



The Bar Council

## **Summary of Law Commission recommendations: Employment Law Hearing Structures consultation**

It may seem like many moons ago that employment practitioners and those concerned with employment law hearings responded to the Law Commission consultation which it prepared as part of its 13<sup>th</sup> programme of law reform. That included a project to review the jurisdictions of the Employment Tribunal (ET) and Employment Appeal Tribunal (EAT), as well as the civil courts in employment and discrimination matters, before making recommendations.

I, together with **Jamie Anderson** of Trinity Chambers, who is also a longstanding member of the Law Reform Committee and an employment practitioner of many years' experience, responded to this consultation on behalf of the Bar Council, considering the very many excellent suggestions of our colleagues on Committee and at the Bar. We are heartened to see many of those suggestions included within the exciting recommendations which the Law Commission has now made in its report.

We summarise the key recommendations below, but the report is highly deserving of your full attention when you have the chance to read it. It remains to be seen what will become of the recommendations which have been made by the Law Commission in a careful and measured manner. We are optimistic that we may see a change in the way the ET and EAT operate which happens in practice, could happen relatively quickly if the recommendations are accepted and implemented and will benefit all users and practitioners in various ways.

The Bar Council was very pleased to be able to respond to this consultation and looks forward to assisting the Law Commission with any further projects flowing from these 23 recommendations. No doubt, ELBA, the specialist Bar association for employment and equalities barristers will do likewise.

## TIME LIMITS

1. The Law Commission recommends one single time limit for all claims brought in the ET: 6 months.
2. Where an extension of time may be granted on the basis of the reasonably practicability test, this ought now to be the just and equitable test, thus giving the ET a wider discretion and aligning the extension of time tests, with the latter being the test applicable to discrimination complaints.
3. In relation to breach of contract complaints, the recommendation is that the six-month time limit should run as follows:
  - a. Where the claim for breach is brought during the subsistence of the employment contract then it must be presented within six months of the date of the alleged breach (see paragraph 12 below);
  - b. Where the claim for breach is brought after the termination of the employment contract, it must be presented within six months of termination;
  - c. Where the alleged liability arises after the termination of the contract, the claim must be brought within six months of the alleged liability arising.
4. In relation to equal pay claims, the Law Commission recommends giving the ET discretion to extend time if it is just and equitable to do so.
5. Were this simplification to be adopted, it would likely be welcomed by litigants in person, charities providing advice on a pro bono basis, those for whom a 3-month time limit may be especially onerous e.g. someone on parental leave or with a disability or health condition. Conversely, the extension from 3 to 6 months is unlikely to cause substantial uncertainty for employers who might argue it is unfair to have the Sword of Damocles hanging over the business for extended periods of time.

## JUDGES

6. The expertise of Employment Judges (EJs) is to be shared. The Law Commission recommends that EJs with experience of hearing discrimination claims should be deployed to the County Court to hear non-employment discrimination claims.
7. This is a recommendation which may well provide a great benefit to many, but it will depend on adequate resourcing as with so many others. At present, the County Court relies heavily on District Judges who have specialist knowledge of the Equality Act 2010 and fee paid assessors for cases in which they are called for.

### **WIDER CONTRACTUAL JURISDICTION**

8. There has always been what the Civil Courts Structure Review (Lord Briggs) describes as an awkward area of shared and exclusive jurisdiction in the fields of employment and discrimination law. The Law Commission notes in its report the far-reaching recommendations made in that review, which fall outside the remit of the Law Commission's consultation and recommendations. You may recall that these included the creation of a whole new Employment & Equalities Court.
9. In any event, the Law Commission recommends that ETs should have jurisdiction to hear claims for damages for breach of contract (and employer's counterclaims) or for sums due under the contract even where the employment has not come to an end; that is to say, widening the jurisdiction currently conferred upon the ET by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Additionally, it is recommended that such claims ought also to be within the ETs' jurisdiction where the liability itself arises after the employment has been terminated.
10. The recommendations include enabling the ET to determine claims for unquantified sums pursued by way of an unlawful deduction from wages under Part II ERA and to apply set off principles to claims limited to established liabilities for quantified amounts extinguishing the Part II ERA claim.
11. I use the term "employment" above, but one of the recommendations which will no doubt be welcomed by many low paid workers in particular is the recommendation

that all such contract claims may be brought by workers within the definition of section 230(1)(b) Employment Rights Act 1996 ('ERA') i.e. Limb B workers.

12. Settling or perhaps affirming the settlement of a legal dispute that raged briefly before a decision of the Court of Appeal (*Agarwal v Cardiff University & Anor* [2019] ICR 433), the Law Commission recommends that the ET should have jurisdiction to interpret and construe contracts of employment under sections 10 and 11 ERA in order to exercise their jurisdiction under Part I.

13. Finally, the Law Commission recommends raising the current £25,000 limit to compensation in respect of claims (and employers' counterclaims) to £100,000 and thereafter maintaining parity with the limit for contractual claims in the County Court.

#### **JOINT AND SEVERAL LIABILITY**

14. Potentially settling another grey area, the Law Commission recommends that respondents to discrimination claims in the ET *should* be able to claim a contribution from others who are jointly and severally liability along the same lines as is provided for in section 2(1) Civil Liability (Contribution) Act 1978.

#### **ENFORCEMENT**

15. The Law Commission recommends looking into a means by which enforcement can stay within the ET and the use of the BEIS ET Penalty Scheme, so it is automatically triggered whenever the ET makes an award. This scheme enables the naming and shaming as well as fining of respondents which do not pay on time.

16. Many of these recommendations have been discussed amongst legal practitioners for a number of years and were, no doubt, informed by the input of 72 respondents to the consultation when it closed in January 2019 and it is to be hoped that they are given life and impetus in due course.

#### **HIGH COURT**

17. The creation of a specialist Employment and Equalities Court remains uncertain at present (see the Civil Courts Structure Review) but the Law Commission does at least recommend that there should be an informal specialist list in the Queen's Bench Division to deal with employment and discrimination cases in the High Court including restraint of trade cases, breach of confidence actions, injunctions concerning industrial action and equal pay (see Recommendation 23). This is likely to be welcomed by the Employment Bar. The QBD has a number of former employment practitioners within its judicial ranks who would make ideal judges for cases of this type in such a list.
18. The Law Commission did not recommend extending the jurisdiction of the ET in relation to injunctions, which remain within the province of the courts as matters stand. It did however recommend that there should be a power to transfer equal pay claims brought in the High Court (which has concurrent jurisdiction) to the ET with a presumption that transfer in this direction will occur and a discretion, referred to further above, for the ET to extend time.
19. There are no recommendations to change the structure of hearings at the EAT at this time.

## **DIGITAL AND REMOTE WORKING**

20. This was outside the scope of the work of the Law Commission and the report makes no recommendation in this regard. We will therefore have to see what strides are made in this regard given the immediate and obvious impact of the Covid-19 pandemic on ways of working in the ET and EAT, as to which the Bar Council is heavily involved in discussions with the Ministry of Justice and HMCTS.

**Eleena Misra, Old Square Chambers, Vice-Chair of the Bar Council Law Reform Committee**