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HMCTS Flexible Operating Hours Pilots

Response from the Employment Lawyers Association

29 November 2017

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EMPLOYMENT LAWYERS ASSOCIATION
CELEBRATING 25 YEARS OF SERVICE

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Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law. We include those who represent both Claimants and Respondents/Defendants in the courts and Employment Tribunals. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal and practical standpoint. Our Legislative & Policy Committee is made up of both barristers and solicitors who meet regularly to consider and respond to proposed new legislation.

A working party was set up to discuss the Prospectus and prepare this response, which is co-Chaired by Louise Taft and Robert Davies. The members of the working party are listed at the end of this response. As its members have most experience in the Employment Tribunal, we have confined our response to those questions that properly address issues on which we can provide practical insight.

Page 19, question 1

How do you think we could improve the pilots described above? Are there types of work we're suggesting which should not be included in the pilot or types of work we haven't considered which should be?

We believe strongly that the Employment Tribunal Service (ETS) should **not** be included in the pilot as it considers a defined set of cases dealing with statutory rights/claims arising specifically from the employment relationship which we do not consider are amenable to longer and/or a more structured regime intended to introduce/manage flexible hours (please see in particular our comments regarding the existing flexibility within the practice of Employment Tribunals).

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1992 - 2017

Increased pressures on the timing of cases, which may delay significantly the time taken to reach/issue decisions: Employment Tribunal (ET) cases are often document and fact heavy with an expectation of detailed written submissions immediately after the evidence has ended. Discrimination, equal pay and whistleblowing cases, which together represent 40% of ET claims[1], will often last 4 days or more (some lasting weeks) and require at least 2 x lever arch files (sometimes 10+) and witness evidence from at least 5 witnesses. Longer court days could place an unworkable burden on Judges and wing members (who are not lawyers) in such cases. Truncated days with two sittings would in fact lead to longer hearings, as it will not be possible to hear as much evidence in a truncated day as now happens. This would elongate hearings, increase costs and may also result in more hearings becoming part-heard.

Negative impact on quality of advocacy: Professional advocates and instructing solicitors almost invariably work in the evenings whether on the current claim in order to digest new evidence, to assimilate instructions (as the landscape of cases can change mid trial) and ensure that written submissions are full and/or manage on-going workloads on separate matters or other client matters which have arisen during the hearing. It would impact on the amount of time available to advocates and instructing solicitors to work in the evenings or before court if longer court days were introduced. This could affect the quality of representation.

No benefit for Respondent witnesses and possible detrimental impact on Claimants: Most of the witnesses in an ET case will be "professional witnesses", that is employees of and who are giving evidence on behalf of the Respondent/employer. Accordingly, they are not inconvenienced by the current requirement to attend to give evidence during the existing court day as it will often simply overlap with their usual working day. Claimants/employees comparatively rarely, in our experience, call witnesses beyond themselves. Litigants in person are common in ETs. It follows that a longer court day has no advantages from the perspective of a witness attending to give evidence for the Respondent but it would place a burden on the Claimant, especially one who is representing themselves, as they would be committing to an even longer and more arduous day. Even represented Claimants will find a longer day to their disadvantage as there would be limited time to pass on any updated instructions to their representative(s).

[1] ET statistics April 2016-March 2017

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Equality impact on Claimants/Witnesses: Around 10% of ET claims involve sex discrimination or pregnancy dismissal or detriment[2]. Many of these Claimants are likely to have pressing childcare responsibilities at the time of any ET hearing. Childcare is likely to have been set up around the usual working day. A longer court day will no doubt deter and/or disadvantage these Claimants. Other witnesses may also have childcare needs that cannot be accommodated in a longer day. Also, many cases are listed automatically in the ET: a litigant in person might not have the confidence to apply to have the case heard at a time to suit childcare needs. For those listed at a Preliminary Hearing, Judges would have to consider complex and competing needs of witnesses, advocates and judicial availability.

Flexibility already exists in the ETS: We think this is a particularly significant feature of the approach to ET practice. At present, ET Judges do have wide case management powers and there is a culture whereby start and end times are often adjusted where extra time is required to complete the evidence - although, crucially, in our experience this is always arranged only with permission from the parties/advocates who are in attendance and it takes account of their current and prevailing commitments. It follows that there is no need for a formal and extensive increase in the court day; sufficient flexibility, which can be applied at the relevant time as opposed to attempting to do so through a more detailed listing process, already exists in practice.

Limited scope for shorter, flexible hearings: The pilot involves trialling short court hearings throughout an extended court day. Based on our experience of ET cases, the only hearings which could be confined to a 2-3 hour slot would be a "Preliminary Hearing" which address case management issues, short preliminary applications and simple cases such as for wages. It is not uncommon for ETs to hear several of these hearings in one day. It follows that there is no advantage to having longer or flexible court days.

Equality impact on barristers and solicitors: Longer court days or the introduction of short hearings early in the morning or into the night may be expected almost inevitably to deter advocates and instructing solicitors with child caring responsibilities. There are many women at the employment bar and they often "balance" their working lives with their professional commitments by working from home in the evenings. It is difficult to see how these advocates would be able to continue at the employment bar if there was also an expectation that they would attend court in the evenings. Similarly, solicitors with childcare responsibilities would be deterred from entering (or staying in)

[2] ET statistics April 2016-March 2017

employment law if there was expectation that they would attend hearings (or be available to give advice or receive instructions) early in the morning or in the early evening when the bulk of childcare responsibilities arise in relation to pre-school and school age children. It would significantly affect the ability of both barristers and solicitors to work around childcare, most commonly available between 8 a.m. and 6 p.m.

Impracticability: It is not an answer to the equality concerns outlined above to place an obligation on ETS staff to ensure that the commitments of advocates and the parties are accommodated in relation to listing hearings. This is because hearings are often listed automatically by the ETS at an early stage in proceedings without any knowledge of a party's requirements. Similarly, even for cases listed at Preliminary Hearings, solicitors may not yet know which barrister they will instruct. Even if a solicitor already has a barrister in mind, it would be logistically impossible for counsels' clerks to record every single one of their barrister's pre-existing commitments from early in the morning to into the early evening so that solicitors could ask the ETS to take into account pre-existing commitments. It would also make childcare extremely difficult to organise for barristers and again could lead to parents, especially women, leaving the employment bar. Whilst there is plentiful childcare available during ordinary court hours, it is much harder to find reliable childcare prior to 8 a.m. and after 6 p.m. Alternatively, a two tier system may be anticipated to develop where non-parents (or parents without primary caring responsibilities) were available for all cases whereas parents would be severely limited in terms of their availability and hence desirability to solicitors. This would have a significant impact on diversity at the bar.

Page 20 Question 5

Are there any other considerations for flexible working opportunities for professionals which could be included in the design of the pilots (e.g. legal professionals limiting availability to only morning or afternoon working, condensed hours etc.)? How could you see this working?

From the perspective of ET work, we do not think that moving to flexible operating hours on the basis that legal professionals would be able to limit availability to mornings or afternoons, or work condensed hours, would work in practice.

As touched on in our responses to Question 1, ETs are already more flexible in the way they list than the civil courts. Professional advocates who operate a part-time working pattern are sometimes able to request that long cases are listed omitting their non-working day. However, even this level of flexibility is not always granted or possible, for the following reasons:

- In most cases, the advocate who will appear at trial will not have been selected at the time the case is listed. Many cases are listed automatically by the ETS, without consultation with the parties. In most other cases the solicitor will attend the case management Preliminary Hearing, and counsel will only be selected and instructed at a later date. Thus the case cannot be listed so as to allow for the advocate's working pattern.

- Even if the advocate is present at the listing hearing and able to make the request for flexibility, a positive response is not guaranteed. If a hearing centre is busy, the lack of judicial resource may make it difficult to list a multi-week case with, for example, four day only sitting. Some ETs have a designated day for case management only, when ETs hearing trials do not sit (for example, East London on Mondays). If the advocate's non-working day is different, it is unlikely that the ET will be willing to accommodate a second non-sitting day in the week.

These complications would be compounded should advocates wish to limit their appearances to morning or afternoon sittings only. Whilst a designated day off is relatively simple to explain and for barristers' clerks to pass on, availability during the morning or afternoon is likely to be less binary. If the advocate could work only in the morning but a much earlier listing were available in the afternoon, that places the advocate in conflict with the interest of his/her client. Those advocates able to work mornings and afternoons will inevitably be preferred.

Further, whilst there is plentiful childcare available during ordinary court hours, it is much harder to find reliable childcare prior to 8 a.m. and after 6 p.m.

We are concerned that the introduction of morning and afternoon sittings in the ET setting would undermine the (limited) progress that has been made in accommodating the flexible working patterns of advocates. As explained in the response to question 1, it is likely that this will lead to primary carers, still disproportionately women, leaving the employment bar or unable to continue working as a solicitor. It is also likely that it will exacerbate the unequal distribution of the most

desirable work, which tends to go to those barristers, disproportionately male, who have no limitation on their working hours.

Page 21 Question 2:

What do you think are the drawbacks of a Crown Court and Tribunals mixed jurisdictional model?

The Crown Courts and ETs are part of very different legal regimes which have very different rhythms. In fact they are at totally different ends of the legal spectrum. We attach an Appendix at the end of this paper detailing the history of ETs and how they have grown separately to the courts, with a very different culture. A mixed jurisdictional model would give an impression of formality that is wholly unsuitable.

ETs try to avoid formality in their appearance and procedure; they generally do not look like courts and are quite modern. The panel may sit a little higher, but they are not unreachable. No wigs or gowns are worn. ETs have a lot of litigants in person whereas Crown Court trials involve (sometimes large numbers of) lawyers, with judges, barristers and solicitor-advocates in formal dress. A Crown Court environment would probably be intimidating for litigants in person. Witnesses would have to give evidence from a dock or the more formal witness stands in Crown Courts, rather than from a witness table in the ET. It would also be undesirable during the cross-over of cases where robed barristers, sometimes armies of them, and police exit with potential criminals. Conference and waiting rooms are likely to be shared between ET and Crown Court users, which will fundamentally alter the atmosphere.

As is detailed above, most ET hearings are listed for a full day or multi-days. Truncated sittings will not allow for breaks, needed to accommodate ET users. As a result of disability and pregnancy/sex discrimination claims, there are a significant number of disabled people attending the Tribunal and it is also not uncommon for babies or children to be present in waiting rooms whilst their parents attend a hearing - it is not unheard of for breastfeeding mothers with to bring babies along to the hearing of a discrimination claim. ETs have to accommodate these factors. With these and the large number of litigants in person, there can be a lot of breaks and proceedings move

slower than environments where all parties are legally represented. It is difficult to envisage how this could be accommodated into a truncated sitting.

A truncated sitting would either have the perverse effect of increasing the length of hearings or inappropriately condensing the day by reducing the number of breaks for advocates, litigants and witnesses. The only types of hearings which could therefore reasonably be heard in this time would be Preliminary Hearings or simple issues of wages: the ETS already deals with these short hearings adequately by listing several throughout the day.

On balance, we are concerned that the culture and history of the ET and Crown Court are so fundamentally different that it is almost impossible to see how there could be a mixed jurisdictional model without undermining all that the ETS was designed to achieve.

Page 21 question 5

Do you think a Civil/Family Court & Tribunals mixed jurisdiction model would be a better fit? Are there any different benefits or concerns for running this as a pilot?

As has previously have been espoused we do not consider that the ETS is suitable to be included in the current pilot or any subsequent mixed jurisdictional scheme.

We consider that the Crown Court is particularly unsuited to host the ETS given the factors listed above. The Civil/Family Court is undoubtedly a 'less bad' fit than the Crown Court, however this does not make it a good fit.

The nature and format of ETs has been designed to be navigated by litigants in person and avoid the rigid formality of the courts system. The nature of the buildings themselves are determined in order to convey a less formal setting to be more approachable. Hosting the ETS in court buildings will immediately lose this informality and create a more intimidating experience. Whilst there is some evidence of this happening already, a mixed jurisdictional model will compound the problems this creates.

Voluminous procedure is required to be navigated in court proceedings and accordingly the staff in courts are tuned to follow strict procedure and deadlines, in which solicitors and barristers are

trained. We are concerned that this rigidity and formality followed by staff in the courts system would not easily transfer to the informality of an ET following the changing of the hour. In fact nothing is said in the pilot scheme about how the support staff would work, and whether this would be a core of staff which covered all hearings (court and ET) or whether there would be a changeover for specific functions. A changeover of staff would appear to be cumbersome and unrealistic. We consider a core staff would result in a more formal system being followed in relation to ETs and accordingly be a further barrier for litigants in person.

The same issues arise with truncated sittings as is detailed above in the question regarding the Crown Court.

It remains our view that any type of mixed jurisdictional system which includes the ET will be to the detriment of lay as well as professional users.

ELA Working Party Members

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Appendix

Extract from Response by the Employment Lawyers Association to Proposals for a Single Employment Court.

12 April 2016

2 Brief Review of Employment Tribunals

Industrial Tribunals (as they were then called) 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.

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

Other jurisdictions of an 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

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

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:

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1992 2017

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.

In the 1980's, the jurisdiction of industrial tribunals continued to expand. For the first time individual employees were given rights to complain against trade unions in relation to trade union membership disputes, as well as the right to 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.

The result has been that the Tribunals now have jurisdiction to determine more than 70 different types of claim, 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 Minimum Wage Act 1998, claims made by whistle-blowers under the Public Interest Disclosure Act 1998, and claims under the Working Time Regulations.

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, and became "Employment Tribunals".

Common law jurisdiction

The High Court continues to have 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. The majority of low volume contractual claims are brought back the Employment Tribunals.

Incorporation into the Courts and Tribunal Service

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 ("MoJ"), when the Employment in 2006 Tribunals became part of the then Tribunal Service (which was formed to implement the recommendations of the Leggatt Report). This 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. A copy of the

Protocol appears at Appendix 3. It would not be unfair to say that currently this arrangement engenders far less enthusiasm within HMCTS and the MoJ, than it does within BIS.

Tribunal remedies

The Donovan Commission anticipated that the primary remedy for unfair dismissal would be reinstatement or re-engagement. In fact, in practice, tribunals have normally awarded (the remedy of) 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 then it has been indexed linked, and the compensatory award currently stands at £78,962 or 52 weeks gross pay, whichever is the lower. Awards in discrimination and whistleblowing cases are uncapped.

As referred to above, 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. They must then 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).

It was then said by the Government Minister introducing the contract jurisdiction in the House of 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. 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

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. 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.

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. 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. Originally, the rules of procedure were limited and quite straightforward. For example under Industrial Tribunal Regulations 1980, there were just 17 Rules. However, each subsequent revision has added additional procedural requirements so that now under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, there are 106 Rules in Schedule 1 alone.

In addition to the greater formalisation of tribunal procedures, and 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 (paragraph 2.2) and the degree of formality "in the physical arrangements" and "court atmosphere" (paragraph 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.

The Tribunal system as a whole was formally reviewed by Sir Andrew Leggatt. Following his report in 2001, responsibility for the tribunal system was transferred to the MoJ, and tribunal chairman were renamed "Employment Judges". Nonetheless the system remained identifiable, and separate from the reforms Sir Andrew proposed in relation to other tribunals.

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. In this respect there was a Green Paper "Options for Reform" in 1994, Fairness at Work in 1998, the report of the Employment Tribunal System Taskforce in 2002, a report from the MoJ "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 a distinct lack of any identifiable vision for the function of tribunals, by successive governments.

Recent developments

The "characteristics" identified by Donovan (referred to above), have been further eroded by amongst other things:

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

(ii) 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 advances in Information Technology, and there is no clear evidence that these changes in themselves have made tribunals less accessible, even if the current requirements are more formal than before;

(iii) the increase in the number of jurisdictions in which employment tribunal claims are determined by Employment Judges sitting alone. From 2012 these included unfair dismissal claims. This led to 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";

(iv) the introduction in 2013 of tribunal fees. Statistics vary, but all will agree there has been a drastic fall in the number of claims compared to the period before fees were introduced – most probably somewhere between 65% and 75%, depending upon the type of claim being considered for these purposes; and

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

ELA has welcomed some, although not all, of these changes. Taken in a historical context, it must nonetheless be accepted that they do represent a fundamental change in the character of the tribunals, as compared to that which was contemplated by the Donovan Commission in 1968, and later, by the Employment Tribunal System Taskforce in 2002. In recent years there does appear to have been a continuing drift away from the relative informality that applied when the Tribunals were first created and developed, towards a process that is now increasingly legalistic and court like.