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Nicholas Paines QC
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Dear Nicholas,

RE: Government Response to Employment Law Hearing Structures review

The Government welcomes the Law Commission's report on Employment Law Hearing Structures, and the detailed consideration the Commission has given to this important topic. The Commission's comprehensive report and consultation exercise have helped to highlight several important areas that could help improve access to justice, clarify and consolidate employment law and improve use of judicial resources, all with the wider aim of facilitating efficient and effective dispute resolution. Below, I have set out BEIS' final response to the Law Commission's recommendations relating to areas within our responsibility along with a brief overview of the Department's recent employment law activity over the last year.

Since the release of the report the Government has focused on addressing the legislative and practical challenges of Covid-19 on the labour market. Since March 2020, we have implemented a range of measures to support jobs and businesses, including the Coronavirus Job Retention Scheme and additional employment rights protections.

I also recognise that the dispute resolution system is under significant pressure from a combination of the rise in caseload following the removal of ET fees and the challenge to tribunals from the impact of Covid-19 on physical hearings.

The Government laid legislation in October 2020 to boost hearing capacity in Employment Tribunals. The reforms will give the system more flexibility to respond to the impact of COVID-19 and increased caseloads. We have received positive feedback from stakeholders about the impact of these measures in reducing administrative burden for parties and allowing more focus on resolving disputes rather than satellite litigation.

In considering the Law Commission's proposals, it is only right that we take time to consider the impact of our recent reforms and consider what support and changes the labour market will need post-Covid.

The Recommendations

We have reviewed the recommendations relating to employment law, considering how these align with the profound impact of Covid-19 on the labour market and the increased pressure on the Employment Tribunal system. We have addressed the recommendations in turn, responding to related recommendations together where appropriate.

Clarifying employment law / extending protections

Time limits

Recommendation 1: We recommend that the time limit for bringing a claim should be six months for all Employment Tribunal claims.

We note that the Law Commission findings outlined the need for consistency in time limits to avoid confusion. We see some merit in considering an increase in time limits for bringing forward a claim both for Employment Rights Act 1996 and Equality Act 2010 based cases, especially where one claim can have multiple components. Looking at Equality Act 2010 cases specifically, given the circumstances that often surround these claims, it may be that the limit in these instances particularly warrants further consideration.

However, while we recognise that additional time to bring a claim may be helpful to some parties it is unclear what impact an extended period would have on litigation behaviours.

A significantly extended period might result in a greater opportunity for parties to conciliate, however there are associated risks that parties lose key details or memories of events that then hampers conciliation discussions, and potentially hearings even later. Instead, there is a focus on preparation for an impending tribunal application, and there is a risk that Acas might be drawn into using conciliator time on enquiries such as ET administrative details rather than on discussions on prospects for settlement.

It is difficult to foresee the behaviour of parties, which may differ between claimants, respondents (large or small), and representatives. This proposal is also likely to have an increased demand for Acas services and consequently on conciliator resource.

As the Employment Tribunals have the discretion to allow claims submitted out of time, we believe that the current approach, taken on a case by basis, is the most proportionate at this time.

Recommendation 2: We recommend that in types of claim where the time limit for bringing the claim can at present can only be extended where it was "not reasonably practicable" to bring the complaint in time, Employment Tribunals should have discretion to extend the time limit where they consider it just and equitable to do so.

For most types of claim, the tribunal will have some discretion to extend the time limit to accept a claim after the original deadline has passed.

The test of reasonable practicability is a question of fact for the tribunal. However, tribunals do exercise a degree of flexibility in extending time limit claims where it was not reasonably practicable, i.e. serious illness or stress, reasonable ignorance and faulty advisers.

We note that there were some reservations among those responding to the consultation. Including a lack of certainty as this affords judges greater discretion; the 'reasonably practicable test' is well understood and that there may be a lack of justification for greater discretion outside of the discrimination field.

We have noted this recommendation and will consider this as part of any future work on extending time limits.

Contractual claims

Recommendation 4: We recommend that Employment Tribunals should have jurisdiction to determine claims by an employee and counterclaims by an employer for damages for breach of, or a sum due under, a contract of or connected with employment notwithstanding that the employee's employment has not terminated.

Recommendation 5: We recommend that Employment Tribunals should have jurisdiction to determine claims by an employee and counterclaims by an employer for damages for breach of, or a sum due under, a contract of or connected with employment notwithstanding that the alleged liability arises after employment has terminated.

Recommendation 6: We recommend that the current £25,000 limit on employment tribunals' contractual jurisdiction in respect of claims by employees be increased to £100,000 and thereafter maintained at parity with the financial limit upon bringing contractual claims in the county court.

Recommendation 7: We recommend that the same financial limit on Employment Tribunals' contractual jurisdiction should continue to apply to claims by employees and counterclaims by employers.

Recommendation 9: We recommend that Employment Tribunals should have jurisdiction to determine claims and counterclaims for damages or sums due in respect of the provision by an employer of living accommodation.

We note that the issues raised in these recommendation concern restrictions on ETs contractual jurisdiction and the need to bring parity to claims by both employees and employers involved in a contract and, more generally an employment arrangement, to resolve matters both during and after the termination of employment. Any further work in this area will need to consider more closely the practical and operational impacts on ETs and on Civil Courts.

We also note the £25,000 limit for ET awards generates complexity in practice, pushing some cases into the civil courts and some disputes between the court and the Employment Tribunal. We can understand the merit in employees and employers having a clear route through the judicial system. However further work would be needed to understand the cost and impact of increasing the ET limits on employees and employers.

We have noted this recommendation and will consider this as part of any future work on employment contracts.

Recommendation 8: We recommend that:

(1) the time limit for claims for breach of contract brought in an Employment Tribunal during the subsistence of an employee's employment should be six months from the date of the alleged breach of contract;

(2) the time limit for claims for breach of contract brought in an Employment Tribunal after the termination of an employee's employment should be six months from the termination, but

(3) where the alleged liability arose after the termination of the employment, the time limit should be six months from the date upon which the alleged liability arose.

We note that the Law Commission highlights a discrepancy in time limits between civil courts and ETs. The time limit for bringing a claim in the civil courts is six years from the alleged breach of contract. In the Employment Tribunal it is three months from the termination of employment.

We note this recommendation and would consider as part of any wider work on extending time limits.

Recommendation 10: We recommend that it be made clear that Employment Tribunals have the same jurisdiction to determine breach of contract claims in relation to workers within the meaning of section 230(3)(b) of the Employment Rights Act 1996 as they have in relation to employees within the meaning of section 230(1) of the Act.

Recommendation 11: We recommend that the extensions of the Employment Tribunals' jurisdiction that we have recommended in Recommendations 4, 5, 6, 7 and 8 should apply equally to workers within the meaning of section 230(3)(b) of the Employment Rights Act 1996.

We have noted these recommendations and will consider further.

Recommendation 12: Employment Tribunals should have the power to interpret or construe terms in contracts of employment in order to exercise their jurisdiction under Part I of the Employment Rights Act 1996.

We understand that the key issue this recommendation is addressing is that, when looking at a written statement, the Employment Tribunal are limited to identifying the terms of the contract and cannot rule on the interpretation of terms whose meaning is disputed.

Working time

Recommendation 18: Employment Tribunals should have jurisdiction to hear complaints by workers that they are working hours in excess of the maximum working time limits contained in regulations 4(1), 5A(1), 6(1) and 6A of the Working Time Regulations 1998.

This proposal sets out that certain working time regulations currently falling to the Health and Safety Executive to enforce could also be effectively enforced via an Employment Tribunal. We note the arguments that in some cases some of these rights have already been enforced through civil courts. We will consider this proposal further.

Unlawful deductions

Recommendation 13: Employment Tribunals should have power to hear claims of unlawful deductions from wages that relate to unquantified sums. This power is sufficiently conferred by Recommendation 4.

We note that the Court of Appeal has held that an unauthorised deduction from wages claim must be for a "significant, identifiable sum". Accordingly, a wage claim relating to an unquantified discretionary bonus fell outside the Employment Tribunals' jurisdiction.

The responses to the Law Commission consultation highlighted reservations, noting that unquantified wages claims were most likely to occur where there was a dispute in respect of a complex bonus scheme. There was a difference in views on whether ETs or civil courts would be the best placed to assess such matters.

We can see the benefit for employees of an easier route to redress, but do not have a strong policy view, as this seems to be a matter of which court or ET has the ability to examine this issue.

Recommendation 14: Where an Employment Tribunal finds that one or more of the "excepted deductions" listed in section 14(1) to 14(6) of the Employment Rights Act 1996 applies, the tribunal should have the power to determine whether the employer deducted the correct amount of money from an employee's or worker's wages.

We note that the Law Commission raise concerns that in cases of excepted deductions, ETs may only decide whether one of the excepted reasons for the deduction applies; if so, it may not determine whether the employer deducted the correct amount.

We do not have evidence about what this means for employees and employers in practice but see that it might leave room for uncertainty. We also do not know the scale of the issue – i.e. how often this happens, on what magnitude, in which contexts. We will consider this further.

Recommendation 15: We recommend that Employment Tribunals should have jurisdiction to apply set-off principles in an unauthorised deduction from wages claim under Part II of the Employment Rights Act 1996, limited to established liabilities for quantified amounts and to extinguishing the Part II claim.

We note that the Law Commission asked if employers should be able to use the doctrine of 'set-off' – thereby relying on debt owed by an employee to reduce the amount they would be able to pay under contractual claims. We accept that there is an issue to investigate further to take a firm view on this issue. Our policy interests would likely be:

- Deterring employers from deducting sums from wages
- Fairness for employees – and a proportionate impact on employers

We have noted this recommendation and would look to consider this as part of any future work on unlawful deduction wages.

Blacklisting

Recommendation 19: We recommend that the maximum award applying to Employment Tribunal claims brought under the Employment Relations Act 1999 (Blacklists) Regulations 2010 is at least increased to, and maintained at, the level of the maximum award for unfair dismissal under section 124(1ZA) of the Employment Rights Act 1996.

The Government takes the issue of blacklisting of trade unionists seriously and we will consider this recommendation further.

Enforcement

Recommendation 21: We recommend that the Government should investigate the possibility of:

> **(1) creating a fast track for enforcement which allows the claimant to remain within the Employment Tribunal structure when seeking enforcement; and**
>
> **(2) extending the BEIS Employment Tribunal penalty scheme so that it is triggered automatically by the issuing of a tribunal award.**

We recommend that consideration be given to:

> **(1) sending a notice with the judgment to inform an employer that if it does not pay the award by a set date, it will be subject to a financial penalty;**
>
> **(2) sending a copy of the judgment to the BEIS enforcement team; and**
>
> **(3) improving the information sent to successful claimants on how to enforce awards.**

The Government is committed to ensuring workers receive what they are entitled to and protect workers from exploitation. Effective enforcement plays a vital role in giving individuals the confidence to challenge employers where they are denied their rights and it creates a level playing field between businesses.

We keep the enforcement process for Employment Tribunal penalties under constant review and should an opportunity arise to strengthen the process in relation to enforcement either through streamlining or automation it will be carefully considered.

An individual's employment right to take their employer to a Tribunal remains an individual right and thus it is their right to enforce in a manner that best suits their individual need(s).

The current system allows for parties to appeal the judgment before it can be referred to the Employment Tribunal penalties scheme. The scheme is one option among many and individuals can choose which enforcement mechanism to use in light of either their personal or case circumstances. Automatic referral also potentially risks making assumption of sharp practices and creates duplication of effort when payment of awards have been made.

Recommendation 21- We accept part 2 recommendations (1) & (3) however we reject recommendation (2).

The ET penalties scheme has secured payment of nearly £4 million worth of payments to claimant who might not have otherwise secured their award.

This shows that enforcement is having an impact, although we accept more can be done to ensure information sent to successful claimants in general is clearer. We have already started to take action to improve the clarity of notices, interest orders and accompanying information sent by the courts. We will continue to discuss ways to improve signposting and the information sent to successful claimants on how to enforce awards.

For the reasons set out above in relation to duplication of effort, appeals, and defendant good practice recommendation 21 part 2 (2) is rejected.

Equalities / Judicial resourcing

The Ministry of Justice and the Government Equalities Office, will be responding to the recommendations below separately:

Recommendation 3. Employment judges with experience of hearing discrimination claims should be deployed to sit in the county court to hear non-employment discrimination claims.

Recommendation 16. We recommend that section 128(2) of the Equality Act 2010 be amended to provide a power to transfer equal pay cases to employment tribunals, with a presumption in favour of transfer.

Recommendation 17. We recommend that employment tribunal judges be given a discretionary power to extend the limitation period for equal pay claims where it is just and equitable to do so.

Recommendation 20. We recommend that respondents to employment-related discrimination claims should be able to claim contribution from others who are jointly and severally liable with them for the discrimination. The test to be applied should mirror that in section 2(1) of the Civil Liability (Contribution) Act 1978.

Recommendation 22. An informal specialist list should be established to deal with employment and discrimination-related claims and appeals within the Queen's Bench Division of the High Court.

Recommendation 23. The subject matter within the remit of the new List should be:

> **(1) employees' claims for wrongful dismissal or other breach of contract where the sum claimed exceeds the limit on tribunals' jurisdiction under the Extension of Jurisdiction Order;**
>
> **(2) employees' equal pay claims;**
>
> **(3) employers' claims to enforce covenants in restraint of trade;**
>
> **(4) employers' claims for breach of confidence or misuse of trade secrets;**
>
> **(5) employers' claims against trade unions for injunctions to prevent industrial action or for damages following what is alleged to be unlawful industrial action;**
>
> **(6) claims arising in "employee competition" cases such as team moves and garden leave;**

(7) appeals from the county court in claims for discrimination in goods and services; and

(8) appeals from the county court in employment-related cases.

Yours sincerely,

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