



Ministry of Justice

The Right Honourable Dominic Raab MP
Deputy Prime Minister, Lord Chancellor &
Secretary of State for Justice
Ministry of Justice

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By Email Only

Dear Nicholas,

We are aware that the Law Commission's report on Employment Law Hearing Structures highlighted several important topics, including some which fall within the remit of the Ministry of Justice and the Government Equalities Office. We want to thank you for your carefully considered and comprehensive report, which noticeably put improving the experience of claimants at the forefront.

We understand that you have already received a letter from our colleague Minister Scully, setting out his Department's response to the majority of the recommendations within your report. Below, we have set out our response to the Law Commission's remaining recommendations, and those which relate in part to areas within our responsibility.

We recommend that the time limit for bringing a claim should be six months for all employment tribunal claims.

With regard to the time limit for Equality Act based cases (except for equal pay), the Government has considered these separately, as part of the Sexual Harassment in the Workplace consultation. As you may have seen in our recent response to that consultation, we are continuing to look closely at extending the time limit for Equality Act based cases to six months.

Respondents to the consultation provided compelling evidence demonstrating the positive impact this change could have, not just for those bringing sexual harassment cases, but for others too, particularly pregnancy and maternity discrimination cases. The specific circumstances surrounding these kinds of cases; for example, the trauma of sexual harassment, and the major life change surrounding pregnancy and maternity; can make it more difficult for individuals to bring these types of claims within the three-month limit. However, we also recognise that the pandemic has put additional pressure on the entire



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Courts and Tribunal Service, particularly the Employment Tribunal service, and that restoring its existing levels of service needs to be the priority. Given this, we believe the appropriate approach at this time is to continue to look closely at extension of the limit for this specific group of claims.

Our consultation has furthered our understanding of how any new limit could be designed. For example, based on the responses received, we believe that any extension should stop at six months, to adequately balance the needs of individuals and employers. Consultees suggested that this could ensure full access to justice for those looking to bring cases, while minimising the potential negative impact on smaller employers.

We will continue to engage with stakeholders as this work progresses. This will not only help improve our understanding of what impact an extended period could have on litigation behaviours; but also how we could ensure that any new limit, if introduced, is compatible with the realities of the tribunal process. We would welcome the support of the Commission as part of this work.

We recommend that section 128(2) of the Equality Act 2010 be amended to provide a power to transfer equal pay cases to employment tribunals, with a presumption in favour of transfer.

At this time we believe that the current powers within section 128 are sufficient to ensure that cases are heard in the most appropriate forum. As was raised by several respondents, introducing a presumption in favour of transfer risks complex cases becoming misallocated, especially in claims brought with other contractual claims. We also note that a presumption in favour of transfer would remove the choice of claimants over which forum they pursue; and, to a certain extent, reduce the ability of the courts to use their discretion. As was raised by several respondents, the presumption of transfer also highlights the issue of time limit disparity, with many suggesting that the six year limit applied in civil courts should be observed in tribunals also. This would undoubtedly be at odds with the intended purpose of Employment Tribunals, as a forum for quick resolutions, as well as the aims of other recommendations within this report which attempt to bring consistency to time limits. Any decision to introduce a presumption in favour of transfer should therefore only be taken after a full assessment of the practical implications has been carried out, as well as the implications for access to justice.

Similarly, while we recognise that the decision in the *Abdulla v Birmingham City Council* case may have wider ramifications for the treatment of equal pay claims, we believe it is important to first see how this manifests. We will pay close attention to see whether this results in a reduction in the number of equal pay cases being referred to employment tribunals, or an increase in cases being struck out on these grounds, and consider whether further action is necessary.

We recommend that employment tribunal judges be given a discretionary power to extend the limitation period for equal pay claims where it is just and equitable to do so.

We recognise that this review sought, through its recommendations, to establish an approach to time limits which provided consistency and clarity for all stakeholders. However, there is a specific framework surrounding equal pay which already makes it an exception. In comparison to other tribunal claims relating to pay (other than redundancy) and terms and conditions which

have a three month time limit, there is a six month time limit for equal pay claims. Similarly, unlike other Equality Act based cases, individuals can bring equal pay claims in civil courts with a six year limit, under breach of contract. It therefore makes sense to consider the circumstances for equal pay claims separately from other tribunal cases.

Furthermore, introducing this discretion would still fail to provide the consistency that the Commission is seeking, with other Equality Act based cases still limited to being heard in tribunals, while most other pay related claims have a three month time limit. We therefore believe that the current provisions are sufficient, and that change in this area could introduce further confusion and fragmentation, as opposed to simplifying the process for claimants as desired.

We recommend that respondents to employment-related discrimination claims should be able to claim contribution from others who are jointly and severally liable with them for the discrimination. The test to be applied should mirror that in section 2(1) of the Civil Liability (Contribution) Act 1978.

We recognise that a case can be made for harmonisation of the Employment Tribunal approach with that of other civil courts, in particular having some advantages in terms of deterring (on financial grounds) Equality Act breaches by those who do not own or run the entity but have, for example, managerial positions in it. However, we are concerned that this might detract from the principle that the employer is vicariously liable for discriminatory acts by their employees against other employees. This in turn could adversely impact the incentive for employers to promote and enforce high standards of Equality Act compliance, by potentially reducing their own financial liability for failing in this regard.

We have not previously received any representations on this issue, either within or beyond Parliament, which suggests that current arrangements are accepted by or at least tolerable for most employers. Nevertheless, we will keep this matter under review and future adjustment is not ruled out.

Employment judges with experience of hearing discrimination claims should be deployed to sit in the county court to hear non-employment discrimination claims.

We welcome proposals that contribute to efficient operation of the employment dispute resolution system and we note the strong support expressed for flexible deployment in the responses to your consultation. As you note in your review, employment judges are already judges of the County Court and cross-ticketing of judges between the Employment Tribunal and the County Court already occurs; albeit on an more informal basis than proposed by this recommendation.

While judicial deployment is a judicial function and we are unable to specifically comment on this recommendation, we have shared it and the views expressed in your consultation with the judiciary for their consideration when planning future deployment of judicial resources.

An informal specialist list should be established to deal with employment and discrimination-related claims and appeals within the Queen's Bench Division of the High Court. The subject matter within the remit of the new List should be:

1. *employees' claims for wrongful dismissal or other breach of contract where the sum claimed exceeds the limit on tribunals' jurisdiction under the Extension of Jurisdiction Order;*
2. *employees' equal pay claims;*
3. *employers' claims to enforce covenants in restraint of trade;*
4. *employers' claims for breach of confidence or misuse of trade secrets;*
5. *employers' claims against trade unions for injunctions to prevent industrial action or for damages following what is alleged to be unlawful industrial action;*

We welcome proposals that support the aim of ensuring cases are heard by judges with relevant expertise and experience. We note the support in the consultation for the creation of an informal specialist list in the Queen's Bench Division covering employment and equalities matters. As set out in your review, similar lists exist elsewhere in the courts system and have been an effective administrative measure in supporting the efficient resolution of disputes.

While judicial listing is a function of the judiciary and we are unable to comment specifically on these recommendations, we have shared these with our judicial colleagues together with the valuable views set out in the consultation response for their consideration.

Thank you once again for your thorough report, we look forward to working with you on these matters in future.

Yours sincerely



THE RT HON DOMINIC RAAB MP



THE RT HON ELIZABETH TRUSS MP