AN IER RESPONSE

Response to a consultation document from The Law Commission Consultation on Employment Tribunal Hearing Structures

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The Institute of Employment Rights is an independent charity established in 1989. We exist to inform the debate around trade union rights and labour law by providing information, critical analysis, and policy ideas through our network of academics, researchers and lawyers.

This response was kindly drafted by the expert named and reflects the views of the authors not the collective views of the Institute. The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

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RESPONSE OF INSTITUTE OF EMPLOYMENT RIGHTS TO LAW COMMISSION CONSULTATION:

EMPLOYMENT TRIBUNAL HEARING STRUCTURES

Introduction

This is the response of the Institute of Employment Rights (IER) to the Law Commission consultation on Employment Law Hearing Structures. The responses below draw upon the IER's *Manifesto for Labour Law* – a programme of work beginning in 2016 which has produced 25 recommendations for reform developed by 26 leading lawyers and academics from across the UK. Key proposals from the *Manifesto* have since been adopted and built upon by political parties, trades unions and think tanks, and were particularly influential on the Labour Party Manifesto *For the Many, Not the Few*.

Question 1: We provisionally propose that employment tribunals' exclusive jurisdiction over certain types of statutory employment claims should remain. Do you agree?

Subject to the creation of a Labour Court, with full jurisdiction to hear all work-related claims (which we deal with below), employment tribunals' (ETs) exclusive jurisdictions should be preserved. This is in accordance with the original aims of the Donovan Commission that all contractual or statutory disputes between employers and individual employees (except personal injury claims) should be directed to (then) industrial tribunals, in order to ensure a hearing in a single jurisdiction which was 'easily accessible, informal, speedy and inexpensive' (Cmnd. 3623, §§ 572-3).

Question 2: Should there be an extension of the primary time limits 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?

There is still much value in a speedy process, just as recommended by the Donovan Commission. But three months now appears increasingly anomalous, given how few tribunals award reinstatement or re-engagement in unfair dismissal and how long it takes for a claimant to obtain a hearing and a remedy (currently some tribunals are listing cases in 2020 or beyond). The very short primary time limit can also interfere with attempts to resolve matters internally, a common feature of unfair dismissal claims where the claim is issued while an appeal is pending and in other cases where a claimant has submitted a grievance.

At the very least the primary time limit should be extended to six months in cases involving pregnancy. Recent research commissioned by the Government and EHRC highlights how widespread pregnancy-related discrimination has become, and the difficulties women have in bringing claims in the ET (see

https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings). Such a time limit extension has been recommended by the House of Commons Justice Committee, endorsed by the Women and Equalities Committee, and is now apparently supported by the Government.

We consider, however, that the three-month time limit is too short in general. A general period of six months, already adopted for some claims such as equal pay and dismissals in connection with industrial action as the Commission notes at §2.50, should be adopted as the norm. It would better allow matters to be resolved internally first.

Question 3: In types of claim (such as unfair dismissal) where the time limit at present can 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?

The adoption of different grounds for extension of time is anomalous and hard to rationalise. It creates particular problems where a claimant is making complaints in two jurisdictions with different time limits (e.g. that a dismissal was both discriminatory and unfair). It involves some very nice legal distinctions which few appreciate: for example, prejudice to the respondent and the effect of delay are relevant factors for the purpose of the 'just and equitable' exception but are not in relation to reasonable practicability (***Porter v Bandridge*** [1978] ICR 943, CA, per Waller LJ at 948D-E).

The limited powers to extend time on the basis of reasonable practicability also sit awkwardly with the greater latitude given to respondents to obtain an extension of time where the response is late (see e.g. rule 20 and ***Kwik Save Stores v Swain*** [1997] ICR 49). Finally, the limited grounds for extension constitutes a potentially serious barrier to access to justice, given prominence by the Supreme Court in ***R (UNISON) v Lord Chancellor (Equality and Human Rights Commission Intervening)*** [2017] UKSC 51, [2017] ICR 1037. To use the language of Lord Reed in ***UNISON***: it creates a real risk that some claimants, such as those who were incorrectly advised, will be denied access to the tribunal, with knock-on effects for general compliance with labour standards. The principles of justice are best reflected in a test of allowing extensions based on what is just and equitable.

Question 4: We provisionally recommend that the County Court should retain jurisdiction to hear non-employment discrimination claims. Do consultees agree?

The IER considers that ETs generally have more experience and greater expertise than County Courts in relation to discrimination, given the rareness of cases based on discrimination in goods and services and other matters outside the work sphere. We consider it would probably be preferable if goods and services, public functions, premises and, especially, membership association cases also went to ETs (claims

against trade organisations, including unions, already fall within Part 5: see s.57 of the Equality Act 2010).

Question 5: Should ETs be given concurrent jurisdiction over non-employment discrimination claims?

Yes, or exclusive jurisdiction – see above.

Question 6: If ETs are to have concurrent jurisdiction over non-employment discrimination claims, should there be power for judges to transfer claims from one jurisdiction to another?

We have no views to offer on this question, save that priority should be given to ensuring that claimants are given a quick, inexpensive, accessible means of access to a court.

Question 7: IF ETs 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 ET?

We have no views on this.

Question 8: Do consultees consider that employment judges should be deployed to sit in the County Court to hear non-employment discrimination claims?

Yes. Many Employment Judges (EJs) already sit in the County Court. By reason of the much larger number of discrimination cases which reach the ET rather than the County Court, EJs are likely to have much more familiarity with the law and practice of such claims and how to deal with them. We believe the number of discrimination claims in the County Court to be tiny whereas the Tribunal statistics show the high number in the ET: see e.g. Table C.2 to the July to September 2018 statistics at https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-july-to-september-2018.

Question 9: If consultees consider that EJs should be deployed to sit in the County Court, should there be provision for them to sit with one or more assessors where appropriate?

Yes. The IER considers that the tripartite membership of ETs improves the quality of their decision-making because members often add expertise and sensitivity in this area, as well as giving them greater legitimacy in the eyes of the public. The same considerations apply to the use of assessors in the County Court.

Question 10: Should ETs have jurisdiction to hear a claim for damages for breach of contract where the claim arises during the subsistence of the employee's employment?

Yes. At present, of course, an employee may bring a claim for unlawful deduction from wages under Part II of the Employment Rights Act 1996 (ERA) while employed, as the Commission notes. But there may be some difficult questions about whether a claim is a deduction from wages, which generally requires liquidated sums, rather than damages for breach of contract (see e.g. ***Coors Brewers v Adcock*** [2007] ICR 978). In addition, following ***Bear Scotland v Fulton*** [2015] ICR 221, it seems that a 'series of deductions' is broken by a gap of more than three months. The result is that Part II of ERA is subject to various exceptions on recovery, which are not easy to understand or justify, especially for a non-lawyer. By the same token, few claimants appreciate that they will need to wait until termination to bring a breach of contract claim or, if not, bring a claim in the County Court first. These distinctions are in tension with the original aims of the Donovan Commission for, then, industrial tribunals.

Consideration will need to be given as to whether all claims for breach of contract during employment should be brought in the ET – a probable exception is personal injury claims, as in the current Extension of Jurisdiction Order 1994 (see article 4), where County Courts have more expertise and hear parallel tort claims. But the IER's view is that in principle all work-related claims should go to a single tribunal – what we call a Labour Court.

Question 11: Should ETs have jurisdiction to hear a claim for damages for breach of contract where the alleged liability arises after employment has ended?

Yes. The Commission's Consultation Paper already highlights the anomalies that can arise here. It is particularly unsatisfactory that ex-employees need to enforce post-employment settlement agreements in the ordinary courts. Few claimants appreciate the dual enforcement model, and it may be a contributory factor to the lamentable record of enforcement and payment of ET awards. On this, see the 2013 BIS research finding that only 41% of ET awards were paid in full without enforcement and, even after taking account of enforcement, still 35% of claimants were paid nothing: see BIS, *Payment of Tribunal Awards*: *2013 Study* (IFF Research) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf.

Question 12: We provisionally propose that the current £25,000 limit on ETs' contractual jurisdiction should be increased. Do consultees agree?

The IER strongly supports this proposal. Unlawful deduction from wages claims are not subject to any cap, and ETs often deal with high value discrimination, equal pay and similar claims for individuals as well as 'multiple' claims which can be worth many millions of pounds. ETs have existing expertise determining breach of contract

claims, above all in the context of wrongful dismissal – probably greater than the County or High Court. Where a contract claim is brought in the ET, the doctrine of merger of causes of action can preclude a later claim in the High Court, even if the right to bring one is expressly reserved: see ***Fraser v HLMAD*** [2006] ICR 1395, referred to by the Commission at §4.22. The suggestion of the CA in ***Fraser*** that ETs should warn claimants not to bring a wrongful dismissal claim unless they expect to be awarded no more than £25,000 only highlights the lack of justification for the present position. Few claimants understand the subtle distinctions between withdrawing a claim and having it dismissed. Claims for wrongful dismissal often arise out of the same facts as unfair dismissal: there is little sense in having to bring parallel actions in two jurisdictions, subject to different procedural rules. The IER supports having no limit at all, just as in other sorts of claim frequently dealt with by ETs.

Question 13: What (if any) should the financial limit on ETs' contractual jurisdiction be, and why?

There should be no limit: see above.

Question 14: If the financial limit on ETs' 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?

The IER has no response on this.

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 the employee's employment?

We agree the time limits should be aligned, in part in keeping with the need for speedy resolution of disputes and because such claims are often combined. However, we consider that the time limit for unfair dismissal should be six months, subject to a just and equitable extension of time. Contract claims during employment should be subject to the same time limit, though we can see the virtue in allowing claims to go back in time where there is some sort of 'continuing act' or 'series of deductions', just as in relation to discrimination claims (s.124 Equality Act) or unlawful deduction from wages claims (s.23 ERA).

Question 16: We provisionally propose that ETs contractual jurisdiction should not be extended to include claims for damages, or sums due, relating to personal injuries. Do you agree?

We probably agree. The implied term to take reasonable care for an employee's health and safety operates in parallel with the duty of care in tort and, where still permitted, claims for breach of statutory duty (see s.69 of the Enterprise and Regulatory Reform Act 2013, removing the right to bring a civil claim for breach of health and safety regulations, both for regulations made under s. 15 HSWA and those in existence at the time the HSWA was enacted). The ordinary courts have well developed protocols and procedures for dealing with personal injury claims, which typically involved a narrow area of factual dispute but much argument about compensation (including expert evidence, both medical and otherwise). To give ETs that jurisdiction would disrupt this structure which has developed over many years. It would lead to an enormous increase in ETs' workload, would probably require primary legislation, and would require a much more detailed consultation than is set out in the Commission's paper. It is not a step to be taken lightly.

Question 17: We provisionally propose that the prohibition against ETs hearing claims for contractual breaches relating to living accommodation should be retained. Do consultees agree?

Yes. Claims for possession and the like give rise to specialist issues relating to housing law which ETs are not equipped to deal with. If such a change were to be introduced, it would require a wider consultation, including those who are expert in housing law – which EJs, mostly, are not.

Question 18: We provisionally propose that the prohibition against ETs hearing breach of contract claims relating to intellectual property rights should be retained. Do consultees agree?

At the moment, yes. In the long run the IER considers there should be a Labour Court which should hear all work-related issues. But at the moment the ETs are not equipped to deal with the typically urgent injunctions brought in this area. Such claims would require giving ETs the power to issue injunctions and related orders (actions for damages, accounts of profits, restitutionary actions, orders for contempt); they would need powers to make the various evidential orders (search orders, delivery up orders, detention orders, *Norwich Pharmacal* orders); and the ET Rules would need to be rewritten to deal with the issues which arise in interim and final injunction applications.

Question 19: We provisionally propose that the prohibition against ETs hearing claims relating to terms imposing obligations of confidence should be retained. Do consultees agree?

Yes: see response to question 18.

Question 20: We provisionally propose that the prohibition against ETs hearing claims relating to terms which are in restraint of trade should be retained. Do consultees agree?

Yes: see response to question 18.

Question 21: We provisionally propose that ETs 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 of Jurisdiction Order. Do consultees agree?

Yes. The IER's position is that all workers should have employment rights, save for individuals running a genuine business undertaking on their own account (see our *Manifesto*, §§6.9-6.16). Pending a new definition of worker, it makes little sense only to allow employees to bring contract claims – especially when 'workers' are allowed to bring claims for unlawful deductions from wages, for reasons which have become lost in the mists of time (the earliest Truck Acts were not restricted to employees).

This is all the more important because the boundary between 'employee' and 'worker' is frequently very unclear, and often turns on difficult concepts such as the extent of control or 'mutuality of obligation'. It is a waste of tribunal resources to spend time addressing collateral arguments on which side of the line someone falls rather than addressing the substantive issue, above all where the individual has a good claim for what will often be small sums. In this regard note that the SETA survey (BIS, *Findings from the Survey of Employment Tribunal Applications 2013* (Research Series No. 177, June 2014) found median awards of £3,500 for breach of contract and £900 for wages claims (Table 5.9). Moreover, if a 'worker' brings a contract claim in the ET and is found not to be an employee, this may well mean that any later action in the ordinary courts is barred. Such distinctions break with the fundamental purpose of ETs, of providing a quick cheap and accessible forum for resolving workplace disputes. If anything, workers have greater need of protection of their contractual rights because they lack some of the important statutory rights restricted to employees, such as unfair dismissal.

Question 22: If ETs 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 ETs also have jurisdiction in relation to workers?

Yes. The distinction between workers and employees is very fine; there is no justification for the operation of dual regimes based on differences which do not reflect the potential for abuse of rights.

Question 23: We provisionally propose that ETs not be given jurisdiction to determine breach of contract disputes relating to genuinely self-employed independent contractors. Do consultees agree?

Yes, at present. The IER's concern is that the present concepts of 'worker' and 'employee' are insufficient to capture all those who work for another but are not doing so as part of a genuine business undertaking on their own account (e.g. those who supply labour through intermediaries). But this is a matter for legislation in another context, redefining the core categories.

Question 24: We provisionally propose that ETs should continue not to have jurisdiction to hear claims originated by employers against employees and workers. Do consultees agree?

Yes. ETs were never intended to be a forum in which employers sued their workers and this could give rise to issues which ETs are ill-equipped to resolve (e.g. contractual claims by employers for losses caused by strikes).

Question 25: We provisionally propose that employers should continue not to be able to counterclaim in the ETs against employees and workers who have brought purely statutory claims against them. Do consultees agree?

Yes. As Lord Reed explained in ***UNISON***: "When Parliament passes laws creating employment rights, for example, it does not do so merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect" (§72). The potential for a counterclaim could often be used as a means of threatening employees or workers who bring statutory claims. The claims are typically for small sums of money, as the official annual statistics show (see Table E.2 to the April-June 2018 statistics at https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2018; and see the SETA 2013 survey for other forms of claim, giving median awards of £3,500 for breach of contract, £900 for wages claims, £2,800 for redundancy payments and £1,000 for 'other' claims (Table 5.9). Such claims are particularly vulnerable to deterrence by threats of counterclaims, just as shown by evidence in relation to the deterrent effect of fees summarised in ***UNISON***.

Question 26. Should ETs have jurisdiction to interpret or construe terms in contracts of employment in order to exercise their jurisdiction under Part I of ERA 1996?

Yes. ETs already construe contractual terms in the context of dismissal (e.g. what were an employee's duties; what was defined as gross misconduct) and in the context of claims for deduction from wages: see ***Argawal v Cardiff*** [2018] EWCA Civ 2084. Particularly in circumstances of a collective dispute, it is useful for an ET to be able to issue a form of declaration as to what a term, properly interpreted, means in the circumstances. This, after all, is what the High Court often does to good effect. Once more, such a restriction on ETs' powers is in tension with their original objective.

Question 27. **Should ETs be given power to hear unauthorised deductions from wages claims which relate to unquantified sums?**

Yes. The boundary of Part II of ERA will be less important if, as the IER submits above, contractual claims can be brought during employment (see response to Question 10). But still the rule on unquantified sums in Part II of ERA should go: it is unclear in scope, anomalous in application, and lacks rational justification.

First, the exception carved out by ***Coors Brewers*** is not clear. It may depend on fine factual distinctions: a declared bonus can be brought as a claim, one not yet declared may not be certain enough as in ***Coors***. Second, as the Commission notes, the authorities are themselves confused, with some referring to 'quantifiable' rather than 'quantified' sums: see, for example, ***Tradition Securities and Futures SA v Mouradian*** [2009] EWCA Civ 60 and compare ***Lucy v British Airways*** UKEAT/0033/08/LA. Third, some of the statutory sums listed as wages in s.27(1) of ERA require the ET to assess what is a statutory 'week's pay' – an exercise which itself can involve assessments which are imprecise (see e.g. s.228 ERA). Fourth, for the moment, the EU principle of equivalence may require some claims to be brought by means of a wages claim: see ***Stringer v HM Revenue*** [2009] ICR 985.

Finally, it will defeat remedial purpose of Part II if ERA workers cannot bring claims for e.g. small amounts of wages or underpaid holiday pay because the sums claimed are not entirely certain. Once more, the difficult case-law diverts ETs down a side-track which has nothing to do with the merits of the case. In this regard it is notable that the original 'Truck Acts' from which ERA was derived were wide in scope: see the definition of 'wages' in the Truck Act 1832. The same should apply to the modern jurisdiction in Part II of ERA.

Question 28: Where an ET finds that one or more of the 'excepted deductions' listed by s.14(1) to 14(6) of ERA applies, should the ET also have power to determine whether the employer deducted the correct amount of money from an employee's or worker's wages?

Yes. It is hard to see the rationale for retaining the blanket exemptions. If the original purpose of s.14(5) ERA was to preserve ETs from involvement in industrial action, for example, that rationale is now undercut by the unfair dismissal jurisdiction in TULRCA extending to dismissals in connection with industrial action. The exercise of determining the extent of a deduction for strikes is no more complicated than other exercises performed by an ET, and the correct approach to the issue has recently been clarified by the Supreme Court in ***Hartley v King Edward*** [2017] ICR 774. It can also lead to needless duplication of actions or technical arguments about jurisdiction which do no credit to the legal system. Nor is it in accordance with a straightforward system of giving access to justice that claims for lost strike pay and the like, often for small amounts, have to be brought in the ordinary civil courts with the attendant costs' rules. The case for changing the exclusion is all the more pressing now that s.14 is worded in wide terms in some respects (e.g. s.14(4) ERA).

The difficulties workers have in bringing claims for unpaid wages are now well-known. Less known is the difficulties in enforcement: the BIS research in 2013, *Payment of Tribunal Awards*: *2013 Study* (IFF Research), showed that only 32% of wages claims were paid in full without the use of enforcement, and only 39% were paid in full after enforcement; 48% of successful claimants received nothing. What was meant to be a simple, costs-fee, accessible way by which workers could quickly recover underpaid wages is now often less favourable than actions in the ordinary courts, where the limitation period is longer and there is not a two-year limit on recovery of back pay (see s.23(4A) of ERA). A sensible system would direct the claims towards ETs, and allow them to determine all these questions, without restriction or limitation.

Question 29: Should ETs be given the power to apply setting off principles in the context of unauthorised deduction claims?

The IER has no particular submissions on this issue. But it points out how serious are the restrictions now on claims under Part II of ERA: the claim must be brought within three months, a series is broken by any gap of three months (see ***Bear Scotland***), and now there is a two-year gap on the period of recovery (s.23(4A)). Little surprise that some claims for unpaid wages, often by the most disadvantaged workers, are now brought in the High Court instead of the ET: see e.g. ***Ajayi v Abu*** [2017] EWHC 1946.

If set-off is added to this list, it will add to the disincentives to bring claims, further undermining the very purpose of Part II. It should not be forgotten in this context that perhaps the class of claimants who tend to have the longest period of underpaid wages are those who were not paid the national minimum wage.

Question 30: We provisionally propose that ETs should continue not to have jurisdiction in relation to employers' statutory health and safety obligations. Do consultees agree?

ETs already hear appeals from improvement and enforcement notices issued by safety inspectors, although such cases are not common: see s.24 HSWA 1974 and the many cases on this listed in *Redgrave's Health and Safety*. This jurisdiction should remain. In the long run, the IER considers a Labour Court should deal with criminal health and safety offences too. At present, however, it would require very detailed legislation to give ETs power to hear criminal prosecutions under e.g. the HSWA and the myriad regulations made under s.15 HSWA, which are now only enforceable by criminal sanctions (see the amendments to s.47 HSWA). It would require e.g. new rules of procedure and rules on sentencing (e.g. would ETs' powers be similar to those in magistrates' courts?). This is something which should be the subject of further consultation in the long-term – there has already been much discussion about the issue of enforcing health and safety duties and this subject needs detailed empirical evidence (see e.g. Sir Philip Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (HM Treasury 2005; R.

Macrory, *Regulatory Justice: Making Sanctions Effective* (2006), http://webarchive.nationalarchives.gov.uk/20121205164501/http://www.bis.gov.uk/files/file44593.pdf).

Question 31: We provisionally propose that ETs should continue not to have jurisdiction in relation to workplace personal injury negligence claims. Do consultees agree?

Yes: see response to question 16 above.

Question 32: We provisionally propose that ETs 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?

Yes. Such claims are often connected with existing claims for discrimination in the ET.

Question 33: Do consultees consider that ETs should have any jurisdiction over common law claims (whether in tort or contract) which relate to references given or requested in respect of employees or workers (and former employees and workers)?

ETs might sensibly decide questions about negligent references or those given in breach of contract. Issues such as malicious falsehood or defamation are probably too far beyond their existing jurisdiction and expertise. The IER considers that there should be a general protection for post-employment victimisation of workers who, in good faith, brought ET proceedings or were witnesses in such proceedings, along the lines of how the victimisation and post-employment provisions of the Equality Act operate. The absence of protection for such individuals is a large gap in the current regime. It appreciates, however, that these matters may stray beyond the ambit of the current consultation.

Question 34: Should employment tribunals and civil courts retain jurisdiction over equal pay claims?

The existing legal provisions on equal pay are complicated, costly (especially if equal value claims are involved) and the litigation often takes place over several years. With some notable exceptions they have mostly failed to close the gender pay gap. In that context, the IER is not in favour of any change which might have a detrimental impact on enforcement of equal pay. The six-month time limit for equal pay claims is not always straightforward in its application, as shown by the cases on 'stable' employment relationship (see s.129 EqA 2010) and the case on a transfer of an undertaking (see e.g. ***Sodexo v Gutridge*** [2009] ICR 70). Moreover, the absence of

a costs threat (ordinarily) in the ET weakens the incentives on employers to settle claims which it is pretty sure that it will lose, illustrated by some of the group litigation in the public sector where employers have continued to take every step to delay a final ET order, despite the ultimate weakness of their case. In that light the IER supports the continuation of the concurrent jurisdiction, pending a more radical overhaul of the system (see pp 45-6 of the *Manifesto*).

Question 35: Should the time limit for bringing an equal pay claim in the ETs be extended so that it achieves parity with the time limit for bringing a claim in the civil courts?

Matters are not so simple. As the House of Lords judgment in ***Preston (No.2)*** [2001] 2 AC 455 highlights, in some respects (at least in relation to pensions), the time limit in the ET may operate more favourably than the six-year limitation period for breach of contract: see Lord Slynn at §30. The tribunal time limits in the EqA have developed to accord with EU law: hence the concealment and stable employment exceptions. If a six-year limitation period is included, it will need to have built into it protections to ensure that there is no reduction in the level of protection given by those existing provisions in s.129 of the EqA. The IER notes that a six-year limitation period may mean that a claim turns out to be a Pyrrhic victory because a claimant can only recover arrears going back six years before the claim. That may be a reason for retaining the six-month time limit in the ET (though it should also embody a 'just and equitable' power to extend time, just as should apply to all ET claims).

Question 36: What other practical changes, if any, are desirable to improve the operation of ETs and civil courts' concurrent equal pay jurisdiction?

See answer to question 35 above: whatever happens, there must be no reduction in the standard of protection given to workers, most of which at present is underpinned by EU law.

Question 37: Should the current allocation of jurisdictions across ETs and the civil courts regarding the non-discrimination rule applying to occupational pension schemes remain unchanged?

Yes. The IER is not in favour of any change, especially given some of the advantages of ET claims identified in ***Preston No. 2*** (see response to question 35).

Question 38: The present demarcation of employment tribunals and civil courts' jurisdiction over the TUPE Regulations 2006 should not be changed. Do consultees agree?

Yes. In fact many claims were brought in the High Court based on TUPE rights in relation to pensions following the decision of the CJEU in ***Beckmann*** [2003] ICR 50

(see most recently ***Proctor & Gamble v Svenska*** [2012] IRLR 733). Dual jurisdiction mostly works well, and any removal of the right to bring claims based on contract in the civil courts would be detrimental to workers.

Question 39: The present demarcation of employment tribunals', civil courts' and criminal courts' jurisdiction over Working Time Regulations should not be changed. Do you agree?

The IER's principal concern is that low level of compensation for working time claims, or even the loss of wages which can result from a successful claim reducing hours, reduces or eliminates the individual incentive to enforce the Working Time Regulations 1998 ('WTR'). It considers much greater state enforcement is needed in this sector, backed by full criminal sanctions. The inadequacy of ET enforcement in this area has recently been recognised by the Administrative Court: see ***R (FBU) v South Yorkshire Fire and Rescue Authority*** [2018] IRLR 717 (a good example of an area where individual workers have a disincentive to enforce owing to the effects of reduced hours on pay).

In fact the enforcement of working time legislation is much messier than the short summary in the Consultation Paper suggests. For example, The Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 are similar to WTR, distinguishing 'entitlements' (employment tribunal claims) and employer duties (criminal sanctions). By contrast, under the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018, only annual leave is enforced by civil claims, with parallel criminal liability. Under the Civil Aviation (Working Time) Regulations 2004 a wider range of rights are enforced in the ET with breach of the remaining regulations a criminal offence. Criminal penalties alone apply to drivers' working hours: see ***R (URTU) v Secretary of State*** [2013] IRLR 890. We are happy to provide further examples of the legislative incoherence if requested. It is difficult to make sense of this: the IER's basic starting point is that, owing to the limited individual incentives or remedies to enforce working time legislation, the rights and duties should be backed by state enforcement as well as giving rise to individual rights.

Question 40: Do consultees agree that the present demarcation of ETs', civil courts' and criminal courts' jurisdiction over the NMW should not be changed?

There is one problem with ET claims which should be addressed urgently. The two-year limitation in s.23(4A) of ERA, introduced without consultation in the wake of the successful holiday pay litigation in ***Bear Scotland***, has a very serious detrimental effect on individual claims in the ET for breach of the NMW. Typically, such claimants will have suffered loss throughout their employment, so they will often have more than two years' loss. It is in the public interest that the NMW is paid and is fully enforced. The provision produces the curious result that it is often disadvantageous for individuals to bring a claim in the very forum, the ET, where such claims were intended to be heard. The provision should be repealed.

Question 41: We provisionally propose that the present demarcation of ETs' and civil courts' jurisdiction over the Blacklists Regulations should not be changed. Do you agree?

Question 42: Should the £65,300 cap applying to ET 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?

No. The cap should be removed altogether. Blacklisting is a very serious wrong, as reflected in the reports of the Scottish Affairs Committee (see the various reports at https://www.parliament.uk/blacklisting-in-employment). The Government has committed to reviewing the Regulations but the IER is not aware of any progress on this (see Appendix 1 to the SAC report https://publications.parliament.uk/pa/cm201314/cmselect/cmscotaf/1291/1291.pdf).

There are various problems with the Blacklists Regulations, which justify their wholesale revision, but here we focus on matters which fall within the ambit of the consultation. One problem is that blacklisting is rarely discovered until long after the practice has occurred. Time limits should run from the time the claimant discovered (or ought reasonably to have discovered) the act had occurred, with the retention of the just and equitable power to extend time in regulation 10. Another is, of course, the levels of compensation. Only full compensation, including injury to feelings, is a sufficient deterrent to blacklisting and an adequate measure of compensation for the deep individual and social wrong (by analogy with the approach taken in the Equality Act and in discrimination law). It may be of interest that in the large legal actions in the construction sector, the claims were mostly based on the common law tort of conspiracy. Third, there should be criminal sanctions for blacklisting because reliance on individual claims alone will often not be a sufficient deterrence.

Question 44: Should members of trades or professions who are aggrieved by decisions of their qualification 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 ET?

Yes. The different jurisdictions address different wrongs and give rise to different remedies. Judicial review is hardly ever a sufficient remedy for a claimant, given the strict time limits, high costs and legal expertise required. But that is not a sufficient reason to remove it.

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

a Police Appeals Tribunal and separately to complain that the decision is discriminatory in the ET?

Yes. Police officers are entitled to challenge discriminatory decisions of a misconduct panel in the ET owing to the EU principles of effectiveness and equivalence: see Lord Reed in ***P v Metropolitan Police*** [2018] ICR 560 at §§29-30. As Lord Reed noted (§22), an appeal to the PAT is not a particularly suitable means of addressing discrimination by the misconduct panel. Nor is the procedure suitable. The best forum in which to address such questions, which typically turn on factual evidence, is the ET.

Question 46: Our provisional view is that ETs should not be given the power to grant injunctions. Do consultees agree?

In the long run, we consider ETs (or rather our proposed Labour Court) should have powers to grant injunctions or equivalent orders (such as the interim relief orders they can currently be made in trade union or whistleblowing cases). It is notable, for example, that the Certification Officer has power to make declarations and enforcement orders against unions which have the same effect as orders of a court: see e.g. s.55 of TULRCA 1992). So too the HSE can issue improvement notices and enforcement notices in relation to health and safety (see ss 20ff HSWA). Given the lamentable record of the enforcement of ET awards – see the BIS research in 2013 referred to above – in the longer term the IER considers ETs should have powers to impose freezing orders. Their power to order reinstatement and re-engagement in unfair dismissal claims also requires strengthening. We accept, however, that these changes require extensive consultation and detailed legislation.

Question 47: Should ETs have the power to apportion liability between co-respondents in discrimination cases, so that each is separately liable to the claimant as part of compensation?

The IER's starting point is that claimants should receive their full award. Where a corporate employer becomes insolvent or is liquidated, a joint and several order best ensures that a claimant can obtain their compensation from someone. We suggest the appropriate approach is that (i) the employer is always liable for the full sum (after all, liability is dependent on the act occurring in the course of employment and the employer has a defence of if it took all reasonable steps to prevent the act: see s.109 EqA) and (ii) those in control of the company – directors, controlling companies and the like – should also be liable (see our *Manifesto*, §10.16).

Subject to that, in an exceptional case, the IER has no objection to the ET determining the maximum extent of the liability of an individual respondent who is not the employer – that is, the maximum of what they should pay. It should be based on some formula such as 'as the ET considers just, having regard to matters such as the importance of the claimant receiving full compensation and the extent of each respondent's responsibility for the relevant detriments' (there is an existing model

based on the extent of responsibility in regulation 14 of the Agency Worker Regulations 2010). There may be ways of strengthening the practical effect of such a formula: e.g. requiring the individual respondent to pay the sum to the claimant as a precondition of such an order having any legal effect.

Question 48: We provisionally propose that ETs should be given the power to make orders for contributions between respondents in appropriate circumstances and subject to appropriate criteria. Do consultees agree? If so, we welcome consultees' views as to the appropriate circumstances and criteria.

The IER can see the virtue in an ET determining this question because it is the body which heard the claim itself and thus best knows the circumstances. The criteria would presumably be similar to those set out in answer to question 47, based on what a tribunal considers just, and the extent of each respondent's responsibility (see regulation 14 of the Agency Worker Regulations 2010). Once more, though, the IER considers such a model should be used to ensure claimants are more likely to receive some of their awards: for example, in order to be granted a contribution award, a respondent would be required to deposit a sum with the ET as a contribution to the claimant's compensation.

Question 49: If respondents are given the right to claim a contribution from one another in ETs, 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?

See answer to question 48.

Question 50: Should ETs be given the jurisdiction to enforce their own orders for the payment of money? If so, what powers should be available to ETs and what would be the advantages of giving those powers to ETs instead of leaving enforcement to the civil courts?

To a degree. The IER has already referred above to the lamentable record of enforcement of ET awards: see BIS, *Payment of Tribunal Awards*: *2013 Study* (IFF Research) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf.

Earlier research similarly showed that only about half of successful claimant received their awards: see L. Adams, A. Moore, K. Gore and J. Browne, *Research into Enforcement of Employment Tribunal Awards in England and Wales* (Ministry of Justice Research Series 9/09, 2009). This matter is, of course, currently the subject of proposals following the Taylor Review.

The advantage of enhancing enforcement within the ET jurisdiction is obvious: we suspect that many claimants give up once they realise they must go to another court to try and recover their award under different procedures and pay a fee to do so. We consider a package of measures should be introduced to improve enforcement. First, there should be an automatic issuing of a penalty notice with a tribunal award, informing the employer that if it does not pay the award by a set date, it will be subject to a financial penalty under ss 37A-Q of the Employment Tribunals Act 1996. Those provisions are insufficiently publicised at present. Second, where an award is not paid, ETs should have the power (on application by the Claimant if necessary) to trigger the current High Court Enforcement Officer process (alternatively the Claimant could be informed in the letter sending the judgment of how to activate this process). In accordance with the small sums at stake in ETs, no fees should be payable for activating this procedure. Using the existing HCEO process would also minimise the extent to which ETs were engaged in areas for which they are not equipped.

Question 51: Should the EAT be given appellate jurisdiction over the CAC's decisions in respect of trade union recognition and recognition disputes? If such an appellate jurisdiction were created, do consultees agree that it should be limited to appeals on questions of law?

The IER agrees with both proposals. The costs rules in judicial reviews make this avenue a poor one for challenging CAC decisions (recent challenges brought by the IWGB have required applications for cost capping orders). But, in order to avoid the fate of the predecessors of the CAC, it is important that the grounds of appeal are limited to questions of law.

Question 52: We provisionally propose there is no need to alter or remove the EAT's current jurisdiction to hear original applications in certain limited areas. Do consultees agree?

The IER agrees.

Question 53: We provisionally propose that an information 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?

We agree: it is frequent in applications involving e.g. judicial reviews in employment to request such a judge be assigned to the full hearing. This should be a first step towards establishing a Labour Court. The subject matters for such judges should include: judicial reviews in employment; contractual disputes involving workers; industrial action and other forms of protest; trade union matters. It should probably extend more widely, and embrace discrimination (not only in goods and services but also claims in JR on the public sector equality duty).

Question 54: What name should it be given: Employment List, Employment and Equalities List or some other name?

Labour law and equalities list.