THE EXCLUSIVE JURISDICTION OF THE EMPLOYMENT TRIBUNALS

ELBA submission to the Law Commission's Consultation on Employment Law Hearing Structures

Introduction

ELBA is the specialist bar association for practitioners working in Employment Law. Its membership includes a number of fee-paid employment judges.

The response has been prepared by a team of members:

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Each practitioner has answered an allocated set of questions, taking into account the views canvased from other practitioners.

Response to Consultation

THE EXCLUSIVE JURISDICTION OF EMPLOYMENT TRIBUNALS

1. **We provisionally propose that employment tribunal's exclusive jurisdiction over certain types of statutory employment claims should remain? Do consultees agree?**

   We agree. We can see no merit in conferring concurrent or exclusive jurisdiction to the county court and/ or high court for statutory employment claims that currently rest with the employment tribunals. Employment judges and lay members sitting in the employment tribunals have built up significant knowledge and experience of these types of claims over the years. The employment tribunals are well placed to continue to provide the most appropriate forum for workers and employers to resolve disputes.

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?**

   In the current climate it is difficult to see an argument for maintaining the current 3-month time limit for the majority of statutory employment claims. Much has changed since these time limits were first imposed and, although there is still significant merit in retaining a

relatively short time limit for such claims, we are of the view that a 6-month time limit is now more realistic.

There are numerous arguments in favour of a short time limit, particularly the importance of witness' recollection of events and reliability of evidence which can often be extremely important given the nature of many claims brought before the employment tribunals.

However, claims are now often much more complex and of a higher financial value than they were when these time limits were first put in place. There is little to be gained from rushing a claimant to bring a claim within a short period of time, only for changes and clarifications to be needed later which may not have been required had more time been allowed for the claim to be brought.

Often claimants are required to commence proceedings prior to internal processes, such as an appeal against dismissal, being concluded. This often then causes delays in the claim being heard in any event and could have rendered the proceedings unnecessary.

With the level of claims before the employment tribunals and the current resourcing issues, most claims take many months to come to trial in any event.

With the current arrangements for extension of time under the ACAS early conciliation regime, the time limits for bringing a claim are often already extended significantly beyond the three month time limit. Revising the time limit to 6 months may also give rise to an opportunity to simplify the current extension provisions under that regime which are confusing to lay people and employment lawyers alike. A 6 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.

A 6 month time limit already applies to some statutory employment claims such as claims for redundancy payments under the ERA 1996 and claims for equal pay under the Equality Act 2010.

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?**

There can be little justification for retaining the 'not reasonably practicable' test for certain claims. It is often the case that multiple claims are brought in employment tribunal proceedings that arise out of the same facts. Where an individual wishes to claim discriminatory dismissal, they will bring a claim for discrimination under the Equality Act 2010 and a claim for unfair dismissal under the Employment Rights Act 1996. Where those claims are brought outside the statutory time limits, two separate tests apply to the question of

whether to extend time. This is confusing for claimants and the 'not reasonably practicable' test can often result in an unduly harsh decision being made against a claimant who otherwise would have good grounds for extending time under the 'just and equitable' test. The current test is arbitrarily inflexible.

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. On the current test, a claimant can be prevented from proceeding with a claim that was filed one day late where there is no prejudice to the employer. On balance therefore, we think that there is no longer any justification to retain this test and the 'just and equitable' test should apply to all claims.

RESTRICTIONS ON THE JURISDICTION OF THE EMPLOYMENT TRIBUNALS – DISCRIMINATION

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

   Yes. Non-employment discrimination claims currently before the county court can arise in many different scenarios. They will often involve other difficult questions of law in areas (eg landlord and tenant) that employment judges may not be so well equipped to deal with.

   Although there is no doubt that the county courts could benefit from the expertise of employment judges in determining claims of discrimination outside of the employment context, it is respectfully submitted that conferring jurisdiction upon the employment tribunals to hear such cases in their entirety would not be the appropriate approach.

5. **Should employment tribunals be given concurrent jurisdiction over non-employment discrimination claims?**

   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.

6. **If employment tribunals are to have concurrent jurisdiction over non-employment discrimination claims, should there be power for judges to transfer claims from one jurisdiction to the other?**
   If so, what criteria should be used for deciding whether a case should be transferred:
   (1) from county courts to employment tribunals; and/or
   (2) from employment tribunals to county courts?
   Should county courts be given the power to refer questions relating to discrimination cases to employment tribunals?

   For the reasons set out above, we consider there are a number of practical difficulties with transferring claims from one jurisdiction to another. We think this would be unworkable and inadvisable. If employment tribunals were to have concurrent jurisdiction over non-employment discrimination claims it would, in our view, be necessary for judges to have the power to transfer claims from one jurisdiction to the other as some cases may simply be unsuitable for hearing in the tribunal. 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 regimes?

   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.

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? If so, what form should this triage take?**

   We think that a triage system would be fraught with difficulty. Any triage process would need to be carried out by a judge. It is not a purely administrative task and could not easily be undertaken by tribunal or court staff. For the reasons set out above, we do not consider that this system of concurrent jurisdiction and having to triage cases is feasible or desirable.

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

   Yes. 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.

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?

Yes. It is considered appropriate for discrimination claims in the employment tribunals to be determined by a judge sitting with lay members. The same principles would be likely to apply to at least some allegations of discrimination in non-employment matters.

OTHER RESTRICTIONS ON THE JURISDICTION OF THE EMPLOYMENT TRIBUNALS

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?

Yes. There is no good reason to limit employee contract claims only to breaches of contract arising or outstanding on termination. ETs already have jurisdiction to determine claims for unauthorised deductions from wages 'during' employment. In doing so, the ETs are experienced in routinely construing complex contract terms to determine whether a quantified or quantifiable sum of wages was properly payable to the employee. Such claims are not subject to any statutory cap.

If during employment an employee wishes to bring claims for discrimination and breach of contract, this will require separate claims in the ET and CC/HC. Often the ET claim will need to be stayed pending determination of the civil claim where there is a material overlap of issues. This leads to delayed justice and increased costs for parties and HMCTS.

Currently employees are able to bring claims for breaches of the employment contract in the ET but workers cannot claim for breaches of the worker contract. This anomaly is irrational.

Presently, ETs do not have jurisdiction to assess damages for breach of contract based on the loss of a chance either during employment or upon its termination. Yet ETs routinely assess compensation for unfair dismissal by reference to the loss of a chance of a hypothetical or future event occurring. The ETs should have the ability to award any measure of damages for breach of contract.

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

Yes. The ET already has jurisdiction to deal with post-employment discrimination and detriment claims. There is no logical reason why ETs should not be able to adjudicate upon post-termination breach of contract claims. In cases where the same facts give rise to a post-termination discrimination/detriment claim and to a breach of contract, currently requires claimants to issue separate proceedings in the ET and CC/HC which causes delay and increased cost.

It is not logical for the ET to have jurisdiction to determine breach of compromise agreements where the agreement involved termination of employment but not have power to adjudicate

upon breaches of compromise agreements which do not arise upon termination but arise after termination and relate to past employment.

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

We agree. The problematic scenarios outlined at para 4.21 to 4.24 are frequently encountered by practitioners, such that the current cap is clearly unsustainable. The ETs have power to award uncapped compensation in discrimination, equal pay, detriment, automatically unfair dismissal and wages claims – all of which may also amount to a breach of a contractual term. The ETs have considerable expertise in dealing with claims running into the millions of pounds. These claims are no less, and often more, factually and legally complex than breach of contract claims.

13. What (if any) should the financial limit on employment tribunals' contractual jurisdiction be and why?

We suggest that there be no cap. The ETs have undoubted expertise and experience of determining extremely high value and legally complex claims, affecting thousands of claimants directly in the case of multiple claims and whole industries indirectly and the employment relationship generally. An uncapped breach of contract jurisdiction for ETs will substantially reduce the number of multi-forum employment termination claims. There will be a reduction in time and cost (to the parties and HMCTS) for the final determination of such disputes.

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?

We agree on the basis that this will simply continue the current position.

15. Do consultees agree that the time limit for an employee's claim for breach of contract under the Extension of Jurisdiction Order should remain aligned with the time limit for unfair dismissal claims? Should a different time limit apply if tribunals are given jurisdiction over claims that arise during the subsistence of an employee's employment?

We agree that the time limit for bringing a breach of contract claim should remain the same as that for unfair dismissal claims. These two types of claim are often presented and heard together.

We consider that there should not be different time limits for pre-termination contract claims compared with those arising or outstanding on termination. This would create further and unnecessary complexity.

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?

We agree. The jurisdiction of the ETs should not be extended to contractual personal injury claims. Whilst the ETs have expertise to award compensation for personal injury caused by the statutory tort of discrimination, the law and practice of personal injury claims by specialist personal injury lawyers dealing with distinct tortious claims (common law negligence and breach of statutory duties) is firmly established in the civil courts.

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?

We disagree. ETs can currently hear and determine contractual claims relating to employee benefits other than those relating to living accommodation. This is despite the fact that the ETs are very experienced in assessing compensation (including loss of living accommodation) following a dismissal which was discriminatory and/or unfair. Again, this anomaly leads to increased time and money being expended on such claims in both the ETs and civil courts. Claimants should be able to bring contractual claims for accommodation benefits in the normally no/low-cost jurisdiction of the ETs.

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?

We agree. The jurisdiction of the ETs should not be extended to contract claims relating to IP rights. Whilst the ETs have experience in making anonymity orders restraining publication of certain information and of making urgent continuation of employment contract orders following a whistleblowing dismissal, we consider that the complete and extensive jurisdiction of the civil courts is firmly established and should not be added to. In particular, the civil courts are experienced in enforcing breaches of injunction orders by way of committal proceedings.

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?

We agree. See response to Q18 above.

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?

We agree. See response to Q18 above.

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

We agree that such jurisdiction should be expressly given to ETs. It would be unwelcome and irrational for workers to not be accorded the same ability to litigate contract claims in the ETs.

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

We consider that there is no reasonable basis for any difference of approach as between employees and workers in relation to the matters raised in consultation questions 10 to 20.

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?

We agree. It is foreseeable that many such contractual disputes would be in essence disputes of professional negligence, or would concern issues of commercial or intellectual property law. While various of the statutory rights may be available to the self-employed who have worker status, we consider that to become a forum for self-employment disputes goes beyond the tribunal's central purpose of providing employment protection. There is no clear reason for the tribunal's limited resources to be allocated to these disputes nor for this litigation to be within the different costs regime provided by the tribunal.

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?

We agree. The tribunal procedure and costs regime is devised to provide employees with an accessible means of pursuing their complaints and to have them heard before an industrial panel. We do not consider that there is a like need on the part of employers to have a special procedure or forum for their complaints. We note that it is rare for employers to bring proceedings against employees, save for post-termination litigation, in relation to which there is developed High Court practice.

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?

We agree. We consider that the possibility of counterclaims could discourage employees to bring statutory complaints and thus have negative implications for access to justice. We also anticipate that employers may bring some counterclaims for tactical reasons, and with the effect of lengthening tribunal proceedings.

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?

Yes.

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

We consider that it should. This opens the way for tribunals to decide on discretionary bonuses which may in some sectors form a significant part of the employee's remuneration. We see no reason in principle why those employees should be put to High Court proceedings. We do not foresee difficulties in the tribunal considering such matters, both liability and quantum, as the tribunal already addresses these issues in cases where bonus is claimed as part of a discrimination complaint.

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

We consider that it should be able to decide this issue so that it can consider unlawful deductions issues in the round.

29. Should employment tribunals be given the power to apply setting off principles in the context of unauthorised deduction claims? If so:

(1) should the jurisdiction to allow a set off be limited to liquidated claims (i.e. claims for specific sums of money due)?

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

We do not consider that employers should be able to bring contractual counter-claims in response to statutory claims. We have concerns that that 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 s. 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 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.

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?

We agree. Health and safety has numerous specialist components which are outside the technical expertise of the tribunal.

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

We agree. Personal injury is another specialist branch of law outside the current expertise of the tribunal. Further, the personal injury protocol may not be easily transposed to tribunal practice: while the protocol assumes the parties are represented, the tribunal system is devised to enable unrepresented parties to participate without disadvantage.

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

We are not aware of any difficulties that have arisen as a result of the tribunal having this exclusive jurisdiction. As any claim is rooted in the employment relationship, we agree that it is sensible to retain this in the employment tribunal.

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 (or former employees and workers)?

We consider that they should not have such jurisdiction in relation to claims brought by employers, as such litigation is outside the central purpose of the employment tribunal. There is no clear reason why employers should be able to bring such claims against employees with the protective costs regime provided by the tribunal.

In relation to claims by employees and workers, were these to be permitted in the tribunal, it is likely that many more employers would adopt the practice of refusing to provide a qualitative reference. Our experience is that it is rare for a reference to be misleading in a way that disadvantages the employee/worker, and rarer still for that not to be covered by the discrimination/victimisation jurisdictions. On balance therefore, we do not consider that it would be useful to extend this jurisdiction to the tribunal.

CONCURRENT JURISDICTION

34. Should employment tribunals and civil courts retain concurrent jurisdiction over equal pay claims?

The concurrent jurisdiction is anomalous. If an employer directly or indirectly discriminates against an employee in relation to their pay or other contractual terms on grounds of, say, their race, the employee's recourse is a tort action over which the Employment Tribunal has exclusive jurisdiction. It is not clear to us why a different approach is required where the relevant protected characteristic is sex. However, it is accepted that a more fundamental review of the approach taken to tackling such discrimination is beyond the scope of this consultation.

The approach taken in relation to sex-related pay discrimination involves the implication of an "equality clause" which rewrites the employee's terms and conditions to eliminate any discriminatory disparity. That has the effect of giving the employee a contractual entitlement to the improved terms. Because a contractual right is created, that would seem to suggest that it would be appropriate for the civil courts to have a jurisdiction. There are no breach of contract claims over which the Tribunal has exclusive jurisdiction. However, there is no reason in principle why the Tribunal should not have exclusive jurisdiction if that were otherwise desirable. Cases where a claim is based upon breach of a term implied or amended by operation of an equality clause ("a relevant clause") are reasonably straightforwardly identified. There could be cases where a claimant complains of breach of a relevant clause but also of other breaches of other clauses. If the employment is still subsisting the other breaches would, as matters stand, have to be considered in a civil court because the tribunal would not have jurisdiction. That problem would be ameliorated, however by removing the restriction on claims within the currency of the employment from the **Extension of Jurisdiction Regulations.**

For some members, the concurrent jurisdiction is seen as an advantage. In particular, the possibility of bringing claims in the civil courts when the **Equality Act** time limit has run is identified as a positive benefit. We have some concerns about that position. First, that is not an option available to people bringing pay discrimination claims that relate to other protected characteristics. In those cases, the time limit is only three months (although there is the comparative advantage of there being no back-dating limit if the discrimination has been a continuing act). Second, if there is a significant problem with claimants being able to commence in time in the Tribunal, that should, logically, be resolved by considering the time limit provisions themselves and either extending them to 6 years or at least allowing for extensions of the time limit where it is just and equitable to do so. The latter discretion is

available in all other cases of pay discrimination. Third, (and a related point) the power for the court to refer issues to the Employment Tribunal for consideration means that, in practice, the civil court can be used as a back door into tribunal proceedings for those who are otherwise out of time.

A further difficulty is that whilst the Employment Tribunal has special rules applicable in Equal Value claims, there is no equivalent in the civil courts. The former were developed as a result of the lived experience of tribunals of how such cases are best approached. The civil courts usually lack that experience and certainly lack a set of specific rules. 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.

Our preference would be for the Tribunal to be given exclusive jurisdiction as it is in all other employment-related discrimination matters and for the question of the appropriateness of existing rules on time limits to be reconsidered.

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?

As we indicated above, we think that, as a minimum, it should be possible to extend time on the grounds of justice and equity.

There is a case for extending tribunal time limits if concurrent jurisdiction is retained as the policies that underpin the generally short periods of time allowed for commencement in the Tribunal are undermined by the practice of the civil courts referring issues to the Tribunal for determination.

36. What other practical changes, if any, are desirable to improve the operation of employment tribunals' and civil courts' concurrent equal pay jurisdiction?

Civil judges hearing equal pay claims should receive the same training that Employment Judges are required to undertake before sitting on claims of this type. There should also be a specific default procedure for equal value claims and costs budgeting rules should be amended to reflect the stages provided for in that procedure. At present, the costs-budgeting rules assume a path to determination that is not one used in equal pay cases.

37. Should the current allocate of jurisdictions across employment tribunals and the civil courts regarding the non-discrimination rule applying to occupational pension schemes remain unchanged?

We adopt the same position here as we do in relation to equal pay claims more generally.

38. The present demarcation of employment tribunals' and civil courts' jurisdiction over the TUPE Regulations 2006 should not be changed. Do consultees agree?

We agree.

39. The present demarcation of employment tribunals', civil courts' and criminal courts' jurisdiction over the Working Time Regulations should not be changed. Do consultees agree?

We agree.

40. Do consultees agree that the present demarcation of employment tribunals', civil courts' and criminal courts' jurisdictions over the NMW should not be changed?

We agree.

41. We provisionally propose that the present demarcation of employment tribunals' and civil courts' jurisdictions over the Backlist Regulations should not be changed. Do consultees agree?

Unless or until the Employment Tribunal is given the power to grant injunctions, a civil jurisdiction seems necessary. However, 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, s. 44**). That would then allow jurisdiction to be concentrated in the Employment Tribunal.

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

It seems sensible for the compensation available for workers and employees dismissed in circumstances where there has been a breach of **Reg 3** to be the same. Equally, refusal of employment seems to us naturally to require the same remedy. At that point, we think a merit in general consistency comes into play.

We are not aware of any cases affected by the £65,300 cap on compensation which have been brought in the civil courts.

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 the changes they would make?

No. There are remedies available in JR proceedings which are not available to the Tribunal. It would not, therefore, be sensible to preclude JR as route. If the Tribunal jurisdiction were ousted, that would mean that damages would not be available as part of JR proceedings since compensation can only be awarded where it might have been obtained in a private law civil action. Ousting the Tribunal jurisdiction would mean there was no private law civil action available.

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?

Yes, remover the ouster in cases where there is a statutory appeal.

45. Should a police officer who is aggrieved by a 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" wat changes do they suggest?

Yes.

RESTRICTIONS ON ORDERS WHICH MAY BE MADE IN EMPLOYMENT TRIBUNALS

46. Our provisional view is that employment tribunals should not be given the power to grant injunctions. Do consultees agree?

We agree that the power to grant injunctions should continue to be exclusive to the High Court. An additional reason that employment tribunals should not be given the power to grant injunctions is that they do not have the administrative capabilities or other logistical arrangements to deal with urgent matters such as injunction applications (But see Answer 41 above).

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?

We do not consider it necessary for tribunals to have the power to apportion liability between co-respondents.

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.

We do not think that employment tribunals should be given the power to make orders for contributions.

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 as regards common law claims bought in the civil courts, or be modified to suit the employment context? If the latter, we would be grateful to hear consultee's views on appropriate modifications.

If respondents are given the right to claim contribution from one another in employment tribunals, we think that the right should precisely mirror the position as regards common law claims brought in the civil courts, for the sake of consistency.

50. Should employment tribunals be given the jurisdiction to enforce their own orders for the payment of money? 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?

We do not think that the employment tribunals should be given the jurisdiction to enforce their own orders for the payment of money. The employment tribunals have limited resources and those should not have to include enforcement. The civil courts are better placed to deal with enforcement.

THE EMPLOYMENT APPEAL TRIBUNAL'S JURISDICTION

51. Should the EAT be given appellate jurisdiction over the CAC's decisions in respect of trade union recognition and derecognition disputes? If such an appellate jurisdiction were created, do consultees agree that it should be limited to questions of law?

Yes. Further, we agree that such appellate jurisdiction should be limited to questions of law.

52. We provisionally propose that there is no need to alter or remove the EAT's current jurisdiction to hear original application in certain limited areas. Do consultees agree?

Yes.

AN EMPLOYMENT AND EQUALITIES LIST?

53. We provisionally propose that an informal specialist list to deal with employment-related claims and appeals should be established within the Queen's Bench Division of the High Court. Do consultees agree? If so, what subject matter should come within its remit?

We think that a specialist list to deal with employment-related claims should be established within the QBD.

The remit of the list should include "employee competition" cases, such as team moves, garden leave cases, restrictive covenant cases, breach of contract and confidential information cases in an employment context.

54. What name should it be given? Employment List, Employment and Equalities List or some other name?

The Employee Competition List.

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