Below, the authors summarise the proposed changes and set out the Employment Law Bar Association’s (ELBA) views on the key themes.

The background
Since the introduction of fees in July 2013, there has been much soul searching about the future of the employment tribunal. Some have queried whether it should maintain ‘separate pillar’ status, standing apart from the civil courts one the one hand and the first-tier/upper-tier administrative tribunals on the other. Some have favoured the creation of an Employment and Equalities Court. ELA’s own report, ‘Response by the Employment Lawyers Association to Proposals for a Single Employment Court’, 12 April 2016, weighed up the pros and cons.

In July 2016, the final report of Briggs LJ’s ‘Civil Court Structure Review’ (CCSR) contained a wide range of recommendations for civil justice. Its most headline-grabbing recommendation was the creation of an ‘online court’, a user-friendly digital means of allowing people to access the courts with minimum assistance from lawyers.

The tribunal and EAT were not directly within the CCSR’s scope, but Briggs LJ considered the ‘boundary’ question of whether the tribunal and EAT should remain a separate pillar. He was in favour of convergence with the civil courts and encouraged the notion of an Employment and Equalities Court, while acknowledging that the many detailed questions that would arise as to the jurisdiction and procedure for such a court were beyond his remit.

The Scottish Government consulted in 2016 on a proposal to transfer the function of the tribunal to the First-Tier Tribunal for Scotland. Employment tribunals north and south of the border appeared to be heading in different directions. One thing appeared clear in the summer of 2016: whatever the direction of change, change would be coming.

In September 2016, the Lord Chancellor, Lord Chief Justice and Senior President of Tribunals (SPT) jointly announced the ‘Transforming Our Justice System’ initiative. This is a substantial programme of reform and investment, with a particular emphasis on the digitisation of the court system. Proposals include:

- the use of online and virtual hearings (by telephone or video), with some cases being handled entirely ‘on paper’;
- a single online system to start and manage cases;
- increased use of case officers to deal with ‘routine’ case management under judicial supervision;
- revision of panel composition to ensure ‘appropriate expertise is focussed on those cases that need it’.

A single employment court?
Despite embarking upon a large-scale reform programme, the Government is not, for now, pursuing the idea of an Employment and Equalities Court. The ‘Reforming the Employment Tribunal System’ consultation paper said this: ‘There has been some public discussion about the future of employment tribunals and the EAT in the justice system … Whilst the Government has decided that action is needed to bring the processes in employment tribunals and the EAT in line with the rest of the justice system, it does not consider that radical structural change is necessary to achieve this … It will keep the separate nature of employment tribunals and the EAT under review and consider if more substantive benefits could flow from further change.’

Reforming the tribunal system: Government response
The Government’s intention is to apply the principles of its broader reforms to the tribunal system. Key features are an increased digitisation of the system and the delegation of judicial functions to caseworkers.

The aim would be to take the entire case management system online, with users able to ‘digitally start a claim, track progress, provide evidence and information, and participate in innovative resolution methods if they wish to do so’. Case management would be dealt with on paper or via virtual hearings where possible, and assisted digital support would be provided for users with difficulty using online services.

Although the proposals include online consideration without a physical hearing in appropriate cases, the Government’s position is that this will not be mandatory. The Government has also deferred more detailed proposals on delegating judicial functions to caseworkers until there has been further engagement with tribunal judiciary and users.

Rule-making power and decisions about the composition of tribunal panels are to be moved away from the ministerial level and handed over to the SPT and the Tribunal Procedure Committee (TPC), with the latter adding an employment judge and employment lawyer, and establishing an employment subgroup. There are no specific proposals to remove lay members ‘where their workplace experience is necessary to help determine a case’, and there are no proposals for a major revision to the existing tribunal rules of procedure.

The Prisons and Courts Bill 2017
The Bill makes provision for:
• delegation of judicial functions (s.5 and schedules 10-11);
• moving powers to decide tribunal composition to the SPT (s.52);
• rule-making powers to be transferred to the TPC, supplemented by two employment members (ss.48-49); and
• the establishment of Online Procedure Rules (OPRs) (ss.37-45 and schedules 8-10).

This last proposal is significant. The Bill seeks to establish an Online Procedure Committee (consisting of two judges, a lawyer, a representative for lay advisers and an IT specialist), who will be responsible for establishing OPRs. Their powers are similar to the TPC, and the rules would be formulated following consultation, with the SPT, EAT President and tribunal presidents able to supplement them with practice directions. These rules are envisaged to allow for disposal of cases, up to and including final determination, ‘by electronic means’. It will be for the Lord Chancellor, in consultation with the SPT, to designate specific types of proceedings, or parts thereof, as eligible for being conducted under the OPRs. Some proceedings would be mandatory, subject to exceptions, while others would be optional.

Comment: digitisation
The digitisation of court systems presents some real opportunities to enhance access to justice. Practitioners and litigants alike should welcome investment in IT systems, and the opportunities it presents. However, there are dangers in the move towards digitisation, and as the Government’s plans develop, a number of points should be kept in mind.

A distinction must be drawn between case management and the determination of claims. Few would dispute that case management would benefit from better IT systems. The tribunal has an effective online portal for lodging claims, but, following presentation, management is paper based: electronically submitted documents are printed and placed on a paper file. A ‘start to finish’ shared access electronic case management system would be a valuable improvement to the system.

Online determination of claims is a different matter – there is no substitute for a face-to-face final hearing. The issues in employment claims are often complex and generally turn on contested factual evidence. None of that is amenable to resolution on paper. Many litigants will be unable to express
themselves as well on paper as they might at a hearing when asked questions by a judge. There may be increased scope for video hearings, but these should be treated with caution. It is not easy to manage a hearing with parties and witnesses in different locations connected only online. There is also the potential for abuse; for example, through prompting of witnesses off camera.

Although the Government has conceded that an online procedure will not be mandatory for final hearings, questions remain: for example, what proceedings are to be eligible to be conducted under the OPR. Many preliminary hearings involve determination of complex questions affecting parties’ rights; such hearings may also not be suitable for online determination.

It is a vital part of the rule of law that hearings are conducted in public. One challenge for the Government in developing its plans will be to devise a mechanism whereby online hearings are accessible to the public. That will mean either streaming proceedings online or providing a public space with terminals where the public can watch proceedings.

Another key challenge for the Government will be to devise a digital system that does not exclude those who cannot access the internet. The Government recognises the need for ‘assisted digital’ means to assist the digitally disenfranchised to have access to justice. It remains to be seen what concrete proposals will be brought forward and what the cost implications will be. It may be wishful thinking, but the Government might start by reviewing the parlous state of funding for CABs and Law Centres, bodies that would be well suited to assisting litigants in navigating an online system.

Even if all these issues are resolved satisfactorily, issues remain about whether HMCTS will be able to deliver its ‘digital by design’ vision. Successive governments have had a poor track record of delivering large-scale IT projects. That said, the digitisation of the criminal courts under ‘Transforming the Criminal Justice System’ appears to have been popular with both judges and practitioners.

**Comment: delegation of judicial powers**

ELBA opposes the delegation of judicial powers to caseworkers, even for case management decisions. Effective case management at an early stage saves parties’ time and cost. Without proper definition of the issues and directions tailored to those issues, cases can go off the rails. Good case management requires knowledge of the substantive law, practical experience of adversarial litigation, and skill and sensitivity in handling litigants. It should not be left to caseworkers.

The proposal is that caseworker decisions will be reviewable by a judge; this is likely to be by way of rehearing. The potential for a second bite at the cherry risks disgruntled parties routinely seeking rehearings, irrespective of merit. If that happens, the proposals will not achieve the desired efficiency savings.

**Comment: rule-making powers and panel composition**

The transfer of powers relating to panel composition and rule making to the SPT and TPC makes sense. It will allow greater flexibility in the system, and will allow the system to respond to the developments across the civil justice system as a whole. However, such decisions need to reflect the peculiarities of employment litigation. It is vital that the TPC includes experienced employment practitioners.

In any new rules regarding panel composition there should be a strong presumption in favour of lay members. Lay members have been a vital element of the tribunal system since its inception. They provide an important element of industrial reality checking to proceedings. It is not sufficient that parties should simply be able to apply for a full panel: experience thus far is that where they are optional, there appears to be a strong default for parties not to ask for them.

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