
# Law Commission - Employment Law Hearing Structures

## JUSTICE consultation response

## January 2019

**For further information contact**

Stephanie Needleman, Public Lawyer

email: sneedleman@justice.org.uk direct line: 020 7762 6439

Alex Walters, Civil Lawyer

email: awalters@justice.org.uk direct line: 020 7762 6439

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100

fax: 020 7329 5055 email: admin@justice.org.uk

website: www.justice.org.uk

## Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.

2. We are pleased to respond to this consultation, which raises important questions about how legal process can be improved. Our consultation response to the Law Commission's paper on Employment Law Hearing Structures is constrained to structural changes that promote access to justice.

### Chapter 1

### Consultation Question 1

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

3. We agree that employment tribunals should retain an exclusive jurisdiction over certain types of statutory employment claims. Our consultation with an employment law Queen's Counsel revealed support for the way in which employment tribunals manage employment disputes.

4. Employment tribunal judges have built up particular expertise in statutory entitlement claims and are seen as effective at case managing disputes. Further, the Queen's Counsel we consulted took the view that mandatory early conciliation through ACAS[1] as part of the tribunal process is an extremely valuable resolution tool in employment law disputes.[2]

[1] ACAS conciliation is of course mandatory for employment tribunal claims by virtue of section 18A of the Employment Tribunals Act 1996, save for the narrow exemptions prescribed at s18A(7) and Regulation 3(1) of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014.

[2] There were 66,762 Early Conciliation Notifications between April-September 2018, with only 23% of the 65,383 ACAS cases closed during that period leading to an employment tribunal claim, http://www.acas.org.uk/index.aspx?articleid=6630

**Consultation Question 2**

**Should there be any extension on the primary time limit for making a complaint to employment tribunals, either generally or in specific types of cases? If so, should the amended time limit be six months or some other period?**

5. We are of the view that the statutory time limit for making a complaint to employment tribunals ought to be lengthened from three months to six months.

6. There are number of reasons why employees may not be able to bring a claim within the three-month time limit:

   (a) An employee may not be in a position to submit a claim within three months because of the circumstances in which they were dismissed, for example if they were dismissed whilst pregnant, on maternity leave or ill.

   (b) Putative claimants are likely to have more difficulty in assessing whether they have a potential claim and obtaining legal advice on the relative merits of such a claim following cuts to publicly funded legal aid and resultant advice deserts in some parts of the country. Further, lower levels of unionisation mean that a higher proportion of workers do not have access to union advice and support.

7. Whilst we understand that the longer the time between the act(s) complained of and the hearing the more memories fade, claims are already being heard long after events took place due to lengthy waiting times in the employment tribunal from filing to hearing.[3] Further, three months is also far shorter than limitation periods in most other areas of the civil justice system

8. In addition, the three-month statutory time limit was appropriate when record keeping was largely paper based, but the rationale for short time limits is weaker in an age of

[3] Official statistics show that the average age of case at clearance in the employment tribunal in 2017/18 was 27 weeks. Ministry of Justice, Tribunals and gender recognition certificate statistics quarterly: April to June 2018, Main Tables (April to June 2018), available at https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2018. However, Ministry of Justice data elsewhere has put the average waiting time between the filing and a hearing at 207 days (or 29.6 weeks) in the 12 months to 31 March 2018, see https://www.personneltoday.com/hr/employment-tribunal-hearing-delays-rise-to-seven-months/

digital correspondence and record keeping. We therefore believe that the advantages of extending the time limit outweigh the disadvantages of not doing so.

9. We propose six months both to limit any detriment that may be caused by the fading of memories and also to standardise the time limit across statutory claims. Having different time limits applicable to different claims lacks clarity and certainty for claimants.

**Consultation Question 3**

10. In our view the test for extending the time limit should be where the tribunal considers it "just and equitable to do so" for all tribunal claims. The "not reasonably practicable" test gives the tribunal limited discretion and therefore prevents individuals who may have a very good reason why they could not bring their claim within the (short) time limit from accessing justice.

11. It will not cause difficulties for tribunals to apply the "just and equitable" test as they have already been doing so in the context of employment discrimination claims under the Equality Act 2010.[4] There is therefore a body of case law on the interpretation of "just and equitable" and the terms are well understood.

**Chapter 3**

12. We agree that county courts should retain jurisdiction to hear non-employment discrimination claims. We do not think that employment tribunals ought to be given concurrent jurisdiction over non-employment discrimination claims.[5] Creating parallel jurisdiction in circumstances where there is no jurisdictional overlap will require

[4] Equality Act 2010, s.123.

[5] Rule 76(1) of the Employment Tribunals Rules of Procedure 2013 circumscribes costs orders in the employment tribunal as payable only where a claim or response "has no reasonable prospect of success" or where a party or their representative have acted vexatiously, abusively, disruptively or unreasonably in the bringing of or conduct of the proceedings. We recognise that if concurrent jurisdiction were to be conferred on the employment tribunal, the costs regime would arguably be more favourable to putative non-employment discrimination claimants than if issued in the county court as the losing party is generally not required to pay the winner's costs (however, conversely the winner cannot reclaim their costs from the winner). However we think that, on balance, a more favourable cost regime does not, in and of itself, provide a sufficient basis for the conferral of a concurrent jurisdiction.

primary legislation at a time when legislative attention is short. It would also be liable to promote "forum shopping", unnecessary satellite litigation and confuse lay-users. The other alternative would be to give employment tribunals exclusive jurisdiction over non-employment discrimination claims. However, this is not something proposed in the consultation and we believe it would be incoherent for the employment tribunal to deal with non-employment claims.

13. However, as the consultation paper notes that "circuit and district judges are generalists who…may not have had an opportunity to develop the expertise in discrimination law that employment judges have" whilst "employment judges have developed practices to manage and determine discrimination claims, there is no concomitant standard practice in the county court…[and] there is concern about inconsistent judicial approaches developing". We agree that there is merit in judicial officers with expertise in discrimination claims determining non-employment discrimination disputes, however this can be achieved without tribunals being given concurrent jurisdiction.

14. We agree with the consultation paper proposal for "district and circuit judges [to] receive appropriate training regarding discrimination law concepts" but think that in addition employment tribunal judges should be flexibly deployed to hear non-employment discrimination cases in the county court; moving judges "to the work".

15. We see flexible deployment of the judiciary as promoting access to justice, collegiality, knowledge and up-skilling across the bench. It also takes advantage of employment tribunal judges' specialised skills without the unnecessary legislative process of conferring concurrent jurisdiction.

16. "Cross-ticketing",[6] where tribunal judges have been deployed to sit in the county court, has been trialled for property law disputes, through the Residential Property

[6] Cross-ticketing or flexible deployment refers to two possible mechanisms. The first is where a tribunal judge with specialist experience and the authority to do so is deployed to sit as a county court judge for matters solely within the jurisdiction of the court (or vice versa). Secondly, in circumstances where a claim partly traverses court and tribunal, a judge may hear the entirety of the claim in one sitting, exercising concurrent jurisdiction as a judge of both the county court and the First Tier Tribunal.

Dispute Deployment Pilot.[7] Pursuant to amendments to the County Courts Act 1984 made by the Crime and Courts Act 2013 and by virtue of provisions of the Tribunals Court and Enforcement Act 2007 (TCEA), First-Tier Tribunal (Property Chamber), judges have been able to hear property cases and decide issues within the jurisdiction of the county court.[8]

17. This kind of fluidity for non-employment discrimination cases will necessitate individual employment tribunal judges being recommended to the Judicial Appointments Commission for appointment as county court judges. However, we note from the consultation paper that a pilot project to this effect featuring 26 employment judges is currently underway, with judges case managing and conducting trials of multi-track claims engaging the Equality Act 2010 sitting in the county court for no more than 30 days per year.

18. To ensure "cross-ticketing" for non-employment discrimination works effectively it will be necessary for there to be timely case management at the county court shortly after filing to; (a) identify relevant matters in issue; and (b) assess which "cross-ticketed" employment tribunal judge has the appropriate expertise to resolve the issues in dispute. Further, we think that cross-ticketed judges can benefit from summoning the specialist experience of assessors to sit in non-employment discrimination cases in the county court.[9]

19. While appropriate training on county court procedure will of course be required for cross-ticketed judges, we think cross-ticketing has the potential to promote access to

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[7] See S McGrath, 'Report on Property Chamber deployment project for Civil Justice Council meeting 26th October 2018' para 10 available at https://www.judiciary.uk/wp-content/uploads/2018/11/property-chamber-deployment-project-report-oct2018.pdf

[8] This equally applies in reverse – county court judges are also tribunal judges and could be cross-ticketed to sit in the tribunal. Cross-ticketing under the TCEA goes beyond property law and is intended to be part of a broad shift across the judiciary, to "enable the flexible deployment of judiciary to meet fluctuations in workloads between jurisdictions…encourage greater consistency of standards and approach across previously disparate jurisdictions…assist where there are difficulties in finding judges for particular locations and where there are recruitment difficulties in smaller jurisdictions", House of Commons Hansard Ministerial Statements for 16 July 2009 (pt 0005) available at https://publications.parliament.uk/pa/cm200809/cmhansrd/cm090716/wmstext/90716m0005.htm#09071651001389

[9] The Equality Act 2010 s114(7) refers to the County Courts Act 1984 s73, which makes provision for judges in the county court to "summon to his assistance one or more persons of skill and experience in the matter to which the proceedings relate".

justice and standardise judicial decision-making across the discrimination law spectrum.

**Chapter 4**

20. A discrete aspect of Chapter 4 addresses circumstances where a claim has to be litigated partly in the employment tribunal and partly in the civil courts. The consultation paper notes stakeholders had reported that this bifurcation, in the context of tribunals' contractual jurisdiction as "undesirable, because it leads to confusion amongst litigants and potential litigants".

21. We agree. As Sir Geoffrey Vos has remarked (in a property law context), requiring a party to initiate parallel proceedings in separate jurisdictions to deal with different aspects of one substantive dispute is liable to "increase costs, cause additional delay and in some cases, stress and frustration associated with an illogical judicial process".[10] In addition, satellite litigation over jurisdiction inevitably benefits the richer party whom is able to run up costs to a level where the other party is no longer willing to shoulder the costs risks.

22. If the Commission recommends retaining the current division of jurisdiction for contract claims, we recommend flexible deployment of the judiciary to deal with the issue of bifurcation in line with the approach currently in operation for certain types of property law cases through the Residential Property Dispute Deployment Pilot ("the Pilot"). The Pilot was convened after a Civil Justice Council Working Group recommended[11] deploying the judiciary in a flexible manner to ensure that all issues in dispute in property cases were dealt with in one forum.[12]

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[10] Sir Geoffrey Vos, 'Professionalism in Property Conference 2018', 9 May 2018, available at https://www.judiciary.uk/wp-content/uploads/2018/05/chc-speech-property-lecture-09052018.pdf

[11] See 'Interim Report of the Working Group on property disputes in the courts and tribunals' (Civil Justice Council, 2016) available at https://www.judiciary.uk/wp-content/uploads/2011/03/final-interim-report-cjc-wg-property-disputes-in-the-courts-and-tribunals.pdf

[12] The idea that all matters in issue should be resolved in one forum is provided for by section 49(2) of the Senior Courts Act 1981, which requires that every court shall so exercise its jurisdiction in every cause or matter before it as to secure that as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided.

23. Rather than holding parallel hearings between the court and tribunal, the Pilot has proceeded on the basis that judges would sit concurrently in courts and tribunals, hearing the entirety of any particular claim in one sitting, and using the full array of powers available to them to resolve a particular dispute.[13]

24. To facilitate this approach on a longer-term basis Judge McGrath, President of the First-Tier Tribunal (Property Chamber) has proposed to the Civil Justice Council the addition of a "courts and tribunals track" under CPR 26.[14] While the precise details of this proposed change need to be worked out, including whether the CPR and/or the Tribunal rules ought to apply, we broadly understand the proposal as follows:[15]

    (a) parties can seek or oppose allocation to the track;

    (b) the track allows for proceedings in both the county court and tribunal to be heard concurrently, i.e. by one judge in one sitting, most likely with the claim heard in its entirety by a tribunal judge in the tribunal; and

    (c) where parties elect into the "courts and tribunals track", cases would be sent by the county court to be administered by tribunal staff. To facilitate this arrangement, it is proposed that regional tribunal offices are to be designated as county court offices.

25. We think that a similar approach could usefully be adopted in the context of contractual disputes that traverse the county court's and employment tribunal's jurisdictions. This would of course require the "cross-ticketing" of judges (as described above) so that they are able to sit as both employment tribunal and county court judges in order to hear all elements of the claim. We believe that such an approach would encourage party autonomy by offering the choice to opt in or out of the track and facilitate access to justice by promoting the resolution of bifurcated claims through one substantive hearing.

26. While we think the Commission ought to consider a new track to assist in the triage

[13] See footnotes 3 and 11.

[14] *Ibid* footnote 3 pg. 4, 23.

[15] *Ibid* pg 23.

certain types of employment claims, there is a need to have regard to some of the procedural and costs difficulties that may arise when triaging claims, in particular those experienced in the Pilot relating to jurisdiction, applicable costs regime and procedure. For example, in *Avon Grounds Rents Ltd v Child* [2018] UKUT 204 the Upper Tribunal (Lands Chamber) ("UT") considered an appeal from a first instance decision heard in the First-Tier Tribunal (Property Chamber) ("FTT") by a Tribunal Judge exercising jurisdiction as both FTT and county court judge. The appeal had been brought primarily on the basis that the judge had made decisions outside the power of a FTT judge while purporting to exercise his FTT jurisdiction, as opposed to county court powers.

27. The UT recognised that in "identifying which subsidiary issues ought properly to be treated as being included within the scope of the questions transferred, it is not appropriate to be too pedantic"[16] but that there remained an important qualification, in that "the FTT has no power to extend its jurisdiction, or to arrogate to itself a jurisdiction to determine questions which the county court had no power to transfer to the FTT for determination".[17]

28. The UT held that the FTT had tried to determine the county court costs of the dispute by treating them as a variable administration charge, which the tribunal had not been entitled to do.[18] The UT said that what ought to have been done was for costs to have been dealt with after the main hearing using the "county court hat" available to the judge.[19]

29. The UT judgment suggests there is a need for a judge "wearing two hats" to be sufficiently prescriptive and clear to the parties about which jurisdiction they are exercising at any given moment.

30. While JUSTICE supports the introduction of a "courts and tribunals" track and considers it a useful mechanism to resolve disputes where there is bifurcation

[16] *Avon Grounds Rents Ltd v Child* [2018] UKUT 204 para 46 – citing *Cain v London Borough of Islington* [2015] UKUT 0117.

[17] *Ibid* para 47.

[18] *Ibid* para 50.

[19] *Ibid* 52.

between tribunals and courts, we think it is important that the judiciary and judicial staff are clear as to the jurisdictional limits of tribunals when hearing such cases.

31. Certainly additional training through the Judicial College ought to ensure that judges participating fully appreciate the jurisdictional limits of tribunals (particularly with respect to matters of enforcement), differential costs regimes and the need to make clear to the parties before them which "jurisdictional hat" they are wearing whenever they purport to exercise a power or discretion.

JUSTICE
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