The Law Society

Making employment tribunals work for all

Is it time for a single employment jurisdiction?

A discussion document

September 2015

In June 2014 David Latham, the recently retired President of the Employment Tribunals (England & Wales), gave an address at the Law Society[1] in which he suggested the time was ripe to review whether the employment dispute resolution system, including the employment tribunal framework, was meeting the needs of society. He floated the concept of an Employment and Equality Court.

The Law Society, with the help of its Employment Law Committee, has taken up his challenge to look at how the system works. Our members have unrivalled experience in how employment disputes work in practice and in the way in which the tribunal system plays its part. Having spoken with politicians, civil servants, the judiciary, business associations, trade unions, and employment law groups we ascertained there was an appetite to consider reforms. All agreed that the employment tribunal structure could be improved.

This discussion document sets out how the Law Society believes the employment tribunal system could be improved to the benefit of both employers and employees, and the administration of justice. The ideas proposed in this document are intended to stimulate further debate. We are grateful to those who have already shared their thinking with us and we look forward to hearing further views.

At the end of the document we set out a number of questions. We will be organising discussion groups, involving key stakeholders, to debate the points raised and to collect more detail on how a single employment jurisdiction should operate. If you have any comments or would like to be part of a discussion group, please contact Nick Denys by 30 October 2015 (nick.denys@lawsociety.org.uk).

[1] www.lawsociety.org.uk/policy-campaigns/documents/how-should-employment-tribunals-operate-in-the-future-law-society-consultation

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Executive summary

1. The employment tribunal (ET) system is not working as well as it could. The introduction of ET fees has created a barrier to genuine claimants. Organisations, especially small businesses, can find the cost and time needed to respond to a claim damages their business. Due to advances in employment law, both legislative and procedural, the ET process has become increasingly legalistic; simple cases are not being dealt with as quickly and efficiently as they could be. Most employment disputes need to be lodged at the ET, while some can only be heard in the County or High Court, and in some cases the claimant has a choice of forum. This can be confusing to unrepresented claimants as to where they should start their claim. Once a dispute enters the ET process the avenues for Alternative Dispute Resolution (ADR) are unclear.

2. This discussion document suggests that the structure of the ET could be reformed so that cases are dealt with at a level proportionate to their complexity and value. All employment cases could be heard in a single jurisdiction, consisting of four levels. Each of the levels would have different procedural considerations.

Level	Approach	Types of cases
1	Document based decision making.	Simple straightforward cases, such as unpaid wages claims, where the judge can make a decision on the documents alone.
2	Judicial inquisitorial approach.	Straightforward cases, such as redundancy payments or failure to consult, that need further investigation.
3	Encourage early neutral evaluation and ADR.	Cases that make up the majority of claims currently heard in the ET.
4	Cases heard under civil litigation principles.	Employment disputes which are currently heard in the civil court, such as restrictive covenants. Costs will apply to some cases.

3. To make the single jurisdiction easy for the public to use there would be a single point of entry. Cases would then be allocated to the appropriate level by a gatekeeper.

4. The single jurisdiction should promote ADR. This would increase awareness of different types of ADR, including the benefits of solving the dispute before the hearing. The fee for judicial mediation should be removed, to encourage parties to consider ADR one last time before the hearing starts.

5. The question as to whether the single jurisdiction should remain a tribunal or become a court is a finely balanced one. We would welcome more views on this matter. What is clear is that having a single jurisdiction, made up of different levels, best accommodates the needs of society and the development of employment law.

6. We would also like to invite views on whether a single employment jurisdiction should adjudicate on Equality Act 2010 goods and services cases. David Latham thought that ET judges would be well placed to hear such cases as many areas of employment law involve equality issues.

7. The suggested reforms should create an employment law system that is accessible to all. We hope that they might also lead to a restructuring of the current ET fee regime.

Introduction

8. Work is an important part of life. In the UK today there are nearly 30 million people in employment and over 5 million employing businesses. All workers have certain statutory rights. Depending on a person's employment status, and the policies of the organisation in which they work, some will have enhanced rights. All employees owe obligations to those who employ them. The dynamics of these millions of relationships are important to each individual employee and employer, and they are crucial to how well the British economy performs.

9. The vast majority of relationships between employers and employees work well. When disputes do arise most are resolved in the work place, often informally and sometimes with the assistance of third-parties. Successive governments have rightly sought to encourage employers and employees to resolve disputes at the earliest stage possible, but there will always be some disputes which need external intervention. Their resolution requires a system that is accessible, delivers just outcomes, and works efficiently.

10. It is almost 50 years since the Royal Commission on Trade Unions and Employers Associations published recommendations (better known as the Donovan Report) which led to the creation of industrial tribunals. Industrial tribunals, renamed employment tribunals in 1998, were intended to be quick and free from legal procedural constraints. In 1957[2] the Franks Committee concluded that the advantages of tribunals were "cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject". Over time successive governments have introduced more employment legislation, usually to reflect different political perspectives on the balance between worker and employer rights, and sometimes to implement EU directives. The growing complexity of employment and equality law has taken the ET a long way from the original concept that it should provide non-legalistic access to redress.

11. In the last few years there have been a number of changes that have had a significant impact on the ET system. These are:
    - the introduction of fees in order to proceed with a claim in the ET, which has a lead to a dramatic fall in the number of cases;
    - the mandatory requirement to go through early conciliation (EC) before being able to lodge a claim in the ET;
    - cuts in public funding for legal advice; and
    - technological advances, including an increased ability to access more information through the internet.

12. Although the employment law environment has changed significantly over the last 50 years the ET has not been through any structural reforms. Throughout our conversations with stakeholders and employment law practitioners it was clear that there was a widespread, shared view that the ET could be more effective and efficient.

13. The problems with the current system can be split into two areas. The first is the cost of access to the system for both employees and employers. For claimants, the introduction of significantly high fees to lodge a case with the ET represents a

[2] Report of the Committee on Administrative Tribunals and Enquiries, 1957.

significant hurdle - the number of cases taken to the ET has decreased by over 60% since June 2013[3]. The reduction in assistance available from voluntary advice centres, as a result of cuts in legal aid and local authority funding, has also made the decision to bring a claim more difficult. From the employer's perspective the complexity and cost of responding to a claim represents a burden. The Confederation of British Industry (CBI) Employment Trends Surveys series has found that in each of the last five years more than half of concluded settlements have taken place when the employer was advised that they would have won the final hearing[4]. The CBI concludes that this is because defending a company's actions before the ET is judged by employers to take up a significant amount of management time, which would be better used on building the business.

14. Secondly the structure of the ET has not evolved with advances in employment law. This means that the ET is not as responsive as it could be when dealing with the wide range of employment disputes that now exist. The processes and procedures have become more formal. This reflects two principal causes: firstly employment legislation has become increasingly complex; secondly, the path for appeals from the ET leads into the higher court system, and then ultimately the Court of Justice of the European Union, whose decisions are binding on the ET. Simple cases are not dealt with as quickly or as cheaply as they could be. The ET also has the opportunity to do more to promote ADR pathways. There are types of employment cases that, for historical reasons[5], can only be heard in the civil court. This can make it confusing as to where a dispute should be dealt with.

15. The theme running through this discussion document is that employment-related claims need to be dealt with flexibly, depending on their complexity and the financial stakes. It is not acceptable that individuals should be discouraged from bringing legitimate claims or from opposing them because of the cost or complexity associated with the process.

16. David Latham recommended that the ET be transformed into an Employment and Equality Court (EECt), and that the EECt would be made up of different levels. Whether the majority of Equality Act 2010 goods and services cases should be heard in the same jurisdiction as employment law is an interesting concept worth further exploration. This paper concentrates on the idea of creating a single jurisdiction within which all employment law cases could be heard. It also suggests that alternative dispute resolutions exit points should exist throughout the system. The final section poses the question as to whether this single employment jurisdiction should incorporate the majority of Equality Act 2010 goods and services cases.

17. This document suggests that if a tiered system were to be created it would work best if it were made up of four levels. Each of the levels would have different procedural considerations. In broad terms, simple cases such as handling unpaid wages claims would be dealt with on a paper basis in Level 1, while more complex cases - such as restrictive covenants and multi-strand discrimination cases - would be heard by an experienced judge in Level 4. There would be a single application point and cases would be allocated to the appropriate level. Parts of the single jurisdiction would be based on civil litigation principles, and

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434176/tribunal-gender-statistics-jan-mar-2015.pdf
[4] http://www.cbi.org.uk/media/2008906/the_right_balance_-_delivering_effective_employment_tribunals.pdf
[5] Page 9.

other sections would remain true to the tribunal principles of simplicity and accessibility. ADR exit points would be available throughout the system.

18. We hope these ideas stimulate discussion and believe that they can achieve significant improvements to the system for all users.

Question 1.1
What are the benefits and disadvantages of having a single jurisdiction within which employment disputes are resolved?

Employment law - betwixt and between the tribunal and the civil court

19. *"Our courts system is complicated and - in places - confusing, because it has developed over 1,000 years rather than being designed from scratch."* Structure of the court system, Courts and Tribunals Judiciary website.[6]

20. When tribunals were first created it was envisaged that they would be a non-legal forum in which people could represent themselves. The reality is that over time many tribunals have become more formal and are now bound by complex rules.

21. ET cases can be heard by a single judge, but some are heard with two non-legal members sitting alongside a judge. This reflects the original concept that decisions in the ET were to be determined on an understanding of industrial practice as much as employment law.

22. Most employment matters are heard in the ET, although a significant minority are heard in the civil court. Historically this derives from the concept that where the employment relationship is governed by contract law it should be heard in the courts, while employment rights that are based in statute should be decided by the ET. In practice, the ET does consider some contractual claims, while the courts can also deal with a few statutory claims.

23. Examples of claims heard in the ET are:
    - unfair dismissal;
    - discrimination;
    - equal pay; and
    - claims related to the deduction of wages.

    The main types of employment cases that go to the civil court are:
    - contractual breaches relating to non-payment of wages and benefits;
    - restrictive covenants; and
    - wrongful dismissal claims.

24. The courts and the ET have different procedures and decide cases in different ways. This can be confusing for both claimants and respondents. The two paths are not, as is sometimes assumed, related to the complexity of the law. Nor are the two paths related to the size of the claim. The ET cannot make awards of over £25,000 in breach of contract claims, but has the power to make unlimited awards in other areas such as discrimination[7].

25. These parallel tracks for resolving employment disputes have developed through evolution rather than by design. When the industrial tribunals were established in the 1960s they heard a very limited number of disputes. They were not equipped to deal with the more legal aspects of employment disputes, such as restrictive covenants and breaches of contracts. At that time it made sense that some employment matters would be heard in the court. Over the years, as employment law has developed, and more employment rights have been codified, the ET has developed a wide jurisdiction, including powers to impose financial penalties.

[6] https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/court-structure/
[7] https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2014

Many of the matters that the ET considers are legally complex, for example transfer of undertakings disputes.

Should there be an employment court?

26. In structural terms the ET operates in isolation. It is neither part of the civil court, nor is it incorporated into the first-tier tribunal system. The Tribunals, Courts and Enforcement Act 2007 brought all the individual tribunals together under a unified structure - except for the ET, which is referred to as a "separate pillar". Sir Andrew Leggatt - whose 2001 report "Tribunals for Users: One System, One Service" was translated into the 2007 Act - recognised that the ET dealt with many legally complex and highly charged cases:

    "*There was, however, an overwhelming consensus in the consultation responses that ET cases were becoming progressively more difficult for the unrepresented users to prepare or present their cases in most of those which involve allegations of discrimination, or points of European law (particularly that relating to the transfer of undertakings).*

    There are also cases where it is unrealistic to expect unrepresented parties to maintain the detachment required of an advocate presenting a case. An obvious example is allegations of sexual harassment in discrimination cases."[8]

27. Leggatt put forward the idea that there should be *"... a formal system of tracks separating cases by weight and complexity...*" He also aired the view that "*the current division of jurisdiction between the ETs and the courts was anomalous"*. His report stated that there was a good case for the ET to be responsible for all employment law related matters. The government agreed to the ET having a special status between the first-tier tribunal system and civil court, but did not have the time to consider the proposals Leggatt made around jurisdiction.

28. Since Leggatt made these observations in 2001 employment law has continued to expand in scope and complexity. The view that all employment law matters should be heard in one jurisdiction is worth revisiting.

29. Leggatt believed that this single jurisdiction should be a tribunal, rather than a court. His reasoning was that:

    "One of the defining characteristics of the ET is that it has wing members who bring experience of both sides of industry... Tribunals' other great strength is that their procedures should be simple enough, and hearings informal enough, for users to represent themselves... Indeed, making ETs into courts would be likely to mean more lawyers and so more complexity; and in a self-perpetuating spiral, more complexity means more lawyers."

30. The counter argument is that a single employment jurisdiction would be best if it existed as part of the civil court system[9]. This is because it would not make sense for employment matters that have their basis in contract law, such as restricted covenants, to be separated from the civil justice system.

[8] Tribunals for Users: One System, One Service - Report of the Review of Tribunals by Sir Andrew Leggatt.
[9] 64% of employment lawyers believe an Employment Court would be an improvement on the current system. Employment Lawyers Association Survey - April 2015 - (pg4).

31. This does not mean that all aspects of an employment court would be beholden to civil court processes, or that the best aspects of tribunals would be jettisoned. Civil court rules and procedures, including costs, would only apply to those cases that are currently heard in the county court. This means that the process by which such cases are decided would remain the same. The difference is that the judge would be an employment law specialist and that these cases would be dealt with within the single employment jurisdiction.

32. The debate around whether the ET should become a court or not is a finely balanced one.

Question 1.2
Should the single jurisdiction be a court or tribunal?

How a single employment jurisdiction could work

33. Employment disputes range widely in terms of legal complexity and value. In our view, it would make considerable sense for there to be a number of different levels to which cases could be allotted according to their value and complexity, with proportionate rules and procedures applying to the different levels of claims. Our initial view is that four levels would be sufficient to cover the different types of case.

34. Levels 1 and 2 would provide an informal, swifter and therefore a less expensive way to resolve disputes that involve simple facts and no new issues of law. The requirement for documentation would be simpler and the hearings conducted in a less formal manner. Judges could take a more inquisitorial approach in order to obtain the necessary evidence upon which to make a decision. For certain types of cases judges could make decisions purely on documents provided by the parties with no need for representation. This would make the ET/employment court (ECt) simpler for those who cannot afford legal representation. For example, a worker who has not been paid their last month's salary could enforce his or her statutory rights simply on the documentation. As the system currently operates many workers in these types of situations are unable to do so.

35. Levels 3 and 4 would be more formal and legalistic. Level 3 would operate in a similar way to the ET - the main difference being that Level 3 would promote more ADR exit points. The option of having lay members alongside the judge would continue. Level 4 would operate like a civil court for those cases that are currently heard in the courts. Level 4 would ensure that employment matters such as high value breaches of contract claims, declaratory relief and breaches of restrictive covenants would be determined by judges with employment expertise. As Level 4 would be able to operate as a civil court it could award costs in those cases that would traditionally have been heard in the civil court. Not all cases that are heard in Level 4 would attract costs.

36. Moving to the four level system would present some logistical challenges to HM Courts and Tribunals Service (HMCTS) and some refocusing of the role of the employment judge. We believe the challenge this would present would be worth overcoming, to create an ET/ECt structure that would be fit-for-purpose for many years. Much of what is proposed could be implemented within the Employment

Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the 'Rules')[10]. For example, early neutral evaluation (ENE) could happen during the preliminary hearings where the current Rules require judges to encourage the parties to resolve their disputes by agreement. HMCTS is currently considering the provision of information technology in courts and tribunals. Modern technology will help the four tier system to be efficient and effective.

37. ADR would be available and encouraged throughout the system.

[10] http://www.legislation.gov.uk/uksi/2013/1237/schedule/1/made


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Diagram of the single employment jurisdiction
Court of Appeal
It is worth considering whether some level 4 cases should go straight to the Court of Appeal.
Employment Appeal Tribunal
All appeals from levels 1 - 4 will go straight to EAT.
ADR
4 LEVEL
Highly complex and very high value claims.
Hear cases under civil litigation principles.
Costs attached to some cases.
3 LEVEL
Most matters currently heard by the full ET.
Parties to have option of early neutral evaluation.
Strongly promote alternative dispute resolution (ADR).
2 LEVEL
Straight forward matters, though need further probing.
Judicial inquisitorial approach.
1 LEVEL
Simple straight forward matters.
Document based decision making.
Allocation Centre
Early conciliation. Workplace resolution of disputes.

Allocating cases

38. A key aspect of making the single jurisdiction work well lies in the allocation of cases. To make it easy for members of the public to navigate the ET/ECt there would be a single entry point. Cases would then be allocated to the appropriate level. Broadly speaking, and as a starting point, cases could be allocated depending on their complexity and value.

39. The concept of submitting cases to a single application point, which then allocates them to the appropriate level, is already used successfully in the Single family court.

How allocation in the family court works

40. When someone applies to the family court, a 'gatekeeper' decides on the allocation of cases. The gatekeeper would be either a nominated legal adviser or a nominated district judge.

41. There is an allocation table which sets out the different types of proceedings and the level of judge to which they should be allocated. This makes it obvious for most cases where the matter should be heard.

42. The gatekeeper normally allocates the case within one working day of receiving all the relevant documentation.

Allocation in the single jurisdiction

43. The level that a case would be referred to would broadly depend on the complexity and value of the case. Levels 1 and 2 are designed to deal with straightforward cases. Some high-value cases may be straightforward, but the large amounts of money involved may add extra pressures, thus justifying determination of the case at a higher level. Complexity would arise either where the facts are disputed or uncertain, or where the law is unclear.

Appeals against allocation

44. The allocation system needs to have provision for parties to apply for a review of the decision. In the family court a party could make a request to the court to reconsider allocation. This could be made at any hearing where they first have notice of the allocation or in writing no later than 2 days before the first hearing. A party making such a request is also required to serve notice on the other party at the same time. The judge would then decide whether the case has been allocated correctly. A similar process could operate in the single employment jurisdiction.

Question 2.1
Would allocating cases according to their value and complexity, with different rules and procedures applying to different levels of claims, be sensible?

Question 2.2
How should parties who believe that their case has been allocated incorrectly request a review of the decision?

The four levels

45. Below is a description of what the different levels might look like.

Level	Approach	Types of cases
1	Document based decision making.	Simple straightforward cases, such as unpaid wages claims.
2	Judicial inquisitorial approach.	Straightforward cases, such as redundancy payments or failure to consult, that need further investigation.
3	Encourage early neutral evaluation and ADR.	Cases that make up the majority of claims currently heard in the ET.
4	Cases heard under civil litigation principles.	Employment cases which are currently heard in the civil court, such as restrictive covenants.

Level 1 - Document based decision making

46. There are a number of types of employment law cases that a judge could determine solely by looking at documentation. For example, claims dealing with the non-payment of wages, holiday pay, or the abuse of Sunday working rights. A judge could decide on the validity of the claim by looking at bank statements, pay slips, policies, and written answers to questions. This means such issues could be dealt with quickly and at a low level of cost to the ET/ECt and the parties.

47. Level 1 would operate in a straightforward way, with guidance written in plain English. It would be easy for the claimant to use.

48. Since the introduction of ET fees many of these types of cases are no longer pursued in the ET because the claimant could not afford the financial risk. Level 1 would operate in a cost effective way. This would ensure that all workers, including those on low-pay, could enforce their statutory rights.

49. The claimant would set out the relevant facts in the original claim form that had been sent to the allocation centre. It is important that clear advice is provided to claimants as to how best to fill in the forms and what evidence would be required. For the most common Level 1 cases specific forms could be created to guide a claimant's arguments. The ET would contact the respondent to ask them for their written response and evidence. The judge would be able to ask the claimant for further written evidence. For example, if it is a dispute about the amount of salary, the claimant may be able to provide bank records which show how they had been remunerated in previous months.

50. If the respondent is uncooperative, for example by not providing evidence that they could be reasonably expected to give, then the judge would be able to make

a decision based on the evidence available. If the respondent gives a good reason as to why such documentation was not available, or the judge did not feel able to make a decision on the evidence before them, then the judge could elevate the case to Level 2.

51. All levels need to be accessible to those who have low educational attainment, whose first language may not be English, or suffer from mental health issues. If the allocation centre or tribunal/court believes that the claimant may need extra help, beyond the standard guidance provided, they could advise the person to get assistance from a legal advice charity.

Level 2 - Judicial inquisitorial approach

52. Some of the cases that could be heard in Level 1 might need further investigation. Rather than escalating such cases to a full hearing they could be most efficiently dealt with by using a judicial inquisitorial approach. In most cases the allocation team should be able to assess when a matter should go directly to Level 2. There would also be some occasions where a judge in Level 1 believes that a case should be elevated to Level 2.

53. At Level 2, the judge could question witnesses and ask for further evidence. Both parties would have to provide written information about the case. This would be in line with what parties have to provide in Level 1.

54. It would be for the judge to decide who should be questioned and what questions should be asked. Parties could suggest routes of inquiry but it would be up to the judge to determine what evidence is required. Parties could also put forward their opinions to the judge at the hearing, but could not cross-examine other witnesses. As all the key arguments and evidence would have been provided in writing as assessed by the judge beforehand, it should be a shorter hearing.

55. If a judicial inquisitorial approach were adopted a new provision would need to be inserted into the Rules to set out the expectations of a judge's conduct in gathering evidence and questioning witnesses.

Question 1.3
What information and processes are needed to make document based decision making and the judicial inquisitorial approach a success?

Question 1.4
What safeguards should be put in place to make sure that Levels 1 and 2 operate well for vulnerable claimants?

Level 3 - Promoting ADR

56. In Level 3 ADR would be more heavily promoted. Cases heard at this level will be those that make up the majority of claims currently heard in the ET - for example, unfair dismissal, discrimination and whistleblowing. The main difference would be that parties would have the option of having their cases evaluated early.

Parties could choose to have early neutral evaluation (ENE)

57. At the beginning of the case parties may have diametrically opposed perceptions about the law affecting their dispute, or the weight or effect of the evidence to support their arguments. A judge, who is a neutral person with specialist knowledge, is well placed to evaluate the case. This evaluation could illuminate the strengths and weaknesses of a case, which may help the parties to decide how best to pursue the issue. It could also move parties away from unrealistic positions by managing their expectations.

58. There is a good argument that the increased use of ENE would raise the likelihood of parties settling before going to a final hearing. The Rules encourage judges to manage cases, but there is ambiguity as to what judges can do. By making ENE an explicit part of the process parties would know that judges could evaluate their dispute.

59. ENE may indicate to both parties that it is worth trying ADR. If a judge believes that the case could be best resolved through arbitration or judicial mediation they could say so.

60. ENE would happen at an early stage in the process. Parties would not be expected to provide all the evidence, such as witness statements. The claimant would set out their case in the original claim form and the respondent would respond in writing. The judge would be able to ask the claimant and respondent for further information. There might be the need for presidential guidance as to the level of detail judges can request. The parties would then have a preliminary hearing with the judge who would explore and give an opinion on the respective merits of each side's case.

61. ENE could be encouraged by having a tick box on the claim form asking whether the claimant or respondent wishes to have the matter referred to ENE. After completion of ENE, it could always be suggested that the parties go through a settlement gateway with Acas. This would give both parties the opportunity to discuss the ENE findings. As is the case with Acas' early conciliation scheme, there would be no obligation to settle or to engage in the discussion.

Question 1.5
What would encourage or discourage parties from using early neutral evaluation?

Level 4 - Hearing cases under civil litigation principles

62. The purpose of Level 4 is to allow those matters which are currently heard in the civil court to be heard within the single employment jurisdiction. This would make sure that all employment matters would be heard in a court/tribunal that specialise in employment law.

63. There would be a costs regime for breach of restrictive covenant, declaratory relief, and breach of contract cases that are above the current rate at which they can be heard in the ET - £25,000. Breach of contract cases worth below £25,000 will be heard in Level 3 and not attract costs, as is the case now. This reflects the fact that these two types of disputes are currently heard exclusively in the civil court at present and that costs awards are routinely made.

Single jurisdiction to include breach of restrictive covenants in employment matters

64. A restrictive covenant is typically a clause in a contract which prohibits an employee from:
    - competing with his ex-employer for a certain period after the employee has left the business;
    - soliciting or dealing with remaining employees or customers of the business; or
    - using knowledge gained during their prior employment.

65. If an employer has reason to believe that an employee has breached the post-termination restriction they can seek an injunction in the civil court. If the employer believes that a breach of covenant has resulted in a financial loss the civil court can award damages.

66. For restrictive covenant cases that arise solely in the context of employment, it makes sense for such cases along with cases relating to confidential information in the employment context to be heard in the single employment jurisdiction. The costs regime that currently applies in the civil court for breach of covenant proceedings would still apply.

Hear breach of employment contract claims that are over £25,000

67. The ET currently has the power to award up to £25,000 in compensation for breach of employment related contract claims and can only hear such claims once the employment contract has been terminated. Conversely, there is no equivalent limit on what the civil court can award and, unlike the ET, such claims can be brought without the employment contract having been terminated.

68. Employment judges should be able to hear uncapped breach of contract claims in Level 4, as they currently have experience in making unlimited awards in complex discrimination cases. These cases in the ET/ECt would operate in-line with the civil court..

69. As with restrictive covenants, those cases which were above £25,000 would have a costs regime. The costs regime would mirror how costs are allocated in the civil court. The default position would be that the loser pays, unless there is a conduct issue. If the amount of costs could not be agreed the ET/ECt would carry out an assessment. This would follow the Civil Procedure Rules (CPR), which hold that costs "are proportionate if they bear a reasonable relationship to –

    (a) the sums in issue in the proceedings;
    (b) the value of any non-monetary relief in issue in the proceedings;
    (c) the complexity of the litigation;
    (d) any additional work generated by the conduct of the paying party; and
    (e) any wider factors involved in the proceedings, such as reputation or public importance."[11]

[11] CPR 44.3 (5).

Question 1.6
What are the benefits and disadvantages of Level 4 cases being subject to the civil costs regime?

Alternative dispute resolution

70. Parties should be encouraged to engage in ADR. This could be done by improving awareness of the different types of ADR that are available and explaining the benefits of settling a case outside litigation. In addition to benefiting the parties, settlement of disputes also means less court/ET time, which in turn represents a saving to the tax payer. While ADR should be encouraged parties could not be forced to engage in ADR, and it may not be possible to resolve a case before it reaches a hearing.

Promoting ADR

71. Educating employees and employers about the advantages of ADR would help to alter the perception that proceeding to a hearing is the only, or best, means of seeking an acceptable remedy. Education could be improved by increasing the information on the ET website, producing short videos and podcasts which explain the options, and by providing leaflets which explain all ADR options to those who submit a claim.

72. Acas currently provides an arbitration scheme as an alternative to ET hearings, though it is hardly ever used. With the creation of a single jurisdiction, and a single point of entry, there would be an allocation framework[12] to vet and recommend suitable cases for the Acas arbitration scheme[13]. The scheme as it was originally intended was available for unfair dismissal claims and for disputes under the flexible working legislation. Allocation officers could suggest that parties use arbitration for these cases, but equally they would also be able to recommend arbitration for other disputes that are particularly suitable for resolution by this method – such as where the sums in issue are low and where both parties are unrepresented.

73. The scheme could be promoted as being speedy, informal, private and less legalistic than full hearings. Hearings could be conducted by arbitrators from the Acas panel of independent arbitrators, who are appointed on a case-by-case basis.

74. Before deciding to use arbitration both parties must be aware that under the scheme, the ET/ECt could no longer hear the claim. For this reason arbitration should only be used after both parties have had the process explained to them by an Acas conciliator, or an independent legal adviser. A revived Acas arbitration scheme would most likely be seen as an additional option available to the parties who have been allocated to Level 2 or Level 3.

Question 3.1
How can parties be best made aware of the different types of ADR that are available and the benefits of settling a case in such a way?

[12] Page 14.
[13] http://www.acas.org.uk/index.aspx?articleid=2006

Removing the barriers to ADR

75. The two main barriers to using ADR are the cost[14] and a lack of understanding or awareness of what mechanisms are available[15]. There might be a perception that engaging in ADR is in some way conceding defeat. Some view ADR as being an expensive additional burden and a less serious way of dealing with a dispute. Any reformed employment dispute resolution system must overcome these barriers.

Removing the judicial mediation fee

76. Judicial mediation in the ET was successfully piloted in 2006 and went nationwide in 2009. In judicial mediation a judge acts as the impartial mediator, trying to help parties to resolve their dispute. Nothing said at the judicial mediation can be referred to in any subsequent hearings. If the mediation fails to resolve the case the employment judge is prevented from being involved in any subsequent hearings on the case.

77. There is no discussion of the merits of the case in a judicial mediation. The role of the mediating judge is to help to identify the areas of dispute and act as a catalyst to enable the parties to reach an agreed settlement.

78. During 2012 judicial mediation was used 576 times, with a success rate of 70%. The number of judicial mediations increased until 2013, when a £600 fee was attached to the process. Anecdotal evidence suggests that the introduction of the fee has dramatically decreased take-up[16].

79. A fee has to be paid to make a claim to the ET and for the claim to be heard. Having to pay another fee for mediation when the outcomes are uncertain is off-putting. At this stage in the process the parties will have failed to conciliate, thus may need extra encouragement to enter into mediation. Removing the fee for judicial mediation would encourage those who have entered the process to consider ADR one last time before the hearing starts. The statistics show that increasing the use of judicial mediation would increase the number of settlements. This would decrease the amount of cases needing to proceed to a full hearing. If the current fee regime were to remain then parties should be able to off-set the amount they have paid for judicial mediation, if unsuccessful, against the hearing fee.

Question 3.2
What would encourage parties within the ET/ECt system to try ADR?

The Treasury should liberate public sector employers to negotiate settlements.

80. The Department for Business, Innovation and Skills (BIS) is keen for businesses and employees to use ADR to resolve workplace issues. Conversely, the government's own polices preclude public sector managers from making

[14] http://www.acas.org.uk/media/pdf/d/s/making-more-of-alternative-dispute-resolution-accessible-version-July-2011.pdf
[15] These were the two most common views expressed by respondents to the Society's December consultation.
[16] http://www.parklaneplowden.co.uk/uploads/documents/CAS%20march%202015%20Employment%20newsletter.pdf

settlements outside the ET process or from engaging in ADR such as judicial mediation.

81. Since March 2013 public sector employers have required the approval of the Treasury before trying to resolve a claim through ADR. Evidence from our members suggests that the Treasury rarely allows government departments and agencies, including the NHS, to enter into negotiated settlements. This precludes public sector managers from contemplating ADR. The result of adopting this approach means that cases which could be resolved at an earlier stage proceed to the full ET hearing, with all the extra management and judicial time commitments and cost this requires.

82. The government is the largest employer in Great Britain. The good practices promoted by BIS would have greater penetration if the government's internal policy empowered managers to reach negotiated settlements.

Employment tribunal fees

83. The introduction of fees in July 2013 has meant that the employment justice system is hard to access for those on an average income[17], and intimidating to the point of prohibitive for the poorest workers. It has been the long-term position of the Law Society that the current ET fee structure needs to be removed.

84. Creating a single jurisdiction, alongside introducing modern technology into the workings of the ET/ECt, would give the government the opportunity to create an employment system that could be run at a lower cost while maintaining access to justice. The model contained in this paper suggests how a single jurisdiction could encourage ADR, and make sure that cases are heard in the most efficient and effective forum. The government could consider whether they could make savings without harming access to justice by remodelling the ET. The fee structure could then be reviewed.

85. To lodge a claim in an ET, claimants have to pay a fee or apply for a fee remission. This has to be done at the same time as the claim is submitted. The issue fee is £160 or £250 and the hearing fee is £230 or £950.[18]

86. The government's stated aim for introducing ET fees was to get back some of the cost of running the ET service. It was not intended to be a deterrent but the reality is fees have had a big impact on the dramatic decrease in the numbers of cases going to the ET.

87. The most recent statistics from the Ministry of Justice (MOJ) show that in 2014/2015 there were 16,456 single claims received by the ET, a decrease of over 60% on 2013/14[19]. In some areas there has been an even more dramatic drop in claims. For example, there has been an 83% drop in sexual discrimination claims and a 77% drop in equal pay claims[20].

[17] The average take home salary is £1,792.27 per month. (Office of National Statistics, Annual Survey of Hours and Earnings, 2013 Provisional Results)
[18] https://www.gov.uk/employment-tribunals/make-a-claim
[19] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434176/tribunal-gender-statistics-jan-mar-2015.pdf
[20] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434176/tribunal-gender-statistics-jan-mar-2015.pdf

88. Research by the Citizens Advice Bureau found that workers with legitimate grievances against their employers are being deterred from pursuing claims in the ET following the introduction of the fee system. They found that four out of five prospective claimants are put off by fees. Just under half of those people with an employment issue would have to save for six months to afford fees of £1,200[21]. Acas have found that among the 63% who could not reach an agreement through the early conciliation process and then decided not to pursue the claim, the most frequently reason cited was ET fees - 26%.[22]

89. To make a claim of unfair dismissal or discrimination a claimant would have to pay £1,200 to take the matter to a hearing. For those on low pay, or who have recently lost their job this is a significant amount. The claimant who has been unfairly dismissed in a redundancy situation is required to bring into account the redundancy payment received when determining whether fee remission is available. The ET may order a respondent to reimburse the fee to a successful claimant, along with any award granted. However, the power to order the repayment of the fee is discretionary. The reality of whether the claimant actually receives their award in full, or in part, is another matter entirely. The latest statistics from the MOJ show that only half of ET claimants received their full award, while only 35% received any compensation at all.[23] Even if a claim is proved to be well-founded successful claimants only have a 50% chance of having their fee refunded, which in most cases would be over £1,000.

90. If the government wishes to keep some form of fee system in the ET/ECt it should base the level of the fee on the value and complexity of the claim. This would mirror the allocation process. Similar fee systems operate in other parts of the justice system. The fees for money claims[24] in the civil court are based on the amount claimed. The fees ought to be at a level that will not discourage meritorious claims.

Question 4.1
What are the advantages and disadvantages of basing ET fees on the amount claimed?

Using technology

91. The single employment jurisdiction would adopt a digital first approach to how it is run. Claimants would make a claim through an online portal, documents will be transferred electronically, video links and digital presentations could be used. There might be capacity for having an online conflict resolution tool, but further research on how such a tool may work would be necessary before implementing such a tool. Legal advisers should always be available where they are needed.

92. Using technology to make the ET/ECt work as effectively as possible matches the MoJ's modernising aims. The courts and tribunals have been much criticised for

[21] https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/four-in-five-deterred-by-employment-tribunal-fees/
[22] Evaluation of Acas early Conciliation 2015. http://www.acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf
[23] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf
[24] https://www.gov.uk/make-court-claim-for-money/court-fees

not using technology to make the justice system work better. There are few services that offer digital channels for the public, and much of the estate relies on paper based processes. The Lord Chief Justice, Sir Brian Leveson, has proposed a "profound revolution" to digitalise the criminal court system.

"Cases will all be managed on computer, information will only be keyed in once, whether by a police officer in a criminal case or by a legal executive or a litigant in person in other jurisdictions. It will then be passed down the line in a digital format, being bundled and stored electronically."[25]

93. The Rt Hon Michael Gove MP, Secretary of State for Justice, has pledged to implement Sir Brain Leveson's recommendations[26] and secured £700m to design a system where every case will be started and then case-managed online. All papers will be made stored and shared electronically.

94. The ET has a comparatively good record in digitalising parts of its process. In 2013 an online portal was created that allowed people to make a claim to the ET online. Since its introduction HMCTS has worked with users to further simplify the process, use clearer language, and to improve the logical flow of filling in the form. The process has been cut from 29 pages down to 12 and users can save a claim to complete later. The portal generally works well.

Question 5.1
What parts of the single employment jurisdiction would work better through using modern technology?

Question 5.2
What safeguarding is needed to make sure that digital processes do not disenfranchise some claimants?

Should there be an Employment and Equality Court?

95. Employment judges are already experienced in handling matters concerning the Equality Act 2010 ('Equality Act'). There are many areas of employment law that involve equality issues, for example it is unlawful to discriminate against a person in the workplace because they have one of the protected characteristics[27]. The Equality Act also gave the ET the power to make wide recommendations about the workplace in successful discrimination claims.

96. Arguably, allowing the single employment jurisdiction to have a wider range of Equality Act cases would enable a consistent jurisprudence to be developed and for the judiciary to gain expertise in all aspects. Against this, however, it may be thought that this proposal might extend the jurisdiction of the court too far. There are prohibitions on discrimination in a very wide range of areas including access to education; public services; and private goods and services. These may well involve different contexts and considerations from disputes arising in the workplace. We would be interested to hear views on whether any of these non-

[25] https://www.judiciary.gov.uk/wp-content/uploads/2015/06/pqbd-technology-keynote-240615.pdf
[26] https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like
[27] The Characteristics are age, disability, pregnancy and maternity, gender reassignment, marriage and civil partnership, race, religion or belief, sex, and sexual orientation.

employment disputes could be best dealt with by an Employment & Equality Court.

Question 6.1
Which non-employment equality disputes should the single employment jurisdiction be able to adjudicate on?

Questions for further discussion

A single employment jurisdiction

- (Q1.1) What are the benefits and disadvantages of having a single jurisdiction within which employment disputes are resolved?
- (Q1.2) Should the single jurisdiction be a court or tribunal?
- (Q1.3) What information and processes are needed to make document based decision making and the judicial inquisitorial approach a success?
- (Q1.4) What safeguards should be put in place to make sure that Levels 1 and 2 operate well for vulnerable claimants?
- (Q1.5) What would encourage or discourage parties from using early neutral evaluation?
- (Q1.6) What are the benefits and disadvantages of Level 4 cases being subject to the civil costs regime?

Case allocation

- (Q2.1) Would allocating cases according to their value and complexity, with different rules and procedures applying to different levels of claims, be sensible?
- (Q2.2) How should parties who believe that their case has been allocated incorrectly request a review of the decision?

ADR

- (Q3.1) How can parties be best made aware of the different types of ADR that are available and the benefits of settling a case in such a way?
- (Q3.2) What would encourage parties within the ET/ECt system to try ADR?

Employment tribunal Fees

- (Q4.1) What are the advantages and disadvantages of basing ET fees on the amount claimed?

Using technology

- (Q5.1) What parts of the single employment jurisdiction would work better through using modern technology?
- (Q5.2 What safeguarding is needed to make sure that digital processes do not disenfranchise some claimants?

Employment & Equality Court

- (Q6.1) Which non-employment equality disputes should the single employment jurisdiction be able to adjudicate on?