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Civil Courts Structure Review

Interim Report by Lord Justice Briggs of December 2015

Response from the Employment Lawyers Association

26 February 2016

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. On this occasion however, we considered it appropriate to respond to the Civil Courts Structure Review : Interim Report ("Interim Report") insofar as it relates to matters which affect or may affect the practice of employment law and the role of Employment Tribunals ("ET") and the Employment Appeal Tribunal ("EAT").

A sub-committee, co-chaired by Joanne Owers of Fox Williams LLP and Paul McFarlane of Weightmans was therefore reconvened under the auspices of ELA's Legislative and Policy Committee to comment on the Interim Report. Members of the sub-committee are listed in Appendix 2. This response follows ELA's submission of November 2015 ("the First Response") prior to the publication of the Interim Report.

In this response we have focused on two core areas affecting our practice area namely (1) the suitability of the proposed On-Line Court for employment claims and (2) the location of the ET and EAT within the judicial system. We fully acknowledge that as regards (2) in particular, the litigation of employment claims and the employment law jurisdiction as a whole sits only at the "borders" of the terms of reference underlying the Interim Report and have yet to be fully considered. Nevertheless, comments are made about it in the Interim Report and we therefore offer our preliminary observations on what has been said in that regard. We consider it imperative that detailed consideration is given to this extremely complex and important issue before any decisions are taken to abandon the existing system of the Employment Tribunals Service having a "separate identity" with the suggestion that there is no longer a requirement for such a separation and essentially nothing to distinguish cases emerging from the workplace from routine commercial disputes.

We repeat our previous offer to participate and contribute further to this debate.

SUITABILITY OF THE PROPOSED ON-LINE COURT FOR EMPLOYMENT CLAIMS

Introduction

1. The online court proposed is intended to be a court for litigants without lawyers, intended to be less adversarial than the current courts, with investigation forming "an important and distinctive part". The report notes that the resolution of disputes submitted to the online court will not inevitably take place online in their entirety. Stage 1 will involve a mainly automated process to enable litigants to clarify their case and in effect create a document "broadly approximating to particulars of claim" or defence, along with identifying key documents and evidence to be provided at that stage. Stage 2 is to be a mix of conciliation and case management by a Case Officer, which may be conducted online or by telephone. Stage 3 will consist of determination by judges, "either on the documents, on the telephone, by video or at face-to-face hearings". There would be no default assumption in favour of

a face to face hearing, which would be regarded as the last resort and/or which could be confined to determining particular issues, "where for example live evidence and cross examination was required". Judges are to be their own lawyers, and receive no assistance in the law from the parties. At present, the Interim Report appears to envisage that employment claims will be litigated in the court as there is no express indication to the contrary or carve out (as there may be for personal injury claims and certain other named areas).

2. 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 many 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 (and increasingly those who claim that or similar status such as "worker" claims as will be heard in relation to multiple persons in the Pimlico Plumbers and Uber drivers cases in June/July 2016). **It is the combination of these factors which, in our view and for the reasons set out in this paper, provides the historic and ongoing justification for separate Employment Tribunals with specialist judges and/or lay members.** It also, in our view, distinguishes these claims from those set out in the Civil Justice Council paper of February 2015 and Interim Report as good examples of current On-Line dispute resolution.

3. 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. Clearly, there are at first blush potential advantages of an On-line court of the type envisaged in terms of costs savings to litigants and the Tribunal system, with the potential to increase access to justice, as well as speeding it up.

4. That said, if it is indeed intended to litigate employment claims in the proposed On-Line court, ELA urges an extensive consultation as to the types of claims (if any) that such a court could process in practice meaningfully and efficiently whilst ensuring that the special focus and safeguards of the existing Employment Tribunal system are mirrored in any new On-Line system and whether the use of a fixed value (whether £25,000 or otherwise) is a suitable mechanism to determine whether a particular claim should be litigated there.

Potential benefits of online resolution

5. The system as envisaged and outlined in the Interim Report would involve more interactive claim and response forms giving more assistance to parties in their completion, hopefully leading to the correct information and documents being supplied by litigants in person. If it works, this should further reduce the cost and time involved in bringing claims to resolution. However, for the reasons set out in this paper, we have serious reservations as to the likely effectiveness of this type of process.

6. The idea is that the system would be more user friendly, leading to a reduced need for lawyers. The potential extension of access to justice, particularly in low value claims, is obvious, as is the removal of the stress / anxiety of giving evidence (either as a party or as a witness) in the standard adversarial process.

7. This is turn should lead to a lower instance of "ransom" claims, whereby claims are brought with the belief that it is more effective to offer commercial settlement than litigate.

8. Assuming there would be a lower fee for online resolution, this further extends access to justice, and could address some of the problems caused by the introduction of fees to the Employment Tribunal.

9. Removing the need for attendance at a physical Tribunal building will further reduce cost to the Employment Tribunal system and potentially improve access for those with mobility issues.

The nature of employment claims and the industrial context

10. The law recognises and governs the employment relationship by 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.

11. 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.

12. 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. Whilst it is recognised that any new On-Line system would be designed to prompt parties to provide the correct information and documents, it is difficult to envisage how this could be done electronically in any but the simplest of cases.

13. 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.

14. 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.

15. As identified in the Interim Report, personal communication between litigant, witness and judge is a central tenet lending legitimacy to the existing system. Employment relationships are often said to be individuals' second most important relationships (after family). It is therefore particularly important that disputes arising out of this important relationship are seen to be handled fairly. Further, the Employment Tribunals recognise that there is an inherent inequality of bargaining power as between employers and their workers. This must be a primary consideration when reviewing the role of the Employment Tribunal in resolving disputes that arise in the workplace (see in comparison to personal injury cases below).

16. 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.

Analogy with personal injury claims

17. The Working Party noted with interest the provisional comments made in relation to personal injury cases in paragraphs 6.44 - 6.48 of the Interim Report and the persuasive reasons given by those who seek to exempt personal injury claims from on-line resolution which were considered meritorious.

18. The Interim Report notes as particularly relevant that (i) such cases involve a private individual ranged against a large insurance company, such that "nothing short of legal representation … will

ensure that the playing field is not so steeply slanted as to prejudice a fair and just outcome", (ii) there is also already online entry for these cases with capacity for negotiation pre-issue and an enviable settlement rate, so that the online court would be unnecessary and duplicative. The report suggests that the online court ought to be optional only for PI claims up to the general financial limit chosen, and perhaps compulsory for the smallest value claims.

19. In our view, clear analogies can be drawn with employment law claims in this regard. Firstly, it is generally accepted that in the vast majority of employment cases involving all but the most senior of employees there is a clear inequality of power between an employer and employee. Indeed, the origins of the Employment Tribunal are steeped in this knowledge (see Appendix 1 below). Secondly, there is the unique role which ACAS plays in the early settlement of employment cases both as part of the now mandatory early conciliation process and more generally which results in a healthy percentage of employment cases settling very early before pleadings are submitted or which are not pursued to an Employment Tribunal. Third, employment claims frequently involve consideration of medical evidence (e.g. as to assessing loss or existence of or reasonableness of adjustments for disability) or claims of a quasi-personal injury nature such as compensation for injury to feelings in discrimination cases. Taken together with the issues we have raised regarding the restricted types of claims which may be appropriate for on-line resolution, it could certainly be argued that an online court for employment claims is similarly unnecessary and duplicative.

20. It is also against this same background that any proposals for an On-Line system for employment claims must be considered. An employer who is well-resourced (with in-house legal and/or HR functions) will be in a far better position to deal with claims without external lawyers, but the same cannot be concluded for a worker who may be encountering the system for the first time.

21. CFA's and insurance backed claims are also becoming increasingly popular in the employment law field.

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

22. The Interim Report identifies that an On-Line system might be suitable for relatively simple claims. 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

23. Such claims are in most respects simple debt cases, and to the extent that an On-Line system may 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.

24. 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.

25. It is difficult to envisage how an On-Line system could make such an assessment without (a) the special industrial knowledge and focus of an Employment Tribunal (particularly lay-members (see paragraphs 69 to 78 below) and (b) hearing detailed evidence. In practice, if the On-Line system 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 system being the first recourse of Claimants and encouraging a litigious approach.

26. It should be noted that the above are all claims for which jurisdiction is reserved to the Employment Tribunal (save to the extent that the same remedy may be achieved via a contractual claim for wages or holiday pay). ELA therefore questions whether the work needed to extend jurisdiction to an On-Line Court would be proportionate to the number of claims that could realistically be dealt with effectively in this forum.

27. Further, it is important to ensure that any extension of jurisdiction to an On-Line system does not accidently extend to claims not intended for resolution by this method lest it lead to unintended consequences. For example, when two fee groups were introduced to the Employment Tribunal, equal pay claims were accidentally included within the lower fee group.

Claims not suitable for Online resolution, irrespective of value

28. The Interim Report identifies that is intended for use in relatively simple disputes. In identifying potential reasons to merge the Employment Tribunal system into the general civil courts, Briggs refers to the growth of detailed jurisprudence. Except in the limited areas identified above, ELA considers most employment disputes to be too complex for online resolution. ELA is concerned that the availability of online resolution might lull parties into a false sense of security, fooling them into believing that they do not need legal advice for what can be very complex disputes of law. Further, the absence of legal advice might lead to unrealistic expectations of the value of claims, reducing the potential for settlement. It is interesting to note that these considerations formed a key part of the decision to introduce ACAS Early Conciliation. It should also be noted that precisely the same body of statutory claims to which the jurisdiction relates can only be compromised before being brought or adjudicated with the receipt of independent legal advice, from a person, who is legally qualified, or from ACAS via a COT3. In that context, it seems odd to propose that formal resolution could occur with lesser personal / professional input.

29. Many employment claims, whilst quantifiable financially, are not purely about money. Preservation of reputation is often a key feature in employment disputes. This is demonstrated by the availability of declarations and recommendations as remedies in claims for unfair dismissal and discrimination. A declaration or recommendation can be as or more important to a Claimant than financial remedy. ELA suggests that any claims which may result in an non-financial remedy such as this are not suitable for resolution by an On-Line Court. Parties may be able to recognise there is a difference of view and even their interpretation is wrong, but seek judgments or recognition as to their honesty, bona fides etc which, especially in regulated employments such as healthcare, financial services and teaching, are important in relation to career prospects.

30. Certain types of claims would also in our view not be suitable for an On-Line system as they depend on findings of fact based on live evidence. Advocates act as inquisitors and often reveal vital facts and evidence fundamental to a judge's finding. Some cases, such as for unfair dismissal, also require a more nuanced consideration of matters such as reasonableness and fairness, and in the case of discrimination claims, unconscious bias, that can only be fairly determined after hearing full evidence from both parties. Certain jurisdictions, such as in respect of equal pay and TUPE, have developed extensive case law, both within this jurisdiction and emanating from the ECJ, making

them unsuitable for consideration by an On-Line system. It is difficult to envisage how interactive online software could be designed to elicit the correct information and documents in these claims. Further, given the speed at which legislation and case law changes within employment jurisdictions, it would be a significant task to continually update the system to ensure the correct information is given.

31. Some examples of the types of claims that we regard as unsuitable for an On-Line system, regardless of value, include:

    (a) Unfair dismissal and automatic unfair dismissal;

    (b) Discrimination;

    (c) Equal Pay;

    (d) Claims related to protected disclosures.;

    (e) Claims related to TUPE;

    (f) Claims involving multiple Claimants or Respondents;

    (g) Trade union issues and issues concerning employee representatives and collective consultation.

    This is not an exhaustive list.

Further special considerations related to employment disputes

ET Rules and Practice

32. Many of the perceived advantages of an On-Line Court identified in the Interim Report stem from perceived weaknesses and complexity of the CPR, which of course do not apply in the Employment Tribunal. The Employment Tribunal has several key advantages over the general civil system:

    (a) Simple rules: As identified by Lord Justice Briggs, the ET rules are simpler and more understandable to litigants in person than the rather more complex CPR. The ET Rules were the subject of a substantial overhaul by Lord Justice Underhill (with the support of the Presidents of the ET's for England and Wales and Scotland) as recently as 2013 and are generally accepted to be well drafted and working well in practice;

    (b) Inquisitorial role: Employment Judges and wing members take their quasi inquisitorial role seriously, often interrupting parties' cross examination to ask pertinent questions going to the heart of a dispute.

    (c) ACAS Conciliation: The availability of specialist ACAS conciliators assists many parties, especially those who are unrepresented, to settle disputes without the need for judicial intervention. Pre-claim Conciliation is now compulsory.

    (d) Costs Shifting: The general rule in the Employment Tribunal is that, subject to misconceived claims or unreasonable behaviour, each party bears its own costs. Proportionality must be viewed in this context.

Claim value limits

33. The On-Line Court proposals we have been considering suggest a simple claim value limit to delineate its jurisdiction which many of working party regarded as something of a blunt tool, particularly in the employment context. To the extent that specific types of claims within the employment context (or indeed generally) are considered capable of determination by an On-Line system, 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 system.

34. Many employment claims are difficult to quantify within the short 3 month claim limitation period, given they encompass future earnings loss. It is easy to foresee claims that initially appear to be worth more than the financial limit but due to earlier than expected mitigation of loss, become less valuable. Equally, Claimants may find it more difficult than anticipated to mitigate and find that a claim issued in an On-Line system is in fact worth more than its early valuation. Schedules of Loss are regularly disputed over issues such as mitigation of loss. This is a further reason that ELA believes that the types of claims to which an On-Line system would be of use would be restricted to debt-type claims where loss is readily quantifiable and certain from the outset.

Equal footing

35. See comments in relation to the analogy between personal injury and employment cases above.

Data Protection

36. The nature of employment disputes often necessitates provision of documents of a highly personal and often sensitive nature, most notably wage slips containing home addresses and National Insurance numbers as well as medical evidence in disability discrimination and other claims of the type referred to in paragraph 19 above. The temptation to potential hackers if such documents are available online is obvious.

Conciliation

37. ELA strongly believes that the availability of ACAS to assist in resolution of cases should remain in place notwithstanding the introduction of any On-Line system. Whatever conciliation solution is determined appropriate for the On-Line Court, ELA believes that the availability of specialist ACAS conciliation officers will lead to a higher settlement rate than any replacement generalist system without the knowledge and experience ACAS have built up over many years. Removing the compulsory system of Early Conciliation would seem to fly in the face of the move towards ADR.

De-personalisation of claim handling

38. 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.

39. A potential danger associated with access to an On-Line system for employment claims is the distancing effect and "depersonalisation" of a dispute which such a forum may provide. We are concerned that one-line channels could in some scenarios act as an over-incentive for employees to adopt a legalised approach to disputes that should initially be self-determined. 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. The On-Line Court could become the first point of call for disgruntled employees rather than internal communication with HR. Habitual use might lead to a breakdown of trust and confidence between employer and employee.

40. 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.

41. Whilst encouraging access to justice is generally seen as a positive step, the corollary of this is an increased burden on industry in defending those claims.

42. 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?

43. ELA considers that one effective option to address some 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.

44. 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.

45. 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.

On-Line Courts and Access to Justice

46. At first glance, it might seem that an On-Line system 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 system 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.

47. The assumption that an On-Line system 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. Whilst the Briggs report makes clear that it is envisaged that support will be available from an Assisted Digital Service, 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?

48. Statistics on internet usage vary. It is important to look at not only access to the internet but an ability to use it. 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 it claims 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. The Interim Briggs report accepts that around half of litigants in person may fall within this group.

49. Further, however much work goes into making an On-Line system 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 system 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.

50. 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.

51. Further, as stated in paragraph 20 above, 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 system when up against a better resourced employer or lawyers on the other side.

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

53. Those for whom English is not their first language may be able to understand and make themselves understood in person but have difficulties in doing so in writing online.

54. This raises the question of whether the On-Line system 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).

55. 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.

56. 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.

57. 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.

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

THE ELA'S PRELIMINARY OBSERVATIONS ON THE "RIGHT HOME" FOR THE ET AND EAT WITHIN THE JUDICIAL SYSTEM

Introduction

59. We begin by setting out the observations in the Interim Report that are relevant to this section of our response by reference to the appropriate paragraph number of the Interim Report.

60. Firstly there are many negative and rather subjective references to the location of Employment Tribunals (and the Employment Appeal Tribunal) in the relation to existing civil courts and other tribunals.

    (a) '…*the uncomfortable split of jurisdiction*…' (p 2.83)

    (b) '…*awkward areas of shared and exclusive jurisdiction*…' (p. 3.61)

    (c) '…*their rather lonely existence*…' (p.3.63)

    (d) '…*the present unsatisfactory isolation of that tribunal*…' (p. 8.20)

    (e) '…*the desirability of finding the right home for the Employment Tribunal…and the Employment Appeal Tribunal*….' (p. 11.8).

    (f) '…*uncomfortably stranded between the civil courts and the main Tribunal Structure*' (p. 11.10)

61. Secondly it is suggested that the need for lay members no longer exists and they could be replaced by assessors: *'…although at its inception there was good reason for a new statutory jurisdiction to be adjudicated upon by a tribunal with a majority of lay members, the strength of that reason has diminished with the growth of detailed jurisprudence… Moving the two tribunals within the civil courts structure would not deprive them of the continuing benefit of lay contributors, where appropriate. They could well fit the role of assessors.'* (p.11.14).

62. Thirdly, that given that the current position of Employment Tribunals is unacceptable that it is now necessary to move them given *'the desirability of finding the right home for the Employment Tribunal …and the Employment Appeal Tribunal*.' (p.11.8). The choices considered were:

    (a) To leave the ET (and the EAT) where they are, uncomfortably stranded between the civil courts and the main Tribunal Structure.

    (b) To bring both tribunals broadly under the wing of the structure of the civil courts.

    (c) To make both tribunals part of the Tribunal Structure, as First Tier and Upper Tribunals respectively.

63. To the suggestions outlined in the Interim Report, Lord Justice Briggs added these important words which appear to distance him from any definite recommendation having already clearly made his preferences known: '*The only item under this heading upon which significant further work and consultation will be needed as part of this review is the question whether, and if so how, the Employment Tribunal and Employment Appeal Tribunal might be integrated into the structure of the civil courts. Even then it is a large question lying only at the borders of my terms of reference, upon which others than me are likely to have a more important, and decisive, influence.' (p.12.31).* The working party concurs with these expressions of qualification and our preliminary response is made accordingly in the hope of aiding such further enquiry which we agree is clearly required before any such far reaching decisions are made.

64. We are concerned by the absence of any reference in the Interim Report to the reasons for and the history of the development of Employment Tribunals or to any of the previous studies which have been carried out in this area. We are concerned that a lack of awareness or understanding of these

issues and lessons from the past may hamper the "future proofing" of the system enabling it to adapt effectively for future patterns of disputes and preserve relevant judicial experience and effectiveness. Members of our Working Party were particularly concerned to ensure that the awareness of and sensitivities to the particular vulnerabilities of litigants in discrimination cases shown by the Employment Tribunal and Employment Appeal and their considerable expertise in handling such cases are not lost should these cases eventually move to the civil courts. To assist those involved in or considering this Report who do not have any extensive background in either practising in employment law or adjudicating claims in that area we have provided a short history of the development of Employment Tribunals in Appendix 1 and references to what we regard as essential reading material in this area.

History

65. No one reviewing employment tribunals, their purpose and ethos should fail to consider the work of The Employment Tribunal System Taskforce. 'Moving Forward' chaired by Dame Janet Gaymer which was published in 2002 and is available at: http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.dti.gov.uk/er/individual/etst-report.pdf

66. Everyone involved in its preparation had expert knowledge and an understanding of the purpose and function of employment tribunals and whilst we acknowledge that much has changed in the last 14 years it remains essential reading for anyone contemplating the changes in the Interim Report not least as the essence of the employment relationship remains largely unaltered. The description of the history and development of employment tribunals to 2002 is to be found at pages 22 to 27.

67. It will be seen from both these reports that there has always been a wish to provide litigants in employment tribunals a different format and experience, less court like and legalistic than civil courts, and it is with that in mind that an attempt needs to be made to establish a desired ethos of its own which requires rather more than efficiency and administrative convenience as its objective. The fact that circumstances have moved away from this ideal in varying degrees does not require wholesale abandonment. Indeed, future discrimination disputes around access or pricing of goods and services between businesses and customer, and across borders, may require the retention of this kind of ethos. We therefore ask for a full review and consideration of views expressed in the past which were all made with the objective of assisting the litigants using the system.

68. As that history has until very recently seen lay membership of tribunals as an essential component we begin our observations on that aspect.

The Role of Lay Members

69. As we report below at paragraphs 101 and 102, in addition to the Justice and Leggatt reports into employment tribunals, their role and nature has been reviewed on a number of other occasions during their 50 year history: there was a Green Paper 'Options for Reform' in 1994, Fairness at Work in 1998, the report of the Employment Tribunal Taskforce in 2002, a report from the Ministry of Justice 'Transforming Tribunals' in 2007 and the Gibbons report in the same year. Each of these reports saw the involvement of lay members as a defining characteristic. For example when reviewing employment tribunals in 2001 Sir Andrew Leggatt concluded that *"what has rendered them successful has been the composition of the tribunal, the absence of fees and the proximity of ACAS".*

70. It is important to keep in mind that lay members have a decision-making role. They are nothing like Assessors in the civil courts and the suggestion that Assessors could replace lay members is on our view misconceived.

71. Assessors are appointed under section 70 of the Senior Courts Act 1981 or section 63 of the County Courts Act 1984. They provide advice and reports at the direction of a judge and need not attend the whole of a hearing. They have no judicial function and can be directed not to tend a hearing or attend only part of a hearing. By way of contrast, a lay member of a tribunal is there to bring the whole of their working experience to the decision making process and contribute to that on an equal

footing with a judge. It has been recognised by all those who have previously enquired into the function of tribunals that this factor contributes considerably to the acceptability of decisions made particularly amongst unrepresented parties and Trade Unions.

72. It is also important to stress that despite the widespread belief to the contrary unfair dismissal and any other cases need not be heard by a judge sitting alone. A full panel can be formed if, having regard to any views expressed by the parties, there is a likelihood of a dispute on facts or law that make it desirable for the case to be heard by a full tribunal (section 4(5) Employment Tribunals Act 1996).

73. At present the law requires the presence of lay members in all discrimination cases and as described above permits it in unfair dismissal cases at the discretion of the Tribunal. As the function of lay members is to determine whether conduct is 'unfair' or has caused 'detriment' it is their experience of the workplace which is relevant for this exercise not a reliance on previous case law which is the suggestion made in paragraph 11.14 of the Interim Report. Whilst precedent properly plays a part many judges have emphasised in the past how important it is for tribunals to determine these decisions on a factual basis relevant to the particular case rather than to rely on 'rules' developed in earlier cases. Given the continual criticism of tribunals having become too legalistic the drift away from using lay members requires explanation. To examine this properly requires a statement of the advantages of judge alone hearings.

74. One well known commentator has set out these advantages as follows:

    (a) Delay: when cases go part-heard, having three people to accommodate to obtain another date takes longer than for a single judge.

    (b) Legal issues: it is said to be rare for a judge or wing member to have difficulty applying the test of fairness. But if the issue is the application of a tricky equal pay or working time regulations point, it is said to be undesirable that the two lay members can overrule the judge on a point of law.

    (c) County Court and High Court judges made decisions all the time about whether someone has acted reasonably (which is the fundamental issue in any unfair dismissal case).

    (d) If the judge sits alone, the case is dealt with faster.

    (e) Administrative costs saving is achieved.

75. It will be noted that none of these perceived advantages deals with the question of the acceptability of the process to the parties and all previous reviews have identified this element as important in that regard. We consider that assessing the issue of reasonable conduct in the workplace is unlikely to be best dealt with by a judge alone, particularly if that judge is not a specialist.

76. In addition the list of advantages fails to address the issues of legalism or pay any attention to the undesirability of the case not being heard in a formal court room. However much tribunals have moved for the original Donovan conception outlined in the two historical analyses referred to above there remains even now a huge difference in the usual atmosphere of a court and a typical tribunal hearing room. Our view is that there is very little doubt that to hear an employment case is such an atmosphere would be a detrimental move. The arguments that surround making the maximum utility of the court estate have fail to accommodate this requirement and have even resulted (in the experience of our members) in unfair dismissal cases being heard in magistrates courts.

77. No mention is made in the Interim Report whether it would be expected if Tribunals were to take place in civil courts adherence to court dress with all of the formality that brings would be required – we hope that would not be the case. Rights of audience will also need to be carefully consider if the ET / EAT were to become part of the civil court system in view of the range of representatives (e.g. trade union representatives, CAB volunteers, etc) who currently represent parties to ET proceedings.

78. It is difficult to escape the conclusion that the most persuasive arguments in favour of abandoning the lay element in employment cases are administrative convenience and cost. These arguments in a climate of austerity naturally have their persuasive effect. Our wish is to ensure, if they prevail, that there is a full understanding of what is likely to be lost if they do and to ensure that any alternative future arrangements are fit for purpose, and enable the retention of what is useful to preserve from the concentration of acquired experience and judgment in Tribunals.

Integration and the future

79. It is plain that for Lord Justice Briggs the unique position of the Employment Tribunals in relation to the existing court and tribunal system is somewhat troubling and uncomfortable. As no reference is made in the Interim Report to the reasons Employment Tribunals have long occupied this position it is necessary to set out the background which also appears in the History below.

80. The responsibility for administering Employment Tribunals moved from being the sole responsibility of the Department for Trade and Industry (as it then was, now BIS)) to be shared between that department and the Ministry of Justice when the Employment Tribunals became part of the then Tribunal Service. This service was formed to implement the recommendations of the Leggatt Report in 2006 which has since been absorbed into HM Courts and Tribunals Service (HMCTS). BIS retains responsibility for policy, rules and governance and HMCTS is responsible for the delivery of the service. The purpose of this arrangement, which was recorded in a Protocol between the two departments, was to secure that Employment Tribunals retained a separate identity and ethos from other administrative tribunals and as such formed a 'distinct pillar' within HMCTS. From the discussions we have held with representatives of both departments it would not be unfair to say that currently there appears to be far less enthusiasm within HMCTS and the MoJ for this arrangement than there is within BIS (see Appendix 3).

81. That Protocol recognised what is still the case ie that there is a benefit in distinguishing between party and party tribunals and tribunals concerned with disputes between the individual and the State and good reasons to keep the tribunal process away from the Court system with its complex rules and excessive formality. These reasons have not really changed. How much more expensive would have been the Pimlico Plumbers' dispute referred to in paragraph 2 if it had started at a unitary court? Tribunals provide a useful filtering level. It was a result of the desire to keep tribunal processes as simple as possible that the rule making process was not in the hands of what is now the Ministry of Justice and that outcome remains beneficial as recognised by Lord Justice Briggs in his references to the existing rules of procedure (as referred to in paragraph 32 above.

82. A reason it is suggested some form of integration is required is set out in paragraph 11.11 of the Interim Report i.e. *'it leaves both tribunals unsupported by the management structure and resources of either the civil courts or the Tribunal Structure'*. Plainly this is an argument of administrative convenience and cost that appears to us to ignore the purpose of the current arrangements and pays insufficient attention to the benefits, function and ethos of the employment tribunal system. Its legitimacy depends on there being sufficient structural and material resources within the civil courts, and there is as yet little clarity around the cost of change and the extent of assurance that these perceived benefits would be delivered.

83. Among the key features of any evolved or unitary system should be, in our view:

(a) the ability to apply contextual marketplace understanding, as is notably found in the common use of lay member judgment as to fairness and mitigation and judicial observation as to disability, sex discrimination and impact;

(b) enough concentration of experience to ensure efficient and consistent exercise of judgment in the likely flow of future employment claims (e.g. as to status in the "gig economy" outsourcing, discrimination, whistleblowing etc);

(c) retention of transferable and even potentially scaleable expertise to apply in evolving areas of dispute where the principles have been long considered in an employment context, including discrimination in the provision or movement of goods and services (not exclusively

EU, but consideration should be given to a system which is harmonious with the strategy for resolving disputes in other contexts, e.g. the Digital Single Market and the rules for dispute resolution in the Consumer Rights Act 2015, and the EC communication COM (2015) 550 "Upgrading the Single Market : more opportunities for people and business").

84. We question the proposition that if a change is required the three options proposed in the Interim Report are the only available options. It is clear from proposals put forward by the Law Society and by our responses to those proposals which are to be published shortly that there is a variety of alternatives which could accommodate the need to provide a low cost (and possibly lawyer-free) alternatives to the current system and also deal with the overlap in jurisdictions that the Interim Report understandably found troubling.

85. Finally, we are aware of the current proposals in Scotland to integrate Employment Tribunals into the First Tier of the Tribunal Service. This is obviously at variance with the favoured option in the Interim Report, i.e. to bring ETs in England and Wales under the structure of the civil courts.

Appendix 1

A Brief History of Employment Tribunals

86. Industrial Tribunals were set up in 1965. Originally their task was to adjudicate in disputes arising out of the imposition of levies on employers by the Industrial Training Boards set up under the Industrial Training Act 1964.

87. From the outset, tribunals were composed of a legally qualified chairman who was assisted by two lay members: one drawn from each side of industry. Lay members were considered to play a crucial and unique role using their 'employment' expertise in the interpretation and application of legal principles to the facts in issue. As recently as 2010 Mummery LJ in Aylott v Stockton on Tees Borough Council described lay members as "indispensable for the actual experience of industrial relations and of day to day life in the workplace that they bring to [tribunal] decisions".

Initial jurisdiction

88. Other jurisdictions of administrative kind were added under the Selective Employment Payments Act 1996 and the Docks Harbour Act of the same year. Then, following the introduction of the Redundancy Payments Act 1965, Tribunals were, for the first time, given jurisdiction to adjudicate in disputes between employers and employees under the Redundancy Payments Act 1965.

89. The idea of the industrial tribunal as an embryonic specialist labour court for the resolution of employments disputes was suggested by the Ministry of Labour in the 1960's in its evidence to the Royal Commission on Trade Unions and Employers' Associations (the Donovan Commission). The Donovan Commission proposed that the jurisdiction of labour tribunals (as it suggested the revamped tribunals should be called), "should be defined so as to comprise all disputes arising between employers and employees from their contracts of employment or from any statutory claims they may have against each other in their capacity as employer and employee". Subject to some notable additions, in what may be related to collective labour law (for example the right of trade unions to complain of a failure to provide information and consult in redundancy situations and business transfers), this has been reflected in subsequent developments.

Expansion of jurisdiction

90. Among its many recommendations, the Donovan Commission recommended that employees should be given a right to claim "unfair dismissal" against employers, a right which was introduced by the Industrial Relations Act 1971. Thereafter the jurisdiction of industrial tribunals has steadily expanded: initially by the Trade Union and Labour Relations Act 1974 and the Employment Protection Act 1975, which were consolidated in the Employment Protection (Consolidation) Act 1978 (and included rights to maternity leave) and then by the introduction of discrimination legislation starting with the Equal Pay Act 1970, the Sex Discrimination Act 1975 and the Race Relations Act 1976. The Tribunal's jurisdiction was also extended to cover specified claims under the Health and Safety at Work Act 1974.

91. The jurisdiction of industrial tribunals continued to expand in the 1980's: for the first time individual employees were given rights to complain against trade unions in relation to trade union membership disputes as well as bring claims for non-payment, or deductions, from wages under the Wages Act 1986, claims in relation to shop working and betting work, claims arising from the transfers of businesses under the Transfer of Undertakings Regulations 1981 and claims for breach of contract (limited to what was then the tax exempt amount of £25,000) under the 1994 Extension of Jurisdiction Orders.

92. Tribunals now have jurisdiction to determine more than 70 types of claims including claims for disability, age, pregnancy, religious and sexual orientation discrimination, claims arising out of the Part-time, Fixed term and Flexible working and Parental leave Regulations, claims under the

National Minimum Wage Act 1998, claims made by whistle-blowers under the Public Interest Disclosure Act 1998 and claims under the Working Time Regulations.

93. Tribunals are now the principal forum for the resolution of contractual and statutory employment disputes. Many, though not all, of the current individual rights are to be found in the Employment Rights Act 1996 and the Equality Act 2010. In 1998, 'Industrial Tribunals' were renamed 'Employment Tribunals'.

Common law jurisdiction

94. The High Court has exclusive jurisdiction in applications for injunctions and other related interlocutory orders such as 'search' orders (previously known as Anton Pillar orders). Together with the County Court, it has power to determine other common law claims, particularly claims for wrongful dismissal and disputes over pension rights. The High Court also has jurisdiction over some collective disputes in particular it has power to grant injunctions where industrial action is proposed in breach of the statutory rules on balloting, picketing and other related restrictions set out in the Trade Union and Labour Relations (Consolidation) Act 1992.

Incorporation into the Courts and Tribunal Service

95. As indicated above, the responsibility for administering Employment Tribunals moved from being the sole responsibility of the Department for Trade and Industry (as it then was, now BIS)) to be shared between that department and the Ministry of Justice when the Employment Tribunals became part of the then Tribunal Service (formed to implement the recommendations of the Leggatt Report) in 2006 which has since been absorbed into HM Courts and Tribunals Service (HMCTS). BIS retains responsibility for policy, rules and governance and HMCTS is responsible for the delivery of the service. The purpose of this arrangement, which was recorded in a Protocol between the two departments, was to secure that Employment Tribunals retained a separate identity and ethos from other administrative tribunals and as such formed a 'distinct pillar' within HMCTS

Tribunal remedies

96. The Donovan Commission anticipated that the primary remedy for unfair dismissal would be reinstatement or re-engagement but in practice, tribunals have normally awarded compensation to successful claimants. Originally in 1971 the maximum award was £5,200. It was gradually increased to £12,000 until 1999 when it was increased to £50,000. Since 1999 it has been indexed linked and the compensatory award currently stands at £78,335 or 52 weeks gross pay whichever is the lower. Awards in discrimination and whistleblowing cases are uncapped.

97. As previously mentioned Employment Tribunals may only deal with contractual claims for wrongful dismissal up to a maximum value of £25,000. Contractual claims for damages for personal injury, breach of terms relating to intellectual property, duties of confidentiality and restraint of trade are expressly outside a Tribunal's jurisdiction and so must be issued in the County or High Court. The cap on contractual claims in the employment tribunal has not been increased since 1994 although the unfair dismissal cap has been increased substantially (see above).

98. It was then said by the government minister introducing the contract jurisdiction in the Lords that the intention was to deal with the matter prudently 'until we have had the chance to assess how this new, somewhat experimental, jurisdiction is working out in practice'. The cap continues to cause practical problems and if inflation-adjusted should be about £35,000 and its existence is in any event illogical given the levels of compensation that may be awarded in other tribunal jurisdictions. For example discrimination cases are uncapped.

Characteristics of tribunals

99. In 1968, the Donovan Commission identified four characteristics which distinguished industrial tribunals from ordinary courts: first it believed that tribunals would be more accessible than ordinary courts, secondly, it believed that tribunals were less formal than ordinary courts, thirdly, it believed that tribunals would be more expeditious than ordinary courts and finally, it believed that tribunals

would be less expensive than ordinary courts in that under the system proposed by the Donovan Commission, there was no cost in bringing or defending proceedings. It was also hoped that tribunals would be less legalistic than ordinary courts.

100. These aims, however laudable, appear to have been overtaken by subsequent events: In 1972 there were just 13,555 claims, by 1976, this had increased to 43,066 and in 2010 the ETS Annual Report recorded that there were 57,400 complaints of unfair dismissal alone. This led to substantial delays in the determination of claims. This, combined with the growth in tribunal jurisdictions, has led to greater formalisation of tribunal procedures. Tribunal Rules were introduced to regulate the conduct of tribunal proceedings. These rules underwent a substantial revision by Lord Justice Underhill in 2013 to form the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013,and are favourably viewed.

101. In addition to the greater formalisation of tribunal procedures, as noted by the 1987 Justice Report (chaired by the late Professor Sir Bob Hepple), there has been a growth of 'legalism' both in terms of the way in which tribunals interpret and apply employment legislation (para 2.2) and the degree of formality "in the physical arrangements" and "court atmosphere" (para 2.4). The report attributed some of these problems to the 'adversarial' nature of the tribunal system and recommended a more investigative approach at least in more straightforward cases. Nonetheless, there is now a considerable body of sometimes complex case law covering all of the tribunal's various jurisdictions.

102. The Tribunal system as a whole was formally reviewed by Sir Andrew Leggatt. Following the Leggatt report in 2001, responsibility for the tribunal system was transferred to the Ministry of Justice and tribunal chairman were renamed 'Employment Judges' but the system remained identifiable and separate from the reforms he proposed in relation to other tribunals.

103. In addition to the Justice and Leggatt reports, the role and nature of employment tribunals has been reviewed on a number of other occasions during their 50 year history: there was a Green Paper 'Options for Reform' in 1994, Fairness at Work in 1998, the report of the Employment Tribunal Taskforce in 2002, a report from the Ministry of Justice 'Transforming Tribunals' in 2007 and the Gibbons report in the same year. Each of these reports saw the involvement of lay members as a defining characteristic of employment tribunals. Furthermore, despite these reviews, there has been an absence of any identifiable vision for the function of tribunals by successive governments.

Recent developments

104. Indeed, the 'characteristics' identified by Donovan (referred to above) have been further eroded by among other things:

(a) the greater formalisation of employment tribunal procedures for example the introduction of detailed case management procedure and pre-prepared witness statements;

(b) the introduction of prescribed application and response forms in 2004. Initially, unlike the ordinary courts, there was no prescribed form for applying to an Employment Tribunal and no mandatory elements to making such a claim. Now all claims must be made by way of a prescribed form and a claim can be rejected if it does not include the mandatory information. However, it should be noted that these changes have coincided with the advances in IT and there is no clear evidence that these in themselves have made tribunals less accessible even if the current requirements are more formal than before;

(c) the increase in the number of jurisdictions in which employment tribunal claims are determined by Employment Judges sitting alone including from 2012 unfair dismissal claims and therefore a decline in the number of full tribunal hearings with 'lay members'. As stated above, one of the unique and crucial features of the original systems was the role played by 'lay members' in using their 'employment' expertise in the interpretation and application of legal principles as an 'industrial jury';

(d) the introduction in 2013 of tribunal fees. According to the latest statistics published in March 2015, this has led to a 52% reduction in the number of claims compared to the period before which the fees were introduced; and

(e) the relocation of some tribunal to court centres (including criminal court centres) which may have increased the perception that tribunals already form part of the court structure.

Appendix 2

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Appendix 3

Copy Protocol regarding the Transfer of ETs to a Tribunals Service in LLD

PROTOCOL REGARDING THE TRANSFER OF ETS TO A TRIBUNALS SERVICE IN LCD

Introduction

1. This is the agreement between the Lord Chancellor and the Secretary of State for Trade and Industry to transfer the Employment Tribunals Service (ETS) from the Department of Trade and Industry to a Tribunals Service to be established within the Lord Chancellor's Department. ETS administers Employment Tribunals and the Employment Appeal Tribunal in England, Scotland and Wales.

ETS and the Tribunals Service

2. ETS will form part of a Tribunals Service answerable to the Lord Chancellor. In recognition of the differences of party and party tribunals from the administrative tribunals which deal with disputes between party and state, the Employment Tribunals Service will retain a separate identity within the overall Tribunals Service, forming a distinct pillar within the organisation, with administrative tribunals forming the other pillar. The names "Employment Tribunals" and "Employment Appeal Tribunal" will continue to be used. It is proposed that the transfer will take place in 2005/06.

Governance and Management

3. The Lord Chancellor will be the Minister responsible for the operation of the ETS. The intention is to constitute the Tribunals Service as an Executive Agency. Were there to be a Ministerial Advisory Board, DTI and relevant external stakeholders should be included. A Tribunal Service board answerable to a Chief Executive Officer will be charged with the delivery of the Tribunals Service's business including that of Employment Tribunals. The Director of ETS will sit on this board. There should be a subsidiary advisory board for the ETS on which DTI will also be represented, together with the Advisory, Conciliation and Arbitration Service (ACAS) and other external stakeholders. Principles guiding governance are DTI representation and a voice for external stakeholders on the top tier body.

4. The arrangements for transferring will be overseen by a joint steering group with representation from LCD, DTI and ETS and other stakeholders to be identified.

ACAS

5. Current links with ACAS will be maintained and strengthened and the Tribunals Service will seek to improve those links through use of some shared IT applications and the creation of joint performance indicators.

Policy lead and legislation

6. DTI's policy lead for employment law is entirely retained but responsibility for administering Employment Tribunals and the EAT will be transferred to LCD. DTI also retains responsibility for the Employment Tribunals Act 1996 and the secondary legislation relating to employment tribunals including the Rules of Procedure. Sub legislative procedures will be for LCD. In making changes to Employment Tribunals legislation, DTI will consult with LCD, the Employment Tribunals judiciary and the Tribunals Service representatives within the Employment Tribunal pillar. DTI will be responsive to the need for legislative changes to ensure administrative efficiency or to realise the potential for modernising within the new Tribunals Service. The Lord Chancellor shall retain responsibility for making the Rules of Procedure for the Employment Appeal Tribunal.

Funding Arrangements

7. LCD have bid for the costs of overarching tribunal reform in SR2002 and the funding secured through this route will be available to meet costs of creating the new Tribunal Service and modernising tribunals transferring to it, including the Employment Tribunals and EAT. DTI have bid in SR2002 for steady state costs adjusted by forecast workload variations and other known costs of maintaining and improving ETS and will bid for areas of modernisation identified by the Employment Tribunal System Taskforce. At the point of transfer, a PES transfer will be negotiated that will cover the full costs of operating ETS for the remainder of the SR period, together with any funds secured to maintain and improve services.

8. When steady state has been reached LCD will be responsible for bidding for ongoing resources but if DTI makes changes to employment law or to the policy in such a way as will significantly increase the workload of the Tribunals Service, then the normal rules would apply:

- either DTI will inform LCD sufficiently in advance of the policy change and with reasoned assumptions of the increase in workload to be expected allowing the LCD to bid in advance for additional means to fund the increased workload, or
- DTI will make an appropriate PES transfer to LCD.

It is recognised that DTI is not responsible for employment law changes which are made by other Government Departments.

Administrative Staff Structure

9. All administrative staff will work for the new Tribunals Service within LCD, over time, with common terms and conditions of service, scales of pay and grading (the Cabinet Office Statement of Practice on Staff Transfers within the Public Sector will be followed). Common HR policies will be established with the aim of creating a career structure for the benefit of all staff and the service overall. Some staff functions will be shared between the two pillars of

the organisation but the processing of Employment Tribunal cases will remain a separate activity.

Tribunal Panel Members

10. The implementation of the Tribunals Service will create a shared pool of tribunal panel members answerable to the Lord Chancellor and "cross ticketing", so that members consider cases from more than one tribunal, will be encouraged. However, the existing statutory requirements for sitting on the Employment Tribunals and EAT panels will be retained as will, as a minimum, existing training requirements (employment expertise in the Employment Tribunals will not be diluted) However the new Tribunals Service will seek improvements to training for all tribunal panel members especially in areas of general tribunal practice ("judge craft") and management. Common proposals for appraisal of judicial members will also be developed. Over time the new Tribunals Service will seek to harmonise terms and conditions for all tribunal panel members where this is consistent with delivering efficiency and value for money.

Panel Appointments for the Employment Tribunals

11. The appointments of Chairmen will continue to be made by the Lord Chancellor and the Lord President. Responsibility for the appointment of lay members (for England, Wales and Scotland) will pass to the Lord Chancellor in consultation with the Secretary of State for Trade and Industry.

Accommodation

12. Accommodation both for administrative staff processing cases, Chairmen involved in interlocutory work and hearings themselves will, over time, be shared across the Tribunals Service although the special requirements of Employment Tribunal hearings will be fully reflected in the design of shared accommodation and hearing centres.

Information and Communications Technology

13. Within the overall Tribunals Service IT systems ETS will have its own IT applications for case processing, where appropriate sitting on a common platform and sharing a common infrastructure. Where appropriate, Management Information Systems data may be held in common. Improved IT links with ACAS will be promoted. A common telecommunications platform will also be established.

EAT

14. The administration of the Employment Appeal Tribunal will transfer to the new Tribunals Service through ETS and, subject to further discussion, EAT may be incorporated into a new Appellate Division to be created within the Tribunals Service.

Levels of service

15. The integration of the Employment Tribunals Service into a separate pillar of the Tribunals Service will be carried out, over time, in such a way as to maintain or improve upon present standards of service to users.

Other Party and Party Tribunals

16. The potential inclusion of other party and party tribunals, which are consonant with Employment Tribunals, into the operations of the ETS within the Tribunals Service will also be reviewed separately.