Employment Law Hearing Structures: Response to the Law Commission

Introduction

1. LawWorks is pleased to be able to respond to this important and wide ranging consultation on the jurisdiction, role and structure of the employment tribunal (ET) and Employment Appeal Tribunal (EAT). The consultation is timely as the Ministry of Justice and the Department for Business, Energy & Industrial Strategy (BEIS) are in the process of reforming the Tribunal system; following from the Taylor Review there are important questions about how employment rights and redress work in the context of today's more flexible labour market. The Briggs Review also addressed jurisdictional issues between the courts and the ET system, noting the impact for discrimination and employment law.[i] We therefore welcome that the Law Commission is consulting on reforms. Our response draws from insights from our employment rights work and our key concerns over access to justice.

About LawWorks

2. LawWorks is the operating name of the Solicitors Pro Bono Group, an independent charity which promotes, supports and facilitates pro bono legal services that extend access to the law for individuals and communities in need and the organisations that support them. LawWorks supports a network of over 240 independent pro bono clinics across England and Wales, with several clinics providing specialist advice and support on employment matters. In the year to March 2018 17% of enquiries received by clinics in the network were employment law related,[ii] and since 2014 there has been over a 50% increase in employment advice taking place at clinics, demonstrating growing demand in this area.[iii]

3. LawWorks also runs an employment law pro bono casework project (on a 'secondary specialisation' basis) which is currently focused on unpaid wages claims. The project facilitates an inward referral network, triage and matches volunteer lawyers (from among LawWorks members) with clients in need. The project supports the training and supervision of volunteer lawyers to enable them to take on unpaid wages cases from the start to completion of the matter, including representation and advocacy at the tribunal stage.

General Comments

4. Whilst we welcome the wide ranging nature of the consultation, our response primarily focuses on the following issues:-

    - Time Limits;
    - (Contractual) Damages limit;

- Enforcement;
- Other matters relating to access to justice.

5. The access to justice context of this consultation matters. With employment law issues having been virtually removed from the scope of legal aid (only cases involving human trafficking or a contravention of the Equality Act 2010 now qualify), specialist advice on employment rights and redress for those without means is in short supply. The information and support currently available through ACAS, whilst good, is often insufficient to address the complexity of modern employment relationships and the routes to redress. In any event, ACAS has the duty to settle cases and cannot advise parties on how they ought to act in their own best interests. And whilst we were pleased that - following the *Unison* case[iv] - ET fees were removed, other barriers to bringing claims before the ET and obtaining redress remain.
6. In our responses to the Taylor review consultations,[v] we argued that there not only needs to be better social protection for those with more precarious employment, but also that remedies should be more readily available through a more accessible ET system with the power to enforce compensation.

Jurisdiction of the Tribunal: Chapters 1 & 2

7. The Law Commission highlights issues concerning the jurisdiction of the ET relative to the civil courts. Employment tribunals already have a jurisdiction over some contractual matters, as so much employment law is based on contract as well as statutory law rights. Given the complexity of employment law, as well as the balance of power between parties, it is important that fair and consistent principles apply to how comparable cases are handled by tribunals and courts.

Time Limits

8. In answer to consultation questions 2 and 3, we would strongly support proposals to extend the time limit for making an application to the ET. 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 ET claims. The time limit of three months is an unreasonably short one, especially compared to other civil litigation time limits – for example six years for a contract claim in the civil courts, and three years for tort.
9. Whilst there is discretion available in relation to unfair dismissal and a number of other claims, this is very limited. The ET can only extend the primary time limit for those claims where it was ‘not reasonably practicable’ for the claimant to meet the time limit, and the claim is presented within a reasonable time thereafter.

10. The policy justifications for keeping a short time limit no longer stand. Whilst ETs were originally conceived as a forum for speedy, informal resolution of employment disputes, the law, process and practice around the ET jurisdiction has developed significantly in recent decades. Many, if not most, ET cases are far more complex than they were when the unfair dismissal protection was introduced in 1971. Furthermore, the process itself can take longer. It is now common for a claimant, having been pushed into presentation of the claim within three months, to have to wait a year or more before the ET is available to hear it. 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. We therefore regard the three month time limit as being far too short - it is not only often impractical but also unjustifiable. We agree with the proposal for a generic six-month time limit, with a discretion to extend.

11. We agree that ETs should have wide discretion to extend a time limit where it is just and equitable to do so. For the majority of claims (including unfair dismissal and various wages claims), the “not reasonably practicable” test applies. This is markedly less generous than the test for discrimination claims, where the ET can extend time if it is “just and equitable” to do so. This can lead to the strange anomaly, in the case of an unfair dismissal claim which is alleged to be discriminatory, where the ET may decide that it was reasonably practicable for the claimant to present the claim in time, so that the unfair dismissal claim fails, but it is just and equitable to extend time, so the claim for discrimination can proceed. This not uncommon result understandably makes the law look irrationally inconsistent.

12. If the two tests are to be rationalised, the “just and equitable” test should prevail as we consider that it better meets the needs and interests of justice. It allows the ET to take into account not just the reason why the claim is presented late, but all the other relevant circumstances, including the crucial question whether its lateness means that the case cannot be fairly heard.

Removing restrictions/wider jurisdiction: Chapters 3 - 5

13. A number of the questions for this part of the consultation relate to the distinct character of employment tribunals, noting how they have evolved from ‘industrial tribunals’ (which originally only covered disputed training levies) to cover wider issues such as discrimination. The consultation asks whether non-employment discrimination claims should be heard in the ET, and recommends lifting the £25,000 limit on the ET’s jurisdiction for breach of

contract claims. It also questions whether breach of contract claims should be allowed in the ET where the individual is still employed, and suggests that - following the Taylor review's work on employment status - all 'workers' should be allowed to bring breach of contract claims in the ET.

14. We are broadly supportive of the Law Commission's proposals. There may be concerns however that too wide a jurisdiction could risk blurring the distinction between tribunals and the civil courts and result in applying civil litigation principles that would be inappropriate for the ET. Some of these issues were previously addressed in the 2001 Leggat Review,[vi] and more recently by the Law Society's *Making employment tribunals work for all* paper[vii] which argues that the problem with a 'concurrent' system, is that choice of jurisdiction can be confusing for unrepresented claimants, and can lead to the same dispute having to resolved in two different fora.

15. We agree in principle with the wider jurisdiction arguments - it is the users' journey that matters - and from an access to justice perspective the ET should be a 'one stop shop'. We are not able to answer all of the questions in detail, but what is most important is that the tribunal is able to provide effective redress. So, for example, although the ETs has jurisdiction to hear unlawful deduction from wages claims, this is only in respect of a clearly identifiable sum which limits the ET's ability to provide a remedy for cases over which it has jurisdiction (see our answer to question 27, below).

Concurrent jurisdiction issues

Discrimination: Questions 5 to 9

16. In answer to these questions on non-employment discrimination claims, we would be supportive of the ET taking on a wider jurisdiction on equalities law, although some of the policy implications would need to be worked through. In principle, the expertise of ET judges on discrimination cases in employment could be most useful in other discrimination cases. It would therefore follow that there should be a power for judges to transfer claims from one jurisdiction to the other; however, some criteria would be needed including: the views of the parties; nature of the case and the relevant expertise; and length of time before a hearing is possible. Cases could be triaged by enabling the relevant judicial authority in either the county court or the ET to determine whether a transfer should take place, based on the criteria.

17. On questions 8 and 9, it would follow that employment judges should also be able to adjudicate non-employment related discrimination claims in the County Court. Such a change may require primary legislation (beyond the existing cross-ticketing provisions of the Crime and Courts Act 2013) to facilitate a flexible approach to the deployment of judges in the County Court. 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.

Contractual matters: Questions 10-15

18. In answer to questions 10 and 11, we see no justification for the restrictions which limit employment tribunals' jurisdiction over contractual matters to employment contracts which have already ended. Taking a current/ongoing employment contract dispute to the civil court can be inappropriate, and the tribunal will often be a better forum. At worst, this situation can potentially lead to a perverse outcome in that the only way to get the matter before the tribunal could be resigning and claiming constructive dismissal. It is also inconsistent with the approach to unlawful deductions from wages, for which there can be a claim and remedy at tribunal during the course of employment.

19. In answer to question 12, we strongly support the proposal to raise the £25,000 limit on the amount of damages that an ET can award for breach of contract. We see no justification for the ET only being able to deal with damages claims where the damages are below £25,000. The limit has not changed to allow for inflation since 1994, and it can push some cases into the civil courts which would otherwise have been litigated in employment tribunals. There is also a strong policy case for treating wrongful dismissal (contractual) and unfair dismissal (statutory) on a similar basis. From an adviser/practitioners' perspective, it would avoid the difficult question which currently arises when advising claimants about which forum to use when seeking damages for breach of contract e.g. notice payment, commission, etc. It would also avoid any need to pursue split-forum disputes which waste time and money for both the parties and for HMCTS.

20. If there were to be a limit to reflect the fact that ETs operate in a largely costs-free jurisdiction, £100,000 would broadly reflect the maximum for unfair dismissal (basic and compensatory awards combined), while ensuring that the great majority of contractual claims arising from employment were covered. Consistent with our answers to questions 2 and 3 above, we also consider that time limits for breach of contract claims made in the ET should align with the time limit for unfair dismissal claims (a generic six month time limit, with a discretion to extend.)

Related contractual claims and counter claims: Questions 16-26

21. We do not have any detailed comment on these questions, but broadly agree with the Law Commission's reasoning for not proposing the widen the ET's jurisdiction further to take in matters that might be related to employment contracts and matters such as personal injury, health and safety, intellectual

property, or introduce rights for employers to counterclaim in the ET. In answer to question 21, we agree with proposals that the ET be expressly given jurisdiction to determine breach of contract claims relating to workers, and, similarly, self-employed independent contractors. This would be consistent with the recommendations of the Taylor Review. There is no reason in principle why workers (many of whom may have vulnerable employment status) should be denied the relatively informal, fee-free, no costs option of bringing a contractual claim in the ET.

Unpaid wages claims: Questions 27-29

22. Consistent with our answers above, we would support ETs being given the power to hear unauthorised deductions from wages claims relating to un-quantified sums. However, we are not convinced that it would help for the ET to have powers to apply 'set-offs' (question 29), as this could complicate important practical provisions for claiming unpaid wages by enabling employers to introduce unrelated contractual issues.

Other types of claims: Questions 30-45

23. These questions relate to other types of more complex claims, especially equalities issues such as equal pay, and also the national minimum wage, working time directive, and TUPE. We do not propose to take a view on these, other than to say we broadly agree with the Law Commission's approach to maintaining the appropriate lines of demarcation between employment tribunals and the courts.

Orders and Powers: Chapter 6

24. Whilst we consider that it may not be appropriate for the ET to have the full range of injunctive powers, orders and interventions that are available to civil courts, we are clear that it should have stronger enforcement powers. We therefore restrict our answer to question 50.

Enforcement

25. This is a significant issue, as it impacts on the effectiveness of the tribunal and a claimant's ability to access and achieve justice. For example:-

> In September 2018 the first case in our unpaid wages project went to the ET and the claimant won his case. The claimant was a chef working in an Italian restaurant. He had been working at the restaurant for 4 months and took a day off sick and was instantly dismissed. The restaurant said he was self-employed so not entitled to notice pay or holiday pay. Volunteer lawyers from a City law firm took on the case and successfully argued the claimant was an employee. 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 ET 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 ET 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.

26. Effectively employment rights only exist if they can be enforced. Without a robust and proactive enforcement system, other employment law reforms, including those proposed by the Taylor review, may not have the intended impact. The obstacles employees face in enforcing ET awards have, for example, been highlighted by Citizens Advice' for over a decade,[viii] and systemic avoidance by employers risks undermining the ET's jurisdiction and purpose. According to the last available BEIS survey, over one third of awards made by tribunals go unpaid, and only half of successful claimants get paid without having to take enforcement action.[ix]

27. Employees face hurdles and barriers to bringing enforcement proceedings against recalcitrant employers, with all the stress, technicality and cost involved weighing heavily in any calculation whether or not to enforce rights. Some employers game the system, with inevitable delays, for example by dissolving a business that faces enforcement action, only to set up the same business operating under a new name and run by the same individuals.

28. We support Government adopting a robust policy to address the problems with enforcement of ET awards and looking at how it may be possible for enforcement to routinely take place in the ET, rather than the courts. Enforcement proceedings in the civil courts are too complex and intimidating for many employees, especially those unrepresented, not least as there is the additional consideration of costs (i.e. the employer being in a position to threaten costs against the employee meritoriously or tactically).

29. We proposed to the Taylor review consultations that Government explore whether ETs could be given direct enforcement powers, without the employee/worker having to fill in extra forms, pay an extra fee and having to initiate additional court proceedings. However, the options explored in the BEIS consultation aiming to make the process easier and more seamless were all based on defaulting to the County or High Court to obtain enforcement. Transfer to the civil courts, even where that transfer is automatic, with no additional fee, would not sufficiently address the real barriers to enforcement for many employees. It is also inconsistent with the policy of handling employment disputes outside the civil courts by requiring employees to enforce awards in the courts system.

30. There are already some systems in place, for example the “Fast Track” scheme to enable High Court Enforcement Officers (HCEOs) authorised by the Lord Chancellor to enforce ET awards and ACAS settlements under the authority of a writ of control (previously called a writ of fieri facias). However, this involves a lengthy form process and administrative fee. The fairest and most effective solution for employees is to give the ET direct enforcement powers, backed up by a state led enforcement system targeting employers/engagers who do not pay ET awards.

31. In answer to Question 50, we therefore support the proposal that employment tribunals be given the jurisdiction to enforce their own orders for the payment of money. We believe the powers/orders given to ETs for enforcement should broadly equivalent be those currently available to the civil courts, including as the Commission recommends seizure of goods, debt orders, and charging orders preventing respondents from selling their assets. Appropriate enforcement orders could be then attached to existing judgements without additional process, and enable enforcement activity to be commenced relevant agencies without intermediary litigation steps or transfer of jurisdiction to the County and High Courts. The effectiveness of the process would be enhanced because it would be in the hands of an institution which would be committed to the implementation of its own decisions, with the necessary background knowledge to carry them out.

32. We recognize however that it may not be possible to achieve full parity of enforcement powers as between the ET and the civil courts, and that 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 ET 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 ET. The precise range of enforcement powers may therefore need to be subject to further consultation, and would require legislation.

Conclusion

33. We are supportive of the Law Commission’s proposals which overall will provide for greater jurisdictional and procedural coherence for the ET, and a smoother journey to redress for claimants. Some of the issues raised however impinge on broader pol-icy questions about the role of the ET and employees/contractors’ redress rights, within the context of balancing employees and employers interests. Many of the proposed reforms will require primary legislation, at a time when Government and Parliament already have a bottleneck of legislative matters to deal with.

34. With the (LASPO Act) post-implementation review of legal aid due to report shortly, and follow up work expected on the Government's access to justice framework, as well as BEIS (Taylor Review implementation) "Good Work Plan",[x] we hope that the Commission's proposed reforms will find favour in the current policy environment. As we have made clear in this response, in considering the ET's jurisdiction it is important that rights and redress are treated as a package – a package which includes access to justice and enforceability as the essential pathways between rights and redress. We hope this link (between rights and redress) is maintained and strengthened, especially as the labour market continues to evolve, and that there is no regression on the protections established for employees and workers through both UK and EU law.

January 2019

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[i] www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf
[ii] www.lawworks.org.uk/sites/default/files/files/LW-Clinics-Report-2017-18-web.pdf
[iii] www.lawworks.org.uk/sites/default/files/LawWorks%20Clinic%20Network%20Report%202014-15.pdf
[iv] www.supremecourt.uk/cases/uksc-2015-0233.html
[v] www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-consultation-response-beistaylor-review-employment
[vi] https://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm
[vii] www.lawsociety.org.uk/policy-campaigns/documents/making-ets-work-for-all-discussion-document/
[viii] https://www.citizensadvice.org.uk/about-us/policy/policy-research-topics/work-policy-research-surveys-and-consultation-responses/work-policy-research/justice-denied/
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