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Civil Courts Structure Review-
A review by Lord Justice Briggs

Response from the Employment Lawyers Association

November 2015

Employment Lawyers Association Response

Civil Courts Structure Review -

Lord Justice Briggs Enquiry

Introduction

The Employment Lawyers Association (“ELA”) is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA’s role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA’s Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A sub-committee, co-chaired by Paul McFarlane and Joanne Owers was set up by the Legislative and Policy Committee of ELA to consider and comment on Lord Justice Briggs’ review of the Civil Courts Structure. Its report is set out below. Members of the sub-committee are listed at the end of this paper.

In the time available, we have focussed our comments on the two key proposals referred to in Lord Justice Briggs’ letter to our organisation, namely the creation of an On-Line court for lower value disputes and the greater use of Delegated Judicial Officers. These are preliminary observations only at this stage, and we would be pleased to participate and contribute further as the Civil Courts Structure Review progresses.

In considering the topic of an On-Line court, we have concentrated on two matters, namely the suitability of this form of dispute resolution for employment claims and the potential impact on access to justice. In commenting, we have paid particular attention to the report of the Civil Justice Council of February 2015 entitled “Online Dispute Resolution for low value civil claims”.

An On-Line Court

A. Suitability of the proposed On-Line Court for employment claims

Introduction

Employment law disputes may involve high values, but for the majority of cases relatively modest sums are likely to be at stake, certainly when compared to the size of nearly all commercial claims before the courts. On this basis, at first glance, employment claims may appear suitable candidates for the jurisdiction of an On-Line court. Yet such claims are also characterised by their complexity, and the manner in which they are handled needs to take into account the special nature of the relationship between employers and employees. It is the combination of these factors which, in our view, provides the historic and ongoing justification for separate Employment Tribunals and which, in our view, distinguishes these claims from those set out in the Civil Justice Council paper of February 2015 as examples of current On-Line dispute resolution.

ELA wholeheartedly supports initiatives to improve access to justice, and in particular the provision of a cost-effective remedy for employees with very low value claims. However, it recommends the

exercise of real caution before contemplating the determination of employment claims via any new online process which may not incorporate the special focus and safeguards of the existing Employment Tribunal system.

The nature of employment claims and the industrial context

The law recognises and governs the employment relationship in a manner which is unique, extending special common law duties to both employers and employees (including duties of loyalty, good faith, trust and co-operation), and imposing a varied and wide ranging set of statutory restrictions and obligations.

In this context, there are frequently a range of legal issues which must be considered when handling a potential employment claim. Firstly, the correct type of claim must be identified and whether jurisdiction exists to consider it. Secondly, the matters which must be taken into account in order to determine the claim may be extensive and require detailed consideration of a range of evidence.

In the experience of members of the ELA, the Employment Tribunal plays an essential specialist role at both stages, particularly for litigants in person who generally need guidance and direction from the Tribunal when pursuing any claim. This is provided through discussion at case management hearings, and at hearings when the Tribunal will generally prompt claimants and explore issues of its own initiative when it considers that necessary to provide justice to a case.

The employment relationship is also explicitly a personal relationship, and in any situation in which employment is continuing while a claim is being pursued, maintaining that relationship may be very important. Justice needs to be dispensed with a view to preserving the relationship where that is appropriate, both through care in the manner in which it is delivered and, where necessary, through the application of special protections for employees and witnesses.

Care must also be taken to exercise judicial power in a manner which is sensitive to the industrial context. From the time that industrial tribunals were first created to handle unfair dismissal and other claims linked to the employment relationship, the law has been reluctant to interfere unnecessarily with normal industrial practice where it is accepted as appropriate by employers, employee representatives and employees, and in particular, where there may be separate effective workplace mechanisms for resolving disputes. Employment Tribunals are explicitly constituted to take into account these considerations.

ELA acknowledges (and comments on elsewhere in this submission) the potential advantages of an online system for facilitating and managing the determination of certain legal claims. Such a system may well also be appropriate for certain employment claims, but taking into account the above issues, a key requirement for effective and appropriate justice in the general employment context is the special knowledge and focus in the same way as that provided by the current Employment Tribunal service.

Employment claims which may be appropriate for an On-Line Court

There are some limited claims and disputes which arise in the employment context that are relatively straightforward to determine. Readily identifiable in this category are:

- (a) simple unlawful deduction from wages claims

- (b) simple claims for unpaid holiday pay
- (c) claims for non-payment of a redundancy payment in connection with an acknowledged redundancy dismissal

Such claims are in most respects simple debt cases, and to the extent that an On-Line Court would provide an effective forum for these types of claims to be determined cheaply, quickly and fairly, that would be supported by ELA. However, safeguards would need to be in place to ensure that:

- (a) claims which are presented which in fact involve more complex issues are identified and transferred to the Employment Tribunal;
- (b) where a claim is linked to other types of employment claims being raised by The Claimant, it is consolidated with those to be heard together at the Employment Tribunal (separate determinations could lead to confusion and potential injustice without all the issues being considered together);
- (c) where multiple claimants raise the same claim against an employer, these are identified and considered together;
- (d) as with all current employment claims, there is a strong incentive for The Claimant to seek redress through informal and/or internal complaint or appeal mechanisms before bringing the dispute to court.

Even in these "simple" cases, current legislation provides for an uplift and/or decrease in any award of compensation by an Employment Tribunal by reference to each party's compliance with relevant ACAS Codes of Practice. In particular, the Code relating to handling disciplinary and grievance procedures is generally applicable, and an Employment Tribunal needs to assess whether any failure by a party to comply is "unreasonable" and then to determine the extent of any appropriate adjustment in the award.

It is difficult to envisage how an On-Line Court could make such an assessment without (a) the special industrial knowledge and focus of an Employment Tribunal and (b) hearing detailed evidence. In practice, if the On-Line Court is to have jurisdiction of such claims, ELA considers that it could not fairly decide questions concerning Code compliance, and that incentive mechanism might have to be abandoned in this context. Consideration must be given to workable alternatives to prevent the On-Line Court being the first recourse of Claimants and encouraging a litigious approach.

Further special considerations related to employment disputes

Claim value limits

The On-Line Court proposals we have been considering suggest a simple claim value limit to delineate its jurisdiction. However, to the extent that specific types of claims within the employment context (or indeed generally) may be amenable to being determined by an On-Line Court, ELA suggests consideration is given to extending the monetary limit in those cases. Whatever the value of a simple claim, the concepts and issues for determination will be the same, and all such claims, if properly defined, should be equally appropriate for determination by an On-Line Court.

De-personalisation of claim handling

We have commented above upon the personal nature of the employment relationship, and also the focus of the current legal system and indeed the Employment Tribunals upon seeking to resolve employment disputes as far as possible within, and otherwise while maintaining, the employment relationship.

A potential danger associated with access to an On-Line Court for employment claims is the distancing effect and "depersonalisation" of a dispute which such a forum may provide. If employees have a route to bring claims which avoids the need for dealing directly with their employer, that can only have a very negative impact on the employment relationship.

In straightforward 'debt' cases where an ongoing employer is in fact refusing to pay, negative impacts on the relationship may be a small consideration. But, if, in fact, the employee is mistaken, trust and confidence between the parties may be seriously damaged by a decision to bring a claim. More generally, ELA would be concerned that the industrial relations landscape could be altered undesirably by a system which allows regular impersonal court intervention during the life of the employment relationship.

Post-termination jurisdiction option?

ELA considers that one effective option to address many of the concerns highlighted above would be to restrict an On-Line Court's jurisdiction (in respect of the identified straightforward employment claims) to those claims that are brought after the employment relationship has ended. Following termination of employment, the maintenance and questions of the personal relationship are obviously far less relevant.

We note that (if for slightly different reasons) a similar jurisdiction provision has successfully operated in respect of the Employment Tribunal's ability to hear breach of contract claims for many years.

Furthermore, most such claims, in any event, arise following termination (including by definition claims for notice and redundancy pay). At this stage also, incentives aimed at encouraging workplace based dispute resolution are of less importance, and allowing jurisdiction in this limited respect would not undercut their continued application during the employment relationship.

B. On-Line Courts and Access to Justice

At first glance, it might seem that an On-Line Court would increase access to justice, particularly for those Claimants with low value money claims that might otherwise be put off by Tribunal fees. It is assumed that the On-Line Court would have a lower fee structure, and be a simpler process more easily managed by a litigant in person, at which this process appears to be aimed.

The assumption that an On-Line Court would be a simpler process presupposes that potential Claimants (and indeed Respondents) would not only have internet access but familiarity with conducting their affairs online and an ability to do so. The Civil Justice Council Online Dispute Advisory Group report recommending an On-Line Court estimates that 5% of the adult population neither has access to the internet nor someone who could assist them. They suggest that this group be given "special support" by HMOC officials but it is unclear just how this would work. Indeed, if a

potential Claimant does not have access to the internet, how would they know that this support is available?

In a report prepared for the Legal Education Foundation, Roger Smith explored “digital divides”, with inequality persisting by age, education and income. The report identifies that the issue is not physical access but barriers relating to cognitive abilities, skills and culture. It was said that 14% of internet users are “discontented”, which added to the 20% of the population who are non-users, produces a third of the population either not using the internet or not happy doing so. It is acknowledged that this population may decline as those now young and familiar with the internet age but it is considered that the poor, old, less well educated and with a disability are likely to continue to be disproportionately excluded. It is claimed that the overall excluded population rises to around a half of those on low incomes.

Further, however much work goes into making an On-Line Court user-friendly, it cannot be as simple a process as arranging a supermarket shop, bidding for second hand goods on eBay or even online banking. Conducting dispute resolution online is likely to require at the very least provision of detailed information and the ability to upload documents. Access to the internet has increased amongst low income groups largely due to the prevalence of smartphones and tablets. Unless the On-Line Court is designed for use with mobile devices, this would require access to physical hardware, such as scanners, as well as a desktop or laptop computer.

It may well be that potential Claimants with low value money claims form a significant proportion of the group potentially excluded by the very system purporting to increase their access to justice. Please also see our comments under "Delegated Judicial Officers" below.

Further, if so much reliance is to be placed in on written submissions/evidence, litigants in person may be at a particular disadvantage in an On-Line Court system when up against lawyers on the other side.

More often than not in employment cases litigants in person out of necessity need the assistance of the tribunal to properly pursue their case. An On-Line Court would remove that all important leveller of the playing field and, in doing so, would compromise the fairness of an On-Line Court.

This raises the question of whether the On-Line Court should be compulsory for some or all Employment Tribunal claims (perhaps by way of gateway into the “ordinary” Tribunal system for more complex claims not suitable for resolution online).

Online ET1 and ET3 forms are already available but not compulsory. They simplify the process for those familiar with the online space. However, it is possible for a physical ET1 form to be posted to a central processing centre. Local Tribunal Centres also take hand delivery of forms. ET3 forms can be downloaded and posted to the Tribunal office dealing with the claim.

The Financial Ombudsman Service lauded by the Civil Justice Council Online Dispute Advisory Group provides a physical form to complete by hand and post as well as its online offering.

More and more government services are available online but rarely has the online service completely replaced that provided offline. For example, passport applications can be made online but it is still possible to obtain a physical form and complete it by hand. The same fee is payable however the application is made. Presumably it is thought that savings will be made from those

individuals who prefer to use the online system whilst ensuring that those unable or unwilling to apply online can still obtain a passport.

Similarly, making an On-Line Court available but not compulsory might still achieve savings without excluding potential users of the Tribunal system.

Delegated Judicial Officers

(A) *The use of Delegated Judicial Officers in Employment Tribunal claims*

The question on which we are being asked to respond is difficult to address in detail without an understanding of what functions it is envisaged would be performed by a Delegated Judicial Officer (DJO). In particular, addressing the issue of what requirements would be appropriate in respect of legal qualifications, experience and training of DJOs in general terms will be of limited assistance without understanding the overall structure within which it is intended DJOs will operate.

In spite of this, this working party has considered some of the issues which would require to be taken into account in determining the requirements for legal qualifications, experience and training of DJOs and how they might vary depending on the specific function being performed, and the type of case in question.

The proposal by Briggs LJ is that some employment tribunal functions could be dealt with by DJOs instead of ET judges. The proposal is that certain routine, simple functions would be performed by DJOs.

If it were to be decided that DJOs should carry out some judicial functions, the function to be carried out will influence the level of qualification, experience and training which is required.

We address this question by looking at types of functions which possibly could be undertaken by DJOs, providing our comments on the level of qualifications, experience and training which we consider would be required, for each type of decision.

Simple cases

It is not clear if it is proposed that DJOs have full decision making power over some substantive claims, in their entirety, or for parts of those claims only. It is also unclear to us whether it is envisaged DJOs would exercise some or all of their powers via any On-Line Court that may be created. This will need to be clarified.

Our view is that, in the case of a simple claim, that being one dealing with a settled and straightforward area of law e.g. an unlawful deduction of wages claim or a holiday claim which does not involve the complicated and unsettled case law concerning the Working Time Regulations 1998, essentially, claims where there is only a dispute of fact, it may be possible for a DJO to deal with all or part of a claim. However, the decision as to whether the claim is suitable for consideration in full or part by a DJO must be taken by a qualified employment judge who would have the experience and qualification to determine if the case was "simple".

In the event that it is proposed that DJOs would have decision making powers over substantive claims, or elements thereof, the considerations regarding qualifications, experience and training are as follows:

- A legal qualification would not have to be a pre-requisite for simple claims, perhaps claims on which there is no legal issue in dispute and where the resolution lies in determining the facts. However,

knowledge of the law, the Employment Tribunal ('ET') process and an ability to understand and apply the facts in dispute would be required.

- Employment law experience would be required to identify the issues, the facts in dispute and the law – a minimum period of time working in the employment law field at a certain level, which level would have to be quite advanced, would need to be stipulated. A period of at least 5 years is suggested.
- Training would need to be provided to DJOs hearing these cases. Training would be required on when to refer to a judge, the skills involved in considering evidence, determining admissibility of evidence, dealing with objections by parties and representatives and making determinations on credibility and reliability. (This is working on the assumption DJOs could hear cases in person as well as via any On-Line Court that may be set up). Legal update training would also be required on a regular basis.
- We consider that there would be a large upfront training cost involved. This could be worthwhile but would need to be considered alongside the likely duration of an appointment, the likely saving to be gained by use of DJOs rather than judges and the likelihood of the cost and extent of appeals against DJO decisions.

Low value cases

In the Law Society's discussion document 'Making employment tribunals work for all – is it time for a single employment jurisdiction?' - September 2015 they suggest that cases may be categorised based on complexity and value. The working party's main concern relating to 'low value' claims being dealt with by DJOs is the creation of a two-tier justice system based on level of earnings.

ET claims are unique in that, in the majority of claims, the value is directly linked to the level of earnings of the Claimant. To have a system whereby lower earners receive unqualified decision makers and higher earners receive qualified decision makers is unfair and denies equal access to justice to some users of the ET system and in addition could be perceived as a barrier to justice for lower earners.

Furthermore, there is no link between the legal complexity of a case and its value. Low value claims are often presented by unrepresented parties who may not be able to best present their case, or refer to the correct legislation or case law. Those claims, and those litigants, benefit from a skilled judge with legal knowledge who can extract the relevant information and ensure that the tribunal system is accessible to all claimants and that their claims are properly managed going forward. For example claims under the Working Time Regulations 1998 are often very complex, yet low value, these include some holiday pay claims. Low value claims can often require an understanding of EU law and its applicability in the UK.

Save for very simple unlawful deduction of wages claims, we do not consider that there is any category of claims, categorised by value, which should be dealt with by judges without legal qualifications, training and experience.

Case management decisions

If a DJO is to perform certain case management decisions, then the level of qualification, experience and training which this working party considers to be appropriate is as follows:

- No formal legal qualification is necessary but may be desirable.

- Experience of the ET system or civil courts system is crucial, previous work in the ET system or civil court system would be required, for a minimum number of years, and at a minimum level. It would not be necessary to have experience of employment law in a wider setting (outside of the ET) although such experience could be a substitute for ET or civil court experience where a proposed DJO has employment litigation experience e.g. as a solicitor or barrister. Experience of the ET claim acceptance and case management procedure would be required, perhaps through having worked with a Judge carrying out that function.
- Training would be the most important element. This would require a period of initial training and supervision, followed by regular training on any changes in law and procedure, and in conjunction with a system to ensure all DJOs were up-to-date on changes in law and procedure. There would likely need to be a requirement for a certain number of relevant training sessions or hours per year and some system of ensuring that the training was effective, such as assessments and review of some decisions by judges.
- In addition to the training above, DJOs would need to be supervised by more qualified, experienced personnel, and for some tasks, judges. There would need to be a system where the DJO could refer to a judge for assistance, and a system of checking decisions at random, to ensure consistency and accuracy.

General considerations

This working party has concerns and reservations about whether it is possible to provide adequate training, and whether it would be economic to do so, given the skills required and the likelihood that the majority of substantive issues may be deemed unsuitable for determination by a DJO, given the complexity of the legal issues involved.

In addition to qualifications, training and experience, there would need to be provision for access by DJOs to proper resources to enable them to fulfil their role. This would include both academic resources and human resources in the form of legally qualified and experienced personnel, and, where necessary judges, to supervise and provide help and guidance where required. Again, the cost of this would need to be weighed against the benefit of DJOs as an alternative to judges for some types of decisions in the ET.

Is it envisaged that there would be a waiver of fee, or a different level of fee depending on whether the claim is heard by a judge or a DJO?

A claim may appear simple at first, and then become more complex and require the experience and qualifications of a legally qualified judge. There would need to be a mechanism for claims to be referred to judges if claims developed complexities which made those claims inappropriate for the DJO to consider/hear, for example, a simple claim for redundancy payment may turn into a complicated argument on whether there is a redundancy situation at all, involving consideration of case law which the DJO would not have the necessary qualification and/or experience to consider. This would require the DJOs to have the requisite knowledge and expertise to know when to refer claims. This working party has a concern as to how a new system, using DJOs would be monitored to ensure that the DJOs were identifying such cases referring them on to the appropriate person/Judge in a new system.

The risk of appeals, and the inherent cost of those, and therefore the extent to which the use of DJOs would make the ET system more efficient and cost effective would need to be considered and balanced against the

potential time and cost savings of using DJOs in the first place, and the cost of training at the outset, and throughout the period of appointment of a DJO.

(B) *The extent to which (both in the OC and the existing Courts) DJOs should have case management authority*

This question, like the others we are being asked to comment on, is difficult to answer without the context of a greater understanding of the proposals Briggs LJ has in mind regarding the reform of HMCTS. This answer is therefore given with that caveat.

With legal qualifications, adequate training and judicial supervision, it seems to this working party that some case management authority could be delegated to DJOs. In the Employment Tribunals and the Employment Appeal Tribunal, there are case officers who already deal with “standard” case management orders upon receipt of a Claimant’s ET1. Depending on the claims made, each case is either listed for a preliminary hearing on case management or standard directions relating to disclosure, evidence and a hearing are set down. DJOs could have a similar role in these arenas. However, if the plan is an OC which incorporates a properly digitised case management system, it seems to us that there would, in fact, be very little need to have a DJO performing this role; the computer could simply send out automated directions depending on which box(es) are completed in the ET1. In this case, every case management order made by a computer could (and should) be made with the right to an automatic judicial review on application by a party, as those made without a hearing do currently.

Within the more legally and financially complex employment law services provided by the civil Courts, we do not see any sphere in which a DJO could deal with case management. For instance, High Court applications for without notice interim injunctions, freezing or search orders must be dealt with by a senior experienced Judge, who alone should have case management authority. However, perhaps via the OC, if the parties agree to vary an order (in accordance with the CPR) or settle the claim(s) then an appropriately qualified, trained and supervised DJO could deal with those Consent Orders without a requirement for judicial involvement in the first instance.

(C) *The nature and extent of rights of review by a judge*

In answering this question, we are mindful of our response to the first and second questions raised under the heading ‘Delegated Judicial Officers’ (see above).

As a matter of general principle, we would suggest that if DJOs are to be empowered to determine substantive issues, a corollary of that power should be a full right of appeal on the merits to a Judge or a Master (as the case may be). We would submit that even if the DJO’s powers were limited to claims of a certain value or certain jurisdictions, there should still be a full right of appeal on the merits as a matter of natural justice and as part of the right to a fair trial under Article 6 of the Human Rights Convention. Furthermore, there is a danger that in the absence of an appeal mechanism, the appellate courts could be swamped by appeals from DJO’s which would defeat the underlying purpose of the proposal.

We recognise that with appropriate training, DJO’s may have a useful part to play in cost assessments.

The same principle should apply to procedural matters where DJO’s are performing a judicial or quasi-judicial function, for example determining issues of limitation, and other jurisdictional questions. (However, we reiterate that we do not currently know whether it is envisaged that DJOs will perform such a function).

The position is not quite so straightforward in relation to functions which are more administrative in nature, for example, case management functions. Again much will depend on the answer to second question raised under this heading (Delegated Judicial Officers) by the review. We would suggest that where the case management functions are of a quasi-judicial nature, the judgment reached by a DJO should be subject to review by a Judge or a Master. This could include, for example, applications to amend and/or decisions to grant witness orders or issues relating to disclosure other than in 'no go zones – see below'.

As stated above, our primary interest in the Review is as Employment Lawyers. For the reasons explained above, it is unclear the extent to which it is intended that any proposal to introduce Delegated Judicial Officers is to extend to Employment Tribunals. If it is, then it is necessary to take into account the various functions currently performed by Employment Judges under the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013.

We would suggest that the same general principles should apply namely where a DJO determines substantive issue, there should be a full right of appeal to an Employment Judge. This would include Claims which are rejected for jurisdiction reasons pursuant to Rule 12 or other jurisdictional reason including Claims which are made out of time. We would suggest that where a DJO performs a quasi-judicial function, any judgment made by a DJO should be subject to review by an Employment Judge. This would include functions under the existing ET rules currently performed by an Employment Judge in relation to the rejection of a Claim because it does not comply with Rule 10/Rule 17 of the ET Rules (failure to use the prescribed form or provide minimum information); Rule 11 of the ET Rules (failure to accompany the claim with the prescribed fee) ,and Rules 18 and 19 of the ET Rules (rejection of late presentation of Responses and applications for an extension of time to enter a Response). We would also suggest that any case management orders of a quasi-judicial nature such as issues relating to disclosure other than in 'no go zones', for example, disclosure in discrimination cases, should be open to review by Employment Judges.

The above are general examples and any comprehensive list would need to be developed with specific reference to the ET Rules.

(D) *Whether there are 'no go zones' where the involvement of DJOs would be inappropriate, regardless of value or importance of the issues*

We consider for reasons of public policy/the complexity of the law involved etc. the following types of claim(s)/case(s) are ones where it would be inappropriate for DJOs to be involved in determining any issues related to them:

- all complaints of discrimination, victimisation, harassment, equal pay etc. brought under the Equality Act 2010;
- complaints alleging suffering a detriment or dismissal because of making a protected disclosure under the Employment Rights Act 1996 (commonly known as 'whistleblowing' claims);
- all complaints made under the Part VII of the Employment Rights Act 1996 (relating to maternity leave, shared parental leave, adoption leave etc.);
- all complaints, applications etc. made under the Trade Union & Labour Relations (Consolidations) Act 1992;
- all complaints made under the Safety Representatives & Safety Committee Regulations 1977;

- all applications for injunctive relief;
- applications for Anton Pillar Orders;
- applications for 'Freezing Orders (previously known as 'mareva orders').

(E) *How and by whom should DJO's be supervised and managed*

We would suggest that, subject to any right of appeal or review (referred to above), DJO's could be supervised and managed within existing structure, for example by the relevant presiding judge or in the case of employment tribunals, the Regional Employment Judge.

Members of ELA Sub-Committee

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