Law Commission
Reforming the law

# Employment Law Hearing Structures

## Consultation paper

Consultation Paper 239

Law Commission
Reforming the law

**Consultation Paper No 239**

# Employment Law Hearing Structures

# A Consultation paper

**26 September 2018**

© Crown copyright 2018

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.uk/government/publications.

# THE LAW COMMISSION – HOW WE CONSULT

**About the Law Commission:** The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Hon Mr Justice Green, *Chair*, Professor Nick Hopkins, Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Phillip Golding.

**Topic of this consultation:** The jurisdictions of the employment tribunal, Employment Appeal Tribunal and the civil courts in employment and discrimination matters. This consultation paper does the following:

- examines the jurisdictions of the employment tribunal, Employment Appeal Tribunal and the civil courts, including the jurisdictional boundaries between them, areas of shared and exclusive jurisdiction, restrictions on employment tribunals' jurisdiction, and the handling of employment cases in civil courts;
- assesses the extent to which the current system could be improved; and
- makes a number of provisional proposals and asks a number of consultation questions.

**Geographical scope:** This consultation paper applies to the law of England and Wales.

**Availability of materials:** The consultation paper is available on our website at https://www.lawcom.gov.uk/project/employment-law-hearing-structures/.

**Duration of the consultation:** We invite responses from 26 September 2018 to 11 January 2019.

**Comments may be sent:**

Using an online form at https://consult.justice.gov.uk/law-commission/employment-law-hearing-structures (where possible, it would be helpful if this form was used).

By email to employment-law@lawcommission.gov.uk

OR

By post to Henni Ouahes, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

Tel: 020 3334 0200

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

**After the consultation:** In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

**Consultation Principles:** The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

**Information provided to the Law Commission**

We may publish or disclose information you provide us in response to Law Commission papers, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also share any responses received with Government. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission. The Law Commission will process your personal data in accordance with the General Data Protection Regulation, which came into force in May 2018.

Any queries about the contents of this Privacy Notice can be directed to: general.enquiries@lawcommission.gov.uk.

# Contents

# 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.

**Assessor –** a person appointed to assist a court in dealing with a matter in which that person has skill and experience.

**Automatically unfair dismissal –** a dismissal for one or more of the special reasons listed in Part X of the ERA 1996 and certain other pieces of legislation which is, as a result, deemed to be unfair without reference to the reasonableness test which applies in cases of ordinary unfair dismissal.

**AWR –** Agency Workers Regulations 2010.

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

(1) statutory recognition and derecognition 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 TULR(C)A 1992 to deal with various issues relating to trade unions, including the certification of their independence.

**Constructive dismissal –** where an employee is entitled to and does resign by virtue of an employer's conduct amounting to a repudiatory breach of the contract of employment.

**Duty of trust and confidence –** a mutual term implied into employment contracts to the effect that employers and employees must not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them.

**EAT –** Employment Appeal Tribunal.

**Employee –** for the purposes of ERA 1996, an individual who has entered into or works (or, where the employment has ceased, worked) under a contract of employment.

**Employment judge –** 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).

**HMRC –** Her Majesty's Revenue and Customs.

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

**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 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.

**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).

**TULR(C)A –** Trade Union and Labour Relations (Consolidation) Act 1992.

**TUPE 2006 –** 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 consultation paper we use the term "worker" to refer to this second category, that is to say a non-employee.

**Wrongful dismissal –** a breach of contract claim arising from either an express dismissal by an employer which breaches the employment contract or a constructive dismissal. Wrongful dismissal is distinct from the statutory claim of unfair dismissal.

# Chapter 1: Introduction

1.1 The Law Commission's 13th Programme of Law Reform was approved by the Lord Chancellor and laid before Parliament in December 2017. The 14 items in the Programme included a review of employment law hearing structures. The 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
>
> (4) The handling of employment disputes in the civil courts.
>
> The project will not consider major re-structuring of the employment tribunals system.

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. Notable additions were claims for statutory redundancy payments (in 1965), for unfair dismissal (introduced by the Industrial Relations Act 1971), and for various types of discrimination in employment, now brought together in the Equality Act 2010.

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

(1) the employee or worker[1] 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;

[1] See paragraphs 1.21 – 1.24 for how we use the terms "employee" and "worker" in this consultation paper. We have also included these terms in the glossary appended to this paper.

(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;[2] and

(6) the employment tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.[3]

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

1.5 However, tribunals, being created by statute, have no inherent jurisdiction. It has long been observed that this creates anomalies. For example, until 1994 employment tribunals had no jurisdiction to consider claims for breach of contract even when arising on a dismissal. A dismissed employee could, therefore, bring claims both for unfair dismissal and wrongful dismissal, but the first could only be brought in the tribunal and the second only in the county court or High Court.

1.6 In two cases in 1990 this distinction was deplored. In *Barlow v Whittle*,[4] Wood J, President of the Employment Appeal Tribunal, said "at present an applicant finds it difficult to understand why he cannot recover all that is due to him in the one court. It must tend to bring the law into disrepute". In *Delaney v Staples*,[5] Lord Donaldson of Lymington, Master of the Rolls, described what Wood J had said as "unanswerable" and asked "can nothing really be done?" This plea for action resulted in the Extension of Jurisdiction Order,[6] which we consider in Chapter 4 below, but many anomalies remained.

1.7 In 2001, Sir Andrew Leggatt published the report of his review of tribunals under the title *Tribunals for Users – One System, One Service*. Regarding the jurisdictions and powers of employment tribunals, the report said:

> **Jurisdiction**
>
> Many respondents suggested that the current division of jurisdiction between the ETs and the courts was anomalous. They suggested that the ETs should: become the forum for litigation instituted by the employer, not just the employee; hear all cases involving contracts between employer and employees, whether or not the applicant remained in employment and including restrictive covenants; therefore have authority to grant injunctive relief; be enabled to make recommendations to the employer to improve workplace practices, as well as awarding compensation, where an action for unfair dismissal had succeeded;

---

2 Employment Tribunals Act 1996, s 6(1).

3 Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2013 No 1237, Sch 1, rule 41.

4 [1990] ICR 270.

5 Decided in December 1990 but reported at [1991] 2 QB 47.

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

have an increased limit on claims, and an unlimited jurisdiction; be the starting point for all discrimination cases (although there should be a possibility of transfer to the county courts); and have jurisdiction to hear goods, facilities and services cases under the Disability Discrimination Act.

**Powers**

It was also suggested that the ETs' powers should be extended to enable them to: award greater or unlimited amounts in basic or unfair dismissal cases; order that discriminatory collective agreements be rewritten, and be given powers to enforce those orders; award back pay for pay discrimination arising from discriminatory collective agreements; award punitive damages against employers for bad employment practice; and, in cases involving insolvent companies, make sums due payable immediately.

We consider that the ETs and the EAT have demonstrably acquired the status and authority for them to be the initial, as well as the principal, forum for the resolution of all employment and discrimination disputes. There may therefore be a good case for their assuming the jurisdictions suggested. If that found favour, a completely impermeable division would not, however, be possible. For example, personal injury cases can also involve disputes about employment practices. Flexible arrangements for transfer would therefore be necessary.[7]

1.8 The Civil Courts Structure Review led by Lord Justice (now Lord) Briggs from 2015 to 2016 noted that there is 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.[8] He considered that these issues, which are well known amongst employment law experts, judges and practitioners, can cause delay and prevent cases being determined by the judges best equipped to handle them.

1.9 Some of the suggestions made to the Briggs review were far-reaching, for example that the Employment Appeal Tribunal be given first instance jurisdiction to hear the heavier cases at present coming before employment tribunals. Another was 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 provision of goods and services.[9] Either of these proposals would require significant primary legislation. We interpret the final sentence of our terms of reference

---

7 Sir Andrew Leggatt, *Tribunals for Users One System, One Service: Report of the Review of Tribunals by Sir Andrew Leggatt* (2001), Part II, p 148, paras 26 to 28.

8 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 14 September 2018), 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 14 September 2018).

9 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 14 September 2018), at para 3.62.

as precluding changes of this kind. They would involve significant and possibly contentious primary legislation in a period when Parliamentary time is under almost unprecedented pressure. We consider that the scope of this project should rather be to propose the removal of discrepancies in the light of several decades of experience of the employment tribunals system.[10]

1.10 Not all discrepancies between the employment tribunal and the civil courts will be within scope of this project. For example, we do not deal with issues of legal costs. There are very different costs rules in employment tribunals from those in the civil courts, at least if one excludes small claims in the county court. Costs are only awarded in employment tribunals in very limited circumstances. We do not consider that costs issues fall within our terms of reference.

1.11 Other matters, while they may technically be within our terms of reference, are not properly matters of law reform for the Law Commission. We take that view on matters which are primarily policy choices best left to Parliament. For example, we consider that the limits on compensatory awards for unfair dismissal are not properly for this review. Where to set such limits is not a boundary issue between the tribunals and the courts but rather a matter of policy. We do, however, consider that the limits on employment tribunals' contractual jurisdiction contained in the Extension of Jurisdiction Order [11] are within scope since they impose limits on contractual claims which apply only in the tribunals and not in the civil courts which have concurrent jurisdiction.

1.12 Chapter 2 of this consultation paper will outline the areas in which employment tribunals currently have exclusive jurisdiction established by statute. We are not aware of any proposals that any of these should be removed from the jurisdiction of the tribunals, and we doubt whether there is a need to give concurrent jurisdiction to the civil courts over them, possibly with one or two minor exceptions. We would welcome consultees' views. We also invite responses from consultees on an aspect of unfair dismissal claims in the tribunals which differs from wrongful dismissal claims in the courts: the strict time limit for bringing a claim.

1.13 Chapters 3 and 4 consider the restrictions imposed on the jurisdiction of employment tribunals.

1.14 Chapter 3 deals with claims of discrimination in education, the provision of services, and other non-employment contexts, where jurisdiction is conferred exclusively on the county courts.

1.15 Chapter 4 deals with claims for breach of contract, where the tribunals' jurisdiction is confined both as to the subject matter, the amount which can be awarded, and by the rule that the tribunals' jurisdiction is confined to breach of contract cases arising or outstanding on the termination of employment. It also deals with claims for unauthorised deductions from wages.

---

[10] See a speech to the Employment Appeal Tribunal by the then Chair of the Law Commission on 1 February 2018, available online at https://tinyurl.com/y7paxazd (last visited 14 September 2018).

[11] Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623.

1.16 Chapter 5 considers areas in which the tribunals and the civil courts have concurrent or shared jurisdiction, in particular:

(a) equal pay;

(b) discrimination in occupational pension schemes;

(c) certain claims affected by the Transfer of Undertakings Regulations ("TUPE");[12]

(d) claims of breaches of the Working Time Regulations;[13] and

(e) claims under the National Minimum Wage Act 1998.

1.17 Chapter 6 mentions three areas in which employment tribunals' powers are restricted. The first is that they cannot grant injunctions. The second is that, unlike civil courts, when they have found two or more respondents liable to the claimant in the same case, they cannot make an order for contribution between the respondents. The third is that, employment tribunals cannot enforce their own awards.

1.18 In Chapter 7 we consider some issues relating to the jurisdiction of the Employment Appeal Tribunal ("EAT") in respect of appeals from decisions by the Central Arbitration Committee and we note the general jurisdiction of the EAT to hear appeals from employment tribunals.

1.19 Chapter 8 considers whether a specialist Employment and Equalities List should be created within the High Court.

1.20 Because the subject matter of this project is technical and procedural, we assume, we hope correctly, that most readers of this consultation paper will have at least a basic knowledge of employment law. We have therefore not set out the substantive law in any detail except where to do so is necessary to explain an issue about the lines of demarcation between employment tribunals and the courts. We explain some of the technical legal terms used, particularly where they are not specific to employment law, in footnotes to the text and in the Glossary at pages v-vi above.

**Note on terminology: employees and workers**

1.21 Readers will note that we use the terms "employee", "worker" (and, on occasion, "self-employed independent contractor") in this consultation paper.

1.22 "Employee" and "worker" are defined in legislation,[14] with employees enjoying the full set of statutory employment-law rights and workers enjoying a more limited set of

---

12 Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246.

13 Working Time Regulations 1998 SI 1998 No 1833.

14 For "employee", see Employment Rights Act 1996, ss 230(1) and 230(2). For "worker", see Employment Rights Act 1996, s 230(3), but note that different definitions of each are found in other pieces of legislation. The delineation of "worker" as an intermediate category of employment status between employment and self-employment has been the subject of much litigation in recent years - see, for example, the Supreme Court decision in *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29. How to make employment status rules for

statutory employment-law rights.[15] The third category (self-employed independent contractor) is not defined in legislation and is a label used to describe individuals who are in business for themselves providing services to clients and who are therefore neither employees nor workers. Self-employed individuals in general have no employment-law rights and their rights and responsibilities are predominantly set out in the terms of the contracts they have with their clients.[16]

1.23 All employees are workers but not all workers are employees, the statutory definition of worker being wider than that of employee. Section 230(1) of the Employment Rights Act 1996 defines an employee as someone "who has entered into or works under … a contract of employment." Section 230(3) defines a worker as someone "who has entered into or works under" either, "(a) a contract of employment, or (b) any other contract … whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual". A worker who is not also an employee is therefore sometimes referred to as a Limb (b) worker, although in this consultation paper we will use the term "worker" to refer to an individual who works under a contract to perform work or services personally rather than under a contract of employment.

1.24 The default forum for employees and workers who seek to enforce their statutory employment-law rights is the employment tribunal. Disputes relating to a genuinely self-employed person are predominantly dealt with by the civil courts.

**Devolution and territorial extent**

1.25 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 consultation paper is reserved to the UK Government,[17] who through the Ministry of Justice have asked us to conduct this review.

1.26 Only the Scottish Law Commission may make recommendations in respect of the law in Scotland. Furthermore, the subject matter of this consultation paper is due to be devolved to the Scottish Parliament and Government under the Scotland Act 1998, as amended by the Scotland Act 2016.[18]

---

employment rights and tax clearer is the subject of consultation by the Department for Business, Energy and Industrial Strategy, HM Treasury and HM Revenue and Customs. See Department for Business, Energy and Industrial Strategy, HM Treasury and HM Revenue and Customs, Good Work: The Taylor Review of Modern Working Practices – Employment Status Consultation (February 2018) ("Employment Status Consultation") available online at: https://tinyurl.com/ybhzdyda (last visited 14 September 2018). The consultation ran from 7 February 2018 to 1 June 2018 and at time of writing the departments are analysing feedback from consultees.

15 For a table setting out the statutory employment rights of employees and workers respectively, see the government's February 2018 "Employment Status Consultation", pp 11 and 12: https://www.gov.uk/government/consultations/employment-status (last visited 14 September 2018).

16 Self-employed people are, however, covered by work-place health and safety legislation and, in some cases, discrimination legislation.

17 Government of Wales Act 2006, Sch 7A, Part 1, para 9.

18 Scotland Act 1998, Sch 5, Part III, para 2A; Scotland Act 2016, s 39.

1.27 Although this consultation paper is only concerned with the law in England and Wales, employment legislation is at present, with minor exceptions, the same throughout Great Britain. We have therefore listened and will continue to listen to key stakeholders whose expertise will help us formulate better recommendations for law reform in England and Wales. That may include Scottish organisations and persons, such as the President of Tribunals (Scotland). If and when any recommendation for law reform is taken forward in England and Wales, it will be a matter for the Scottish Government to decide whether they wish to bring forward similar measures in Scotland.

**Impact Assessment**

1.28 The Law Commission produces impact assessments in respect of its reform recommendations. We have had early indications from stakeholders about where they think efficiencies might be gained. This consultation paper asks, in some places, broad questions, and alternative options for reforming the employment law hearing structures. After consultation concludes and as we formulate our reform recommendations, we expect to publish along with our report an economic impact assessment, and an equality impact assessment which will help inform Government in its decision whether to take forward those recommendations.

1.29 We invite consultees to comment on the cost of operating the current system for employment dispute determination, and particularly on whether and how some of our proposals or issues about which we ask questions might affect the cost to the parties and the public purse.

**Acknowledgements**

1.30 On this project we were fortunate to have had the services of Greg Chambers, solicitor and Associate Director at Osborne Clarke LLP, who was seconded to work part time for the Commission between April and August 2018. The staff of the Commission who worked on this project were Henni Ouahes (head of public law), Rose Ireland, Fiona Petersen and Marina Heilbrunn (research assistants). We also record our appreciation to Vivienne Gay, former Regional Employment Judge, Andrew Short QC and Sir Brian Langstaff for their comments on some sections of the draft. They are not responsible for the contents.

1.31 Work on this paper was led by Sir David Bean, whose term of office as Chair of the Law Commission ended shortly before the publication of this consultation paper. We are grateful to him for leading the project from its inception and for the particular expertise in employment law that he brought to the task.

# Chapter 2: The exclusive jurisdiction of employment tribunals

## INTRODUCTION

2.1 Employment tribunals have exclusive jurisdiction over certain types of claims. This means that those types of claims can only be initiated and litigated in an employment tribunal. This Chapter outlines which types of claims fall into this category. There are also a number of rights and issues which can be litigated in both civil courts and employment tribunals; these areas of shared jurisdiction are explored in Chapters 4 and 5.

2.2 The entire jurisdiction of employment tribunals is conferred by statute. A range of primary and other, subordinate, 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.

2.3 Employment tribunals do not have the power to award the full range of remedies available to civil courts. The vast majority of successful employment tribunal cases result in an award of financial compensation. However, employment tribunals may, in some cases, make an order for non-financial remedies, for example re-instatement or re-engagement in cases of unfair dismissal.

2.4 In this Chapter we list the principal areas of employment tribunals' exclusive jurisdiction. These form the bulk of complaints made to tribunals. We refer more briefly at paragraphs 2.44 and 2.45 to other miscellaneous claims over which the tribunals have exclusive jurisdiction.

## THE AREAS OF EMPLOYMENT TRIBUNALS' EXCLUSIVE JURISDICTION

2.5 The principal areas of employment tribunals' exclusive jurisdiction are:

(1) unfair dismissal;

(2) discrimination in employment;

(3) detriment of various specified types;

(4) redundancy;

(5) maternity and parental rights;

(6) flexible working;

(7) time off work for study or training;

(8) various matters concerning trade union membership and activities;

(9) written statements of employment particulars;

(10) itemised pay statements; and

(11) the Agency Workers Regulations 2010.

2.6 We consider these areas of exclusive tribunal jurisdiction in more detail in this Chapter at paragraphs 2.8 to 2.43 below.

2.7 We consider various other areas which also give rise to litigation in employment tribunals in Chapters 4 and 5 because, unlike the areas of exclusive jurisdiction discussed in the present Chapter, they can give rise to litigation in courts as well as in employment tribunals.

**(1) Unfair dismissal**

2.8 Employees, as defined in section 230 of the Employment Rights Act 1996 ("ERA 1996"), have a right not to be unfairly dismissed by their employer.[19] Complaints of unfair dismissal can only be made to employment tribunals[20] and the relevant law is set out in Part X of the ERA 1996.

2.9 In order to bring an ordinary unfair dismissal claim, an employee must generally have accrued two years of continuous service with the employer.[21] When such a complaint of unfair dismissal is made, employment tribunals must consider whether the employer has shown that the reason or principal reason for the dismissal was capability, conduct, redundancy, a statutory restriction, or some other substantial reason justifying dismissal. In such cases a reasonableness test also applies – the tribunal will consider whether in all the circumstances the employer acted reasonably or unreasonably in treating the shown reason as a sufficient reason for dismissing the employee.[22]

2.10 A dismissal will be *automatically unfair* if it was for one or more of a number of special reasons listed in Part X of the ERA 1996 and certain other pieces of legislation. If so, the dismissal is deemed to be unfair without reference to the reasonableness test which applies to ordinary unfair dismissal. In most cases of automatically unfair dismissal, the two-year service requirement which we describe at paragraph 2.9 above does not apply. Some examples of automatically unfair reasons for dismissing someone include:

(1) pregnancy, childbirth or maternity, or maternity/paternity/shared paternity/ adoption leave;[23]

---

19 Employment Rights Act 1996, s 94.

20 Employment Rights Act 1996, s 111(1).

21 Employment Rights Act 1996, s 108(1).

22 Employment Rights Act 1996, s 98. If the tribunal finds that the employee was unfairly dismissed, it will consider the following remedies: reinstatement, re-engagement (both of which are rarely invoked) and compensation (Employment Rights Act 1996, ss 113 to 115, 118 to 119). Compensation usually comprises a basic award and a compensatory award. Basic awards are calculated based on age, length of service and the amount of a week's pay, and compensatory awards are in ordinary cases currently capped at £83,682. We note the discrepancy between this cap and the cap on compensation for breach of the blacklisting regulations in Chapter 5.

23 Employment Rights Act 1996, s 99.

(2) raising health and safety issues;[24]

(3) making protected disclosures ("whistleblowing");[25]

(4) trade union membership, activities or use of union services.[26]

2.11 The statutory claim of unfair dismissal, in which the focus is ordinarily on the employer's reasoning and procedures, is distinct from a wrongful dismissal claim under the common law, where the question for a court or a tribunal is whether the termination of employment was in breach of contract (or a result of the employer's breach of contract where the employee resigns for that reason). If so, the employee will be able to claim contractual damages.

### (2) Discrimination in employment

2.12 The Equality Act 2010 is the principal discrimination law statute in the United Kingdom. It harmonised and strengthened existing discrimination law, consolidating diffuse provisions into one Act. The Act lists nine protected characteristics: (age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation).[27] Employees and workers are protected from certain types of conduct on account of the protected characteristics (direct discrimination; indirect discrimination; harassment; victimisation; instructing, causing, inducing and helping discrimination), and by certain different provisions which variously apply to the protected characteristics of disability; pregnancy and maternity, and gender reassignment.[28]

2.13 The Equality Act 2010 gives exclusive and concurrent jurisdiction to the county court and employment tribunals on different subject matters. Employment tribunals generally have exclusive jurisdiction to determine discrimination at work cases, for which provision is made in Part V of the Act.[29] An exception is where the complaint is against a decision by a qualifications body (for example, the General Medical Council). We discuss this in more detail in Chapter 5.

### (3) Detriment

2.14 There are several statutory claims which aim to protect employees and, in some cases, workers, from being subjected to a detriment by their employer in specified circumstances.

2.15 There is no general definition of "detriment", but it is commonly understood as meaning that the employee or worker is put at a disadvantage as a result of an act or omission

---

24 Employment Rights Act 1996, s 100.

25 Employment Rights Act 1996, s 103A, added by the Public Interest Disclosure Act 1998, s 5.

26 Trade Union and Labour Relations (Consolidation) Act 1992, s 152.

27 Equality Act 2010, s 4.

28 Equality Act 2010, Chapter 2 ss 13 - 27 and ss 111 - 112.

29 Equality Act 2010, s 120(1).

by the employer which was based on an unlawful ground.[30] Usually, a *worker's* detriment claim can encompass detriment arising from dismissal, whereas an *employee's* detriment claim does not extend to dismissal. This is because, from the moment of termination, employees' rights are defined by unfair dismissal legislation.

2.16 We deal with some types of detriment claims below, such as those related to involvement in trade union activities, and the exercise of the right to maternity, paternity and parental leave.[31] Detriment claims can be made on a number of other grounds, for example, whistleblowing or a matter related to health and safety.[32] The statutory grounds for detriment claims also vary. Part V of the ERA 1996 makes provision for a range of detriment claims, and the remaining causes of action are scattered across other primary and secondary legislation. Some of these could be framed alternatively as claims for breach of contractual duty and brought in the High Court or the county court.

### (4) Redundancy

2.17 Redundancy refers broadly to circumstances in which the need for employees has reduced, leading to proposed and then actual dismissals by the employer.[33] Employment law places obligations on the employer in relation to redundancy, which give rise to corresponding claims for employees.

(1) **Statutory redundancy pay:** Under Part XI of the ERA 1996, employees who are dismissed by reason of redundancy have a statutory right to a redundancy payment.[34] Any complaint arising under Part XI falls within the exclusive jurisdiction of employment tribunals.[35]

(2) **Collective redundancy consultation obligations:** An employer who proposes to dismiss as redundant 20 or more employees at the same establishment within a period of 90 days must consult appropriate representatives of the affected employees.[36] Employment tribunals have exclusive jurisdiction to hear complaints that an employer has failed to comply with this duty.[37]

2.18 A *contractual* claim to a particular payment in the event of redundancy may be brought in the civil courts or employment tribunals but subject, in a tribunal, to maximum damages of £25,000 (see Chapter 4, paragraphs 4.17 to 4.31).

---

30 *Harvey on Industrial Relations and Employment Law*, loose-leaf 2018, Division DII, 2A and 2B(1) para 16.

31 Trade Union and Labour Relations (Consolidation) Act 1992, s 146; Employment Rights Act 1996, s 47C.

32 Employment Rights Act 1996, ss 47B and 44.

33 *Harvey on Industrial Relations and Employment Law*, loose-leaf 2018, Division E, 1A, para 1.

34 Employment Rights Act 1996, s 135(1)(a). Employees may also be eligible for redundancy payment if they are laid off or kept on short-time (Employment Rights Act 1996, s 135(1)(b)).

35 Employment Rights Act 1996, s 163.

36 Trade Union and Labour Relations (Consolidation) Act 1992, s 188.

37 Trade Union and Labour Relations (Consolidation) Act 1992, ss 189 to 192.

### (5) Maternity and parental rights

2.19 Parents (expecting and actual) are given a collection of rights in employment law. These rights are subdivided into four categories: maternity, paternity, adoption and shared parental rights. Each category is governed by different legislative and regulatory provisions. Substantively, the rights generally concern entitlement to leave and payment during periods of leave.

2.20 Pregnant employees, adoptive parents and fathers are entitled to maternity leave, adoption leave and paternity leave respectively.[38] In addition, shared parental leave and pay provisions in effect allow parents to share a pot of leave and pay between each other if the mother (or adopter) elects to curtail their own maternity leave and pay (or adoption leave and pay) and share the balance with their partner.[39]

2.21 Expecting and actual parents (who are qualifying employees under the Social Security Contributions and Benefits Act 1992) have a right to receive statutory maternity, paternity, adoption or shared parental pay, depending on the circumstances.[40]

Detriment and dismissal claims

2.22 It is unlawful for an employer to subject their employees to a detriment or dismiss them for reasons related to pregnancy, childbirth or maternity, or the taking of or intention to take maternity, paternity, adoption or shared parental leave.[41] It is also unlawful to subject agency workers to detriment in connection with their more limited set of "family friendly" rights.[42] We discussed detriment and unfair dismissal claims above, at paragraphs 2.8 to 2.10 and 2.13 to 2.15. Detriment and unfair dismissal claims are within the exclusive jurisdiction of employment tribunals.

Discrimination claims

2.23 Pregnancy and maternity are protected characteristics under the Equality Act 2010.[43] Section 18 of the Act governs discrimination because of pregnancy and maternity in the work context. As we discussed above at paragraph 2.13, employment tribunals generally have exclusive jurisdiction to determine discrimination at work claims.

Claims related to statutory payments

2.24 Statutory maternity, paternity, adoption and shared parental pay count as "wages" as defined in the ERA 1996, and accordingly fall within the unauthorised deduction of

---

38 Maternity leave: Maternity and Parental Leave etc Regulations SI 1999 No 3312, reg 7. See also Employment Rights Act 1996, ss 71 to 75. Employees as defined by Employment Rights Act 1996, s 230. Adoption leave: Employment Rights Act 1996, ss 75A to 75D. Paternity leave: Employment Rights Act 1996, ss 80A to 80E; See also Paternity and Adoption Leave Regulations SI 2002 No 2788.

39 Employment Rights Act 1996, ss 75E to 75K.

40 Social Security Contributions and Benefits Act 1992, Parts XII, XIIZA, XIIZB and XIIZC.

41 Employment Rights Act 1996, ss 47C and 99.

42 Employment Relations Act 1999, s 47C(5).

43 Equality Act 2010, s 4.

wages framework set out in Part II of that Act, over which employment tribunals have exclusive jurisdiction.[44]

2.25 However, it appears that employment tribunals do not have jurisdiction to decide whether an employee meets the statutory tests necessary to be entitled to these statutory payments in the first place, that being a matter exclusively for HMRC, which has overall responsibility for the administration of these statutory payments. This was the conclusion of the Scottish EAT in the case of *Hair Division Ltd v MacMillan* in the context of statutory maternity pay.[45]

2.26 Complaints regarding non-payment may be made to HMRC, following which HMRC may determine that an employer must pay, in default of which a financial penalty may be levied. Appeals from decisions of HMRC can be made to the First-tier Tribunal (Taxes and Duties Chamber) and then the Upper Tribunal (Tax and Chancery Chamber).

### (6) Flexible working

2.27 Employees have the right to request changes in the terms and conditions of their employment to enable them to have more flexible working patterns.[46] Employers have corresponding obligations to consider such requests in a reasonable manner and in accordance with specified criteria.[47]

2.28 Employment tribunals have exclusive jurisdiction to hear and determine complaints related to flexible working requests.[48] The grounds for complaint in this context are listed in section 80H of the ERA 1996 and include, for example, that the employer has not complied with the substantive and procedural requirements in section 80G, or that the employer rejected the application based on incorrect facts.[49]

2.29 In addition, employees receive statutory protection from detriment or dismissal connected to their exercise of the right to request flexible working;[50] such claims are also within the exclusive jurisdiction of employment tribunals.

### (7) Time off work for study or training

2.30 Under the ERA 1996, young employees have the right to take paid time off during working hours to undertake study or training leading to a "relevant qualification", subject

---

44 For definition of wages: Employment Rights Act 1996, s 27(1)(c), (ca), (cb) and (cc). For employment tribunals' jurisdiction over claims relating to unauthorised deductions from wages, see Employment Rights Act 1996, s 23.

45 [2012] UKEAT 0033/12/1210, [2013] Eq LR 18. For HMRC's remit in relation to these statutory payments, see: Statutory Sick Pay and Statutory Maternity Pay (Decisions) Regulations SI 1999 No 776, regs 2 and 3; Statutory Paternity Pay and Statutory Adoption Pay (Administration) Regulations SI 2002 No 2820, regs 12 and 13; Statutory Shared Parental Pay (Administration) Regulations SI 2014 No 2929, regs 12 and 13.

46 Employment Rights Act 1996, ss 80F to 80I.

47 Employment Rights Act 1996, s 80G.

48 Employment Rights Act 1996, s 80H.

49 Employment Rights Act 1996, s 80H(1).

50 Employment Rights Act 1996, s 47E (detriment) and s 104C (unfair dismissal).

to a number of conditions.[51] "Relevant qualification" is defined broadly.[52] Different provision is made for employees aged 16 or 17 and those aged 18. In addition, the ERA 1996 contains a general right for "qualifying employees" to make a section 63D application to their employer to allow them to undertake study or training.[53] Unlike the rules for young employees, the study or training must be for the purpose of improving the employee's effectiveness in the employer's business, or the performance of the business more generally.[54]

2.31 Employment tribunals have exclusive jurisdiction over complaints regarding an employer's refusal to grant time off for study or work in accordance with the rights contained in sections 63A to 63H.[55]

2.32 Employees are also protected from being subjected to detriment by reason of their exercise of the right to take paid time off for study or training, or the making of a request to allow them to undertake study or training.[56] In addition, a dismissal for reasons related to a section 63D application is automatically unfair under section 104E of the ERA 1996. As discussed above, both detriment and unfair dismissal claims are within the exclusive jurisdiction of employment tribunals.

**(8) Trade union membership and activities**

2.33 There is an extensive body of law governing the constitution, activities and membership of trade unions. The Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A 1992") is a major piece of collective labour relations legislation, consolidating in one statute provisions relating to trade unions, employers' associations, industrial relations and industrial action. Several of the statutory claims under TULR(C)A 1992 fall within the exclusive jurisdiction of employment tribunals.

2.34 Some of the statutory claims over which employment tribunals have exclusive jurisdiction are based on rights asserted against employers. For example, employees who are officials or members of an independent trade union are entitled to take (in some circumstances, paid) time off for certain specified purposes related to trade union activities.[57] Complaints against an employer for failure to allow time off for those purposes must be brought in an employment tribunal.[58] Another example is a claim that

---

51 Employment Rights Act 1996, s 63A.

52 Employment Rights Act 1996, s 63A(2)(c).

53 Employment Rights Act 1996, s 63D. Note these provisions do not apply to small employers and their employees: Apprenticeships, Skills, Children and Learning Act 2009 (Commencement No 2 and Transitional and Saving Provisions) Order SI 2010 No 303, art 4.

54 Employment Rights Act 1996, s 63D(4).

55 Employment Rights Act 1996, ss 63C and 63I.

56 Employment Rights Act 1996, ss 47A and 47F.

57 Trade Union and Labour Relations (Consolidation) Act 1992, ss 168 to 170.

58 Trade Union and Labour Relations (Consolidation) Act 1992, ss 168(4), 168A(9), 169(5) and 170(4).

an employer unlawfully refused a person employment for reason of that person's membership or non-membership of a trade union.[59]

2.35 Workers and employees may also make a complaint against their employer for any detriment suffered or, in the case of employees, unfair dismissal on grounds related to their involvement or non-involvement with trade unions.[60] Employment tribunals have exclusive jurisdiction over detriment and unfair dismissal claims.[61]

2.36 Employment tribunals also have exclusive jurisdiction over some complaints against trade unions, as opposed to employers. This includes, for example, complaints that an individual has been unjustifiably disciplined by a trade union, or unlawfully excluded or expelled from a trade union.[62]

**(9) Written statement of employment particulars**

2.37 Employers must give employees a written statement of the particulars of their employment not later than two months after the beginning of employment. The particulars required to be included in the statement are set out in section 1 of the ERA 1996. If those particulars change, employers are obliged to give employees a statement of changes.[63]

2.38 If an employer fails to provide such a statement, or the employee contests its contents, the employee (or in the latter case, the employer) may refer the matter to an employment tribunal. Section 11 of the ERA 1996 states that employment tribunals can then "determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements".[64] In *Southern Cross Healthcare Ltd v Perkins*, the Court of Appeal affirmed that, in such a claim under Part I of the ERA 1996, employment tribunals have no jurisdiction to interpret the statement; they can only ensure that the statement corresponds to what was agreed between the parties.[65] The jurisdiction to interpret the statement lies exclusively with the civil courts.

2.39 It is important to note here that the Court of Appeal has recently held[66] that employment tribunals do have jurisdiction to interpret and construe contractual provisions in the context of an unauthorised deductions from wages claim under Part II of the ERA 1996; in that context, the *Southern Cross* principle does not apply. There is therefore a discrepancy between an employment tribunal's power to interpret statements under

---

59 Trade Union and Labour Relations (Consolidation) Act 1992, s 137.

60 Trade Union and Labour Relations (Consolidation) Act 1992, ss 146 to 151 (detriment); ss 152 to 167 (unfair dismissal).

61 Trade Union and Labour Relations (Consolidation) Act 1992, ss 146(5) (detriment) and 152(1) (unfair dismissal).

62 Trade Union and Labour Relations (Consolidation) Act 1992, ss 64 to 67 and 174(5).

63 Employment Rights Act 1996, s 4.

64 Employment Rights Act 1996, s 11(1), (2).

65 [2010] EWCA Civ 1442, [2011] ICR 285 at [25] to [30].

66 *Agarwal v Cardiff University* [2018] EWCA Civ 1434

Part I of the ERA 1996 and its power to interpret the contract of employment when determining a claim under Part II of that Act. We discuss this further in Chapter 4.

### (10) Itemised pay statements

2.40 Employees have the right to be given an itemised pay statement – a breakdown of the amount paid to them, including any deductions from their gross pay – by their employer, each time they are paid.[67] This right will be extended to workers in April 2019.[68] The particulars which the statement must contain are listed in section 8 of the ERA 1996.

2.41 As with written statements of employment particulars, if an employer does not comply with the itemised pay statement obligations, or the employee and employer dispute the particulars which ought to have been included, an employee (or in the latter case, an employer) can make a reference to an employment tribunal under section 11 to determine what the statement ought to have contained.[69] Employment tribunals have exclusive jurisdiction in this regard.[70] Their jurisdiction under section 11 is limited to assessing whether the particulars have been included; it does not extend to considering the accuracy of the amount stated or whether any deductions were authorised.[71] Complaints regarding the amount or status of any deductions must be brought under Part II of the ERA 1996, or as part of a claim for breach of contract.

### (11) Agency Workers Regulations 2010

2.42 The Agency Workers Regulations SI 2010 No 93 ("AWR") aim to protect agency workers[72] by giving them certain:

(1) "day one" rights: "hirers", or end-users, of agency workers must ensure that those workers can access their "collective facilities and amenities" (such as canteens and child-care facilities), and information about their job vacancies, from the first day of the workers' assignments;[73] and

(2) "week 12" rights: after doing the same role, whether on one or more assignments, with the same hirer for 12 continuous weeks, agency workers are entitled to "the same basic working and employment conditions" as they would have received for doing the same job had they been recruited by the hirer directly instead of placed by an agency. This includes various terms and conditions relating to pay (but not all types of pay), working time and annual leave.[74]

2.43 Agency workers have the right not to be subjected to detriment and (if they are employed, for instance by the employment agency or by another company in the staffing

---

67 Employment Rights Act 1996, s 8.

68 Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order SI 2018 No 147.

69 Employment Rights Act 1996, s 11.

70 Employment Rights Act 1996, s 205(1).

71 Employment Rights Act 1996, s 11(3)(b).

72 As defined by reg 3 of the Agency Workers Regulations SI 2010 No 93.

73 Agency Workers Regulations SI 2010 No 93, regs 12 and 13.

74 Agency Workers Regulations SI 2010 No 93, regs 5 to 7.

supply chain) not to be unfairly dismissed by reason of exercising their rights or bringing proceedings under the AWR 2010.[75] Employment tribunals have exclusive jurisdiction to hear and determine complaints by agency workers that their rights under Parts 2 and 3 of the AWR 2010 have been infringed by a hirer or a temporary work agency.[76] Hirers are solely responsible for breaches of "day one rights", whereas agencies and hirers are each liable for breaches of "week 12" rights to the extent that they are responsible.[77] When enacting the AWR 2010, the government decided not to make agencies and hirers jointly and severally liable for breaches.[78] Where there are two or more respondents, regulation 18(9) enables tribunals to identify the degree to which each was responsible for the infringement and to apportion the compensation payable by each accordingly.

### (12) Other areas of employment tribunals' exclusive jurisdiction

2.44 In addition to the principal areas of jurisdiction, there are some other more rarely-invoked statutory claims within the exclusive jurisdiction of the employment tribunal. These derive from a range of primary and secondary legislation. It is not necessary for our purposes to list them all here.

2.45 By way of illustration, they include: applications by the Secretary of State for an order prohibiting a person from running an employment agency,[79] and appeals against an improvement or prohibition notice imposed under the Health and Safety at Work Act 1974, the Control of Major Hazards Regulations and notices specified in Part 2 Schedule 8 of the REACH Enforcement Regulations 2008.[80]

## TIME LIMITS

### Three months

2.46 For the majority of the statutory employment claims discussed in this consultation paper, the primary time limit (or limitation period) for bringing a claim is three months from the alleged unlawful conduct (or, where applicable, from the "effective date of termination" of employment).

### "Not reasonably practicable" test

2.47 Where the employment tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within three months, the limit may be extended for such period as the tribunal considers reasonable. This is the case with, for instance: unfair

---

75 Agency Workers Regulations SI 2010 No 93, reg 17.

76 Agency Workers Regulations SI 2010 No 93, reg 18.

77 Agency Workers Regulations SI 2010 No 93, reg 14(1) and (2).

78 If two people (A and B) are jointly and severally liable to pay another person (C) a sum of money, C may claim the sum from one or both of them. See further footnote 283 below.

79 Employment Agencies Act 1973, s 3A to 3D.

80 Health and Safety at Work Act 1974, s 24; Control of Major Hazards Regulations SI 2015 No 483, reg 23(6); REACH Enforcement Regulations SI 2008 No 2852, Sch 8, Part 2. "REACH" stands for the registration, evaluation, authorisation and restriction of chemicals.

dismissal claims (both "ordinary" and "automatic"[81]); detriment claims; claims for breach of an employer's collective redundancy consultation obligations; flexible working claims; claims related to time off work for study or training, and claims related to statements of initial employment particulars and itemised pay statements.[82]

### "Just and equitable" test

2.48 Less commonly, the test is whether the employment tribunal considers that an extended time period is just and equitable. The most significant example of this is in relation to employment discrimination claims under the Equality Act 2010. For such claims, the primary time limit is three months from the date of the act or omission of discrimination complained of, or where the act is one of a series of such acts, from the latest act or omission in the series. This time limit is subject to the just and equitable test for extension.[83] A just and equitable extension may also be made for claims under, for instance, the AWR.[84]

2.49 The "just and equitable" test gives employment tribunals a wide discretion. The "reasonably practicable" test, by contrast, gives almost no discretion at all and its strictness, especially when combined with a primary time limit as short as three months, has often been criticised. A recent example of such criticism can be found in a short adjournment debate initiated by Mike Penning MP in the House of Commons on 13 September 2017.[85] Another is Michael Reed's (of the Free Representation Unit) oral evidence to a House of Commons committee.[86]

### Six months

2.50 In relatively rare instances, the primary time limit for bringing a claim is six months. For example:

---

81 An exception is that if a dismissal is automatically unfair in relation to "blacklisting", then a more generous "just and equitable" test for extension applies (Employment Rights Act 1996, ss 104F and 111(5)). We describe the difference between "ordinary" and "automatic" unfair dismissal at paras 2.9 and 2.10 above, and trade union blacklisting at para 5.80 and following.

82 Employment Rights Act 1996, ss 111(2) (unfair dismissal), 48(3) (detriment), 80H (flexible working), 63C(2) and 63I(5) (study or training), and s 11(4) (statement of initial employment particulars and itemised pay statements); Trade Union and Labour Relations (Consolidation) Act 1992, ss 189(5) (collective redundancy consultation obligations), 147(1), 171(1), 139(1) and 66(2) (trade union claims).

83 Equality Act 2010 s 123(1).

84 Agency Workers Regulations SI 2010 No 93, reg 18(4) and (5).

85 *Hansard* (HL), 13 September 2017, vol 628, cols 949 to 954. Mike Penning MP advocated for the time limit and the test for unfair dismissal claims to be reviewed: https://hansard.parliament.uk/Commons/2017-09-13/debates/3FC126E5-67ED-4F52-8286-DCF4C5AFCD7D/EmploymentTribunals (last visited 14 September 2018).

86 Michael Reed, Principal Legal Officer at the Free Representation Unit, when giving evidence to the Women and Equalities Committee recently commented that: "all the limits in the Employment Tribunal are bizarrely short compared with all other areas of the civil justice system". Women and Equalities Committee, *Oral evidence: Sexual harassment in the workplace* (6 June 2018) HC 725.

(1) exclusion or expulsion complaints against trade unions must be brought within six months from the date of the exclusion or expulsion, subject to the "reasonably practicable" test for extension;[87]

(2) complaints of unfair dismissal where the basis for dismissal relates to industrial action must be brought within six months from the date of dismissal, subject to the "reasonably practicable" test;[88] and

(3) as we discuss in Chapter 5 at paragraph 5.2, equal pay claims brought in employment tribunals are generally subject to a (rigid) six-month time limit.

### Six-year time limit for contract claims in the civil courts

2.51 By contrast with the time limits applying to employment tribunal claims, the time limit for bringing a contractual claim in the civil courts is six years.[89] We discuss the limited extent to which employment tribunals share jurisdiction to hear breach of contract claims in Chapter 4,[90] but we note here that the contrast between the standard six-year limitation period (applying in civil courts) and the three-month limitation period (applying when bringing such breach of contract claims in employment tribunals) is pronounced. We also discuss the differences between the time limit for equal pay claims in employment tribunals and the civil courts in Chapter 5.

### Early conciliation

2.52 An early conciliation procedure ("Early Conciliation") involving ACAS must be followed before the majority of employment tribunal claims can be commenced. Early Conciliation became mandatory for claims presented on or after 6 May 2014. Its rationale is to encourage parties to settle disputes before employment tribunal claims are issued, and the statutory time limits for issuing tribunal claims (described above) are paused or extended so that claimants are not disadvantaged by the amount of time taken out of the relevant limitation period while complying with Early Conciliation.[91] Early Conciliation generally lasts for up to one month. The precise methods of pausing or extending the statutory limitation period are relatively involved but, in short:

(1) 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;[92] and

(2) 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

---

87 Trade Union and Labour Relations (Consolidation) Act 1992, s 175(1).

88 Trade Union and Labour Relations (Consolidation) Act 1992, s 239(2).

89 Limitation Act 1980, s 5.

90 Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623. See Chapter 4, paras 4.32 to 4.39.

91 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.

92 Employment Rights Act 1996, s 207B(3).

for issuing a tribunal claim is extended to in effect give the claimant one month from the date when they receive a certificate from ACAS verifying that Early Conciliation has been completed.[93]

2.53 Employment tribunal claims to which Early Conciliation applies include, but are by no means limited to, the following:[94]

(1) discrimination and equal pay;

(2) employee breach of contract claims (but not employer contract claims (counterclaims), for discussion of employment tribunals' limited contractual jurisdiction, see Chapter 4, paragraphs 4.1 to 4.67);

(3) unauthorised deductions from wages;

(4) unfair dismissal; and

(5) protection from detriment.

## ISSUES FOR CONSULTATION

2.54 As we note in Chapter 1, this project's terms of reference exclude the fundamental restructuring of employment tribunals or civil courts. Employment tribunals' areas of exclusive jurisdiction go to the heart of their function as specialist, low cost forums for determining industrial disputes, so we do not consider whether any of them should cease to be part of the tribunals' jurisdiction.

2.55 We are not aware of any body of opinion among the employment law or employment relations community which suggests that any of the exclusive jurisdictions of the employment tribunal should become an area of concurrent jurisdiction with the county court and/or High Court.

2.56 Our provisional view, therefore, is that there should be no change in the current areas where employment tribunals' jurisdiction is exclusive. If consultees disagree, we are particularly interested in knowing which, if any, area of the tribunals' exclusive jurisdiction should be shared with the county court and/or the High Court.

**Consultation Question 1.**

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

2.58 The short primary time limits for bringing an employment tribunal claim and the relatively strict test in many cases for extending the primary time limit derive from the original

[93] Employment Rights Act 1996, s 207B(4).

[94] For a non-exhaustive list stating the vast majority of claims to which Early Conciliation applies, see s 18(1) of the Employment Tribunals Act 1996 as amended by the Employment Tribunals Act 1996 (Application of Conciliation Provisions) Order SI 2014 No 431.

concept of tribunals as a forum for the speedy and informal resolution of employment disputes. This concept remains valid to some extent. But many employment tribunal cases are far more complex (and of much higher value) than such cases were in the 1970s, and the waiting times for hearings are often significantly longer. It could be considered anomalous that there should be such strict time limits for some employment tribunal claims, notably unfair dismissal, when a claimant who does issue the complaint in time may have to wait many months for a hearing. We also understand that there may be particular concerns about the unfair dismissal time limit (and the test for extending it) where an employee is dismissed for automatically unfair reasons relating to pregnancy or maternity, and the time limit for claims of sexual harassment.[95]

2.59 This consultation gives an opportunity to take stock of how employment tribunals have evolved, of the various time limits of three to six months depending on the nature of the claim, and of the different tests for extending time to bring a claim. We are therefore interested to hear from consultees whether the varying time limits should be rationalised into a more consistent, and perhaps slightly more generous time limit of six months, and/or whether the power to extend the time limit should afford tribunals greater discretion, as the "just and equitable" test does in discrimination cases, in most or all claims.

2.60 We deal separately in Chapter 5 at paragraphs 5.27 to 5.38 with the issue of time limits in equal pay cases.

**Consultation Question 2.**

2.61 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?

**Consultation Question 3.**

2.62 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?

[95] See para 2.10 above on automatically unfair dismissal and para 2.47 above for the "reasonable and practicable" test for extending its time limit. As regards sexual harassment, the Women and Equalities Select Committee has recommended an extension of the time limit for bringing such a claim in an employment tribunal. See Women and Equalities Select Committee, *Sexual Harassment in the Workplace* (25 July 2018) Chapter 3: Make Enforcement Processes Work Better for Employees, https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72507.htm#_idTextAnchor053 (last visited 14 September 2018).

# Chapter 3: Restrictions on the jurisdiction of employment tribunals - discrimination

## INTRODUCTION

3.1 This Chapter and Chapter 4 consider some of the restrictions on employment tribunals' jurisdiction.

3.2 Some stakeholders suggest that the jurisdiction of employment tribunals is artificially, or unhelpfully, constrained and that this can prevent cases from being heard by the most expert and qualified judges in the most cost and time efficient way. One way of maximising the use and benefit of employment judges' expertise is to review the boundaries of that tribunal's jurisdiction. This would, however, require legislation.

3.3 In this Chapter, we explore an area of substantive law over which employment tribunals have no jurisdiction, namely various types of discrimination claims arising outside the field of employment. In Chapter 4, we consider an area over which employment tribunals have jurisdiction, but which is subject to restrictions, namely breach of contract claims. We then deal with certain constraints on employment tribunals' jurisdictions in two areas which can relate to breaches of contract: written statements of employment particulars and claims for unauthorised deductions from wages.

3.4 We will seek consultees' views on whether some, or all of, the restrictions we identify should be removed and, if so, how and to what extent.

3.5 We will also investigate, in this Chapter, alternative ways of maximising the use of the most expert judicial resources. 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".

## NON-EMPLOYMENT DISCRIMINATION CLAIMS

3.6 Employment tribunals may only hear claims if specifically authorised to do so by legislation.[96] One important consequence of this (which is the subject of this Chapter) is that employment tribunals have no jurisdiction to hear a variety of discrimination claims arising in contexts outside the workplace.

3.7 The Equality Act 2010 prohibits discrimination against people on the basis of certain "protected characteristics". We outline these, and employment tribunals' exclusive jurisdiction to hear discrimination claims arising in the workplace, in Chapter 2.[97]

---

96 Employment Tribunals Act 1996, ss 1 to 3.

97 See Chapter 2, paras 2.12 and 2.13.

3.8 Section 114(1) of the Equality Act 2010 gives the county court exclusive jurisdiction to hear discrimination claims arising in the following non-employment contexts:

(1) the provision of services;

(2) the exercise of public functions;

(3) the disposal and management of premises (covering, for instance, those who provide premises for rent, and also the sale of property);

(4) membership associations (such as sports clubs or organisations established to promote the interests of their members); and

(5) education.[98]

3.9 There is therefore a relatively hard boundary between the civil courts and employment tribunals. It is important to note, however, that this boundary relates to the factual context in which a discrimination claim arises, not the substance of discrimination law. That remains governed by the Equality Act 2010 and the principles of discrimination law apply irrespective of whether a judge hearing a claim sits in the civil courts or an employment tribunal.

3.10 Some stakeholders have criticised this way of allocating discrimination claims between employment tribunals and county courts.[99] The criticisms put forward have two strands:

(1) the first concerns expertise. Most circuit and district judges are generalists who, due to their professional and judicial backgrounds and training, may not have had an opportunity to develop the expertise in discrimination law that employment judges have; and

(2) the second, related point is that employment judges have developed practices to manage and determine discrimination claims, and that there is no concomitant standard practice in the county court. There is concern about inconsistent judicial approaches developing between employment judges and county court judges. There is also a concern that county courts' case law may diverge from settled interpretations of the law by employment tribunals and the Employment Appeal Tribunal (EAT). A frequently cited example is *London Borough of Lewisham* v *Malcolm*, to which we now turn.[100]

---

98 Some discrimination claims regarding school pupils, however, must be brought in specialist education tribunals (Equality Act 2010, s 116). In addition, complaints of unlawful discrimination relating to certain decisions by "immigration authorities" are decided by specialist immigration tribunals rather than by the county court (Equality Act 2010, s 115). The immigration tribunal does not have jurisdiction to award compensation; if it determines that there has been unlawful discrimination (and the period for appealing the immigration decision has expired), the individual may then go to the county court to claim a remedy (Equality Act 2010, s 118(5)).

99 In this consultation paper we do not consider the allocation of jurisdiction as between employment tribunals and the specialist tribunals referred to at footnote 98 above; nor do we consider the allocation of jurisdiction as between those specialist tribunals and the civil courts. These matters fall outside our terms of reference.

100 *London Borough of Lewisham* v *Malcolm* [2008] UKHL 43, [2008] IRLR 700.

### *Lewisham LBC v Malcolm*

3.11 The *Malcolm* case was not heard in the employment tribunal system. Because it arose from the provision of premises, it was heard in the civil courts, culminating in a House of Lords judgment.

3.12 Mr Malcolm, a secure tenant of a flat owned by a local authority ("Lewisham"), had sublet his flat without Lewisham's permission, contrary to the tenancy agreement. Lewisham brought a claim for possession against Mr Malcolm in the county court. Mr Malcolm raised a defence and counterclaim under the Disability Discrimination Act 1995 ("DDA 1995").[101] Seeking to rely on a (now replaced) category of disability discrimination known as "disability-related discrimination",[102] Mr Malcolm argued that his subletting of the flat was disability-related because he would not have done so if he had not been schizophrenic.

3.13 The county court ruled against Mr Malcolm. Mr Malcolm appealed to the Court of Appeal who overturned the county court decision. Lewisham appealed to the House of Lords.

3.14 The House of Lords judgment reinstated the county court's first instance decision and in doing so significantly affected disability discrimination law, not just as it applied in the provision-of-premises context, but also in the employment context. This was because:

(1) their Lordships overturned aspects of a Court of Appeal decision (*Clark v TDG Ltd (t/a Novacold)*) which had for nearly a decade informed employment lawyers' and employment judges' understanding of disability-related discrimination;[103]

(2) in doing so, they limited employees' scope to bring claims of disability-related discrimination (although other avenues remained open to employees under the DDA 1995, including a duty on employers to make "reasonable adjustments" to take account of the needs of a disabled employee[104]); and

(3) after initial debate among employment law practitioners as to whether the House of Lords judgment applied outside the provision-of-premises context, the appellate courts confirmed that it did.[105] Employment tribunals and the EAT were therefore bound to follow *Malcolm.*

3.15 The Government considered that the effects of the House of Lords decision were contrary to its policy intentions and so in 2010 introduced a change in the legislation with a view to:

> re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her

---

101 Disability Discrimination Act 1995 was repealed and replaced by the Equality Act 2010.

102 Disability Discrimination Act 1995, s 3A(1).

103 *Clark v TDG Ltd (t/a Novacold)* [1999] IRLR 318, CA.

104 Disability Discrimination Act 1995, s 4A(1).

105 In an employment context: *Stockton on Tees Borough Council v Aylott* [2009] ICR 872, [2009] IRLR 533 (EAT). This was overturned by the Court of Appeal on other grounds ([2010] EWCA Civ 910, [2010] IRLR 994).

disability, and providing an opportunity for an employer or other person to defend the treatment.[106]

3.16 The Equality Act 2010 achieved this aim by removing "disability-related discrimination" from the statute book and replacing it with a new concept of "discrimination arising from disability",[107] and "indirect discrimination",[108] which was for the first time extended to the protected characteristic of disability.

**Should non-employment discrimination cases be heard in employment tribunals?**

3.17 As we noted above, there are a number of arguments in favour of enabling employment tribunals and/or employment judges to hear non-employment discrimination cases.

3.18 The argument which some stakeholders derive from the *Malcolm* example emphasises the need to minimise the risk of inconsistent judicial approaches developing in non-employment discrimination claims (heard in the county court) and employment discrimination claims (heard in employment tribunals).

3.19 A distinct argument put to us by stakeholders is the principle that, so far as practicable, discrimination disputes should be determined efficiently (both in terms of time and costs), by specialist judges. Given that discrimination claims are generally accepted to be part of the "stock-in-trade" of employment judges, this points to the latter being able to hear at least some suitable non-employment discrimination claims. Employment judges have significant training in and exposure to discrimination law, and are often current or former practising employment lawyers with significant experience of discrimination law concepts. By contrast, a circuit or district judge may have little or no experience of discrimination law. While there is a presumption that circuit or district judges hearing discrimination claims in the county court will sit with one or more assessors who have relevant experience (and are often employment tribunal lay members), it is arguably preferable and less costly for the judge to have specialist knowledge and experience.[109]

3.20 Some stakeholders, however, have put forward counter-arguments or offered cautionary notes regarding expanding the jurisdiction of employment tribunals to encompass non-employment discrimination claims. These include the following:

(1) the root cause of the "*Malcolm* confusion" was the way the legislation at the time (DDA 1995) was drafted and that the House of Lords decision in that case highlighted problems inherent in the legislation regarding disability-related discrimination, which prompted Parliament to introduce changes in the law through the Equality Act 2010;

(2) given that the case went to the House of Lords, the extent to which it demonstrates problems arising from employment tribunals having no jurisdiction

---

106 Equality Act 2010, Explanatory Notes, para 70.

107 Equality Act 2010, s 15.

108 Equality Act 2010, ss 6 and 19.

109 Equality Act 2010, s 114(7) refers to the County Courts Act 1984, s 63, which in turn empowers a judge to "summon to his assistance one or more persons of skill and experience in the matter to which the proceedings relate". We have been informed that it is common for only one assessor to sit.

over non-employment cases is open to debate – it might, for instance, be said that regardless of where a case is heard at first instance, the appellate courts have available to them case law from all jurisdictions to aid their interpretation of the legislation;

(3) while employment judges typically have more experience of general discrimination law concepts than county court judges, employment judges may have no particular experience of non-employment areas such as education, insurance, housing or policing. If, for instance, an individual alleges discrimination under the Equality Act in the context of a possession or wrongful arrest claim, it seems unlikely that this would in itself make an employment tribunal a better forum than the civil courts in which to determine the dispute; and

(4) legal aid is available, for example, to a tenant in a county court possession claim, but is not available in employment tribunals.

**ISSUES FOR CONSULTATION**

3.21 The arguments as we have set them out are finely balanced. In our preliminary exploration of this issue, stakeholders have informed us that they think some non-employment discrimination cases could usefully be heard by employment judges. But few would argue that *all* cases in which a discrimination issue arises should be moved to the employment tribunal.

3.22 We therefore provisionally propose that the civil courts should retain jurisdiction to hear non-employment discrimination claims, with district and circuit judges receiving appropriate training regarding discrimination law concepts.

3.23 We welcome consultees' views, whether they agree or disagree, and are particularly interested in whether there are any arguments either way on this issue which we have not touched upon.

**Consultation Question 4.**

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

3.25 The next issue is whether this jurisdiction of the county court should be shared, in at least some circumstances, with the employment tribunal, or should continue to be exclusive. The paramount consideration here is the strength of arguments that employment judges are, in at least some cases, better equipped to hear and determine non-discrimination claims justly and efficiently. Two solutions are particularly worth exploring. The first is concurrent jurisdiction with a power to transfer appropriate cases to or from the employment tribunal. The second is for the county court to retain its exclusive jurisdiction, allied with flexible deployment of employment judges to the county court. We will consider each in turn.

**Concurrent jurisdiction**

3.26 Legislation could give concurrent jurisdiction (also known as shared jurisdiction) to the employment tribunal and county court over non-employment discrimination claims. Giving employment tribunals concurrent jurisdiction over non-employment discrimination claims offers opportunities to allocate more discrimination cases to the most appropriate forum and so determine them more efficiently.

3.27 For concurrent jurisdiction to achieve the above benefits, there would need to be a mechanism to enable claims to be appropriately allocated as between the employment tribunal and county court. One such mechanism would be to give judges the power to transfer discrimination cases from court to tribunal or vice versa. This could be done as part of a triage process at the case management stage, where a judge could decide in which forum the case should be heard.

3.28 We note that section 140 of the Equality Act 2010 already permits the transfer of cases between employment tribunals and civil courts in the very specific scenario where there is litigation is 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"). The example given in the Explanatory Notes to the Act is as follows:

> An employer instructs an employee to discriminate against a customer. The customer brings a case against the employer or an employee in a county court. The employee brings a case against the employer in an employment tribunal. These claims both arise out of the same conduct and so the court and the tribunal can transfer one set of proceedings so that they can be dealt with together as this is a better way of managing the cases.

3.29 In addition, as we will note in Chapter 5, when we consider existing areas of shared jurisdiction between the tribunal and the civil courts, section 128 of the Equality Act 2010 allows civil courts to:

(1) strike out equal pay cases if it appears to the court that they could more conveniently be determined by an employment tribunal; or

(2) refer equal pay questions to employment tribunals before the case is ultimately disposed of by the civil court.

3.30 Transfers of cases from employment tribunals to the county court against the wishes of the claimant would, we think, be inappropriate. It should be borne in mind that that there are significant differences between litigating in the county courts and employment tribunals:

(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;[110]

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

(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 in county courts and employment tribunals (respectively, the Civil Procedure Rules and the Employment Tribunals Rules of Procedure[111]).

3.31 We therefore think that any power to transfer would require guidance as to the criteria for deciding which cases are appropriate for a transfer. We welcome views from consultees as to what those criteria might be.

**Consultation Question 5.**

3.32 Should employment tribunals be given concurrent jurisdiction over non-employment discrimination claims?

**Consultation Question 6.**

3.33 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?

**Consultation Question 7.**

3.34 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?

### Flexible deployment of judges (cross-ticketing)

3.35 Bringing about concurrent jurisdiction over non-employment discrimination claims would require primary legislation at a time when available parliamentary time is scarce. Another option is to retain the hard boundary between the jurisdictions of the county court and employment tribunal, but to use flexible deployment of judges (also known as cross-ticketing) so that an employment judge could where appropriate be deployed to

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

hear a discrimination case in 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.[112]

3.36 This option would, in other words, move the judge to the work rather than the work to the judge. This could for instance be done where an allegation of discrimination forms a significant element of the case. The employment judge could sit in the county court with an assessor where appropriate. It would require that some or all salaried employment judges should be recommended to the Judicial Appointments Commission for appointment as deputy district judges. Their sitting time in the county court would no doubt be limited, but that is a matter of administration.

3.37 We understand 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.

3.38 We understand that this has been welcomed by judges in the county court, who recognise the employment judges' experience in these areas.

3.39 It seems that flexibly deploying more employment judges to hear cases in the county court would reduce (but not eliminate) the possibility of a county court judge with little or no discrimination experience having to hear a discrimination case. If appropriately managed, it should improve the chances of allocating the most expert judicial resources to appropriate non-employment discrimination cases. We therefore ask consultees whether they consider this option to be a good alternative to concurrent jurisdiction conferred by amendment to primary statute.

**Consultation Question 8.**

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

**Consultation Question 9.**

3.41 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?

[112] We consider issues of listing and the deployment of judges in the High Court in Chapter 8.

# Chapter 4: Other restrictions on the jurisdiction of employment tribunals

## CONTRACTUAL JURISDICTION

### Introduction

4.1 A claim that a term of an employment contract has been breached may be brought in the civil courts. Legislation has extended this contractual jurisdiction to employment tribunals in limited ways. Section 3 of the Employment Tribunals Act 1996 empowers the relevant Minister to make provision by order for tribunals to hear, among other types of cases, "a claim for damages for breach of a contract of employment or other contract connected with employment", or for a sum due under any such contract. Under article 3 of the Extension of Jurisdiction Order, tribunals may hear certain breach of contract claims brought by employees against employers, and under article 4, tribunals may hear certain breach of contract claims brought by employers against employees who have already claimed under article 3 (counterclaims).[113]

4.2 In addition, the "equal pay" provisions of the Equality Act 2010 provide for a type of contractual claim specifically designed to deal with unequal pay (or other contractual terms) as between women and men. We discuss equal pay claims separately, in Chapter 5. Our topic in paragraphs 4.5 to 4.73 of this Chapter 4 is the restricted extent to which employment tribunals may hear breach of contract claims under the Extension of Jurisdiction Order.

4.3 Where legislation gives employment tribunals contractual jurisdiction, this does not remove the civil courts' jurisdiction. Section 3(4) of the Employment Tribunals Act 1996 provides that:

> Any jurisdiction conferred on an employment tribunal by virtue of this section in respect of any claim is exercisable concurrently with any court in England and Wales or in Scotland which has jurisdiction to hear and determine an action in respect of the claim.

4.4 Where employment tribunals have not been given contractual jurisdiction by legislation, the civil courts retain exclusive jurisdiction.

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

---

[113] Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623. The Order was made pursuant to a power contained in s 131 of the Employment Protection (Consolidation) Act 1978 ("EP(C)A") (for the equivalent Scottish Order, see SI 1994 No 1624). With the repeal of the EP(C)A, this general power was re-enacted in s 3 of the Employment Tribunals Act 1996 ("ETA"), and the 1994 Order was treated as if it had been made under that section (ETA 1996 Sch 2 para 2).

(1) temporal – employment tribunals' jurisdiction is limited to breach of contract claims which arise or are outstanding on the termination of employment.[114] An employee who wishes to bring a claim while still employed, must use the civil courts;[115]

(2) financial - the contractual damages which employment tribunals may award are limited to £25,000.[116] 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 nor restraint of trade. Such claims must be brought in the civil courts;[117]

(4) employers cannot claim against employees in employment tribunals, though they can *counterclaim* in contract as described above at paragraph 4.1; and

(5) it may be that the Order does not extend to workers (as distinct from employees) at all.

4.6 Restrictions (1) to (3) above apply both in relation to contractual claims by employees against employers under article 3 of the Extension of Jurisdiction Order, and to any counterclaims by employers against employees under article 4.[118] So an employer would, for instance, be able to counterclaim for damages up to the £25,000 maximum.

4.7 A widely held view among stakeholders is that some (but not all) of these restrictions on employment tribunals' contractual jurisdiction are undesirable because they lead to:

(1) confusion among litigants and potential litigants; and

(2) some disputes being litigated partly in employment tribunals and partly in the civil courts.

4.8 We now consider these restrictions on employment tribunals' contractual jurisdiction in more detail and invite consultees' views.

---

114 Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, art 3(c) and 4(c).

115 See *Capek v Lincolnshire County Council* [2000] ICR 878, [2000] IRLR 590 (CA) and *Southern Cross Healthcare Ltd v Perkins* [2010] EWCA Civ 1442, [2011] ICR 285. In his judgment in the latter case, Maurice Kay LJ observed: "The current position is that the breach of contract jurisdiction is confined to claims arising or outstanding on the termination of employment. It is not available during the subsistence of the contract."

116 Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, art 10.

117 Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, arts 3 and 5.

118 Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, arts 4(b) and (c).

**Jurisdiction restricted to claims which arise or are outstanding on the termination of employment**

4.9 Articles 3(c) and 4(c) of the Extension of Jurisdiction Order respectively limit the employment tribunal to hearing contractual claims and counterclaims which arise or are outstanding on the termination of the employee's employment.

4.10 However, many stakeholders see no justification for limiting employment tribunals' contractual jurisdiction to employment contracts which have already ended.

4.11 The restriction of jurisdiction has the effects described at paragraphs 4.12 to 4.16 below.

Employees may not "stand and sue" for breach of contract in the employment tribunal

4.12 Employment tribunals have jurisdiction to hear many statutory claims brought by claimants who at the time the claim arose were still employed by the respondent, but may not hear pre-termination claims for breach of contract. This means that an employee who wishes to "stand and sue" in response to a breach of contract rather than resign and claim constructive dismissal must bring the claim in the county court or High Court. For instance, a claim for breach of the duty of trust and confidence not leading to the termination of the claimant's employment is outside the jurisdiction of the tribunal, but if the breach of duty culminates in a constructive dismissal the case may be brought in the employment tribunal.[119]

4.13 It is important to note that claims for unpaid or underpaid wages *may* be brought in employment tribunals while employees remain employed as a result of the statutory right not to suffer unauthorised deductions from wages.[120] Such claims often involve an alleged breach of contract by the employer and may therefore be brought either in an employment tribunal (as a statutory unauthorised deduction from wages claim) or in the civil courts (as a breach of contract claim). Our consultation questions 10 to 25 below have all been prompted by our consideration of the restrictions placed on employment tribunals' contractual jurisdiction by the Extension of Jurisdiction Order. They do not relate to unauthorised deductions from wages claims nor equal pay claims. We discuss unauthorised deductions from wages claims below at paragraph 4.80 and following, and equal pay claims at paragraph 5.2 and following.

**Consultation Question 10.**

4.14 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?

---

119 Note, however, that if it is alleged that there has been discrimination, then where the detriment which has been caused is a breach of contract (eg a failure to pay a pre-agreed pay rise or to honour an agreed promotion), the full amount of the detriment may become payable as part of an award in respect of discrimination.

120 Employment Rights Act 1996, s 23.

Employees may not claim for liabilities which arise after termination of employment

4.15 As we have explained above, under the Extension of Jurisdiction Order, an employment tribunal has jurisdiction if a breach of contract arises or is outstanding on termination of employment, not afterwards. Accordingly:

(1) in *Peninsula Business Services Ltd v Sweeney*, the Employment Appeal Tribunal ("EAT") held that an employment tribunal did not have jurisdiction to hear an employee's claim for payment of commission on sales which he had achieved during his employment but which did not fall due for payment under the contract until after the employment had ended. The commission payment was only a contingent or future liability as at termination of employment and so fell outside the tribunal's jurisdiction;[121]

(2) subject to the £25,000 cap, an employee may claim in the employment tribunal to recover a payment due under a settlement agreement if the settlement agreement involved the termination of an employment contract.[122] But an employee may not do so if the settlement agreement is made after the employment has ended. Such an ex-employee would need to sue in the civil courts.[123]

**Consultation Question 11.**

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

**£25,000 limit on contractual damages**

4.17 Consistent with employment tribunals' contractual jurisdiction being confined to claims arising or outstanding on termination of employment, the most common breach of contract claim heard by employment tribunals is a claim for "wrongful dismissal".

4.18 A wrongful dismissal claim may arise out of:

(1) an actual dismissal by an employer which breaches the employment contract, most commonly because the employer dismisses the employee without notice or with less than full notice, and has insufficient justification for doing so; or

(2) a constructive dismissal, meaning a termination where an employee resigns in response to the employer's repudiatory breach of the employment contract.

---

121 *Peninsula Business Services Ltd v Sweeney* [2004] IRLR 49. Contrast the position in *Sarker v South Tees Acute Hospitals NHS Trust* [1997] IRLR 328, [1997] ICR 673 (EAT) where the EAT found that a claim may be made in the employment tribunal for damages for breach of a contract that was terminated before the employee had started working under it.

122 *Rock-It Cargo v Green* [1997] IRLR 581 (EAT).

123 *Miller Bros & FP Butler Ltd v Johnston* [2002] ICR 744, [2002] ICR 744 (EAT).

4.19 In either case, the damages payable for wrongful dismissal will ordinarily be an aggregate of the salary and contractual benefits which the employee would have received if they had worked their full notice period instead of having been terminated on less than full notice.

4.20 Wrongful dismissal is distinct from the statutory claim of unfair dismissal which we summarised at paragraphs 2.8 to 2.11. Employment tribunals have exclusive jurisdiction in respect of unfair dismissal and may award successful claimants remedies including financial compensation which can include loss of earnings beyond the notice period. Cases of unfair dismissal ordinarily turn on whether a dismissal was for a potentially fair reason and the employer acted reasonably, not on whether the dismissal was in breach of contract (although the two may be connected).

4.21 It is not uncommon for a dismissed employee to bring both types of claim, since each arises from the termination of employment. However, an employee claiming wrongful dismissal in an employment tribunal is restricted to maximum damages of £25,000.[124] Whether this is relevant to an employee will depend on whether the employee could have earned more than £25,000 had they been permitted to work their full notice period.

4.22 We understand that the £25,000 limit generates complexity and confusion in practice, pushing some cases into the civil courts which would otherwise have been litigated in employment tribunals, and splitting some disputes across employment tribunals and the civil courts which might otherwise have been disposed of in a single forum. For example:

(1) a claimant who would have earned more than £25,000 if they had worked their full notice period may issue a wrongful dismissal claim seeking full contractual damages in the High Court or the county court instead of in an employment tribunal (subject in the High Court to a minimum value of £100,000); but

(2) if this claimant believes their dismissal to have been both unfair and wrongful, they will claim unfair dismissal in an employment tribunal and must choose whether to claim wrongful dismissal in the same forum (employment tribunal) but subject to the £25,000 cap, or in a different forum (civil courts) without the cap; and

(3) if this claimant goes to the employment tribunal first and obtains the first £25,000 of a larger contractual claim for wrongful dismissal, a claim in the civil courts for the balance would then be barred by cause of action estoppel.[125] In the case of *Fraser v HLMAD Ltd*,[126] Mr Fraser brought proceedings for unfair dismissal and wrongful dismissal in an employment tribunal but sought to reserve his right to bring a claim in the High Court, should the wrongful dismissal damages exceed employment tribunals' contractual jurisdiction of £25,000. He did not, however, withdraw the wrongful dismissal claim presented to the tribunal. The employment tribunal found that he had been both unfairly and wrongfully dismissed. It assessed the wrongful dismissal claim at £80,000 but applied the £25,000 cap. When Mr Fraser sought to recover the difference in the High Court, the court

---

[124] Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, art 10.

[125] The rule that, once a claim has been judicially determined, it cannot be brought again.

[126] [2006] EWCA Civ 738, [2006] ICR 1395 (CA).

struck out his claim on the basis that his wrongful dismissal claim had already been determined by the employment tribunal. As the Court of Appeal confirmed on appeal, Mr Fraser would have had to withdraw the wrongful dismissal claim from the employment tribunal in order to bring the same cause of action in the High Court. Alternatively, he could have brought two separate claims in the first place, one in the employment tribunal (unfair dismissal) and one in the High Court (wrongful dismissal).

4.23 Similar scenarios include the following:

(1) an employee considers that they have been unfairly dismissed and that, in breach of contract, the employer has failed to pay a final bonus whose value is greater than £25,000. In this scenario, the unfair dismissal claim must be brought in an employment tribunal but, due to the £25,000 limit on contractual claims in employment tribunals, the bonus issue will be a matter for the civil courts;

(2) an employee wishes to combine a discrimination claim with a contractual claim worth over £25,000. Again, this requires two sets of proceedings, one in the employment tribunal, the other in the civil courts;

(3) an employee uses the division of jurisdictions to their advantage by using an unfair dismissal claim brought in a "no-costs environment" (the employment tribunal) as a launchpad to bring a much more lucrative wrongful dismissal claim in the High Court. An employee might, for instance, claim unfair (constructive) dismissal in the tribunal if the employer failed to pay a very substantial commission or provide share rights. If the employment tribunal finds that the facts which the employee alleges to be a breach of contract leading to constructive dismissal are as claimed, then the central factual issues relevant to the much higher value High Court claim could, in certain circumstances, in effect have been pre-determined in the tribunal as a result of the principle of issue estoppel.[127]

4.24 We have heard concerns that such split-forum disputes waste time and money for both the parties and Her Majesty's Courts and Tribunals Service. We also understand that:

(1) the above jurisdictional issues can lead to satellite litigation between parties as to which claim should be issued and heard first; and

(2) according to some stakeholders, respondents sometimes use jurisdiction issues as a costs tactic, their intention being to run up the claimant's costs in one forum in order to make it harder to pursue their claim in the other forum.

4.25 Some stakeholders have told us that the scenarios described above are undesirable consequences of the current demarcation of jurisdiction between employment tribunals and the civil courts, and of the £25,000 limit on the tribunals' contractual jurisdiction. The figure of £25,000 seems out of date and anomalous to many stakeholders:

[127] The rule that, once an issue between particular parties has been judicially determined, the determination is binding on them in other legal proceedings.

(1) even by reference to inflation since the Extension of Jurisdiction Order was enacted in 1994, the limit would now be in the region of £50,000; 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.

4.26 Stakeholders have suggested a range of options for dealing with this issue:

(1) raising the limit to £100,000 (to align with the High Court minimum value for breach of contract claims);

(2) raising the limit in line with inflation since 1994;

(3) raising it to the maximum compensatory award which employment tribunals may make in ordinary unfair dismissal cases (currently £83,682); or

(4) having no limit at all, bearing in mind that there is no statutory cap on the employment tribunal's financial jurisdiction in some other areas.

4.27 Some take the view that the problematic scenarios we have identified tend to be experienced by a minority of claimants whose employment remuneration is high enough to engage the cap on contractual awards. Even so, if the current law leads to an inefficient use of parties' and taxpayers' resources, we consider that this is something about which we should consult the public. We are particularly interested in consultees' views as to how frequently the scenarios we have mentioned arise in practice.

**Consultation Question 12.**

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

4.29 An advantage of having no financial limit on employment tribunals' contractual jurisdiction (as opposed to increasing the limit) is that this would do more to reduce the number of termination-related disputes which are litigated across more than one forum. But some people consider that where a contractual claim is of exceptionally high value the claimant should not have the option of bringing it in a no-costs jurisdiction.

**Consultation Question 13.**

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

**Consultation Question 14.**

4.31 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?

### Contractual time limits

4.32 In exploring the case for expanding employment tribunals' financial and/or temporal jurisdiction in relation to contract claims (as described above at paragraphs 4.9 to 4.31), it should be noted that there are different time limits (also referred to as limitation periods) for starting contract claims in employment tribunals from those in civil courts.[128]

4.33 Under the Limitation Act 1980, the limitation period in the civil courts is six years from the date of the alleged breach of contract.

4.34 Under Article 7 of the Extension of Jurisdiction Order, the primary time limit for an employee bringing a contractual claim in an employment tribunal is (in summary) three months from the termination of the employee's employment.

4.35 An employer who wishes to counterclaim under Article 4 of the Order must ordinarily do so within six weeks beginning with the day, or if more than one, the last of the days, on which the employer received from the employment tribunal a copy of the claim form in respect of the employee's contract claim.[129]

4.36 Although the time limits for bringing breach of contract claims under the Extension of Jurisdiction Order are on their face much shorter than those in the civil courts, they start running from a different point in time. In employment tribunals, the three-month limit starts running from the end of the employee's employment, whereas in the courts the six-year limit starts from the date of the breach.

4.37 Nevertheless, some stakeholders consider that there is a good case for lengthening the time limits for bringing employment tribunal proceedings, both in relation to breach of contract claims and in other areas, notably unfair dismissal. In this context, we note that the time limit for claims under article 7 of the Extension of Jurisdiction Order was clearly chosen to correspond with that for unfair dismissal claims,[130] and we are not aware of any suggestion that it should do otherwise.

4.38 In paragraph 4.14 above, we seek views on whether employment tribunals should have contractual jurisdiction where employment has not terminated. If so, we also seek views on whether a different time limit should apply in such cases.

---

128 Another notable difference is the fact that employment tribunals typically do not order the losing party to pay the winner's legal costs.

129 Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, art 8(c)(i).

130 Discussed in Chapter 2.

**Consultation Question 15.**

4.39 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?

**Substantive restrictions on employment tribunals' contractual jurisdiction**

4.40 Regardless of the financial value of the claim and when it arises, employment tribunals may not hear the following types of contractual dispute:

(1) claims for damages, or sums due, in respect of personal injuries;[131]

(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.[132]

Claims for damages, or sums due, in respect of personal injuries

4.41 Workplace personal injury can result from, for example, accidents, work-related stress, assaults by customers or colleagues, bullying or harassment. Courts and tribunals imply into employment contracts terms requiring employers to provide safe work places and systems of work.[133] Employees therefore often enjoy implied contractual rights regarding their personal safety, as well as rights arising from health and safety legislation[134] and the tort of negligence (we discuss the latter further below at paragraph 4.117).

131 Employment Tribunals Act 1996, s 3(3); Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, art 3.

132 Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, art 5(a) to (e).

133 *Wilsons & Clyde Coal Ltd v English* [1938] AC 57, [1937] 3 All ER 628.

134 For instance, the Health and Safety at Work etc Act 1974 imposes a duty on employers to ensure, so far as is reasonably practicable, employees' health, safety and welfare.

4.42 However, the Employment Tribunals Act 1996 and the Extension of Jurisdiction Order specify that employment tribunals' contractual jurisdiction "does not apply to a claim for damages, or for a sum due, in respect of personal injuries".[135]

4.43 Although employment tribunals already have jurisdiction to award compensation for personal injury caused by unlawful discrimination,[136] this has not been presented to us as a sufficient reason for expanding their contractual jurisdiction to encompass claims which seek personal injury damages. We have heard very little demand for such an expansion, which may be because:

(1) it is perhaps unlikely that many 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. Even if employment tribunals' contract law jurisdiction were expanded, claimants would not be able to bring a tribunal claim on this dual basis unless the jurisdiction of employment tribunals was also extended to include common law tort claims;

(2) civil courts have very long-standing and considerable experience dealing with personal injury claims; and

(3) claimants may prefer to litigate personal injury claims in the civil courts where, unlike in the employment tribunal, the winning party generally recovers costs from the other party.

**Consultation Question 16.**

4.44 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?

Claims for breaches of contractual terms relating to living accommodation

4.45 Employment tribunals have no jurisdiction to hear claims for alleged breaches of contractual terms relating to the provision of living accommodation, whether brought by employees or employers. We are currently unaware of stakeholders having raised this restriction as being problematic. Since this restriction relates to contractual disputes concerning residential accommodation, we are provisionally minded that no change in the law is required here.

---

135 Employment Tribunals Act 1996, s 3(3); Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, arts 3 and 4.

136 Confirmed by the Court of Appeal in *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] ICR 1170, [1999] IRLR 481 (CA): claimants may claim damages relating to personal injury (physical or psychological) caused by discrimination as a separate head of loss in its own right, though it is not possible to claim twice in respect of the same injury under two different heads of loss (most obviously, compensation for injury to feelings as well as for personal injury).

**Consultation Question 17.**

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

Claims for breaches of a contractual terms relating to intellectual property

4.47 Employment contracts commonly include terms addressing the ownership of intellectual property created by employees. As stated by the Extension of Jurisdiction Order, "intellectual property" includes copyright, rights in performances, moral rights, design rights, registered designs, patents and trademarks.[137] Employment tribunals may not hear a breach of contract claim relating to such a term, although if an employer for instance dismissed an employee for allegedly having breached such a term and the employee denied having done so or alleged procedural unfairness, then the employee could bring an unfair dismissal claim in an employment tribunal. If the employer wished to take legal action against the employee in respect of the alleged breach, the employer would need to do so in the civil courts.

4.48 No stakeholder, however, has suggested that employment tribunals' contractual jurisdiction should be extended to intellectual property claims. Stakeholders may consider that, even when arising from an employment context, contractual claims relating to intellectual property are better suited to the civil courts because:

(1) Intellectual property disputes may involve the assertion not only of contractual rights but of intellectual property rights set out in legislation.[138] Even if the Extension of Jurisdiction Order were expanded to give employment tribunals jurisdiction over breach of contract claims with an intellectual property dimension, without more far-reaching jurisdictional reform, employment tribunals would still not be able to determine allegations that statutory intellectual property rights had been breached. Employment tribunals would be unable to determine the totality of the dispute.

(2) Claimants who allege infringements of intellectual property rights and breaches of contractual terms concerning intellectual property will often seek an injunction to restrain misuse of intellectual property rights, as well as damages. Employment tribunals have no jurisdiction to issue injunctions. If employment tribunals were to be given the power to issue injunctions, this would require primary legislation and would place employment tribunals in an anomalous position by comparison with tribunals generally (see Chapter 6).

(3) Claimants who successfully claim for infringements of intellectual property rights are likely to wish to recover some or all of their legal costs. However, unlike the civil courts, the employment tribunal is largely a "no-costs" forum.

---

137 Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623, art 5.

138 See the Patents Act 1977, s 60; Copyright, Designs and Patents Act 1988, ss 16, 22 and 226; Registered Designs Act 1949, s 7(2); and Trade Marks Act 1994, s 10.

(4) Most employment judges have little if any experience of intellectual property litigation.

**Consultation Question 18.**

4.49 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?

Claims for breaches of contractual terms imposing obligations of confidence, and claims for breaches of terms which are covenants in restraint of trade

4.50 Obligations of confidence (or confidentiality) and covenants in restraint of trade (or restrictive covenants) are interconnecting areas of law which are frequently litigated together. We will consider them together.

4.51 A duty of good faith or fidelity is implied in all employment contracts. As part of this duty, employees must not use nor disclose, for the benefit of a competing business, confidential information about their employer's business acquired in the course of their employment.[139] A significant body of case law has developed in relation to this implied duty, including cases addressing which categories of information are protected by the implied contractual term during employment and which (narrower) categories of information remain protected by the implied term after the employment has ended.[140]

4.52 Employers frequently seek to amplify the protection given by the implied duty of good faith by including express confidentiality clauses in employment contracts. These will typically be stated to apply both during the employment and after its termination. If an employer sues on such a term, the court will decide whether the term is enforceable, or void on public policy grounds such as being in unreasonable restraint of trade.

4.53 As a result of article 5(d) of the Extension of Jurisdiction Order, this type of claim or counterclaim is outside the jurisdiction of employment tribunals.

4.54 In addition to confidentiality clauses, employment contracts may include other post-termination covenants in restraint of trade (also known as post-termination restrictive covenants). These are relatively common in senior or key employees' employment contracts. They may take many forms but the most common are promises by the employee that for defined periods of time after the termination of their employment, they will not compete against their former employer, nor solicit or deal with their former employer's customers, clients, suppliers or other employees.

4.55 Injunctions (which are in practice only dealt with by the High Court) are the most usual remedy sought by employers in restraint of trade cases, although employers may also seek other remedies including damages caused by the employee's (or ex-employee's) breaches. As noted above at paragraph 4.48(2), employment tribunals, in common with most other tribunals, have no jurisdiction to grant injunctions and it would require

---

139 See *Robb v Green* [1895] 2 QB 1.

140 See *Faccenda Chicken Ltd v Fowler* [1984] ICR 589.

primary legislation to give them such a power. Article 5(e) of the Extension of Jurisdiction Order also prohibits employment tribunals from hearing claims for breach of a covenant in restraint of trade, even if the only remedy claimed is financial.

4.56 Issues connected with post-termination restrictive covenants may feature in claims which do fall within employment tribunals' jurisdiction (for example, where an employee's refusal to sign up to covenants in restraint of trade leads to his or her dismissal and the employee claims unfair dismissal)[141] but any contractual claim asserting breach of a post-termination restrictive covenant must be brought in the civil courts.

4.57 The majority view we have so far heard from stakeholders is against extending employment tribunals' contractual jurisdiction to claims relating to terms imposing obligations of confidence (confidentiality) and, likewise, against extending employment tribunals' contractual jurisdiction to the related area of terms which are covenants in restraint of trade.

4.58 Additional factors which may militate against expanding employment tribunals' jurisdiction to cover breach of confidentiality and breach of restrictive covenant cases are that:

(1) such claims are invariably brought by employers not employees;

(2) employers will relatively often not just claim breach of contract against the former employee, but also claim the tort of inducing breach of contract against the new employer. Employment tribunals have no tort law jurisdiction;

(3) restraint of trade disputes involving directors or, in some cases, senior or influential employees below board level, may involve considering fiduciary duties, a subject about which High Court judges usually have more experience than employment judges; and

(4) if a departing employee is or was a shareholder, they may have agreed to a set of confidentiality and/or post-termination covenants in restraint of trade contained in a shareholder or share sale agreement, in addition to any such "business protection" provisions contained in their employment contract. If so, the business is likely to seek to enforce all the covenants together in the High Court. If employment tribunals were given jurisdiction to hear claims seeking to enforce such terms contained in employment contracts, this would raise the question of whether tribunals should also be given jurisdiction to hear claims seeking to enforce parallel sets of "business protection" covenants contained in shareholder and sale agreements. This would be a significant departure.

---

141 See *Willow Oak Developments Ltd (t/a Windsor Recruitment) v Silverwood* [2006] EWCA Civ 660, [2006] IRLR 607, in which the Court of Appeal confirmed previous authority to the effect that an employee's refusal to sign new terms and conditions of employment which included covenants in restraint of trade was capable (whether or not the restraints were reasonable) of being a potentially fair reason for dismissing the employee. The Court of Appeal observed, however, that the reasonableness (and so the enforceability) of the restraints was a non-determinative factor which the employment tribunal could take into account when deciding whether it was fair to dismiss the employee for that reason under the Employment Rights Act 1996, s 98(4).

**Consultation Question 19.**

4.59 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?

**Consultation Question 20.**

4.60 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?

### Jurisdiction over breach of contract claims by workers and self-employed independent contractors

4.61 There is some doubt as to whether the Extension of Jurisdiction Order gives employment tribunals any contractual jurisdiction in respect of claims involving workers as distinct from employees (see paragraphs 1.21 to 1.24 of Chapter 1).

4.62 This is because section 3(2) of the Employment Tribunals Act 1996, under which the Extension of Jurisdiction Order was made, gives employment tribunals jurisdiction in relation to "breach of a contract of employment or any other contract connected with employment", and the relevant provisions of the Extension of Jurisdiction Order refer to "termination of the employee's employment". Read literally, this might suggest that employment tribunals only have jurisdiction to determine breach of contract claims under the Extension of Jurisdiction Order if they relate to employees, and that workers can only pursue such breach of contract claims in the civil courts.

4.63 When the Extension of Jurisdiction Order came into force in 1994, much less "employment" legislation covered non-employees. However, the range of what may be described as quasi-employment rights enjoyed by workers has since proliferated and our provisional view is that it would be unfortunate and inefficient if a worker whose contract to perform work or services personally is terminated could bring any applicable statutory claims in an employment tribunal but had to make any claim for breach of contract in the civil courts. Given the significant number of statutory rights now enjoyed by workers, there is a strong case for introducing legislation making it clear that employment tribunals' contractual jurisdiction includes not just breach of contract claims relating to employees but also breach of contract claims relating to those workers who are not employees. We are interested to hear consultees' views, including on whether, if such legislation were introduced, employment tribunals' jurisdiction to determine breach of contract claims relating to workers should exactly mirror employment tribunals' jurisdiction to determine breach of contract claims relating to employees.

**Consultation Question 21.**

4.64 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?

**Consultation Question 22.**

4.65 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.

4.66 If our provisional proposal at paragraph 4.64 is adopted, it may in turn raise the question as to whether the contractual jurisdiction of employment tribunals should also be expanded to encompass breach of contract claims relating to self-employed independent contractors. It seems to us that the case for doing so is much less strong than it is in relation to workers. This is partly because the genuinely self-employed are not covered by statutory employment rights so the undesirable scenario where parties need to use both employment tribunals and civil courts to litigate the totality of their dispute does not arise. It may also be felt that disputes relating to self-employed individuals would not sit comfortably in employment tribunals because such individuals are in business on their own account (that is, they are "their own bosses").

**Consultation Question 23.**

4.67 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?

## RESTRICTIONS ON TRIBUNAL CLAIMS BY EMPLOYERS AGAINST EMPLOYEES

Original claims

4.68 Employment tribunals have no jurisdiction to hear claims against employees or workers originated by employers. This restriction reflects the fact that the primary purpose of

employment tribunals is to hear "claims from people who think someone such as an employer or potential employer has treated them unlawfully".[142]

4.69 Although an argument for removing this restriction would be that claims originated by employers against employees or workers may raise issues particularly within the expertise of employment tribunals, to allow such claims in employment tribunals would be a major departure requiring significant primary legislation.

**Consultation Question 24.**

4.70 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?

Counter claims

4.71 As we have mentioned above at paragraph 4.1, 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.

4.72 Employment tribunals have no jurisdiction to hear an employer's counterclaim if the employee's original claim alleged breaches of statutory rights alone; the employee must have claimed breach of contract. So if, for instance, an employee who had breached his or her employment contract brought the statutory claim of unauthorised deductions from wages or unfair dismissal (without adding the contractual claim of wrongful dismissal), the employment tribunal would have no jurisdiction to hear a counterclaim from the employer seeking contractual damages in relation to the employee's breach. To allow employers' counterclaims in these circumstances would again be a major departure requiring significant primary legislation.

**Consultation Question 25.**

4.73 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?

## WRITTEN STATEMENTS OF PARTICULARS - NO POWER TO CONSTRUE

### Introduction

4.74 As we outlined at paragraphs 2.37 to 2.39, Part I (sections 1 to 7B) of the Employment Rights Act 1996 ("ERA 1996") concerns an employer's duty to provide employees with written statements setting out certain particulars of their employment (section 1) and, if applicable, details of changes to these particulars (section 4). These written statements

[142] Gov.uk, *Employment Tribunal – What we do*, available at: https://www.gov.uk/courts-tribunals/employment-tribunal (last visited 14 September 2018).

of particulars are not necessarily employment contracts but they are often incorporated into "section 1 compliant" employment contracts.

4.75 If an employer does not provide a written statement of particulars, or provides one which is inaccurate or incomplete, an employee may ask an employment tribunal to determine "what particulars ought to have been included or referred to" in the statement.[143] If the tribunal determines particulars as those which ought to have been included or referred to in a statement of written particulars, the employer is deemed to have given the employee a statement containing those particulars.[144]

4.76 In addition, if a statement has been given to an employee but a question arises as to the particulars which "ought to have been included or referred to" in it, either the employee or the employer may ask a tribunal to determine the question.[145] The tribunal may then:

(1) confirm that the particulars were correct;

(2) amend them; or

(3) substitute other particulars for them.[146]

**Limits on sections 11 and 12 of the ERA 1996**

4.77 Although Part I of the ERA 1996 allows an employer or an employee to ask an employment tribunal whether a particular term should or should not be included in a written statement of particulars, in dealing with such a "Part I claim" the tribunal has no jurisdiction to interpret or construe contractual terms and conditions contained or referred to in the statement of particulars. The case of *Southern Cross Healthcare Ltd v Perkins*[147] concerned a dispute over whether a holiday provision in a written statement of particulars had been impliedly amended when the minimum number of days of statutory annual leave was increased by legislation. The employees sought a declaration from the employment tribunal that there had been such an amendment but the Court of Appeal held that the tribunal had no jurisdiction to determine the point. This was because doing so went beyond identifying the terms of the contract in order to ensure that the written statement of particulars was accurate and strayed "into the forbidden territory of construing and enforcing them".[148]

---

143 Employment Rights Act 1996, s 11(1).

144 Employment Rights Act 1996, s 12(1).

145 Employment Rights Act 1996, s 11(2).

146 Employment Rights Act 1996, s 12(1).

147 [2010] EWCA Civ 1442, [2011] IRLR 247 (CA).

148 *Harvey on Industrial Relations and Employment Law*, loose-leaf 2018, Division AII, 3, F(1) para 120.

**Consultation Question 26.**

4.78 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?

4.79 Outside the context of Part I of the ERA 1996, the *Southern Cross* principle led to conflicting EAT decisions about employment tribunals' jurisdiction under Part II of the ERA 1996 (unauthorised deduction from wages claims). Although the position relating to Part II has now been resolved by the Court of Appeal in *Agarwal v University of Cardiff*,[149] we briefly discuss this at paragraphs 4.87 to 4.91 below.

## UNAUTHORISED DEDUCTIONS FROM WAGES CLAIMS

### Introduction

4.80 As we have explained above at paragraph 4.12 and following, employment tribunals do not have jurisdiction under the Extension of Jurisdiction Order to hear a claim for breach of the employment contract while the contract is still running. This contractual jurisdiction of employment tribunals only applies once the employment has terminated, and damages are restricted to £25,000.

4.81 Employment tribunals do, however, have exclusive jurisdiction to hear the statutory claim of "unauthorised deductions from wages" during employment, and this type of claim is not subject to a financial cap.[150] Rights regarding unauthorised deductions from wages were previously enacted in the Wages Act 1986 and unauthorised deductions claims are sometimes referred to as "Wages Act" claims. "Unauthorised deductions" are also commonly referred to as "unlawful deductions".

4.82 This jurisdiction (which is today found in Part II, "Protection of Wages" of the ERA 1996[151]) is subject to certain restrictions which we summarise below.

4.83 It is unlawful for an employer to make a deduction from an employee's or worker's wages unless:

(1) the deduction is required or authorised by statute;[152]

---

149 [2018] EWCA Civ 1434.

150 However, since 1 July 2015 there has been a two-year "backstop" restricting the amounts which can be recovered in most (but not all) unauthorised deductions claims. The Deduction from Wages (Limitation) Regulations SI 2014 No 3322 added two subsections to s 23, Employment Rights Act 1996, providing that for claims brought under s 27(1)(a) of that Act tribunals may only look back two years from the date of the complaint. We are aware that a tribunal claim has been brought which among other things questions whether the two-year backstop is legally valid insofar as it relates to unauthorised deductions from wages claims brought in respect of holiday pay.

151 Employment Rights Act 1996, ss 13 to 27.

152 Employment Rights Act 1996, s 13(1)(a).

(2) the deduction is required or authorised by virtue of any provision of the employee's or worker's contract;[153]

(3) the employee or worker has previously signified in writing his or her agreement or consent to the making of the deduction;[154] or

(4) the deduction is an "excepted deduction" listed at section 14(1) to 14(6) of the ERA 1996.

4.84 "Deduction" for these purposes is not confined to an underpayment – it also covers complete non-payment.[155]

4.85 Therefore, regardless of whether their employment has ended, employees who consider that they have not been paid what they are due under an employment contract may choose between either bringing a breach of contract claim in the county court or High Court, or an unauthorised deduction claim in the employment tribunal.[156]

4.86 When the Wages Act 1986 was introduced, the then Department of Employment anticipated that there would be only a few hundred unauthorised deductions claims per year. In fact, in 2016/17, ACAS received over 25,000 unauthorised deductions claims for Early Conciliation. Although not all of them entered the employment tribunal system, this figure shows the significance of such claims to modern day employment law.[157]

**Restrictions on employment tribunals' unauthorised deductions jurisdiction**

4.87 Employment tribunals' unauthorised deductions jurisdiction is restricted in ways which include the following.

"Wages properly payable" - contractual basis of the sum is disputed

4.88 Section 13(3) of the ERA 1996 stipulates that the claim must relate to a deduction from, or non-payment of, "wages properly payable".

4.89 For wages to be "properly payable", employees or workers must have a legal entitlement to them,[158] often via a term (normally express but sometimes implied) of their contracts. An employer may therefore argue that, properly interpreted or construed, the contract gave no legal entitlement to the disputed sum, so that the wages in question were not "properly payable". In this situation an employment tribunal will need to interpret or construe the contract in order to be able to determine an unauthorised deductions from wages claim. There has, however, until recently been doubt as to whether employment tribunals have jurisdiction to do this. The question was whether the principle in *Southern Cross Healthcare Co Ltd v Perkins* (ie that

---

153 Employment Rights Act 1996, s 13(1)(a).

154 Employment Rights Act 1996, s 13(1)(b).

155 *Delaney v Staples* [1991] 2 QB 47, [1991] IRLR 112 (CA). *Delaney v Staples* went on to be heard by the House of Lords but this aspect of the Court of Appeal's decision was not appealed.

156 *Rickard v PB Glass Supplies Ltd* [1990] ICR 150 (CA).

157 *Harvey on Industrial Relations and Employment Law*, loose-leaf 2018, Division BI, 7(A) para 326.

158 *New Century Cleaning Co Ltd v Church* [2000] IRLR 27 (CA).

employment tribunals may *identify* the terms of an employment contract in order to ensure that an employee's written statement of principal terms is accurate, but may not go further and *interpret* or *construe* the contract) should be read across to the "Wages Act" provisions of Part II of the ERA 1996.

4.90 There were conflicting EAT decisions on this question. The EAT in *Agarwal v Cardiff University*[159] held that the *Southern Cross* principle did apply to Part II of the ERA 1996 but the EAT in *Weatherilt v Cathy Pacific Airways Ltd*[160] and in *Tyne and Wear v Passenger Transport Executive v Anderson*,[161] held that it did not.

4.91 The Court of Appeal has now allowed an appeal in *Agarwal v Cardiff University*[162] and in doing so has approved the reasoning of the EAT in *Weatherilt* and *Tyne and Wear.* Therefore, subject to any contrary decision by the Supreme Court, the settled position is that employment tribunals have jurisdiction to hear unauthorised deductions from wages claims even when the contractual basis of the sum claimed is disputed.

"Wages properly payable" - the need to claim quantified amounts

4.92 In *Coors Brewers Ltd v Adcock*,[163] the Court of Appeal held that an unauthorised deduction from wages claim must be for a "significant, identifiable sum". Accordingly, a claim relating to an unquantified discretionary bonus fell outside employment tribunals' "Wages Act" jurisdiction.

4.93 The case concerned employees who had originally been employed by B and been entitled to participate in B's profit share scheme (B's Bonus Scheme). The business was then sold via share transfers and as a result the employees lost their entitlement to benefit from B's Bonus Scheme.

4.94 The Court of Appeal found that the respondent employer had been contractually obliged to introduce a scheme which, when "properly and fairly applied", was capable of replicating B's scheme. Although a new scheme was introduced, it did not comply with this requirement and the scheme did not pay out in a given year. The employees claimed in the employment tribunal that they had suffered unauthorised deductions from their wages.

4.95 Finding that the claim could not be advanced using statutory unauthorised deductions from wages protections, the Court of Appeal commented that the "underlying premise" on which an unlawful deductions claim is based is that "the employee is owed a specific sum of money by way of wages which he asserts has not been paid to him". On the facts of the case, a range of schemes could have been introduced to comply with the respondent's contractual obligations; each would have had different targets and incentives, and each could have led to different amounts of bonus. This made it impossible to say by how much the wages paid to the claimants were less than the

---

159 [2017] IRLR 600.

160 (25 April 2017) UKEAT/0333/16/RN (unreported).

161 (15 January 2018) UKEAT/0151/16 (unreported).

162 [2018] EWCA Civ 1434.

163 [2007] EWCA Civ 19, [2007] IRLR 440.

amount properly payable. As a result, the claims could not be advanced in the employment tribunal as unauthorised deductions from wages claims.

4.96 In other words, claims for unquantified damages for breaches of express or implied terms in employment contracts may not be brought as unauthorised deductions from wages claims and must instead be brought as breach of contract claims, 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 which we describe at paragraph 4.17 and following.

4.97 We are informed that this restriction on employment tribunals' unauthorised deductions jurisdiction can sometimes cause difficulties for employees and workers by compelling them to decide whether to risk litigating in the civil courts which, along with being more formal and (sometimes) more complex than employment tribunals, carries the risk of having to pay the other side's costs.

4.98 Potential claimants may also experience a degree of confusion because the *Coors* case leaves open the question of how precise the quantification must be before an employment tribunal's unauthorised deductions jurisdiction is engaged.[164] One post-*Coors* EAT decision has suggested that tribunals may hear such claims even if there are real difficulties calculating the value of the claim, provided that the difficulties stop short of making the claim unquantifiable.[165] But another post-*Coors* EAT decision has indicated that once the calculation becomes "very difficult," employment tribunals' unauthorised-deductions jurisdiction may not apply.[166]

**Consultation Question 27.**

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

"Excepted deductions"

4.100 Section 14(1) to (6) of the ERA 1996 sets out a number of "excepted deductions" which employers may make from wages without breaching the Act. For example, section 14 permits:

(1) a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of –

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

---

164 *Coors Brewers Ltd v Adcock* [2007] EWCA Civ 19, [2007] IRLR 440. *Harvey on Industrial Relations and Employment Law,* loose-leaf 2018, Division BI, 7, E (4).

165 *Lucy v British Airways* (13 January 2009) UKEAT/0033/08 (unreported).

166 *Jandu v Crane Legal Ltd* (11 April 2014) UKEAT/0198/13 (unreported).

made (for any reason) by the employer to the worker.

…

(5) a deduction from a worker's wages made by his employer where the worker has taken part in a strike or other industrial action and the deduction is made by the employer on account of the worker's having taken part in that strike or other action.[167]

4.101 In such scenarios, 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.

4.102 For instance:

(1) In *Sunderland Polytechnic v Evans*[168], the employer deducted a day's pay from the wages of a worker who had been on strike for half a day. The worker claimed that this was an unauthorised deduction from her wages but the EAT held that because the deduction was an excepted deduction (industrial action), the employment tribunal had no jurisdiction to determine whether the deduction was lawful.

(2) In *SIP (Industrial Products) Ltd v Swinn*,[169] the employee had dishonestly obtained money from his employer by altering fuel receipts. When dismissing the employee, the employer withheld some holiday pay and wages. In response to the employee's claim of unauthorised deductions from wages, the EAT held that the employer had been entitled to withhold the payment under what is now

---

[167] s 14 of the Employment Rights Act 1996 also permits:

(2) a deduction from a worker's wages made by his employer in consequence of any disciplinary proceedings if those proceedings were held by virtue of a statutory provision.

(3) a deduction from a worker's wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority.

(4) a deduction from a worker's wages made by his employer in pursuance of any arrangements which have been established—

(a) in accordance with a relevant provision of his contract to the inclusion of which in the contract the worker has signified his agreement or consent in writing, or

(b) otherwise with the prior agreement or consent of the worker signified in writing,

and under which the employer is to deduct and pay over to a third person amounts notified to the employer by that person as being due to him from the worker, if the deduction is made in accordance with the relevant notification by that person.

(6) a deduction from a worker's wages made by his employer with his prior agreement or consent signified in writing where the purpose of the deduction is the satisfaction (whether wholly or in part) of an order of a court or tribunal requiring the payment of an amount by the worker to the employer.

[168] [1993] ICR 392, [1993] IRLR 196 (EAT).

[169] [1994] ICR 473, [1994] IRLR 323 (EAT).

section 14(1)(b) of the ERA 1996 because the deduction was "in respect of an overpayment of expenses incurred by the worker in carrying out his employment".

4.103 Some stakeholders consider it odd that in cases such as the above, the determining factor for employment tribunals, in deciding whether a deduction is lawful for the purposes of the ERA 1996, is purely whether one of the exceptions stated at sections 14(1) to (6) of that Act applies. If one of them does apply but the worker contends that the employer deducted too much, this must then be litigated in the civil courts.

4.104 Employment tribunals' limited scope for inquiry under section 14 of the ERA 1996 may be contrasted with the position under section 13(1)(a) of that Act, where they must determine whether a deduction is required or authorised by virtue of a statutory provision or by a provision of the worker's contract. When doing so, it is not sufficient that the relevant contractual or statutory authority exists; it must also be shown that the deduction in question is justified on the facts.[170]

**Consultation Question 28.**

4.105 Where an employment tribunal finds that one or more of the "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 money from an employee's or worker's wages?

No setting off

4.106 Some employees who claim sums owed by an employer under the employment contract may have themselves 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 the civil courts, this doctrine can in certain circumstances be used as a defence to a contractual claim. In an employment context this means that an employer defendant may be able to bring a debt it is owed by the employee into account to reduce or extinguish (set off) any damages it is liable to pay to the employee.

4.107 Employers may rely on this doctrine to set sums off when contractual claims are heard by employment tribunals under the Extension of Jurisdiction Order.[171] They may not do so, however, in the context of unauthorised deductions from wages claims which are brought under Part II of the ERA 1996.[172] This is illustrated by the case of *Asif v Key People Ltd.*[173] An agency worker claimed for two days' wages under the ERA's unauthorised deductions provisions. The employment tribunal declined to order the agency to pay these wages, due to the fact that the agency had a cross claim for damages against the worker which extinguished the amount of the worker's claim. The

---

170 *Harvey on Industrial Relations and Employment Law*, loose-leaf 2018, Division BI, 7, F, (2) para 363 – 364.01.

171 *Ridge v HM Land Registry* UKEAT/0485/12 (19 June 2014, unreported).

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

173 EAT/0264/07 (7 March 2008, unreported).

EAT disagreed, finding that Part II of the Act did not allow an employer to use setting off principles to withhold wages otherwise due to the worker.

**Consultation Question 29.**

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

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

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

## OTHER AREAS OF EXCLUSIVE CIVIL JURISDICTION

### Matters arising in an employment context which we do not cover in this review

4.109 There are a variety of legal protections which, although they may arise in an employment context, are not within the proper scope of the present project. In those contexts, another court, tribunal or body has been appointed as the proper forum for enforcing these protections. These areas include:

(1) criminal offences;

(2) claims under the Protection from Harassment Act 1997;[174]

(3) declarations of incompatibility under the Human Rights Act 1998;[175] and

(4) claims of infringements of data protection legislation.[176]

4.110 We do not propose to ask questions about the above matters. We are nevertheless interested to hear from consultees whether there is any area of the civil courts' jurisdiction which might properly be the subject of shared jurisdiction with employment tribunals. We highlight two areas in particular which we consider merit outlining in greater detail, although we do not propose a change in the law: personal injury, and employers' references.

---

174 The Act was designed to protect victims of stalking and harassment by making the wrongful conduct a criminal offence (s 2) (they may bring claims before the civil courts for an injunction or damages). But employers may also be vicariously liable under the Act for acts of harassment committed by their employees in the course of employment: *Majrowski v Guy's and St Thomas's NHS Trust* [2006] ICR 1199 (HL). This is distinct from employment tribunals' exclusive jurisdiction to determine harassment discrimination claims against employers under s 26 of the Equality Act 2010.

175 Namely, the power to make a declaration of incompatibility with Convention rights and a person's right to bring a claim against a public authority for breach of human rights: Human Rights Act 1998, ss 3 and 6.

176 For instance, the Information Commissioner's Office can impose administrative fines under the General Data Protection Regulation Article 83, as implemented by the Data Protection Act 2018.

**Personal injury and health and safety at work**

4.111 As we have explained above at 4.41, workplace personal injuries may lead to legal action arising from:

(1) implied terms in employment contracts obliging employers to provide safe places and systems of work;

(2) health and safety legislation;

(3) the tort of negligence.

Implied contractual terms

4.112 As we have described above at paragraphs 4.41 to 4.43, employment tribunals do not have jurisdiction to hear breach of contract claims seeking damages or other sums relating to personal injury. We have asked for consultees' views about this above at paragraph 4.44.

Statutory health and safety obligations

4.113 Statutory health and safety obligations include those under:

(1) the Health and Safety at Work etc Act 1974, which imposes a general duty on employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of their employees and workers;

(2) the Management of Health and Safety at Work Regulations SI 1999 No 3242, which imposes various duties on employers in relation to, for instance, risk assessments and developing a coherent overall prevention policy; and

(3) the Management of Health & Safety at Work and Fire Precautions (Workplace Amendment) Regulations SI 2003 No 2457, by virtue of which employees may seek injunctions against employers who fail to comply with health and safety regulations.

4.114 The Health and Safety Executive has extensive enforcement powers in relation to statutory health and safety obligations, including the powers to prosecute offending employers in the criminal courts.

4.115 Employment tribunals do not have jurisdiction over this enforcement regime nor, clearly, the criminal prosecutions which can result.

**Consultation Question 30.**

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

Tort of negligence

4.117 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.[177] Such personal injury claims are a matter for the civil courts.[178]

**Consultation Question 31.**

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

### Employer's references

Types of reference-related claims

4.119 Employment-related claims can result if an employer or (more usually) former employer provides an allegedly inaccurate, misleading or discriminatory reference relating to an employee/worker or former employee/worker. Potential claims include:

(1) claims by the employee/worker for:

(a) negligent misstatement (if the reference is inaccurate);[179]

(b) defamation;

(c) malicious falsehood (if the reference contains untruths which were published maliciously);

(d) breach of contract (in some circumstances there will be an implied term in a contract of employment that the employer will take reasonable care when

[177] 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.

[178] Non-employees can also bring a negligence claim against an 'employer' (*Heynike v 00222648 Ltd (formerly Birlec Ltd)* [2018] EWHC 303 (QB), provided there is a sufficiently proximate relationship (*Hyndman v Brown* [2012] NICA 3).

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

preparing a reference and occasionally an employment contract may include a relevant express term);[180] and

(e) discrimination under the Equality Act 2010 (if the reference was written in a detrimental way because of any of the protected characteristics set out in the Equality Act,[181] or if doing so was an act of victimisation following the individual having for instance brought a discrimination claim[182]);

(2) claims by the recipient of the reference (typically the new employer) for:

(a) negligent misstatement; and/or

(b) deceit (if a referee deliberately includes false information intending that the recipient will rely on it).

4.120 There is no general obligation on an employer or former employer to provide a reference. The above claims are engaged once a reference is given. But if a refusal to provide a reference is because the employee/worker or former employee/worker has a protected characteristic (or if the refusal is an act of victimisation against such a person), this may amount to discrimination under the Equality Act 2010.

Jurisdiction over reference-related claims

4.121 Employment tribunals have exclusive jurisdiction over claims by employees and workers and former employees and workers who allege unlawful discrimination against their employers in relation to the provision of references.

4.122 The remainder of the reference-related claims which we have outlined above are common law causes of action over which the civil courts have exclusive jurisdiction.

4.123 It is in theory possible that this demarcation of jurisdiction could lead to split-forum litigation if, for instance, a former employee wished to claim both for malicious falsehood and discrimination in respect of the same reference. We are, however, not aware of any calls to extend employment tribunals' jurisdiction in the context of references.

**Consultation Question 32.**

4.124 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?

180 *Spring v Guardian Assurance* [1994] ICR 596 (HL).

181 For a list of protected characteristics, see para 2.12.

182 *Pothecary Witham Weld v Bullimore* [2010] IRLR 572 (EAT).

**Consultation Question 33.**

4.125 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)?

# Chapter 5: Concurrent jurisdiction

## INTRODUCTION

5.1 In this Chapter 5 we examine how a number of areas of substantive employment law can give rise both to claims in employment tribunals and causes of action in the civil courts. We consider the tribunals' and civil courts shared or concurrent jurisdictions over these areas.

## EQUAL PAY

### Introduction

5.2 Where they are doing equal work, women and men are entitled to receive equal pay (and be treated equally in respect of all contractual terms) unless there is a non-discriminatory reason for any difference. The law in this area is commonly referred to as "equal pay" law but the relevant equality entitlement extends to contractual terms generally and not just to pay. The legislation governing equal pay (and equality of terms) is found in the Equality Act 2010 at Part 5, Chapter 3 and Part 9, Chapter 4. An equal pay claim may be brought either in an employment tribunal, where there is generally a rigid six-month time limit for bringing the claim, or in the High Court or county court, where the time limit is six years. Both jurisdictions allow claimants to claim arrears of pay going back six years.[183]

5.3 Since most equal pay claims are brought by women, to avoid awkward circumlocution our summary below is written on the basis that a female claimant compares herself to a higher paid man or men (or men with other better contractual provisions).

5.4 The statutory mechanism for achieving the equality entitlement is to import a "sex equality clause" into the woman's contractual terms and a "sex equality rule" into her occupational pension scheme, if she is a member of one.[184] The former operates by modifying any term of the woman's employment contract so that it is not less favourable than a corresponding term in the man's contract, or by modifying the woman's contract to include the man's term where she has no equivalent. The sex equality rule does the same for occupational pension schemes, and also prevents discretions from being exercised in ways which are less favourable to the woman than to the man. Discretions are particularly important in relation to pensions and are provided for in section 67(2)(b) and 67(4).

5.5 Section 65 defines the woman's work as being equal to that of a man if it is:

(1) the same, or broadly similar to, the man's work ("like work");

---

[183] By contrast, discrimination in respect of pay (or other contractual terms) because of any protected characteristic other than gender, is dealt with by the different rules and time limits contained in the Equality Act 2010 at Part 2 and Part 5, Chapter 1. For a full list of protected characteristics, see para 2.12.

[184] Equality Act 2010, ss 66 and 67. The relevant statutory definition of "occupational pension scheme" is at s 1, Pensions Schemes Act 1993.

(2) rated as equivalent to the man's work; or

(3) of equal value to the man's work.

5.6 The burden of proof rests on the woman to identify a comparable man and to show that her work falls into one of these three categories (which we discuss in more detail below at paragraphs 5.10 to 5.16).

5.7 Section 69 of the Equality Act 2010 provides an absolute defence to an equal pay claim: the sex equality clause or rule has no effect if the respondent shows that "the difference is because of a material factor" which, briefly put, is neither direct sex discrimination nor indirect sex discrimination.

5.8 Equal pay law (Chapter 3 of Part 5 of the Equality Act 2010) is distinct from discrimination law, including sex discrimination (Chapter 1 of Part 5 of that Act): as described above, equal pay law deals specifically with situations where men and women are treated differently in relation to pay or other contractual terms, and it does so by importing sex equality clauses into women's employment contracts and sex equality rules into occupational pension schemes. Accordingly, generally speaking the provisions of the Equality Act 2010 relating to sex discrimination will not apply if that Act's specific equal pay provisions are engaged. This is achieved by section 70 of the Act which lists certain of the Act's "sex discrimination provisions"[185] and stipulates that they do not apply in relation to terms which are modified or included by virtue of a sex equality clause or rule.

5.9 An exception is that by section 71 of the Act, if there is no comparable man (for example because none is engaged on equal work), a woman may bring an equal pay claim as a direct sex discrimination claim under section 13 based on a hypothetical male comparator (if she can show that he would have had better terms). In short, the effect is to allow the woman to rely on a hypothetical male comparator where there is no comparable man. This provision was introduced in 2010 to fill a perceived gap in the statutory protection. As a work-place discrimination claim, it may only be brought in an employment tribunal and is subject to the three-month primary time limit.[186]

Like work

5.10 "A" and "B" are regarded as doing "like" work if:

(1) A's work and B's work is the same or broadly similar; and

---

185 Including s 39(2), Equality Act 2010 (discrimination against employees).

186 The position as regards pensions may be somewhat different, because the pensions' non-discrimination rule (which we describe below at paras 5.40 – 5.49) is not one of the "sex discrimination provisions" excluded by s 70. As a result, on the face of the legislation there is an argument that a woman unable to rely upon the sex equality rule because she does not have an actual comparator can nonetheless use a hypothetical comparator to bring an equivalent claim in relation to her pension relying on the non-discrimination rule, without having to do so via s 71. If this argument is upheld by the courts, it appears that such a claim using the non-discrimination rule could be brought either in an employment tribunal or the civil courts.

(2) there is no difference or no important difference in the tasks they perform.[187]

Work rated as equivalent under a job evaluation study

5.11 For a woman to bring a "rated as equivalent" claim, the employer must have commissioned a qualifying job evaluation study which rated her job as of equal value with that of a man.[188]

Work is of equal value

5.12 A's work is of equal value to B's work if, despite not being "like B's work" nor "rated as equivalent to B's work", it is equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision making.[189] A claimant will pursue an "equal value" claim if unable to show to that her job is "like" or "rated as equivalent to" her comparator's job.

5.13 For "equal value" claims:

(1) employment tribunals may (and usually do) appoint an independent expert to prepare a report to help the tribunal determine the question of equal value;[190] and

(2) a special set of procedural rules applies, set out in Schedule 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2013 No 1237 ("Equal Value Procedural Rules").

5.14 The independent expert has various powers and duties under rule 9(2) of the Equal Value Procedural Rules and must be a member of the panel of independent experts designated by ACAS.[191]

5.15 The Equal Value Procedural Rules set out bespoke case management provisions which require the employment tribunal to hold a series of hearings to determine an equal value claim, and regulate how the work of the independent expert is done and the evidence which the employment tribunal hears.

5.16 Neither the Equal Value Procedural Rules, nor the Equality Act 2010's provisions regarding independent experts, apply to equal value claims heard in the civil courts.

**Jurisdiction over equal pay claims**

Employment tribunals' jurisdiction

5.17 Equal pay claims are most commonly pursued in employment tribunals, under section 127(1) of the Equality Act 2010, which states that "an employment tribunal has jurisdiction to determine a complaint relating to a breach of an equality clause or rule".

---

187 Equality Act 2010, s 65(1) and (2).

188 Equality Act 2010, ss 65(1)(c) and 80(5).

189 Equality Act 2010, s 65(6).

190 Equality Act 2010, s 131.

191 Equality Act 2010, s 131(8). In practice, the employment tribunal will inform ACAS that an independent expert is required; ACAS will then appoint the expert and tell the tribunal who she or he is.

5.18 Under section 127(2) and 127(3) respectively, employers and pension scheme trustees or managers can ask employment tribunals to make declarations as to the rights of the parties in any dispute about the effect of an equality clause (which, as described above, is automatically implied into employment contracts) or an equality rule (automatically implied into occupational pension schemes).

Civil court jurisdiction

5.19 As we noted in Chapter 4, the High Court and county courts in England and Wales,[192] have an inherent jurisdiction to hear breach of contract claims. Since equal pay law operates by way of sex equality clauses implied into all employment contracts, a breach of equal pay law also amounts to a breach of contract which can be pursued in the civil courts.[193]

5.20 While it is therefore possible for an equal pay claim to be commenced in the civil courts, courts may transfer the determination of aspects of the claim to an employment tribunal and, in certain circumstances, in effect require a claimant to re-issue her claim in an employment tribunal. The relevant legislation is as follows:

(1) if in proceedings before a civil court a question arises about an equality clause or rule, the court may refer the question to an employment tribunal for determination and, meanwhile, stay (that is, pause) the court proceedings.[194] We understand that this usually (but not always) happens where equal pay cases are pursued in the civil courts.

(2) if it appears to a civil court that a claim or counterclaim relating to an equality clause or rule could more conveniently be determined by an employment tribunal, the court may strike out the claim or counter-claim[195] - it would then be for the claimant to bring a fresh claim in the tribunal. However, in *Abdulla v Birmingham City Council* ("*Abdulla*"), the Supreme Court found 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,[196] and since *Abdulla* we are not aware of any such claims having been struck out.

Employment tribunals' specialist status

5.21 Employment tribunals are acknowledged as being the specialist forum for determining at least some types of equal pay claims. The existence of provisions for transferring equal pay questions from the civil courts to employment tribunals implicitly recognises this expertise and paragraph 419 of the notes accompanying the Equality Act 2010 does so explicitly. Paragraph 419 states:

---

192 The Court of Session and sheriff courts in Scotland also have jurisdiction to hear breach of contract claims.

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

194 Equality Act 2010, s 128(2).

195 Equality Act 2010, s 128(1).

196 *Abdulla v Birmingham City Council* [2012] UKSC 47, [2013] IRLR 38 at [29]: "a claim in respect of the operation of an equality clause can never more conveniently be disposed of by the tribunal if it would there be time-barred".

Employment tribunals have the specialist knowledge and procedures to handle claims relating to equality of terms and this section gives a court power to refer such issues to a tribunal.

5.22 It is interesting to note that there is no power to effect a transfer in the other direction: the Equality Act 2010 does not empower employment tribunals to transfer equal pay questions to the civil courts, nor to strike out equal pay claims if the tribunal considers that the claim could be more conveniently determined by a court. Employment tribunals may, however, stay tribunal proceedings (possibly indefinitely) while overlapping proceedings in the High Court or elsewhere are heard, provided that this is not done with the aim of compelling reluctant claimants to bring their claims in the High Court.[197]

Remedies

5.23 Under the Equality Act 2010, the following remedies are available to successful claimants in either the employment tribunal or the civil courts:[198]

(1) arrears of pay (recoverable as a debt meaning that the claimant is not under a duty to mitigate her losses). In a standard case, arrears may go back up to six years before the date the claim was brought. The period may go back further if the employee has an incapacity or there has been concealment by the employer;[199]

(2) damages (relevant if the claim relates to a contractual right other than pay); and

(3) a declaration of the claimant's rights under an equality clause.

5.24 In common with many other types of employment tribunal claim, the tribunal may also adjust monetary awards in equal pay cases if there has been an unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures.[200]

5.25 Employment tribunals, but not civil courts, are in certain circumstances required to order employers who are in breach of equal pay law to carry out and publish equal pay audits designed to identify action to be taken to stop equal pay breaches occurring or continuing.[201] A fine of up to £5,000 may be imposed on an employer who fails, without reasonable excuse, to carry out the audit.

---

197 *Asda Stores Ltd v Brierley* [2016] EWCA Civ 566, [2016] IRLR 709 (CA).

198 These remedies under s 132 of the Equality Act 2010 apply in non-pensions cases; s 133 sets out specific remedies in pensions cases.

199 Equality Act 2010, s 132(4) and (5). We refer here to the provisions governing England and Wales only.

200 If an employer (or employee) has unreasonably failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures an employment tribunal may, if it is just and equitable to do so, increase (or reduce) the amount of compensation which would otherwise have been payable by up to 25% (section 207A, Trade Union and Labour Relations (Consolidation) Act 1992). The code of practice applies widely and unreasonable failures to follow it may affect compensation awards in many types of claims brought in employment tribunals. Those claims are listed in Sch A2 to the Trade Union and Labour Relations (Consolidation) Act 1992 and include equal pay claims.

201 The Equality Act 2010 (Equal Pay Audits) Regulations SI 2014 No 2559.

5.26 In contrast with discrimination claims (including sex discrimination claims), compensation for non-economic loss (for example, injury to feelings) is not available in equal pay cases pursued in employment tribunals.[202] Whether such compensation might be available in an equal pay case brought in the civil courts is uncertain under the current case law.[203]

**Time limits for equal pay cases**

Time limits in the employment tribunal

5.27 There is, in practice, no time limit for an equal pay claim to an employment tribunal so long as the claimant remains employed in the relevant employment.[204] However, if the claimant has ceased working for the employer, she must in general bring a tribunal claim within six months of ceasing to be employed.[205]

5.28 Unlike most types of claim brought in employment tribunals, the tribunal has no discretion to extend the deadlines for commencing equal pay claims.[206] However, if the claimant suffers from an incapacity[207] or the employer deliberately concealed facts[208] relevant to pay inequality, then different limitation rules apply which are more favourable to the claimant.[209]

Time limits in the civil courts

5.29 Like other breach of contract claims, the time limit in England and Wales for commencing an equal pay claim is six years, running from the date of the breach.[210]

5.30 In the case of *Abdulla*, the Supreme Court held that equal pay claims brought more than six months after the end of employment, which would therefore have been out of time in an employment tribunal, can proceed as breach of contract claims in the civil courts.[211]

---

202 *Council of the City of Newcastle upon Tyne v Allan* and *Degnan v Redcar and Cleveland Borough Council* [2005] ICR 1170, [2005] IRLR 504 (EAT).

203 *Harvey on Industrial Relations and Employment Law*, loose-leaf 2018, Division K, 9A para 654.

204 But note that the arrears of pay will typically go back no longer than six years from the date of the claim.

205 Equality Act 2010, s 129(2).

206 We discuss typical employment tribunal time limits for bringing claims in Chapter 2, paras 2.47 to 2.54.

207 Where the claimant has a "qualifying incapacity", the six-month period does not start to run until she has ceased to be under the incapacity (Equality Act 2010, ss 129(3) and 130(7)).

208 Where an employer deliberately concealed facts relevant to its failure to comply with an equality clause, and the claimant could not reasonably have been expected to discover the true facts, the six-month period only begins from the date when the claimant discovered (or might reasonably have been expected to discover) the facts in question (Equality Act 2010, ss 129(3) and 130(4)).

209 Equality Act 2010, s 129(3).

210 The limitation period is five years in Scotland.

211 *Abdulla v Birmingham City Council* [2012] UKSC 47, [2013] IRLR 38. The Supreme Court in essence held: (a) the only basis for preventing claimants from using the longer civil court time limits was the general law of abuse of process; and (b) a claimant allowing the period for bringing a claim in the tribunal to pass was not in itself an abuse of process.

## ISSUES FOR CONSULTATION

5.31 We are not aware of any calls to take away employment tribunals' jurisdiction over equal pay claims and give exclusive jurisdiction to the civil courts. It seems to us that doing so would run counter to significant aspects of the statutory regime and procedures to which we have referred above.

5.32 We are aware of some (by no means universal) support for the position that all equal pay claims should be heard in employment tribunals and that, if they were, claimants should not lose the six-year time limit which applies if bringing equal pay cases in the civil courts.

5.33 Arguments in favour of investigating the merits of this position include the following:

(1) some employment tribunals will have more experience and expertise of equal pay law and of handling equal pay claims than civil courts;

(2) where the claim is specifically one of "equal value", tribunals have dedicated rules of procedure and access to independent experts sourced through ACAS;

(3) although the civil courts already have the power to transfer questions relating to equal pay cases to employment tribunals, this process may cause delay and increase legal costs;

(4) many stakeholders dislike employment disputes needing to be litigated partly in employment tribunals and partly in the general courts and resolving the totality of a dispute in one forum may lead to reduced costs for the parties and for Her Majesty's Courts and Tribunals Service;

(5) some litigants in equal pay claims may perceive a tactical advantage in exploiting boundary issues to run up costs; and

(6) for reasons to do with judicial expertise, fees, procedure and costs, many claimants prefer to issue equal pay claims in the employment tribunal but the six-month time limit for doing so may be prove too short for some claimants.

5.34 There are several arguments against *requiring* all equal pay claims to be brought before employment tribunals. These include the following:

(1) the civil courts have an inherent jurisdiction to hear breach of contract claims, from which equal pay claims cannot always effectively be severed;

(2) we understand that most equal pay claims are already commenced in employment tribunals (which also indicates that the six-month time limit does not cause difficulty in most cases);

(3) it appears unlikely that the Supreme Court's decision in *Abdulla*[212] will lead to many additional equal pay claims being commenced in the civil courts because, for example:

(a) the period in respect of which unequal pay can be recovered is limited by reference to when the proceedings are brought, not to when employment is terminated. So a claimant who delays bringing a claim until five years after the end of her employment will only be able to recover (in England and Wales) one year's pay differential; and

(b) there are costs risks associated with starting a claim in the civil courts, where (in contrast with the tribunal) the losing party often pays the other party's legal costs;

(4) the current shared jurisdiction offers claimants a choice of forum and there may be instances where one or all parties to an equal pay claim wish to litigate in a costs forum governed by the Civil Procedure Rules; and

(5) many cases dealing with the sex equality rule in occupational pension schemes raise overlapping or ancillary issues of pensions law and administration which are often outside the jurisdiction and expertise of employment tribunals. Such litigation tends to be dealt with between the pension-scheme trustees, sponsoring employers and "representative beneficiaries" appointed under Civil Procedure Rule 19.7. Therefore, while individual claimants can still bring claims to an employment tribunal or make a complaint to the Pensions Ombudsman, it may seem undesirable to require that all such cases dealing with the sex equality rule be heard by employment tribunals.

Conclusion

5.35 There is plainly a degree of acknowledgement, both in law and practice, that employment tribunals are often the expert forum for determining equal pay claims. That is not sufficient, of itself, to support a proposal that they should be the exclusive forum for hearing such claims. In order to reach that conclusion, we would need a compelling case to be made by consultees. Our view at present is that, if the arguments are as finely balanced as we outlined above, it may be preferable for the concurrent jurisdiction of the civil courts and employment tribunals to be retained. If it is retained, it should be considered what may be done to deter litigation tactics which cost parties and the court system time and money. If, however, consultees do consider that concurrent jurisdiction should cease, we would be grateful for their views as to what changes should be made.

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

**Consultation Question 34.**

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

5.37 There appears to us to be a stronger case for aligning the time limits for bringing equal pay claims in the tribunal with those applying in the civil courts. This would prevent equal pay claims being "artificially" pushed into the civil courts due to the 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.[213]

**Consultation Question 35.**

5.38 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?

**Consultation Question 36.**

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

## THE NON-DISCRIMINATION RULE IN OCCUPATIONAL PENSION SCHEMES

### Introduction

5.40 Occupational pension schemes are deemed to include a "non-discrimination rule" which overrides the other provisions of the scheme.[214] 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.[215] This is subject to some exceptions which, for instance, permit certain differential treatment due to members' ages. "Responsible persons" include the trustees of the pension scheme and employers of members and prospective members of the scheme.

---

213 See Chapter 2, paras 2.46 and following.

214 Equality Act 2010, s 61.

215 Namely age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. 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 Part 2 of Schedule 7); see Equality Act 2010, s 61(10). We discuss the sex equality rule above at paras 5.4 and 5.9.

5.41 The non-discrimination rule works by levelling up discriminatory benefits so that the disadvantaged person or group receives the benefits of the advantaged members.

5.42 In addition, it would provide a remedy, for example, for an unnecessarily demeaning physical examination of a disabled person prior to admission to a pension scheme or when seeking early retirement benefits.

**Employment tribunals' jurisdiction**

5.43 Employment tribunals have jurisdiction to hear discrimination claims arising from breach of the non-discrimination rule. 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.

5.44 If a claim is successful, then under sections 124 and 126 of the Equality Act 2010 employment tribunals may make:

(1) a declaration of the rights of each party;

(2) a recommendation as to how the trustees or employer should tackle the discrimination;

(3) an order that an individual be admitted to the scheme;

(4) an order allowing a scheme member to continue their membership of the scheme without discrimination; and

(5) a compensation order, but only in relation to non-compliance with an earlier order or in respect of injury to the claimant's feelings.

5.45 Employment tribunals also have jurisdiction to determine applications by:

(1) responsible persons for declarations as to their own rights, and those of workers, in relation to disputes about the effect of a non-discrimination rule;[216] and

(2) trustees or managers of occupational pension schemes for declarations as to their own rights, and those of scheme members, in relation to disputes about the effect of a non-discrimination rule.[217]

**Civil court jurisdiction and references by courts to employment tribunals**

5.46 The High Court's and county courts' ordinary jurisdiction to hear claims relating to occupational pension schemes is expressly preserved in claims relating to the non-discrimination rule.[218] Similarly to equal pay claims, civil courts are empowered to strike out a civil claim, or refer a question to the employment tribunal.[219]

---

216 Equality Act 2010, s 120(2).

217 Equality Act 2010, s 120(3).

218 Equality Act 2010, s 120(6).

219 Equality Act 2010, s 122(1) and 122(2).

5.47 Pension scheme members may also seek redress by making a complaint to the Pensions Ombudsman.

5.48 We are not aware of any calls to change this allocation of jurisdictions regarding pension schemes' non-discrimination rules, but welcome consultees' views.

**Consultation Question 37.**

5.49 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?

## TRANSFER OF UNDERTAKINGS (TUPE REGULATIONS)

### Introduction

5.50 The Transfer of Undertakings (Protection of Employment) Regulations 2006[220] ("TUPE Regulations 2006") contain a set of rules and rights designed to protect employment when a business, or part of a business, is transferred from one legal person ("A") to another ("B") by means other than a sale of shares in A, and/or when there is a "service provision change" (typically a first or second generation outsourcing, or where a client takes previously outsourced services back in house).[221]

5.51 Prior to the predecessor Regulations – the Transfer of Undertakings (Protection of Employment) Regulations 1981[222] ("TUPE 1981") – the transfer of a business from one employer (A) to another (B) would automatically terminate the employment of the employees employed in the business transferred. Broadly, this was because under the common law an employment contract cannot be transferred from one employer to another without the consent of the employee and the receiving employer.[223] Depending on the circumstances, A's employees might be able to claim for wrongful dismissal, a redundancy payment and/or unfair dismissal, but their employment by A would cease. They might negotiate a *new contract* of employment with B but there would be no guarantee that this would be on the same terms as the old one with A. Such "business transfers" contrasted with the situation where, rather than acquiring A's business from A, the purchaser bought A itself by acquiring A's shares. If so, as remains the case today, the employees would simply remain employed by A, but with A under new ownership.

---

220 SI 2006 No 246 (as amended).

221 Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246 replaced the Transfer of Undertakings (Protection of Employment) Regulations SI 1981 No 1794. The TUPE Regs 2006 were amended from 31 January 2014 by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations SI 2014 No 16.

222 SI 2006 No 246.

223 *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, [1940] 3 All ER 549.

5.52 TUPE 1981 amended the common-law position applying to business transfers so that, subject to certain criteria and conditions, A's employees would automatically transfer to B. B would in most respects step into A's shoes as regards the employees' contractual and statutory entitlements.

5.53 The TUPE Regulations 2006 are triggered by two types of "relevant transfer" (although both types can apply to same set of facts):

(1) a transfer of an undertaking, business or part of an undertaking or business as a going concern;[224] and

(2) 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.[225]

5.54 When there is a "relevant transfer" the TUPE Regulations 2006 protect employment by, in summary:

(1) transferring employees to the buyer, or to the new service provider (the "transferee"),[226] on most of their existing terms of employment and with their accrued rights intact;[227]

(2) subject to limited exceptions, rendering void changes made to a contract of employment if the sole or principal reason for them is the TUPE transfer;[228]

(3) transferring trade union recognition and collective agreements relating to the transferred employees;[229]

(4) making dismissals automatically unfair if their sole or principal reason was the TUPE transfer, unless an "economic, technical or organisational reason entailing changes in the workforce" was the sole or principal reason;[230]

(5) requiring the provision of information to, and potentially consultation with, employee representatives ("informing and consulting obligations");[231] and

(6) obliging the transferor to give information to the transferee about the transferring employees ("employee liability information").[232]

---

224 Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246, reg 3(1)(a).

225 Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246, reg 3(1)(b).

226 Subject to employees' right to object to transferring.

227 Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246, reg 4(1) and 4(2).

228 Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246, reg 4(4).

229 Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246, reg 5.

230 Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246, reg 7.

231 Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246, reg 13.

232 Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246, reg 11.

**Jurisdiction**

5.55 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 a TUPE transfer (consistent with employment tribunals' unfair dismissal jurisdiction which we explained in Chapter 2);

(2) claims by a transferee employer that the transferor employer failed to comply with its obligation to supply employee liability information. The tribunal may award "just and equitable" compensation to the transferee and the minimum level of award in ordinary cases is £500 per employee;[233] and

(3) complaints that an employer has failed to carry out its informing and consulting obligations. Where a complaint succeeds, the tribunal must make a declaration to this effect and may order the employer to pay compensation up to a maximum of 13 weeks' gross pay for each affected employee.[234]

5.56 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 2006, it seems to us that 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*,[235] whether restrictive covenants were enforceable against an employee depended on whether the employee had TUPE transferred. It was therefore necessary for the High Court (whose decision was upheld by the Court of Appeal) to consider and apply the TUPE Regulations.

5.57 We are not aware of any calls to alter the demarcation of employment tribunals' and civil courts' jurisdictions over the TUPE Regulations 2006, and are not minded to propose that the law be changed.

---

233 Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246, regs 11(6) and 12.

234 Transfer of Undertakings (Protection of Employment) Regulations SI 2006 No 246, regs 15(1), (7), (8) and 16(3).

235 [2011] EWCA Civ 428, [2011] IRLR 599 (CA).

**Consultation Question 38.**

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

## WORKING TIME REGULATIONS

### Introduction

5.59 The Working Time Regulations[236] contain rules limiting employees' and workers' working hours and providing for rest breaks and paid holidays, prominent amongst which are rights:

(1) not to work more than 48 hours a week on average, subject to an agreement to opt out of the limit;[237]

(2) limiting the length of night work and providing for health assessments in respect of night work;[238]

(3) to daily and weekly rest periods and to rest breaks;[239]

(4) relating to annual leave;[240] and

(5) relating specifically to young employees and workers.[241]

### Jurisdiction and enforcement

5.60 The Working Time Regulations are enforced in two main ways: by way of a tribunal claim and by state enforcement action.

Employment tribunal claims

5.61 Employment tribunals have jurisdiction under regulation 30 to hear complaints by individuals:

(1) seeking to enforce their rights in relation to rest and statutory annual leave (including rights to take paid annual leave).[242] The remedies available are a declaration and compensation; and

---

236 Working Time Regulations SI 1998 No 1833.

237 Working Time Regulations SI 1998 No 1833, regs 4 and 5.

238 Working Time Regulations SI 1998 No 1833, regs 6 and 7.

239 Working Time Regulations SI 1998 No 1833, regs 10, 11 and 12.

240 Working Time Regulations SI 1998 No 1833, regs 13 to 16.

241 Working Time Regulations SI 1998 No 1833, regs 5A and 6A.

242 Working Time Regulations SI 1998 No 1833, regs 10, 11, 12, 13, 13A, 14, 16, 24, 24A, 25, 27 and 27A.

(2) asserting that their employer has subjected them to a detriment because they asserted rights under the Working Time Regulations.[243] The remedies available are a declaration and compensation.

5.62 In addition, claims for unpaid (or underpaid) holiday pay, or for pay in lieu of leave not taken before termination of the employment, may be pursued as unlawful deduction from wages claims under the Employment Rights Act 1996 ("ERA 1996") Part II.[244]

State enforcement

5.63 Various provisions of the Working Time Regulations, including limiting the working week, limiting working time for night workers and provisions on health assessments, may be enforced by the Health and Safety Executive or other agencies, backed by criminal penalties.[245]

Contract claims

5.64 The High Court in *Barber and ors v RJB Mining (UK) Ltd* held that regulation 4(1) of the Working Time Regulations creates a contractual right not to work more than a 48-hour average working week.[246] 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.

5.65 It seems unlikely that employees and workers would seek contractual damages in relation to working more than the weekly limit, given that they would typically earn more money not less. Furthermore, the Working Time Regulations have been amended to state that pay for statutory annual leave under those Regulations is not contractual and so may not be recovered by a breach of contract claim.[247]

5.66 We are not aware of any calls to alter the demarcation of employment tribunals', civil courts' and criminal courts' jurisdictions over the Working Time Regulations.

**Consultation Question 39.**

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

---

243 Employment Rights Act 1996, s 45A.

244 *Revenue and Customs Commissioners v Stringer* [2009] UKHL 31, [2009] IRLR 677.

245 Working Time Regulations SI 1998 No 1833, reg 29(1). This is done by inspectors appointed by the Health and Safety Executive, local authority Environmental Health Officers and certain specialist agencies.

246 [1999] 2 CMLR 833, [1999] IRLR 308.

247 Deduction from Wages (Limitation) Regulations SI 2014 No 3322, reg 3, amending the Working Time Regulations SI 1998 No 1833, reg 16(4).

## NATIONAL MINIMUM WAGE

### Introduction

5.68 Under section 1 of the National Minimum Wage Act 1998 ("National Minimum Wage Act"), employees and workers must not be paid less than the National Minimum Wage ("NMW"). Detailed provisions as to the operation of the NWM, and certain exempt categories of worker, are set out in the National Minimum Wage Regulations.[248]

5.69 Employees and workers who are not paid the NMW are deemed to be entitled under their contracts to the higher of:

(1) the difference between what they are paid and the NMW; or

(2) the NMW arrears, adjusted to take account of any increase in the NMW rate at the time the arrears are determined, by applying a formula set out in the legislation.[249]

5.70 The NMW is enforced in two main ways: by the individual, or by Her Majesty's Revenue and Customs ("HMRC").

### Enforcement and jurisdiction

Individual enforcement

5.71 As envisaged by section 28(1) to (2) of the National Minimum Wage Act, individuals who do not receive the NMW have two options if they want to bring a claim themselves.

5.72 First, they can claim the difference via an unauthorised deduction from wages claim under section 13 of the ERA 1996. Such a claim must be brought in an employment tribunal, with a three-month primary time limit, and may not be brought in the civil courts. For claims issued on or after 1 July 2015, employment tribunals may only be able look back two years from the date of the complaint when determining arrears. This is a result of the Deduction from Wages (Limitation) Regulations.[250]

5.73 Second, they can bring a breach of contract claim to recover the money owed (because the effect of section 17 of the National Minimum Wage Act is to amend employees' and workers' contracts to provide a minimum rate per hour). Such contract claims may be 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 Extension of Jurisdiction Order.[251]

5.74 In addition:

(1) if employees and workers believe they are not being paid the NMW, section 10 of the National Minimum Wage Act entitles them to see records which the

---

248 National Minimum Wage Regulations SI 1999 No 584.

249 National Minimum Wage Act 1998, s 17.

250 SI 2014 No 3322. See footnote 150 to para 4.81 above.

251 Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623. This Order is discussed above at paras 4.1 to 4.73.

employer is obliged to keep. If the employer refuses, the individual may complain to an employment tribunal. If the tribunal upholds the complaint, it must make a declaration to that effect and award the individual a sum equal to 80 times the NMW rate.[252] Employment tribunals have exclusive jurisdiction; and

(2) employees (but not workers) may bring unfair dismissal claims if their employers dismiss them and employees and workers may bring detriment claims if their employers subject them to detriments because of their right to receive NMW or, in short, their having asserted that right.[253] Employment tribunals have exclusive jurisdiction.

State enforcement

5.75 The NWW 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 county courts); "naming and shaming"; civil penalties, and criminal prosecution for the most serious cases.[254]

5.76 Employers have the right to appeal against a notice of underpayment to an employment tribunal within 28 days of the date the notice was served on them.[255]

5.77 As regards HMRC's power to recover underpayments, section 19D of the National Minimum Wage Act empowers its officers to bring proceedings on behalf of employees and workers. Accordingly, if an employer fails to comply with a notice of underpayment, an officer may bring the following claims on behalf of any employee or worker to whom the notice relates:

(1) a complaint under section 23(1)(a) of the ERA 1996 (deductions from wages).[256] Such a claim must be brought in an employment tribunal; or

(2) civil court breach of contract proceedings to recover any NMW sums due.[257]

5.78 We are not aware of any calls to alter the demarcation of employment tribunals', civil courts' and criminal courts' jurisdictions in relation to the NMW.

**Consultation Question 40.**

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

252 National Minimum Wage Act 1998, s 11.

253 National Minimum Wage Act 1998, ss 25 and 23.

254 See for instance, National Minimum Wage Act, ss 19, 19A, 19D, 19E, 31 and 32.

255 National Minimum Wage Act 1998, s 19C.

256 National Minimum Wage Act, section 19D(a).

257 National Minimum Wage Act 1998, s 19D(c).

## TRADE UNION BLACKLISTS

### Introduction

5.80 Under regulation 3 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 ("Blacklists Regulations"), it is unlawful to compile, use, sell or supply lists of people who are or have been trade union members, or who are taking part or have taken part in trade union activities, if the list was compiled to help employers or employment agencies to discriminate against such persons in relation to recruitment or in relation to the treatment of employees or workers.[258]

Enforcement and jurisdiction

5.81 A person may complain to an employment tribunal if, in relation to a blacklist and in contravention of regulation 3, she or he is: refused employment (regulation 5); refused services provided by an employment agency (regulation 6); or subjected to other detriment for such a reason (regulation 9). The primary time limit for bringing these tribunal claims is three months.[259] The compensation which a tribunal may award for breaches of regulations 5 and 6 is capped at £65,300 (regulation 8(7)). The compensation a tribunal may award under regulation 9 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 (regulation 11(10)). An employee who is dismissed in reliance on a blacklist which contravenes regulation 3 may not claim detriment under regulation 9 because of the separate unfair dismissal protection (available to employees but not workers) under the ERA 1996: under section 104F(1) of that Act (inserted by regulation 12(1), (2) of the Blacklists Regulations), if an employer dismisses an employee in reliance on a blacklist which contravenes regulation 3, then the dismissal will be automatically unfair.

5.82 We note that the £65,300 cap applying to tribunal claims brought under the Blacklists Regulations corresponds with the maximum compensatory award for most types of unfair dismissal claim that was in force at the time the Blacklists Regulations were introduced. The £65,300 cap, however, has not been raised in line with subsequent increases to the maximum compensatory award for unfair dismissal (which is currently £83,682, or 52 weeks' gross pay if lower). The unfair dismissal figure is reviewed annually and index linked (section 34 of the Employment Relations Act 1999), but the £65,300 under the Blacklists Regulations is not.

5.83 Under regulation 13 of the Blacklists Regulations, a breach of regulation 3 may also be challenged in the civil courts (but not employment tribunals) as a breach of statutory duty. The remedies available are damages, an injunction, or both.[260] The time limit is 6 years in England and Wales.

5.84 A claimant may seek damages from a civil court or compensation from an employment tribunal but may not seek both. However, the claimant may claim for financial

---

258 Employment Relations Act 1999 (Blacklists) Regulations SI 2010 No 493, reg 3.

259 Employment Relations Act 1999 (Blacklists) Regulations SI 2010 No 493, reg 7(1).

260 Employment Relations Act 1999 (Blacklists) Regulations SI 2010 No 493, reg 13(3).

compensation in a tribunal and also apply to the civil courts for an injunction preventing the behaviour which is in breach of regulation 3.[261]

5.85 We are not aware of any calls to alter the demarcation of employment tribunals' and civil courts' jurisdictions in relation to the Blacklists Regulations.

5.86 However, we note the discrepancy between the compensation cap for breach of the Blacklists Regulations and the cap for unfair dismissal, both in amount and in the frequency with which they are updated. It may be that, in time, this discrepancy encourages applications to be made for breach of statutory duty in the civil courts, where no cap on recoverable damages is in effect. We are interested to hear consultees' views on this issue, in particular on whether there are cases affected by the £65,300 cap which have to be brought in the civil courts.

**Consultation Question 41.**

5.87 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?

**Consultation Question 42.**

5.88 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?

## QUALIFICATIONS BODIES

5.89 A "qualifications body" is an authority or body which confers qualifications (and/or other forms of authorisation and certification) needed in particular trades or professions.[262] Under section 53 of the Equality Act 2010, such a body must not discriminate[263] against a person in relation to, for instance, the arrangements which the body makes for deciding whether to confer qualifications; by withdrawing qualifications, or by subjecting the person to any other detriment.

5.90 Two examples where bodies have been found to be covered by these provisions are:

---

261 Employment Relations Act 1999 (Blacklists) Regulations SI 2010 No 493, reg 13(5) and (4).

262 Equality Act 2010, s 54.

263 We have set out at para 2.12 the protected characteristics which the Equality Act protects from discrimination.

(1) *Bohon-Mitchell v Common Professional Examination Board and Council of Legal Education* - a complaint of discrimination was upheld regarding the examination board's requirement that non-law graduates from overseas had to complete a two-year diploma covering eight subjects whereas non-law graduates from Britain or Ireland could do a one-year diploma covering six subjects;[264]

(2) *British Judo Association v Petty* - a complaint of sex discrimination was upheld by the Employment Appeal Tribunal regarding the judo association's grant of a referee's certificate which, despite its apparently permissive wording, did not enable a female referee to officiate at men's judo competitions.[265]

5.91 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.[266] 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.

5.92 This is illustrated by *Khan v General Medical Council*,[267] in which the Court of Appeal (subsequently approved on this point by the Supreme Court in *Michalak v General Medical Council* [268]) found that an employment tribunal did not have jurisdiction to hear a discrimination claim against the General Medical Council because (unlike in the case of *Michalak,* discussed below), the claimant had the right to apply to a statutory review board under section 29 of the Medical Act 1983, a right which the Court of Appeal considered was "in the nature of an appeal".

5.93 There was at one time some doubt whether employment tribunals had jurisdiction to hear discrimination claims arising from decisions to suspend or erase doctors from the General Medical Council's register. Since such decisions may be judicially reviewed, the question arose whether judicial review was in the nature of a statutory appeal, in which case employment tribunals would be deprived of jurisdiction by section 120(7) of the Equality Act 2010. However, the Supreme Court, in *Michalak,* has now definitively established that the availability of judicial review in relation to a qualifications body's decisions and actions does not mean that employment tribunals are deprived of jurisdiction by section 120(7).[269] Some stakeholders consider that this availability of judicial review (High Court) as well as a discrimination claim (employment tribunal) may lead to regrettable complexity and they question whether it is sensible for the claimant to be able to challenge the same decision in two different forums, one after another. We welcome consultees' views.

---

264 [1978] IRLR 525. This case was brought under provisions of the Race Relations Act 1976 which were equivalent to those of the Equality Act 2010.

265 [1981] ICR 660, [1981] IRLR 484. This case was brought under provisions of the Sex Discrimination Act 1975 which were equivalent to those of the Equality Act 2010.

266 Equality Act 2010, s 120(7).

267 [1996] ICR 1032, [1994] IRLR 646.

268 *Michalak v General Medical Council* [2017] UKSC 71, [2018] IRLR 60.

269 *Michalak v General Medical Council* [2017] UKSC 71, [2018] IRLR 60.

**Consultation Question 43.**

5.94 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.

**Consultation Question 44.**

5.95 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?

## POLICE MISCONDUCT PANELS

5.96 In the case of *P v Metropolitan Police Commissioner,* the Supreme Court found that employment tribunals have jurisdiction to hear discrimination claims brought under the Equality Act 2010 arising from the decisions of police misconduct panels.[270] This was so notwithstanding the fact that, under the statutory misconduct scheme applicable to the police officer, she was also able to (and did) challenge the decision of the police misconduct panel by appeal to the Police Appeals Tribunal. In reaching its decision, the Supreme Court overturned the Court of Appeal, which had considered that because a statutory police disciplinary board was a judicial body, an action against its deliberations and/or decisions (such as a discrimination claim in the tribunal) would run counter to the principle of judicial immunity and therefore could not proceed. The Supreme Court held, however, that the EU principle of equal treatment trumped domestic law on judicial immunity, meaning that police misconduct hearings were no longer covered by judicial immunity in respect of discrimination claims. In his supplementary judgment in the case, Lord Hughes noted the following consequence:

> … in relation to discrimination there exists considerable potential for parallel or collateral proceedings in an Employment Tribunal and the statutory Police Appeals Tribunal. The former can grant relief relating to discrimination, but cannot direct an alteration to the outcome of the disciplinary proceedings. The latter cannot grant discrimination-related relief, and does not have the expertise of an Employment Tribunal in that area, although it can and should consider any suggested discrimination when hearing an appeal against that outcome … For the reasons which Lord Reed [who gave the lead judgment] explains, this division of justiciability is, in the present state of the law, unavoidable. It might, however, usefully be considered in the event of any review of the overall structure.[271]

---

270 [2017] UKSC 65, [2018] 1 All ER 1011.

271 *P v Metropolitan Police Commissioner* [2017] UKSC 65, [2018] 1 All ER 1011 at [38] and [39].

**Consultation Question 45.**

5.97 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?

# Chapter 6: Restrictions on orders which may be made in employment tribunals

## RESTRICTIONS ON ORDERS

6.1 The orders and remedies which employment tribunals may grant claimants are limited to those specifically set out by legislation. Accordingly, employment tribunals do not have at their disposal a variety of discretionary remedies available to civil courts, notably injunctions.

### Injunctions

6.2 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.

6.3 Employment tribunals do not have the power to grant injunctions and it is very rare for tribunals to have such a power.[272] The jurisdiction of the civil courts to grant injunctions is conferred by primary legislation, currently section 37 of the Senior Courts Act 1981 (for the High Court) and section 38 of the County Courts Act 1984 (for the county court). 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,[273] for example where it is alleged that the reason or principal reason for the dismissal was the claimant's participation in trade union activities. But such interim relief orders, which are rarely made, are not injunctions and do not carry the sanction of contempt of court.

6.4 In the Scottish case of *AA v BEIS*,[274] the Court of Session has recently held that the EU principle of effectiveness does not require that employment tribunals have powers to freeze respondents' assets in advance of judgment rather than a claimant having to make a separate claim to freeze assets in the civil courts. It was accepted by both sides that employment tribunals have no power to make a freezing order (in Scottish terminology, to grant diligence on the dependence). The same rule plainly exists in England and Wales. However, it was held both in *AA v BEIS* and in the earlier English case of *Amicus v Dynamex Friction Ltd*[275] that the civil court has power to grant a freezing injunction in support of a pending employment tribunal claim where there is evidence of a real risk that the respondent is about to dissipate its assets in order to defeat the claim. Such cases are unusual. We see no reason to recommend amending the law in this respect.

---

272 See also Chapter 4, para 4.48(2).

273 This remedy is only available if the employment tribunal decides, at an interim hearing, that the claimant is likely to win at the final hearing (Employment Rights Act 1996, s 128; Trade Union and Labour Relations (Consolidation) Act 1992, s 161).

274 [2018] CSOH 54.

275 [2005] IRLR 724.

6.5 As we have noted, employment tribunals do not (with very minor exceptions) have jurisdiction to hear claims brought by employers and it follows that an employer seeking, for example, an injunction to enforce a covenant in restraint of trade cannot do so in a tribunal.

6.6 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. We doubt whether such a proposal would fall within our terms of reference. In any event we are not aware of any substantial body of opinion that employment tribunals should be given the power to grant injunctions.

**Consultation Question 46.**

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

**Contribution and apportionment in discrimination claims**

Introduction

6.8 More than one legal person may be responsible for the same act of unlawful discrimination under the Equality Act 2010. As noted by the Employment Appeal Tribunal ("EAT") in the case of *Brennan v Sunderland City Council* ("*Brennan*") (Underhill P presiding), the most obvious example of this is where the alleged discrimination was carried out by an employee (or individual discriminator) in the course of their employment.[276] If so, a claimant may choose between:

(1) just claiming against the employer, who will be vicariously liable for the discriminatory acts of its employees under section 109(1) of the Equality Act 2010 unless it has taken all reasonable steps to stop those acts occurring (section 109(4));

(2) proceeding against the individual discriminator(s) but not the employer (this is only occasionally done, reflecting the fact that the employer will normally have a deeper pocket); or

(3) proceeding against the employer and one or more individual discriminators, such individuals being liable under section 110. If an employment tribunal awards compensation in such a case, it will normally be on the basis that these concurrent discriminators are jointly and severally liable to the claimant for 100% of the award.[277]

6.9 Where a claim in tort or for breach of contract is brought in the High Court or county court against two defendants (A and B) who are jointly or otherwise liable for the same damage, and the successful claimant chooses to recover damages only against A, A

[276] *Brennan v Sunderland City Council* UKEAT/0286/11, [2012] ICR 1183 at [15].

[277] See footnote 283.

may claim contribution from B under the Civil Liability (Contribution) Act 1978 ("the 1978 Act").[278] However, as we set out in more detail below:

(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 discriminator(s), these respondents may not recover contribution from one another in the employment tribunal; and

(2) the EAT has suggested (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.

Employment tribunals' previous practice of apportioning liability

6.10 Until disapproved 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.[279] As noted by the EAT in *Brennan*, 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 (or co-discriminators), it had the same effect.[280]

6.11 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. If the harm is divisible, the employment tribunal may, in appropriate cases, make separate awards against each respondent.[281] But 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 between them. The EAT reached the same conclusion in *Bungay v Saini*.[282]

6.12 We understand from stakeholders that this joint-and-several approach is important to claimants where an employer respondent goes into administration because it enables

---

278 Civil Liability (Contribution) Act 1978, ss 1 and 2.

279 See for instance, *Way v Crouch* [2005] ICR 1362, [2005] IRLR 603 (EAT).

280 *Brennan v Sunderland City Council* UKEAT/0286/11, [2012] ICR 1183 at [15].

281 [2011] ICR 1374, [2011] IRLR 740 (EAT). This case was appealed to the Court of Appeal. By the time it was 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 paragraph 47, Mummery LJ strongly approved of the EAT's approach (*London Borough of Hackney v Sivanandan* [2013] EWCA Civ 22, [2013] IRLR 408 (CA)).

282 UKEAT/0331/10, [2011] EqLR 1130. Contrast reg 18(9) of the Agency Workers Regulations SI 2010 No 93 which, as we describe at paragraph 2.42, expressly enables employment tribunals to identify the degree to which two or more respondents are responsible for a relevant infringement and to apportion the compensation accordingly. In addition, under reg 14(4) of the Blacklists Regulations SI 2010 No 493, where both an employer and employment agency are found to have acted in contravention of those Regulations and an employment tribunal awards compensation, the tribunal may order that the compensation be paid entirely by the employer, entirely by the agency, or apportion the payments between the two as it considers just and equitable.

the claimant to recover the entire award from the individual discriminator(s) instead, provided they are themselves solvent.

**Consultation Question 47.**

6.13 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?

Contribution between respondents

6.14 Where a claim in tort or for breach of contract is brought in the High Court or county court and one defendant (A) considers that he or she is not solely responsible for the alleged harm, then A may invoke the 1978 Act.[283] A can do so by joining another defendant (B) to the existing proceedings as a third party pursuant to rule 20.7 of the Civil Procedure Rules. Alternatively, A can bring a freestanding claim for contribution. If A and B are made defendants to the same claim, each may seek contribution from the other within the same proceedings by serving notice of a claim for contribution on the other defendant under rule 20.6 of the Civil Procedure Rules. The court will then decide the contribution each should make to the other after it has determined their liability to the claimant. Section 2(1) of the 1978 Act provides that the amount which A may recover from B will 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".

6.15 The Court of Appeal has held that the 1978 Act may be used in the county court in the context of non-employment discrimination claims.[284] However, the EAT has found that in employment discrimination claims, concurrent discriminators may not use the 1978 Act in employment tribunals to claim contribution from each other. In considering this issue, the EAT in *Brennan* identified two distinct questions:

(1) first, whether the 1978 Act confers any right at all to contribution in the case of liability for discrimination in the employment field ("Question One"); and

(2) secondly, whether employment tribunals (as distinct from civil courts) have jurisdiction to determine such contribution claims ("Question Two").[285]

6.16 The EAT addressed Question Two first. It held that employment tribunals do not have jurisdiction to hear contribution claims in discrimination cases. This is because any jurisdiction for employment tribunals to consider contributions claims would have to

---

283 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. If C only claims against A, it is not a defence for A to say that C could have claimed from B, though it is a defence for A to show that he or she has already paid C all or part of the money. The Civil Liability (Contribution) Act 1978 enables A to obtain from B a contribution towards the amount that A has paid or been ordered to pay to C. The same principles apply where more than two people are jointly and severally liable.

284 *Ross v Ryanair Ltd* [2004] EWCA Civ 1751, [2005] WLR 2447.

285 *Brennan v Sunderland City Council* UKEAT/0286/11, [2012] ICR 1183 at [16].

derive not from the 1978 Act (which was concerned simply with the creation of a right to contribution and not with where that right might be enforced), but from the statutes which confer substantive jurisdiction on tribunals; the discrimination legislation conferred (and still confers) no such jurisdiction.[286]

6.17 The EAT went on to give its view on Question One, while noting that this was not binding because the appeal had already been disposed of as a result of the answer to Question Two. The EAT's view was that the 1978 Act is concerned only with liabilities falling for determination in the High Court or county court and creates no right to contribution in relation to discrimination in the employment field (whether sought in an employment tribunal or civil court). The EAT considered that the legislature had simply failed to consider the question of contribution in the context of liability for unlawful discrimination.[287]

6.18 Our current understanding is that the absence of a right to claim for contribution in employment tribunals is seen as unjust and anomalous. We also note that the EAT in *Brennan* did "not regard [its conclusion in this regard] with any satisfaction". The EAT observed that:

> In a straightforward case where the joint or concurrent discriminators are at arm's length [as was the case in *Sivanandan*], the situation seems to us indistinguishable from that of tortfeasors at common law, where it has been recognised since 1935 (or 1940 in Scotland) that it is not fair that the party against whom the claimant chooses to proceed should have no recourse against others who have contributed to the same damage. There is nothing special about discrimination which makes such an outcome acceptable…

and continued:

> We accept that the issues of policy might be less straightforward in cases where an employer seeks contribution against an employee whose conduct has rendered him liable for discrimination … Be that as it may, however, in our view any right to contribution, whether precisely mirroring the position as regards common law claims or modified to some extent to suit the employment context, can only be created by Parliament.[288]

6.19 Our provisional view is that it is very hard to defend the fact that concurrent respondents to workplace discrimination claims in the employment tribunal may in no circumstances seek contribution from one another. We consider, however, that the EAT in *Brennan* was also correct to raise the question of whether less straightforward policy issues might apply in cases where an employer seeks contribution against an employee whose conduct had rendered the employer liable for discrimination, than they might do in scenarios where concurrent respondents are "at arm's length" from each other.

---

286 *Brennan v Sunderland City Council* UKEAT/0286/11, [2012] ICR 1183 at [17] to [21].

287 *Brennan v Sunderland City Council* UKEAT/0286/11, [2012] ICR 1183 at [24] and [25].

288 *Brennan v Sunderland City Council* UKEAT/0286/11, [2012] ICR 1183 at [26].

**Consultation Question 48.**

6.20 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.

**Consultation Question 49.**

6.21 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.

**Enforcement**

6.22 In the view of some stakeholders, 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.

6.23 Accordingly, if an employment tribunal orders an employer to pay a sum to an employee or worker but the employer demurs, the employee or worker will have to go to the civil courts to try to force the employer to pay. Section 15(1) of the Employment Tribunals Act 1996 provides that, "any sum payable in pursuance of a decision of an employment tribunal in England and Wales which has been registered in accordance with employment tribunal procedure regulations shall be recoverable under section 85 of the County Courts Act 1984 or otherwise as if it were payable under an order of the county court".[289] Under section 19A of the 1996 Act, ACAS conciliated settlements may be enforced in the same way.

6.24 The topic of enforcement of "employment rights recommendations" is the subject of a separate review by the Ministry of Justice ("MoJ") and the Department for Business, Energy and Industrial Strategy ("BEIS") in response to the Taylor Review of Modern Working Practices ("the Taylor Review").[290] Government consultation ran from 7

---

289 Section 15(2) of the Employment Tribunals Act 1996 provides: "Any order for the payment of any sum made by an employment tribunal in Scotland (or any copy of such an order certified by the Secretary of the Tribunals) may be enforced as if it were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland".

290 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) available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679792/2018-01-17_Taylor_Employment_Tribunal_Enforcement_Condoc_v7.1_FINAL__1849_.pdf (last visited 14

February 2018 to 16 May 2018 and, at the time of writing, the Departments are analysing feedback from consultees. We do not seek to duplicate that work although we note the following:

(1) the Taylor Review recommended that: "Government should make the enforcement process simpler for employees and workers by taking enforcement against employers/engagers who do not pay employment tribunal awards, without employees/workers having to fill in extra forms or pay an extra fee and having to initiate additional court proceedings";[291]

(2) as part of their response to the Taylor Review, MoJ and BEIS stated that: "Enforcement of employment tribunal awards is part of a wider enforcement system in Her Majesty's Courts and Tribunals Service, where individuals also enforce judgments and orders made in the civil and family jurisdictions. The government is already planning improvements to the current enforcement services across these jurisdictions, which should go a long way to meet the concerns raised in the Taylor Review";[292]

(3) as part of their response to the Taylor Review, MoJ and BEIS have summarised the current civil court procedures available to claimants seeking to enforce employment tribunal awards;[293]

(4) the specific question of whether employment tribunals should be able to enforce their own monetary orders has not formed part of the consultation exercise conducted by MoJ and BEIS.

6.25 Although it is not our intention to duplicate the consultation exercise undertaken by MoJ and BEIS, we consider that employment tribunals' inability to enforce their own monetary awards falls within our terms of reference[294] and that our addressing this topic will be complementary to the work being undertaken by MoJ and BEIS.

---

September 2018). See also M Taylor, *Good Work: The Taylor Review of Modern Working Practices* (July 2017) available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf (last visited 14 September 2018).

291 M Taylor, *Good Work: The Taylor Review of Modern Working Practices* (July 2017) p 63.

292 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) p 14.

293 See section B and 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) p 14. See also M Taylor, *Good Work: The Taylor Review of Modern Working Practices* (July 2017) pp 62 - 64.

294 We note, however, that where an employment tribunal makes an order for re-instatement or re-engagement in an unfair dismissal case and the employer fails to comply (and is unable to show that it was not practicable to comply), the tribunal has the power to order the employer to pay a (penal) sum in addition to the usual compensation (the Employment Rights Act 1996, s 117). The amount of this additional sum will be between 26 and 52 weeks' pay (s 117(3)). The tribunal has a wide discretion within that range (*Mabirizi v National Hospital for Nervous Diseases* [1990] ICR 281, [1990] IRLR 133 (EAT)). "A week's pay" is calculated as per s 220 of the Employment Rights Act 1996 onwards.

6.26 There would no doubt be potential resource implications in establishing an enforcement regime for employment tribunals. Although we have not explored these resource implications at this stage, we note by way of illustration that enforcement methods currently available in the county court and High Court include (but are not limited to) the following:

(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);

(3) bankruptcy proceedings.[295]

6.27 We would welcome consultees' views on whether employment tribunals should be given the power to enforce their own monetary orders, and what form such powers should take.

**Consultation Question 50.**

6.28 Should employments 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?

[295] 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.

# Chapter 7: The Employment Appeal Tribunal's jurisdiction

## EMPLOYMENT APPEAL TRIBUNAL'S JURISDICTION

Introduction

7.1 The Employment Appeal Tribunal ("EAT") was established by the Employment Protection Act 1975. Its statutory footing today is section 20 of the Employment Tribunals Act 1996. The EAT's principal function is to hear appeals on questions of law from decisions of employment tribunals.[296] 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; 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.

7.2 The EAT does not have jurisdiction to hear appeals from the CAC in trade union recognition and derecognition disputes; the CAC's decisions in such cases may be challenged by an application for judicial review in the Administrative Court.

EAT's limited jurisdiction to hear appeals from decisions of the CAC

7.3 The CAC's original functions were limited to arbitrations in collective disputes. It retains these functions but since 1999 has been given a significantly expanded remit:

(1) relating to statutory trade union recognition and derecognition procedures for collective bargaining purposes ("trade union recognition and derecognition"); and

(2) dealing with applications and complaints under the following regulations, each of which contain obligations regarding employee engagement:

(a) the Information and Consultation of Employees Regulations SI 2004 No 3426 ("ICE Regulations");

(b) the Transnational Information and Consultation of Employees Regulations SI 1999 No 3323 ("TICE Regulations");

(c) the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations SI 2009 No 2401;

(d) the European Cooperative Society (Involvement of Employees) Regulations SI 2006 No 2059; and

---

296 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).

(e) the Companies (Cross-Border Mergers) Regulations SI 2007 No 2974.

7.4 The EAT has jurisdiction to hear appeals on points of law from decisions of the CAC relating to various “employee participation” provisions of the following regulations:

(1) the ICE Regulations (see regulation 35(6));

(2) the TICE Regulations (see regulation 38(8));

(3) the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations SI 2009 No 2401 (see regulation 34(6));

(4) the European Cooperative Society (Involvement of Employees) Regulations SI 2006 No 2059 (see regulation 36(6); and

(5) the Companies (Cross-Border Mergers) Regulations SI 2007 No 2974 (see regulation 57(6)).

7.5 Each of these Regulations derives from EU law and includes formal provision for employers to involve their employees to some extent in the affairs of the enterprise in which they work. The best known of them are the ICE Regulations and TICE Regulations.

7.6 Under the ICE Regulations, large and medium-sized UK employers (undertakings with 50 or more employees) are in certain circumstances obliged to set up a works council or other suitable mechanism for consulting employees on various matters.

7.7 Under the TICE Regulations, UK-based multi-national enterprises which employ 1,000 or more employees across the European Economic Area are in certain circumstances obliged to set up a European works council or other suitable mechanism for consulting employees at a transnational level about matters of transnational concern.

7.8 By way of illustration of the CAC’s powers in this context, under the ICE Regulations, the CAC has the power to hear and determine complaints and applications (with a right of appeal to the EAT) as follows:

(1) complaints by an employee or employees' representative regarding a failure by the employer to provide data about the number of employees employed in his or her undertaking or regarding the provision of data that is false or incomplete;

(2) complaints by an employee or employees' representative regarding the failure to satisfy a necessary requirement for the holding of a ballot for the endorsement of an employee request;

(3) complaints by an employee or employees' representative regarding the arrangements for holding such a ballot;

(4) applications by the employer as to whether there was a valid request for such a ballot;

(5) applications by an employee or employees' representative that an employer notification was not valid;

(6) complaints by an employee or employees' representative regarding the appointment or election of negotiating representatives;

(7) complaints by a negotiating representative regarding the arrangements for a ballot for the approval of a negotiated agreement;

(8) complaints by relevant applicants regarding the employer's failure to comply with the terms of a negotiated agreement;

(9) applications by recipients of confidential information as to the reasonableness of the requirement to hold it in confidence;

(10) applications by the employer, an information and consultation representative, an employee or employees' representative regarding the entitlement of the employer to withhold information; and

(11) complaints by an employee or employees' representative that arrangements for a ballot for the election of information and consultation representatives are defective.

EAT's jurisdiction to hear appeals from decisions of the Certification Officer

7.9 The EAT also has jurisdiction to hear appeals on questions of law from decisions of the Certification Officer under the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A 1992"), sections 3 and 4 (lists of trade unions); sections 6 and 7 (certification of independent trade unions); sections 25, 31 and 45C (trade union administration); section 55 (failure to comply with requirements); Chapter VI (application of union funds for political objects);[297] Chapter VIIA (breach of rules);[298] section 103 (resolutions approving union amalgamations or transfers); and sections 124 and 125 (lists of employers' associations).

No right of appeal from CAC's decisions in trade union or derecognition disputes

7.10 By contrast, the EAT does not have jurisdiction to hear appeals from the CAC's decisions in trade union recognition or derecognition disputes.

7.11 As regards the CAC's role and decision-making powers in this area, Schedule A1 of TULR(C)A 1992 allocates a broad range of powers and responsibilities to the CAC in respect of detailed trade union recognition and derecognition procedures. The procedures apply if employers and unions are unable to agree voluntarily, and include:

(1) applications by unions for recognition to conduct collective bargaining on behalf of a particular group of workers (or "bargaining unit");

(2) a procedure for enabling voluntary recognition agreements to be formally recognised;

---

297 See Trade Union and Labour Relations (Consolidation) Act 1992, s 95.

298 See Trade Union and Labour Relations (Consolidation) Act 1992, s 108C.

(3) a procedure for dealing with changes to a bargaining unit in respect of which a union is recognised, either where the unit has ceased to exist or is no longer an appropriate unit, and for the recognition of a new unit; and

(4) applications and requests by employers and workers to bring existing bargaining arrangements to an end.

7.12 The functions which the CAC performs under Schedule A1 include making decisions and declarations on:

(1) the validity of an application for recognition;

(2) the appropriate bargaining unit;

(3) the method for conducting collective bargaining;[299]

(4) the entitlement of a union to be recognised to conduct collective bargaining on behalf of the workers constituting a bargaining unit;

(5) whether a voluntary agreement is an agreement for recognition;

(6) whether a bargaining unit has ceased to exist or be appropriate;

(7) whether another bargaining unit is appropriate;

(8) the validity of an application for derecognition; and

(9) whether bargaining arrangements are to cease to have effect.

7.13 While there is no right of appeal from such CAC decisions and declarations in trade union recognition or derecognition disputes, they can be challenged by an application for judicial review in the Administrative Court (a specialist court within the Queen's Bench Division of the High Court).

7.14 Some stakeholders consider that the EAT's jurisdiction should be extended to include appeals from the CAC in trade union recognition and derecognition disputes. This may be a more suitable way of ensuring the correctness of the CAC's decisions than using public law principles which may not sit easily with the review of the CAC's quasi-judicial functions.

7.15 We also note, however, the following observation of Buxton LJ in the case of *R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee*:

> 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,

[299] See also the Trade Union Recognition (Method of Collective Bargaining) Order SI 2000 No 1300.

is therefore only available if the CAC has either acted irrationally or made an error of law.[300]

7.16 The *Kwik-Fit* case concerned the question of when the CAC's trade union recognition decisions can and cannot be judicially reviewed in the High Court. Elias J's observation above suggests that it is an open question as to whether giving the EAT appellate jurisdiction over trade union recognition disputes would lead to more or less "intervention of the courts".

7.17 If the EAT were given such an appellate jurisdiction our provisional view is that it should be confined (as the EAT's jurisdiction generally is) to issues of law.

**Consultation Question 51.**

7.18 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 appeals on questions of law?

EAT's original jurisdiction

7.19 The EAT has original (as opposed to appellate) jurisdiction:

(1) to hear applications for Restriction of Proceedings Orders under section 33 of the Employment Tribunals Act; and

(2) to hear applications under:

(a) the ICE Regulations 2004 (regulation 22(6));

(b) the TICE Regulations 1999 (regulations 20, 21 and 21A(5));

(c) the Companies (Cross-Border Mergers) Regulations 2007 (regulations 53(6) and 54(5));

(d) the European Cooperative Society (Involvement of Employees) Regulations 2006 (regulation 22(6)); and

(e) the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 (regulation 20(6)).

7.20 Under the regulations listed at paragraph 7.19(2) (each of which derives from EU law), the EAT has jurisdiction to hear applications that penalty notices should be issued following determinations by the CAC that an organisation has failed to comply with relevant employee-participation provisions.[301] In each case the penalty is payable to the

[300] [2002] EWCA Civ 512, [2002] IRLR 395 at [2].

[301] For instance, a failure to comply with the terms of a negotiated agreement under the ICE Regulations.

Secretary of State subject to a maximum of £75,000. Very few cases are brought under this jurisdiction. In 2017/18, for example, the EAT did not receive any such cases.

7.21 Whether any or all of the EU-derived regulations listed at paragraph 7.19(2) above should be amended or repealed as a result of the UK's leaving the EU is not properly a matter for us and we offer no view. We do consider, however, that it falls within our terms of reference to consider whether the EAT is the appropriate forum to deal with the applications for orders and penalty notices to which we refer at paragraph 7.20. We are not aware of any calls to remove or alter these areas of original jurisdiction and our provisional view is to recommend no change.

**Consultation Question 52.**

7.22 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?

# Chapter 8: An employment and equalities list?

8.1 We noted in Chapter 1 that it has recently been suggested (to the Briggs review of the civil courts structure) that an Employment and Equalities Court be created with non-exclusive but unlimited jurisdiction in employment and discrimination cases, including claims of discrimination in goods and services. We noted that this would involve possibly contentious primary legislation and in our view it is not at present a practicable proposal. We consider in this chapter what other measures might be available to seek to ensure that cases about employment law in the High Court are heard by judges with appropriate specialist experience.

8.2 An employment-related claim in the High Court may at present be issued in either the Queen's Bench Division or the Chancery Division. The complement of the Queen's Bench Division is 72 judges and that of the Chancery Judges is 18 judges. In theory an employment-related claim could come before any of 90 permanent judges or any one of a large number of deputy High Court Judges. In practice listing officers, who work under the supervision of judges in charge of each list, do their best to allocate cases to judges with appropriate experience. But this is not always possible, particularly for urgent hearings such as applications for interim injunctions.

8.3 Some High Court business is assigned to a particular Division by Schedule 1 to the Senior Courts Act 1981 ("the 1981 Act"). Employment law is not listed in that Schedule. Section 61(3) of the 1981 Act allows the Schedule to be amended by the Lord Chief Justice with the concurrence of the Lord Chancellor. Section 61(8) requires this to take the form of a statutory instrument which is laid before Parliament. This is very rarely done and would in our view be an over-elaborate course to follow.

8.4 A 'specialist list' can also be formally created under rule 2.3(2) of the Civil Procedure Rules. Where this is done rule 30.5 of the Civil Procedure Rules makes provision for transfers to and from such a list.

8.5 A formal solution risks being inflexible and raises problems of definition: any statutory instrument or rule change would have to cover a variety of situations. Employment-related and non-employment discrimination cases heard in the High Court include:

(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,[302] at present £25,000 (see paragraphs 4.17 to 4.31 above);

(2) employers' claims to enforce covenants in restraint of trade;

(3) employers' claims for breach of confidence or misuse of trade secrets; this type of claim is often brought in the Chancery Division, although there is nothing to prevent a claimant opting for the Chancery Division in other types of claim;

[302] Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 No 1623.

(4) employers' claims against trade unions for injunctions to prevent industrial action or (less frequently) for damages following what is alleged to be unlawful industrial action;

(5) appeals from county courts in claims for discrimination in goods and services; and

(6) appeals from county courts in employment-related cases.

8.6 An alternative method of encouraging allocation to judges with appropriate experience is for an informal specialist list to be created within one Division as an administrative measure. An example in another field of an informal specialist list, widely regarded as successful, is the Media and Communications List in the Queen's Bench Division. This is supervised by a High Court Judge who is a recognised specialist in the field and judges who sit 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 them in the Media and Communications List, although they cannot be compelled to do so. In *Mezvinskyi v Associated Newspapers Ltd*,[303] the Chief Chancery Master refused a defendant's application to transfer a privacy claim from the Chancery Division to the Queen's Bench Division with a view to it being allocated to the Media and Communications List.

8.7 Our provisional view is that the creation of an informal Employment List or Employment and Equalities List within the Queen's Bench Division would be a useful step. We invite the views of consultees.

**Consultation Question 53.**

8.8 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?

**Consultation Question 54.**

8.9 What name should it be given: Employment List, Employment and Equalities List or some other name?

[303] [2018] EWHC 1261 (Ch).

# LIST OF CONSULTATION QUESTIONS

This appendix brings together all of the consultation questions contained in the consultation paper. We particularly invite consultees to comment on all or some of these, as appropriate. This will greatly assist us in formulating our recommendations for reform.

## CHAPTER 2: THE EXCLUSIVE JURISDICTION OF EMPLOYMENT TRIBUNALS

**Consultation Question 1.**

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

**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?

**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?

## CHAPTER 3: RESTRICTIONS ON THE JURISDICTION OF EMPLOYMENT TRIBUNALS – DISCRIMINATION

**Consultation Question 4.**

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

**Consultation Question 5.**

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

**Consultation Question 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?

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

**Consultation Question 8.**

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

**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?

## CHAPTER 4: OTHER RESTRICTIONS ON THE JURISDICTION OF EMPLOYMENT TRIBUNALS

**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?

**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 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?

**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?

**Consultation Question 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?

**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?

**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?

**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?

**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?

**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?

**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 or Jurisdiction Order. Do consultees agree?

**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? 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.

**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?

**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?

**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?

**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?

**Consultation Question 27.**

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

**Consultation Question 28.**

Where an employment tribunal finds that one or more of the "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 money from an employee's or worker's wages?

**Consultation Question 29.**

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

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

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

**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?

**Consultation Question 31.**

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

**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)?

## CHAPTER 5: CONCURRENT JURISDICTION

**Consultation Question 34.**

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

**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?

**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?

**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?

**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?

**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?

**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?

**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?

**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?

**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.

**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?

**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?

## CHAPTER 6: RESTRICTIONS ON ORDERS WHICH MAY BE MADE IN EMPLOYMENT TRIBUNALS

**Consultation Question 46.**

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

**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?

**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.

**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 as regards 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.

**Consultation Question 50.**

Should employments 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?

## CHAPTER 7: THE EMPLOYMENT APPEAL TRIBUNAL'S JURISDICTION

**Consultation Question 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 appeals on questions of law?

**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?

## CHAPTER 8: AN EMPLOYMENT AND EQUALITIES LIST?

**Consultation Question 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?

**Consultation Question 54.**

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