while it lasts (or a job reference is awaited); they might want to pursue internal grievance or appeal processes, or to focus on looking for a new job; or they might not immediately realise that their claim has any particular value. A very short time limit may push some individuals into precipitous litigation, and act as a barrier to justice for others.

- 2.34 Angharad Ellis Owen (on behalf of Greene & Greene), also noted that practical factors, such as having the funds available to pursue a claim when under pressure to meet, for example, a mortgage payment, can lead to delay, observing that this was

²⁴ Sexual harassment in the workplace, Report of the Women and Equalities Committee (2017-19) HC 725, para 92, <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf> (last visited 21 August 2018).

²⁵ Another consultee suggested that the time limit should not begin until all the pertinent information requested by the claimant has been fully disclosed by the respondent.

“especially true in cases of pregnancy discrimination ... where appetite for litigation will be affected”.

2.35 Mary Gleave (on behalf of Suffolk New College) thought that the “just and equitable” test would be particularly appropriate in cases where “someone has been hospitalised [or is] unable physically or mentally to pursue their case”.

2.36 Consultees also argued that changes in the manner of operation of employment tribunals and the nature of the claims heard by them render the three-month time limit too short. This was a point we raised in the consultation paper: that employment tribunals deal with increasingly complex, high value claims, and the waiting times for hearings are increasingly long. Some consultees suggested that these changes make the extent of the discrepancy between the time limits for employment tribunal claims and other private law claims outdated and less logical. The Council of Employment Judges told us that the current target for getting claims heard is within six months of issue, and that the “remedy stage” (the point at which the remedy is decided in the case of a successful claim) may be concluded much later. They commented:

It is somewhat anomalous and anachronistic that the time limit in which an employee must identify, decide upon, formulate and decide to bring their claims is half as long as the time within which the tribunal thereafter aims to start the hearing of their claim.

2.37 The general position conveyed by consultees was that three months is an insufficient amount of time, particularly since many claimants may be unaware of their rights and will want to seek legal advice. As it was put by the National Association of Schoolmasters Union of Women Teachers:

Three months is not a lot of time in practice, especially when an employee has to absorb the situation, recognise they have been wronged, seek representation (if appropriate), go through early conciliation and begin the process of lodging a potential employment claim, including the associated paperwork.

2.38 Similarly, LawWorks commented:

Our experience of working with often vulnerable clients is that claimants with valid claims take time to make decisions, and it then takes time to assemble a claim. It is therefore typical to be up ‘against the clock’ when preparing employment tribunal claims The most compelling case for change is that the short time limit does not pay due regard to the wellbeing of the dismissed employee, for example: struggling to cope with the financial consequences of losing their job, looking for advice and representation, looking for new employment and trying to come to an informed decision about whether to bring a claim and how best to frame it. Unfair outcomes can also result when employees wait until internal procedures or settlement discussions have taken place first, and their claims may then be out of time.

2.39 Many consultees also expressed concern about the confusion caused by having different limitation periods for different types of employment claims. The Law Society of England and Wales stated that this can be exacerbated where the claimant is also a litigant in person:

The different limitation periods often cause confusion especially where parties are not legally represented. Genuine mistakes around limitation can result in individuals being barred from seeking justice in their case.

- 2.40 Similarly, JUSTICE commented that “having different time limits applicable to different claims lacks clarity and certainty for claimants”. Several consultees appealed to the benefits of increasing certainty and reducing complexity, for both claimants and respondents, by adopting a consistent six-month time limit for all types of claims.

If there is to be any extension of the primary time limit for making a complaint to employment tribunals, should the amended time limit be six months or some other period?

- 2.41 Forty-nine consultees addressed this question. Of those, seven proposed various time periods for specific types of claims only (five of whom favoured 6 months).²⁶ Of those who proposed extension for all types of claims, the President of Employment Tribunals (England and Wales) and the Regional Employment Judges (joint response) (with whom the President of the Industrial Tribunal and Fair Employment Tribunal (Northern Ireland) agrees) and 31 other respondents thought that the amended time limit should be six months (three of whom thought that the six-month period should include any period of ACAS Early Conciliation),²⁷ seven said at least six months (four of whom supported an extension of the time limit to one year), and three did not suggest a specific period.

- 2.42 Three of the consultees who suggested that the time limit should be “at least” six months did not specify a period. Where a period was specified, it was one year. These consultees argued that one year would allow adequate time for potential claimants to come to terms with what had happened, learn about their rights, properly consider whether they want to bring a claim, and attempt to resolve matters with the employer through internal processes.

- 2.43 The majority of consultees thought that six months was a sufficient period of time. They viewed it as adequately balancing the rights of employees, by better reflecting the realities of bringing a claim, and the rights of employers, by limiting any detriment caused by fading witness recollection or the destruction of relevant paperwork.

ACAS Early Conciliation

- 2.44 Although we did not ask a question about ACAS Early Conciliation,²⁸ a number of consultees, both those in favour of and against extending the time limit, referred to it in their responses, so we outline their views here.

- 2.45 ACAS offers a conciliation service to parties and prospective parties to employment tribunal claims which must be pursued before the majority of claims can be

²⁶ Professor Owen Warnock suggested that in pregnancy and maternity cases the time limit should be extended to the later of the normal three months or 52 weeks from the birth of the child. Since a breach of maternity rights may occur after a child is born, the three-month time limit may in some cases be longer than 52 weeks from birth.

²⁷ ACAS Early Conciliation is considered further at paras 2.44 to 2.49 below.

²⁸ We summarised its effect on time limits in *Employment Law Hearing Structures* (2018) Law Commission Consultation Paper No 239, paras 2.52 to 2.53.

commenced.²⁹ The statutory time limits for issuing tribunal claims are paused or extended while the conciliation service is ongoing.³⁰ We stated in our consultation paper that Early Conciliation generally lasts up to a month; however, as consultees highlighted, with the extensions of time permitted, the process can add up to two months to the time limit for claims.

- 2.46 Six consultees commented that the reform of time limits also provided an opportunity to review and attempt to simplify the impact of ACAS Early Conciliation on time limits. These consultees emphasised the complexity of the existing regime and how it can negatively impact access to justice. For example, the Bar Council found the regime:

simply too complex to be understood by the lay person. We are aware of cases whereby litigants have had to seek an extension of time arising out of their misinterpretation of the ACAS time limits.

- 2.47 Four of the six consultees suggested that the limitation period should encompass ACAS Early Conciliation; in other words, that ACAS Early Conciliation should no longer pause or extend the limitation period for the purposes of calculating the time limit. Their rationale is that having a set limitation period would remove complexity and create certainty. For example, Pinsent Masons, who favoured a three-month time limit including ACAS Early Conciliation, stated:

The law linking time limits to ACAS pre-claim conciliation has introduced unwelcome uncertainty into the law, creating unnecessary confusion for claimants and consultees alike. We favour a fixed time limit which is not impacted by ACAS conciliation, with a shorter fixed period within which ACAS conciliation must be commenced.

- 2.48 The Birmingham Law Society, the Law Society of Scotland and the Employment Law Bar Association (“ELBA”) favoured extending the time limit to six months, including ACAS Early Conciliation. ELBA reasoned:

A six-month time limit would allow sufficient time for early conciliation to take place without the need for any extensions and would be simpler for claimants to understand.

²⁹ The details of Early Conciliation are set out in ss 18A and 18B of the Employment Tribunals Act 1996 (which were inserted by the Enterprise and Regulatory Reform Act 2013) and in the Employment Tribunals (Early Conciliation): Exemptions and Rules of Procedure Regulations SI 2014 No 254.

³⁰ The rationale being to encourage parties to settle disputes before employment tribunal claims are issued, but ensuring that claimants are not disadvantaged by the amount of time taken out of the relevant limitation period while complying with Early Conciliation. The precise methods of pausing or extending the statutory limitation period are relatively involved. First, the amount of time spent on early conciliation does not count in calculating the date when the statutory time limit expires. The clock stops during Early Conciliation for up to one calendar month, with a provision for an extension of two weeks if ACAS believe that the claim is close to settlement. Secondly, if a prospective claimant leaves it until relatively close to the end of the ordinary time limit before contacting ACAS to start Early Conciliation, then the deadline for issuing a tribunal claim is extended to give the claimant effectively one month from the date when they receive a certificate from ACAS verifying that Early Conciliation has been completed. See Employment Rights Act 1996, s 207B.

- 2.49 Some stakeholders at a meeting between the Law Commission and the Employment Law National Users Group also expressed support for a six-month time limit which incorporates ACAS Early Conciliation.³¹

Discussion

- 2.50 We discuss the issues in the order in which we analysed the consultation responses: first, considering whether the primary time limit should be increased and in what circumstances; secondly, what the precise length of the limitation period should be; and finally, ACAS Early Conciliation and its impact on limitation periods.
- 2.51 Those who argued against increasing the time limit for any type of employment claim, or for only increasing it for certain types of claims, considered three months to be a sufficient amount of time to bring a claim in most circumstances. Other consultees, drawing from studies, statistics and/or personal experience, argued that the three-month time limit is often an unrealistic timeframe within which to bring a claim.
- 2.52 We are persuaded that bringing a claim in three months may be difficult for a significant number of claimants. Some may prefer to pursue resolution through internal grievance processes and not risk escalating the dispute by bringing a claim in an employment tribunal. Moreover, the increased complexity and value of employment tribunal claims means obtaining legal advice and representation is often crucial. This, coupled with the long waiting time before a claim is heard and resolved, renders the original rationale behind the short time three-month time limit open to question.
- 2.53 We see the force of consultees' arguments that increasing the time limit too much is detrimental to employers because of the effect of witnesses' recollection fading,³² staff turnover,³³ and the destruction of relevant files and documents.³⁴ However, some employment tribunal claims already have a six-month limitation period; the Law Society of England and Wales and the Council of Employment Judges both commented in their responses to our consultation that they were not aware of it causing difficulties or injustices to employers in practice. We do not consider that lengthening the time limit from three to six months will be unduly burdensome for employers.
- 2.54 In their responses, consultees arguing both for and against a general increase of the time limits for employment tribunal claims emphasised the importance of certainty for the parties. Having a consistent time limit for all types of employment claims will increase certainty and reduce complexity. Many who supported a six-month time limit did so because it would align the limitation period for many types of tribunal claims to

³¹ The meeting occurred on 7 December 2018.

³² Rebecca Meritt, Cheryl Moolenschot, Ann McKillop, Hannah Dahill, British Telecommunications plc, Peninsula, Countrywide plc, Employment Judge Chris Purnell.

³³ Cheryl Moolenschot, British Telecommunications plc, Liverpool Law Society Employment Law Committee, Countrywide plc.

³⁴ Hannah Dahill, British Telecommunications plc.

that for bringing equal pay claims and claims brought under the Trade Union and Labour Relations (Consolidation) Act 1992.³⁵

- 2.55 A small number of consultees supported a general increase of the time limits for employment tribunal claims to one year, while others appeared to view six months as the minimum desirable time limit. A one-year time limit was endorsed by a minority and has not been tested in practice, whereas six months is used elsewhere and has not given rise to difficulties. We take the view that a standard time limit in an employment tribunal of one year would be uncharacteristically long, with an attendant increased risk of memories fading, and prefer to follow the majority view. Some consultees suggested that the event which triggers the time limit should be changed, for example, to the completion of an internal grievance process. This is not something we consulted upon and we do not make any recommendation in relation to it. It is, of course, open to the Government to seek views if it wishes to explore the matter further.
- 2.56 We agree with the majority of consultees that the current three-month time limit is undesirably short. It dates back to the original conception of tribunals as a speedy and informal forum for resolving employment disputes. As we noted in our consultation paper, however, claims now take longer to be resolved and are often more complex, with large sums being claimed in some cases. We are attracted to a single time limit for all employment claims, which will simplify matters for all parties. The longer time limit of six months already applies to some employment tribunal claims. We do not believe that the extra three months causes any problems in practice. We conclude that a time limit of six months for all employment tribunal claims strikes an appropriate balance between facilitating access to justice for employees and providing certainty for employers and employees.
- 2.57 We therefore recommend that the time limit for bringing claims should be six months for all claims brought in an employment tribunal. This should apply both to claims within the exclusive jurisdiction of employment tribunals and to claims over which employment tribunals share concurrent jurisdiction with the courts.

Recommendation 1.

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

Harassment claims and pregnancy and maternity discrimination claims

- 2.59 We note that some consultees felt strongly about extending the time limit in pregnancy and maternity discrimination cases (as well as in harassment cases). The short limitation period spans a stressful time in a new or expectant mother's life, when she may be under considerable pressure, exhausted, and mentally and/or physically

³⁵ Trade Union and Labour Relations (Consolidation) Act 1992, ss 175(1) and 239(1). Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, para 2.50. Another example is the time limit for a claim for statutory redundancy pay. This is six months from the date of termination of employment: Employment Rights Act 1996, s 164.

vulnerable. In these circumstances, a short time limit is not only unrealistic, but may force a woman to choose between pursuing a claim and her own wellbeing. Similarly, in harassment cases, consultees highlighted how it may take time for a victim of harassment to recover from what happened to them and find the courage to make a claim.

- 2.60 At the time of writing, the Government and Equalities Office (“GEO”) is undertaking a consultation on sexual harassment in the workplace.³⁶ One aspect of their consultation focusses on the time limits for Equality Act claims within the jurisdiction of employment tribunals. They ask whether there should be different time limits for certain types of claim under the Equality Act, such as sexual harassment or pregnancy and maternity discrimination.³⁷ They also ask whether the three-month time limit is sufficient in general for all Equality Act claims brought in employment tribunals and, if not, whether the limitation period should be extended to six months or more than six months.³⁸ The GEO is expressly not considering changes to time limits for non-Equality Act employment law claims.³⁹
- 2.61 For the reasons outlined above, our recommendation is that the time limit is extended to six months for all types of claim within the jurisdiction of employment tribunals. We note that many consultees felt that there was a particularly strong case against the current short time limit for bringing a claim in the context of harassment and pregnancy and maternity-related claims. It is best left to the Government to decide, in the light of responses to its consultation, whether to increase the limitation period further in the case of Equality Act claims.

ACAS Early Conciliation

- 2.62 Without asking a consultation question specifically about ACAS Early Conciliation, our consultation paper noted that Early Conciliation currently pauses the running of time, with the practical effect of extending it in some cases. Some consultees supported the inclusion of ACAS Early Conciliation within the six-month limitation period. They thought this would make the system for calculating limitation periods for employment tribunal claims less complex.
- 2.63 Given that we recommend a consistent six-month time limit for all employment tribunal claims partly because of the simplification involved, we see the force of the argument for including any period of ACAS Early Conciliation within that time limit. But the main reason for extending the current short time limit is that it is too short. The policy of excluding periods of Early Conciliation is a separate matter. In addition, for claims which currently have a six-month time limit such as equal pay claims, this reform would effectively reduce the amount of time a claimant currently has to bring a claim. Protections would have to be introduced to ensure that prolonged Early Conciliation

³⁶ GEO, *Consultation on Sexual Harassment in the Workplace: Legal protections under the Equality Act 2010* (11 July 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816116/Technical_consultation_-_FINAL.pdf (last visited 5 September 2019).

³⁷ GEO Consultation above, Consultation Question 13.

³⁸ GEO Consultation above, Consultation Questions 12 and 14.

³⁹ GEO Consultation above, para 5.1.

does not present an employee with a dilemma about making an employment tribunal claim. We therefore make no recommendation on whether Early Conciliation should cease to suspend the time limit for bringing tribunal claims.

THE TEST FOR EXTENDING TIME

2.64 Our consultation paper also asked whether the power to extend the time limit should afford tribunals greater discretion, highlighting that the “just and equitable” test for extending time to bring discrimination claims is less strict than the “not reasonably practicable” test which is in use in unfair dismissal and other claims which can only be brought in employment tribunals.⁴⁰ We asked whether the less strict test should apply to most or all claims.

Consultation Question 3: In types of claim (such as unfair dismissal) where the time limit can at present only be extended where it was “not reasonably practicable” to bring the complaint in time, should employment tribunals have discretion to extend the time limit where they consider it just and equitable to do so?

2.65 Of the 64 consultees who answered this question, 42 favoured the “just and equitable” test for extending time to bring a claim, while 19 did not. Two gave responses expressly contingent on whether the time limit to bring a claim was extended to six months. One thought that the reasonably practicable test should remain if (as we have recommended) the time limit is extended. The other suggested that there should be a single test for all claims, and that an extension of the limitation period to six months may justify a stricter test for extending time. The Employment Appeal Tribunal judges saw “the benefit of consistency”, but did not view it as appropriate for them to engage with the policy issues underlying this question.

Arguments against applying the “just and equitable” test across the board

2.66 The main principles underpinning arguments against adopting the “just and equitable” test in all types of tribunal claims were certainty, the absence of a justification for wider judicial discretion outside discrimination claims, and safeguarding the limited resources of employment tribunals.

Certainty

2.67 With regard to certainty, some consultees implied that the “just and equitable” test was inherently more uncertain and complex than the “not reasonably practicable” test, because the former affords employment tribunal judges much wider discretion. The Manchester Law Society argued that this leaves room for subjectivity and exacerbates uncertainty, since “the likelihood of an extension will be fact-specific and sometimes it will depend upon the view of the decision-maker”. The Liverpool Law Society Employment Law Committee argued that the “not reasonably practicable” test, on the other hand, is “certain and understood”, the implication being that the parameters of the “just and equitable” test are less clear. This sentiment was echoed by other consultees, such as Professor Owen Warnock, who stated that the “not reasonably practicable” test “aids certainty and finality”. In addition, Transport for London argued

⁴⁰ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 2.46 to 2.49 and 2.59.

that it is right that, under the “not reasonably practicable” test, claims can only proceed “in certain limited and specified circumstances”.

- 2.68 Some consultees, such as Lewis Silkin LLP, argued that this uncertainty would be disproportionately disadvantageous to employers and could increase delays in the employment tribunal system. The firm emphasised the importance of the speedy resolution of claims to both parties “so that the claimant can move on with his/her working life and the employer can be sure whether or not it is likely to face a claim”. Peninsula suggested that the widespread use of the “just and equitable” test could also cause problems for claimants:

It must be recognised that tribunals were intended to be used by those without any legal training Claimants, particularly unrepresented litigants in person, generally do not understand the just and equitable test Widening the test is likely to increase the number of claimants who do not comply with the time limits as they will believe that their perceived injustice will mean that it will be waived on their account.

Lack of justification for greater discretion outside the discrimination field

- 2.69 Others argued that there are valid reasons for having different tests for different types of claim and, in particular, affording judges wider discretion to extend the limitation period in discrimination cases.⁴¹ For example, Lewis Silkin LLP said:

The “just and equitable” test is appropriate for discrimination claims as these cases are generally more complex, and they involve the fundamental human right not to be discriminated against so that some discretion on the part of the tribunal is desirable. Claims that are subject to the “not reasonably practicable” test are essentially about industrial relations and dismissal.

- 2.70 The Bar Council argued that the use of a more liberal test is justified in discrimination claims only, because the chain of events leading up to a cause of action is more likely to be complex:

The more liberal just and equitable regime is better suited to discrimination claims because there is often (though not necessarily) different issues that occur and escalate over time, with the identification of the discriminatory act and the decision to take action about it not always being straightforward decisions. In contrast, the not reasonably practicable regime provides certainty about events that are most likely to have occurred on a specific date eg the effective date of termination.

- 2.71 British Telecommunications plc argued that, for unfair dismissal cases in particular, the “not reasonably practicable” test is fit for purpose and will accommodate an extension of time where appropriate.

Safeguarding limited tribunal time and resources

- 2.72 Another argument featuring in consultation responses was that the widespread adoption of the “just and equitable” test would lead to an increased number of claims

⁴¹ Some consultees argued that discrimination cases warranted different treatment but did not explain why, for example, Peninsula referred to “the added significance of discrimination claims” and Pinsent Masons stated that discrimination cases merit “additional protection”.

being heard by employment tribunals, placing further strain on their already limited resources. The Manchester Law Society gave the following description of the problem:

In many discrimination cases a Tribunal will need to hear all of the evidence available and spend considerable time in hearing a case, before deciding whether time should be extended. That does lead to significant time and cost being spent on cases which ultimately may be dismissed as being out of time. It would be unfortunate if [this were also the case for] unfair dismissal claims ... [which] would create an increase in cases needing to have evidence heard....

- 2.73 A small number of consultees supported replacing the “just and equitable” test with the “not reasonably practicable” test for all types of claim.⁴² Some consultees viewed the length of the limitation period as relevant to which test should apply. For example, the Birmingham Law Society, Liverpool Law Society Employment Law Committee and the Law Society of Scotland suggested that if the time limit is extended to six months for all types of a claim, a stricter test for extension may be more justified.

Arguments in favour of applying the “just and equitable” test across the board

- 2.74 The majority of consultees favoured replacing the “not reasonably practicable” test with the “just and equitable” test for all types of claim.⁴³ The main arguments advanced by these consultees were that the narrow parameters of the “not reasonably practicable” test result in unjust outcomes, while the “just and equitable” test, by allowing for a wider consideration of factors, gives judges the ability to do justice in each case. Consultees also countered the assertion that the “just and equitable” test would be more burdensome than the “not reasonably practicable” test for employers and employment tribunals. Many consultees argued that the strictness of the “not reasonably practicable” test can give rise to injustices, since it does not permit judges to consider the wider circumstances of the case. ELA maintained that:

The tests for reasonable practicability operate in many cases arbitrarily and with little correspondence to the intrinsic merits of the claimant’s position or the balance of prejudice between the parties.

- 2.75 Many argued that the narrowness of this test leads to harsh results for claimants. Thompsons Solicitors referred to two cases where the deadline for a claim of unfair dismissal was missed by a matter of seconds.⁴⁴ They argued that in such circumstances an extension of the limitation period would not be unduly prejudicial to the respondent, but because the “not reasonably practicable” test applied, the claims could not proceed. Unite gave an example of a case where the application of the “not reasonably practicable” meant an unfair dismissal claim could not be brought due to a minor technicality:

⁴² For example, Professor Owen Warnock, Transport for London and Birmingham Law Society.

⁴³ Two of these consultees qualified their support. Suffolk New College stated that the test should be changed “in cases where someone has been hospitalised, unable physically or mentally to pursue the case and/or instigate people acting on their behalf”. Employment Judge Philip Rostant would retain the “not reasonably practicable” test for “strictly money claims”.

⁴⁴ *Beasley v National Grid Electricity Transmissions* UKEAT/0626/06 (88 seconds late) and *Miller v Community Links Trust Ltd* UKEAT/0486/07 (nine seconds).

In the case of *Consignia (formerly the Post Office) v Sealy*⁴⁵ we see the example of the Post Office successfully arguing that a first-class stamp was no guarantee of next day delivery to defeat Mr Sealy's claim of unfair dismissal on the technicality.

- 2.76 The National Education Union summarised the situation, criticising the lack of scope under the “not reasonably practicable” test for employment tribunal judges to do justice in appropriate cases:

This is despite the fact the Claimant may have a good reason for missing the time limit, the cogency of the evidence remains unaffected, the employee may have a very good case and the prejudice to the Claimant far outweighs any prejudice suffered by the Respondent, especially in the circumstances where the claim is out of time by a few days or so.

- 2.77 Similarly, the Council of Employment Judges argued that the test “lacks the flexibility to do justice” in many cases. They stated that it is not uncommon in practice for employment judges to point out the harshness of the outcome using the “not reasonably practicable” test, quoting as an example Lord Justice Waller in *London Underground v Noel*:

I share the feeling evident from the judgments of Lords Justices Peter Gibson and Judge that, if this appeal must be allowed, it is hard on the employee. She, it seems to me, acted reasonably in not bringing her proceedings until after the offer of her new job was withdrawn. But the test is whether it was reasonably practicable for her to do so within the period of three months from her dismissal, and the answer to that question is much more difficult.⁴⁶

- 2.78 The Institute of Employment Rights suggested that the test does not only potentially constitute a substantial barrier to access to justice but could have “knock-on effects for general compliance with labour standards”.

- 2.79 The majority of consultees were of the view that the “just and equitable” test produces fairer outcomes. John Sprack, a former employment judge, outlined the benefits of the “just and equitable” test:

It allows the employment tribunal to take into account, not just the reason why the claim is presented late, but all the other relevant circumstances, such as the balance of prejudice and whether the case can be tried fairly.

- 2.80 Numerous consultees shared this sentiment and advanced the same rationale for supporting the “just and equitable” test for extension over the “not reasonably practicable” test. In disagreement with consultees who were against the widespread application of the “just and equitable” test in employment tribunal claims, JUSTICE argued that the parameters of the test are well-defined and understood:

It will not cause difficulties for tribunals to apply the “just and equitable” test as they have already been doing so in the context of employment discrimination claims

⁴⁵ [2002] IRLR 624.

⁴⁶ *London Underground v Noel* [2000] ICR 109, p 118.

under the Equality Act 2010.⁴⁷ There is therefore a body of case law on the interpretation of “just and equitable” and the terms are well understood.

- 2.81 At a meeting between the Law Commission and a number of senior judges with particular experience of employment appeals, a consensus among the judiciary emerged in favour of adopting the “just and equitable” test for all types of employment tribunal claim; it was noted that it required claimants to give a reason for submitting their claim after the time limit has expired.
- 2.82 Many consultees highlighted that the exclusionary and rigid nature of the “not reasonably practicable” test compared to the “just and equitable” test is evident when different claims arise from the same, or similar, sets of facts. An example given by many consultees was when an unfair dismissal is alleged to be discriminatory, and the discrimination claim is allowed to proceed where it would be just and equitable to do so, whereas the former out-of-time claim cannot, regardless of the wider circumstances. LawWorks thought that “this not uncommon result understandably makes the law look irrationally inconsistent”. Consultees argued that this anomaly lacks logic and adds complexity and confusion to the process.⁴⁸ They favoured having a single test for extension, and supported the “just and equitable” test over the “not reasonably practicable” test for the reasons outlined above.
- 2.83 Some, such as the Council of Employment Judges and ELBA, anticipated but dismissed the argument that the “just and equitable” test would be unfair to employers. ELBA, for example, stated:

We have considered whether changing the test would result in significant unfairness to employers, but the burden would still remain on the claimant to persuade a tribunal that it was just and equitable to extend time and the tribunal will apply all the usual principles in considering that question, including that of prejudice to both parties.

- 2.84 Thompsons Solicitors further emphasised that there is no guarantee that the limitation period will be extended under the “just and equitable” test:

Whilst the employment tribunal has a wider discretion, we would emphasise that it is not a given that late claims will be allowed under this test. In *Bexley Community Centre v Robertson*,⁴⁹ the Court of Appeal made it clear that there is no presumption in favour of extending time and that tribunals should not extend time unless they are convinced that it is just and equitable to do so. The burden is on the claimant, and the exercise of discretion to extend time should be the exception, not the rule.

- 2.85 An argument made against the widespread adoption of the “just and equitable” test was that it would prove too burdensome for employment tribunals.⁵⁰ And yet some

⁴⁷ This is under Equality Act 2010, s 123.

⁴⁸ See for example, the President of Employment Tribunals (England and Wales) and the Regional Employment Judges who suggested that having two tests “lacks logic and introduces complexity and confusion”.

⁴⁹ [2003] EWCA Civ 576, [2003] IRLR 434.

⁵⁰ See paras 2.72 to 2.73 above.

consultees took the converse view that it could, if anything, save time and money by reducing the number of preliminary hearings on time limits. The rationale behind this assertion was that where the limitation period has expired for a claim subject to the “not reasonably practicable” test for extension, the claim will often require a separate preliminary hearing in order to proceed; more so than with claims subject to the “just and equitable” test. ELA explained that this is because the “not reasonably practicable” test gives rise to ancillary disputes on the tribunal’s jurisdiction, unrelated to the merits of the case. In discrimination cases, on the other hand, they suggested that:

The question whether it is just and equitable to extend time may be better addressed after the merits of the case have been heard, and this is often, in our experience, the approach tribunals adopt In addition there will be cases where it is sufficiently clear that there is no real prejudice to the respondent to balance against the fact of the claim having been presented a few days late; in such cases, respondents may not seek to contest an extension of time, or at least may not seek a preliminary hearing on the point, thereby saving both tribunal time and the expense of an additional hearing.

Discussion

- 2.86 One of the main objections to the adoption of the “just and equitable” test is that it is less certain than the “not reasonably practicable” test. Uncertainty is problematic, particularly for employers. To consider this objection, a more detailed analysis of the legal application and interpretation of the two tests is required.
- 2.87 Some consultees viewed the “just and equitable” test as uncertain on the grounds that it was fact-specific and required judges to consider a wide range of factors. It is correct that the “just and equitable” test is, in the words of Lord Justice Sedley in *Chief Constable of Lincolnshire Police v Caston*, “not a question of either policy or law; it is a question of fact and judgement”.⁵¹ However, objecting to the “just and equitable” test on this basis overlooks the fact that the “not reasonably practicable” test also raises an “issue of fact”.⁵² Moreover, there are a wide range of possible factors that an employment judge may wish to consider in making a determination under the “not reasonably practicable” test, dependent upon the circumstances of the particular case.⁵³ In *Schultz v Esso Petroleum Ltd*, Lord Justice Potter observed that the “reasonable” element of the test requires “the answer to be given against the background of the surrounding circumstances and the aim to be achieved”.⁵⁴ Therefore, to say that the “just and equitable” test is more uncertain than the “not reasonably practicable” test because it is fact-specific and involves consideration of a wide range of factors overstates the position.

⁵¹ [2009] EWCA Civil 1298, [2010] IRLR 327 at [32].

⁵² *Palmer and Another v Southend-on-Sea Borough Council* [1984] 1 All ER 945, [1984] IRLR 119, CA, by Lord Justice May at p 1141.

⁵³ *Palmer and Another v Southend-on-Sea Borough Council* [1984] 1 All ER 945, [1984] IRLR 119, CA, at p 1141. See the discussion in *Harvey on Industrial Relations and Employment Law*, loose-leaf 2018, Division PI, 1G(2) paras 192 to 193.

⁵⁴ [1999] ICR 1202, p 1209.

- 2.88 Some consultees argued that the “just and equitable” test was too uncertain because of the wide discretion granted to judges, and the concomitant room for subjectivity. The “just and equitable” test does indeed give employment tribunal judges broader discretion than is permitted under the “not reasonably practicable” test.⁵⁵ In *Hutchison v Westward Television Ltd*, Mr Justice Phillips commented that it gives a tribunal:
- ... a wide discretion to do what it thinks is just and equitable in the circumstances. Those are very wide words. They entitle the industrial tribunal to take into account anything which it judges to be relevant.⁵⁶
- 2.89 This discretion, however, is not entirely unfettered and the parameters of the “just and equitable” test have been explored in a large body of caselaw. For example, it has been held that, when making a determination as to whether an extension of time would be just and equitable, employment tribunals should (but are not required to) consider the list of statutory factors that judges must consider when exercising discretion under section 33 of the Limitation Act 1980.⁵⁷
- 2.90 It is well established that one factor that judges may consider when applying the “just and equitable” test is the balance of prejudice between the claimant and the respondent if the claim were to proceed (or not).⁵⁸ This includes “forensic prejudice ... caused by such things as fading memories, loss of documents, and losing touch with witnesses”.⁵⁹ This is relevant to a concern expressed by some consultees that the “just and equitable” test is disproportionately prejudicial to employers, particularly due to the impact of delays on witness availability and recollection.
- 2.91 Another concern expressed by one consultee was that employees could deliberately delay proceedings to gain an advantage over the employer. However, the “just and equitable” test is sufficiently flexible for judges to take a variety of factors into account when making a determination, including the fault of the claimant,⁶⁰ witness recollection, and the impact of extension on both parties. Evidence of deliberate delay would be taken into account when applying that test. The flexibility of the test also makes it suitable for dealing with both complex and straightforward cases.
- 2.92 As some consultees highlighted, the burden is on the claimant to prove that it is just and equitable for the limitation period to be extended, so the test is not more burdensome for employers in that regard.⁶¹ Nor is there a presumption in favour of the

⁵⁵ See for example, *British Coal Corporation v Keeble* [1997] 3 WLUK 586, [1997] IRLR 336, EAT.

⁵⁶ *Hutchison v Westward Television Ltd* [1977] IRLR 69, [1977] ICR 279, EAT.

⁵⁷ See *British Coal Corporation v Keeble* [1997] 3 WLUK 586, [1997] IRLR 336, EAT. Affirmed in *Mr R Miller and Others v The Ministry of Justice and Others* UK EAT/0003/15 (15 March 2016, unreported), at para 10. See the discussion in *Harvey on Industrial Relations and Employment Law*, loose-leaf 2018, Division PI, 1G(3), para 279.

⁵⁸ *British Coal Corporation v Keeble* [1997] 3 WLUK 586, [1997] IRLR 336, EAT.

⁵⁹ *Miller and Others v The Ministry of Justice and Others* UK EAT/0003/15 (15 March 2016, unreported), by Laing J at para 12.

⁶⁰ *Virdi v Commissioner of Police of the Metropolis* [2007] IRLR 4, EAT, at para 40.

⁶¹ See for example, *British Transport Police v Norman* UKEAT/0348/14 (2 March 2015, unreported), by Judge Eady QC at para 44. This is also the case under the “not reasonably practicable” test: *Porter v Bandridge Ltd* [1978] 1 WLR 1145, [1978] IRLR 271, at p 1150.

claimant. This was emphasised by Lord Justice Auld in *Robertson v Bexley Community Centre*:

When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.⁶²

- 2.93 With the above in mind, we are not persuaded by arguments against the “just and equitable” test on the grounds of uncertainty or prejudice to employers. We tend to the view that the sharp edges of the “not reasonably practicable” test risk producing arbitrary and unjust outcomes. Limiting the relevant question to one of “reasonable practicability” prevents some deserving cases from proceeding even where there is good reason to extend the limitation period and extension would not be prejudicial to the respondent.
- 2.94 As we discussed above under Consultation Question 2, there are a number of reasons why a claim may be brought outside the limitation period. The “just and equitable” test seems to us to be better suited to allow employment tribunals to assess these reasons, taking into account the wider circumstances of the claim and the position of the respondent. In short it seems to us to empower them to deliver justice in individual cases. By making the question one of justice and equity, the test facilitates more just and fair outcomes. We are of the view that this would be beneficial for all types of employment tribunal claim to which the “not reasonably practicable” test currently applies. For the same reasons, we are also not persuaded by consultees who suggested that the extension of the time limit to six months justifies the retention of the “not reasonably practicable” test.
- 2.95 No consistent picture emerged from consultees’ responses as to the impact on the resources of employment tribunals, if any, of replacing the “not reasonably practicable” test with the “just and equitable” test. Some consultees argued that it would alleviate the caseload of employment tribunals, by reducing the number of preliminary hearings which are often held on the “not reasonably practicable” test. These consultees pointed to the fact that frequently the question of whether it is just and equitable to extend the limitation period will be heard with the merits of the case as a money- and time-saving attribute of the “just and equitable” test. Other consultees argued the opposite, suggesting that deploying the test across the board would take up valuable judicial resources on the question of extending time. We cannot predict what, if any, effect reforming the test would have on tribunal resources but expect our recommended increase in the time limit to reduce the number of applications for an extension. In any event, we recommend the reformed test in the interests of overall consistency and greater fairness.

⁶² [2003] EWCA Civ 576, [2003] IRLR 434 at [25].

Recommendation 2.

2.96 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.

Chapter 3: Restrictions on the Jurisdiction of Employment Tribunals – Discrimination

- 3.1 This chapter considers one restriction on employment tribunals’ jurisdiction: the limitation of their jurisdiction to hear discrimination cases to discrimination in the employment field.

NON-EMPLOYMENT DISCRIMINATION CLAIMS

- 3.2 Our consultation paper focussed on the desirability and feasibility of softening the hard line between the civil courts (which hear non-employment discrimination claims) and employment tribunals (which hear employment discrimination claims). It explored two options for optimising the use of employment judges’ discrimination expertise: formally sharing jurisdiction between the tribunals and the county court, and deploying employment judges to hear discrimination cases in the county court.⁶³
- 3.3 The first option involves a review of the boundaries of the tribunals’ jurisdiction, with a view to formally creating a shared jurisdiction over non-employment discrimination. We noted that this would, however, require legislation, as well as extensive guidance on allocating cases to the right forum. The second option involves the sharing of judicial expertise so that expert employment tribunal judges can be deployed to hear and determine appropriate non-employment discrimination claims brought in the county court. As we put it in the consultation paper:

It would be possible to give employment tribunal *judges* more scope to hear disputes over which employment *tribunals* lack jurisdiction. This could be done by enabling them to sit in the county court, through the practice of flexible deployment or “cross-ticketing”.⁶⁴

- 3.4 Whilst both options gained support in the response to our consultation, there was also a degree of opposition to both options, while some of the support was guarded, or qualified. The second option – flexible deployment – gained more support, and attracted less, or at least less strong, opposition.

Concern about limited judicial resources

- 3.5 One recurring theme in the response to our consultation is concern about exacerbating the call on limited judicial resources in employment tribunals. Most agree that the court system as a whole would benefit from having expert discrimination judges hear non-employment discrimination claims. But many worry that there would be disadvantages for the employment tribunal service. Even with the current jurisdictional constraints, employment tribunal claims take a long time to proceed to a hearing. Following the Supreme Court’s decision in *R (UNISON) v Lord Chancellor*,⁶⁵ claimants are no longer

⁶³ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, ch 3.

⁶⁴ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, para 3.5.

⁶⁵ *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] IRLR 911.

required to pay a fee to bring claims in employment tribunals. The judgment resulted in a significant increase in the number of tribunal claims brought. A significant recruitment round for employment judges followed in 2018.⁶⁶ Many consultees were concerned that concurrent jurisdiction, or the extensive deployment of employment judges to sit in the civil courts, would dilute the judicial resources available to be deployed in the employment tribunal. We report these concerns in this chapter, as they will plainly be relevant to the Government and the judiciary.

Consultation Question 4: We provisionally propose that the county court should retain jurisdiction to hear non-employment discrimination claims. Do consultees agree?

- 3.6 Before asking about the issue of sharing jurisdiction, Consultation Question 4 sought to test our starting point, namely that the county court should continue to have jurisdiction to hear non-employment discrimination claims. This is distinct from the issue of whether it should share some or all of that jurisdiction with the employment tribunal, which is discussed in subsequent questions. Of the 64 consultees who responded to this proposal, 44 agreed that the county court should retain jurisdiction to hear non-employment discrimination claims. Twelve respondents expressly disagreed with the proposal, while eight expressed more nuanced views, which we took as expressing neither agreement or disagreement.
- 3.7 Many of those who disagreed with our proposal emphasised the expertise of employment tribunal judges in discrimination claims. These consultees shared the view that county court judges, as generalist civil lawyers, tend to have less expertise in discrimination law than employment tribunal judges. They argued that this pointed in the direction of the employment tribunal judges having exclusive jurisdiction to hear any discrimination claim, whether it arises in the workplace or not. Some stressed that discrimination law forms a single corpus of law under the Equality Act 2010, and that Equality Act expertise on discrimination in the workplace context should straightforwardly translate to other contexts.
- 3.8 Two thirds of consultees, however, agreed with our provisional proposal that the county court should continue to have jurisdiction to hear non-employment discrimination claims. Many of these consultees noted that the expertise of employment judges in employment-related discrimination claims could contribute to resolving discrimination disputes in the civil courts, and some went on to argue for either or both of shared jurisdiction and flexible deployment of employment judges. Consultees who supported our proposal tended to focus on employment tribunal judges' relative lack of expertise in the wide range of non-employment contexts in which discrimination claims arise in the civil courts, from housing to education, actions against the police and the provision of services. Some noted that legal aid was available for some claims in the county court, but not for claims in the employment tribunal (which is a no-costs forum where parties ordinarily meet their own costs). As Cloisters said:

Not only [is the county court] best placed to deal with such a variety of claims, but if our courts are to deal effectively with diversity then enabling them to deal with

⁶⁶ See <https://www.judicialappointments.gov.uk/122-salaried-employment-judge-employment-tribunals-england-and-wales-information-page> (last visited 22 January 2020).

discrimination is vital – and removing such claims to a specialist court sends a message that these claims are difficult and “other”.

Discussion

- 3.9 A number of points made by those who disagreed with this provisional proposal are best considered in the context of whether and how the civil courts might share jurisdiction with employment tribunals over non-employment discrimination claims. We therefore consider these points in more detail later in this chapter. Our focus here is on the question of whether the jurisdiction of the county court to hear some non-employment discrimination claims should, contrary to our proposal, be abolished. This would require primary legislation to transfer that jurisdiction to the employment tribunals.
- 3.10 The main argument made against the county court hearing discrimination claims is that discrimination law under the Equality Act 2010 forms a single corpus of law in which employment judges are expert. The relative scarcity of discrimination claims in the county court has led some to suggest that, because discrimination law is less frequently invoked outside the employment context, judges do not develop expertise in it. This was stressed by the Employment Lawyers' Association (“ELA”), and forms part of the grounds of its members' support for the creation of an Employment and Equalities Court.
- 3.11 We do not think that it follows from the consolidation of discrimination law into a single statute in the Equality Act 2010 that claims under the Act must be heard in a single specialist forum. That is a distinct and further policy decision, one requiring careful adjudication between views such as ELA's above, and the view of others such as Cloisters that a single equalities tribunal would inappropriately move discrimination law out of the main stream of civil law.
- 3.12 As we noted in the introduction to this chapter, many consultees were concerned that the employment tribunals' workload is proving challenging even within the current limits of their jurisdiction. In considering this question, we have assumed that resources currently allocated to the civil courts would commensurately move to the tribunals.
- 3.13 Transferring non-employment discrimination jurisdiction entirely to the employment tribunal would be a major alteration of the nature of employment tribunals. It would, in substance, create a single “employment and equalities tribunal”, which as we have indicated above raises important justice policy issues and is close to a major restructuring of employment tribunals (which would be outside our terms of reference). Given the balance of consultee opinion against it, it is not something that we are in a position to recommend. We therefore confirm our provisional proposal, which found favour with over 67% of consultees. We consider how best to use employment judges' discrimination expertise outside the employment field in the remainder of this chapter.

CONCURRENT JURISDICTION

- 3.14 As we noted above, the main issue raised in chapter 3 of our consultation paper is whether employment *tribunals* should share the jurisdiction to hear appropriate non-employment claims with the civil courts. Alternatively, we asked whether deploying employment *judges* to the civil courts to hear appropriate claims is desirable. The main points raised by the series of questions in our consultation paper are as follows:

- (1) Should jurisdiction be formally shared between the courts and employment tribunals? (Consultation Question 5)
- (2) If so, how is such formal sharing best achieved in practice? (Our consultation paper suggested a triage process, and a power to transfer or refer cases to the employment tribunals) (Consultation Questions 6 and 7)
- (3) If not, can the same benefits be realised through informal sharing of judicial resources, in the form of cross-ticketing and flexible deployment of employment judges in the county court? (Consultation Questions 8 and 9)

3.15 All these questions are premised upon the argument that employment judges are, in at least some cases, better equipped than general civil judges to hear and determine non-employment discrimination claims justly and efficiently (“the discrimination expertise” argument). Most consultees thought that the “discrimination expertise” argument justified some action by way of reform. They were then split between those who thought concurrent jurisdiction was desirable, if properly managed, and those who preferred that judicial expertise should, at least for now, be shared by deploying employment judges to sit in the county court.

Consultation Question 5: Should employment tribunals be given concurrent jurisdiction over non-employment discrimination claims?

3.16 Sixty-three consultees answered this question. Views were relatively evenly split: 28 thought that employment tribunals should have concurrent jurisdiction over non-employment discrimination claims, while 33 thought that they should not. Two consultees did not give a concluded view. One of those was the Equality and Human Rights Commission (“EHRC”), whose response is worth setting out at the outset as it highlights some of the difficulties that many consultees, whichever view they settled on, wrestled with.

We recognise that there could be benefits to the employment tribunals having jurisdiction to hear non-employment discrimination claims. Employment judges’ experience in discrimination law mean that some cases may be dealt with more efficiently

The employment tribunal jurisdiction also provides certain inherent benefits to litigants: currently no tribunal fees are payable for pursuing a claim; the costs regime in the employment tribunal means that generally no costs are payable in the event of losing the case; and the court system is less formal than, at least, for multi-track claims in the county court.

Concerns about county court judges potentially having less discrimination law experience than employment judges could, however, be reduced through the provision of appropriate training (just as employment judges regularly receive), the use of suitably expert assessors with special skill and experience in relation to the protected characteristic discrimination in issue in the claim, and/or the flexible deployment of employment judges in the county court.

However, allowing non-employment discrimination claims to proceed in the employment tribunals could also lead to other issues. Legal aid is not currently

available in employment tribunals, which may mean someone who becomes eligible for legal aid after issuing their claim will find themselves unable to benefit from legal aid. Also, employment tribunals are not able to award an injunction, which might only become relevant to a litigant after they have issued their claim.

As highlighted in our response to question 4, our view is that a more holistic approach should be taken. We consider that further discussion and consultation should be taken in light of the response to this consultation about how complainants in discrimination claims can have access to appropriate advice and can be confident of an affordable, fair, and speedy hearing by skilled adjudicators with knowledge and understanding of equality legislation and the effects of discrimination.

Arguments in favour of concurrent jurisdiction

- 3.17 Twenty-eight consultees favour giving employment tribunals concurrent jurisdiction over non-employment discrimination claims. This group includes a varied range of consultees, including former employment judges, the Council of Employment Judges (with whom Employment Tribunals (Scotland) agree), the Institute of Employment Rights, the Disability Law Service, Lewis Silkin LLP, the Liverpool branch of the Law Society, Unite and the National Association of Schoolmasters Union of Women Teachers. This group of consultees emphasised the benefits of realising the discrimination expertise of employment judges. Concurrent jurisdiction in appropriate cases would, in their view, result in hearings being conducted with greater efficiency and against a more appropriate tribunal setting. As the Employment Appeal Tribunal (“EAT”) judges put it:

There are discrimination claims that raise no significant issues of law deriving from other fields where employment tribunals may be better-equipped to resolve them. This might be particularly true of cases concerned with the provision, or non-provision, of goods/services under the Equality Act 2010, Part 3. We consider it would afford greater flexibility and better use of specialist judges for there to be extensions to the present concurrent jurisdiction of the employment tribunal and county court in non-employment discrimination cases.

- 3.18 Stephen Cribbin emphasised the accessibility of the employment tribunal relative to the civil courts:

The employment tribunals are intended to provide a more user-friendly approach with less risk of a costs award and better suits those claimants who believe that they have a valid claim but could not afford the risks associated with other courts. They are also better suited to litigants in person.

- 3.19 The Disability Law Service thought that concurrent jurisdiction would benefit people with disabilities:

It is our view that employment tribunals should be given concurrent jurisdiction over non-employment discrimination claims. The deliberately distinct characteristics of employment tribunals are of equal relevance for disabled people in non-employment discrimination claims. There appears to be no good reason why, for example, a worker in a business whose employer has failed to provide disability access to their workplace would pursue their complaint in one jurisdiction whilst a customer of the

same business would pursue their complaint in another. Concurrent jurisdiction would enable better access to specialist legal advice (many employment specialists do not have specialist knowledge of the Civil Procedure Rules) and would simplify the system.

- 3.20 ELA supported concurrent jurisdiction as a first step towards establishing a distinct employment and equalities court:

We would agree with this proposal as a first step towards establishing a single Employment and Equalities Court. This would at least allow judges who are well versed and trained in the area of discrimination to take over the case.

Were the proposal to be pursued however, care would be required to ensure that the benefits of the Tribunal system were made equally applicable to non-employment discrimination matters. In particular, the more flexible procedural rules and the no costs jurisdiction should apply equally to all types of claim. We also believe legal aid should be retained for non-employment discrimination matters, even where they are brought before the Tribunal.

However, in the longer term, we urge further consideration be given to establishing a single court to hear all these matters.

- 3.21 ELA was not alone in seeing concurrent jurisdiction as an incremental step towards an Employment and Equalities tribunal. The Council of Employment Judges, for example, said:

We would welcome this. The experience of this over time would show whether most equalities business should sensibly be allocated to an Employment and Equalities Tribunal/Court in due course.

Arguments against concurrent jurisdiction

- 3.22 Over half of respondents (33 out of 63) did not favour giving employment tribunals concurrent jurisdiction over non-employment claims. These included the President of Employment Tribunals (England and Wales) and the Regional Employment Judges (joint response) (with whom the President of the Industrial Tribunal and Fair Employment Tribunal (Northern Ireland) agrees), the Law Society of England and Wales (and its Manchester Branch), the Law Society of Scotland, Peninsula, firms such as Pinsent Masons and Slater and Gordon, Professor Owen Warnock (University of East Anglia), the Employment Law Bar Association (“ELBA”), Cloisters, the Association of Her Majesty’s District Judges, GMB and the National Education Union, and employers such as Countrywide plc, British Telecommunications plc, and Transport for London.
- 3.23 This varied group of consultees offered a range of reasons for maintaining the current divide between courts and tribunals. Many focussed on the complexity and possible delay that shared jurisdiction risked bringing about. Others thought that concurrent jurisdiction would further stress the resources of employment tribunals at a difficult time. Some rejected concurrent jurisdiction because they thought that cross-ticketing and flexible deployment was the better way forward.

Scepticism about the discrimination expertise argument

- 3.24 The argument that employment judges are more expert in discrimination law, and that this expertise would lead to a more efficient resolution of non-employment discrimination disputes did not go unchallenged. A research team led by Dr Laura William of the University of Greenwich⁶⁷ suggested that, in fact, many employment judges do not have significant exposure to disability discrimination claims:

We note in the consultation document concerns about civil court judges' lack of expertise on discrimination, but importantly our research shows that many Employment Tribunal judges do not have the necessary expertise. Using the sample of disability discrimination cases claimed between 2015-2017 which went to a preliminary hearing or beyond, information on the identity of the judge was available for 755 cases. In total, 167 judges presided in those 755 cases, with the median being four cases per judge. 37 judges had one case, 77 judges had two to five cases, 44 judges had six to ten cases, and nine judges had more than 10 cases. This suggests that most employment judges had low levels of experience with disability discrimination cases. Accordingly, we have proposed that in each employment tribunal region there should be a few designated specialist Employment Judges who deal with disability discrimination cases. This arrangement will allow claimants the chance of having an experienced Judge hear their case.

- 3.25 We note that this research, which covers a period when employment tribunal receipts were reduced by the impact of fees, relates to disability discrimination cases only. Figures for employment tribunal claims for 2013 to 2019 show significant numbers of claims grouped under age, race, religion or belief, sexual orientation and sex in addition to disability.⁶⁸ Other possibly relevant factors are the length of time spent by employment judges in dealing with disability discrimination cases and the extent of their discrimination law training.

Employment judges' expertise is better shared in some other way

- 3.26 JUSTICE endorsed the point made in our consultation paper that employment judges have developed practices to manage and determine discrimination claims, but that no corresponding standard practice has developed in the county court. Nonetheless, JUSTICE did not think that that justified concurrent jurisdiction over non-employment discrimination claims:

We agree that there is merit in judicial officers with expertise in discrimination claims determining non-employment discrimination disputes, however this can be achieved without tribunals being given concurrent jurisdiction.

- 3.27 A similar conclusion was reached by Mark McWilliams (a solicitor at Archon Employment Solicitors), who preferred "the option of cross-ticketing which (provided

⁶⁷ The research team also consisted of Dr Birgit Pauksztat and Professor Susan Corby. The research referred to in the response has since been published: L William, B Pauksztat and S Corby, "Justice obtained? How disabled claimants fare at employment tribunals" (2019) 50(4) *Industrial Relations Journal* 314, p 322. The published figures differ slightly from those in the consultation response; they indicate that 38 judges had one case and 43 judges had six to ten cases.

⁶⁸ See Annex C, Employment Tribunal Receipts Tables, at <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2019> (last visited 10 January 2020).

the shortage of employment judges is soon resolved) seems to me less likely to cause delay, expense and inconvenience to the parties”. Professor Owen Warnock also rejected the idea of concurrent jurisdiction. He said:

The fact that some non-employment discrimination cases require knowledge of housing or education law means it would be inappropriate to transfer all Equality Act cases to the employment tribunals⁶⁹ – notwithstanding that the knowledge of discrimination law of Employment Judges is very much greater than that of Circuit and District Judges. The better solution is to introduce an ability to transfer cases and to assign Employment Judges to hear particular county court cases.

Concerns about concurrent jurisdiction: delay and procedural complexity

3.28 Concern about delay and inconvenience in the event of concurrent jurisdiction was a major theme. A number of practical and procedural challenges associated with concurrent jurisdiction were highlighted by consultees, including the availability of legal aid, appeal routes, and the principles governing recoverable legal costs. JUSTICE, for example highlighted the difference in costs regimes, adding:

Creating parallel jurisdiction in circumstances where there is no jurisdictional overlap will require primary legislation at a time when legislative attention is short. It would also be liable to promote “forum shopping”, unnecessary satellite litigation and confuse lay-users.

Concerns about the strain on judicial resources

3.29 As we noted in the introduction to this chapter, concern about judicial resource featured prominently in consultation responses to the questions covered in this chapter. Many consultees thought that concurrent jurisdiction would result in greater strains on employment tribunals’ limited resources. Many consultees seemed to think that employment claims are taking too long to proceed to a hearing under current arrangements. Put plainly, for them now is not the time to consider enlarging the tribunal’s jurisdiction to include discrimination in the provision of services. The Association of Her Majesty’s District Judges also expressed concern over the impact on the resources of the civil courts:

An obvious and immediate impact of such a change would be a reduction in the court issue fees which are currently collected when proceedings are issued in the county court. Since the Supreme Court decision in the UNISON litigation, no fees are payable for proceedings pursued in the Employment Tribunals. Therefore, one foreseeable consequence of such a change would be to reduce the fees generated by proceedings which would, by extension, have an impact upon the funding of the court service generally at a time when funding is already stretched.

3.30 GMB’s response was predicated on the employment tribunal being “already heavily under resourced”. GMB added that:

⁶⁹ The reference to transfers applies equally to concurrent jurisdiction, as Professor Warnock’s answer to Consultation Question 5 referred us to his answer to Question 4, approving our provisional proposal that the county court should retain jurisdiction in relation to non-employment discrimination.

During 2017/18, the number of claims received by the tribunal system increased significantly. According to figures from the Ministry of Justice 109,698 claims were made in 2017/2018, compared with 88,476 in 2016/17. And the courts' outstanding employment caseload has significantly increased. It stood at 336,637 on 31 March 2018, up by 23% on the number outstanding the year before (272,032).

[Concurrent jurisdiction would have] a detrimental impact on claimants seeking resolution of their employment law disputes. And it would over burden an already over-stretched system.

- 3.31 A response which brings together concerns about stretching the tribunal resources, forum shopping, and the limitations of the discrimination expertise argument, is that of ELBA:

We would be concerned about the practicalities of conferring concurrent jurisdiction upon the employment tribunals over non-employment discrimination claims. Claimants, and particularly litigants in person, may well elect to issue in the employment tribunal because of the fees and costs regimes and also because of the expertise of employment judges in matters relating to discrimination. However, this may not take account of the other potential issues in the claim that employment judges may not be so well equipped to deal with.

Given the difference in the fees and costs regime, giving concurrent jurisdiction to the employment tribunals would be likely to significantly increase the number of non-employment discrimination claims being issued in the tribunals with the attendant difficulties with resource in a system that is already drastically overstretched.

- 3.32 We discuss consultees' arguments below. We pause only to note that the issue of concurrent jurisdiction split consultees and groups of consultees almost equally. That includes respondents representing the views of the judiciary, practitioners, and the unions regardless of their perspective. Only academics and some major employers responded uniformly to this question – and these came out against concurrent jurisdiction.

Consultation Question 6: Transfer and referral of cases in the event of concurrent jurisdiction

- 3.33 Consultation Question 6 was concerned with how claims might be allocated to a particular forum in the event of concurrent jurisdiction. Chapter 3 of our consultation paper treated the question of case allocation, whether through a power to transfer to either forum, or to refer a discrimination question to employment tribunals, as a key part of a concurrent jurisdiction system. We indicated that we thought it highly unlikely that any case could appropriately be transferred against the wishes of the claimant.⁷⁰
- 3.34 Question 6 is accordingly complex, and in summarising the response to it we have broken it down into its component parts.

⁷⁰ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 3.26 to 3.31.

- (1) First, we asked whether, if concurrent jurisdiction were established, there should be a power for judges to transfer claims from one jurisdiction to another.
- (2) If so, we then asked about the criteria to be used in making a transfer to or from the county court and the employment tribunals.
- (3) Finally, we asked whether the county court should have a power to refer questions relating to discrimination to employment tribunals, rather than transfer the whole case.

(First part): If employment tribunals are to have concurrent jurisdiction over non-employment discrimination claims, should there be power for judges to transfer claims from one jurisdiction to the other?

- 3.35 Of the 53 consultees who answered the question on a power to transfer, 32 thought that, if concurrent jurisdiction were established, there should be a power for judges to transfer claims from one jurisdiction to the other. Seventeen consultees thought that there should be no power to transfer. Two consultees urged that further consideration of the issues was required, while a further two did not give a view.
- 3.36 A majority of respondents thought that there should be a power to transfer claims. Many among this group of consultees thought concurrent jurisdiction would in practice require transfers to allocate claims to be heard in the most appropriate forum. Such a power would assuage at least some of the concerns of many consultees who opposed concurrent jurisdiction, such as forum shopping and procedural confusion. Much turns on the criteria to be used when considering a transfer, which we turn to below. Indeed, some consultees who grudgingly accepted the need for a power to transfer in the event of concurrent jurisdiction, remained distinctly sceptical that it would work. ELBA for example, noted:
- This would cause further difficulties of an administrative nature. How would the tribunals and courts deal with transferring cases between them given the difference in fees and costs regime?
- 3.37 Those who were against introducing a power to transfer claims gave a range of reasons for their opposition. These included that employment tribunals' resources are already overstretched, that it is difficult to formulate workable criteria for transfer, and that there are practical difficulties due to the different fees and costs regimes in the employment tribunal and civil courts.

(Second part): If so, what criteria should be used for deciding whether a case should be transferred (1) from county courts to employment tribunals and/or (2) from employment tribunals to county courts?

- 3.38 Twenty-one consultees suggested criteria for deciding to transfer a claim between the civil courts and the employment tribunal. One, Employment Judge Chris Purnell, thought that there should only be a power to transfer cases from the county court to the employment tribunal.
- 3.39 Three criteria frequently offered by consultees were: the subject matter of the claim, the complexity of the legal issues, and the views of the parties. Consultees considered that if a case involves substantive issues of which the employment tribunal has

expertise, this should be a factor when deciding where the case should be heard. The Liverpool Law Society's Employment Law Committee and the Bar Council suggested that it might be more appropriate for cases relating to housing and property matters to be heard in the county court, given employment judges' relative lack of expertise in those areas. A number of consultees also said that if a point of law arises that is not related to the Equality Act 2010, the case should be heard by the county court.

- 3.40 Orpington Constituency Labour Party conveyed the motion passed by its members that county court judges should be given the power to transfer any "complex non-employment discrimination" case to the employment tribunals.
- 3.41 Judge Purnell cited "multiple allegations of discrimination of various types" as an example of complexity that might be taken into account when assessing whether a non-employment discrimination claim is suitable for transfer.
- 3.42 Some consultees did not offer suggestions on the criteria to be used when transferring claims. A few expressly stated that the power should be in general terms. As Professor Owen Warnock put it:

Yes, there should be a power to transfer. It should be in general terms like the [provision in] the Equality Act cited in the consultation paper and no further criteria should be adopted: so as to minimise the likelihood that decisions to transfer or not (which are procedural rather than dispositive) become an area for appeals.

Views of the parties

- 3.43 Our consultation paper set out our preliminary view that transfers should not be possible against the wishes of the claimant. Unite stressed that the criteria for transfer "should be based on the wishes of the claimant except in exceptional circumstances". Most consultees, however, mentioned the views of the parties as a criterion without distinguishing between claimant and defendant. The EAT judges' response expressly stated that any party should have the right to seek a transfer to the other forum, although a transfer should not be made against the wishes of the claimant.

Procedural considerations

- 3.44 The Law Society of England and Wales response mentioned factors alongside the complexity of the legal issues which we would label generally as "procedural" considerations. These are:
- whether alternatives (such as deploying an employment judge in the court) have been considered already;
 - whether a transfer would be in compliance with the overriding objective of the Civil Procedure Rules, in particular whether both parties would continue to be on an equal footing,
 - whether the transfer is simply being requested for tactical reasons (for example to take advantage of the different costs regime); and

- when the case can be listed if transferred (it advocated consideration of listing updates from the relevant employment tribunal regional office to avoid undue delay).

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

3.45 Of the 26 consultees who answered this part of the question, 13 thought that the county court should be given the power to refer questions relating to discrimination cases to employment tribunals. Six did not think there should be a power to refer. Four consultees did not offer a firm view other way, many among them feeling that the issue was finely balanced and that careful consideration was necessary. Three consultees supported a power to refer discrimination claims only if concurrent jurisdiction is not granted to the employment tribunal.

3.46 ELBA, who rejected transfer of claims from one jurisdiction to another as “unworkable and inadvisable”, preferred the option of a power to refer discrimination law issues to employment tribunals:

However, we do consider that there is merit in the county courts being given the power to refer questions relating to discrimination cases to employment tribunals. The considerable expertise of employment judges in determining discrimination claims could undoubtedly assist in cases of non-employment discrimination and having the ability to refer discrete questions relating to discrimination seems a sensible way for the tribunals and courts to share this valuable resource.

3.47 The Law Society of England and Wales thought that some practical issues would need to be addressed when considering whether to give this power to the county court:

It may not be easy to refer purely legal questions to employment tribunals without allowing them to consider the evidence and make findings of fact at either a preliminary or a full hearing. However, the employment tribunal can refer to case law decided on similar facts and/or guidance to assist the county court Judge in determining the issues.

3.48 Of the six consultees who thought that county court should not be given the power to refer questions relating to discrimination cases to the employment tribunals, only two gave reasons. Birmingham Law Society considered that “this would build further delays into an already slow system” and expressed a preference for the transfer of the whole case to the employment tribunal. Peninsula thought that referrals were “unlikely to be a productive use of time and resources”.

3.49 The President of Employment Tribunals (England and Wales) and the Regional Employment Judges were amongst those who responded without giving a firm view. They did not oppose referrals in principle, but thought that they would cause “unnecessary complexity” and that transfer of the whole case or deployment of an employment tribunal judge to hear the case in the county court would be preferable.

Consultation Question 7: If employment tribunals are to have concurrent jurisdiction over non-employment discrimination claims, should a triage system be used to allocate the claim as between the county court or the employment tribunal?

- 3.50 A total of 45 consultees answered this question. Twenty-four consultees thought that a triage system should be used to allocate the claim as between the county court or the employment tribunal, whereas fifteen consultees held the opposing view. Some others felt they needed to know more about a proposed triage system to give a settled view.
- 3.51 The Council of Tribunal Members' Associations were in favour of a triage system, saying that it "should be implemented to assess which judicial forum has the better expertise, knowledge and understanding to aid the fairest and most equitable outcome for the claimant". Cloisters thought that triage "should be carried out at the first preliminary hearing/case management conference". Slater and Gordon thought that the triage mechanism should take into consideration which forum had capacity to hear the claim. Countrywide plc thought it the most appropriate way to "enable proper allocation to take place at the earliest opportunity", but emphasised that the claimant and respondent should be able to put forward their view as to where the claim should be heard.
- 3.52 It is precisely because a triage system will – at least sometimes – require a decision by a judge that some consultees opposed it. Peninsula and the Bar Council noted that in the early stages of litigation it is not always clear what all the relevant legal issues are. Therefore, difficulties are likely to arise when attempting to allocate a claim to the appropriate forum through such a system. As Peninsula put it:

Ultimately, discrimination claims rest on specific facts and those are rarely contained within the original claim and response forms. Most employment tribunals, when considering discrimination claims, organise a preliminary hearing to determine the relevant issues and give any specific orders to ensure that the matters of dispute are fully identified in advance. This can include the provision of a 'Scott schedule' that clarifies what the alleged discriminatory acts were, who was supposed to have carried them out, identifying any relevant witnesses and confirming the type of discrimination the act was alleged to be.

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

- 3.53 ELBA was similarly sceptical of triage, emphasising that as an allocation mechanism it would be "fraught with difficulty". It would not be a "purely administrative task and could not easily be undertaken by tribunal or court staff". The Law Society of England and Wales questioned whether a triage system would inadvertently create additional problems for parties, courts and tribunals:

There is a risk that such a triage system may not sufficiently consider the representations of the parties. Any triage system would need to ensure that cases

are reviewed in detail in order to determine the most appropriate route. As there is currently a lack of judicial resources it is unlikely that the courts would have the capacity to assist with such an exercise. There would also be a risk that the decision made could be litigated, further complicating the process for the parties.

What form should the triage take?

- 3.54 Twenty consultees offered suggestions as to what form the triage should take. Most, but not all, thought that the allocation of a claim is a task for a judge. The President of Employment Tribunals (England and Wales) and the Regional Employment Judges suggested that “the triage should be conducted by a legal officer or tribunal case worker on paper or by a judge at an initial case management hearing”. Hannah Dahill also thought it could be conducted by trained senior case workers.
- 3.55 The Disability Law Service suggested that the triage could operate within the processes “already in place under rules 12 and 26 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013”.⁷¹ Rule 12 sets out examples where “the staff of the tribunal office shall refer a claim form to an Employment Judge.” This includes where the claim, or part of it, may be one which the tribunal has no jurisdiction to consider.⁷² Under Rule 26, the judge will consider “all of the documents held by the Tribunal in relation to the claim, to confirm whether there are arguable complaints and defences within the jurisdiction of the Tribunal”⁷³ and will then make a case management order.⁷⁴
- 3.56 Countrywide plc referred to their view on transfer that “the judge is the best placed to make the decision” but added that “it is crucial that triage does not take up valuable resource which would cause further delay to hearings and negatively impact proceedings”. Both the Council of Employment Judges and Slater and Gordon suggested that questionnaires could be used in the triage process. The Council of Employment Judges suggested:

The matter might be raised in a Defence or a Response; by direct application; and provision should be made for this issue to be addressed in Directions and Listing Questionnaires in the county court or Case Management Agendas in the employment tribunals.

- 3.57 Slater and Gordon added that the questionnaire could ask “amongst other things, whether they would oppose the transfer of a claim to a different court and also questions relating to their finances and objectives”.

FLEXIBLE DEPLOYMENT OF JUDGES (CROSS-TICKETING)

- 3.58 Our consultation paper explored flexible deployment (also known as cross-ticketing) as an alternative to concurrent jurisdiction. Cross-ticketing employment tribunal judges

⁷¹ SI 2013 No 1237.

⁷² Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2013 No 1237, sch 1, r 12(1)(a).

⁷³ Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2013 No 1237, r 26(1).

⁷⁴ Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2013 No 1237, r 26(2).

to hear appropriate discrimination claims is a way of “moving the judge to the work” rather than the work to the judge, which concurrent jurisdiction does.

- 3.59 Opting for flexible deployment would retain the hard boundary between the jurisdictions of the county court and employment tribunal, but enable an employment judge, where appropriate, to be deployed to hear a discrimination case as a judge of the county court. The flexible deployment option can be viewed either as an alternative to concurrent jurisdiction, or as a temporary measure to achieve a similar aim while primary legislation is pending. Properly used by listing officers in the county court, flexible deployment could reduce (but not eliminate) the possibility of a county court judge with little or no discrimination experience having to hear a discrimination case. In other words, flexible deployment is an informal way of improving the chances of allocating the most expert judicial resources to appropriate non-employment discrimination cases.

Consultation Question 8: Do consultees consider that employment judges should be deployed to sit in the county court to hear non-employment discrimination claims?

- 3.60 In total, 58 consultees submitted a response to this question. Thirty-seven consultees supported the option of deploying judges to sit in the county court to hear non-employment discrimination claims, while 14 consultees held the opposing view. The remaining consultees did not offer a concluded view one way or the other.

Flexible deployment of employment judges is already in use

- 3.61 It should be noted, as Employment Judge Philip Rostant explained in his response, that “to an extent” and “informally” flexible deployment is already happening, as “many employment judges now hold tickets as deputy district judges”. Our consultation paper noted:

that 26 employment judges (including one from Scotland) have already been authorised to sit in the county court by way of a pilot project. They are at present deployed to sit in the county court on civil matters (but not family matters) as part of a four-year pilot of the deployment provisions of the Crime and Courts Act 2013, which commenced in February 2016. They are sitting “as judges of the county court” for up to 30 days per year, in effect exercising the jurisdiction of a district judge (although not described as such). Some have been asked to case manage and conduct trials of multi-track claims engaging the Equality Act 2010, for example in disability cases.⁷⁵

- 3.62 Employment judges are already judges of the county court by virtue of section 5(2)(v) of the County Courts Act 1984 (as substituted by the Crime and Courts Act 2013). The explanatory notes for the 2013 Act explain that while circuit judges and district judges would remain the principal judges of the county court, the effect of the substituted section 5 would be “to enable a wider range of other judges to sit, on a flexible basis, in the single county court”.⁷⁶

⁷⁵ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, para 3.37.

⁷⁶ See para 295 of the explanatory notes for the Crime and Courts Act 2013. The 2013 Act created the single county court.

- 3.63 Consultation Question 8 sought to test the option of flexible deployment as way of taking advantage of employment judges' discrimination expertise. In effect we were asking whether there should be more, or more systematic, flexible deployment of employment judges specifically to determine discrimination claims in the county court – the central issue underlying the option of concurrent jurisdiction.

The property chamber deployment pilot

- 3.64 JUSTICE's response and some other responses to our consultation mentioned that flexible deployment has been the subject of the Civil Justice Council's property chamber deployment project, which enables appropriately ticketed judges of the county court and property chamber to exercise both jurisdictions for the purpose of resolving a dispute. We note that the pilot project was declared a success by the President of the First-tier Tribunal (Property Chamber), Judge Siobhan McGrath.⁷⁷
- 3.65 The project is principally aimed at determining in one set of proceedings the totality of a dispute between the parties where the dispute falls partly under the jurisdiction of the county court and partly under that of the Property Chamber. It involves a flexibly deployed judge sitting as both a tribunal and county court judge (described as "concurrent sitting") to determine disputes that engage both jurisdictions. The objective is to enable all the issues in a dispute to be resolved in one place. This is not the same as concurrent (or shared) *jurisdiction*, nor is it the same as deploying employment judges to the county court in order to bring their discrimination expertise to discrimination in goods or services claims that fall entirely within the jurisdiction of the county court. But it may be a precedent worth following in employment cases in which it is uncertain which forum has jurisdiction; we return to it at the end of this chapter.

Support for flexible deployment

- 3.66 Nearly two thirds of consultees supported flexible deployment. The general view among this bloc of consultees was that flexible deployment was a sensible method of ensuring that more non-employment discrimination cases are heard by a judge with the relevant expertise.
- 3.67 ELA set out some factors to be taken into account if there is deployment of employment tribunal judges:

Consideration would need to be given to (a) how procedural hearings would be dealt with to ensure that this was administratively and practically possible and (b) the training required for the employment judges to address the other matters involved in the civil claim. It should be noted that most employment judges come from a specialist background in employment law and may not have a more general background for the handling of other civil court work. We would encourage the Commission to consider proposing that more employment judges become dual-ticketed as district judges able to sit in the county court.

⁷⁷ See Judge Siobhan McGrath, President of the First Tier Tribunal (Property Chamber), *Report on Property Chamber Deployment Project for Civil Justice Council Meeting 26 October 2018*, paras 10 and 30, <https://www.judiciary.uk/wp-content/uploads/2018/11/property-chamber-deployment-project-report-oct2018.pdf> (last visited 20 January 2020).

3.68 Some consultees' support was guarded. John Sprack, a former employment judge, responding in a personal capacity, felt that flexible deployment should be used "as an interim measure until the reforms suggested in the answers to Questions 5, 6 and 7 [namely, concurrent jurisdiction] are in force" and that "any such deployment must be subject to the need to cope with the current backlog of cases in some employment tribunal regions". EHRC suggested that flexible deployment "should be taken into account as part of wider and more detailed discussion and consultation on changes to the hearing structures for discrimination claims". ELA, meanwhile, considered that flexible deployment "may be a good workable proposal" but made clear that it was not its preferred option, which would be for a single Employment and Equalities Court or alternatively, for a presumption that discrimination matters will be transferred to the employment tribunal.

3.69 Most supporters of flexible deployment, however, were more enthusiastic. As we noted above, a core number of consultees have insurmountable reservations about concurrent jurisdiction, transfers or even the power to refer discrimination issues to employment tribunal. Many among those viewed flexible deployment as an attractive, pragmatic and lower risk way of making the most of employment judges' discrimination expertise. As Cloisters put it:

It is our view that a more appropriate means of achieving expertise in discrimination than concurrent jurisdiction between employment tribunals and county court, if such is considered desirable, would be deploying employment judges to sit in the county court to hear non-employment discrimination claims. This does not, in our view, remove the need for assessors, who can bring practical experience, as do lay members of the employment tribunal, to the case and so there should be provision for sitting with assessors.

3.70 Similarly, the EAT judges said:

This would improve flexibility and better use of this specialist judicial resource; it would also have the benefit of broadening the perspective of employment tribunal judges, assisting in their career development and (we believe) improving morale.

3.71 ELBA also held the view that flexible deployment may improve employment judges' skillset:

This is an excellent way to utilise the considerable knowledge and experience of employment judges in relation to non-employment discrimination claims, with the benefit of the support of their judicial colleagues in the county court. It will have the benefit of broadening the knowledge of employment judges which should have a positive impact on their own career progression and their work in the employment tribunals. Gaining further experience of sitting in the county court may ultimately render it more feasible to confer concurrent jurisdiction as discussed above.

3.72 Similarly, the Council of Employment Judges noted that:

There is an increasing number of examples of Employment Judges being asked to sit on trials of multi-track cases that engage the Equality Act 2010. The Employment Judges are keen to do this because it fits with their experience in sitting on multi-day

discrimination and equal pay cases. This is known to have happened in Birmingham, Bristol, Sheffield and Watford County Courts.

It is submitted that it makes sense to make use of the knowledge and experience of Employment Judges in this way. It is in the public interest. Furthermore, cross-ticketing is an important means of judicial career development.

3.73 LawWorks, who expressed support for flexible deployment, explained that:

This reform would enable HMCTS to ‘move the judge to the work’ rather than ‘moving the work to the judge’, and we note that this idea has been welcomed by county court judges who recognise the experience of employment judges in this area. It would also reduce, although not eliminate, the situation in which a county court judge with little or no experience in discrimination claims is required to hear and determine such cases.

Concerns about the strain on judicial resources

3.74 Many who strongly supported flexible deployment nonetheless stressed the need to minimise the impact on the judicial resources available to employment tribunals. Having expressed support for flexible deployment, Cloisters added:

However, we are aware of the stretched resources of the employment tribunals. The priority must be that employment judges sit and provide the resources for the employment tribunal. Additional training for county court judges in discrimination – perhaps including shadowing in the employment tribunal – may assist in ensuring that county court cases are appropriately adjudicated. But employment tribunal Claimants and Respondents should not experience further delays in achieving justice because judges are being allocated to county courts.

3.75 Slater and Gordon’s response was similar. It was in favour of flexible deployment, but was mindful that “the allocation/flexibility in deployment for employment tribunal judges to the county court should not have a detrimental impact on the effective administration of law in employment tribunals.” Similarly, Transport for London made its support of flexible deployment conditional upon there being “sufficient capacity and expertise to determine such claims”. ELA cautioned that:

A concern with asking employment judges to sit in the county court is that there is a serious shortage of [such judges] at present which is causing significant issues with listing and progressing employment cases. Accordingly, we believe this is only a workable solution if sufficient numbers of employment judges are recruited and trained. Given the particular nature of discrimination claims, employment judges do not sit on discrimination cases immediately upon appointment and additional training is required. This lead-in time should also be borne in mind.

3.76 Concern about exacerbating the strain on judicial resources in the employment tribunals also featured prominently among those who opposed flexible deployment. As stated by Peninsula:

While we recognise the considerable experience employment judges could bring to bear in the county courts in relation to discrimination cases it has to be acknowledged that employment judges are already an extremely restricted and

scarce resource. The shortage of judicial resources is a major factor in the significant delays in listing matters in the employment tribunal, particularly on complex cases that would run for multiple days, which would cover the majority of discrimination claims. Reducing the availability of judges to sit on any hearings, and particularly on multi-day hearings, due to diary commitments in the county court would only further exacerbate the listing difficulties within the employment tribunals, increasing the delays on cases.

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

- 3.77 The Association of Her Majesty's District Judges sounded a note of caution about flexible deployment:

Whilst flexible deployment of Employment Judges may be superficially attractive, it is not clear that such a process would be efficient in using available judicial resources. For example, case management hearings in the county court do not normally last longer than 1 to 2 hours as a maximum. Unless Employment Judges are able to deal with several such cases in the course of one day (which will itself depend on listing), or are able to also deal with other standard county court work for the remainder of any such days, such an approach is likely to be inefficient.

- 3.78 The Law Society of Scotland's view was that the preferable solution is for non-employment discrimination claims to be heard in an employment tribunal, rather than via the deployment of employment tribunal judges in the county court.

Consultation Question 9: If consultees consider that employment judges should be deployed to sit in the county court, should there be provision for them to sit with one or more assessors where appropriate?

- 3.79 In the county court it is usual for a judge hearing a claim under the Equality Act 2010 to sit with assessors. We sought views on whether this should be the case where the judge is an employment judge. Of the 43 consultees who answered this question, 37 said that there should be provision for judges to sit with one or more assessors where appropriate. Four were against providing for employment judges to sit with assessors, while two consultees reserved judgement, noting that there were divergent views as to the value of sitting with an assessor.⁷⁸
- 3.80 Among the four consultees who thought there should not be provision for employment judges to sit with one or more assessors, most objections related to the consultees' opposition to any sharing of employment judges' time and expertise outside their tribunals. Employment Judge Philip Rostant gave a different reason, namely that he was "not currently convinced of the value added by an assessor as opposed to a fully-fledged non-legal member".

⁷⁸ Jo Chimes and the Bar Council. Jo Chimes cited recent suggestions that rules and guidance on the use of assessors (and their fees) in discrimination claims is currently unclear, and could and should be clarified: A Qwarnstrom and S Mullings, "Equality Act: access to assessors in the county court", *Legal Action Group*, 2019, <https://www.lag.org.uk/?id=205940> (last visited 10 January 2020).

3.81 There was nevertheless strong support for employment judges sitting with assessors. Two main arguments were put forward. The first was that assessors would bring relevant practical experience of discrimination disputes outside the workplace context. The second was that this reflects the position in the employment tribunal, where employment judges sit with two lay members when hearing discrimination claims. It also reflects the default position that in discrimination claims in the county court appointing assessors is mandatory unless there are good reasons for not doing so.⁷⁹ As EHRC put it:

[Cross-ticketed employment judges] should sit with assessors in the same way as required for county court judges. As we set out in our intervention into *Cary v Commissioner of the Police for the Metropolis*,⁸⁰ we consider that assessors should have special skill and experience in relation to the protected characteristic discrimination in issue in any claim. This is because discrimination against groups sharing protected characteristics generally manifests itself differently. The majority of assessors are lay employment tribunal members with greater experience in more general employment law and practice. Therefore we consider that, without the requirement we suggest, the additional expertise and skill they may bring to non-employment discrimination claims being heard by an employment tribunal judge (rather than a county court judge) will be limited.

Regardless of the above, the Equality Act 2010 currently requires that a judge hearing a non-employment discrimination claim will normally have to appoint an assessor, unless there are good reasons for not doing so. The Commission's ... Statutory Code of Practice states ... that it would not be a good reason that the court believes itself capable of hearing the issues in the case without an assessor or that having an assessor would lengthen proceedings ...⁸¹ Without further primary legislation it is therefore likely that in any event an employment judge sitting in the county court would be required to sit with an assessor.

DISCUSSION AND RECOMMENDATION

3.82 We now discuss the responses to Consultation Questions 5 to 9. There was general agreement about the value of employment judges' discrimination expertise. Opposition to our proposals was based not upon scepticism about the value of that expertise but rather upon concerns that the employment judiciary might become overstretched by the caseload. The main issue on which consultees were split is how best to realise the value of the expertise. Concurrent jurisdiction proved a divisive option, including among respondents who shared the same background (in particular, the judiciary, practitioners and unions). Flexible deployment attracted greater support and

⁷⁹ Equality Act 2010 s 114(7) provides that "In proceedings in England and Wales on a claim within subsection (1), the power under section 63(1) of the County Courts Act 1984 (appointment of assessors) must be exercised unless the judge is satisfied that there are good reasons for not doing so." See also CPR 35.15.

⁸⁰ [2014] EWCA Civ 987, [2015] ICR 71.

⁸¹ EHRC referred to its *Services, Public functions and Associations: Statutory Code of Practice*, <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice> (last visited 21 October 2019).

reservations about it were expressed less strongly. But we also note that the consultation response to our questions here calls for a degree of caution.⁸²

3.83 Views were split as to what, if any, action should be taken in order to capitalise on employment judges' expertise.

- (1) Some consultees thought that formal concurrent jurisdiction was desirable. This group of consultees thought concerns about delay, forum shopping, satellite litigation and procedural complexity could be sensibly met by allocating cases to the appropriate forum through a transfer, triage and/or referral mechanism.
- (2) Others preferred flexibly deploying employment judges to the county court as a means of "moving the judge to the work" that did not involve the risks of shared jurisdiction. In addition, many of those who favoured concurrent jurisdiction appear to view flexible deployment as an acceptable alternative.
- (3) A third group, while recognising the merit of having some non-employment discrimination claims decided by employment judges, thought that other concerns outweighed it. The main concerns were straining the resources of employment judges and the risk of delay and procedural complexity. Several consultees urged caution and further study of these options.

Despite the concerns there was a consensus that employment judges, properly deployed, can help deal with non-employment discrimination claims more efficiently. Consultation responses have not deflected us from the provisional views we expressed in our consultation paper⁸³ that most circuit and district judges are generalists who have not had the opportunity to develop the expertise in discrimination law that employment judges have, and that employment judges have developed practices to manage and determine discrimination claims which are not mirrored in the county court.

3.84 We acknowledge the merit of counter-arguments put forward by some consultees. In particular:

- (1) the procedural and case management practices that have emerged in employment tribunals may not be applicable across all discrimination cases heard in the county court; and
- (2) any deficit in expertise can be addressed in the county court through training, development and sharing of expertise.

3.85 Nonetheless we remain of the view that the discrimination expertise possessed by many employment judges will be of value in non-employment discrimination cases and that more advantage should be taken of it. This does not diminish the case for more training of the county court judiciary in discrimination law. Nor does it mean that every case raising a non-employment discrimination issue should be heard by an employment judge.

⁸² See para 3.14 above for a breakdown of the issues covered by Consultation Questions 5 to 9.

⁸³ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 3.10 and 3.35 to 3.39.

Concurrent jurisdiction over non-employment discrimination claims

- 3.86 Our consultation paper noted that formal conferring of shared jurisdiction over non-employment discrimination claims would require legislation. It would also create a need for claims to be appropriately allocated between the employment tribunal and the county court, whether through a power to transfer cases, a triage process at the case management stage, or a power to refer issues.
- 3.87 The need to avoid “forum shopping” by a party seeking tactical advantage by bringing a claim in the less appropriate forum is reinforced by the significant differences between litigation in the county court and employment tribunals. In particular:
- (1) subject to any new fees legislation, following the Supreme Court’s decision in *R (UNISON) v Lord Chancellor*, claimants are not obliged to pay fees to bring claims in employment tribunals;⁸⁴
 - (2) in employment tribunals, the losing party is not generally ordered to pay the winner’s legal costs;
 - (3) legal aid is not available in employment tribunals; and
 - (4) different procedural rules apply (respectively, the Civil Procedure Rules and the Employment Tribunals Rules of Procedure⁸⁵).
- 3.88 Most consultees recognised the risk of parties seeking to take tactical advantage of the differences between the forums. Doubts about the effectiveness of mechanisms for allocating cases, and the potential demands on judicial resources of “satellite litigation” about transfer led a narrow majority of consultees to reject concurrent jurisdiction. Others urged caution and further exploration of the potentially difficult issues involved in making concurrent jurisdiction work well and efficiently.
- 3.89 Supporters of concurrent jurisdiction had a range of views about the mechanism for allocating cases to the appropriate forum. We gave two examples in our consultation paper.
- (1) Section 140 of the Equality Act 2010 already permits the transfer of cases between employment tribunals and civil courts; but that is in the very specific situation where there is litigation in both tribunal and court and at least one of the cases concerns a breach of section 111 of that Act (“instructing, causing or inducing a person to discriminate against, victimise or harass another person”).⁸⁶
 - (2) Section 128 of the Equality Act 2010 allows civil courts to:

⁸⁴ *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] IRLR 911.

⁸⁵ The Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2013 No 1237.

⁸⁶ The example given in the Explanatory Notes to the Act is as follows: An employer instructs an employee to discriminate against a customer, who sues the employer or employee in the county court. The employee simultaneously makes a claim against the employer in an employment tribunal. The court or tribunal can transfer its proceedings so that all proceedings are dealt with together.

- (a) strike out equal pay cases if it appears to the court that they could more conveniently be determined by an employment tribunal; or
- (b) refer equal pay questions to employment tribunals before the case is ultimately disposed of by the civil court.

- 3.90 Both of these are general powers leaving a substantial amount of discretion to judges. Concurrent jurisdiction over non-employment discrimination claims, however, may well increase the number of cases requiring reallocation. A number of consultees suggested that an allocation decision need not necessarily be made at the outset. Even so, we consider it impractical to devise allocation criteria that will avoid the need in many cases for discretionary decision-making, and thus for representations from the parties. We see a risk of allocation disputes becoming a drain upon judicial resources, probably also resulting in delay and conceivably satellite appeals.
- 3.91 Leaving aside concern about the impact on judicial resources, our main concern is as to how well concurrent jurisdiction can be made to work in practice. The majority of responses to Consultation Questions 5 to 7 concern revealed doubts among consultees from a range of backgrounds. The reasons for their concern were varied, including delay, the risk of contentious procedural hearings, satellite litigation, and the strain on judicial resources. No clear consensus about the parameters of a power to transfer emerged.
- 3.92 The problem that we see with any allocation system is that the factors militating in favour of one jurisdiction or the other are such as to require discretionary assessment and are to a large extent incommensurable. At first sight the factors will include the prominence and complexity in the litigation of discrimination issues, balanced against the prominence and complexity of other issues of law in which discrimination judges are less well versed – factors that will require discretionary assessment in many cases. Other factors that will motivate the parties are the procedural advantages and disadvantages of either forum from their point of view. The costs-shifting jurisdiction of the county court is likely to be attractive to employers who perceive the claim against them as weak, whilst protection against costs will, unless they are eligible for public funding, attract claimants to the tribunal. It is not obvious how the various competing considerations should be balanced.
- 3.93 Consultees found a power to refer discrimination questions to the tribunal less problematic than other methods of allocation. Some thought it was less likely than transfer to lead to procedural complications, although it might delay some claims in their progress to a final determination. We nevertheless see difficulties here in separating issues to be determined by the employment tribunal from the issues remaining to be determined by the civil court. A referral system limited to questions of pure law would, we think, be of limited utility, given that one of the relevant strengths of the employment judiciary is in case-managing discrimination claims as a whole. Any arrangement that involved two forums determining issues of fact and law – typically on the basis of oral evidence – leads to the risk of findings of fact which, though made with reference to different issues of law, could be inconsistent with each other. Referral could only work if the issues fell into separate watertight compartments. Even

in such a case, the need for determination of different issues in different forums – inevitably on different occasions – would require additional time and resources.⁸⁷

3.94 These considerations, and the tenor of responses to our consultation lead us to conclude that the case for concurrent jurisdiction or a referral system is not made out. Many prominent stakeholders pointed to the dangers of any system of concurrent jurisdiction; though consultee opinion was more favourable to the referral option, the responses have not resolved our doubts about split determination of issues arising in a single set of proceedings. For different reasons we conclude that neither concurrent jurisdiction coupled with a system of allocation nor a system of referral have advantages matching those of determination by a judge with suitable expertise in a single, fixed forum.

Flexible deployment of employment judges in the county court

3.95 The less formal alternative – deploying employment judges to the county court – proved a more attractive option than concurrent jurisdiction or referral, attracting a greater degree of support from respondents. Those who opposed it tended to do so on one of two bases:

- (1) that employment judges are a scarce resource, and that ticketing expert judges to sit in the county court would divert judicial resources away from the tribunals; or
- (2) that flexible deployment does not systematically ensure that county court discrimination cases are heard by an expert employment judge.

3.96 Neither of these difficulties is impossible to overcome. The senior judiciary charged with managing the judicial resources of the county court and employment tribunals are well placed to decide the extent of need for employment judges' time in the county court and the extent to which they can be spared from tribunal work in order to sit in the county court. The likelihood that not all non-employment discrimination claims will be able to be listed before an employment judge is not in our view a powerful argument against an option that will result in some claims (perhaps, in time, many or most claims) being heard by the most appropriate judge.

3.97 We have noted that flexible deployment is already in operation, with some employment judges ticketed to sit in the county court. In his report on the modernisation of tribunals in December 2018, the Senior President of Tribunals (Sir Ernest Ryder) stated that:

The cross deployment of Employment Judges into the county court to undertake civil cases and the dual authorisation of First-tier Tribunal Property Chamber judges to

⁸⁷ See also the discussion of the increased time and costs involved in a referral of an equal pay issue under section 128 of the Equality Act 2010 at paras 6.41 to 6.46 below.

hear cases concurrently in the Tribunal and in the county court have both been successfully trialled.⁸⁸

3.98 Scepticism has been expressed to us as to whether – particularly in times like the present of strain upon employment tribunal resources – employment judges will in practice be released from tribunal sitting duties for county court training or sitting. We agree that there is a risk that they will not be, or not sufficiently. If our preferred method of making discrimination expertise available in non-employment disputes is accepted, procedures will have to be introduced in order to make the system work. In the longer term, the amount of time that employment judiciary spend in the county court as a result of this recommendation can be taken into account in determining the required number of employment judiciary; as we noted above, a significant employment judge recruitment exercise was undertaken in 2018.

3.99 We therefore find that the case for continuing and (subject to availability of judicial resources) stepping up the ticketing of suitable employment judges to hear county court discrimination cases is the most persuasive. We note the strong support for assessors and consider that, where an allegation of discrimination forms a significant element of a county court case, an employment judge could sit with an assessor where appropriate.

3.100 We do not offer a view on how cases should be identified for hearing by an employment judge; the use of a questionnaire was put forward by both the Council of Employment Judges and Slater and Gordon. More intricate processes may emerge out of the current court transformation programme, which is aimed at a more agile dispute resolution process. Given that one of the main reasons that employment judges' discrimination expertise is valued lies in their experience of case management of discrimination claims, we suggest that suitable cases should be identified at an early stage.

Recommendation 3.

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

The property chamber pilot and “concurrent sitting”

3.102 We mentioned above that a number of consultees, such as JUSTICE, referred to the Civil Justice Council's successful property chamber deployment project, in which First-tier Tribunal (Property Chamber) judges, who are also ticketed to sit in the county court, sit “concurrently” in both jurisdictions to determine disputes that engage both jurisdictions.⁸⁹ Though consultees mentioned this in connection with our question on flexible deployment, the property chamber project appears to us to have a different

⁸⁸ The Modernisation of Tribunals 2018: A Report by the Senior President of Tribunals (December 2018) n 8, p 5, https://www.judiciary.uk/wp-content/uploads/2019/01/Supplementary-SPT-report-Dec-2018_final.pdf (last visited 18 July 2019).

⁸⁹ Paras 3.64 and 3.65 above.

scope from our recommendation that employment judges should be flexibly deployed to hear non-employment discrimination claims. The project involves “concurrent sitting”, where a single judge hears and determines:

- (1) cases where separate determinations may be required by the court or the tribunal but where the same facts and evidential basis apply to both;
- (2) cases where the court and the tribunal each have partial jurisdiction; and
- (3) cases where it is convenient to decide all issues in one set of proceedings.⁹⁰

3.103 The project is aimed at enabling litigants to resolve all the issues in a dispute in one place. It was piloted against a backdrop of calls for rationalisation of the different venues for resolving property and housing disputes, including calls for the creation of a housing court with jurisdiction over all housing matters.⁹¹

3.104 Judge McGrath’s report not only found the project evaluated in 2018 to have been successful, but made a number of recommendations aimed at considering amendments to procedural rules which would streamline the process by which cases are dealt with concurrently. In particular, the report found that the different fees and costs regimes in the court and tribunals did not cause difficulties in practice when deploying judges to determine claims arising in both forums.⁹² We mention this because the different regimes for fees and costs was a major theme running through opposition to concurrent jurisdiction. The report also identified factors to be considered in identifying whether a case is suitable to be heard concurrently by one judge in both the county court and property chamber.⁹³

3.105 There may be areas of employment litigation where “concurrent sitting” could be used to ensure that the whole of a dispute can be determined by the same judge. In its response to us, EHRC suggested that the advent of the “gig economy” might lead to more cases which give rise to arguments about whether they involve employment or non-employment discrimination:

Having a single jurisdiction able to consider both employment and services discrimination claims could also lead to greater efficiency in certain “employment” cases where a claimant may currently wish to bring an employment tribunal claim and a county court claim (in the alternative) out of the same set of facts. This can occur in a “gig-economy” situation where there is dispute that the claimant is a worker for the purposes of Part 5 of the Equality Act 2010 (“EA2010”) and so the claimant may in the alternative seek to claim that the alleged employer is actually a

⁹⁰ Judge Siobhan McGrath, President of the First Tier Tribunal (Property Chamber), *Report on Property Chamber Deployment Project for Civil Justice Council Meeting 26 October 2018* Pt 3, para 10.

⁹¹ Civil Justice Council *Interim Report of the Working Group on Property Disputes in the Courts and Tribunals*, May 2016. The interim report refers generally to calls for a Housing Court as part of the Law Commission’s programme of work on housing law: see also *Housing: Proportionate Dispute Settlement* (2003) Law Com No 309, paras 5.7 to 5.10.

⁹² Judge Siobhan McGrath, President of the First Tier Tribunal (Property Chamber), *Report on Property Chamber Deployment Project for Civil Justice Council Meeting 26 October 2018* Pt 4, paras 22 to 25.

⁹³ Above, Pt 3 para 11.

service provider under Part 3 of the EA2010. Such split-forum claims are currently unusual, although they may become more common in the future

As highlighted in our response to Question 4, our view is that a more holistic approach should be taken. We consider that further discussion and consultation should be taken in light of the response to this consultation about how complainants in discrimination claims can have access to appropriate advice and can be confident of an affordable, fair, and speedy hearing by skilled adjudicators with knowledge and understanding of equality legislation and the effects of discrimination.

3.106 Cases in which there may be uncertainty as to which forum has jurisdiction raise a discrete issue lying outside the main area of focus of our project. EHRC noted that their suggestion would require further consultation, which we have not thought it appropriate to engage in within this project owing to our resource constraints and the delay to the project that further consultation would cause. It may be the case that a mechanism for concurrent sitting would be of value in “gig economy” cases or other cases of uncertainty as to the jurisdiction of the tribunal, enabling a claim to be finally determined by one expert judge sitting in concurrent proceedings.

3.107 Without making a formal recommendation to this effect, we suggest that the Government and, as appropriate, the Civil Justice Council should consider what lessons can be learnt from the ongoing property chamber deployment project. This review should be conducted with a view to investigating the extent to which “concurrent sitting” in both the employment tribunal and county court might be desirable in cases where it is uncertain, before the facts have been determined, which forum has jurisdiction.

Chapter 4: Restrictions on the jurisdiction of employment tribunals: the Extension of Jurisdiction Order 1994

4.1 This chapter considers restrictions on the limited jurisdiction of employment tribunals to hear breach of contract claims created by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (the “Extension of Jurisdiction Order” or “1994 Order”).⁹⁴

OVERVIEW OF THE TRIBUNALS’ LIMITED CONTRACTUAL JURISDICTION

4.2 A claim that a term of an employment contract has been breached may, of course, be brought in the civil courts. But legislation has, in limited contexts, extended this contractual jurisdiction to employment tribunals. Under article 3 of 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.

4.3 The main restrictions on employment tribunals’ contractual jurisdiction under the Extension of Jurisdiction Order are:

- (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;⁹⁵
- (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 for personal injury, claims concerning the provision of living accommodation, nor claims relating to intellectual property, confidentiality or restraint of trade. Such claims must be brought in the civil courts;⁹⁶

⁹⁴ SI 1994 No 1623.

⁹⁵ 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.

⁹⁶ Arts 3 and 5 of the 1994 Order.

- (4) claims by workers - it may be that the 1994 Order does not extend to workers (as distinct from employees) at all;⁹⁷ and
- (5) claims by employers - 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.

4.4 Our consultation paper asked consultees whether these restrictions continue to be justified.⁹⁸

TEMPORAL AND FINANCIAL RESTRICTIONS

4.5 As we noted above, employment tribunals only have jurisdiction over claims that arise, or are outstanding, upon the termination of employment. This means that:

- (1) contractual claims cannot be brought whilst the employment relationship continues (except under the separate jurisdiction over deductions from wages); and
- (2) claims cannot be brought for sums (such as certain commission payments) that become due as a matter of contract law after termination of employment.

In our consultation paper we asked first whether the restriction on an employee's ability to bring proceedings during employment should be removed.

Consultation Question 10: Should employment tribunals have jurisdiction to hear a claim by an employee for damages for breach of contract where the claim arises during the subsistence of the employee's employment?

4.6 This question asked whether the restriction on an employee's ability to "stand and sue" should be removed. Of the 57 consultees who answered it, 53 said that employment tribunals should have jurisdiction to hear breach of contract claims by employees where the claim arises during the subsistence of the employee's employment.

Arguments in favour of being able to "stand and sue"

4.7 Many consultees saw no justification for limiting employment tribunals' contractual jurisdiction to employment contracts which had already ended, and characterised that limitation as anomalous and illogical.⁹⁹ A number of responses emphasised the

⁹⁷ An employee is a person who works under a contract of employment, whereas the statutory definition of a worker is wider, encompassing both an employee and also an individual who works under a contract to perform services personally for another person who is not a client or customer of a business carried on by the individual (in this report we use the term "worker" to refer to this second category). In contrast, self-employed independent contractors are in business for themselves providing services to clients. In general, self-employed individuals have no employment rights.

⁹⁸ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 4.1 to 4.73.

⁹⁹ See the full consultation response of the Council of Employment Judges for a review of case law illustrating these anomalies.

existing jurisdiction in relation to unlawful deductions during employment. As Cloisters put it:

There is no rational basis for the present alternative in light of *Agarwal v Cardiff University*: tribunals have jurisdiction to interpret contracts of employment in relation to unlawful deduction of wages claims. Tribunals are therefore entrusted with interpreting contracts even 'during employment' in so far as the claim is framed as an unlawful deduction of wages claim, and on the present law after employment has ended would be able to deal with it additionally as a breach of contract claim. There is little sense in such an artificial distinction remaining 'during employment'.

- 4.8 Some argued that extending the jurisdiction of the employment tribunal would increase access to justice. The Disability Law Service, for example, said:

It is our view that extending jurisdiction to employment tribunals to hear claims for breach of contract which arise during the substance of the employee's employment would simplify the process and increase access to the more informal employment tribunals.

- 4.9 Other consultees thought that allowing tribunal claims would help preserve the relationship between the employer and the employee. The Liverpool Law Society Employment Law Committee was of the view that:

Given that the employment relationship is continuing, the employment tribunal which is generally more straight forward, less formal and familiar to employers is the most appropriate forum to potentially help facilitate the employment relationship in continuing.

Arguments against "standing and suing"

- 4.10 Three consultees, Ann McKillop, Countrywide plc and Peninsula, thought that employment tribunals should not be able to hear breach of contract claims brought by existing employees. Countrywide plc said this would place an extra burden on tribunal resources, due to a likely increase the number of claims brought before tribunals. It also added that it:

would encourage claimants to seek resolution by way of litigation, as opposed to exhausting internal procedures, which would in turn be damaging to an on-going employment relationship between employee and employer.

- 4.11 Peninsula elaborated on the risk of straining ongoing employment relationships as one of a number of arguments for not allowing claimants to "stand and sue".

The cost implications of pursuing a breach of contract claim where it is only minor, discourages frivolous claims. This would not be the case where minor breaches can be pursued for free. The remedy available from employment tribunals is clear, limited as it is to loss. Damages are not available for claims of breach of contract. Where there is any actual loss this can be pursued under existing legislation without constituting a breach of contract claim.

Additionally, there is no track system, differentiating between small claims and those of higher value at the employment tribunal. Giving the ability to pursue a claim for

damages for breach of contract, where they cannot be awarded for other claims, for free with no requirement to identify in advance the amount claimed would bypass the established and effective system in place within the country courts for dealing with contractual disputes.

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

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

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

Discussion

- 4.12 The philosophy of the 1994 Order was plainly to avoid the need for proceedings in two forums where an employee makes a claim of unfair dismissal and also seeks some contractual remedy arising out of the termination; it was not intended to make the employment tribunal an alternative forum to the county court or High Court in respect of employees' contractual claims generally. The issue is whether that remains the right policy.
- 4.13 It can be viewed as an anomaly that employment tribunals nowadays have a wide-ranging jurisdiction over matters connected with employment, including in some instances an unlimited power to award compensation as well as jurisdiction over deductions from wages arising during employment and contractual claims arising during employment (provided that the claim is outstanding upon its termination), yet lack jurisdiction over other contractual claims. The points made by Cloisters support that view. To the extent that the temporal restriction was based on the view that the courts are better equipped than employment tribunals to adjudicate employees' contractual claims, we consider that that view no longer holds good.
- 4.14 On the other hand, to give employment tribunals the additional jurisdiction contemplated in this consultation question would be likely in practice to shift claims from the county court and High Court, where successful parties normally benefit from an order for costs,¹⁰⁰ to the costs-free jurisdiction of the tribunals. The concern

¹⁰⁰ Sometimes referred to as a "costs-shifting" order.

identified by Countrywide plc and Peninsula is that claimants will be encouraged to bring unmeritorious claims, causing expense to the parties and the tribunal service, and that employer-employee relations will be damaged when they do so.

- 4.15 These concerns are valid but need to be set in context. The additional employment tribunal jurisdiction that is in issue relates to contractual claims that do not concern deductions from wages (since these can already be pursued in an employment tribunal) and are not excluded by the other substantive restrictions in the 1994 Order (since we go on to recommend that all but one of these be retained). Secondly, an employment tribunal can award costs against a party who behaves unreasonably¹⁰¹ (though in practice the circumstances have to be extreme) and there is power to prescribe a fee for bringing a tribunal claim (though none is prescribed currently); these amount to some deterrent against bringing frivolous claims. Thirdly, county court claims brought in the small claims track are also free of liability for a successful opponent's costs save in cases of unreasonable behaviour.¹⁰² The extent to which the reform could serve as additional encouragement to bring unmeritorious claims is therefore limited.
- 4.16 We are not persuaded that allowing employees to bring contractual claims in the employment tribunal during their employment would tend to damage relationships between employers and employees. If an employee is considering bringing legal proceedings against their employer, it is likely that the relationship between them is under strain already. Indeed, it is arguable that facilitating such a claim may even go towards repairing the relationship when the tribunal either gives a remedy or explains why the complaint is misconceived.
- 4.17 We are not motivated by the consideration that removing the temporal restriction might increase the number of claims litigated. Our concern is with the appropriateness of a particular procedure in its wider legal context. Viewing the matter from that perspective, we conclude on balance that the exclusion of contractual claims brought during employment fits ill with the wider policy evident in the legislation of providing employment tribunals as a forum for resolving disputes arising out of employment relationships. We therefore recommend that the jurisdiction of the employment tribunals be extended to cover claims by employees for damages for breach of (or for sums due under) a contract of or connected with employment where the claim arises during the subsistence of the employee's employment.

¹⁰¹ Rule 76(1)(a) of the Employment Tribunal Rules of Procedure 2013 gives the tribunal the power to award costs where "a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part [of the proceedings]) or the way that the proceedings (or part) have been conducted".

¹⁰² Under rule 27.14(2)(g) of the Civil Procedure Rules, "the court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except ... such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably".

Recommendation 4.

- 4.18 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.

Consultation Question 11: Should employment tribunals have jurisdiction to hear a claim for damages for breach of contract where the alleged liability arises after employment has been terminated?

- 4.19 Under the Extension of Jurisdiction Order, an employment tribunal has jurisdiction if a claim for breach of contract arises or is outstanding on termination of employment (not afterwards). Accordingly, employment tribunals do not have jurisdiction to hear employees' claims for, for example, payment of sales commission that becomes due for payment after employment has ended. Employees are also unable to claim in an employment tribunal for breaches of settlement agreements if the settlement agreements are entered into after the employment has ended.
- 4.20 Of the 57 consultees who responded to this question, only five thought that employment tribunals should not have jurisdiction to hear a claim for damages for breach of contract where the alleged liability arises after employment has terminated.

Arguments in favour of extending jurisdiction

- 4.21 Consultees stated that the current situation is anomalous, and can result in claimants having to bring a claim in two different jurisdictions. The Council of Employment Judges (with whom Employment Tribunals (Scotland) agree) noted that:

The employment tribunal has this jurisdiction to consider claims arising or outstanding upon termination and there is no logical reason for this not to extend to claims arising after termination. The employment tribunal has jurisdiction to deal with post-termination discrimination and detriment claims connected with past employment. There is no logical reason why they should not deal with post-termination breach of contract claims either.

- 4.22 The Liverpool Law Society argued that the employment tribunal was "the forum with the required expertise to deal with matter[s] involving the employment relationship". A number of consultees observed that a claimant should only be able to bring such a claim in the employment tribunal if there is a sufficient connection with employment. That would be the case, since the 1994 Order applies to claims for breach of "a contract of employment or any other contract connected with employment".¹⁰³

Arguments against extending jurisdiction

- 4.23 Three consultees gave reasons why employment tribunals should not have jurisdiction extended in this way. The main points raised were that employment tribunals'

¹⁰³ Employment Tribunals Act 1996, s 3(2)(a).

resources are already overstretched and such contractual claims are less likely to be linked to the employment relationship as they relate to alleged breaches which take place after employment has ended. Peninsula therefore found it more appropriate for such claims to be heard by the county court. Peninsula also argued that enabling claimants to choose between the county court and tribunal as forums for such contractual claims would create unnecessary confusion and pointed out that that making breach of contract claims would open claimants up to the risk of counterclaims by employers.

Discussion

- 4.24 A large majority of consultees favoured extending jurisdiction so that tribunals can hear contractual claims where the liability arises after employment has ended, seeing the existing restriction as anomalous. Consultees who disagreed made valid points about tribunal resources, the potential for confusion arising from two forums having jurisdiction and the need for a link with employment. As to these points, we are not aware of particular confusion arising from the fact that claims within the present scope of the 1994 Order can be litigated either in an employment tribunal or in the courts; we see more scope for claimants to be caught unawares by this particular limitation on that jurisdiction.
- 4.25 The requirement for a link between the claim and the past employment will in our view be satisfied since the 1994 Order only applies to claims under a contract of employment or a contract connected with employment. The additional strain upon employment tribunals caused by the addition of the present narrow category of claims will in our view be slight. In short, none of these considerations amount to a convincing reason why an employee should be unable to make a claim in an employment tribunal for the sole reason that the liability in question only accrued after termination.
- 4.26 Nor can we discern any reason of policy for excluding this narrow category of claims from the employment tribunals' jurisdiction. They are in all other respects suitable for adjudication by the tribunal. Indeed, we suspect that the exclusion of these cases is simply an incidental effect of wording whose main purpose was to preclude tribunal claims being made during employment.

Recommendation 5.

- 4.27 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.

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

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

- 4.28 Employment tribunals cannot award more than £25,000 under the Extension of Jurisdiction Order. Our consultation paper noted our understanding that the £25,000 limit generates complexity and confusion in practice, pushing some cases into the civil courts and splitting some disputes between the court and the employment tribunal when they might sensibly have been fully litigated in employment tribunals. This can happen where, for instance, an employee has claims of both unfair dismissal (which must be litigated in the tribunal) and wrongful dismissal (a contractual claim which may be litigated in the civil court or tribunal, but subject to the £25,000 cap in the tribunal).¹⁰⁴
- 4.29 In this context, we reported concerns about matters including the occurrence of satellite litigation between parties as to which claim should be issued and heard first, and the wasting of time and money for both the parties and HM Courts and Tribunals Service. We asked whether the limit should be removed altogether, or increased, given that:
- (1) even by reference to inflation since the Extension of Jurisdiction Order was made in 1994, the limit would now be at least £50,000;¹⁰⁵ and
 - (2) in discrimination, equal pay and certain types of automatically unfair dismissal claims, the financial jurisdiction of employment tribunals is unlimited, and occasionally tribunals hear claims valued in millions of pounds.

Support for increasing the financial limit

- 4.30 A total of 63 consultees responded to our question on whether the current £25,000 limit should be increased. Only five consultees thought the current limit was adequate. One, Countrywide plc, maintained that in their industry most employees’ claims do not exceed the current limit. Peninsula argued that increasing the limit would have a disproportionately negative impact on respondents, who would have to incur significant costs to defend claims against them. One consultee suggested that increasing the limit would have an adverse impact on small to medium enterprises.
- 4.31 An overwhelming majority, 58 consultees, supported increasing the limit. The Employment Lawyers Association (“ELA”) summed up the arguments for an increase as follows:
- (1) Employment judges have considerable expertise and there is no reason to believe an increase to £50,000 would cause any particular problem.

¹⁰⁴ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 4.17 to 4.30.

¹⁰⁵ Using the Bank of England’s inflation calculator, the figure adjusted for inflation to 2019 is £50,101.14.

- (2) It is not clear why the figure of £25,000 was chosen in the first place. An assessment of the jurisdictional limit was envisaged when it was introduced, but none has been carried out.
- (3) Failure to increase in line with inflation has in practice limited breach of contract claims to those on low earnings with short periods of notice.
- (4) The limit gives rise to certain anomalies. First, sometimes it is argued that claimants are estopped from bringing claims in civil courts, after having withdrawn those proceedings from an employment tribunal. Secondly, the limit increases the risk of a multiplicity of proceedings in tribunals and courts.

Views on what the financial limit should be

4.32 Consultees expressed a range of preferences for what the financial limit should be:

- (1) raising the limit to £100,000 (to align with the High Court threshold for breach of contract claims);¹⁰⁶
- (2) raising the limit, broadly in line with inflation since 1994, to £50,000;
- (3) raising the limit to the level of the maximum compensatory award which tribunals may make in ordinary unfair dismissal cases (then £83,682, currently £86,444); or
- (4) having no limit at all, bearing in mind that there is no statutory financial limit on some of the employment tribunals' jurisdictions.

4.33 Of the 53 consultees who responded to our question about what the new limit should be, 42 thought that the limit should be increased to £100,000 or above.¹⁰⁷ Some, such as the Law Society of England and Wales, reasoned that as other claims heard by the employment tribunals are not subject to a financial limit, the employment tribunal already possessed the requisite expertise to hear high value claims, and that therefore there should be no financial limit at all on employment tribunals' contractual jurisdiction. Others argued that the limit should be increased to £100,000 to align with the High Court minimum value for breach of contract claims. Increasing the limit to £83,628 in line with the then maximum compensatory award was less popular; only two consultees expressed support for this option. Two consultees proposed a limit of £50,000. One anonymous consultee thought that the limit in each case should be assessed with regard to the size and turnover of the employer. The remainder of consultees who responded were undecided or unclear as to the appropriate limit.

¹⁰⁶ The High Court and County Court Jurisdiction Order 1991 determines whether claims are to be issued in the county court or High Court. The Order, as amended by the Civil Procedure (Amendment) Rules 2014, provides that claims of no more than £100,000 (excluding personal injury claims) must be issued in the county court.

¹⁰⁷ This bloc of consultees effectively brings together those who preferred a £100,000 limit or above, and those who thought there should be no limit.

Adjusting the limit to account for inflation

- 4.34 Of those who thought that a financial limit should continue to be set, ten consultees suggested that that limit should be increased to keep pace with inflation. Pinsent Masons believed that “the current limit is outdated and should be increased in line with inflation to provide an appropriate forum for remedy of such claims (for claimants and employers)”. The National Association of Schoolmasters Union of Women Teachers (“NASUWT”) believed that “the Retail Prices Index should be used as the basis for any up-rating to tribunal awards across the board, as opposed to the Consumer Prices Index”. The President of Employment Tribunals (England and Wales) and the Regional Employment Judges (joint response) (with whom the President of the Industrial Tribunal and Fair Employment Tribunal (Northern Ireland) agrees) thought that the limit should be subject to regular review and increase.

The ramifications of increasing the cap in a no-costs forum

- 4.35 The power of a court to award costs against a claimant is seen as a deterrent against exaggerated or frivolous claims. The tribunal is a no-costs forum with greatly reduced powers to use costs awards as a deterrent. When considering the need for a financial limit, many consultees pointed to the no-costs nature of the employment tribunal. ELA thought that the limit should be increased to £100,000 (and no less than £50,000) and then increased annually by the retail price index. Its response acknowledged the argument for the limit being abolished altogether; employment judges are familiar with the principles of awarding damages, they exceptionally make very substantial awards in discrimination cases, and parties should determine their choice of forum, rather than being limited by rules of jurisdiction. ELA nonetheless suggested that there should be a financial limit for the following reasons.

- (1) The rules in the employment tribunal are less formal than the Civil Procedure Rules, making no provision for payments into court, Part 36 Offers or resulting cost provisions. Certain claims, such as breach of contract claims of senior company officers, can amount to very large figures, and should be treated the same as comparable disputes of a commercial nature rather than put in the “cost free” environment of employment tribunals.
- (2) Creating different tribunal rules for claims in excess of a specified figure (where there is a perceived need to deter frivolous claims) would add a level of complexity, and make the assessment of costs difficult in practice.
- (3) Since fees are payable for bringing a claim in the civil courts, but not in employment tribunals, an unlimited jurisdiction would lead to undesirable forum shopping to avoid payment of fees.

Discussion

- 4.36 We are persuaded that there should continue to be a limit on the value of contract claims which can be brought in the employment tribunal. This approach is consistent with that taken across much of civil litigation, where cases are often assigned to “tracks” designed to deal with cases of different monetary value or complexity. A limit would reflect the fact that the employment tribunal is generally a low-cost cases jurisdiction, with procedural rules designed accordingly. It is true that employment

tribunals do occasionally hear high value cases, particularly relating to discrimination. However, these claims are not typical.¹⁰⁸

- 4.37 The question then is at what level the new limit should be set. We think that the limit should increase at least as much as by inflation, which would take it to £50,000, and that it should not exceed £100,000, which would give employment tribunals greater contractual jurisdiction in financial terms than the county court. The question is whether to recommend one or other of these levels or a figure in between them. Using the level of the maximum award for unfair dismissal attracted little support and lacks any inherent logic. Nor have we detected (or been directed to) any other logically relevant figure between £50,000 and £100,000. The choice therefore lies between £50,000, whose logical basis is that it is the equivalent in real terms of the figure used in 1994, and £100,000, whose logical basis is that it is equivalent to the financial jurisdiction of the county court.
- 4.38 We see the greater logic in tying the figure to the financial jurisdiction of the county court. This would be consistent with our view that employment tribunals are no less satisfactory a forum for employment-related contractual disputes than the county court (and indeed have advantages of greater familiarity with and expertise in this area of law). A £50,000 limit would merely continue in real terms the original threshold of £25,000, which was itself arbitrary.
- 4.39 The point has been made to us that the county court has costs-shifting powers that employment tribunals lack. The choice between two forums, one of which is costs-free, creates some advantage for employment-based contractual claimants; the financial limit of the (substantially costs-free) small claims track in the county court is much lower, at £10,000 for most claims.¹⁰⁹ The low median level of employment tribunal awards suggests that contractual claims by employees exceeding £50,000 are likely to be a rarity.¹¹⁰
- 4.40 However, complete consistency cannot be achieved. Much larger sums can already be claimed in the costs-free jurisdiction of the employment tribunal than in the costs-free small claims track. A higher limit also increases the scope for employers to bring counterclaims in employment tribunals.¹¹¹ The costs-free nature of the employment tribunals' jurisdiction recognises the imbalance of financial resources that typically (though not invariably) differentiates employment relationships from the generality of contractual relationships giving rise to litigation before the civil courts. There is also significant employment law expertise in employment tribunals. A higher limit tends to reduce the need to bring related claims in more than one forum. Balancing these considerations, we are persuaded by the majority view that the limit on employment

¹⁰⁸ The survey of Employment Tribunal Applications in 2013 concluded the median award for claims in an employment tribunal was £3,000. See Department for Business Innovation and Skills, *Findings from the Survey of Employment Tribunal Applications 2013* (June 2014), p 68.

¹⁰⁹ Rule 26.6 of the Civil Procedure Rules. Both employment tribunals and the small claims track are costs-free save in cases of unreasonable behaviour. See para 4.15 above.

¹¹⁰ See para 4.36 above.

¹¹¹ Unless different limits are applied, a suggestion that we reject below.

tribunal's contractual jurisdiction should be increased to £100,000, and recommend accordingly.

- 4.41 Any limit should be insulated against inflation; it is regrettable that the financial scope of operation of the 1994 Order was allowed to drop to one half of its original level. The logic underlying our choice of a £100,000 limit militates in favour of maintaining the limit at the level of the threshold for High Court claims.

Recommendation 6.

- 4.42 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.

Consultation Question 14: If the financial limit on employment tribunals' contractual jurisdiction is increased, should the same limit apply to counterclaims by the employer as to the original breach of contract claim brought by the employee?

- 4.43 Fifty-two consultees addressed this question, 41 of whom thought that the same limit should apply to counterclaims by the employer as to the claim brought by the employee. Eight out of the nine who disagreed thought that a lower limit should apply to counterclaims brought by the employer for reasons which related to the imbalance in the power relationship between employers and employees. Two consultees responded "other" because they thought that, although it would be fair to have equal limits, an equivalent limit for the employer could be used as a "bullying tactic" to deter employees from bringing a claim.

Arguments in favour of applying the same limit

- 4.44 Those who favoured the same limit for claims and counterclaims tended to focus on the fairness of this approach. Susan Shirley, responding in a personal capacity, said that as employers bear the majority of costs in an employment tribunal, "this would help level the playing field". ELA's response addressed the arguments for and against parity. Overall, they were in favour of parity between the contract claim and counterclaim limit, concluding that:

[although] 'spurious' counterclaims could be raised if the tribunal's jurisdiction is extended to cover claims arising during employment ... on balance we think that the tribunal's existing powers to award costs where such claims are 'misconceived' or 'unreasonable' is probably sufficient to deal with this issue.

Arguments for different limits for claims by employees and counterclaims by employers

- 4.45 Of those who thought that the same limit should not apply to counterclaims by the employer, only Slater and Gordon offered an alternative method for calculating the financial limit for counterclaims. They suggested that, because claimants have more financial constraints than employers, "the limit should be assessed on the paying party's ability to meet the reasonable costs of any counterclaims against them". Other consultees reasoned that parity between the financial limits for claims and

counterclaims would fail to address the power imbalance between the employee and employer.

Discussion

- 4.46 Logic and fairness suggest that the same limit should apply to both parties to a dispute unless some objective difference in their situation justifies different limits. The suggested difference is the typical imbalance of power (particularly in financial terms) between employers and employees. We are not persuaded that this justifies different limits. Imbalance of financial power is not an acceptable objection to the advancing of meritorious counterclaims and we are not persuaded that the increased financial limit will commonly be exploited by employers to advance unmeritorious counterclaims. To the extent that this risk exists, leaving the financial limit for counterclaims at the present £25,000 would not prevent unscrupulous employers from harassing employees with unmeritorious counterclaims. Such employers could in any event harass employees with unmeritorious county court claims for more than £25,000.
- 4.47 We therefore agree with the majority of consultees in recommending that the same increased limit should continue to apply both to claims and counterclaims. We envisage that this recommendation and recommendation 6 be implemented by amendment of the figure in article 10 of the 1994 Order.

Recommendation 7.

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

Consultation Question 15 (First part): Do consultees agree that the time limit for an employee's claim for breach of contract under the Extension of Jurisdiction Order should remain aligned with the time limit for unfair dismissal claims?

- 4.49 The time limit for bringing a claim in the civil courts is six years from the alleged breach of contract. In the employment tribunal it is three months from the termination of employment – clearly chosen to align with the time limit for an unfair dismissal claim. We proposed that, if the time limit for unfair dismissal claims is altered, the time limit for contractual claims should be altered likewise.¹¹² Of the 58 respondents to this proposal, 46 agreed with it. Nine consultees disagreed, while three did not express a firm view either way.

Arguments in favour of keeping the time limits aligned

- 4.50 Of the 46 consultees who agreed, 14 reiterated their view that the unfair dismissal time limit should be extended to six months. Consultees typically reasoned that, as claims of breach of contract and unfair dismissal are frequently brought together, having an aligned time limit for both types of claims promotes simplicity.

¹¹² In the second part of the question (discussed below) we asked what time limit is required if the jurisdiction is extended to cover claims brought during employment.

Arguments against keeping the tribunal time limits aligned

- 4.51 Some consultees favoured aligning the time limit for breach of contract claims in the employment tribunal with the six-year limit in the civil courts. For example, the Chartered Institute of Legal Executives told us that they:

would welcome greater streamlining between the procedures of the county courts and those of the Tribunal to simplify the system where parallel claims are being sought. Extending the current time restrictions for bringing contractual claims to the employment tribunal, so that it is better aligned with the six-year limit for county courts, seems both sensible and pragmatic.

- 4.52 Birmingham Law Society took a different stance, arguing that the time limit for breach of contract in the employment tribunals should be three months from the date of breach “to ensure certainty and expediency for resolving the dispute”.

Discussion

- 4.53 The issue here is whether the time limit for post-termination contractual claims in employment tribunals should be aligned with the time limit for unfair dismissal claims or with that for contractual claims in the civil courts. While we see the logic of aligning the time limit for breach of contract claims whether brought in the tribunal or in the civil courts, we see more logic in aligning the tribunal time limit with the unfair dismissal time limit, as the 1994 Order was designed to do. It would be odd if an ex-employee were obliged to bring a claim of unfair dismissal within six months of the dismissal but could add a claim for breach of the (by then terminated) contract at any time within six years from the breach.
- 4.54 The difference in treatment of contract claims brought in the tribunal and in the courts in is our view justified by the fact that the county court and the tribunal are different forums for dispute resolution. While the employment tribunal no longer offers as speedy resolution of disputes as it was designed to provide, short time limits for invoking its jurisdiction are one of its characteristics. We think it appropriate that contractual claims in the tribunal remain subject to a short time limit.
- 4.55 We therefore recommend that, as far as post-termination contractual claims are concerned, the time limit under the Extension of Jurisdiction Order should remain aligned with the time limit for unfair dismissal claims. In line with recommendation 1, we envisage that the time limit in both cases should be six months from the termination of employment. We discuss below how this time limit should relate to the time limit for claims brought during employment. Before moving to that issue, we need for completeness to consider the appropriate time limit for the narrow category of cases of claims brought after employment in respect of liabilities (such as sales commission, discussed in paragraph 4.19 above) that only fall due after employment has terminated. In our view, consistency requires that in such cases the six-month time should run from the date on which the liability falls due.

(Second part): Should a different time limit apply to claims that are litigated during the subsistence of an employee’s employment?

- 4.56 In recommendation 4 we have recommended that employment tribunals should have jurisdiction over contractual claims notwithstanding that the employee’s employment

has not terminated. The question then arises of what time limit should apply in such cases. Given that the existing limit starts running from the termination of employment, it follows that a time limit for proceedings brought during employment must have a different starting point; if not, there would be no effective time limit on bringing claims during employment at all. Of the 33 consultees who engaged with this issue, only seven explicitly addressed the issue of the starting point; all of them took the view that time should start running from the breach of contract.¹¹³

4.57 Twenty-seven consultees believed the time limit should be the same for claims litigated during the subsistence of employment. The length of the time limit was more contentious. More than half – 17 – of the consultees who responded maintained that the time limit should be six months. This followed their suggestion in response to Consultation Question 2 that the time limit for claims should be six months.

4.58 Cloisters, who did not specify a time limit, suggested that:

A different time limit should not be used during the subsistence of an employee's employment. It makes sense to align it with the situation of unlawful deduction of wages claims that equally have a short time limit.

4.59 Of the 39 consultees who, in response to Consultation Question 2, suggested a general time limit of a minimum of six months, 16 believed no variation from this was necessary in cases where employment subsisted (and a further 18 did not answer this part of Consultation Question 15). Four consultees, who in their responses to Consultation Question 2 preferred the three-month time limit to remain, believed that the time limit for claims brought during employment should be three months from the date of breach.

4.60 Five consultees thought that there should be a different time limit for contractual claims brought during employment, of whom three believed that limit should be three months. For example, Employment Judge Colm O'Rourke favoured the extension of the current time limit to six months, but suggested that for claims that arise during the subsistence of an employee's employment a three-month limit may be appropriate "in order that such disputes are quickly brought and resolved".

4.61 Two consultees thought that the time limit should be longer, to reflect the practical issues that arise when trying to bring a claim while breaches are recurring. ELA noted:

One problem that may occur is that where breaches are continuing, there could be a need to reissue proceedings every three months. This is something that currently happens in many claims involving holiday pay or deductions from wages. This is an unnecessary administrative burden, for the parties and the Tribunal Service. It seems to us, on balance, that a compromise is called for and that a longer period would be appropriate for such contract claims. To balance the ethos of tribunals and avoid additional work we suggest a 12-month limitation period to bring claims or within three months of termination of employment, whichever is earlier.

¹¹³ Including ELA, which suggested the earlier of 12 months from the date of breach, or three months from termination of employment.

- 4.62 Stephen Cribbin suggested that the time limit for claims brought after the termination of employment should remain aligned with the time limit for unfair dismissal claims, but that the time limit for claims brought during employment should be six years from the date of the alleged breach.

Discussion

- 4.63 We share the implicit consensus that contractual claims brought during employment should be subject to a time limit running from the date of the breach or, where an alleged breach of contract has extended over a period, from the ending of the alleged breach. A time period of six months has strong attractions of simplicity. We have rejected the view that contract claims in the tribunal should have a six-year time limit, for the reasons we gave in paragraphs 4.53 and 4.54 above. We see force in Employment Judge O'Rourke's point that disputes litigated while the employee remains in employment should be got over as quickly as possible, but this needs to be balanced against the point made by ELA: a shorter time limit can increase the need to bring repeat claims where an alleged breach continues despite the commencement of litigation. In addition, to prescribe a six-month time limit for claims brought after termination of employment but a three-month period for claims brought during employment has some potential to sow confusion. We accordingly recommend that the time limit for bringing contractual claims during employment should be six months from the date of breach or from the end of the period of breach.
- 4.64 We are aware that the effect of this, coupled with the time limit that we have recommended for claims brought after the ending of employment, 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 because (1) the reform would bar a number of claims that would be in time under the present law and (2) if a dismissed employee is bringing a statutory claim in an employment tribunal (typically for unfair dismissal) as a consequence of the termination of their employment, it remains convenient for them to be able also to bring a contractual claim that is still otherwise open to them even if it would have been too late to bring that claim in the tribunal if their employment had continued.
- 4.65 We are also aware that, while termination of employment is a clearly identifiable event of which a claimant will be aware, the same cannot always be said of a breach of contract that arises during the subsistence of employment. We think that, rather than introducing a time limit based on the date of knowledge of the alleged breach, the simpler solution is provided by the application of the just and equitable test to extensions of time to cover cases of concealed breach. The Extension of Jurisdiction Order applies the "not reasonably practicable" test to contractual claims at present,¹¹⁴ which means that our recommendation to replace this test with the just and equitable test set out in chapter 2 will apply to our proposed extension of contractual jurisdiction.

¹¹⁴ See art 7 of the 1994 Order.

Recommendation 8.

4.66 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.

SUBSTANTIVE RESTRICTIONS ON EMPLOYMENT TRIBUNALS' CONTRACTUAL JURISDICTION UNDER THE EXTENSION OF JURISDICTION ORDER

4.67 Regardless of the financial value of the claim and when proceedings are brought, employment tribunals may not determine the following types of contractual dispute:

- (1) claims for damages, or sums due, in respect of personal injuries;
- (2) claims for breach of a contractual term requiring the employer to provide living accommodation for the employee;
- (3) claims for breach of a contractual term imposing an obligation on the employer or the employee in connection with the provision of living accommodation;
- (4) claims for breach of a contractual term relating to intellectual property;
- (5) claims for breach of a contractual term imposing an obligation of confidence; and
- (6) claims for breach of a contractual term which is a covenant in restraint of trade.

4.68 In our consultation paper we provisionally proposed that these types of contractual dispute should continue to be excluded from the jurisdiction of employment tribunals. We consider each in turn.

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

4.69 There were 55 responses to this proposal, 47 of which, including those of the President of Employment Tribunals (England and Wales) and the Regional Employment Judges and of the Council of Employment Judges, were in agreement.

Seven consultees disagreed with the proposal.¹¹⁵ NASUWT gave balanced arguments for and against, ultimately concluding that the proposal warrants further consideration.

Arguments against extending jurisdiction

4.70 Consultees who opposed extending jurisdiction in these areas endorsed the reasons for maintaining the current division provided at paragraph 4.43 of the consultation paper.

- (1) It is unlikely that claimants would choose to bring personal injury claims in an employment tribunal. Employees who seek personal injury damages from their employer commonly plead their case using tort law (claims for negligence or breach of statutory duty) as well as contract law. The employment tribunal does not have jurisdiction to hear common law tort claims.
- (2) Civil courts have considerable expertise in personal injury claims, whereas the employment tribunals do not.
- (3) In contrast to the position in employment tribunals, the winning party generally recovers costs from the other party in the civil courts.

4.71 An additional reason mentioned by consultees, including Fiona Doyle and Hannah Dahill, was that introducing concurrent jurisdiction would place further pressure on employment tribunals' limited resources. Colin Perkins thought that such an extension would increase the tendency which he has observed over the years for employment tribunals to "become far too legalistic and excessively complex".

4.72 The Institute of Employment Rights noted that:

The ordinary courts have well developed protocols and procedures for dealing with personal injury claims, which typically involved a narrow area of factual dispute but much argument about compensation (including expert evidence, both medical and otherwise).

4.73 The Disability Law Service agreed that important features of personal injury litigation (such as Part 36 offers¹¹⁶ and interim payments¹¹⁷) would be difficult to translate to the employment tribunals. It also had less concern about access to justice for personal injury complaints, owing to the prevalence of conditional fee agreements.¹¹⁸ ELA opposed extending jurisdiction with one qualification. They argued that the interpretation that the tribunals have applied to this exclusion is overly wide and that

¹¹⁵ These included Employment Judges Philip Rostant and Tudor Mansel Garnon, Jason Frater (JF Legal Services Ltd), Billy Tonner, Linda Hilsdon and Rona Membrey.

¹¹⁶ These are offers to settle a case on particular terms; in the county court and the High Court they are made pursuant to Part 36 of the Civil Procedure Rules.

¹¹⁷ The High Court and the county court can order the payment of an interim sum on account of damages in a personal injuries case.

¹¹⁸ Agreements by lawyers to represent a party in litigation on the terms that their fees will only payable if the party succeeds.

claims which do not concern negligence or fault by the employer should not be excluded:

We refer to the case of *Flatman v London Borough of Southwark*¹¹⁹ which concerned an employer's refusal to pay an allowance from a scheme that related to injuries sustained during the course of work. The Court of Appeal held that this was a claim for damages in respect of personal injuries, and was excluded from a tribunal's jurisdiction. Commentators have observed that this exclusion is also likely to apply in respect of benefits under long-term disability and permanent health insurance schemes. A recent example occurred in *Awan v ICTS UK Limited*¹²⁰ concerning a long-term disability benefit plan. The rationale for such a wide-ranging interpretation seems dubious to us. It was stated in the judgment of the Court of Appeal in *Flatman* that "such claims typically involve the calling of doctors and psychiatrists as witnesses and raise matters which might be thought to be unsuitable for resolution by an employment tribunal". However tribunals now regularly deal with such evidence in discrimination claims.

- 4.74 Professor Owen Warnock (University of East Anglia) also added that he thought that the ability of employment tribunals to award compensation in discrimination cases for personal injury caused by discrimination should be removed, as the expertise in assessing the evidence and calculating damages for personal injury lies with the civil courts.¹²¹

Arguments in favour of extending jurisdiction

- 4.75 Some consultees thought that the employment tribunal both had the expertise to hear personal injury claims and would be a suitable forum for doing so. Two employment judges, Philip Rostant and Tudor Mansel Garnon, considered the current demarcation of jurisdiction illogical given that the employment tribunal already addresses personal injury issues in the context of discrimination claims. Judge Garnon noted the practical impact that this can have:

If an act of discrimination causes personal injury, employment tribunals have unlimited jurisdiction to compensate a victim. If no discrimination is involved but a breach of an implied term to look after health and safety or a tortious duty of care, employment tribunals have no jurisdiction (for example in a *Hatton-v-Sutherland* type case). If there may, or may not, be a discrimination element, we have to stay the employment tribunal case until any court case ends. I see no justification for this and have known it work to the detriment of all concerned on more than one occasion.

- 4.76 For the Council of Employment Judges, who supported our proposal, the arguments in favour of extending jurisdiction to personal injuries included the relative familiarity of tort law principles to employment judges, who encounter them in the context of

¹¹⁹ [2003] EWCA Civ 1610, [2003] 11 WLUK 292.

¹²⁰ UKEAT/0087/18/RN.

¹²¹ This view formed part of Professor Warnock's response to Consultation Question 31.

discrimination claims and section 109 of the Equality Act 2010.¹²² But they feared that extending jurisdiction to personal injury claims in the employment context might dilute the specialism of employment tribunals.

Discussion

- 4.77 We do not recommend extending the employment tribunals' jurisdiction to personal injury claims. While we recognise that employment tribunals do have expertise in assessing such claims in the discrimination context, a line nevertheless has to be drawn. To extend the contractual jurisdiction without conferring jurisdiction over, for example, claims for negligence would create a different, and possibly more anomalous, borderline. Conferring jurisdiction over common law torts would require primary legislation and would raise issues as to which torts should be included. In addition, we agree that the county court is better equipped to handle this type of litigation.
- 4.78 We have considered whether to recommend conferring contractual jurisdiction in respect of no-fault compensation schemes for workplace injuries but consider on balance that jurisdiction over these is best left with jurisdiction over other personal injury claims.

Consultation Question 17: We provisionally propose that the prohibition against employment tribunals hearing claims for contractual breaches relating to living accommodation should be retained. Do consultees agree?

- 4.79 A total of 49 consultees addressed themselves to this proposal; 35, including the Employment Appeal Tribunal ("EAT") judges, agreed with it. Twelve consultees disagreed, including the President of Employment Tribunals (England and Wales), the Regional Employment Judges and the Council of Employment Judges; two consultees did not express a firm view.

Arguments in favour of extending jurisdiction to hear living accommodation claims

- 4.80 It was argued that the employment tribunal has expertise in issues connected to accommodation, and that allowing claims for contractual breaches relating to living accommodation to be heard in the employment tribunal would avoid a claimant having to bring such a claim in two different forums. The Council of Employment Judges observed:

The incidence of claims involving living accommodation connected with employment occurs, generally, in agricultural employment, for peripatetic employees and in pub/club employment. The experience is that the former type of case is brought infrequently, but the latter two are brought quite often.

- 4.81 They cited the case of *Qantas Cabin Crew (UK) Limited v Alsopp and Others*¹²³ as an example of when the current delineation of jurisdiction can cause problems. In that case:

¹²² S 109 of the Equality Act 2010 provides for the vicarious liability of employers for the discriminatory acts of their employees.

¹²³ (10 September 2013) UKEAT/0318/13/SM (unreported).

the cabin crew were not permitted to pursue claims for a living away from home allowance in the employment tribunal but were able to pursue a claim for a food allowance when away from home. This led to the absurdity of having to claim in the civil courts for the loss of the living away allowance but being permitted to claim in the employment tribunal for the non-payment of the food allowance.

- 4.82 They also illustrated the relevance of accommodation issues in a wide range of employment claims:

The employment tribunal is well-versed in issues that can arise around accommodation. Claims of unfair dismissal and discrimination can engage the tribunal in contractual questions relating to accommodation in deciding appropriate levels of loss in dealing with remedy. Claims of constructive dismissal can involve construction of contracts which have accommodation clauses in deciding whether there has been a fundamental breach of contract. Most accommodation issues in employment situations involve contractual licences rather than tenancies and it is remedy issues which are to the fore in litigation in such cases. The tribunal has to deal with accommodation issues in its jurisdiction under Minimum Wage provisions as to the permitted deductions in such cases.

- 4.83 The Council of Employment Judges went on to explain the advantages of bringing such claims before the employment tribunal:

[First] there is the facility of ADR; secondly, the fees and costs position promotes access to justice; and thirdly, it could avoid unnecessary duplication of litigation.

- 4.84 The President of Employment Tribunals (England and Wales) and the Regional Employment Judges also emphasised the benefits of considering living accommodation as part of the overall terms of employment:

Provision of living accommodation may be an important part of an employee's terms of employment, for example for a live-in club steward. Employment tribunals already assess the value of such accommodation where awarding compensation for unfair dismissal. There is no logical reason for excluding such benefits from the employment tribunals' breach of contract jurisdiction.

- 4.85 The Bar Council proposed further investigation to establish the most appropriate line to draw between the jurisdictions:

The county court is the appropriate forum to resolve issues such as unlawful evictions, possession, or housing matters that require injunctive relief for example.

However, it is artificial to require an employee or employer to initiate separate civil proceedings where there is a clear monetary issue that is connected to the employment and is capable of being resolved. There is nothing inherently complicated in dealing with such issues and they would be within the competence of an Employment Judge. For example, an employer should be entitled to offset the damages arising from a breach of contract claim arising out of employment if they are owed sums in respect of rent for example.

We would suggest that further evidence is obtained on this point and that consideration is given to a limited reform providing the Tribunal with jurisdiction in respect of straightforward monetary points arising out of a contract relating to accommodation.

Arguments against extending jurisdiction to hear living accommodation claims

- 4.86 Other consultees told us that employment tribunals, unlike the civil courts, do not have expertise in this specific area. The Institute of Employment Rights touched upon some of the practical challenges of extending jurisdiction:

Claims for possession and the like give rise to specialist issues relating to housing law which employment tribunals are not equipped to deal with. If such a change were to be introduced, it would require a wider consultation, including those who are expert in housing law – which employment judges, mostly, are not.

Discussion

- 4.87 It is clear that the current system is frustrating for claimants in cases such as *Qantas*, in which claimants were obliged to bring similar claims in different forums. There was, however, a difference of view between the President, the Regional Judges and the Council of Employment Judges on the one hand and the EAT judges on the other as to whether the employment tribunals' jurisdiction should be extended to disputes relating to living accommodation and between consultees as to the amount of expertise that the employment tribunal would need in order to hear these types of claims.
- 4.88 We do not envisage that the claims that could be brought if the exclusion were lifted would include claims for possession. Jurisdiction under the 1994 Order is generally limited to claims for damages or sums due. Removal of the exclusion would enable employees to initiate financial claims relating, for example, to the standard of the living accommodation provided; where an employee had made any contractual claim pursuant to the 1994 Order, an employer would be able to counterclaim not only for unpaid rent but also for matters such as compensation for damage allegedly caused to the accommodation.
- 4.89 We do not therefore foresee any substantial risk of the claims raising issues of housing law. We acknowledge that the extension of the jurisdiction could lead employment tribunals into issues about the state of premises, which are somewhat remote from employment law. On the other hand, it would increase the scope for employment-related disputes to be litigated in a single forum. On balance, in view of the limitation of claims under the 1994 Order to financial claims, we are persuaded that the jurisdiction should be extended to include claims and counterclaims for damages or sums due in respect of living accommodation.

Recommendation 9.

- 4.90 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.

Consultation Question 18: We provisionally propose that the prohibition against employment tribunals hearing breach of contract claims relating to intellectual property rights should be retained. Do consultees agree?

- 4.91 Of the 52 consultees who responded to this proposal, 50 agreed. The main argument put forward was that the employment tribunal, unlike the civil courts, does not have expertise in this specific area. Some consultees argued that the employment tribunal's lack of power to grant injunctions and enforce those orders through committal proceedings (sending individuals to prison) was a reason for retaining the current demarcation of jurisdiction. The President of Employment Tribunals (England and Wales) and the Regional Employment Judges regarded the claims as lying outside the specialism of employment tribunals while the Council of Employment Judges said:

Whilst the employment tribunal has the necessary skills to consider injunctive relief: for example (1) the tribunal can, in effect, create a super injunction in respect of anonymity under the terms of rule 50 Employment Tribunal Rules 2013; and (2) the tribunal has specific powers to grant interim relief (which is akin to an order for specific performance of the employment contract) the existing machinery set up in the High Court to obtain interim injunctions from a Judge, including if necessary, from a Judge on call, and for the enforcement of injunctions by way of committal (to prison) support keeping such matters in the civil courts.

- 4.92 The Employment Law Bar Association made similar points, emphasising that the civil courts have the necessary injunctive powers and experience of enforcing breaches of injunctions by way of committal.

Discussion

- 4.93 The overwhelming majority of consultees agreed with our provisional proposal that employment tribunals' jurisdiction should not be extended in this way. For the reasons set out in the consultation paper, we are minded to maintain our provisional proposal. In summary, claims relating to intellectual property are better suited to the civil courts because:

- (1) such claims involve not only contract claims but also the assertion of statutory intellectual property rights;
- (2) claimants seeking to assert intellectual property rights will often wish to obtain an injunction, which the employment tribunal cannot provide;¹²⁴ and

¹²⁴ At para 8.13 below we recommend that employment tribunals should continue not to have jurisdiction to grant injunctions.

- (3) claimants who successfully claim for intellectual property infringements are likely to want to recoup some of their legal costs.

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

4.94 Of the 52 responses to this proposal, 38 agreed that the prohibition against employment tribunals hearing claims relating to terms imposing obligations of confidence (or confidentiality) should be retained.¹²⁵ Thirteen disagreed, while one consultee had mixed views on the proposal and advanced balanced arguments for and against without giving an overall opinion.

Arguments against employment tribunals determining claims relating to obligations of confidence

4.95 Consultees agreed with the arguments put forward in the consultation paper for retaining the current demarcation, namely that:

- (1) the employment tribunal, unlike the civil courts, does not have the power to grant injunctions;
- (2) such claims are invariably brought by employers and not employees; and
- (3) owing to the complex nature of these types of claims, exercising jurisdiction in this area would require expertise in a range of areas that it currently does not possess.¹²⁶

Arguments for tribunals hearing breach of confidence claims

4.96 A common argument put forward by consultees was that the employment tribunal does in fact have the necessary expertise to deal with such claims. In line with that view, the Liverpool Law Society Employment Law Committee stated that “concurrent jurisdiction could apply with the appropriate triage system, transfer capability and case management considerations”.

4.97 Three consultees¹²⁷ referred to non-disclosure agreements (“NDAs”) or “gagging orders”, two of whom reasoned that NDAs were a justification for extending the employment tribunal’s jurisdiction. They stated that such agreements related directly to employment contracts and therefore disputes of this nature should be heard by the employment tribunal. The National Education Union also raised a further point in relation to NDAs; overall, they agreed with our proposal that the jurisdiction of the employment tribunal should not be extended for this type of claim, but thought that:

For the sake of avoiding any confusion with regards to NDAs, this should only apply to issues around intellectual property (as they were originally designed) and not as

¹²⁵ These included the President of Employment Tribunals (England and Wales), the Regional Employment Judges, the Council of Employment Judges and the EAT judges.

¹²⁶ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 4.55 to 4.58.

¹²⁷ Billy Tonner, the Council of Tribunal Members Association (“CoTMA”) and the National Education Union.

gagging orders for employees who are victims of sexual harassment. As recent high-profile cases have shown, some employers are misusing this tool to allow those perpetrating sexual harassment to escape facing justice We believe that Employment Tribunals are best placed to deal with cases where an NDA is being misused as a gagging order.

Discussion

4.98 We remain of the view shared by the majority of consultees who agreed with our provisional proposal, and do not recommend an extension of jurisdiction in this area. One of the most persuasive arguments against an extension of jurisdiction in this area is that employment tribunals are less well equipped than the civil courts to grant injunctions, which are key to the enforcement of confidentiality agreements.

4.99 We note consultees' concerns regarding the inappropriate use by employers of NDAs. These are, as the National Education Union recognised, a specific type of confidentiality obligation arising not as a normal incident of the employment relationship but as part of a settlement agreement relating to specific misbehaviour by the employer such as sexual harassment. In these cases also, proceedings to enforce confidentiality obligations are more likely to be initiated by the employer and to involve applications for injunctive relief. Moreover, the Government has recently published its response to consultation on this subject. The publication states that the Government will legislate to make it clear that provisions in an employment contract or settlement agreement may not be used to prevent someone from making disclosures to the police, regulated health and care professionals or legal professionals. The document also states that the Government will legislate:

... to introduce a requirement to be clear on the limits of any confidentiality clause in a written statement of employment particulars. A worker [who] receives a confidentiality clause in a written statement that does not meet this requirement will be entitled to receive additional compensation in an employment tribunal award, if they are successful in their claim.¹²⁸

4.100 The employment tribunals will therefore have a limited role in ensuring that the content of confidentiality clauses is appropriate.

Consultation Question 20: We provisionally propose that the prohibition against employment tribunals hearing claims relating to terms which are covenants in restraint of trade should be retained. Do consultees agree?

4.101 In total, 53 consultees submitted a response to our proposal. Of those, 39 agreed.¹²⁹ Twelve disagreed, and two consultees did not give a firm view. Most consultees agreed with the arguments put forward in the consultation paper for retaining the current demarcation (as discussed above at Consultation Question 19).¹³⁰ For

¹²⁸ Department for Business, Energy and Industrial Strategy, *Confidentiality clauses: Response to the Government consultation on proposals to prevent misuse in situations of workplace harassment or discrimination* (July 2019), p 16.

¹²⁹ These included the President of Employment Tribunals (England and Wales), the Regional Employment Judges, the Council of Employment Judges and the EAT judges.

¹³⁰ These arguments are set out at para 4.95 above and in *Employment Law Hearing Structures* (2018) Law Commission Consultation Paper No 239, paras 4.55 to 4.58.

example, Manchester Law Society thought that “there would be practical difficulties in ensuring that the employment tribunal had sufficient judicial and administrative resources to deal with such claims given that they often require very swift resolution”.

4.102 Most of those who disagreed with our position argued that, given that these issues arose in the first place from the employment relationship, the appropriate venue for them to heard was an employment tribunal. In line with this view, CoTMA thought that:

Restrictive covenants primarily relate to the employment contract and ... any disputes over such covenants are most likely to have arisen because of a cessation of the employment contract. Responsibility for assessing the validity and reasonableness of such covenants and whether they may have been breached should rightfully belong within the jurisdiction of the employment tribunal.

4.103 Some suggested that the employment tribunal should have jurisdiction, but the tribunal’s rules on costs in these cases should resemble those applied in the civil courts.

Discussion

4.104 With the support of almost three quarters of consultees, we maintain our provisional proposal. Many of the factors that mitigate against extending the tribunal’s jurisdiction to hear breach of confidence claims apply in this context also. Chiefly, most claims in this area are brought by employers, not employees, and claimants typically wish to enforce contractual terms by an injunction. Consistently with our conclusion on Consultation Question 19, we do not recommend that employment tribunals be able to hear claims relating to covenants in restraint of trade.

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

4.105 Our consultation paper explained that the default forum for employees and workers to enforce their statutory employment law rights is the employment tribunal.¹³¹ Disputes relating to a genuinely self-employed person (who is neither an employee nor a worker) are predominantly dealt with by the civil courts. Chapter 4 of our consultation paper explained that there is some doubt as to whether the Extension of Jurisdiction Order gives employment tribunals any contractual jurisdiction over claims by workers as distinct from employees. This is because section 3(2) of the Employment Tribunals Act 1996 refers to “breach of a contract of employment or any other contract

¹³¹ See Employment Law Hearing Structures, Law Commission Consultation Paper No 239, paras 1.21 to 1.24 for a more detailed explanation of the senses in which we use the terms “employee” and “worker”. In summary, an employee is a person who works under a contract of employment, whereas the statutory definition of a worker is wider, encompassing both an employee and also an individual who works under a contract to perform services personally for another person who is not a client or customer of a business carried on by the individual. The law regards such individuals as deserving many of the protections that employees have. The term “worker” therefore covers a range of individuals who carry out work for others but are not employees, only excluding those who are self-employed and running their own business.

connected with employment” and the Extension of Jurisdiction Order made under that section refers to “termination of the employee’s employment”.¹³²

4.106 We provisionally proposed to put it beyond doubt that employment tribunals’ contractual jurisdiction should extend to workers. Of the 54 consultees who responded to our proposal, only three disagreed. One gave balanced arguments for and against but did not express a definite view.

Arguments in favour of giving the tribunal jurisdiction to determine breach of contract claims relating to workers

4.107 Consultees who supported our proposal thought that it would give workers greater protection, and avoid a situation where workers have to bring a claim in both the employment tribunals (in respect of any statutory claim) and the civil courts (in respect of a contractual claim). The EAT judges saw the proposal as removing a technical and potentially confusing distinction and a fertile area for satellite litigation, while the Council of Employment Judges told us that:

The intention of the 1994 Order was - “to avoid the situation where an employee (or for that matter an employer) is forced to use both a tribunal and a court of law to have all his or her claims determined. In simple terms, the purpose of the extension of jurisdiction was to enable an industrial tribunal to deal with both a claim for unfair dismissal (which we take as an obvious example) and a claim for damages for breach of the same contract of employment. Two sets of proceedings are thus avoided”.¹³³

Precisely the same considerations apply to claims brought by individuals as workers who do not qualify as employees. Many claims, of many kinds, are now brought in the employment tribunal by workers. It would be inefficient and anomalous for those workers who do not also qualify as employees to be unable to bring any claims for breach of contract which arise from breach of their (quasi)-employment contracts in the employment tribunal in the same way as employees may.

4.108 Cloisters gave three reasons in favour of granting employment tribunals jurisdiction to determine breach of contract claims relating to workers:

1) The distinction between an employee and a worker can be fine and hotly-contested. If tribunals could hear breach of contract claims by workers, there would be no need for protracted preliminary arguments about employment status which are in reality skirmishes about whether the claim should be heard in the tribunal or the county court.

¹³² Employment Law Hearing Structures, Law Commission Consultation Paper No 239, paras 1.21 to 1.24 and paras 4.61 to 4.63. Our references to workers are to those who work under a contract other than a contract of employment (sometimes called “limb b” workers). We consider self-employed persons further below.

¹³³ *Sarker v South Tees Acute Hospital NHS Trust* [1997] ICR 673 at [680] to [681] by Keene J, cited with approval by the Court of Appeal in *Capek v Lincolnshire County Council* [2000] ICR 878 at [882].

2) Tribunals regularly deal with claims involving workers under its statutory jurisdiction. It is a specialist tribunal in respect of employment disputes generally and that includes disputes involving workers.

3) The tribunal already has jurisdiction for claims of unauthorised deductions from wages in breach of section 13 of the Employment Rights Act 1996. This will already cover many but not all complaints which workers might want to bring regarding their contracts.

4.109 A number of consultees emphasised that recent changes in the labour market which have expanded the “gig economy” and increased the numbers of those with worker status have made the need for this extension of jurisdiction more pressing. The President of Employment Tribunals (England and Wales) and the Regional Employment Judges said:

We strongly support this proposal. Extending jurisdiction in this way to workers simply reflects the variety of working relationships that now exist and ensures access to justice on the part of such workers where a breach of contract claim arises.

4.110 Few consultees commented expressly on whether the employment tribunal’s jurisdiction in relation to workers should duplicate its existing jurisdiction in relation to employees. The Liverpool Law Society Employment Law Committee expressed the view that jurisdiction over claims relating to workers should mirror “exactly” the current employment tribunal jurisdiction in relation to employees.

Arguments against giving the tribunal jurisdiction

4.111 Only one of the three consultees who disagreed with the proposal gave reasons for their view. Peninsula stated that an extension would put further pressure on the employment tribunal’s limited resources as more time would be taken up determining worker status and differentiating between workers and the self-employed.

Discussion

4.112 Given the overwhelming support from consultees for making it clear that the Extension of Jurisdiction Order does apply to workers as well as to employees, and for the reasons expressed in our consultation paper, we maintain our provisional proposal. We note that this change is consistent with recent Government measures to improve the legal protection of workers more generally; for example, through the conferral of the right to a written statement of particulars of employment.¹³⁴

¹³⁴ SI 2019 No 731, pt 3.

Recommendation 10.

4.113 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.

Consultation Question 22: If employment tribunals' jurisdiction to determine breach of contract claims relating to employees is extended in any of the ways we have canvassed in Consultation Questions 10 to 20, should tribunals also have such jurisdiction in relation to workers?

4.114 Fifty-four consultees answered this question. Forty-seven responded that if employment tribunals' jurisdiction to determine breach of contract claims relating to employees is extended in any of the ways we have canvassed in Consultation Questions 10 to 20, then for the sake of consistency and simplicity tribunals should also have such jurisdiction in relation to workers; these included the President of Employment Tribunals (England and Wales) and the Regional Employment Judges, the Council of Employment Judges and the EAT judges. Four answered that tribunals should not have such jurisdiction in relation to workers, and three expressed no firm view either way.

4.115 ELA noted that:

Extending jurisdiction to cover claims during the subsistence of employment may be all the more important for workers given the difficulty in determining whether there is an umbrella contract or discrete periods of obligation and so whether the worker relationship is continuing. Removing the distinction would negate the need to determine that issue for this purpose.

Arguments against

4.116 Of the four consultees who disagreed, only Peninsula gave a reason, saying that "contractual disputes outside of what is deemed employment should be dealt with by the county courts".

Discussion

4.117 We agree with the majority of consultees that, as a matter of consistency, the extensions of jurisdiction that we recommend in relation to breach of contract claims should be extended to workers.

Recommendation 11.

4.118 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.

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

4.119 Of 53 consultees who addressed this proposal, 47 agreed with it.¹³⁵ Four disagreed, and two expressed no firm view either way.

Arguments against extending jurisdiction to the employment tribunal

4.120 Consultees who agreed with our proposal argued that such disputes are likely to be of a commercial nature, and that the civil courts are therefore the more appropriate forum. The President of Employment Tribunals (England and Wales) and the Regional Employment Judges, and the Council of Employment Judges referred to the distinction between workers/employees and the genuinely self-employed. As the EAT judges put it:

The distinction between workers/employees on the one hand, and those who are genuinely self-employed on the other, arguably marks the line between disputes of a work-related nature and disputes of an essentially commercial nature, for which the Civil Courts are the more natural forum. This demarcation reflects the scope of the employment tribunal's jurisdiction in other areas, and we consider it should be maintained.

4.121 Many observed that self-employed independent contractors will not be able to bring any of the statutory complaints that fall under the employment tribunal's exclusive jurisdiction. As explained by ELA:

Extending the right to hear breach of contract claims to the self-employed would not therefore have the benefit intended by the original Extension of Jurisdiction Order, namely to allow one dispute with both statutory and contractual causes of action to be heard in the same forum.

Arguments for extending jurisdiction to the employment tribunal

4.122 The main argument put forward by consultees who wanted to change the law was that employment tribunals should be granted jurisdiction to determine whether such self-employed independent contractors are "genuinely self-employed". As Unite put it:

The issue as to employment status is complex, but not beyond the knowledge of employment judges. The jurisdiction should be restricted to individuals who are working, including via a personal service company, but should not extend, for example to a partnership. A better, bolder approach is needed to provide a number of ways to deal with bogus self-employment.

4.123 A similar point was also raised by consultees who were in favour of the proposal. For example, the Liverpool Law Society Employment Law Committee qualified their response by stating that:

¹³⁵ These included the President of Employment Tribunals (England and Wales), the Regional Employment Judges, the Council of Employment Judges and the EAT judges.

There needs to be consideration in relation to those cases whereby a so-called self-employed contractor is claiming that they are in fact a worker or an employee and for example are claiming unlawful deduction of wages in relation to any outstanding wages. If they are unsuccessful in their determination of status and are found to be genuinely self-employed then there needs to be a mechanism where they are open to bring their case within the county court at that point easily which could be by way of a transfer.

Discussion

- 4.124 Consultees generally agreed that genuine self-employed contractors should not be able to bring claims in the employment tribunal. We continue to think that is right. Employment tribunals were established to hear disputes between employers and employees; it is sensible that their jurisdiction be extended to workers (in the sense in which we are using the term), but not to genuinely self-employed contractors.
- 4.125 Our recommended reforms will expand employment tribunals' jurisdiction to determine whether an individual is a worker or genuinely self-employed; they will need to decide this, where it is disputed, in order to determine whether they have jurisdiction to entertain a contractual claim. The Liverpool Law Society suggest that, where that decision is adverse to a claimant, there should be a mechanism for transfer of the proceedings to the county court.
- 4.126 There is currently no general power to transfer cases from an employment tribunal to the county court. In chapter 3 we briefly discussed "concurrent sitting" by judges authorised to sit in the county court and the Property Chamber of the First-tier Tribunal so as to determine the whole of a property dispute.¹³⁶ The Equality and Human Rights Commission, in its response to our questions on concurrent jurisdiction and flexible deployment, specifically referred to the "gig economy" as having the potential to generate cases where it is difficult at the outset to decide whether the parties in dispute are in a labour or a commercial services dispute. We suggested that consideration be given to concurrent sitting by judges authorised to sit both in the county court and the employment tribunal.¹³⁷ We further suggest, if our recommendations 4, 5, 6,7 and 8 are accepted, that the employment tribunals' jurisdiction over contractual disputes be taken into account.

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

- 4.127 After our consultation closed, the President of Employment Tribunals (England and Wales) and the Council of Employment judges drew our attention to *Antuzis v DJ Houghton Catching Services Ltd*,¹³⁸ concerning claims against an employer company for breach of contractual terms relating to working hours and minimum pay introduced by the Agricultural Wages Act 1948 and Orders made under it 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. There were also claims for unpaid wages and holiday pay and in respect of unlawful deductions. The High Court found the company to be in breach of contract and found the directors jointly and severally

¹³⁶ See paras 3.64 to 3.65 above.

¹³⁷ See paras 3.105 to 3.107 above.

¹³⁸ [2019] EWHC 843 (QB), [2019] IRLR 629.

liable¹³⁹ for inducing the breach.¹⁴⁰ The Council of Employment Judges made the following observations in a supplementary note:

The case is authority for the proposition that individual directors can be sued in tort at common law for inducing breach of contract if in bad faith they direct breaches of contracts made between their company and employees/workers.

The Employment Tribunal has statutory jurisdiction to consider claims: from employees of breach of contract; and from workers for unpaid holiday pay and for unlawful deduction from wages. (Breach of contract and unlawful deduction from wages claims are subject to limitations and restrictions that are discussed in the Law Commission's consultation and our response to it). These claims must be brought against the employer.

On the authority of *Antuzis* such claims may be brought against individual directors of a separate employing entity where the directors were acting in bad faith: in particular, by inducing employees and workers to provide work with no intention of paying them. However, the claims against individuals other than the employing entity would not be capable of being brought in the Employment Tribunal as there is no jurisdiction to hear claims brought against individuals who are the controlling minds of a separate juridical employing body. Indeed, the employees in *Antuzis* were compelled to institute High Court proceedings.

Claimants may have good reason to wish to pursue the individuals: this would help considerably where the company is or might be insolvent or otherwise there are enforcement issues.

Unless the Employment Tribunal enjoys equivalent jurisdiction to the civil courts to consider such claims then *Antuzis* will be a reason for bringing all holiday pay, breach of contract and wages claims in the High Court or county court where a claimant also wishes to establish personal liability for a director who arguably has acted in bad faith by procuring a breach of contract and thus has a potential personal liability for inducement. This may be a disadvantage to an employee who ought to have a choice of forum in the pursuit of a *Antuzis* claim (as is the case in the pursuit of such claims against the employer).

In light of this development, we suggest that the Employment Tribunal should have jurisdiction to determine tort claims brought by workers in respect of matters of pay and breach of contract. (We do not seek to depart from our position upon other kinds of claim as expressed in our response to the consultation upon the issues at Questions 16,18,19 and 20).

There is precedent for a statutory scheme vesting the Employment Tribunal with power to determine tortious claims against individuals other than the employer. The Employment Tribunal is used to dealing with claims brought under the Equality Act 2010 against individuals whom the employee seeks to hold liable for acts of

¹³⁹ We explain joint and several liability at para 8.14 below.

¹⁴⁰ Inducing a breach of contract is a tort (an actionable civil wrong); a person who is found to have induced another person to breach a contract is liable along with that other person to pay damages for the breach.

discrimination. Commonly, such claims are brought alongside a claim against the employer (who may have vicarious liability for the acts of the impugned employees). Discrimination in the workplace is a statutory tort. A similar statutory scheme operates under the ERA 1996 where an employee is subjected to detriment by a co-worker for making a protected disclosure.

Discussion

4.128 As with the suggestion made by the Equality and Human Rights Commission and others that we discussed in chapter 3,¹⁴¹ we have not thought it appropriate to reopen consultation in order to canvass this suggestion; this is on account of our resource constraints and the delay to the project that further consultation would have caused.

4.129 On the face of it, we see some force in the Council's suggestion of a modest extension of the employment tribunals' jurisdiction so as to include claims for inducing an employer's breach of contract, for the reasons that the Council gives. In short, this could be a desirable simplification of procedure where employees make claims against company directors (and possibly others) who have allegedly induced a breach of the employment contract by an employer, particularly where the employer is a company. Such a reform would give claimants in an employment tribunal the same range of possible defendants as they would have in the county court. As the Council suggests, this could be particularly valuable where the employer company is insolvent or has limited financial means. The Council points to some existing statutory schemes giving tribunals power to determine tort claims against individuals other than the employer:

- (1) Under the Equality Act 2010, claims for discrimination can be brought against individual employees.¹⁴² Discrimination in the workplace is a statutory tort.
- (2) Under the ERA 1996, claims for detriment arising from the claimant making a protected disclosure can be brought against individual employees.¹⁴³

4.130 These considerations would have to be balanced against the risk (which we have not sought to evaluate) of employment tribunals becoming embroiled in difficult issues of what amounts in a particular case to the tort of inducing a breach of contract. We relay the Council's suggestion to the Government.

RESTRICTIONS ON TRIBUNAL CLAIMS BY EMPLOYERS AGAINST EMPLOYEES

4.131 Employment tribunals have no jurisdiction to hear claims against employees or workers originated by employers (though employers can in some circumstances bring counterclaims for breach of contract). This restriction reflects the fact that the primary

¹⁴¹ See paras 3.105 and 3.106 above.

¹⁴² Under s 110(1) of the Equality Act 2010, an employee or agent can be individually liable for discriminating against the claimant. S 120(1)(a) of the Equality Act 2010 gives the employment tribunal jurisdiction over such claims.

¹⁴³ Under s 47B(1A) of the ERA 1996, a worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done by another worker or by an agent of the worker's employer with the employer's authority on the ground that W has made a protected disclosure. Further, the recent case of *Timis v Osipov* [2018] EWCA Civ 2321, [2019] ICR 655 established that co-workers can also be directly liable under s 47B for the act of dismissal.

purpose of employment tribunals is to hear “claims from people who think someone such as an employer or potential employer has treated them unlawfully”.¹⁴⁴

Original claims by employers

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

4.132 We provisionally proposed that employment tribunals should continue not to have jurisdiction to hear claims originated by employers against employees; though claims by employers against employees might raise issues that were particularly within the expertise of employment tribunals, to give the tribunals jurisdiction over such claims would be a major departure requiring significant primary legislation.

4.133 The majority of consultees (42 out of the 51 who responded) agreed with this proposal. Six disagreed, and three consultees commented without expressing a firm view. Jason Frater felt that it depended on the circumstances of the claim. Peninsula also suggested that an employer should be able to bring breach of contract and discrimination claims against an employee in the employment tribunal if other changes to employment tribunals’ jurisdiction are made:

If the cap on breach of contract claims is increased or removed, and if the ability for workers to pursue claims in the employment tribunals is widened, then giving employers the opportunity to pursue such claims in a no costs jurisdiction would help balance the inequity that the system would otherwise create.

4.134 The Bar Council gave balanced arguments for and against, and concluded by suggesting “that if there is reform in this area the employer is restricted to a relatively low cap for such claims in the region of £5,000”.

Arguments in favour of the current position

4.135 A majority of consultees supported the current restriction on employers commencing claims in the employment tribunal. Most simply noted that the tribunals were not set up or designed to hear employers’ claims. Some of them argued that the current restriction on the employment tribunal’s jurisdiction helps address the imbalance of power between the employer and the employee. The President of Employment Tribunals (England and Wales) and the Regional Employment Judges thought that changing the law here would risk encouraging tactical litigation by employers. The EAT judges agreed with the reasoning in our consultation paper. The Council of Employment Judges thought that employers’ claims should be confined to cases where contractual claims had been brought against the employer. ELA remarked that if an employer is confident of its claim’s chances of success, it would initiate it in the civil courts where it can recover its costs if successful. Opening up a no-cost forum to employers’ claims might result in speculative claims being issued in that forum.

¹⁴⁴ Gov.uk, *Employment Tribunal – What we do*, <https://www.gov.uk/government/organisations/employment-tribunal/about> (last visited 5 September 2019).

4.136 Cloisters focussed on the likely nature of the claims that would be made possible by such a reform:

The breach of contract claims which employers make against their employees or workers, rare as they are, normally involve allegations of negligence. Such claims are akin to claims of professional negligence for which the civil courts are better set up with procedure rules dealing with expert evidence.

Arguments for giving employment tribunals jurisdiction to hear claims originated by employers

4.137 Some consultees repeated the point mentioned in our consultation paper: that claims originated by employers against employees or workers may raise issues that are within the expertise of employment tribunals. In addition, Birmingham Law Society stated that the current restriction places employers at a disadvantage:

Access to justice and opportunities to resolve disputes between employers and employees should be equal. Not all employers have significantly greater resources than the employee in order to pursue their legitimate claim. An option may be a small employer exemption. There would be a benefit to employees in that the civil costs regime does not apply, the lack of formality would enable the employee to represent themselves.

Discussion

4.138 The claims to which this reform would relate would have to be, as with existing claims by employees under the 1994 Order, claims for damages or sums due under a contract of or connected with employment.¹⁴⁵ We agree with Cloisters that it is likely that such claims would be in respect of allegedly negligent performance of the employee's duties. If so, that would not be an obstacle in itself; the issues raised would be likely to be similar to those encountered by employment tribunals in cases of allegedly unfair dismissal sought to be justified on grounds of capability or misconduct.

4.139 Nevertheless, we have decided to maintain our provisional proposal, in line with the views of over 80% of respondents. Consultees who favoured the extension based their arguments on equality of treatment, with particular reference to small employers. The case for equal treatment has to be judged in the light of the fact that employment tribunals have always been, almost exclusively, a forum in which employees bring claims against employers. We remain of the view expressed in our consultation paper, and agreed with by several consultees, that to turn employment tribunals into a forum in which employers can initiate litigation against their employees would be a major restructuring of the employment tribunal system.

4.140 A small employer exception would involve drawing an arbitrary line between employers, raising difficult issues of the appropriate criterion (turnover, profits, size of workforce etc), and would have a propensity to generate satellite litigation.

¹⁴⁵ They would also be subject to the restrictions upon jurisdiction provided for in the 1994 Order.

Counterclaims

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

4.141 As we have mentioned above at paragraph 4.2, the Extension of Jurisdiction Order gives an employer a limited ability to counterclaim in employment tribunals against an employee if the employee has commenced proceedings for breach of contract against the employer. Employment tribunals have no jurisdiction to hear an employer's counterclaim if the employee's original claim alleged breaches of statutory rights alone.

4.142 We provisionally proposed to maintain this restriction. Of the 56 consultees who responded to this proposal, 43 agreed 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; these included the President of Employment Tribunals (England and Wales), the Regional Employment Judges, the Council of Employment Judges and the EAT judges. Eleven disagreed and two expressed no firm view either way.

Arguments against employers being able to bring counterclaims to employees' statutory claims

4.143 A considerable majority of respondents did not seek any change in the law here. Some consultees said that there was no conceptual counterclaim to an employee's statutory claim. Others pointed to the risk of tactical use of counterclaims by employers to dissuade employees from bringing or pursuing a legitimate claim. As the National Education Union put it:

We believe that if employers can counterclaim then it may be used as a ploy by some of them or their representatives to intimidate employees/workers bringing claims.

4.144 Cloisters went further and argued that, because employers' counterclaims are usually, in their experience, brought tactically, the opportunity to bring counterclaims should be restricted further. They proposed that such claims should be restricted "to counterclaims that arise out of the same facts as the employee's breach of contract claim".

Arguments in favour of employers being able to bring such counterclaims

4.145 The main argument put forward was that the current restriction is arbitrary, given that employers can counterclaim where an employee brings a breach of contract claim. Consultees also argued that allowing employers to counterclaim would mean that all of a dispute could be heard in one forum, instead of employers having to initiate a separate claim against the employee in the civil courts. Peninsula gave an example of how the current approach can result in an unfair outcome for the employer:

The unreasonableness of this restriction can be best illustrated by a recent event in the news concerning an apparent dispute between a worker and his employer in relation to a building contract at a Travelodge in Liverpool. It is being reported that

the worker believes that he is owed £600 in wages by the contractor and in retaliation for not being paid this, he drove a mini-digger through the reception of the building causing significant amount of damage that the employer will have to correct. Under the current provisions, the worker could pursue a statutory unauthorised deduction claim and the cost to the employer of putting right the damage that the worker caused would be disregarded. By allowing respondents to claim breach of contract in relation to statutory claims seeking monetary compensation this will help to encourage employees to take responsibility for their actions and potentially reduce the workload of the tribunals. This would be in keeping with the overriding objective and avoiding the need for claims in multiple jurisdictions.

Discussion

- 4.146 We maintain our provisional proposal, and do not recommend allowing employers to raise counterclaims in response to purely statutory claims by employees. We acknowledge that at times this must give rise to employers being put in frustrating situations, such as the one described by Peninsula above (though we observe that the factual situation referred to is an unusual one and that it is open to employers to bring a claim in the civil courts or to seek a compensation order in criminal proceedings)¹⁴⁶.
- 4.147 In our view this conclusion follows from two of the conclusions we have reached above. If an employee chooses to bring in an employment tribunal a contractual claim arising out of their employment, equality of treatment militates in favour of the employer being likewise able to bring contractual counterclaims arising out of the employment. On the other hand, employment tribunals should not become a forum in which employers are able to initiate claims against their employees. We therefore consider that the ability of employers to bring a counterclaim should be limited to cases where the employee has chosen to ventilate a contractual dispute in the tribunal. We also fear that, without this rule, employers would be encouraged to bring counterclaims that they would not otherwise have advanced and that employees might as a result be deterred from pursuing their statutory claims.

¹⁴⁶ The provisions of sentencing law on compensation orders will be codified in the Sentencing Bill prepared as part of our Sentencing Code project: see <https://services.parliament.uk/bills/2019-21/sentencing.html>; the compensation order provisions are at ch 2 of pt 7 (cls 133 to 146). Although the courts are required to consider a compensation order in cases of death, injury, loss or damage, such orders are rarely imposed in cases such as criminal damage: see <https://www.gov.uk/government/collections/criminal-justice-statistics-for-2019/20>.

Chapter 5: Other restrictions on the jurisdiction of employment tribunals

5.1 This chapter considers other restrictions on the jurisdiction of the employment tribunals beyond those contained within the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (the “Extension of Jurisdiction Order”). In particular, we consider 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 there are any other areas of the civil courts’ jurisdiction which might properly be the subject of shared jurisdiction with employment tribunals.¹⁴⁷

WRITTEN STATEMENTS OF PARTICULARS – NO POWER TO CONSTRUE

Consultation Question 26: Should employment tribunals have jurisdiction to interpret or construe terms in contracts of employment in order to exercise their jurisdiction under Part I of the ERA 1996?

5.2 Employees can apply to an employment tribunal to determine what terms should be included in a written statement of the particulars of their employment. The Court of Appeal has held that when exercising this statutory jurisdiction employment tribunals are limited to identifying the terms of the contract and cannot rule on the interpretation of terms whose meaning is disputed.¹⁴⁸ We asked whether the statute should be amended to give employment tribunals this jurisdiction.

5.3 Of the 54 consultees who responded to this question, 46 thought that employment tribunals should have jurisdiction to interpret or construe terms in contracts of employment in order to exercise their jurisdiction under Part I of the Employment Rights Act (“ERA”) 1996. Seven thought that employment tribunals should not have such jurisdiction, and one consultee expressed no firm view either way.

Arguments in favour of employment tribunals being able to interpret or construe terms

5.4 Many consultees felt strongly that employment tribunals have the necessary expertise to interpret and construe such terms, and pointed out that giving employment tribunals jurisdiction to do so would be in line with the decision in *Agarwal v University of Cardiff*.¹⁴⁹ The President of Employment Tribunals (England and Wales) and the Regional Employment Judges (joint response) (with whom the President of the

¹⁴⁷ These issues were considered in Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 4.74 to 4.125.

¹⁴⁸ *Southern Cross Healthcare Ltd v Perkins* [2010] EWCA Civ 1442, [2011] IRLR 247 (CA). For more detail on this decision, see Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, para 4.77.

¹⁴⁹ [2018] EWCA Civ 1434, [2018] 6 WLUK 109. In that case the Court of Appeal held that an employment tribunal does have jurisdiction to construe a contract of employment for the purpose of deciding whether a sum has been improperly withheld from wages. For more discussion, see Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 4.89 to 4.91.

Industrial Tribunal and Fair Employment Tribunal (Northern Ireland) agrees) observed that “the present position has no logic”; the Employment Appeal Tribunal (“EAT”) judges described it as “anomalous” and the Council of Employment Judges as “difficult to justify”. In the view of Thompsons Solicitors, employment tribunals are “particularly skilled” in addressing employment contracts. Consultees also suggested that litigants in person may not understand the current limitations on the employment tribunal’s powers. As the Employment Lawyers Association (“ELA”) put it:

Those litigants may well not understand the *Southern Cross* principle and the difference between determining contractual terms as opposed to interpreting or construing them. Allowing employment tribunals to interpret or construe contractual terms removes this rather artificial distinction and gives employees the opportunity to have disputes over terms determined in the low-cost forum set up to resolve employee/employer disputes.

- 5.5 The Institute of Employment Rights added that “in the circumstances of a collective dispute, it is useful for an employment tribunal to be able to issue a form of declaration as to what a term, properly interpreted, means in the circumstances”. The Trades Union Congress thought that giving employment tribunals a power to construe contractual terms would be in line with their legal duty in employment status cases, where they are required to look at the reality of the employment relationship.

Arguments against employment tribunals being able to interpret or construe terms

- 5.6 Of the seven consultees who disagreed with our proposal, three gave specific reasons. They argued that it is not the purpose of Part I of the ERA 1996 to give employment tribunals power to construe or interpret terms in contracts of employment. The Employment Law Bar Association (“ELBA”) added that there is no need for this power:

Part I requires employers to provide a statement of written particulars of employment, with certain matters mandatorily included, for example the length of notice the employee is obliged to give. Where the employer does not comply with this, the employee may apply for the tribunal to “determine what particulars ought to have been included in a statement”, see s. 11(1). That is a materially different enquiry to the construction of a contract where the court must construe the objective intentions of the parties as expressed or implied in the contract.

- 5.7 Slater and Gordon thought that, while a tribunal should not have jurisdiction to construe terms, it should be able to adopt the view of a “reasonable employer” in deciding a Part I claim.

Discussion

- 5.8 We agree with the majority of consultees that employment tribunals should have jurisdiction to interpret or construe terms in contracts of employment in order to exercise their jurisdiction under Part I of the ERA 1996.
- 5.9 We agree with those consultees who thought that the distinction between identifying the terms of a contract and construing it was a difficult one to draw. Not only is it difficult for lawyers, but it is also difficult for litigants in person. We also agree that it is unrealistic to expect such litigants to be able to anticipate such jurisdictional matters.

Even for claimants who are represented, it is frustrating that employment disputes of this nature cannot currently be wholly litigated in the employment tribunal. Is there then a good reason for continuing to limit the employment tribunal's powers in this way?

- 5.10 The most frequently cited argument against granting employment tribunals the power to interpret contracts was that this was materially different enquiry from establishing what the particulars ought to be, which was the enquiry contemplated by Part I of the ERA 1996. We nevertheless consider that this would be a useful power, which will arguably be conferred anyway if our recommendation 4 (claims during employment) is accepted, and would complement employment tribunals' ability to interpret contracts in wages claims.

Recommendation 12.

- 5.11 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.

UNAUTHORISED DEDUCTIONS FROM WAGES CLAIMS

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

- 5.12 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" during employment. 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.
- 5.13 The Court of Appeal has held that an unauthorised deduction from wages claim must be for a "significant, identifiable sum".¹⁵⁰ Accordingly, a wage claim relating to an unquantified discretionary bonus fell outside the employment tribunals' "Wages Act" jurisdiction. In other words, unquantified sums may not be claimed as unauthorised deductions from wages and must be claimed as breach of contract claims; this can be either in the civil courts or an employment tribunal, but in the latter case only after termination of employment and subject to the £25,000 limit discussed above. We asked consultees whether employment tribunals should be given the power to hear claims for unauthorised deductions from wages which relate to unquantified sums.
- 5.14 Of the 54 consultees who answered this question, 46 thought that employment tribunals should be given the power to hear unauthorised deductions from wages claims which relate to unquantified sums.¹⁵¹ Seven disagreed, and thought that the

¹⁵⁰ *Coors Brewers Ltd v Adcock* [2007] EWCA Civ 19, [2007] IRLR 440.

¹⁵¹ These included the President of Employment Tribunals (England and Wales), the Regional Employment Judges, the Council of Employment Judges and the EAT judges.

tribunals should not be given such a power. The Manchester Law Society explained that there had been a divergence of opinion between members, and did not express a settled view either way. It considered that unquantified wages claims were most likely to occur where there was a dispute in respect of a complex bonus scheme, where civil courts' expertise in matters such as complex company accounts would be beneficial. Members thought that simpler issues could properly be dealt with by the tribunals, but some thought that it would be too difficult to identify where to draw the line. It was agreed that the employment tribunal should have jurisdiction in certain circumstances concerning unquantified amounts, for example, over claims that are quantified, but where the quantum is disputed:

The tribunal should have jurisdiction to determine the amount in this situation as it would be possible to adduce expert evidence in support of the parties' respective positions, which the tribunal could consider as it does with other types of claim (such as personal injury arising from discrimination).

Arguments in favour of employment tribunals hearing unauthorised deductions from wages claims relating to unquantified sums

- 5.15 Consultees maintained that giving employment tribunals such a power would remove an unnecessary complexity with the current system, which currently causes confusion for claimants. It was also felt that this would increase access to justice, as claimants would be able to have their claims heard in a more informal setting within the employment tribunals. In particular, this would be a desirable outcome for unrepresented parties.
- 5.16 The President of Employment Tribunals (England and Wales) and the Regional Employment Judges viewed the distinction between quantified and unquantified sums as unsustainable and the present position as unjust. The EAT judges noted that "employment tribunals regularly determine claims relating to unquantified sums in other contexts (unfair dismissal, discrimination claims, and claims for breach of contract)", and supported allowing such determination in the context of wages claims to provide a consistency of approach.
- 5.17 Professor Owen Warnock (University of East Anglia) saw an imbalance in the ability to quantify a claim, as "it can be really difficult for an employee to calculate how much he or she is owed, whereas an employer should always be able to prove what has been paid and why the amount paid was correct".
- 5.18 The Institute of Employment Rights found the distinction between a quantified and unquantified claim to be a fine one, on which the case law is not always clear. They consider that "once more, difficult case-law diverts employment tribunals down a side-track which has nothing to do with the merits of the case".

Arguments against employment tribunals hearing unauthorised deductions from wages claims relating to unquantified sums

- 5.19 ELA reasoned that the employment tribunal is not the appropriate forum to hear unauthorised deductions from wages claims relating to unquantified sums, in a response which is worth quoting at length:

In our experience in practice when issues of this type arise, they are likely to do so in the context of more complex, higher value claims (for example in relation to disputed bonus payments) where adjudication of the dispute would require the employment tribunal to engage in exercising significant discretion and judgement to arrive at a quantified sum. We are mindful of the original intention of Wages Act claims as reflected in the Court of Appeal in *Coors Brewers v Adcock*¹⁵² namely that this jurisdiction in the employment tribunal is there to deal with “straightforward claims where employees can point to quantifiable loss” and provide “a swift and summary procedure”. We agree with these sentiments and consider that overall it provides an effective way for employees to recover unpaid wages and should not be extended to cover unquantified sums beyond the scope of the existing statutory provisions and case law in a costs free jurisdiction. We are conscious that in our answer to Question 13 we recommended a cap of £100,000 on the jurisdiction on contractual claims. However we have taken into account that claims under the Wages Act and its predecessor the Truck Acts were devised to deal with much more modest claims and also that unquantified claims for deductions have no ceiling. These factors have influenced us to reach the decision we have.

- 5.20 Peninsula argued that granting the employment tribunals such a power would place employers at a disadvantage:

Ultimately, the respondent has the right to know what claim they are defending and is put at significant prejudice when faced with a claim that the claimant is pursuing an unspecified and unlimited sum in a no costs jurisdiction, particularly as wages claims are generally run through the fast track giving little preparation time. If a claimant believes that monies are properly payable then they should be able to quantify those.... For the amounts to be properly payable they must be express within the contract and so capable of quantification.

Discussion

- 5.21 We agree with the overwhelming majority of consultees that employment tribunals should have jurisdiction to determine claims arising in circumstances such as those of *Coors Brewers Ltd v Adcock*.¹⁵³ We note the concerns expressed by ELA, but bear in mind that the decision in the *Coors* case was not grounded upon the claim in that case being complex to adjudicate but upon the fact that it was analysed as a claim for damages for breach of contract (in failing to set up an adequate bonus scheme) rather than a claim for wages due. Employment tribunals already engage in complex quantifications; on our understanding of the law, employment tribunals already have jurisdiction under Part II of the ERA 1996 to apply the terms of a bonus scheme, even if its terms are complex and require fact-finding and interpretation. If there is any doubt about that, confirmation that the jurisdiction exists would be highly desirable.
- 5.22 Implementation of our recommendation 4 above, for the contractual jurisdiction of employment tribunals under the Extension of Jurisdiction Order to be expanded to cover contractual disputes litigated during the subsistence of an employee’s employment, would in any event give employment tribunals power to decide claims of

¹⁵² [2007] EWCA Civ 19, [2007] IRLR 440.

¹⁵³ [2007] EWCA Civ 19, [2007] IRLR 440 and see Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 4.92 to 4.96.

the *Coors* type subject to the financial limit in the Order (which we have recommended be raised to £100,000).¹⁵⁴ To that extent, jurisdiction in cases of the *Coors* type would be conferred even without amendment of Part II; the practical differences that amendment of Part II would make would be limited to conferring jurisdiction over claims exceeding £100,000 and enabling a *Coors* claim to be brought without opening the possibility of a counterclaim by the employer.

5.23 We do not find it necessary to recommend that the Part II jurisdiction be expanded to cover these claims. It does not seem to us that extending the jurisdiction so as to cover claims of the *Coors* type would do any damage to the Part II jurisdiction, though it would entail careful amendment of the provisions of Part II to extend them beyond cases where an employer has failed to pay remuneration that is due so as additionally to cover cases where an employer has, by some other breach of contract, prevented remuneration from becoming due. But such an extension would extend Part II into areas that fall more naturally, in our view, within a general contractual jurisdiction.

5.24 Part II is the successor to provisions that are now of considerable antiquity and include machinery going beyond that generally governing contractual remedies. Its existence is a continuing statutory recognition of the importance of workers receiving their due remuneration without deduction or delay. We consider that it has a justifiable place in the legislation notwithstanding the expansion of tribunals' contractual jurisdiction that we recommend in this report. Further, we think it right that it should continue to exist without financial limit, whether or not claims under it would be likely frequently to exceed the £100,000 limit that we are recommending for the tribunals' contractual jurisdiction.¹⁵⁵ We also think that the bringing of claims under Part II should not expose a claimant to an employer's counterclaim. Claims of the *Coors* type, however, are only indirectly connected to wages and, by definition, raise issues going beyond whether wages are due and unpaid.

Recommendation 13.

5.25 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.

EXCEPTED DEDUCTIONS

Consultation Question 28: 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, should the tribunal also have the power to determine whether the employer deducted the correct amount of money from an employee’s or worker’s wages?

5.26 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,

¹⁵⁴ SI 1994 No 1623. See recommendation 6 at para 4.42 above.

¹⁵⁵ See recommendation 6 at para 4.42 above.

employers are permitted to deduct a sum from a worker's wages where the worker's wages have previously been overpaid, or when the worker has taken part in a strike or other industrial action.

- 5.27 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.
- 5.28 Our consultation paper asked whether the tribunal 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.¹⁵⁶
- 5.29 The overwhelming majority of consultees who answered this question (52 out of 54) thought that where an employment tribunal finds that one or more of the "excepted deductions" from section 14(1) to 14(6) of the ERA 1996 applies, the tribunal should also be able to decide whether the employer deducted the correct amount. The main reason put forward in favour was that the exercise of this power is well within the expertise of the employment tribunal, and granting such a power would avoid a situation where parties have to litigate in two different forums.
- 5.30 One consultee thought that the tribunal should not have such a power, but did not give a reason why. Peninsula's answer was conditional. It stated that "the position should only be changed if the employment tribunal had the power to determine that the deduction was too little as well as too high and make an award accordingly".

Discussion

- 5.31 We share the view of nearly every consultee that employment tribunals should have the power to determine whether an employer has deducted the correct amount. The difference between tribunals' powers in respect of deductions under sections 13 and 14 is anomalous; no consultee presented an argument in favour of its retention. As Peninsula noted, our recommendation may in some cases mean the tribunal concludes that an employer has deducted less than it was entitled to.

Recommendation 14.

- 5.32 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.

¹⁵⁶ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 4.100 to 4.104.

NO SETTING OFF

- 5.33 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. In this context, that means an employer defendant may be able to rely on a debt it is owed by an employee 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.¹⁵⁷ An employer cannot however set sums off when an employee brings an unauthorised deductions from wages claim under Part II of the ERA 1996.¹⁵⁸ Our 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 (that is, claims for a specific sum of money), and whether it should be limited to extinguishing the employee's claim (and not be capable of exceeding it).¹⁵⁹

Consultation Question 29: (First part): Should employment tribunals be given the power to apply setting off principles in the context of unauthorised deductions claims?

- 5.34 Of the 55 consultees who answered this question, 36 thought that employment tribunals should be given the power to apply setting off principles in the context of unauthorised deductions claims. Sixteen responded that employment tribunals should not be given this power, and three expressed no firm view either way.

Arguments in favour of giving tribunals the power to apply setting off principles

- 5.35 Many of the consultees who supported extending set off principles to unauthorised deduction claims saw the current position as anomalous, as the employment tribunal can apply setting off principles when determining contractual claims brought under the 1994 Order. Similarly, the employment tribunal can deal with an employer's counterclaim to a breach of contract claim. The EAT judges noted that:

As employers may bring a contract counterclaim in response to a worker/employee's contract claim, such a change would provide consistency. This accords with our general view that consistency of approach should be achieved where appropriate and possible.

- 5.36 Many consultees also found it logical for all issues relating to setting off to be heard in one forum. The President of the Employment Tribunals (England and Wales) and the Regional Employment Judges believed that a power to set off "accords with justice and enables issues to be addressed in one claim in one forum".
- 5.37 Employment Judge Colm O'Rourke commented that this may result in fairness for both parties:

¹⁵⁷ *Ridge v HM Land Registry* UKEAT/0485/12 (19 June 2013, unreported).

¹⁵⁸ *Harvey on Industrial Relations and Employment Law*, loose-leaf 2018, Division BI, 7, I, (3)(f) para 381.03.

¹⁵⁹ See *Employment Law Hearing Structures* (2018) Law Commission Consultation Paper No 239, paras 4.106 to 4.108.

[Such a power] may ensure that, sums having been set off by an employer against their liability to an employee, it is more likely than currently that the employee will get the sum due to them.

Arguments against giving tribunals the power to apply setting off principles

5.38 Consultees who argued against extending the right of set-off to unauthorised deduction claims cited with approval the case of *Asif v Key People Ltd*,¹⁶⁰ referred to in our consultation paper. The EAT had overturned a tribunal's decision to allow a set-off against a claim for unauthorised deduction on the basis that Part II of the 1996 Act did not allow an employer to use set-off principles to withhold wages otherwise due to the worker. Consultees also argued that granting employment tribunals this power may have the undesirable effect of dissuading employees from pursuing a claim for unpaid wages. In relation to the *Asif v Key People Ltd* case, Thompsons Solicitors stated that:

A feature of the case of *Asif v Key People* is the fact that the claimant was an agency worker and the terms were uncertain. Agency workers are particularly vulnerable, as the Director of Labour Market Enforcement pointed out in his [2018/2019] Labour Market Enforcement Strategy.¹⁶¹

5.39 Professor Owen Warnock added that:

Such a power should not be introduced since it would be contrary to the basic philosophy of the deduction from wages legislation which is that all wages due should be paid without set off.

5.40 Similarly, Employment Judge Philip Rostant said:

This is not a contractual claim. It is a statutory tort with its history in the Truck Acts. Employers are to be deterred from deducting sums from wages and if allowed to set off might invent spurious debts as a way of avoiding or delaying liability.

5.41 ELBA gave a robust reminder of the policy of deterrence underlying the current prohibition on set off in this category of claim, observing that extending the right to set off could be exploited by some employers and have an oppressive effect:

The unlawful deductions jurisdiction is an important avenue for employees especially in the context of low value wages complaints, and should be easily accessible bearing in mind that these complaints may often be brought by litigants in person. As above, we would support the tribunal being able to consider the quantum of excepted deductions under section 14.

There is also, at present, provision which prevents an employer recovering sums due from the claimant in any way (including by separate proceedings in other jurisdictions) if they were unlawfully deducted. The provision is a useful deterrent

¹⁶⁰ EAT/0264/07 (7 March 2008, unreported) and see Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, para 4.107.

¹⁶¹ Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705495/labour-market-enforcement-strategy-2018-2019-executive-summary.pdf (last visited 6 November 2019).

and a set off right might create difficult issues as to what sums due to the employer were or were not encompassed in an earlier deduction.

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

5.42 Of the 23 respondents to this part of the question, 18 thought that the jurisdiction to allow a set-off should be limited to liquidated claims; these included the President of Employment Tribunals (England and Wales) and the Regional Employment Judges as well as the EAT judges. Three thought that the jurisdiction should not be limited to liquidated claims, and two expressed no firm view either way. Most of the 18 consultees who responded affirmatively did not expand on their answer. Among the few who did, it was considered that if setting off were not limited to liquidated claims, this would introduce an unnecessary level of complexity and might cause financial detriment to workers.

5.43 The Council of Employment Judges (with whom Employment Tribunals (Scotland) agree) gave a specific reason why set-off should not be limited to liquidated claims:

The logic of extending the employment tribunal's breach of contract jurisdiction to unliquidated amounts claimed by an employee should apply to such claims by employers against workers. To do otherwise would be to replace one anomaly with another.

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

5.44 Of the 24 responses received for this particular question, 15 consultees thought that the amount of the set off should be limited to extinguishing the employee's claim, including the President of Employment Tribunals (England and Wales) and the Regional Employment Judges as well as the EAT judges; seven thought that it should not be. Two expressed no firm view either way. Few consultees expanded on their answer. Those who answered affirmatively and gave an explanation for their view advanced similar arguments to those above on liquidated claims. They stated that if the amount of the set off is limited to extinguishing the worker's claim, this will avoid a situation where the worker suffers financial detriment. In supporting the limitation, the EAT judges highlighted that these claims are concerned with wages a worker may need to live on.

5.45 Those who answered in the negative stressed that not limiting the amount of the set-off to extinguishing the employee's claim would mean that all issues can be resolved in one forum. Countrywide plc said that the amount of the set off should include "costs incurred by the Respondent to defend the claim, as well any costs Orders made against the Claimant".

Discussion

5.46 This question provoked strong views on whether set-off principles should apply to unauthorised deductions claims. The majority thought that they should, arguing persuasively that this would help enable tribunals to do full justice to both employer and employee. The minority who opposed altering the law, however, focussed equally persuasively on the long-standing policy underlying the "Wages Act" legislation.

Allowing employers to set off other claims against wages claims would, they argue, undermine the principle underlying the unpaid wages legislation of requiring wages to be paid to employees, and setting out exhaustively the reasons for making deductions from wages.¹⁶²

- 5.47 Our recommendation here follows once again from our other recommendations in this report. In chapter 4 we have recommended that an employer should not be able to counterclaim under the Extension of Jurisdiction Order against an employee who has brought a purely statutory claim.¹⁶³ That recommendation should in our view apply equally to statutory claims brought under Part II of the ERA 1996, reinforced in this case by the views which we have summarised above regarding the long-standing wage-protection policy underlying the “Wages Act” legislation. We also consider that the statutory policy recognised in *Asif v Key People Ltd*¹⁶⁴ should not be departed from so as to allow employers to withhold wages pending the determination of cross-claims for damages and that it is important that the limits on deductions prescribed by section 13 of the Act should not be circumvented.
- 5.48 On the other hand, the argument that justice should be done in one forum suggests that the tribunals should be able to set off an employer’s liquidated claim against an unauthorised deduction from wages claim. And, as a practical matter, if an employer has an established claim against the employee for a quantified sum of money, it makes little sense for the cross-liabilities not to be netted off.¹⁶⁵
- 5.49 For these reasons we consider that a right of set-off should be limited to established liabilities for quantified amounts and that it should be limited to extinguishing the Part II claim; in other words, by bringing a Part II claim a claimant should not be exposed to a cross-claim for an amount exceeding the wages claimed and thus to the risk of a judgment for a payment by the claimant of a net sum of money to the employer.

Recommendation 15.

- 5.50 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.

¹⁶² Discussed under Consultation Question 28 above.

¹⁶³ See para 4.146 above.

¹⁶⁴ EAT/0264/07 (7 March 2008, unreported) and see Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, para 5.38 above.

¹⁶⁵ By this we mean that set-off would more or less only apply where the employer could produce an unsatisfied judgment in his or her favour. It would not (normally) apply to a liability that the employer claimed before the tribunal, because our recommended rule about no counterclaims to statutory claims would mean that the employer could not advance a claim unless, exceptionally, the employee brought a contractual claim as well as a Wages Act claim. In that exceptional case, the tribunal should give the equivalent of summary judgment on the Wages Act claim so that it was not held up pending trial of the counterclaim.

OTHER AREAS OF EXCLUSIVE CIVIL JURISDICTION

5.51 As part of our consideration of restrictions on the jurisdiction of the employment tribunal, we asked consultees whether there was any area of the civil courts' jurisdiction which might properly be the subject of shared jurisdiction with employment tribunals. There were two areas in particular which we outlined in greater detail, although we did not propose a change in the law: personal injury and employers' references.

Personal injuries

5.52 As we explained in our consultation paper, 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 the 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 of this Report. 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. We now discuss those proposals.

Consultation Question 30: We provisionally propose that employment tribunals should continue not to have jurisdiction in relation to employers' statutory health and safety obligations. Do consultees agree?

5.53 A total of 53 consultees submitted a response to our proposal, 46 of whom agreed with it; these included the President of Employment Tribunals (England and Wales) (with the Regional Employment Judges) and the EAT judges. The main argument against extending jurisdiction was that employment tribunals have less expertise in the area of statutory health and safety obligations than the civil courts. Cloisters observed that claims are likely to be similar to negligence claims. Peninsula noted the potentially wide-ranging and criminal consequences of such cases.

5.54 Five consultees disagreed with our proposal, and two expressed no firm view either way. The main point raised by the five consultees who disagreed related to the need for a specialist tribunal in this area. Two, the Council of Employment Judges, with whom Employment Tribunals (Scotland) agreed, specifically referred to the employment tribunals' enforcement jurisdiction in respect of Health and Safety Executive notices. As the Council of Employment Judges put it:

Employment tribunals are currently the appeal venue for appeals against Health and Safety Executive improvement and prohibition notices. The tribunal exercises expertise in these matters on issues which relate to enforcement. It is of note that appeals from employment tribunal decisions in this jurisdiction are not to the EAT but to the High Court. In exercising this jurisdiction, the Tribunal applies the relevant legislation in light of the factual circumstances. There appears little logical reason to give the Tribunal this function but not to allow it any jurisdiction beyond that. Giving enforcement jurisdiction to the tribunal (excluding criminal prosecutions) would assist in ensuring that such matters are reserved to a specialist forum.

- 5.55 However, the Council of Employment Judges qualified their response by referring to their answer to Consultation Question 46 (below); overall, they did not support employment tribunals being given the power to grant injunctions.
- 5.56 Linda Hilsdon thought that deficiencies on the part of the Health and Safety Executive in the exercise of enforcement powers (which includes powers to prosecute offending employers) justified the extension of jurisdiction in this area to employment tribunals:

I am aware of employees raising health and safety concerns, ultimately to the Health and Safety Executive - whose advice was that no action could be taken against the employer until an accident or death occurred. It would be sensible to allow the Employment Tribunal system to hear such reports.

Discussion

- 5.57 We have concluded in chapter 4 that employment tribunals should not have jurisdiction over personal injury claims based on breach of contract; we concluded that the county court is better equipped to handle personal injury litigation. For the same reason, and given the degree of support from consultees for the existing position, we maintain our proposal that their civil jurisdiction over claims based on health and safety legislation should not be extended. We draw the attention of the Government to the Council of Employment Judges' arguments in favour of giving greater enforcement jurisdiction in this area to employment tribunals, but do not make any recommendation on it as it is distinct from the claims between employers and employees or workers that are the focus of our project.

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

- 5.58 Employers have a common law duty to take reasonable care that their employees do not suffer injuries at work. If an employer breaches this duty and an employee suffers a reasonably foreseeable injury as a result, the employer is liable to the employee in the tort of negligence.¹⁶⁶ Such personal injury claims are a matter for the civil courts.¹⁶⁷ We asked consultees whether they agreed that employment tribunals should continue not to have jurisdiction over workplace personal injury negligence claims.
- 5.59 All but four of the 53 consultees who submitted a response to this proposal agreed with it.¹⁶⁸ Those who agreed took the view that employment tribunals do not have sufficient expertise in the relevant areas. Some feared that the increased workload would be crippling. Two consultees disagreed with the proposal, and two expressed no firm view either way. Of the two consultees who disagreed, one stated that the current system can result in unfairness for the parties. Another said that due to the

¹⁶⁶ See, for instance, the Court of Appeal's judgment in the joined cases of *Sutherland v Hatton*; *Somerset County Council v Barber*; *Sandwell Metropolitan Borough Council v Jones*; *Baker Refractories Ltd v Bishop* [2002] EWCA Civ 76, [2002] IRLR 263.

¹⁶⁷ *Lawton v BOC Transhield Ltd* [1987] IRLR 404; *Spring v Guardian Assurance* [1994] ICR 596 (HL).

¹⁶⁸ These included the President of Employment Tribunals (England and Wales) and the Regional Employment Judges, the Council of Employment Judges and the EAT judges.

expertise of employment tribunals in other areas, shared jurisdiction could be beneficial for claimants with complex claims involving multiple issues.

Discussion

5.60 In view of the near consensus among consultees, and for the reasons that we have just given in respect of claims based on health and safety legislation, we maintain our provisional proposal and do not recommend that employment tribunals should have jurisdiction over negligence claims in respect of workplace personal injuries. This is in line with our conclusions in chapter 4 in relation to the continued exclusion from employment tribunal jurisdiction of claims for personal injury.¹⁶⁹

Employers' references

5.61 Employees and workers (and former 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.

5.62 Our consultation paper pointed to the possibility of litigation in more than one forum where a claimant wished to claim for discrimination as well as to advance a common law cause of action. We said we were unaware of any calls for change and 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.¹⁷⁰ 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.

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

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

5.63 A total of 56 consultees addressed themselves to the proposal in Consultation Question 32, of whom 52 agreed with it.¹⁷¹ The main arguments made were that the current system works well and such claims are within scope of the employment

¹⁶⁹ See para 4.77 above.

¹⁷⁰ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 4.119 to 4.123.

¹⁷¹ These included the President of Employment Tribunals (England and Wales) and the Regional Employment Judges, the Council of Employment Judges and the EAT judges.

tribunals' expertise. The Institute of Employment Rights noted that such claims are often connected with existing claims for discrimination in the employment tribunal.

5.64 Birmingham Law Society disagreed with the proposal, commenting that:

Civil courts have experience of discrimination claims; where the Claimant intends to bring an alternative claim of defamation/misrepresentation/malicious falsehood, the claims would be better brought as one claim.

5.65 Three consultees expressed more nuanced views which stopped short of expressing definite agreement or disagreement with our provisional proposal. These responses highlighted the difficulties with any form of split-forum litigation.

5.66 We received 52 responses to Consultation Question 33. Thirty-two consultees, including the President of Employment Tribunals (England and Wales) (with the Regional Employment Judges) and the Council of Employment Judges, thought that employment tribunals should have jurisdiction over such claims, whereas 19, including the EAT judges, thought they should not.¹⁷² One consultee thought the question required further consideration and consultation, and so expressed no firm view.

Arguments in favour of extending employment tribunals' jurisdiction to common law claims relating to references

5.67 Some consultees thought that the employment tribunal has the necessary expertise to hear such claims, and that it would be more logical to have both common law claims and Equality Act discrimination claims relating to references heard in the employment tribunal. The President of Employment Tribunals (England and Wales) and the Regional Employment Judges viewed claims relating to references in contract or in negligence as "fundamentally employment-related claims which might properly fall within the expertise of the employment tribunals". As Employment Judge Philip Rostant observed:

This is a claim which naturally forms part of the employment tribunals' considerations on remedy in any case since claimants often contend that an unfair or unreasonable reference has resulted in their inability to obtain new work.

5.68 In the view of the Bar Council:

The Tribunal is a more specialist forum with the necessary expertise to analyse a reference. A District Judge is less likely to have direct experience of references beyond their own personal experience. The Judge will probably need to look at the substance of a reference in order to determine whether the wrong has occurred. That is more likely to involve employment rather than civil considerations.

5.69 Employment Judge Tudor Garnon noted that the division between a discriminatory reference and a negligent one was often hard to discern. A number of consultees caveated their response by saying that claims in defamation that relate to references should not be heard by the employment tribunal. David Thomas, of Quay Legal,

¹⁷² The President was of the view that employment tribunals should have jurisdiction over claims of breach of contract or negligence, but was firmly of the view that they should not have jurisdiction over claims in defamation.

thought that defamation claims should not be heard by employment tribunals, but that claims relating to negligent misstatement and implied terms of contract should be within their jurisdiction.

Arguments against extending employment tribunals' jurisdiction to common law claims relating to references

- 5.70 Consultees argued that the civil courts are best placed to hear common law claims, and that extending the jurisdiction would place unnecessary pressure on the employment tribunal's stretched resources. ELBA thought that allowing employees or workers to initiate common law claims in the employment tribunal could lead to defensive practices by employers as "it is likely that many more employers would adopt the practice of refusing to provide a qualitative reference". Manchester Law Society found it "uncomfortable" that discrimination claims and common law claims relating to references were heard in different jurisdictions, but thought that arguably such cases were "few and far between".
- 5.71 The EAT judges thought that the demarcation was justified by the different specialism of the two jurisdictions, and that an extension "may lead to confusion between the different jurisdictions in relation to disputes about references". They noted that the present position has not led to any significant dual-forum litigation or any calls for an extension to the jurisdiction of employment tribunals.
- 5.72 A number of consultees also raised specific concerns with regard to claims in defamation, stating that such claims should not be heard by the employment tribunal. Liverpool Law Society Employment Law Committee felt that jurisdiction over common law claims (whether in tort or contract) relating to references given or requested in respect of employees and workers "was moving into the law of defamation for which Tribunal judges may not have the necessary expertise".

Discussion

- 5.73 Consultation responses showed next to no support for giving the civil courts jurisdiction over the Equality Act aspects of such claims. Opinions on whether the tribunals should be given jurisdiction over any of the common law aspects of the claims were more divided. Many consultees expressed nuanced views, distinguishing in their replies between claims for defamation and other types of common law claim.
- 5.74 Given the lack of consensus on the second issue and the debate over which common law claims are suitable for the jurisdiction of the employment tribunal, we favour the view expressed by the EAT judges that the demarcation of jurisdictions is justified in this area. Tribunals are 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. The terms of a reference may give rise to a claim of breach of contract (for example if they contravene agreed terms of severance). We do not think that the limited scope for a negligent reference to attract additional liability in negligence justifies the possible complications of conferring jurisdiction in tort, whether in whole or in part. We do not recommend any change to the existing legal position.

Chapter 6: Concurrent jurisdiction over claims for equal pay and equality of terms

6.1 There are a number of employment law claims that can be brought either in the civil courts or in employment tribunals. Our consultation paper outlined some of these claims.¹⁷³ In this chapter we consider whether or not any jurisdictional change should be made to claims for equal pay and equality in occupational pension schemes. In the next chapter, we consider the other types of employment law claim with concurrent jurisdiction discussed in our consultation paper.

EQUAL PAY

6.2 “Equal pay” law refers to the area of law which provides that women and men are entitled to receive equal pay (and be treated equally in respect of other contractual terms not related to pay) where they are doing equal work, unless there is a non-discriminatory reason for the difference.¹⁷⁴ 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.¹⁷⁵ The sex equality clause modifies the employment contract so that it is not less favourable than the contract of a person of the opposite sex. The sex equality rule does the same for occupational pension schemes, and an additional “non-discrimination rule” prevents discretions from being exercised in ways which are less favourable to one sex.

6.3 An equal pay claim may be brought either in an employment tribunal or in the High Court or county court.¹⁷⁶ In an 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.¹⁷⁷ There is no discretion for the Tribunal to extend the deadline save in limited circumstances set out in the Equality Act 2010.¹⁷⁸ 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. Equal pay claims are most commonly

¹⁷³ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, ch 5.

¹⁷⁴ The legislation governing equal pay (and equality of terms) is found in the Equality Act 2010 pt 5, ch 3 and pt 9, ch 4. We outline the law in Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 5.2 to 5.16.

¹⁷⁵ Equality Act 2010, ss 66 and 67.

¹⁷⁶ For a more detailed description of the demarcation of jurisdictions over equal pay claims, see Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 5.17 to 5.30.

¹⁷⁷ In summary, the six-month period generally runs from the end of the contract containing the equality clause or rule on which the claim is based. Where the employee continues to work for the same employer but the terms of employment change, this can give rise to issues as to (a) whether the contract has been terminated and replaced by a new one, or has merely been varied; and (b) if the contract has been terminated, whether the parties nevertheless remained in a “stable employment relationship”.

¹⁷⁸ In summary, cases of deliberate concealment of facts or of a claimant with a “qualifying incapacity”: Equality Act 2010, ss 129(3) and 130(4) and (7).

pursued in employment tribunals, which have “jurisdiction to determine a complaint relating to a breach of an equality clause or rule”.¹⁷⁹

- 6.4 Since equal pay law inserts sex equality clauses into employment contracts, a breach of equal pay law also amounts to a breach of contract which can be pursued in the civil courts.¹⁸⁰ This means in effect that equal pay claims brought more than six months after the end of employment, which are out of time in an employment tribunal, can be presented as breach of contract claims in the civil courts. 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.
- 6.5 In *Abdulla v Birmingham City Council*¹⁸¹ 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.
- 6.6 The recognition of the specialist knowledge, procedures and expertise of employment tribunals in determining equal pay claims is implicit in the existence of these powers. It is also expressly acknowledged in the Explanatory Notes accompanying the Equality Act 2010.¹⁸²
- 6.7 In our consultation paper we discussed two propositions: first, that all equal pay claims should be heard in employment tribunals; and secondly, that the six-year limitation period of civil court claims should apply to employment tribunal claims.¹⁸³ Our provisional views are outlined in the consultation paper.¹⁸⁴ We thought that it may be preferable to retain the concurrent jurisdiction of the civil courts and employment tribunals over equal pay claims. We asked consultees whether they agreed or disagreed and, if the latter, what changes they thought should be made. We noted that if concurrent jurisdiction is retained, steps should be considered to deter litigation tactics which cost parties and the court system time and money.
- 6.8 We 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

¹⁷⁹ Equality Act 2010, s 127(1). Employers and pension scheme trustees or managers can also ask employment tribunals to make declarations as to the rights of the parties in any dispute about the effect of an equality clause or rule: Equality Act 2010, s 127(2) and (3).

¹⁸⁰ See *Abdulla v Birmingham City Council* [2012] UKSC 47, [2013] IRLR 38.

¹⁸¹ [2012] UKSC 47, [2013] IRLR 38.

¹⁸² Explanatory Notes accompanying the Equality Act 2010, para 419.

¹⁸³ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 5.33 and 5.34.

¹⁸⁴ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 5.35 and 5.37.

courts due to an employee missing the relatively short deadline for bringing a claim in the tribunal. On the other hand, such a move would run counter to the general policy of requiring employment tribunal claims to be issued within relatively short time limits. We asked consultees for their views. Below we analyse the responses to Consultation Questions 34, 35 and 36, after which we discuss consultees' views and present our conclusions.

Consultation Question 34: Should employment tribunals and civil courts retain concurrent jurisdiction over equal pay claims?

6.9 Fifty-three consultees answered this question. Thirty-one consultees thought that employment tribunals and civil courts should retain concurrent jurisdiction over equal pay claims. A substantial number held the opposite view: 20 consultees were of the view that employment tribunals should have exclusive jurisdiction over equal pay claims. Two consultees expressed no firm view either way.

Views in support of retaining employment tribunals' and the civil courts' concurrent jurisdiction over equal pay claims

6.10 Just over half of respondents thought that employment tribunals and civil courts should retain concurrent jurisdiction over equal pay claims. Some of these consultees simply argued that since the existing system works effectively and does not seem to cause any problems, there is no need to change it. This group of consultees acknowledged that employment tribunals had greater expertise in equal pay matters than the civil courts, but they did not view this as a sufficient justification for removing the civil courts' concurrent jurisdiction. These consultees viewed the civil courts' powers to refer issues to employment tribunals as ensuring that the expertise of employment judges can be brought to bear. However, the processes associated with these powers were viewed as problematic by consultees. We discuss this in more detail below.¹⁸⁵

6.11 Consultees viewed the retention of the civil courts' jurisdiction over equal pay claims as having a number of benefits. Some of these consultees emphasised that equal pay claims are, in essence, breach of contract claims, over which the civil courts ordinarily have jurisdiction. Accordingly, consultees thought that it would be "artificial" and "inappropriate" to exclude equal pay claims from the civil courts.¹⁸⁶ The Council of Employment Judges (with whom Employment Tribunals (Scotland) agree) commented that it "would be unfair for equal pay claimants to be denied the same rights that others enjoy for what are, essentially, breach of contract claims".

6.12 Another argument advanced was that claimants' choice of forum should be preserved, particularly in relation to choosing whether to bring their claim in a costs-shifting or a no-costs jurisdiction, since there are benefits and disadvantages to both. The Institute of Employment Rights argued that the no-costs jurisdiction of employment tribunals can be disadvantageous for claimants, since there is a weaker incentive for employers to settle claims even when the case against them is strong. In practice this can lead to some employers purposely delaying the settlement of claims. Cloisters considered that the ability of the successful party to recover costs in the civil courts may be either

¹⁸⁵ See paras 6.41 to 6.46 below.

¹⁸⁶ The Birmingham Law Society and Cloisters, respectively.

an advantage or a disadvantage for the parties to a case, depending on the circumstances.

- 6.13 Additionally, some consultees were of the view that the civil courts are better suited to hear certain types of equal pay claim. An example frequently given by consultees was equal pay claims which involve aspects of pensions law. Another example given was equal pay claims which are brought with other contractual claims not related to a sex equality clause.
- 6.14 Many consultees viewed concurrent jurisdiction as being important to ensuring access to justice, with the six-year time limit in the civil courts operating as a safeguard against the shorter six-month time limit and the lack of discretion to extend the limitation period in employment tribunals. Consultees were concerned that access to justice would be reduced if employment tribunals were granted exclusive jurisdiction over equal pay claims without a corresponding extension of the limitation period from six months to six years. However, a small number of these consultees indicated that if the time limit for equal pay claims in employment tribunals was extended to achieve parity with the civil court time limit, it would diminish the need to retain the civil courts' concurrent jurisdiction over equal pay claims. This links to Consultation Question 35, which we discuss below.
- 6.15 Thompsons Solicitors summarised the uncertainties created by the six-month time limit for equal pay claims:

Importantly, many of the triggers for bringing a claim are not obvious to the claimants themselves, for example promotions, changes in grade and TUPE transfers. This, combined with the fact that there are no limitation extension provisions in equal pay, mean that they are a particularly tricky type of claim.

Views in support of transferring exclusive jurisdiction over equal pay claims to employment tribunals

- 6.16 Twenty consultees, just over a third of the respondents to this question, thought that exclusive jurisdiction over equal pay claims should be vested in employment tribunals. Many of the reasons given referred to the arguments we included in our consultation paper.¹⁸⁷ A commonly held view was that the expertise of employment tribunals is especially important in the context of equal pay claims due to their specialised nature, and that this calls into question the need for civil courts to retain concurrent jurisdiction over such claims. For example, the President of Employment Tribunals (England and Wales) and the Regional Employment Judges (joint response) (with whom the President of the Industrial Tribunal and Fair Employment Tribunal (Northern Ireland) agrees) commented:

Equal pay is a highly specialist field in which the employment tribunals have gained vast experience over many years and have heard complex, high-value multiple proceedings, for example in the NHS and local government. This raises the question: why should there be concurrent jurisdiction? It enables claimants to take advantage of the longer time-limit in the civil courts, as happened in *Abdulla v*

¹⁸⁷ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, para 5.33.

Birmingham City Council, but our experience is that this is very rare, and we ask, is that a sufficient justification?

- 6.17 Some consultees emphasised that, at present, equal pay claims are rarely brought in the civil courts. For this reason, Countrywide plc suggested that the impact of conferring exclusive jurisdiction over equal pay claims on employment tribunals would be minimal. Consultees referred to the power of the civil courts to refer issues to employment tribunals and strike out claims which could more conveniently be determined by an employment tribunal. Many viewed the power to refer as an inadequate mechanism for harnessing employment tribunals' expertise because of the opaque and complex nature of the process and the additional delays and costs incurred as a result. These consultees favoured a simpler system, with a single jurisdiction vested exclusively in employment tribunals.
- 6.18 Some of these consultees argued that giving exclusive jurisdiction to employment tribunals over equal pay claims would remove the risk of parties exploiting the system to drive up costs. The National Association of Schoolmasters Union of Women Teachers ("NASUWT") wrote that: "hearing cases in a no-costs jurisdiction enables claimants to pursue a claim without fear and intimidation from respondents threatening costs".
- 6.19 Another issue raised by consultees was that the dedicated rules of procedure and access to independent experts sourced through the Advisory, Conciliation and Arbitration Service ("ACAS") for equal value claims in employment tribunals do not apply in the civil courts.¹⁸⁸ The Employment Law Bar Association ("ELBA") gave an example of how this disparity can play out in practice:
- To take one example, a member reported that whereas the Tribunal rules work on the assumption that a claimant may not be able to identify a comparator at the stage at which proceedings are commenced, the defendant in High Court equal pay proceedings insisted that without identification of a comparator at the outset the claim was inadequately pleaded.
- 6.20 ELBA pointed out the inconsistency between equal pay claims and forms of pay discrimination related to protected characteristics other than sex. The latter are within the exclusive jurisdiction of employment tribunals and subject to a three-month time limit. ELBA described the concurrent jurisdiction civil courts have over equal pay claims as "anomalous" and a product of the unique statutory mechanism in equal pay law which modifies contractual terms of employment.
- 6.21 The general consensus amongst this group of consultees was that if employment tribunals are given exclusive jurisdiction over equal pay claims, the limitation period should be extended to six years or, at the very least, judges should be able to extend the limitation period where it would be just and equitable to do so. The views of consultees on this matter are considered in more depth under Consultation Questions 35 and 36 below.

¹⁸⁸ Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI No 1237, sch 3: the regulations contain special detailed rules of procedure for determining equal value claims made under the Equality Act 2010, s 65(1)(c) and (6).

Discussion

- 6.22 The provisional view we expressed in our consultation paper was that the concurrent jurisdiction employment tribunals and civil courts share over equal pay claims should be retained. Consultees were fairly evenly divided over the issue. The majority thought that the existing demarcation of jurisdictions should not be altered. However, a substantial number of consultees held the opposite view, giving strong arguments in support of the transfer of jurisdiction over equal pay claims exclusively to employment tribunals. Arguments in favour of exclusive jurisdiction for employment tribunals were based on the tribunals' expertise, the risk of exploitative litigation tactics, and the fact that equal pay cases are rarely brought in the civil courts, indicating that concurrent jurisdiction is unnecessary. There was agreement amongst all consultees that employment tribunals are the expert forum for the determination of equal pay claims.
- 6.23 There remain, however, a number of important reasons for retaining the civil courts' jurisdiction. The civil courts may be better suited to hear certain types of claim, such as pension matters. We also agree with consultees that since an equal pay claim is a breach of contract claim, it would be artificial to exclude it from the civil courts' contractual jurisdiction.
- 6.24 We note the point made by some consultees that this places equal pay claims at odds with discrimination claims regarding pay based on protected characteristics other than sex. However, this is a necessary consequence of Parliament's choice to give a contractual remedy in equal pay law by inserting an equality clause or rule into contractual terms. To exclude equal pay law from the civil courts' jurisdiction would be to replace one jurisdictional anomaly in discrimination law with another in contract law.
- 6.25 We do not view the costs jurisdiction of the civil courts as being inherently problematic. As highlighted by consultees, there are both benefits and disadvantages to the costs and no-costs jurisdictions of the civil courts and employment tribunals respectively, depending on the particular case. Since equal pay claims are initiated by employees, they can (unless they are out of time in the tribunal) choose whether to proceed in the costs-shifting jurisdiction of the civil courts.

Consultation Question 35: Should the time limit for bringing an equal pay claim in employment tribunals be extended so that it achieves parity with the time limit for bringing a claim in the civil courts?

- 6.26 Consultees were quite evenly divided over this question. Of the 53 consultees who responded to it, 26 were against extending the time limit for equal pay claims in employment tribunals to achieve parity with civil courts, whilst 22 were in favour of such an approach. Five consultees expressed no firm view either way.

Arguments against increasing the time limit for equal pay claims in employment tribunals to achieve parity with civil courts

- 6.27 A small majority of those consultees who expressed a view were against extending the time limit of equal pay claims in employment tribunals to six years to achieve parity with civil courts. One of the main arguments underlying their opposition was that this would be contrary to the concept of tribunals as a forum for the speedy resolution of employment disputes. Consultees emphasised the need for equal pay claims to be addressed promptly. The Bar Council commented that an extension to six years would

be “inherently inconsistent” with the short time limits for other contractual claims heard by employment tribunals (generally three months), such as unlawful deductions of wages and breaches of contract arising or outstanding on termination of employment.

6.28 Some consultees, such as the Institute of Employment Rights, argued that increasing the time limit in employment tribunals to six years could be detrimental to claimants, since arrears of pay can only be recovered in respect of the six years immediately preceding the commencement of proceedings. The President of Employment Tribunals (England and Wales) and the Regional Employment Judges preferred a power to extend the six-month time limit on just and equitable grounds. The Council of Employment Judges objected to extending the employment tribunal time limit for equal pay claims on the basis that it:

would lead to increased costs without providing a substantial benefit to claimants – as has been observed, the longer a claimant waits before lodging a claim after his/her employment changes, the less s/he will recover due to the limits on backdating payment.

6.29 One consultee thought that an extension of the employment tribunal time limit to six years would be unfair to employers, and another consultee suggested that it could have a negative impact on employment tribunals by increasing their caseload. Two consultees supported reducing the time limit for equal pay claims in the civil courts.

6.30 Some consultees argued that there is simply no need to extend the time limit. They said that the fact that most equal pay claims are brought in employment tribunals suggested that six months is a sufficient period of time to bring a claim in the majority of cases. When claimants wish to bring their claim after the employment tribunal time limit has expired, they have the option of going to the civil courts where a six-year limitation period applies. Consultees thought that if concurrent jurisdiction over equal pay claims is retained, the time limits for such claims in employment tribunals should not change. This links to Consultation Question 34 above.¹⁸⁹

6.31 A number of consultees stated that although they did not support an extension of the time limit to six years, they did support giving employment tribunal judges a “just and equitable” discretion to extend the six-month limitation period on a case-by-case basis. We discuss consultees’ views regarding discretion to extend time in more depth under Consultation Question 36.¹⁹⁰

Arguments in favour of increasing the employment tribunal time limit for equal pay claims to achieve parity with the civil courts

6.32 Just under half of consultees who expressed a view supported extending the time limit of equal pay claims in employment tribunals to achieve parity with the civil courts. At a minimum, consultees supported giving employment tribunal judges discretion to extend the limitation period where it would be just and equitable to do so. Many of these consultees objected to having different time limits for the same claim. Cloisters viewed the divergence as “anomalous” and without sufficient policy justification. They thought that parity would also help to mitigate any additional inequality of arms

¹⁸⁹ See paras 6.9 to 6.25 above.

¹⁹⁰ See paras 6.51 to 6.52 below.

problems caused by the costs regime in the civil courts, as litigants would not be pushed into litigating in the civil courts rather than the employment tribunal by time limit considerations. The Employment Appeal Tribunal (“EAT”) judges thought that, as a matter of principle, the same time limit should apply in both forums. In their view, it would be preferable to extend the employment tribunal time limit, because it was common for claimants not to realise they have a claim until long after employment has ended. They also observed that, as equal pay claims often involve groups of workers, rationalisation of the time limit would reduce the incidence of simultaneous claims in different forums.

- 6.33 One consultee highlighted that it can also take time to build a case and obtain the necessary information to pursue a claim. Cloisters suggested that an extension of the time limit for equal pay claims would not impose an undue burden on employment tribunals because:

Equal pay claims are already anomalous in that they can be brought up to six months after the end of employment, in respect of an unequal contractual term that may have persisted throughout the many years of “the employment”. Employment tribunals are well used to dealing with equal pay claims stretching back over many years so use of the civil court time limit should not place any additional burden upon them or the parties.

- 6.34 Similarly, ELBA believed that tribunal time limits should be extended because, in any event, the policy of quick resolution of claims in the employment tribunal was undermined by the power of the civil courts to refer issues to the tribunal for determination even after the six-month limitation period has expired.

Discussion

- 6.35 The tentative view expressed in our consultation paper was that there appeared to be a case for increasing the time limit for equal pay claims in employment tribunals to achieve parity with the limitation period in the civil courts. Consultees were divided in their views in response, with a small majority saying that the time limit should not be altered. Nevertheless, a substantial number of consultees supported increasing the employment tribunal time limit for equal pay claims to six years, in line with the current civil court time limit. We are persuaded, however, that introducing a discretionary power to extend the tribunal limitation period on “just and equitable” grounds, as we recommend later in this chapter, is the better approach.
- 6.36 Short time limits are a characteristic of employment tribunals. The current equal pay time limit is already longer than other tribunal time limits (and will remain so even if other time limits are increased to six months, as we have recommended), in that time starts running at the end of the employment, rather than from the date of breach. A tribunal time limit of six years from the date of breach would jar with the other tribunal time limits and might tend to encourage claimants to delay bringing their claims, with the counterproductive effect that the arrears of pay that could be claimed would be reduced. Litigation long after the event is generally made more difficult by the passage of time and should not in our view be encouraged in employment tribunals. As we noted in chapter 2, respondents to Consultation Question 2 (on tribunal time limits generally) tended to favour a six-month time limit, with none suggesting longer than one year.

- 6.37 We acknowledge that claimants can in practice bring claims in employment tribunals outside the tribunal time limit *via* the civil courts; we see the force of an argument that it would be more straightforward to allow them to bring these claims directly. But we consider that that argument is outweighed by the factors we have discussed in the previous paragraph.
- 6.38 We agree with Thompsons Solicitors that the operation of the six-month time limit is uncertain and unsatisfactory.¹⁹¹ Thompsons advanced this as an argument for retaining the jurisdiction of the civil courts, as we are proposing, but it is also an argument for amending the starting point of the tribunals' time limit. We do not make any such recommendation, since we did not consult on amendments other than alignment with the civil limit and the only possible change – causing time to run from the end of the breach – would be less generous to claimants.

Consultation Question 36: What other practical changes, if any, are desirable to improve the operation of employment tribunals' and civil courts' concurrent equal pay jurisdiction?

- 6.39 Thirty-two consultees gave responses to this question. Six simply stated that they did not have anything to add, five stated that no additional changes are desirable, and 21 made varied suggestions of practical changes to improve the operation of employment tribunals' and civil courts' concurrent equal pay jurisdiction. Some of these suggestions related more to the substantive and procedural aspects of equal pay and discrimination law than to the concurrent jurisdiction of employment tribunals and the civil courts over equal pay matters. We focus on suggestions made regarding the latter, since the former are outside the scope of this project.
- 6.40 The changes suggested by consultees in response to Consultation Question 36 overlap with comments made by consultees in their responses to Consultation Questions 34 and 35. Therefore, we draw from responses to all three consultation questions in the following analysis.

The powers of the civil courts under section 128 of the Equality Act 2010

- 6.41 The topic most frequently raised by consultees was the powers of the civil courts under section 128 of the Equality Act 2010 to strike out claims which could more conveniently be determined by an employment tribunal and to refer determination of aspects of a claim to employment tribunals.¹⁹² Many consultees emphasised the need for the procedures surrounding the use of these powers to be made more transparent and clear. The Law Society of England and Wales and the Employment Lawyers Association ("ELA") suggested that civil court judges be reminded of the power, particularly in relation to equal value claims. Other consultees commented on how the process of referral can lead to delays and increased costs for parties to a case.
- 6.42 Some consultees, including the Law Society of England and Wales, the Law Society of Scotland and the ELA, went further than calling for more clarity in the existing processes and supported more fundamental change. They proposed giving civil courts

¹⁹¹ See paras 6.3 and 6.15 above.

¹⁹² Equality Act 2010, s 128.

the power to transfer entire cases directly to employment tribunals, operating on a presumption in favour of transfer. As the Law Society of Scotland explained:

A civil court may decide to refer a question to the employment tribunal under section 128(2)(b) of the Equality Act 2010. The court has the option to stay or sist the proceedings in the meantime. That provision should be replaced with one which by default transfers the whole claim to the employment tribunal and brings the proceedings in the civil court to an end with no expenses awarded to or by either party, which presumption may be rebutted on cause shown. Otherwise, at the end of the employment tribunal procedure (which it is presumed will definitively resolve the question about whether or not the equality clause is engaged and thereafter, if appropriate, issue a judgment dealing with remedy) parties face incurring unnecessary additional expenses – potentially facing a contentious question of liability for those expenses – in order to bring the litigation to an end.

- 6.43 Birmingham Law Society suggested that, given the expertise of employment tribunals in relation to equal pay claims, there could be:

a presumption that equal pay claims will be referred to the employment tribunal unless one party objects, and a rule that, if there is a referral, the parties will bear their own costs in the High Court.

- 6.44 The consultees thought that a transfer power would remove the need for the parties to return to the High Court to consider costs, and costs would only arise if a party applied for the case to remain in the High Court. Alternatively, one consultee suggested that all equal pay claims should be required to be commenced in employment tribunals, with tribunals being given the power to transfer cases to the civil courts where appropriate.

- 6.45 A small number of consultees referred to the *Abdulla* case, which effectively prevents the civil courts from using the section 128 power to strike out an equal pay claim when the time limit has expired in employment tribunals.¹⁹³ Some consultees viewed this as providing a level of protection to claimants. However, the Trades Union Congress, considered that:

There is still ... a degree of risk that equal pay claims issued in the civil courts will be challenged on the basis that they should have gone through the [employment tribunal] instead.

- 6.46 GMB supported amending section 128 of the Equality Act 2010 so that the wording clearly reflects the decision in *Abdulla*.

Flexible deployment of specialist judges

- 6.47 A number of consultees made suggestions related to the flexible deployment of specialist employment tribunal judges in the civil courts. Cloisters, for example, suggested:

¹⁹³ *Abdulla v Birmingham City Council* [2012] UKSC 47, [2013] IRLR 38, at [29]: see para 6.5 above. See also Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, para 5.20(2).

A system whereby equal pay ticketed employment judges could sit to determine such claims in the county court should not in our view be difficult to develop or implement as something along these lines is already happening. It should also be possible to ticket certain High Court judges (for example, those who sit in the EAT) to deal with equal pay claims that may be brought in the High Court.

- 6.48 Similarly, ELA and the Law Society of England and Wales supported a system which allows employment judges to be transferred to the civil courts to hear equal pay claims. Transport for London thought that there should be “equal pay specialists on hand in both jurisdictions” and GMB favoured the use of a specialist judges list. Alternatively, some consultees suggested that civil court judges presiding over equal pay claims should be given the same training which employment judges must complete before hearing claims of this type.
- 6.49 Peninsula suggested that a panel of lay members could be made available to assist in equal pay claims in both employment tribunals and the civil courts.

Equivalent procedural rules

- 6.50 Some consultees suggested that, if concurrent jurisdiction over equal pay claims is retained, the procedural rules which apply in employment tribunal equal value claims should also apply in the civil courts. In addition, some thought that the experts sourced through ACAS should be available in civil court claims, not just employment tribunal claims.

Discretion to extend the limitation period

- 6.51 A large number of consultees supported giving employment tribunal judges discretion to extend the limitation period for equal pay claims on a just and equitable basis. Birmingham Law Society, for example, described the current lack of discretion to extend time as anomalous, since it is available in all other discrimination claims. Some consultees raised this point again in their response to this consultation question. The Council of Employment Judges argued that this would reduce the need for claims to be brought in the civil courts simply due to the expiry of the employment tribunal limitation period.
- 6.52 The majority of consultees viewed the “just and equitable” test as being the appropriate test to apply.¹⁹⁴ However, Peninsula supported the application of the “not reasonably practicable” test in this context, and Manchester Law Society supported the application of a new test, centred on the claimant’s “knowledge of all material facts about the pay inequality at the time the cause of action accrued”.

Discussion

- 6.53 Some consultees expressed concern over the fact that the equal value procedural rules do not apply in the civil courts and the use of civil courts’ powers under section 128 of the Equality Act 2010 to strike out claims. We expect that fewer equal pay claims will be brought in the civil courts if a discretionary “just and equitable” power to extend the limitation period in equal pay cases is introduced in employment tribunals,

¹⁹⁴ We discuss the “just and equitable” test in ch 2 above.

as we recommend below. Accordingly, the issues raised by consultees would arise less frequently. Nevertheless, they deserve consideration.

- 6.54 As we highlighted in our consultation paper, if an “equal value” claim is brought in an employment tribunal, special procedural rules apply and experts can be sourced through ACAS. Neither the rules nor the experts are available in the civil courts. The general view of consultees was that this discrepancy risks employment tribunals and civil courts taking inconsistent approaches. To the extent that there is a reason not to use one of the powers under section 128, the problem of procedural rules could be resolved by the incorporation of the equal value procedural rules into the Civil Procedure Rules. The problem could also be mitigated through methods short of amending the Civil Procedural Rules; these include the ticketing of judges with expertise in equal value claims to sit in the county court so as to bring their procedural expertise to bear or the provision of training to civil judges hearing equal value claims on procedures in employment tribunals.
- 6.55 As noted above, the effect of the Supreme Court decision in *Abdulla* is that the power under section 128 to strike out a civil court claim cannot be used if the tribunal limitation period has expired.¹⁹⁵ Consultees also proposed extending the other section 128 power so as to permit the transfer of entire cases to employment tribunals. Some thought that there should be a presumption in favour of transfer. The need to introduce such a power could be reduced if judges with relevant expertise and experience could be flexibly deployed to hear discrimination cases in the county court, which we have recommended elsewhere in this report.¹⁹⁶ Nevertheless, we are persuaded that a better solution would be for section 128 to provide for the transfer of equal pay cases to the employment tribunals. We recommend that there should be a power to transfer cases outright so that the whole case and not just particular issues can be transferred across. This would streamline cases, provide a more straightforward approach to costs, and make the best use of the expertise and procedures available in the employment tribunals. We also consider that a transfer should be the general rule; cases that are unsuitable for transfer are likely to have particular features.

Recommendation 16.

- 6.56 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.

- 6.57 Consultees articulated a number of reasons in support of introducing a discretionary power to extend the tribunal limitation period on “just and equitable” grounds. The chain of events which trigger an equal pay claim can be complex and it may take some time from a claimant to realise that they have a claim, and gather the necessary

¹⁹⁵ *Abdulla v Birmingham City Council* [2012] UKSC 47, [2013] IRLR 38, at [29], and see paras 6.5 and 6.55 above.

¹⁹⁶ See ch 3 above.

information to submit it to an employment tribunal. It would be beneficial for claimants to have the option to bring their claim in an employment tribunal even after the limitation period has expired, where it would be just and equitable to do so. There was widespread support for this change in consultee responses, with many pointing out that it was anomalous that no discretionary power to extend the time limit for equal pay claims currently exists.

- 6.58 We accordingly recommend that employment tribunal judges should be given a discretionary power to extend the limitation period for equal pay claims where they consider it just and equitable to do so. We anticipate that this will prevent some claimants from being forced into the costs jurisdiction of the civil courts simply because the employment tribunal time limit has expired. We expect the impact of this discretionary power on employment tribunal workloads to be low, given the section 128 power of the civil courts to refer issues to an employment tribunal and our recommended extension of it into a power to transfer cases entirely.

Recommendation 17.

- 6.59 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.

THE NON-DISCRIMINATION RULE IN OCCUPATIONAL PENSION SCHEMES

- 6.60 Occupational pension schemes are deemed to include, in addition to an equality rule, a "non-discrimination rule" which overrides other provisions of the scheme.¹⁹⁷ 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 2010.¹⁹⁸
- 6.61 Employment tribunals have jurisdiction to hear discrimination claims arising from breach of the non-discrimination rule.¹⁹⁹ 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 High Court's and county court's ordinary jurisdiction to hear claims relating to occupational pension schemes is expressly preserved in claims relating to the non-discrimination rule.²⁰⁰ Similarly to equal pay claims, civil courts are empowered to strike out a civil claim, or

¹⁹⁷ Equality Act 2010, s 61.

¹⁹⁸ But note that the *non-discrimination* rule does not have effect in relation to an occupational pension scheme in so far as the *sex equality rule* has effect (or would have effect save for the exceptions in pt 2 of sch 7); see Equality Act 2010, s 61(10).

¹⁹⁹ Equality Act 2010, s 120(2) to (6).

²⁰⁰ Equality Act 2010, s 120(6).

refer a question to the employment tribunal.²⁰¹ Pension scheme members may also seek redress by making a complaint to the Pensions Ombudsman.

6.62 In our consultation paper, we said we were not aware of any calls to change this allocation of jurisdictions regarding the non-discrimination rule in occupational pension schemes.²⁰² We asked consultees for their views.

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

6.63 Forty-four consultees answered this question. Thirty-seven consultees thought that there should be no change to the current allocation of jurisdictions. Six consultees held the opposite view and supported change. One consultee did not comment on the subject of the question.

6.64 Amongst the four-fifths of consultees who thought there should be no change, the general consensus was that the current allocation of jurisdictions does not cause any problems in practice and there is not a strong case for altering it. Many consultees also commented on the benefits of giving parties a choice of forum, since the litigation sometimes raises other issues which the civil courts are better suited to hearing than employment tribunals.

6.65 Only two of the six consultees who thought that the allocation of jurisdiction should be changed gave reasons for their view. ELBA stated that their position in relation to this issue was the same as their position for equal pay: that the concurrent jurisdiction of the civil courts and employment tribunals over equal pay claims is anomalous and that, as a form of discrimination, such claims should be within the exclusive jurisdiction of employment tribunals. NASUWT advocated exclusive jurisdiction for employment tribunals over all employment-related matters. They commented on the expertise and experience of employment tribunal judges, and the merits of removing the need to resort to the civil courts' "time-consuming [referral] process".

Discussion

6.66 The majority of consultees saw no need to change the allocation of jurisdiction in this area, and many commented on the benefits of retaining civil court jurisdiction. We are minded to agree with these consultees. The current position offers choice, and we do not see any strong policy reasons for changing it. If anything, removing the civil courts' jurisdiction could be detrimental to the parties because judges in the civil courts may have more expertise in the matters relevant to this type of claim than employment tribunal judges. Therefore, we do not recommend any changes to the allocation of jurisdiction to apply the non-discrimination rule.

²⁰¹ Equality Act 2010, s 122(1) and 122(2).

²⁰² See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 5.50 to 5.58.

Chapter 7: Concurrent jurisdiction over other employment law claims

TRANSFER OF UNDERTAKINGS (TUPE REGULATIONS)

- 7.1 The Transfer of Undertakings (Protection of Employment) Regulations 2006²⁰³ (“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”.²⁰⁴
- 7.2 Employment tribunals have exclusive jurisdiction to hear a number of claims that might arise out of a TUPE transfer. These include:
- (1) unfair dismissal claims which arise in the context of the transfer;²⁰⁵
 - (2) claims by a transferee employer that the transferor employer failed to comply with its obligation to supply employee liability information;²⁰⁶ and
 - (3) complaints that an employer has failed to carry out its informing and consulting obligations.²⁰⁷
- 7.3 There are, however, cases in which the civil courts may be required to hear and determine TUPE transfer issues. For example:
- (1) if an employer purports to change a transferred employment contract in a way which is rendered void by the TUPE Regulations, an employee might seek a contractual remedy in the civil courts; and
 - (2) civil courts are sometimes required to determine TUPE issues in the context of other litigation. For instance, in *Marcroft v Heartland (Midlands) Ltd*,²⁰⁸ whether restrictive covenants were enforceable against an employee depended on whether the employee had transferred under TUPE. It was therefore necessary

²⁰³ Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246 (as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations SI 2014 No 16). We consider this area of law in more depth in the consultation paper: see Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 5.50 to 5.57.

²⁰⁴ The two types are: a transfer of an undertaking, business or part of an undertaking or business as a going concern; and a “service provision change” pursuant to which activities are outsourced by a client to a contractor; reassigned to a new contractor, or taken back in house by the client. See TUPE Regulations, reg 3(1)(a) and (b) respectively.

²⁰⁵ Employment Rights Act 1996, s 104(4)(e).

²⁰⁶ TUPE Regulations, regs 11(6) and 12.

²⁰⁷ TUPE Regulations, regs 15(1), (7), (8) and 16(3).

²⁰⁸ *Marcroft v Heartland (Midlands) Ltd* [2011] EWCA Civ 428, [2011] IRLR 599 (CA).

for the High Court (whose decision was upheld by the Court of Appeal) to consider and apply the TUPE Regulations.

- 7.4 In our consultation paper, we indicated that we were not minded to propose any change to the current demarcation of employment tribunals' and civil courts' jurisdiction in relation to the TUPE Regulations. We asked consultees for their views.²⁰⁹

Consultation Question 38: The present demarcation of employment tribunals' and civil courts' jurisdictions over the TUPE Regulations 2006 should not be changed. Do consultees agree?

- 7.5 A total of 49 consultees responded to this proposal. Forty-four consultees agreed that the present demarcation of employment tribunals' and civil courts' jurisdictions over the TUPE Regulations should not be changed. Four consultees disagreed and one consultee did not give a definite answer to the question.
- 7.6 The general consensus amongst the nearly 90% of consultees who agreed with the proposal was that the current demarcation of employment tribunals' and civil courts' jurisdictions over the TUPE Regulations works well, and that there was no strong justification for changing the existing system. The Institute of Employment Rights considered that the removal of TUPE claims from the civil courts' jurisdiction could be detrimental to claimants.
- 7.7 The three consultees who gave reasons for disagreeing with the proposal were of the view that, for the sake of simplicity, all TUPE claims should be heard in one forum. Some consultees, such as the National Association of Schoolmasters Union of Women Teachers ("NASUWT"), based this view on their support across the consultation as a whole for the extension of the current jurisdiction of employment tribunals to cover all employment-related matters under a single employment jurisdiction. NASUWT acknowledged that in this context some cases would benefit from the expertise and experience of non-employment judges, but suggested that this could be achieved through cross-ticketing.
- 7.8 One consultee, Stephen Cribbin, who considered that employment tribunals should be "the default jurisdiction to fully resolve all employee claims", saw a possible link to the "stand and sue" issue we discussed in Chapter 4.²¹⁰ The Disability Law Service also made this connection, reiterating their support for enabling employment tribunals to hear employees' claims for breach of contract brought during their employment. Another consultee, Jason Frater, said his answer would depend on whether the jurisdiction of employment tribunals is also extended to other areas such as claims relating to the enforcement of restrictive covenants.

²⁰⁹ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 5.50 to 5.58.

²¹⁰ The "stand and sue" issue refers to the question of whether employment tribunals should be able to hear claims brought by an employee for damages for breach of contract where the claim arises during the subsistence of their employment. We discuss this at paras 4.6 to 4.18 above.

Discussion

- 7.9 There were no calls for the statutory jurisdiction of employment tribunals over TUPE claims to be transferred to or shared with the civil courts. Conversely, we are not persuaded that the desirability of vesting exclusive jurisdiction over all employment claims in employment tribunals outweighs the reasons for retaining the jurisdiction that the civil courts currently possess in the TUPE context. The consensus which emerged from consultees' responses was that the existing system works well and does not give rise to any problems in practice.
- 7.10 Moreover, in some cases civil courts may be a more appropriate forum for the determination of claims under the TUPE Regulations; removing TUPE claims from the scope of the civil courts' jurisdiction could be detrimental to claimants. Our recommendation²¹¹ that employment tribunals be given jurisdiction to hear contractual claims brought by employees during their employment will, if implemented, enable a wider range of TUPE-related claims to be litigated in the tribunal, but we are in favour of preserving claimants' choice of forum. We therefore do not recommend any other change to the demarcation of employment tribunals' and civil courts' jurisdiction in the TUPE context.

WORKING TIME REGULATIONS

- 7.11 The Working Time Regulations 1998²¹² ("Working Time Regulations") limit employees' and workers' working hours and provide for rest breaks and paid holidays, in particular creating: a right not to work more than 48 hours a week on average, subject to an agreement to opt out of the limit; a limit on the length of night work and provision for health assessments in respect of night work; daily and weekly rest periods and rest breaks; entitlements to annual leave; and rights relating specifically to young employees and workers.²¹³
- 7.12 The Working Time Regulations are enforced in two main ways: by way of a tribunal claim and by state enforcement action,²¹⁴ but they have also been held to create contractual rights within the jurisdiction of the civil courts.²¹⁵ Each type of enforcement covers different parts of the Regulations.
- 7.13 Employment tribunals have jurisdiction to hear complaints by individuals seeking to enforce their rights in relation to rest and statutory annual leave (including rights to take paid annual leave), or asserting that their employer has subjected them to a detriment because they asserted their rights under the Working Time Regulations.²¹⁶ In addition, claims for unpaid (or underpaid) holiday pay, or for pay in lieu of leave not

²¹¹ See recommendation 4 at para 4.18 above.

²¹² SI 1998 No 1833.

²¹³ Working Time Regulations, regs 4 and 5; 6 and 7; 10, 11 and 12; 13 to 16; and 5A and 6A. For our discussion in the consultation paper, see Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 5.59 to 5.67.

²¹⁴ See Working Time Regulations, regs 30 (employment tribunal claims) and 29(1) (state enforcement).

²¹⁵ *Barber and Ors v RJB Mining (UK) Ltd* [1999] 2 CMLR 833, [1999] IRLR 308.

²¹⁶ See Working Time Regulations, regs 30 (employment tribunal jurisdiction) and 10 to 14, 16, 24 to 25, 27 and 27A (rest and statutory annual leave provisions); ERA 1996, s 45A (detriment).

taken before termination of the employment, may be pursued as unlawful deductions from wages under the Employment Rights Act 1996 (“ERA”) Part II.²¹⁷

- 7.14 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.²¹⁸
- 7.15 The High Court held in *Barber and Ors v RJB Mining (UK) Ltd* that regulation 4(1) of the Working Time Regulations creates a contractual right not to work more than a 48-hour average working week.²¹⁹ This meant that the High Court had jurisdiction to hear the employees’ claim seeking a declaration of their rights under regulation 4(1) and enforcement of those rights by means of injunctions. Pay for statutory annual leave is not contractual, so may not be recovered by a breach of contract claim.²²⁰
- 7.16 We said in our consultation paper that we were not aware of any calls to alter the present demarcation of jurisdictions over the Working Time Regulations, and took the provisional view that it should not be changed. We asked consultees for their views.

Consultation Question 39: The present demarcation of employment tribunals’, civil courts’ and criminal courts’ jurisdictions over the Working Time Regulations should not be changed. Do consultees agree?

- 7.17 Thirty-seven out of the 47 consultees who responded to this proposal, four fifths of the total, agreed that the present demarcation of employment tribunals’, civil courts’ and criminal courts’ jurisdictions over the Working Time Regulations should not be changed. The ten consultees who disagreed with the proposal had similar views as to the kind of change they sought. The majority of those who agreed with our proposal did not give an explanation for their support. Of those who did, the general consensus was that the current system does not give rise to any practical problems and that there was no strong case for change. One consultee added that “it would be a mistake to conflate civil and criminal jurisdictions”.
- 7.18 Only one fifth of consultees disagreed with the proposal, but many of them gave detailed and forceful arguments as to why they viewed the current demarcation of jurisdictions as inadequate. The main issue with the current system highlighted was in relation to enforcement. Consultees argued that the current demarcation of employment tribunals’, civil courts’, and enforcement agencies’ jurisdictions over the Working Time Regulations is unclear and confusing. The system was viewed as confusing for, and not well understood by, employees, employers and enforcement agencies. The Employment Lawyers Association (“ELA”) commented:

The rationale for the demarcation, particularly between the employment tribunal and civil courts on one hand and criminal enforcement on the other, is muddled and

²¹⁷ *Revenue and Customs Commissioners v Stringer* [2009] UKHL 31, [2009] IRLR 677.

²¹⁸ Working Time Regulations, reg 29(1). This is done by inspectors appointed by the Health and Safety Executive, local authority Environmental Health Officers and certain specialist agencies.

²¹⁹ *Barber and Ors v RJB Mining (UK) Ltd* [1999] 2 CMLR 833, [1999] IRLR 308.

²²⁰ Deduction from Wages (Limitation) Regulations SI 2014 No 3322, reg 3, amending the Working Time Regulations, reg 16(4).

complex and for employees (and employers) it is not straightforward which rights are to be enforced in which jurisdiction.

- 7.19 It was considered that there was a corresponding lack of awareness of the enforcement mechanisms amongst these groups. The Trades Union Congress (“TUC”) told us that some enforcement agencies are not even aware of their own obligations under the Working Time Regulations:

In the case of local authorities, who enforce the rules in retail, offices and gymnasiums, there is also a very low awareness that enforcement is their responsibility. Thus, the TUC has heard a stream of anecdotes about complaints who have correctly contacted their local authority being wrongly directed to the HSE.

- 7.20 The TUC went on to point to “abundant evidence, including from the business department, the HSE and academic reports” that workers are not able to enforce their Working Time Regulation rights effectively. They suggest that enforcement agencies are not doing enough to enforce the rights over which they are responsible, arguing that they “never enforce proactively and worse still, have often even declined to investigate direct Working Time Regulation complaints from workers, as they see the issue as a low priority”. Similarly, the Law Society of England and Wales and ELA expressed concern that an individual was unable to bring a claim to enforce maximum weekly work provisions and had to rely on the HSE to do so, while there was little evidence of enforcement action. The Law Society observed:

Over the last five years there are just nine entries mentioning Working Time [in the HSE Public Register of Notices]. In those circumstances, criminalisation becomes a blunt form of gaining justice. Victims lose their right to bring an individual claim, yet the power of the criminal law is not being utilised either.

- 7.21 Most of these consultees viewed the solution to these issues as being 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. Many consultees considered it wrong that there is no individual right of action in an employment tribunal for such claims. Emphasis was particularly placed on the maximum weekly work time limit and night work limit provisions.
- 7.22 GMB, the TUC and the National Education Union supported a “dual channel system of enforcement”, whereby an individual can both bring a claim in an employment tribunal and rely on enforcement agencies to investigate breaches by employers of the Working Time Regulations. The Disability Law Service supported an extension of employment tribunals’ jurisdiction specifically over the contractual right not to work more than a 48-hour average working week. ELA and the Law Society of England and Wales supported the civil courts and employment tribunals sharing concurrent jurisdiction over all working time claims, as well as the availability of criminal sanctions for very serious breaches. Conversely, the Institute of Employment Rights supported greater state enforcement “backed by full criminal sanctions”, explaining that:

The Institute of Employment Rights’ principal concern is that low levels of compensation for working time claims, or even the loss of wages which can result from a successful claim reducing hours, reduces or eliminates the individual incentive to enforce the Working Time Regulations 1998 The inadequacy of

employment tribunal enforcement in this area has recently been recognised by the Administrative Court: see *R (FBU) v South Yorkshire Fire and Rescue Authority*²²¹ (a good example of an area where individual workers have a disincentive to enforce owing to the effects of reduced hours on pay)

The Institute of Employment Rights' basic starting point is that, owing to the limited individual incentives or remedies to enforce working time legislation, the rights and duties should be backed by state enforcement as well as giving rise to individual rights.²²²

Discussion

7.23 In our consultation paper, we provisionally proposed that the present demarcation of the jurisdictions of employment tribunals, the civil courts and enforcement agencies should not change. We were not aware of any calls to alter the current system. The majority of consultees who responded to this question agreed with our proposal on the basis that the current system does not give rise to any issues. However, many of the ten consultees who disagreed with the proposal advanced arguments to the contrary, raising issues that were not considered in our consultation paper.

Problems with enforcement

7.24 The first question to consider is whether the current system of enforcement is in fact problematic. *Harvey on Industrial Relations and Employment Law* says of the provisions of the Working Time Regulations which are within the remit of enforcement agencies that:

The experience of enforcement of these provisions of the [Working Time Regulations] has been of a very light hand indeed 63 improvement notices were issued by the HSE in the first five years of the [Working Time Regulations], but by 2007/08 the annual total had fallen to three (together with one prosecution but no prohibition notices), and there has since then been only one (unsuccessful) recorded prosecution, and only three improvement notices and one prohibition notice (prior to a change in recording which removed the possibility of identifying numbers of enforcement notices under specific statutory provisions for years after 2013/14). That is not to say that these provisions are not enforced at all; enforcement action often consists of advice and encouragement²²³

7.25 This, coupled with accounts given by consultees, suggests that the enforcement powers of enforcement agencies, particularly in relation to the imposition of notices and penalties, are rarely used in this context.

Rationale for demarcation

7.26 The rationale for the demarcation of jurisdictions is not articulated in the explanatory notes to the Working Time Regulations. However, the research paper published by

²²¹ [2018] IRLR 717.

²²² The Institute of Employment Rights also considered that the legislation underpinning the enforcement of working time legislation is more incoherent than the summary in our consultation paper suggests. See their full consultation response for detail: <https://www.lawcom.gov.uk/project/employment-law-hearing-structures/>.

²²³ *Harvey on Industrial Relations and Employment Law*, loose-leaf 2019, Division CI, 1K(1) para 230.

the House of Commons shortly after the Regulations were made provides some insight. The paper distinguishes between enforcement of entitlements vested in employees on the one hand, and restrictions of employers' freedom of action on the other.²²⁴ Employees' entitlements such as payment for statutory leave are enforced by individual application to employment tribunals. Restrictions such as those on the duration of the working week and night work are enforced by enforcement agencies. The implicit rationale for the involvement of the HSE seemed to be that working time is a health and safety matter.

- 7.27 This distinction has become less tenable in the light of the *Barber* case, in which Mr Justice Gage held that regulation 4(1) of the Working Time Regulations gives employees a contractual right not to work more than 48 hours each week, as well as imposing a corresponding obligation on employers:

It seems to me clear that Parliament intended that all contracts of employment should be read so as to provide that an employee should work no more than an average of 48 hours in any week during the reference period. In my judgment this is a mandatory requirement which must apply to all contracts of employment. The fact that regulation 4(1) does not state that an employer is prohibited from requiring his employee from working longer hours does not in my view prevent that paragraph from having the effect of placing an obligation on an employer not to require an employee to work more than the permitted number of hours.²²⁵

- 7.28 A practical justification for the demarcation of jurisdictions, referred to in our consultation paper and raised by the Institute of Employment Rights in their response, is that employees and workers are unlikely to seek damages in relation to working more than the weekly limit, given that they would typically earn more money not less.²²⁶ Similarly, the Institute commented that the loss of earnings for an employee whose working hours are reduced gives little incentive to enforce the Working Time Regulations. They referred to *R (FBU) v South Yorkshire Fire and Rescue Authority*, where the terms and conditions of employment set by a statutory fire and rescue authority were challenged through judicial review.²²⁷ Mr Justice Kerr regretted the disruption to individuals that might be caused by the grant of relief, but did not "feel able to refuse relief where there is a conscious decision to commit a continuing and systematic breach of the law".²²⁸

- 7.29 The disincentive for individuals to claim in respect of working hours may explain the legislature's reliance on enforcement agencies. Additionally, enforcement through the criminal law (necessarily outside the jurisdiction of employment tribunals) may be considered appropriate in respect of health and safety issues. The further powers available to enforcement agencies, such as prohibition and improvement notices and

²²⁴ Working Time Regulations, Research Paper 98/82, 10 August 1998, House of Commons: <https://researchbriefings.files.parliament.uk/documents/RP98-82/RP98-82.pdf>, p 19.

²²⁵ *Barber and Ors v RJB Mining (UK) Ltd* [1999] 2 CMLR 833, [1999] IRLR 308, p 690.

²²⁶ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, para 5.65.

²²⁷ *R (FBU) v South Yorkshire Fire and Rescue Authority* [2018] IRLR 717.

²²⁸ *R (FBU) v South Yorkshire Fire and Rescue Authority* [2018] IRLR 717, at [134] and [149].

inspection, are likely to be better suited to addressing breaches of the provisions than those available in employment tribunals or the civil courts.

- 7.30 Nevertheless, *Barber* exemplifies that sometimes employees *do* wish to enforce provisions regarding working hours in the courts, and that non-criminal jurisdictions can offer suitable relief. The remedy given by the High Court in that case was a declaration that the employees were entitled to refuse to work until their average working hours fell to within the 48-hours limit.

Recommendation

- 7.31 We do not suggest that the powers of the HSE under the Working Time Regulations should be removed; there are good reasons for retaining them. But we consider that civil claims based on the reasoning in *Barber* are more appropriately heard within the specialist employment jurisdiction of employment tribunals than in the general civil courts. This would be achieved by implementation of our recommendation to extend employment tribunals' jurisdiction to include claims for breach of contract brought during employment,²²⁹ but we think it desirable formally to extend employment tribunals' jurisdiction so as to enable them to give declaratory relief in respect of regulations 4(1) and 5A(1)²³⁰ and 6(1) and 6A²³¹ of the Working Time Regulations.
- 7.32 We suggest that an employment tribunal that rules in favour of such a complaint should also consider referring the matter to the relevant enforcement agency.

Recommendation 18.

- 7.33 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.

THE NATIONAL MINIMUM WAGE

- 7.34 Under section 1 of the National Minimum Wage Act 1998, employees and workers must not be paid less than the National Minimum Wage ("NMW").²³²
- 7.35 Employees and workers who do not receive the NMW have two options for bringing a claim. First, they can claim the difference in an unauthorised deduction from wages claim brought in an employment tribunal under section 13 of the ERA 1996. Secondly, 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, they can bring a breach of contract claim to recover the money owed. Such contract claims may be

²²⁹ See recommendation 4 at para 4.18 above.

²³⁰ Setting the maximum weekly working time for workers and young workers.

²³¹ Setting the maximum length of night work for workers and young workers.

²³² Detailed provisions as to the operation of the National Minimum Wage, and certain exempt categories of worker, are set out in the National Minimum Wage Regulations SI 1999 No 584. See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 5.68 to 5.78.

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.²³³

- 7.36 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 the county court; "naming and shaming"; civil penalties, and criminal prosecution for the most serious cases.²³⁴
- 7.37 In our consultation paper we noted that we were not aware of any calls to alter the demarcation of employment tribunals' and courts' jurisdictions in relation to the NMW, and suggested that it should not be changed. We asked consultees if they agreed.

Consultation Question 40: Do consultees agree that the present demarcation of employment tribunals', civil courts' and criminal courts' jurisdictions over the NMW should not be changed?

- 7.38 Forty-eight consultees responded to this proposal. Forty-five agreed that the present demarcation of jurisdictions over the NMW should not be changed. Two consultees disagreed and one consultee expressed no firm view in support of or against the proposal.

Arguments in support of changing the demarcation of jurisdictions over the NMW

- 7.39 NASUWT supported transferring jurisdiction from the civil courts so that it rests exclusively with employment tribunals in relation to non-criminal matters and extending the time limit for bringing a NMW claim in employment tribunals. Further, they argued that whilst state enforcement over criminal matters should be retained, it needs to be strengthened:

The evidence suggests that state enforcement in its current guise is failing many employees and workers. For example, there is already widespread non-compliance with the NMW

The NASUWT is clear that employers who break the law should expect there to be significant consequences for their actions, yet at the same time provide workers with the comfort and knowledge that the system works in a fair and just manner.

- 7.40 The Institute of Employment Rights objected to the two-year limitation on the determination of arrears for unauthorised deduction from wages claims in this context, arguing that section 23(4A) of the ERA 1996 should be repealed.²³⁵ They explained that:

²³³ Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, discussed in ch 4 above and in Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 4.1 to 4.15.

²³⁴ See, for instance, National Minimum Wage Act 1998, ss 19, 19A, 19D, 19E, 31 and 32.

²³⁵ This subsection limits the jurisdiction of employment tribunals over deductions of wages to deductions made within the two years prior to the complaint. See our discussion of this provision in Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 4.81 and 5.72.

The two-year limitation ... introduced without consultation in the wake of the successful holiday pay litigation in *Bear Scotland*²³⁶, has a very serious detrimental effect on individual claims in the employment tribunal for breach of the NMW. Typically, such claimants will have suffered loss throughout their employment, so they will often have more than two years' loss. It is in the public interest that the NMW is paid and is fully enforced. The provision produces the curious result that it is often disadvantageous for individuals to bring a claim in the very forum, the employment tribunal, where such claims were intended to be heard.

- 7.41 Cloisters, who generally supported retaining the current demarcation of jurisdictions over the NMW, also commented on this issue. They supported removing the two-year limitation for any unauthorised deduction from wages claims that do not relate to holiday pay:

Two examples from this author's recent practice are a carer who had not been paid the minimum wage for working "sleep in" duties over several years, and a victim of trafficking whose minimum wage claim went back over 9 years. In our view it is undesirable for litigants of this kind to be pushed into the civil courts, which require payment of an issue fee, and have a costs regime. The employment tribunal system is designed to deal with precisely the kind of issue raised in these cases We consider that the backstop should not apply to unauthorised deductions claims that do not relate to holiday pay.

Arguments against changing the demarcation of jurisdictions over the NMW

- 7.42 The majority of consultees agreed with our proposal that the present demarcation of jurisdictions over the NMW should not change. Of those who gave reasons for their view, it was generally considered that the current demarcation works well, particularly in relation to the division between civil claims and criminal prosecutions. The GMB, for example, stated:

This arrangement provides for pro-active enforcement by the enforcement agencies of HMRC and the Gangmasters Licensing Authority alongside direct worker enforcement in the employment tribunals.

- 7.43 Cloisters agreed with the current demarcation but observed that, as specialist issues arise in NMW claims, it would be beneficial to have a list of judges with employment expertise who could be called upon to determine such claims in the civil courts.

Discussion

- 7.44 Our proposal to retain the current demarcation of jurisdictions over NMW claims did not prove to be controversial, with consultees nearly unanimously agreeing with it. We view the retention of the civil courts' inherent contractual jurisdiction over NMW claims as desirable given that Parliament has chosen to create a contractual remedy.²³⁷ Therefore, we maintain our original view that no change in the demarcation of jurisdictions is required in the NMW context.

²³⁶ *Fulton & Ors v Bear Scotland Ltd* UKEATS/0010/16/JW. The Employment Appeal Tribunal held that 'non-guaranteed' overtime needs to be included in the calculation of holiday pay.

²³⁷ See by analogy para 6.24 above in relation to equal pay.

7.45 Two consultees objected to the two-year limitation on recovery of arrears under section 23(4A) of the ERA 1996. Our recommendation to give employment tribunals jurisdiction over contract claims brought during employment would enable this limitation to be circumvented (as it can be already by the expedient of bringing a contractual claim in the county court). We see no merit in introducing that limitation into the contractual jurisdiction of the tribunals, particularly given that it would be out of line with the six-year retrospectivity that already applies generally to contractual and other claims in employment tribunals and could still be circumvented by resort to the county court. We suggest that the government give consideration to Parliament repealing section 23(4A) on the ground that it serves no practical purpose.

TRADE UNION BLACKLISTS

7.46 Under regulation 3 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 (“the Blacklists Regulations”), it is unlawful to compile, use, sell or supply prohibited lists. A list is prohibited if:

- (1) it contains details of people who are or have been trade union members, or who are taking part or have taken part in trade union activities; and
- (2) it 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.²³⁸

7.47 A person may complain to an employment tribunal if, in relation to a blacklist, she or he is: refused employment, refused services provided by an employment agency, or subjected to other detriment.²³⁹ The primary time limit for bringing these tribunal claims is three months.²⁴⁰ The compensation which a tribunal may award for the first two complaints is capped at £65,300.²⁴¹ The compensation a tribunal may award for a detriment complaint is not subject to a general cap but if the claimant is a worker (as opposed to an employee) and the detriment complained of is that her or his contract was terminated, then the £65,300 cap applies.²⁴²

7.48 The £65,300 cap corresponds with the maximum compensatory award for most types of unfair dismissal claim that was in force at the time the Blacklists Regulations were made. It has not been raised in line with subsequent increases to the maximum compensatory award for unfair dismissal (which is currently £86,444, or 52 weeks’ gross pay if lower). The unfair dismissal figure is reviewed annually and index linked but the £65,300 cap under the Blacklists Regulations is not.²⁴³

²³⁸ Employment Relations Act 1999 (Blacklists) Regulations SI 2010 No 493, reg 3.

²³⁹ Employment Relations Act 1999 (Blacklists) Regulations SI 2010 No 493, regs 5, 6 and 9.

²⁴⁰ Employment Relations Act 1999 (Blacklists) Regulations SI 2010 No 493, reg 7(1).

²⁴¹ Employment Relations Act 1999 (Blacklists) Regulations SI 2010 No 493, reg 8(7).

²⁴² Blacklists Regulations, reg 11(10).

²⁴³ See Employment Relations Act 1999, s 34.

- 7.49 A breach of regulation 3 may be challenged in the civil courts (but not in employment tribunals) as a breach of statutory duty.²⁴⁴ The remedies available are damages, an injunction, or both.²⁴⁵ The time limit in England and Wales in the civil courts is six years from the breach. Recoverable damages are uncapped.²⁴⁶ A claimant may seek damages from a civil court or compensation from an employment tribunal but may not seek both. However, a claimant may claim financial compensation in a tribunal and also apply to the civil courts for an injunction preventing the behaviour which is in breach of regulation 3.²⁴⁷
- 7.50 In our consultation paper, we provisionally proposed that the present demarcation of employment tribunals' and civil courts' jurisdictions over the Blacklists Regulations should not be changed.²⁴⁸ We asked consultees if they agreed. We also noted the discrepancy between the compensation cap for breach of the Blacklists Regulations and the compensation cap for unfair dismissal, both in amount and in the frequency with which they are updated. We also observed that, over time, this discrepancy could encourage applications to be made for breach of statutory duty in the civil courts, where no cap on recoverable damages is in effect. We asked consultees for their views on this discrepancy, and whether they were aware of any blacklist cases affected by the £65,300 cap which have had to be brought in the civil courts.

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

- 7.51 Of the 43 consultees that responded to this proposal, 35, four fifths of the total, agreed that the present demarcation should not be changed. Four consultees disagreed, and four expressed no firm view either way.
- 7.52 A common view amongst those who agreed with our proposal was that the concurrent jurisdiction that civil courts share with employment tribunals has a number of benefits in this context, namely, the six-year time limit and the ability to apply for an injunction in the civil courts. The National Education Union commented that the longer time limit was important because a person affected by blacklisting may not become aware of it until many years later. Another benefit noted by one consultee was that there is no cap on the damages available in the civil courts. We discuss consultees' views on the cap on compensation in employment tribunals under Consultation Question 42.
- 7.53 Fewer than one in ten of respondents disagreed with our proposal. Unite said that the present demarcation of jurisdictions would only be satisfactory if employment tribunals were given the power to grant injunctions and the time limit was extended to six years. NASUWT also supported extending the time limit for bringing a claim in employment tribunals. The Institute of Employment Rights suggested that:

²⁴⁴ Blacklists Regulations, reg 13.

²⁴⁵ Blacklists Regulations, reg 13(3).

²⁴⁶ Except that the county court limit is £100,000.

²⁴⁷ Blacklists Regulations, reg 13(5) and (4).

²⁴⁸ See our discussion of trade union blacklists: Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 5.80 to 5.88.

Time limits should run from the time the claimant discovered (or ought reasonably to have discovered) the act had occurred, with the retention of the just and equitable power to extend time in regulation 10.²⁴⁹

- 7.54 NASUWT argued that the inconsistencies between the powers of the civil courts and employment tribunals, in particular in relation to time limits and caps on compensation, are confusing, impede access to justice, and, in some cases, push claimants into pursuing litigation in the civil courts. Thompsons Solicitors also argued that these inconsistencies, coupled with the restrictive criteria for a claim under the Blacklists Regulations, mean that claims are pursued in the High Court. In their view, employment tribunals are “unnecessarily circumscribed” and should be able to hear a claim concerning breach of regulation 3 and grant a broader range of remedies:

The restrictive criteria for a claim under the Blacklists Regulations, and in particular the increased damages available in the High Court has meant that, to date, claims have tended to be pursued in the High Court (see for example the Construction Industry Vetting Information Group litigation).

- 7.55 The Employment Law Bar Association (“ELBA”) told us that until employment tribunals are given the power to grant injunctions, the civil courts’ jurisdiction is essential. Alternatively, they suggested:

One possible model would be to allow the civil court to grant an injunction in support of tribunal proceedings. This is done, for instance, in the context of arbitration proceedings (see Arbitration Act 1996, section 44). That would then allow jurisdiction to be concentrated in the Employment Tribunal.

- 7.56 ELA and the Law Society of England and Wales found insufficient evidence to assess whether changes should be made to the present demarcation. They both said:

It is very difficult to assess whether the demarcation is of importance or not because it is unclear whether there have been any successful claims brought under the 2010 Regulations. This is, we consider, largely because of the very limited definition of Blacklists in the Regulations. In reality, this forces claimants to litigate in the civil courts for alternative causes of action, such as defamation, conspiracy and breach of the Data Protection Act.

Discussion

- 7.57 The issue of whether the present demarcation of employment tribunals’ and civil courts’ jurisdictions over the Blacklists Regulations should be changed needs to be considered in the context of three of our conclusions and recommendations elsewhere in this report. In chapter 2 we recommended that the time limits for all employment tribunal claims should be extended to six months, subject to the “just and equitable” test for extension.²⁵⁰ We recommend below that the £65,300 cap applying to employment tribunal claims brought under the Blacklists Regulations be aligned with the maximum award for unfair dismissal, which will increase it considerably. Finally, in

²⁴⁹ This suggestion forms part of the Institute of Employment Rights’ response to Consultation Question 42.

²⁵⁰ See recommendations 1 and 2 at paras 2.58 and 2.96 above.

chapter 8, we conclude that employment tribunals should not be given the power to grant injunctions.

7.58 The two reforms that we recommend will narrow the gap between the jurisdictions of the civil courts and employment tribunals in this context, reducing the extent to which claimants are forced into the civil courts, which was the primary concern of the small minority of consultees who disagreed with our provisional proposal. We have concluded that the power to grant injunctive relief is not one that employment tribunals should have, for the reasons we give in chapter 8. The Blacklists Regulations already provide for claimants to claim financial compensation in an employment tribunal and apply to a court for an injunction.²⁵¹ The criteria for claiming under the Regulations are a matter of substantive employment law rights, which are outside the scope of this project.

7.59 In the light of our recommended reforms and the balance of consultee opinion, we adhere to our provisional proposal and remain of the view that the present demarcation of jurisdictions in relation to the Blacklists Regulations should remain.

Consultation Question 42: Should the £65,300 cap applying to employment tribunal claims brought under the Blacklists Regulations be increased so that it is the same as the cap on compensatory awards for ordinary unfair dismissal claims, as amended from time to time? Are consultees aware of any cases affected by the £65,300 cap on compensation which have had to be brought in the civil courts?

7.60 There were 49 responses to this question. Thirty-five consultees thought that the £65,300 cap applying to employment tribunal claims brought under the Blacklists Regulations should be increased to achieve parity with the cap on compensatory awards for ordinary unfair dismissal claims. Ten consultees proposed that the cap should be removed entirely. Four consultees thought that there should not be parity, but did not give any reasons to support this view.

7.61 No consultee was able to give an example of a case directly affected by the £65,300 cap on compensation which had to be brought in the civil courts. However, ELA drew attention to the difficulties of assessing whether the cap has had this effect. In their view (as expressed in response to Consultation Question 41) the very limited definition of a blacklist in the Regulations forces claimants to litigate in the civil courts for alternative causes of action and so it is unclear whether there have been any affected claims.

Arguments in favour of increasing the cap to achieve (at least) parity with ordinary unfair dismissal claims.

7.62 The majority of consultees favoured increasing the cap to achieve parity with the cap applicable to compensatory awards for ordinary unfair dismissal claims. Most of these consultees supported requiring that the cap be reviewed annually and index linked, as is the case for unfair dismissal claims. The main reason given by consultees for this view was that the level of the cap and its inconsistency with the general unfair dismissal cap has no logical basis, particularly since the unfair dismissal cap has increased by £20,000 since it was first introduced. Some consultees argued that the

²⁵¹ Blacklists Regulations, reg 13(5).

cap has the potential to force claimants into a civil court, regardless of whether it is the best forum. Several suggested that the cap be abolished, a suggestion we discuss below.

- 7.63 The Council of Employment Judges (with whom Employment Tribunals (Scotland) agree) indicated that the limit on compensation for straightforward ordinary unfair dismissal may be too low for blacklist claims:

Care must be taken not to reduce the cap to the lower of the statutory maximum or 52 weeks' pay per that applicable to ordinary unfair dismissal. This would be a retrograde step given the serious mischief against which the Blacklists Regulations is directed. Indeed, there is a case for uncapped compensation such is the serious nature of blacklisting for individuals lawfully exercising their Convention Rights to participate in trade union activity.

- 7.64 Trade unions supported removing the cap but considered that, at a minimum, the cap should be increased and reviewed regularly.²⁵² Unite suggested £100,000 as a starting figure, in line with the High Court lower limit for contractual claims.

Arguments in favour of abolishing the cap

- 7.65 Ten consultees advocated the abolition of the cap. These consultees argued that blacklisting is a particularly harmful offence because it can have long-term consequences, causing blacklisted persons to struggle to find employment for many years before they become aware of the blacklisting. For this reason, some consultees argued that it had the potential to be much more damaging than ordinary unfair dismissal and should not be subject to the same cap on awards. The unions argued that employment tribunals should be able to award compensation for all losses suffered.²⁵³ One consultee suggested that employment tribunals should be able to award whatever amount they think is just and equitable in the circumstances. NASUWT objected to any limit on compensatory awards as a matter of principle.

- 7.66 The Institute of Employment Rights argued that full compensation is also important to deter blacklisting:

Only full compensation, including injury to feelings, is a sufficient deterrent to blacklisting and an adequate measure of compensation for the deep individual and social wrong (by analogy with the approach taken in the Equality Act 2010 and in discrimination law).

- 7.67 Many consultees compared the cap under the Blacklist Regulations to other areas of law where there is no cap on compensatory awards. The Bar Council likened blacklisting to discrimination, noting that:

The consequences of discrimination by reason of trade union involvement may go beyond loss of one job or job opportunity. If this is seen as being more akin to discrimination than unfair dismissal, then no cap should apply.

²⁵² Unite; GMB; National Education Union; Trades Union Congress.

²⁵³ Unite; GMB; National Education Union; Trades Union Congress.

- 7.68 The whistleblowing charity Protect argued that blacklisting should be treated in a similar way to whistleblowing under the Public Interest Disclosure Act 1998 (“PIDA”):

This is important as PIDA reflects the fact that some whistleblowers do not work again, and there is an obvious parallel with the blacklisting regulations. In the construction industry for 16 years a blacklist operated in the sector denying many workers from working in the industry (either because they were active trade unionists or had raised health and safety concerns) There are many instances where those on the list either struggled to find work or were left permanently unemployed.

- 7.69 Protect also considered that, like whistleblowing, there is a public interest element to trade union activity which should be protected. This is because trade unionists will often be raising concerns about the workplace, as was the case with the blacklisted construction workers they referred to in their response.

- 7.70 Thompsons Solicitors, in observing that blacklisting often involves other actionable wrongs, noted that there is no cap on awards of compensation in these areas:

The act of blacklisting will typically involve the commission of other unlawful acts such as defamation and breach of confidence, privacy and data protection rights. For all of these other causes of action, there is no limit on the amount of damages recoverable. The additional remedy of a statement in open court is also available in privacy and defamation cases. If the remedy available in the Employment Tribunal is to be effective and proportionate, then there should be no cap on the amount of damages recoverable.

- 7.71 They noted that in the Construction Industry Vetting Information Group litigation, where the claims extended beyond blacklisting to include conspiracy, defamation, breach of confidence, misuse of private information and breach of the Data Protection Act 1998, some of the individual settlements were as high as £200,000.

Discussion

- 7.72 Nearly all consultees considered that the £65,300 cap applicable to employment tribunal claims brought under the Blacklists Regulations should be increased. Most agreed with the suggestion that it should be restored to parity with the cap applicable to ordinary unfair dismissal claims, but a significant number of consultees favoured no cap at all.

- 7.73 We have explored the intention underlying the existence of the cap. In a 2009 paper, the Government rejected increasing or abolishing the cap, stating:

The caps on compensation are set at a high enough level that they are unlikely to restrain compensation in blacklisting cases. Also, the regulations already provide scope for individuals to apply to the courts for damages, where no caps apply.²⁵⁴

²⁵⁴ Government Response to the Public Consultation - The Blacklisting of Trade Unionists: Revised Draft Regulations, Department for Business Innovation and Skills (December 2009) URN 09/1546, para 3.79, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/245411/09-1536-government-response-blacklisting-trade-unionists-consultation.pdf (last visited 07 April 2020).

7.74 The Government went on to say that it was not possible to provide that the cap be reviewed and updated regularly because of the limits of the power contained in section 3 of the Employment Relations Act 1999 (under which the Blacklists Regulations were enacted):

Some limits on compensation in existing employment law are re-rated annually to reflect changes in the Retail Prices Index. Whilst it would be desirable to extend this approach to the limits established by the blacklisting regulations, this cannot be achieved because the power in Section 3 of the Employment Relations Act 1999 is insufficient. This means the new limits will be fixed for the foreseeable future.²⁵⁵

7.75 Since then, the Government has rejected reviewing the legislative framework on the grounds that there is no evidence that blacklisting still occurs.²⁵⁶ In 2017, however, in a House of Commons debate it was suggested that blacklisting is still occurring and there were calls for a public inquiry into the issue.²⁵⁷

7.76 We are firmly of the view that, as a minimum, the cap under the Blacklists Regulations should be restored to, and kept at, parity with the maximum award for unfair dismissal. The history of the Regulations suggests a policy intention to set the cap at parity with the unfair dismissal cap and in 2009 the then government acknowledged the desirability of maintaining that parity. Only the absence of a power to establish the link in Regulations was cited as a reason for not doing so. We consider that, ideally, the enabling provision in the 1999 Act should be amended so as to enable the Regulations to link the figure to the prevailing level of the maximum unfair dismissal award. This could be done by adding awards under the Regulations to the indexing power under section 34 of the 1999 Act. If that is not possible, the Regulations should be amended so as to substitute the current unfair dismissal figure and should be further amended each time the figure changes.

7.77 Consultees have made a strong case for raising the cap to a higher figure or removing it. The financial loss potentially suffered by a victim of blacklisting, who is refused offers of employment over a period of time can be much greater than the loss flowing from a single instance of unfair dismissal. We are not, however, persuaded that we should formally recommend this, for a number of reasons.

7.78 Like their jurisdiction over contractual claims that we considered in chapter 4, employment tribunals' compensatory jurisdiction under the Blacklists Regulations is shared with the civil courts, giving claimants a choice between a no-costs jurisdiction and a costs-shifting jurisdiction (save for county court claims not exceeding £10,000). The county court's financial jurisdiction is limited to claims not exceeding £100,000. In

²⁵⁵ Government Response to the Public Consultation - The Blacklisting of Trade Unionists: Revised Draft Regulations, Department for Business Innovation and Skills (December 2009) URN 09/1546, para 3.80, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/245411/09-1536-government-response-blacklisting-trade-unionists-consultation.pdf (last visited 07 April 2020).

²⁵⁶ See Blacklisting in Employment - Update: Incorporating the Government's Response to the Sixth Report of Session 2013-14, House of Commons Scottish Affairs Committee (19 May 2014) HC 1291, p 8, <https://publications.parliament.uk/pa/cm201314/cmselect/cmscotaf/1291/1291.pdf> (last visited 07 April 2020).

²⁵⁷ *Hansard* (HC), 5 September 2017, vol 628, col 70WH.

line with our conclusions regarding the tribunals' contractual jurisdiction,²⁵⁸ we consider that it would be anomalous if the financial jurisdiction of the tribunals exceeded that of the county court.

7.79 The policy of linking the cap to the unfair dismissal cap has some logic, in that a wrongful refusal of employment has some affinities with an unfair dismissal. It mirrors the policy that a victim of unfair dismissal cannot recover more than £86,444 even if their loss is greater. As such, applying a similar policy to victims of blacklisting has some merit of consistency, although the claim of consistency would be more compelling if the policy was not limited to claims in employment tribunals. We see the force of the point that victims of blacklisting may be repeatedly refused employment, but the evidence available to us does not disclose a compelling need for employment tribunals to have a greater financial jurisdiction. No consultee was aware of a case that had had to be brought in the civil courts because of the existing cap. Some suggested that claims under the Regulations needed to be brought alongside claims under other causes of action, such as defamation, over which it is not suggested that the employment tribunals should have jurisdiction.

Recommendation 19.

7.80 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.

QUALIFICATIONS BODIES

7.81 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.²⁵⁹ Under section 53 of the Equality Act 2010, such a body must not discriminate against a person, for instance, in the arrangements which the body makes for deciding whether to confer qualifications, by withdrawing qualifications, or by subjecting the person to any other detriment.

7.82 Employment tribunals' jurisdiction to hear such claims is conferred by the Equality Act 2010. That jurisdiction is residual in that it is conferred unless the act complained of is subject to a statutory appeal or proceedings in the nature of a statutory appeal.²⁶⁰ The existence of a statutory appeal body therefore serves to oust employment tribunals' jurisdiction to hear discrimination claims arising from the qualifications body's decision. This is illustrated by *Khan v General Medical Council*,²⁶¹ in which the Court of Appeal found that an employment tribunal did not have jurisdiction to hear a discrimination claim against the General Medical Council because the claimant had

²⁵⁸ See recommendation 6 at para 4.42 above.

²⁵⁹ Equality Act 2010, s 54.

²⁶⁰ Equality Act 2010, s 120(7).

²⁶¹ *Khan v General Medical Council* [1996] ICR 1032, [1994] IRLR 646.

the right to apply to a statutory review board under the Medical Act 1983. The Court of Appeal considered that this right was “in the nature of an appeal”.

7.83 The Supreme Court held in *Michalak v General Medical Council* that the availability of judicial review in relation to a qualifications body’s decisions and actions does not deprive employment tribunals of jurisdiction.²⁶² This means that if there is no statutory route of appeal, employment tribunals have jurisdiction over allegations of discrimination against qualifications bodies, even if the conduct or decision in question can also be challenged by way of judicial review.

7.84 We noted in the consultation paper that some stakeholders considered that the availability of judicial review (in the High Court) as well as a discrimination claim (in an employment tribunal) may lead to regrettable complexity. They questioned whether it is sensible for the claimant to be able to challenge the same decision in two different forums, one after another.²⁶³ We asked for consultees’ views on whether this should remain the law. We also asked whether any other changes should be made to the jurisdictions.

Consultation Question 43: Should members of trades or professions who are aggrieved by the decisions of their qualifications bodies be able to challenge such decisions on public law grounds in the High Court and separately be able to claim unlawful discrimination in the employment tribunal? If not, please would consultees explain why and what changes they would make.

7.85 Of the 47 consultees who responded to this question, 34 consultees thought that members of trades or professions should be able to bring both claims; conversely, nine consultees thought that they should not. Three consultees supported retaining the dual route of challenging qualifications bodies’ decisions, but thought that a claimant should not be able to pursue a claim in both forums simultaneously. One consultee expressed no firm view for or against the proposition.

Arguments in favour of retaining the dual route of challenging qualifications bodies’ decisions

7.86 The majority of consultees thought that the current position in law should stay the same, with members of trades or professions being able to challenge decisions of qualifications bodies on public law grounds in the High Court and separately claim unlawful discrimination in an employment tribunal. Many of those in favour of the dual route emphasised that the two claims are distinct types of legal challenge, to which different legal tests apply and different remedies are available. As such, consultees supported retaining claimants’ right to advance a claim on both equality law and public law grounds, arguing that this enables claimants to obtain a suitable remedy. ELA argued that this is particularly important in the light of concerns over the discriminatory treatment of Black, Asian and Minority Ethnic (“BAME”) members of trades and professions:

²⁶² *Michalak v General Medical Council* [2017] UKSC 71, [2018] IRLR 60.

²⁶³ See our discussion in *Employment Law Hearing Structures* (2018) Law Commission Consultation Paper No 239, paras 5.89 to 5.95.

The concern is that BAME professionals and tradespersons are more harshly treated by their qualifications bodies more widely and this should be challengeable under the Equality Act 2010 within the employment tribunals.

- 7.87 Some consultees who favoured the dual route nevertheless expressed concern over the implications of overlapping jurisdictions. However, the Manchester Law Society suggested that the overlap of jurisdictions was unlikely to cause major issues in practice because:

The claimant would not get double recovery of compensation and there is a power to stay one set of proceedings if there is any overlap in compensation or 'issue estoppel' may apply. Furthermore, judicial review is a last resort and cannot be pursued where there is an alternative remedy which has not been pursued.

- 7.88 This view was supported by the Council of Employment Judges, who stated:

Any concerns about jurisdictional overlap or duplication could be addressed by use of discretionary case management powers to stay employment tribunal proceedings until other proceedings are concluded if that is appropriate, or vice versa, as where there are parallel High Court claims generally.

Concern over claims being pursued simultaneously in two judicial forums

- 7.89 The Chartered Institute of Legal Executives, the Council of Tribunal Members Associations and Liverpool Employment Tribunals Members Association did not explicitly reject or support the dual route of challenge in this context, but stated that measures should be taken to reduce the risk that the same or similar claim is heard simultaneously in two different forums. It was considered that this could lead to conflicting outcomes and inconsistencies in judicial interpretation. The Liverpool Employment Tribunal Members Association stated:

Should it be decided to allow simultaneous claims in more than one jurisdiction, it is our view that whichever ruling is reached first should be binding and the other claim be ruled out under the application of *res judicata*.

Arguments against the dual route

- 7.90 Nine consultees thought that the dual routes of challenge to qualifications bodies' decisions should be removed. One consultee, Jason Frater, thought that these challenges should be brought exclusively in the High Court on the basis that it is inappropriate for employment tribunals to hear claims against qualifications bodies because they are not employers. Transport for London also supported having only one forum, citing the risks of conflicting decisions and double recovery as justification for their support, but did not specify which forum they preferred. Countrywide plc viewed the dual route as overly complex and unnecessary, believing that there was adequate provision for challenging decisions by qualifications bodies. The remaining consultees opposing the dual route did not specify which route should be retained or why.

Consultation Question 44: Should any other changes be made to the jurisdiction of employment tribunals or of the civil courts in respect of alleged discrimination by qualifications bodies?

- 7.91 We received 39 responses to this consultation question. Thirty-one consultees thought that no other changes should be made to the jurisdictions of employment tribunals and the civil courts in respect of alleged discrimination by qualifications bodies. Six consultees thought that some other changes should be made, three outlining what the changes should be. Two consultees did not state definitively whether changes should be made or not.
- 7.92 ELA and the Law Society of England and Wales thought that no changes need to be made to the demarcation of jurisdictions in this area. They thought, however, that steps could be taken to make better use of employment tribunal judges' expertise in discrimination claims without necessarily altering the demarcation of jurisdiction. They proposed doing so by making the mechanisms for the transfer of civil court cases to the employment tribunals easier, and enabling employment tribunal judges to sit in the civil courts to hear discrimination claims.
- 7.93 Jason Frater suggested that the remedies available in the High Court should be strengthened. ELBA and the Bar Council suggested that employment tribunals' jurisdiction to consider discrimination claims should no longer be ousted when there is a statutory appeal route.

Discussion

- 7.94 We share the view of the majority of consultees that because a judicial review challenge in a High Court is distinct from a discrimination claim in an employment tribunal, both in terms of the legal tests applied and remedies available, the dual route of challenging qualifications bodies' decisions should be retained. This is supported by the reasoning of the Supreme Court in *Michalak v General Medical Council*.²⁶⁴ Central to the Supreme Court's decision in *Michalak* was that judicial review is not "in the nature of an appeal" because it examines the legality of a decision, as opposed to undertaking a full merits review of a case:

Judicial review, even on the basis of proportionality, cannot partake of the nature of an appeal, in my view. A complaint of discrimination illustrates the point well. The task of any tribunal, charged with examining whether discrimination took place, must be to conduct an open-ended inquiry into that issue. Whether discrimination is in fact found to have occurred must depend on the judgment of the body conducting that inquiry. It cannot be answered by studying the reasons the alleged discriminator acted in the way that she or he did and deciding whether that lay within the range of reasonable responses which a person or body in the position of the alleged discriminator might have had. The latter approach is the classic judicial review investigation.²⁶⁵

- 7.95 The High Court and employment tribunals are the specialist forums for judicial review and discrimination claims respectively, and it does not make sense to constrain or

²⁶⁴ *Michalak v General Medical Council* [2017] UKSC 71, [2018] IRLR 60.

²⁶⁵ *Michalak v General Medical Council* [2017] UKSC 71, [2018] IRLR 60, at [21], by Lord Kerr.

transfer either forum's jurisdiction in this context. Whilst qualifications bodies are not employers, we do not think that this means that their decisions should be outside the scope of employment tribunals' jurisdiction; their decisions relate directly to a professional's employment.

7.96 We recognise that there may be some substantive overlap between claims pursued in each forum, and appreciate consultees' concerns in this respect, particularly if two claims are pursued simultaneously. We are not, however, aware of this causing any problems in practice. Both forums have adequate case management powers to deal with a situation in which both might find themselves simultaneously deciding the same issue. Both permission to bring judicial review and the grant of judicial review remedies are discretionary matters and could be refused where parallel proceedings in an employment tribunal were more appropriate for deciding a dispute.

7.97 We now turn to the other changes suggested by consultees in their responses to Consultation Question 44. For the reasons we have outlined, we do not think that the jurisdiction of either the High Court or employment tribunals should be abolished in this context. As we have said, we consider that both forums have adequate case management powers already. We do not consider it appropriate for the powers available in judicial review or the operation of the principle of *res judicata* to be different in the cause of qualifications bodies. As to whether employment tribunals should have jurisdiction over claims against qualifications bodies even when there is a statutory route of appeal, we are persuaded by the observations of Lord Kerr in *Michalak*:

Where Parliament has provided for an alternative route of challenge to a decision, either by appeal or through an appeal-like procedure, it makes sense for the appeal procedure to be confined to that statutory route. This avoids the risk of expensive and time-consuming satellite proceedings and provides convenience for appellant and respondent alike.²⁶⁶

7.98 Therefore we do not recommend that any changes are made to the existing routes of challenge to the decisions of qualifications bodies.

POLICE MISCONDUCT PANELS

7.99 In the case of *P v Metropolitan Police Commissioner*, the Supreme Court held that 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").²⁶⁷

7.100 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

²⁶⁶ *Michalak v General Medical Council* [2017] UKSC 71, [2018] IRLR 60, at [18].

²⁶⁷ *P v Metropolitan Police Commissioner* [2017] UKSC 65, [2018] 1 All ER 1011.

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.²⁶⁸

Consultation Question 45: Should a police officer who is aggrieved by the decision of a police misconduct panel be able to challenge that decision by way of statutory appeal to the Police Appeals Tribunal and separately to complain that the decision is discriminatory in an employment tribunal? If consultees take the view that the answer is “no”, what changes do they suggest?

7.101 Forty-eight consultees responded to this question. Thirty-six consultees thought that a police officer should be able to challenge the decision of a police misconduct panel by way of statutory appeal to the PAT and separately to complain that the decision is discriminatory in an employment tribunal. Nine argued that police officers should only be able to complain in one forum, and three expressed no firm view either way.

Arguments in favour of retaining the dual route of challenge

7.102 An argument advanced by many consultees who were in favour of retaining the dual route of challenge in this context was that, for a number of reasons, the PAT is not well-suited to hearing discrimination complaints. Thompsons Solicitors noted that the PAT does not have the same expertise as the employment tribunals in equal treatment. The Institute of Employment Rights cited the reasoning in *P v Metropolitan Police*:

Police officers are entitled to challenge discriminatory decisions of a misconduct panel in the employment tribunal owing to the EU principles of effectiveness and equivalence: see Lord Reed in *P v Metropolitan Police*.²⁶⁹ As Lord Reed noted (§22), an appeal to the PAT is not a particularly suitable means of addressing discrimination by the misconduct panel.

7.103 Consultees also argued that the procedure and grounds of appeal in the PAT are unsuitable for discrimination claims. ELA emphasised how the PAT and employment tribunals carry out distinct functions, and that the former is not generally a “fact-finding body”:

The PAT is therefore primarily tasked with reviewing the evidence before the misconduct/performance panel below and assessing whether the decision was within a range of reasonable responses. It is not a complete re-hearing

The task of deciding a discrimination claim, including hearing often extensive and highly contested evidence and complex legal submissions and deciding sometimes substantial issues of remedy and loss, is quite far removed from the task normally undertaken by a PAT panel.

7.104 Consultees also highlighted the different remedies available in the PAT and employment tribunals. There was some concern that if redress was limited to one

²⁶⁸ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 5.96 to 5.97.

²⁶⁹ [2018] ICR 560 at [29] to [30].

route of challenge, police officers subjected to discrimination would not be able to obtain full and effective remedy.

7.105 Given the distinct specialisms and procedures of the PAT and employment tribunals, consultees viewed it as undesirable and illogical to limit the route of challenge to one forum. Cloisters suggested that if police officers were to be barred from pursuing a discrimination claim in an employment tribunal, the PAT should be given the power to grant compensation for such claims. In addition, ELA pointed out that the PAT generally only hears appeals at the “top end of the scale”, the implication being that there is not always a dual route of challenge available. Manchester Law Society also commented that:

The employment tribunal has the power to stay a claim pending the outcome of a PAT appeal if it believes there may be an overlap in proceedings or remedy.

7.106 The Council of Employment Judges pointed out that, so long as the EU principle of equal treatment is applicable, the current position in law cannot be changed. They went on to state that, even if EU law did not apply, it would nevertheless be important that the principle of equal treatment is incorporated into domestic law:

It is difficult to see why police officers should not be able to complain to an Employment Tribunal of discriminatory decisions taken by the police misconduct panel thus affording them the same rights to equal treatment as others.

Arguments in favour of limiting the route of challenge to one forum

7.107 A small minority of consultees thought that police officers should only be able to pursue one route of challenge. Some of these consultees thought that the two routes of challenge should co-exist, but police officers should not be able to pursue both routes simultaneously. Instead, these consultees thought that police officers should be required to choose one route through which to pursue their claim. There were concerns that allowing a claim to be pursued simultaneously in two forums could lead to double recovery and inconsistent determinations.

Discussion

7.108 The issues relevant to this discussion overlap with issues we discussed under Consultation Questions 43 and 44 in relation to the demarcation of jurisdictions for challenges against qualifications bodies. Claims made to the PAT and employment tribunals by police officers may concern similar sets of facts and conduct, but they are separate claims involving the application of different legal tests and the availability of different remedies. In this sense, we agree with consultees that the existence of the two routes of challenge does not pose any problems; the potential problems referred to seem to be theoretical. To remove either route of challenge could mean that a police officer who has been discriminated against cannot secure adequate redress. Therefore, we do not recommend any change in this area.

Chapter 8: Restrictions on orders which may be made in employment tribunals

- 8.1 Our consultation paper discussed three restrictions on the types of orders which may be made in employment tribunals; these relate to the granting of injunctions, apportioning liability between respondents, and enforcing tribunals' awards.²⁷⁰

INJUNCTIONS

- 8.2 An injunction is an order of a court prohibiting a respondent from doing something or requiring a respondent to do something. Disobeying an injunction is punishable as contempt of court.
- 8.3 Employment tribunals do not have the power to grant injunctions and it is very rare for tribunals to have such a power. 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, for example where it is alleged that the reason or principal reason for the dismissal was the claimant's participation in trade union activities. However, such interim relief orders, which are rarely made, are not injunctions and do not carry the sanction of contempt of court.
- 8.4 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. In the consultation paper we doubted whether such a proposal would fall within our terms of reference. In any event we were not aware of any substantial body of opinion that employment tribunals should be given the power to grant injunctions. We asked if consultees agreed.²⁷¹

Consultation Question 46: Our provisional view is that employment tribunals should not be given the power to grant injunctions. Do consultees agree?

- 8.5 Out of 49 consultees who responded to our proposal, 36 agreed with it, including the President of Employment Tribunals (England and Wales) and the Regional Employment Judges (with whom the President of the Industrial Tribunal and Fair Employment Tribunal (Northern Ireland) agree), the Employment Appeal Tribunal ("EAT") judges and the Council of Employment Judges (with whom Employment Tribunals (Scotland) agree). Eleven disagreed, and two expressed no firm view either way.

Arguments against giving employment tribunals the power to grant injunctions

- 8.6 Many consultees agreed with the arguments summarised above; namely, that making this change would require primary legislation in a highly contentious area and that there is no widespread support for employment tribunals being given the power to

²⁷⁰ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, ch 6.

²⁷¹ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 6.2 to 6.7.

grant injunctions. Consultees also thought the civil courts better equipped to issue injunctions. The Council of Employment Judges explained that:

The existing machinery set up in the High Court to obtain interim injunctions from a judge, including if necessary from a judge on call, and for the enforcement of injunctions by way of committal (to prison) support keeping such matters in the civil courts.

- 8.7 The Employment Law Bar Association added that employment tribunals “do not have the administrative capabilities or other logistical arrangements to deal with urgent matters such as injunction applications”. The President of Employment Tribunals (England and Wales) and the Regional Employment Judges (joint response) pointed out that employment tribunals have no committal powers, which means that if an injunction were breached, sanction would have to be dealt with by a different jurisdiction.

Arguments for giving employment tribunals the power to grant injunctions

- 8.8 Some consultees thought that granting tribunals the power to grant injunctions would strengthen claimants’ rights and result in a fairer system. As it was put by the National Association of Schoolmasters Union of Women Teachers (“NASUWT”):

Given the inequity in bargaining power and the limited ability of individuals to assert their rights and entitlements against employers, it seems unreasonable that they would need to go through additional layers of legal complexity, including associated costs, in accessing justice.

- 8.9 Cloisters also thought that giving the tribunal the power to grant injunctions would be a “significant help” to employees who wish to enforce their contractual rights, adding:

Breaches of many important provisions in employment law contracts do not cause direct financial losses and therefore cannot give rise to a claim for damages Such provisions are therefore only enforceable by obtaining an injunction.

- 8.10 Disability Law Service highlighted that granting the employment tribunals such a power is particularly important for those with disabilities:

It is our view that consideration should be given to employment tribunals being given the power to grant injunctions preventing dismissal. An unfair or discriminatory dismissal can have particularly serious consequences for disabled workers due to the impact on their health and additional limitations and barriers to finding suitable alternative employment.

- 8.11 The Employment Lawyers Association (“ELA”) thought that injunctive relief might be appropriate in cases where employment is continuing, and the employee is being subjected to a continuing detriment by reason of unlawful discrimination, or having made a protected disclosure.

- 8.12 Some consultees suggested that employment tribunals should only be given the power to grant injunctions if employment judges were trained appropriately and additional resources were made available to the tribunal.

Discussion

8.13 Giving employment tribunals the power to grant injunctions would require considerable additional training of employment judges and, as the Council of Employment Judges pointed out, extensive administrative machinery. We recognise that in some circumstances, such as those highlighted by ELA, employees would benefit from being able to obtain an injunction from an employment tribunal, but we do not consider that the considerable effort and expense involved in bringing this about would be justified. We therefore do not recommend that employment tribunals should be given the power to grant injunctions.

CONTRIBUTION AND APPORTIONMENT IN DISCRIMINATION CLAIMS

8.14 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) claiming only against the employer, who will often be liable for the discriminatory acts of employees;²⁷²
- (2) proceeding against the individual discriminator(s) but not the employer (this is only occasionally done, reflecting the fact that the employers normally have deeper pockets); 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.²⁷³

8.15 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:

- (1) 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; and
- (2) the EAT has concluded (on a non-binding basis) that they would not be able to seek contribution from one another by using the 1978 Act in the civil courts.

²⁷² Under the Equality Act 2010 s 109, unless the employer has taken all reasonable steps to stop those acts occurring.

²⁷³ If two people (A and B) are jointly and severally liable to pay another person (C) a sum of money, C may claim the whole sum either only from one of them or from both of them. They cannot resist the claim on the grounds that the other should pay instead, but they do have a defence if the other has paid.

Employment tribunals' previous practice of apportioning liability

- 8.16 Until recently, employment tribunals had developed a practice of ordering that liability be “apportioned” between employer and individual respondents in discrimination cases. As such, each was separately liable to the claimant for part of the compensation.²⁷⁴ This was not the same as a contribution order under the 1978 Act because the claimant could only claim from each respondent the apportioned part; but as between the respondents, it had much the same effect.
- 8.17 However, the EAT has now held that employment tribunals were incorrect to have apportioned liability between co-discriminators. In *Hackney London Borough Council v Sivanandan*, the EAT (Underhill P presiding) held 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.²⁷⁵ 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.
- 8.18 In our consultation paper we asked consultees whether employment tribunals should have the power to apportion liability between respondents in discrimination cases so that each is separately liable for part of the compensation. If consultees agreed, we also asked for views on the basis on which they should do so.²⁷⁶

Consultation Question 47: Should employment tribunals have the power to apportion liability between co-respondents in discrimination cases, so that each is separately liable to the claimant for part of the compensation? If so, on what basis should tribunals apportion liability?

- 8.19 We received 53 responses to this question. Thirty-eight consultees thought that employment tribunals should have the power to apportion liability between co-respondents in discrimination cases, so that each is separately liable to the claimant for part of the compensation. Those agreeing included the President of Employment Tribunals and the Regional Employment Judges (England and Wales), the Council of Employment Judges, and (in some cases) the EAT judges. Thirteen argued that employment tribunals should not have such a power, and two commented on the question, but did not express a definitive conclusion.
- 8.20 The main argument in favour was that apportioning liability would provide a more just result, as it reflects the actual harm done by co-respondents. John Sprack, a former employment tribunal judge, noted that “during the period when employment tribunals did apportion liability, the practice seemed to be universally accepted as a sensible

²⁷⁴ See, for instance, *Way v Crouch* [2005] ICR 1362, [2005] IRLR 603 (EAT).

²⁷⁵ [2011] ICR 1374, [2011] IRLR 740 (EAT). This case was appealed to the Court of Appeal. By the time it came before the Court of Appeal, the parties agreed that the question of apportionment could not arise, meaning that the Court of Appeal's decision on this point was based on a concession. But additional weight was given to the EAT's ruling on this point by the Court of Appeal. At paras 47 onwards, Mummery LJ strongly approved of the EAT's approach (*London Borough of Hackney v Sivanandan* [2013] EWCA Civ 22, [2013] IRLR 408 (CA)).

²⁷⁶ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 6.8 to 6.12.

one". The EAT judges thought that the option of apportioning liability was preferable to joint and several liability in some circumstances:

We can envisage circumstances where the ability to apportion liability between co-respondents would provide a more just result having regard to the extent of their respective responsibilities for the harm caused to the claimant, and we consider that the option of apportioning liability for indivisible harm should be available to employment tribunals on a just and equitable basis.

- 8.21 Some of those who opposed providing employment tribunals with a power to apportion liability emphasised the protection offered to claimants by joint and several liability. Thompsons Solicitors noted:

The recoverability of employment tribunal awards is an ongoing problem for claimants and too many recover nothing, especially against corporate respondents. The doctrine of joint and several liability ameliorates the effect of that deficiency in the system and we would not wish to see it undermined.

Others noted that joint and several liability played a valuable role in protecting claimants in the event of the insolvency of one of the respondents, most commonly the employer. It was also argued that joint and several liability helps to offset the fact that one-third of employment tribunal awards go unpaid.

- 8.22 GMB thought that the power to apportion liability could introduce additional complexity into employment tribunal proceedings, and fine distinctions, as noted in *Brennan*,²⁷⁷ such as between respondents who are at "arm's length" and those who are not. The National Education Union observed that, on a public policy level, it would be wrong for employers to shift blame in discrimination cases to others, as it would "blunt the incentive for them to improve their recruitment and employment policies and/or the steps they should be taking to eliminate unlawful discrimination".
- 8.23 Eighteen consultees discussed the basis on which tribunals should apportion liability. Eight consultees suggested that tribunals should apportion liability on a just and equitable basis, including the President of Employment Tribunals (England and Wales) and the Regional Employment Judges, the Council of Employment Judges, the EAT judges, and the Bar Council. Eight consultees also thought that liability should be apportioned depending on the extent of the responsibility of the co-respondents, either as a factor in the "just and equitable" test, or as the sole consideration.

CONTRIBUTION BETWEEN RESPONDENTS

- 8.24 We also asked consultees 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 it is very hard to defend the inability of concurrent respondents to workplace discrimination claims in the employment tribunal to seek contribution from one another. 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

²⁷⁷ *Brennan v Sunderland City Council* UKEAT/0286/11, [2012] ICR 1183

discrimination. We went on to ask consultees whether the right to claim contribution should be modified to suit the employment context.²⁷⁸

Consultation Question 48: We provisionally propose that employment tribunals should be given the power to make orders for contribution between respondents in appropriate circumstances and subject to appropriate criteria. Do consultees agree? If so, we welcome consultees' views as to appropriate circumstances and criteria.

- 8.25 Of the 47 consultees who responded to our proposal, 38 agreed with it. Eight consultees disagreed, and one expressed no firm view either way, providing balanced arguments for and against.
- 8.26 Consultees who agreed gave similar reasons to those given in response to Consultation Question 47 above: allowing tribunals to make orders for contribution would lead to a fairer result overall. Several thought the employment tribunal's lack of power to make order for contribution between consultees was an anomaly given that the civil courts can make such orders.
- 8.27 Consultees disagreed for a number of reasons. Thompsons Solicitors thought that the current position "reflects the particular character of statutory torts or statutory contractual claims and the relationship of employer and employee". The Bar Council stressed the need "to reinforce the employer's primary responsibility to guard against unlawful discrimination in the workplace". Transport for London thought that, on the face of it, the idea was positive, but that it was likely to give rise to practical problems such as difficulties in ascertaining clear fault or liability. Others thought that hearing claims for contribution would put too much strain on the employment tribunals' limited resources.
- 8.28 Fourteen consultees responded to the second part of the question. The majority of consultees gave the same answer as to Consultation Question 47 above, recommending a just and equitable basis, with consideration of relative responsibility.
- 8.29 The EAT judges, in an answer worth quoting at length, thought the availability of the power to order contribution should depend on the relationship between the respondents.

We agree that where joint or concurrent discriminators are at arm's length, the situation is indistinguishable from that of tortfeasors at common law, and it is anomalous that in such a case concurrent respondents to unlawful discrimination claims cannot seek a contribution order from one another. Empowering employment tribunals to make contribution orders in such cases would remove that anomaly. The criterion should be what the employment tribunal considers to be just and equitable having regard to the extent of the concurrent discriminator's liability. This would preserve flexibility and enable employment tribunals to achieve a just result.

We also agree that different issues arise in cases where an employer might wish to seek a contribution against an employee whose conduct has rendered him liable for unlawful discrimination. In addition to the policy issues that arise, the absence of

²⁷⁸ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 6.14 to 6.21.

arm's length dealing and the ability of the employer to run an "all reasonable steps" defence which, if successful, eliminates liability entirely, are strong arguments for maintaining the no contribution principle in this sort of case.

8.30 The Law Society of England and Wales gave the following suggestions of potential criteria employment tribunals could follow when assessing claims for contribution:

The criteria as regards to individuals could include:

- the seniority of the individual and their influence over decision making and practice within an employment environment;
- the skills and experience of the individual, including the degree of training given to them and the discretion they have as to work conduct and the matters complained of;
- the degree of support available to the individual including size of their employing organisation and its human resources, financial, legal, risk and other management functions;
- the extent to which the individual was in a junior position and subject to direction or instruction from other respondents; and
- the extent to which the person derived actual or potential personal advantage from any discriminatory actions.

For corporate respondents the criteria could include:

- the degree of responsibility for the matter;
- the extent to which the respondent was the instigator or facilitator of the matter;
- any formal corporate legal relationship between respondents (so that, where they are members of the same group, it may be appropriate to allocate joint and several liability);
- in relation to corporate respondents which are not members of the same group, relative bargaining power and the degree to which one party had effective contractual or other decision-making power over the conduct of the other; and
- the extent to which the entity derived actual or potential benefit from its own discriminatory actions or the actions of others.

Discussion

8.31 The current position is anomalous. The potential unfairness of one respondent bearing the whole of a joint and several liability has been long recognised in the civil courts, and the approach of allowing contribution claims to remedy this potential unfairness works well there. The employment tribunal used to find the tool of apportionment useful to remedy the same unfairness. According to *Way v Crouch*:

In almost every case it will be unnecessary to make a joint and several award of compensation in a discrimination case. The present practice of apportioning liability (where appropriate) between individual employees and employers works well in practice and does justice to the individual case.²⁷⁹

- 8.32 We are persuaded that the current system needs improvement, and that employment tribunals ought to have the ability to allocate responsibility as between respondents. The question is whether this should be done by way of apportionment, or by way of a joint and several award with contribution, or by choosing between the two.
- 8.33 We have concluded that allowing respondents to seek contribution against each other would be the best solution, and would also serve to bring the position into line with that of discrimination claims in the civil courts. We regard contribution as a better solution than allowing tribunals to apportion liability as between respondents. A joint and several award with contribution better protects the position of claimants, who can choose which respondent to pursue for payment. We therefore reject the idea of apportionment as the only power.
- 8.34 We do not favour giving employment tribunals a choice between apportionment and a joint and several award with contribution. The choice would only make a difference if one respondent was insolvent; its exercise would amount to the tribunal deciding whether the claimant or the other respondent should suffer as a result. This is not a choice open to the civil courts: if employment tribunals regularly apportioned liability, claimants in employment-related discrimination cases would be at a financial disadvantage as compared to claimants in the county court pursuing other discrimination claims. Further, providing a choice between a joint and several or an apportioned award places an additional burden on all claimants. In every case of this sort there would be an additional issue of whether the award would be joint and several or apportioned and, if apportioned, what the division should be; the outcome could affect the claimant's ability to recover the sum awarded. To create this additional complication for claimants would be particularly unsatisfactory in the context of the increasing numbers of claimants who are unrepresented.
- 8.35 The procedural disadvantage must of course be balanced against the advantage of the flexibility that a choice between the forms of order would give to employment tribunals. In this context we bear in mind that the choice amounts to deciding whether it is the claimant or one of the respondents who must bear the burden of enforcing all or part of the award against the other respondent and the risk of non-recovery. We have difficulty in conceiving of many occasions when a tribunal would think it just and equitable to place that burden and risk upon the claimant alone, given that the individual respondent will have engaged in the discriminatory behaviour complained of and the employer will only be liable at all where insufficient steps were taken to prevent it.

²⁷⁹ *Way v Crouch* [2005] ICR 1362, [2005] IRLR 603 (EAT) para 23.

8.36 The next question is what criteria ought to be used to determine whether claims for contribution should be granted. The majority of consultees 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 which provides that:

... in any proceedings for contribution ... the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

8.37 We agree. 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. We have reflected on the criteria suggested by the Law Society of England and Wales and agree that these are sensible considerations which are relevant when assessing a respondent's responsibility for damage. We do not however believe that it would be appropriate to enshrine these in primary legislation. We think the better approach would be to leave the principles to develop through case law.

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

8.38 Of the 34 consultees who responded, 23 consultees stated that the right to claim compensation should precisely mirror the position of common law claims brought in the civil courts. Those agreeing included the President of Employment Tribunals (England and Wales) and the Regional Employment Judges, the Council of Employment Judges and the EAT judges. Nine consultees thought modifications should be made to suit the employment context, and two did not come to a firm view.

8.39 Some consultees gave additional views. Birmingham Law Society believed that respondents should not be permitted to make freestanding claims as they are in the civil courts, and that contribution claims should only be permitted against a co-respondent who is already a party to the proceedings. Peninsula stated that:

Modifications would be needed to take into account vicarious liability and where the actions of an individual are carried out in the course of their employment but clearly not on the direction of the employer.

8.40 Although the Bar Council disagreed with the proposal that there should be a right to claim contribution, they stated that if such a right were to be given:

then it should be modified to suit the employment context and should certainly consider the extent to which the employer has fulfilled its obligations as to the provision of suitable training, resources, modes or redress and sanctions for breaches of equality policies and procedures.

8.41 Several consultees thought that the nature of the respondents should determine whether contribution claims were available. Slater and Gordon thought that contribution should only be available in straightforward cases, where the respondents were at “arm’s length” from each other. This distinction was also explored by the EAT judges in the passage set out at paragraph 8.29 above, which illustrates well the concerns several consultees had about the possibility of employers pursuing employees through contribution claims in the tribunal.

Discussion

8.42 Two modifications of the contribution regime have been suggested by consultees: (1) that a respondent should only be able to claim contribution against another respondent and not from someone against whom the employee has not brought a claim; and (2) that an employer respondent should not be able to claim contribution from an employee respondent (an “individual discriminator”) for whose conduct the employer is vicariously liable under section 109 of the Equality Act 2010. There is a considerable degree of overlap between the issues raised by these suggestions, since the majority of cases of joint and several liability will concern employers and their individual discriminator employees. As we have already said, our starting position is that the contribution regime in employment tribunals should mirror that under the general law, so as to avoid the potential anomaly of different contribution regimes applying to workplace discrimination and to other claims of discrimination litigated in the county court. It follows in our view that the regime should only be modified to the extent that the modification is desirable on account of some particular feature of workplace discrimination claims. The issues must also be considered against the background of our recommendation that contribution should be determined on a just and equitable basis.

8.43 As regards the issue of claims against non-parties, it seems to us that it would be anomalous, and potentially unjust, if the ability of a respondent to claim contribution from someone else who was also liable for the injury to the claimant depended on whether the claimant had chosen to claim jointly against that person. This is a matter over which the respondent has no control. On the other hand, it may be anomalous to allow employers to use employment tribunals, designed to determine claims by employees against employers, to initiate claims against people who are not parties to any current proceedings. The fact that tribunal proceedings are costs-free could also create an incentive for employers to bring speculative contribution claims and expose third parties to the irrecoverable costs of defending them.

8.44 On balance we have concluded that contribution claims against non-parties should be permitted; it would, we think, be wrong to create the anomalous situation of contribution being available or not depending on the claimant’s choice of respondents. To the extent that there is a risk of unmeritorious claims for contribution, the risk will exist in any event where the claimant has claimed against more than one respondent.

8.45 In relation to claims by vicariously liable employers against individual discriminators, we see the force of the point 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. It may well be (depending on the facts of the case) that such employers do not deserve any contribution. 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 (and may even have encouraged the discrimination). A further anomaly would be created if individual discriminators were entitled to seek contribution from their employers, but not the other way round.

Recommendation 20.

- 8.46 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

- 8.47 Some stakeholders believe it is 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. 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.
- 8.48 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.²⁸⁰

Consultation Question 50 (First part): Should employment tribunals be given the jurisdiction to enforce their own orders for the payment of money?

- 8.49 We received 54 responses to this question. Forty consultees thought that employment tribunals should be given the jurisdiction to enforce their own orders for the payment of money. Thirteen argued that employment tribunals should not have such jurisdiction. These included the President of Employment Tribunals (England and Wales) and the Regional Employment Judges, the Council of Employment Judges and the EAT judges. One consultee expressed no firm view either way, stating that in general the enforcement of compensatory awards should be strengthened, but offering no view as to whether the employment tribunal should be equipped with enforcement powers.

²⁸⁰ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 6.22 to 6.28.

Arguments in favour of allowing employment tribunals to enforce their own orders

8.50 Many consultees made the point that there is a real problem with enforcement of awards in the employment tribunal. Several quoted the statistic from the Department of Business, Innovation and Skills' 2013 Payment of Tribunal Awards Study; 35% of claimants who obtain awards do not receive payment.²⁸¹ As expressed by NASUWT:

[A lack of enforcement powers] undermines the integrity of the employment tribunal as it allows respondents to game the system on the chance that a claimant will not be able to pursue further litigation through the civil courts.

8.51 The Council of Tribunal Members Associations noted that "the reputation and the status of employment tribunals (and generic justice itself) is recklessly and unnecessarily damaged by the high incidence of respondent employers who do not pay the specified award to successful claimants".

8.52 A point raised by many consultees was that the employment tribunal's lack of enforcement powers greatly disadvantages claimants without legal representation, who have to take steps to enforce judgments in the civil courts.²⁸² Consultees emphasised that this is costly, time-consuming and intimidating for many employees. LawWorks gave an example of how a claimant's ability to access and achieve justice can be impeded by the current system:

In September 2018 the first case in our unpaid wages project went to the employment tribunal and the claimant won his case The claimant was awarded £2,850 for notice pay and holiday pay. The employer refused to pay the award. The claimant had to make a claim in the county court to enforce the employment tribunal award.

Initially he was unable to find pro bono representation for this and faced having to represent himself even though he only speaks limited English. Fortunately, our referral partner, a law centre, was able to advise on using the High Court enforcement process, but this has taken time. The original unlawful deduction took place in January 2018 and the employment tribunal made an award in September 2018 and to date (January 2019) the claimant has still not been paid the money he is owed. After over a year of litigation and further enforcement procedures the claimant has become incredibly frustrated and disillusioned with the process.

8.53 NASUWT focussed on the need to relieve claimants of additional bureaucracy in enforcing awards. In their view, the onus of enforcement should be on the employment tribunals, who should have management and oversight of the process, including over "whether there should be further escalation and sanctions for employers who have failed to pay tribunal awards".

²⁸¹ *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 visited 03 July 2019).

²⁸² This was noted, for example, by Louise Purcell, Professor Owen Warnock (University of East Anglia) and the Chartered Institute of Legal Executives.

Arguments against employment tribunals being able to enforce their own orders

- 8.54 Some consultees argued that because of employment tribunals' limited resources, they should not be granted enforcement powers. Even consultees in favour of tribunals having enforcement powers qualified their response by saying that the implementation of any new enforcement regime in employment tribunals should not be allowed to deplete the tribunals' resources.
- 8.55 The EAT judges thought that while there was a "superficial attraction" to giving employment tribunals the power to enforce their own orders, once the award has been made by the tribunal "its specialist expertise has no bearing on the practicalities of enforcement". The Council of Employment Judges added that "we do not think it would be appropriate for us to deal with statutory demands; winding up petitions; bankruptcy; charging orders; attachment of earnings orders; bailiffs, etc."
- 8.56 Peninsula took a different approach, arguing that it was preferable for civil courts to enforce awards because it was open to them to allow for setting off in relation to any monies owed by the claimant in breach of contract. They also thought that civil courts were better placed to consider what order for enforcement would be appropriate in all the circumstances of the respondent, including other debts.
- 8.57 An alternative approach supported by a number of consultees was to focus on improving the enforcement mechanisms in the civil courts. The President of Employment Tribunals (England and Wales) and the Regional Employment Judges suggested that this could be done through "more clarity and effective 'signposting' of what is available by way of enforcement and how to action the necessary processes". Thompsons Solicitors said that they "would support measures designed to make accessing the existing machinery via the employment tribunal easier". The Council of Employment Judges thought it "anomalous that a claimant does not pay a fee to bring the proceedings but then has to pay one to enforce the judgment" and suggested that an employment tribunal judgment should be "enforceable as a judgment in the civil courts without a need to apply to convert it".
- 8.58 While in favour of giving employment tribunals enforcement powers, the Trades Union Congress, GMB and the National Education Union suggested that, if this were not feasible, defaulting judgments to the High Court for enforcement automatically would be a positive halfway measure.

(Second part): If so, what powers should be available to employment tribunals and what would be the advantages of giving those powers to tribunals instead of leaving enforcement to the civil courts?

- 8.59 Seventeen consultees responded to the second part of Consultation Question 50.
- 8.60 The majority of these thought that the employment tribunal should have the same enforcement powers as the civil courts. The main advantages put forward were that this would simplify the process for parties, reduce the cost of litigation and reduce the overall administrative burden (for both parties and the courts themselves). LawWorks supported giving enforcement powers which were broadly equivalent to those available to the civil courts, including the power to order seizure of goods, debt order, and charging orders to prevent respondents from selling their assets. Enforcement orders could be attached to the existing judgments without the need for further

litigation steps. They recognised, however, that there would be significant challenges in achieving full parity of enforcement powers between the employment tribunal and civil courts:

There are further policy, practical and resource considerations to look at. For example, attaching penal notices to its orders (for example an order to produce evidence on assets), would encroach into the criminal jurisdiction and overly extend the employment tribunal and employment judge's role. Similarly, provisions enabling a judgment creditor to apply to make the judgment debtor bankrupt where the amount owed is more than £750, may not be appropriate to route through the employment tribunal. The precise range of enforcement powers may therefore need to be subject to further consultation, and would require legislation.

8.61 Birmingham Law Society thought that employment tribunals should be given limited enforcement powers. For example, it argued, the employment tribunal should be given the power to issue a judgment which was enforceable in the same way as a county court judgment. But simply duplicating the other enforcement powers of the civil courts was, in their view, not the answer, as it would be "costly to duplicate the infrastructure available in the county court" and "not clear that it would make the judgments easier to enforce".

8.62 The Disability Law Service and the Institute of Employment Rights also gave examples of enforcement powers that should be given to the employment tribunal. The Disability Law Service responded that:

This should certainly include the seizure of goods by High Court Enforcement Officers and possibly charging orders and bankruptcy proceedings. Consideration could be given to ACAS being given a role in this process. The primary advantage would be the simplification and streamlining of the process, which could particularly help disabled workers.

8.63 The Institute of Employment Rights suggested two measures:

First, there should be an automatic issuing of a penalty notice with a tribunal award, informing the employer that if it does not pay the award by a set date, it will be subject to a financial penalty under sections 37A-Q of the Employment Tribunals Act 1996. Those provisions are insufficiently publicised at present.

Second, where an award is not paid, employment tribunals should have the power (on application by the claimant if necessary) to trigger the current High Court Enforcement Officer process (alternatively the claimant could be informed in the letter sending the judgment of how to activate this process). In accordance with the small sums at stake in employment tribunals, no fees should be payable for activating this procedure. Using the existing High Court Enforcement Officer process would also minimise the extent to which employment tribunals were engaged in areas for which they are not equipped.

8.64 Unite suggested that there should be more use of early orders to freeze assets to meet potential awards.

Discussion

8.65 Our consultation paper noted the following (non-exhaustive) list of enforcement methods currently available in the county court and High Court:

- (1) the seizure of goods (involving county court bailiffs or High Court Enforcement Officers) for possible eventual sale at auction;
- (2) charging orders (preventing defendants from selling their assets without first paying what they have been ordered to pay to the successful claimant); and
- (3) bankruptcy proceedings.²⁸³

8.66 To this list can be added the Department for Business, Energy and Industrial Strategy (“BEIS”) employment tribunal penalty scheme, introduced in 2016, under which the government fines and publicly names respondents for late payments.²⁸⁴

8.67 Since the publication of our consultation paper, the Government has produced two further documents in relation to enforcement.

- (1) Its Good Work Plan, as part of its response to the Taylor Review.²⁸⁵ In that plan the Government explains its proposals to improve information and guidance for those who are considering taking enforcement action, signposting at the relevant time all the enforcement options available as part of a more streamlined digital service for those making an employment tribunal claim.²⁸⁶
- (2) A consultation paper seeking views on the possibility of establishing a single enforcement body to enforce employment rights.²⁸⁷ The new body would become responsible for running the BEIS penalty scheme. The Government has also asked whether it should have any further role in unpaid awards.

8.68 It has also been brought to our attention that HMCTS provides a more streamlined enforcement service for claimants who have an employment tribunal or EAT award

²⁸³ Annex D of Department for Business, Energy and Industrial Strategy and Ministry of Justice, *Good Work: The Taylor Review of Modern Working Practices – Consultation on enforcement of employment rights and recommendations* (February 2018), pp 37 and 38.

²⁸⁴ See <https://www.gov.uk/government/publications/employment-tribunal-penalty-enforcement> (last visited 22 January 2020). If a claimant is successful in a claim to an employment tribunal and the respondent does not pay, an application can be made to a team at BEIS to have them fined and named publicly.

²⁸⁵ See <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices> (last visited 22 January 2020). This was an independent review commissioned by the Government considering the implications of new forms of work on worker rights and responsibilities, as well as on employer freedoms and obligations. It sets out seven principles to address the challenges facing the UK labour market. It was published on 11 July 2017. In ch 8, it recommends that Government should take enforcement action against employers so that employees and workers do not have to take any further steps to enforce an award where an employer fails to pay.

²⁸⁶ See <https://www.gov.uk/government/publications/good-work-plan/good-work-plan> (last visited 22 January 2020).

²⁸⁷ Department for Business, Energy and Industrial Strategy, *Good Work Plan: establishing a new Single Enforcement Body for employment rights* (July 2019), p 21.

which has not been paid. The scheme was not mentioned by consultees, and it appears that it is not widely used.²⁸⁸

- 8.69 There is a more straightforward mechanism for enforcement of employment tribunal awards in Scotland. A successful claimant need only make an application to the Secretary of Tribunals who will issue a certificate of the judgment of the tribunal without charge. The party can then take that certificate direct to a Sheriff Officer who can then take appropriate steps to enforce the award.²⁸⁹
- 8.70 Despite the range of enforcement possibilities available, it is clear that the enforcement of tribunal awards is not satisfactory. Claimants have to complete a new set of paperwork and pay additional fees. There are also decisions to be made about what form of enforcement is most appropriate. These difficulties are exacerbated by the fact that claimants have to engage with a new institution, which will not be familiar with the details of their case. All of this is particularly resented because it would not be necessary if employers simply paid sums due on receipt of the judgment. In addition, there is the overarching problem of the low rate of enforcement of orders.
- 8.71 The question is whether some or any of these problems could be remedied by granting additional powers to employment tribunals. One of them clearly could be, namely the understandable confusion claimants feel when, having won their case in front of the employment tribunal, they are then required to go somewhere else to enforce the decision.
- 8.72 We are not, however, persuaded that giving enforcement powers to employment tribunals would alleviate the other problems we have outlined above. The most common suggestion from consultees was that employment tribunals could be granted the same range of powers that civil courts have to enforce orders. This would involve duplicating the significant infrastructure which has built up in the civil courts to enable the enforcement of orders. It is not clear that this duplication would necessarily result in a higher enforcement rate of tribunal awards.
- 8.73 It is also clear from consultees' responses that employment tribunals currently lack the expertise required to enforce their own orders. Conferring these powers would require significant additional training. It would also increase the burden on employment tribunals at a time when they are already struggling with the volume of their case load.

²⁸⁸ The scheme requires the claimant to pay a court fee, after which the ACAS and Employment Tribunal Fast Track, operated by a private contractor, Registry Trust Ltd, allocates a High Court Enforcement Officer ("HCEO"). The HCEO files the award with the county court, issues the writ of control and attempts recovery of the monies owed from the respondent. See <https://www.gov.uk/government/publications/form-ex727-i-have-an-employment-or-an-employment-appeal-tribunal-award-but-the-respondent-has-not-paid-how-do-i-enforce-it> (last visited 22 January 2020).

²⁸⁹ See Employment Tribunals Act 1996 s 15(2). The rate of enforcement of awards in Scotland is still very low. Department for Business, Innovation and Skills research shows that just 26% of those who had not been paid, without using enforcement, took the step of engaging a Sheriff Officer to enforce the award: see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf at p 6. One explanation of this low uptake could be that the cost of using the services of a Sheriff Officer is significantly higher than the cost of parallel mechanisms in England and Wales. We are grateful to the President of Employment Tribunals (Scotland) for drawing our attention to this issue.

- 8.74 We are nevertheless convinced that more could be done to streamline the interface between employment tribunals and the county court's enforcement mechanisms. We do not think that it should be necessary for the claimant to have to engage with the county court directly. We suggest that a fast track for enforcement could be created which allows the claimant to do less and to remain within the employment tribunal structure when seeking enforcement. We also agree that more needs to be done to inform claimants, in clear and accessible language, about how awards could be enforced, and note the Government's work in this area. In particular, we think it would be sensible, once a more streamlined structure is created, for more clearly signposted information on how to enforce awards to be sent with judgments to successful claimants.²⁹⁰
- 8.75 We also think it is possible that the existing BEIS penalty scheme could be extended. It currently relies on claimants to apply to be included in the scheme. Its reach and efficacy could be increased if it were triggered automatically by the issuing of a tribunal award, rather than being reliant on an application. As was suggested by the Institute of Employment Rights, a notice could be sent with the judgment, informing an employer that if it does not pay the award by a set date, it will be subject to a financial penalty. The employment tribunal would also have to provide a copy of the judgment to the enforcement team. Some involvement by the claimant would inevitably be necessary, as the claimant would need to report that the award had not been paid. Nonetheless, it would decrease the administrative burden for the claimant.
- 8.76 We appreciate that making this change would have resource implications both for the tribunal and for the enforcement body, whether that is BEIS or a newly constituted organisation. How easy it is to achieve will depend largely on how easy it is to transfer data about cases from the employment tribunal to the enforcement team. Thought would also have to be given to how to ensure that claimants' data was processed in accordance with data protection law. Instead of making a concrete recommendation therefore, we are recommending that the Government investigate the possibility of extending the scheme.
- 8.77 Extending the reach of the scheme would also increase the quality of information that BEIS holds in relation to the payment of tribunal awards, thereby improving the effectiveness of BEIS's scheme for naming of employers who have failed to pay.

²⁹⁰ Information on how to enforce awards is already sent to claimants by means of a reference in the covering letter sent with the judgment to the further information available on enforcement in booklet T426. A link to an online version of the booklet is provided in the covering letter. See <https://www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426>.

Recommendation 21.

8.78 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.

8.79 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.

Chapter 9: The Employment Appeal Tribunal's jurisdiction

- 9.1 The principal function of the Employment Appeal Tribunal (“EAT”) is to hear appeals on questions of law from decisions of employment tribunals.²⁹¹ It also has:
- (1) a limited jurisdiction to hear appeals on points of law from certain decisions of the Central Arbitration Committee (“CAC”) and the Certification Officer;²⁹² and
 - (2) a very rarely invoked original jurisdiction, which is essentially to impose penalties (fines) on organisations which fail to comply with certain workforce democracy or employee participation requirements derived from EU law.
- 9.2 Our consultation paper considered one current limitation of the EAT’s jurisdiction in respect of the CAC and its original jurisdiction in respect of penalties.²⁹³ We did not ask any questions regarding the mainstream work of the EAT of hearing appeals on questions of law from employment tribunals.

APPEALS FROM THE CENTRAL ARBITRATION COMMITTEE TO THE EMPLOYMENT APPEAL TRIBUNAL

- 9.3 The CAC’s original functions were limited to arbitrations in collective disputes. Since 1999 it has been given a significantly expanded remit, considering applications relating to statutory trade union recognition and derecognition procedures for collective bargaining purposes (“trade union recognition and derecognition”).²⁹⁴ It also deals with applications and complaints under a wide range of regulations which contain obligations regarding employee engagement deriving from EU law.²⁹⁵ The EAT has jurisdiction to hear appeals from the CAC’s decisions relating to these obligations.²⁹⁶

²⁹¹ The appellate jurisdiction of the EAT derives from the Employment Tribunals Act 1996, s 21, and Trade Union and Labour Relations (Consolidation) Act 1992, ss 9(1), (2), (4), 45D, 56A, 95, 104, 108C, 126(1) and (3).

²⁹² We briefly summarise the CAC’s functions below. We outlined the functions of the CAC and the Certification Officer in more detail in the consultation paper: Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 7.1 to 7.13.

²⁹³ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, ch 7.

²⁹⁴ See the Trade Union and Labour Relations (Consolidation) Act 1992, Schedule A1.

²⁹⁵ The Information and Consultation of Employees Regulations SI 2004 No 3426; the Transnational Information and Consultation of Employees Regulations SI 1999 No 3323; the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations SI 2009 No 2401; the European Cooperative Society (Involvement of Employees) Regulations SI 2006 No 2059; the Companies (Cross-Border Mergers) Regulations SI 2007 No 2974.

²⁹⁶ The Information and Consultation of Employees Regulations SI 2004 No 3426, reg 35(6); the Transnational Information and Consultation of Employees Regulations SI 1999 No 3323, reg 38(8); the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations SI 2009 No 2401, reg 34(6); the European Cooperative Society (Involvement of Employees) Regulations SI 2006 No 2059, reg 36(6); the Companies (Cross-Border Mergers) Regulations SI 2007 No 2974, reg 57(6).

- 9.4 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 (a specialist court within the Queen's Bench Division of the High Court). In the consultation paper, we sought views on whether the EAT should be given jurisdiction to hear appeals from the CAC in trade union recognition and derecognition disputes. We noted that there was some support for this amongst stakeholders. Our provisional view was that if the EAT was given appellate jurisdiction in this area, it should be confined to issues of law. We asked consultees whether they agreed.²⁹⁷
- 9.5 We suggested that an appeal to the EAT may be considered a more suitable way of reviewing the legality of the CAC's decisions than a judicial review, given that these functions of the CAC are quasi-judicial.²⁹⁸ However, we also noted an observation of Buxton LJ in *R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee*, which it is useful to repeat:
- I would also venture to endorse in strong terms what was said by the judge [Elias J] in paragraph 23 of his judgment, that the CAC was intended by Parliament to be a decision-making body in a specialist area, that is not suitable for the intervention of the courts. Judicial review, such as is sought in the present case, is therefore only available if the CAC has either acted irrationally or made an error of law.²⁹⁹
- 9.6 We questioned whether giving the EAT jurisdiction over the CAC's trade union recognition decisions would lead to more or less "intervention of the courts".

Consultation Question 51: (First part): Should the EAT be given appellate jurisdiction over the CAC's decisions in respect of trade union recognition and derecognition disputes?

- 9.7 Forty consultees answered this consultation question. Just over half – 23 – thought that the EAT should be given appellate jurisdiction over the CAC's decisions in respect of trade union recognition and derecognition disputes. Sixteen consultees, including the CAC, argued that the EAT should not be given appellate jurisdiction in this area. The EAT judges also responded to this question; they did not consider it appropriate to express a view, but saw "the force of points made on behalf of the CAC".

²⁹⁷ See Employment Law Hearing Structures (2018) Consultation Paper No 239, paras 7.14 to 7.17.

²⁹⁸ The CAC observed in its *Tailored Review report 2017*, that "despite its name the CAC does not function as a committee, and neither is it exactly a court. It could best be described as a first-tier tribunal, with a quasi-judicial function." See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682256/central-arbitration-committee-tailored-review-2017.pdf (last visited 22 January 2019) p 5.

²⁹⁹ *R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee* [2002] EWCA Civ 512, [2002] IRLR 395 at [2]. This view was echoed by Underhill LJ in *Lidl v CAC & GMB* [2017] EWCA Civ 328, [2017] ICR 1145.

Arguments in favour of giving the EAT appellate jurisdiction over the CAC's decisions in respect of trade union recognition and derecognition

Expertise of the EAT

9.8 Consultees thought that since the EAT, as a specialist employment tribunal, has expertise in substantively similar issues, including other types of trade union claim, it makes sense for the EAT to have appellate jurisdiction over the decisions of the CAC regarding trade union recognition and derecognition. For example, the Manchester Law Society commented:

Given the issues to be determined by the CAC, whilst accepting its specialist status, it has always been an anomaly that the only right of review in disputes of this type is by way of public law in the form of an application for a judicial review....

The likely subject matter of any initial determination of the CAC in the area of recognition and derecognition relating to issues such as the bargaining unit sits easily within the specialist knowledge of the EAT. In determining matters of law the EAT will be asked to deal with familiar legislation, terminology and practice.

9.9 They added that the exclusion of appeal jurisdiction over the recognition and derecognition decisions of the CAC was anomalous when considered alongside the EAT's appellate jurisdiction over other decisions of the CAC. Cloisters and Lewis Silkin LLP expressed a similar view.

9.10 Some consultees contrasted the expertise in employment law of judges in the EAT with the less specialist knowledge of judges in the civil courts. For example, the Employment Lawyers Association ("ELA") observed:

The EAT has expertise in matters relating to collective disputes as it hears appeals relating to collective redundancy consultation, inducements relating to collective bargaining (notably *Kostal v Dunkley* [2018]), trade union membership and activities An Administrative Court judge ... may have no knowledge of the reality or politics of collective bargaining and industrial relations generally as well as recognition disputes.

The cost disadvantage of judicial review

9.11 A number of consultees, such as the Equality and Human Rights Commission, the Institute of Employment Rights and Lewis Silkin LLP, identified the cost of judicial review as making it unsuitable in this context, potentially deterring unions from challenging the decisions of the CAC. For example, the Equality and Human Rights Commission described judicial review as "a costly and time-consuming process, with significant costs risks if the trade union is unsuccessful". Similarly, the Institute of Employment Rights said that "the costs rules in judicial reviews make this avenue a poor one for challenging CAC decisions".

9.12 Lewis Silkin LLP also pointed out that, in this context, judicial review operates in a similar way to an EAT hearing, suggesting that in this respect giving the EAT appellate jurisdiction would not amount to a drastic change. This, they explained, is because:

The formal judicial review process is not suited to how the appeals happen in practice. Although the CAC is technically the respondent to the appeal, it has a

general policy of not intervening in or appearing at the hearing. This means that the judicial review hearing is run in practice in the same way as an EAT hearing, with the two parties represented rather than the CAC.

Arguments against giving the EAT appellate jurisdiction over the CAC's decisions in respect of trade union recognition and derecognition

- 9.13 Sixteen out of 40 consultees thought that the EAT should not be given appellate jurisdiction over the CAC's decisions in respect of trade union recognition and derecognition. One of those consultees was the CAC, which gave a detailed response outlining its reasons for rejecting an extension of the EAT's jurisdiction in this context. Summarising its overall position, it stated that:

It is the view of the CAC that judicial review is an appropriate safeguard in relation to the CAC misdirecting itself in law and should remain as the sole means of legal challenge.

Expertise of the CAC

- 9.14 The CAC highlighted its expertise in the realm of industrial relations, as a "specialist non-departmental body sitting outside the legal framework for tribunals":

Section 260(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 explicitly recognises this and states that the Secretary of State may appoint as members of the CAC only persons experienced in industrial relations The High Court and Court of Appeal have consistently and repeatedly acknowledged the specialist nature of the CAC – a specialist body in a specialist area – and have deferred to it when issues of industrial relations have been raised.

- 9.15 This point of view was supported by consultees such as GMB, who told us that:

The decisions of the CAC turn on the application of a high degree of specialist experience alongside knowledge of a particular application that will arise through Panel discussions and any hearings.

- 9.16 Accordingly, the CAC viewed the prospect of an increase in judicial intervention in their decisions as undesirable, and contrary to what it considered as the clear intention of Parliament at the time the CAC was created.

Uniqueness of the CAC's functions in relation to trade union recognition and derecognition

- 9.17 The CAC also emphasised that its functions in relation to trade union recognition and derecognition applications (particularly its duty to facilitate agreement between the parties) are fundamentally different in kind from any other area of employment law. So too are the unique procedures for the applications (consisting of multiple stages with short time limits). It regarded trade union recognition and derecognition applications and procedures as so different from other areas of employment law as to fall outside the EAT's expertise:

Our other jurisdictions with a right of appeal to the EAT are similar to some of the employment tribunal jurisdictions concerning collective rights. It is thus appropriate for those other collective rights to be heard on appeal in the EAT, but not the Schedule A1 decisions. For example, the exercise of gauging likely support for

recognition or de-recognition within 10 days after the receipt of the application for recognition or de-recognition, which is a pre-requisite of the application being able to proceed, has no parallel in other areas of employment law and is outside the expertise of the EAT.

Our dual duty both to facilitate agreement between the parties and decide disputes where necessary in recognition cases also marks out our function in recognition and derecognition cases as different, and requires us to engage constructively with both sides during the application process.

- 9.18 Other consultees, such as the Trades Union Congress (“TUC”), Unite and GMB, echoed this sentiment. For example, GMB commented:

No other area of employment law has to act with such speed and deal with a subject matter that is outside the expertise of the Employment Appeal Tribunal.

- 9.19 The CAC explained why speed is particularly important in trade union recognition and derecognition cases:

An application for recognition or de-recognition of a trade union by an employer is a process with a number of stages Each decision point is, theoretically, open to challenge

Many of the recognition and derecognition provisions are governed by tight statutory deadlines – typically 5 or 10 working days from receipt of information or application. The specification in Schedule A1 of tight time limits for CAC decisions acknowledges the importance for efficiency and speed in the process to avoid the problems of the precursor legislation in the 1970s.

Importance of adequately deterring tactical and frivolous claims

- 9.20 In the light of these tight statutory deadlines, the CAC expressed concern that without adequate deterrence, claims could be used tactically to cause delays and derail valid applications so as, for example, to “sway the democratic mandate in a borderline case around majority support or to re-engineer the composition of the bargaining unit”. GMB considered that delays in this context are:

... not neutral and will favour the employer since the consequence is that the unions’ recognition campaign will likely lose momentum as the process is delayed.

- 9.21 The CAC considered that the fees and stringent procedural requirements applicable to judicial review applications “deter many hopeless challenges” and tactical and spurious appeals. It argued that the no-costs jurisdiction and procedure of the EAT, on the other hand, would be insufficient to deter such appeals, and could actually encourage parties “to bring an appeal for the sake of it, delaying the swift and voluntary resolution of collective disputes”. Other consultees, such as the National Education Union and the TUC, agreed.

Importance of preserving flexibility and informality

- 9.22 Consultees emphasised the efficacy of the flexible and informal approach taken by the CAC. Many expressed concern that giving the EAT appellate jurisdiction could lead to

an increase in the number of challenges to the CAC's decisions, and that in consequence trade union recognition and derecognition procedures would become more legalistic and adversarial. In the CAC's view, a formal, legalistic and adversarial approach would be:

... contrary to the tradition of voluntarism that has long surrounded collective bargaining ... and [would] undermine our unique lack of formality, speed and focus on problem solving, that is so highly regarded by both sides of industry.

- 9.23 This view was expressly supported by consultees such as the Law Society of England and Wales, GMB and the TUC. GMB also said that a move to the EAT could “represent a move away from the voluntary approach to collective bargaining that has characterised the position in the UK”.

Suitability of judicial review in this context

- 9.24 This group of consultees considered judicial review to be the most suitable form of challenge to the CAC's decisions about recognition and derecognition. For example, the Law Society of England and Wales thought that judicial review was:

consistent with CAC's role as a specialist body sitting outside the system of domestic tribunals ... [its] experience of industrial relations representing workers/unions and employers respectively, and the nature of its procedures and the decisions which it makes.

- 9.25 Similarly, Unite said that the judicial review procedure effectively accommodates the CAC's procedures. Some consultees justified their preference in part because of their view that the judicial review procedure sufficiently deters frivolous and spurious claims, but also took into consideration the CAC's economical approach to judicial review challenges. The CAC confirmed that, under the system, if one of its decisions is the subject of a judicial review application, it “adopts a neutral stance unless matters fundamental to the CAC's operation are at issue” and continues its procedure “unless and until we are ordered by the court to desist”.

- 9.26 GMB noted that relatively few applications for judicial review are made, and even fewer are successful, which they viewed as indicating “that the CAC has used appropriate judgment and applied the law correctly”.³⁰⁰ They were not aware of any widespread dissatisfaction with the quality of the CAC's decisions, implying that there was no need for change. The National Education Union, TUC and GMB were concerned that giving the EAT appellate jurisdiction in this area, whilst appearing superficially beneficial by providing an additional route for a party who feels aggrieved by a CAC decision, could in fact undermine workers' right to freedom of association and their ability collectively to organise and bargain with their employers. GMB argued

³⁰⁰ They stated: “The CAC Annual Report of 2016/2017 for example noted that since the introduction of the recognition scheme in 2000 there had been over 1,000 applications for recognition made. As GMB understands it there have been very few judicial review applications – as of 2017 only 10 with 4 being successful (the Annual Report for 2017/2018 makes reference to a further 3 applications pending)”. The CAC's annual report for 2018/19 reports that these claims were dismissed at full hearings and does not mention any further judicial review litigation: see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/829538/CAC_Annual_Report_2018-19.pdf (last visited 20 November 2019).

that it would also undermine the intention of Parliament in making provision for trade union recognition and derecognition.

- 9.27 A final point made by the CAC was that, since it has jurisdiction which operates throughout England, Wales and Scotland, if a right of appeal to the EAT is introduced for trade union recognition and derecognition disputes in England and Wales, but not in Scotland, this would result in an undesirable disparity.

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

- 9.28 There were 22 responses to this part of Consultation Question 51. Twenty-one consultees broadly agreed that the appellate jurisdiction should be limited to appeals on questions of law and/or judicial review principles. One consultee disagreed but did not give specific reasons why.

- 9.29 Many of the consultees who agreed that, if the EAT were given appellate jurisdiction in this area, it should be limited to questions of law, proposed that it should mirror the EAT's existing process for appeals, as opposed to amounting to a complete rehearing. For example, Thompsons Solicitors stated:

We agree that the appeal should be limited to appeals on questions of law and so mirror the existing and familiar process for appeals from the employment tribunals.

- 9.30 Similarly, Lewis Silkin LLP argued that appeals should be limited to points of law "as opposed to opening wider labour relations questions up to appeal". It elaborated further:

The EAT's jurisdiction is already limited in this way in relation to appeals from the employment tribunals and in those areas in which decisions of the CAC may already be appealed to the EAT. The CAC should remain the specialist decision-maker in this area.

- 9.31 The Institute of Employment Rights argued that limiting the grounds of appeal to questions of law was important "in order to avoid the fate of the predecessors of the CAC".

- 9.32 The position of the CAC was that that any appeal jurisdiction "ought to be limited to pure questions of law using the same standards as [applied] in administrative law", including *Wednesbury* unreasonableness.³⁰¹ The CAC suggested that it was unclear whether an appeal to the EAT on a "question of law" would be different from the grounds for challenge in judicial review. It added:

If the intention is to alter the appeal criteria, more work should be done to explore what an "error or question of law" in the context of the trade union recognition and de-recognition procedure would mean in the EAT, as compared to the Administrative Court, given the considerable body of case law from the High Court and Court of Appeal providing a considerable margin of appreciation to the CAC's decisions.

³⁰¹ A concept developed in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 to mark the limits of judicial review in respect of administrative decisions not tainted by an explicit error of law. It is sometimes referred to as perversity or irrationality.

- 9.33 The National Association of Schoolmasters Union of Women Teachers (“NASUWT”) thought that an appeal to the EAT in this context should consider whether the CAC and Certification Officer had acted in a way that was unreasonable and disproportionate.
- 9.34 The Law Society of England and Wales expressed concern about the uncertainty and inconsistency which might arise from having two avenues of challenge to CAC decisions:

If the EAT were to be given appellate jurisdiction ... this should be limited to appeals on points of law given the specialist industrial relations expertise which underpins its decisions. That said, even this limitation would in our view be undesirable given the risk of uncertainty as to whether a challenge was truly one of law.

It is also not clear how a perversity/*Wednesbury* unreasonableness challenge would then operate. It would be undesirable in terms of certainty and consistency for there to be avenues of challenge to CAC decisions both to the EAT and the Administrative Court depending on whether the challenge was based on error of law or perversity.

Discussion

- 9.35 In the consultation paper we did not express any provisional view as to whether the EAT should be given appellate jurisdiction over the CAC’s decisions in respect of trade union recognition and derecognition. We offered a provisional view only to the extent of suggesting that, if the EAT was to be given such jurisdiction, the grounds for appeal should be confined to issues of law.
- 9.36 A small majority of consultees thought that the EAT should have appellate jurisdiction over the CAC’s trade union recognition and derecognition decisions and procedures, invoking the greater familiarity of the EAT judiciary with workplace issues. We have concluded, however, that these advantages are outweighed by the problems identified by the forty per cent of respondents who opposed extending the EAT’s jurisdiction. These included the CAC itself and the trade union respondents, who have experience of involvement in the procedures.
- 9.37 The first issue to consider in reaching a conclusion is the appropriate standard of review. We are entirely persuaded that review should continue to be confined to the judicial review standard for the reasons given by consultees and by Lord Justice Buxton in the *Kwik-Fit* case.³⁰²
- 9.38 We note the view expressed by consultees that there is very little difference between an appeal on a question of law and judicial review. To the extent that there is any difference, the EAT could be directed by statute to apply the principles of judicial review.³⁰³ The real question is whether it is better for this judicial review function to be retained by the Administrative Court or transferred to the EAT. We recognise that

³⁰² See para 9.5 above.

³⁰³ There is a precedent for this. Ss 15 to 19 of the Tribunals, Courts and Enforcement Act 2007 enable the Upper Tribunal to exercise judicial review jurisdiction and provision has been made for the Immigration and Asylum Chamber of the Upper Tribunal to hear certain judicial reviews of decisions made by the Home Office in the field of immigration.

trade union recognition and derecognition applications fit comfortably with the other areas of law within the EAT's remit and expertise, and that in contrast Administrative Court judges may lack the specialist knowledge of the EAT in matters relating to employment and the workplace.

- 9.39 However to create a judicial review jurisdiction within the EAT would require primary legislation to confer the jurisdiction and procedural rules to govern its exercise.³⁰⁴ These would need to include provision for the granting of permission to bring judicial review, such as exists both in the Administrative Court and the Upper Tribunal. A permission "filter" would in our view be essential in the light of the observations of Lord Justice Buxton in the *Kwik-Fit* case and consultees' concerns. These related both to the possibility of tactical and unmeritorious challenges and to risk of a culture of challenge leading to the CAC's processes becoming more legalistic and adversarial. Those of the EAT judiciary who were not already familiar with hearing judicial reviews would need to be trained in the substantive law and procedure.
- 9.40 As we have noted above, 19 years of decision-making by the CAC in respect of more than 1,000 applications in this field appear to have generated 13 applications for judicial review (an average of one every 18 months), of which only four have been successful. It could not be suggested that EAT judges would develop additional specialist expertise through handling a caseload of that order. It would in our view be disproportionate in the circumstances to undertake the considerable work required to transfer the jurisdiction over it to them.
- 9.41 In conclusion, we do not recommend that the EAT be given appellate jurisdiction over the decisions of the CAC in respect of trade union recognition and derecognition.

THE EMPLOYMENT APPEAL TRIBUNAL'S ORIGINAL JURISDICTION

- 9.42 The consultation paper also outlined the EAT's original (as opposed to appellate) 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.³⁰⁵ These penalties are payable to the Secretary of State and are subject to a maximum of £75,000 in each case apart from under the Transnational Information and Consultation of Employees Regulations (which concern European Works Councils), where the maximum is £100,000. Very few cases are brought under this jurisdiction. In 2017/18 and 2018/19, for example,

³⁰⁴ In the case of the transfer of judicial review functions to the Upper Tribunal in immigration cases, this was brought about by the Lord Chief Justice's Direction Regarding the Transfer of Immigration and Asylum Judicial Review Cases to the Upper Tribunal (Immigration and Asylum Chamber) pursuant to s 18(6) of the Tribunals, Courts and Enforcement Act 2007. The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008 No. 2698) contain nine rules relating to judicial review.

³⁰⁵ These regulations are the Information and Consultation of Employees Regulations SI 2004 No 3426, reg 22(6); the Transnational Information and Consultation of Employees Regulations SI 1999 No 3323, regs 20, 21 and 21A(5); the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations SI 2009 No 2401, reg 20(6); the European Cooperative Society (Involvement of Employees) Regulations SI 2006 No 2059, reg 22(6); the Companies (Cross-Border Mergers) Regulations SI 2007 No 2974, regs 53(6) and 54(5). See Employment Law Hearing Structures (2018) Consultation Paper No 239 Employment Law Hearing Structures (2018) Consultation Paper No 239, paras 7.19 to 7.22.

the EAT did not receive any such cases.³⁰⁶ We noted in our consultation paper that, to our knowledge, there had been no calls to remove or alter these areas of original 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. We asked consultees whether they agreed.³⁰⁷

Consultation Question 52: We provisionally propose that there is no need to alter or remove the EAT's current jurisdiction to hear original applications in certain limited areas. Do consultees agree?

9.43 All forty-two consultees who responded to this proposal agreed with it. Not all of them gave reasons for their agreement, but, among those who did, the general view was that there was no need for change and that change would not yield any benefits. ELA commented that the power is rarely used, but when it is used "the EAT remains the correct forum for such unusual applications". Lewis Silkin LLP cautioned against change in this area, commenting that:

Removal of the EAT's jurisdiction to hear applications that penalty notices should be issued would presumably mean that financial penalties would be dealt with by the CAC. This would not be appropriate as it would risk making cases at the CAC about financial issues rather than simply industrial relations. This would be counter-productive as the CAC is primarily about finding effective ways for parties to work together in future given the ongoing nature of relationships in labour relations as compared to most Employment Tribunal cases.³⁰⁸

9.44 NASUWT expressed their objection to the £75,000 limit on the penalty, arguing that it does not sufficiently deter non-compliance with the employee-participation provisions. They also commented on the importance of improving the legal framework governing collective bargaining, including the creation of an obligation on the part of employers to inform their workforce of the Information and Consultation of Employees Regulations. ELA also proposed that the EAT's jurisdiction be expanded to permit the hearing by EAT judges of employment tribunal claims which are of exceptionally high value or significance. These issues are outside the scope of this project.

Discussion

9.45 All forty-two respondents to this question agreed with our provisional view that there was no need to alter or remove the EAT's current jurisdiction to hear original applications in relation to penalty notices under the specified regulations. Accordingly, we maintain our original view, and do not recommend any changes to the law in this area.

³⁰⁶ EAT case figures provided by Ministry of Justice, Justice Statistics Analytical Services. In 2015, two complaints under the Information and Consultation of Employees Regulations were presented to the CAC; one of which was upheld, the other withdrawn. Research shows that the employee right to request Information and Consultation arrangements has rarely been used. The CAC reports about 20 such requests since these rights came into force. See BEIS, Good Work: The Taylor Review of Modern Working Practices: Consultation on measures to increase transparency in the UK labour market, <https://www.gov.uk/government/consultations/increasing-transparency-in-the-labour-market>, February 2018, p 32 (last visited 24 December 2019).

³⁰⁷ Employment Law Hearing Structures (2018) Consultation Paper No 239, para 7.21.

³⁰⁸ Lewis Silkin referred by way of example to para 171 of sch A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 and paras 41 and 69 of the CAC's decision in *ManpowerGroup* [EWC/15/2017].

Chapter 10: An employment and equalities list?

- 10.1 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 91 permanent judges or the large number of deputy High Court Judges, who may or may not have appropriate experience.³⁰⁹
- 10.2 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.³¹⁰ 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.
- 10.3 Some formal solutions include assigning certain types of cases to a particular Division by way of schedule 1 to the Senior Courts Act 1981, or creating a “specialist list” under rule 2.3(2) of the Civil Procedure Rules.³¹¹ Since employment and discrimination law are not currently in schedule 1, the Senior Courts Act 1981 would have to be amended by statutory instrument.³¹² We suggested in the consultation paper that these formal solutions risk being inflexible and raise problems of definition, given that any provision made by a statutory instrument or in the Civil Procedure Rules would have to cover a variety of situations.³¹³
- 10.4 Another method of encouraging allocation to judges with appropriate experience is for an informal specialist list of cases to be created within a Division of the High Court as an administrative measure. An example is the Media and Communications List in the Queen’s Bench Division, which is widely regarded as successful. This list is supervised by a High Court Judge who is a recognised specialist in the field and judges who sit on cases in the list are nominated by the President of the Queen’s Bench Division. Claimants bringing cases related to this field of work generally issue

³⁰⁹ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, para 8.2. See Courts and Tribunals Judiciary, *High Court judges* (2019), <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/high-court-judges/> (last visited 23 October 2019).

³¹⁰ See Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, paras 1.9 and 8.1. Judiciary of England and Wales, *Civil Courts Structure Review: Interim Report by Lord Justice Briggs*, December 2015, <https://www.judiciary.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf> (last visited 23 October 2019), para 3.62.

³¹¹ Where this is done, rule 30.5 of the Civil Procedure Rules makes provision for transfers to and from such a list.

³¹² S 61(3) of the Senior Courts Act 1981 allows the Schedule to be amended by the Lord Chief Justice with the concurrence of the Lord Chancellor. S 61(8) requires this to take the form of a statutory instrument which is laid before Parliament.

³¹³ We set out the topics that our consultation paper suggested that the list might cover, and discuss consultees’ further suggestions, later in this chapter.

them in the Media and Communications List, although they cannot be compelled to do so.³¹⁴

- 10.5 The provisional view we expressed in the consultation paper was that an informal specialist “employment” or “employment and equalities” list should be established within the Queen’s Bench Division. We invited consultees’ views on this proposal and the subject-matter that might be covered.

Consultation Question 53 (First part): We provisionally propose that an informal specialist list to deal with employment-related claims and appeals should be established within the Queen’s Bench Division of the High Court. Do consultees agree?

- 10.6 Of the 49 consultees who responded to this proposal, 35 agreed that an informal specialist list to deal with employment-related claims and appeals should be established within the Queen’s Bench Division of the High Court. Eight consultees disagreed with the proposal, while six consultees either did not give a definitive view or gave only conditional support for the proposal.

Arguments in favour of the establishment of an informal list to deal with employment-related claims and appeals

- 10.7 About 70% of respondents supported our proposal. Many of them emphasised that an informal list would enable cases to be heard by judges with relevant employment and discrimination law expertise and experience. The Employment Lawyers Association (“ELA”) noted that a 2015 survey of their members showed considerable support for discrimination and restrictive covenant cases to be heard by specialist judges, arguing that this would promote consistency in the application and interpretation of legal concepts in employment and discrimination law.
- 10.8 This group of consultees highlighted the practical benefits of an informal list, rather than amendment of the Civil Procedure Rules or the statute. For example, the Manchester Law Society commented that the avoidance of the need for legislation coupled with the non-binding nature of such a list make the proposal “simple” and “very useful”, and noted the success of informal specialist lists in other areas. Some consultees, like the Birmingham Law Society, emphasised the importance of flexibility, particularly in relation to urgent cases such as applications for injunctions.
- 10.9 Some consultees who supported an informal list outlined the possible challenges and disadvantages of a formal list. For example, Professor Owen Warnock (University of East Anglia) warned that:

A formal list would bring two unacceptable disadvantages, first it would cause real problems when an urgent injunction was sought and second it would create problems with boundary definitions as to whether the case is within or outside the criteria for the list.

- 10.10 Similarly, ELA said:

³¹⁴ See *Mezvinyski v Associated Newspapers Ltd* [2018] EWHC 1261 (Ch), [2018] FSR 28.

We can see that a formal solution such as a specific division or formal 'specialist list' could give rise to inflexibility and problems of definition, given the breadth of employment-related and discrimination-related claims that can be brought in the High Court. There may sometimes be no clear delineation between an employment claim and other related claims, particularly where a worker providing a service is claiming for unpaid sums and it is arguable whether or not she is an employee or worker, or an independent contractor. It could be problematic to try to draw a clear line in a statutory instrument.

- 10.11 ELA supported an informal list “supervised by a High Court Judge who is a recognised specialist in the field”, and the establishment of a user group to evaluate the operation of the list. The Institute of Employment Rights agreed that an informal list should be established, but emphasised that the list should be a “first step towards establishing a Labour Court”. The Council of Employment Judges (with whom Employment Tribunals (Scotland) agree) made a similar comment, but abstained from expressing a view on whether such an Employment and Equalities Court would be desirable.

Arguments against the establishment of an informal list to deal with employment-related claims and appeals

- 10.12 Of the eight consultees who disagreed with the proposal, only five gave reasons. Ann McKillop commented that it may attract “further costs to taxpayers”. Three consultees, Transport for London, the Law Society of Scotland and Jason Frater, rejected the proposal on the basis of their view that it is best that discrimination and employment matters are heard in employment tribunals, as opposed to the civil courts. Transport for London maintained that:

Employment-related claims and appeals should be dealt with by specialist judges who sit in the Employment Tribunal and who have the appropriate knowledge, experience and expertise to hear such claims, rather than by judges from an informal specialist list within the Queen’s Bench Division.

- 10.13 Countrywide plc considered that an informal list could create unnecessary issues of demarcation between employment tribunals and the High Court:

We feel that this would blur the boundaries between the different court systems, and create another layer of appeal which in our view is unnecessary. Whilst there are some benefits to having an Employment law specialist on certain claims in the High Court, we would not want to open this up to other claims.

Views expressed by consultees who neither definitively supported or rejected the proposal

- 10.14 Six consultees either did not definitively support or reject the proposal, or only expressed conditional support for the proposal. For example, Roy Carlo would only support the proposal if the jurisdiction of employment tribunals is not extended.
- 10.15 The Employment Appeal Tribunal (“EAT”) judges’ support depends on what kind of claims and appeals are included in the list. They did not favour a list which dealt with employment appeals as well as first instance employment related claims and non-employment related discrimination appeals; they were concerned that this would in effect merge the EAT with a new list in the High Court, reducing the status of the EAT as an appellate court and diminishing its expertise and efficiency. We emphasise that

our proposal was not intended to include bringing appeals from employment tribunals into the new list. The EAT judges did support the creation of an informal specialist list in the Queen's Bench Division for employment related claims and non-employment discrimination appeals. They thought that the judges hearing cases in the list should include all specialist judges authorised to sit in the EAT. That was in line with what we had in mind when making our provisional proposal.

10.16 The Council of Employment Judges saw the proposal as a matter for the High Court judiciary, but said they would support the High Court judges if they decided to introduce the list. The employment judges also suggested that employment and equalities specialist judges could train together, as judges in the Family Court do:

Training in the Family Court is organised such that Lady and Lords Justice, High Court Judges, Circuit Judges, District Judges, Recorders and Deputies train together. We would welcome all levels of Employment and Equalities Judges train together: Lady and Lords Justice, EAT Circuit Judges, Employment Judges, salaried and fee paid. Indeed, the Family Court functions impressively as a unit, with Judges at all levels collaborating in projects, for example early neutral evaluation in divorce. This cannot quite be said at present of the Employment and Equalities jurisdiction.

10.17 The National Association of Schoolmasters Union of Women Teachers emphasised the importance of giving employees and workers access to justice and the ability to seek redress, and emphasised that no change should jeopardize the rights of individuals. They did not expressly support or reject the proposal, but viewed "the tripartite and industrial-jury nature of employment tribunal panels [as] an important component of an effective employment tribunal system" and objected to employment cases being heard by only one judge. They made additional comments advocating the introduction of "a single worker test to determine access to all statutory employment rights, based on the presumption that everyone has access to such rights by default".

(Second part): If a list is created, what subject matter should come within its remit?

10.18 There were 17 responses specifically to this part of the question. Views varied as to what subject matter should come within the scope of the informal list. ELA, Unite and the EAT thought that all the claims which we listed in the consultation paper should be included.³¹⁵ These were:

- (1) employees' claims for wrongful dismissal in breach of contract where the sum claimed exceeds the limit on tribunals' jurisdiction under the Extension of Jurisdiction Order, at present £25,000;³¹⁶
- (2) employers' claims to enforce covenants in restraint of trade;
- (3) employers' claims for breach of confidence or misuse of trade secrets;
- (4) employers' claims against trade unions for injunctions to prevent industrial action or for damages following what is alleged to be unlawful industrial action;

³¹⁵ Employment Law Hearing Structures (2018) Law Commission Consultation Paper No 239, para 8.5.

³¹⁶ Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, art 10.

- (5) appeals from the county court in claims for discrimination in goods and services; and
- (6) appeals from the county court in employment-related cases.

10.19 In addition to these, Unite supported there being “a discretion to include other employment and discrimination cases on application of one of the parties”.

10.20 Some consultees selected specific claims and appeals from the list given above as appropriate for the list. For example, the Manchester Law Society was in favour of including the claims at (1) to (4) above and Slater and Gordon supported including the claims at (1) and (2). A number of other consultees referred to claims (1) to (4) in their responses.

10.21 Some consultees suggested additional employment-related matters as being suitable for inclusion. The Employment Law Bar Association suggested that the list should cover “employment-related claims” including:

... “employee competition” cases, such as team moves, garden leave cases, restrictive covenant cases, breach of contract and confidential information cases in an employment context.

10.22 Similarly, the Bar Council suggested that the list should include “all claims for interim relief and injunctive relief including, for example, in cases concerning restrictive covenants of employees, misuse of confidential information by employees or team moves”. Other consultees also referred to restrictive covenants³¹⁷ and breach of contract claims in their responses. With regard to the latter, Peninsula suggested that breach of contract claims which arise during the subsistence of employment should be included in the list, and the Institute of Employment Rights suggested that any contractual dispute involving workers should be included.

10.23 Some consultees, such as Birmingham Law Society and the President of Employment Tribunals (England and Wales) and the Regional Employment Judges (joint response) (with whom the President of the Industrial Tribunal and Fair Employment Tribunal (Northern Ireland) agrees), endorsed the language used in the consultation question: “employment-related claims and appeals”. The Bar Council stated that the list should cover:

All cases in which the substantive legal rights in question concern an employee or worker (for example employment rights in the Equality Act 2010, Employment Rights Act 1996 or TUPE Regulations to name a few examples) and in which this requires consideration over and above ordinary common law principles of contract and tort whether as a matter of fact or law. The mere fact that a dispute is between an employer and employee ought not to merit inclusion in this list; the substantive dispute is the key.

10.24 With regard to discrimination, consultees made both specific and general suggestions as to the subject matter within the remit of the list. Some consultees used the broad categories of “discrimination cases” and “equalities claims”. Two consultees specified

³¹⁷ Thompsons Solicitors.

that equal pay claims should be included. There was some controversy over whether appeals from the county court in claims for discrimination in goods and services (item (5) in the list at paragraph 10.18 above) should be included in the list. Slater and Gordon and the Institute of Employment Rights expressly thought that such appeals should be included, and Thompsons Solicitors supported the inclusion of “non-employment discrimination claims”. ELA said that:

Given that many key concepts of discrimination law apply equally in the employment sphere and the provision of goods and services, it is strongly preferable that these concepts should be interpreted and applied consistently and with understanding of the impact on the other area of law Equally, legal principles specific to employment contracts and the unequal bargaining strength between employer and employee mean that specialist experience is also advantageous in cases concerning restrictive covenants, confidential information and breach of contract as well as matters involving industrial action.

10.25 Birmingham Law Society, on the other hand, thought it:

... less obvious that appeals from goods and services discrimination cases should be covered by the same list. Most employment law cases heard in the High Court are not about discrimination, while there are discrimination cases heard by a range of other High Court judges, in areas such as housing, education and public law.

10.26 Other types of claim mentioned by consultees include: any subjects which fall within the jurisdiction of employment tribunals;³¹⁸ appeals from the Pensions Ombudsman and pensions cases;³¹⁹ and industrial action and other forms of protest, and trade union matters.³²⁰

10.27 Two consultees thought judicial review applications should be within the remit of the list. Thompsons Solicitors referred to judicial review applications with an employment or discrimination focus,³²¹ and the Institute of Employment Rights referred to judicial review claims on the public-sector equality duty and judicial reviews in employment law more generally.

10.28 ELA noted that some of its members, predominantly those acting for trade unions, specifically opposed the hearing by judges of both employment and industrial action cases (such as applications by employers for injunctions to prevent industrial action, or for damages following what is alleged to be unlawful industrial action). They were concerned that, because of the perception of industrial action cases as “political”, the judges determining these cases could be perceived as biased by one side or the other. Other members thought that the benefits of specialist expertise outweighed the small risk of such a perception.

³¹⁸ Peninsula.

³¹⁹ Thompsons Solicitors.

³²⁰ Institute of Employment Rights.

³²¹ They gave the example of *R (Fire Brigades Union) v South Yorkshire Fire and Rescue Authority* [2018] IRLR 717.

Discussion

- 10.29 The majority (70%) of consultees supported the establishment of an informal specialist list for employment-related claims and appeals within the Queen’s Bench Division. We agree with their emphasis on the value of enabling cases to be heard by judges with relevant expertise and experience. Consultees supported our provisional view that a formal statutory allocation of jurisdiction or list risks being overly rigid and raises problems of definition, with some consultees highlighting the importance of flexibility, particularly in relation to applications for injunctions. It was widely considered that an informal list would provide sufficient flexibility and has proven successful in other contexts.
- 10.30 A small number of consultees objected to an informal list on the basis of the view that discrimination and employment-related claims and appeals should be heard in employment tribunals, as opposed to the High Court. We considered earlier in this paper whether the civil courts’ jurisdiction over various employment and discrimination-related matters should be transferred exclusively to employment tribunals, ultimately deciding not to make such a recommendation.³²²
- 10.31 We have concluded that where discrimination and employment-related claims and appeals come before a judge in the High Court, as is currently the case, it is desirable that, where possible, that judge has relevant expertise and experience. We agree with consultees that an informal list could be an effective mechanism to facilitate the assignment of specialist judges to appropriate cases. The deployment of specialist judges in the High Court would complement and supplement the flexible deployment of suitably qualified employment judges to hear non-employment discrimination claims in the county court, which we have recommended in chapter 3.³²³ We suggest that all EAT judges who are High Court or section 9 judges should sit on the list.³²⁴
- 10.32 As regards the types of matter to be included in the list, we reiterate that the creation of the list would not transfer or alter any substantive jurisdiction so as to create any new avenue of appeal or diminish the role of the EAT. By “employment-related claims and appeals” we meant only those claims and appeals which can already be brought in the High Court.
- 10.33 There was broad support for inclusion of the types of the claim that we listed in the consultation paper (see paragraph 10.18 above), with more support for including the employment-related items (particularly items (1) to (4)) than for the inclusion of discrimination appeals in non-employment cases (item (5)), which one consultee expressly opposed. We nevertheless take the view that, at High Court level also, judges with expertise in employment law are well equipped to hear other discrimination cases as a result of their experience of discrimination law in the employment law context.

³²² See chs 3, 6 and 7.

³²³ See para 3.107 above.

³²⁴ Section 9 judges are those selected for authorisation to act as judges of the High Court under section 9(1) of the Senior Courts Act 1981. Circuit judges, recorders and certain tribunal judges are eligible.

10.34 Following consultees' suggestions, we conclude that our list should be expanded to include equal pay claims to the extent that they are litigated in the High Court and any claims arising in "employee competition" cases, such as team moves and garden leave. We do not consider it appropriate to include applications for judicial review; these involve the application of public law principles and are formally assigned to the Administrative Court; we leave it to the judiciary to consider whether to include litigation relating to workplace pensions, which may more appropriately be heard in the Chancery Division.

Recommendation 22.

10.35 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.

Recommendation 23.

10.36 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.

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

10.37 There were 47 responses to this consultation question. Twenty-two consultees thought that the list should be called the "Employment and Equalities List". Five consultees preferred the "Employment List". Seven consultees thought the list should

have some other name, nine consultees did not have a firm view, and four consultees selected “other” but did not specify what the name should be.

Employment and Equalities List

10.38 Most of the consultees who preferred the name “Employment and Equalities List” thought that it would adequately indicate the scope of the list (thereby indirectly expressing support for the inclusion of non-employment discrimination, though some acknowledged that whether this name would be appropriate would depend on which types of claim and appeal are within the remit of the list). For example, ELA said:

The name should reflect the remit of the list. Assuming this will include discrimination in goods and services, we consider that "Employment and Equalities List" is an appropriate name.

10.39 Similarly, the EAT judges commented:

Although the name ‘Employment List’ would probably reflect the vast majority of work undertaken in this area, it may be that if non-employment discrimination appeals are to be included, the name ‘Employment and Equalities List’ would better reflect the broader scope of work potentially included.

Employment List

10.40 Five consultees thought that “Employment List” would be a better name. Peninsula, for example, favoured this name on the basis that:

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

10.41 The Bar Council acknowledged that not all cases will involve “employees” as a matter of strict interpretation, but nevertheless favoured “Employment List” for brevity.

Other names

10.42 Some consultees suggested alternative names, and others stated that they were not sure what the name should be since it depends on what types of case are incorporated within its remit. The Law Society of England and Wales stated that the name “should accurately reflect how the list works”. One consultee commented that it depends on what jurisdiction is given to the High Court. The Council of Employment Judges viewed the name as being a matter for their High Court colleagues. Some examples of the alternative names suggested by consultees are:

(1) Workforce and Equalities List;³²⁵

(2) Employment and Equality List;³²⁶

³²⁵ Hannah Dahill.

³²⁶ Professor Owen Warnock.

- (3) Equalities List;³²⁷
- (4) Labour law and Equalities List;³²⁸
- (5) Employee Competition List;³²⁹ and
- (6) Employment, Equalities and Professional Misconduct List.³³⁰

10.43 One consultee, Jo Chimes, thought that there should be an employment list and a separate equality list, the latter of which would cover “services, work, public functions etc”. She objected to having a combined Employment and Equalities List on the basis that this:

... would continue the 'erasure' of the importance of claims made under the Equality Act that are not about employment: they should be treated with due seriousness and given their own weight and importance.

Discussion

10.44 In the light of our discussion and recommendations in relation to Consultation Question 53, coupled with the views of consultees in relation to this question, we record our view that the “Employment and Equalities List” is the best name for the list. As consultees highlighted, it is important the name reflects the scope of the list, and this name makes it clear that the list includes both employment matters and also non-employment discrimination and other equality law matters. We do not think there should be separate lists for employment cases and other discrimination cases, since many cases have both aspects.

³²⁷ Cloisters. This was based on the view expressed in their response to Consultation Question 53 that a specialist list would be appropriate for equalities claims.

³²⁸ Institute of Employment Rights.

³²⁹ Employment Law Bar Association.

³³⁰ National Education Union.

Chapter 11: Recommendations

Recommendation 1.

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

Paragraph 2.58

Recommendation 2.

11.2 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 2.96

Recommendation 3.

11.3 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.

11.4 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.

11.5 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.

11.6 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.

11.7 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.

11.8 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.

11.9 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.

11.10 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.

11.11 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.

11.12 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.

11.13 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.

11.14 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.

11.15 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.

11.16 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.

11.17 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.

11.18 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.

11.19 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.

11.20 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.

11.21 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.

11.22 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.

11.23 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

Appendix 1: List of consultees

Name	Organisation	Sector
Anonymous		Individual
Arnold, James	Outer Temple Chambers	Legal practitioner
Association of Her Majesty's District Judges		Judiciary
Birmingham Law Society		Legal practitioner
British Telecommunications plc		Company
Bunting, John W		Individual
Carlo, Roy	Sugiyama & Co	Legal practitioner
Central Arbitration Committee		Judiciary
Chartered Institute of Legal Executives		Legal practitioner
Chimes, Jo		Individual
Cloisters		Legal practitioner
Council of Employment Judges		Judiciary
Council of Tribunal Members Associations		Judiciary
Countrywide plc		Company
Cribbin, Stephen		Individual
Cudbill, Holly	Blake Morgan LLP	Legal practitioner
Dahill, Hannah	Morgan LaRoche	Legal practitioner
Disability Law Service		NGO
Doyle, Fiona	Harsco	Company
Dunning, Jonathan	UNISON Norfolk County Branch	Trade union
Employment Appeal Tribunal Judges		Judiciary

Name	Organisation	Sector
Employment Law Bar Association		Legal practitioner
Employment Lawyers Association		Legal practitioner
Employment Tribunals (Scotland)		Judiciary
Equality and Human Rights Commission		Public body
Frater, Jason	JF Legal Services Ltd	Legal practitioner
General Council of the Bar of England and Wales (Bar Council)		Legal practitioner
Judge Garnon, Tudor Mansel	Employment Tribunal	Judiciary
Gleave, Mary	Suffolk New College	Academic
GMB		Trade union
Hilsdon, Linda		Individual
Institute of Employment Rights		NGO
JUSTICE		NGO
Law Society of England and Wales		Legal practitioner
Law Society of Scotland		Legal practitioner
LawWorks		NGO
Lewis Silkin LLP		Legal practitioner
Liverpool Employment Tribunals Members Association		Judiciary
Liverpool Law Society Employment Law Committee		Legal practitioner
Manchester Law Society		Legal practitioner
McKillop, Ann	Henderson Group	Company
McWilliams, Mark	Archon Employment Solicitors	Legal practitioner
Membury, Rona		Individual
Meritt, Rebecca		Individual

Name	Organisation	Sector
Moolenschot, Cheryl	Employee Management Ltd	Company
National Association of Schoolmasters Union of Women Teachers		Trade union
National Education Union		Trade union
Judge O'Rourke, Colm	Employment Tribunal	Judiciary
Orpington Constituency Labour Party		Political organisation
Owen, Angharad Ellis	Greene & Greene	Legal practitioner
Peninsula		Company
Perkins, Colin	PSM HR Outsourcing	Company
Pinsent Masons		Legal practitioner
Pregnant then Screwed		NGO
President of Employment Tribunals (England and Wales) and the Regional Employment Judges (joint response)		Judiciary
President of the Industrial Tribunal and Fair Employment Tribunal (Northern Ireland)		Judiciary
Protect		NGO
Purcell, Louise	Whitehead Monckton	Legal practitioner
Judge Purnell, Chris	Employment Tribunal	Judiciary
Judge Rostant, Philip	Employment Tribunal	Judiciary
Shirley, Susan	Susan Shirley HR and Coaching	Individual
Slater and Gordon		Legal practitioner
Judge Sprack, John	Employment Tribunal	Judiciary
Thomas, David	Quay Legal	Legal practitioner
Thompsons Solicitors		Legal practitioner
Tonner, Billy		Individual

Name	Organisation	Sector
Trades Union Congress		Trade union
Transport for London		Public body
Unite		Trade union
Walder, Alice	Kew Law LLP	Legal practitioner
Warnock, Professor Owen	University of East Anglia	Academic
William, Dr Laura; Dr Paukstat, Dr Birgit; Corby, Professor Susan	Greenwich University	Academic

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