

**Briggs LJ Q&A – Civil Courts Structure Review
ELBA 18.05.16 Grays Inn**

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Opening remarks

Chapter 11 of the Interim Report is the section that particularly relates to employment lawyers.

The review started in July 2015. I was to a certain extent orientating myself until November. The Interim report was delivered on Xmas eve.

The Report was published in January with written consultation in February. May 2016 is the last of 3 months of the stage 3 consultation consisting of meetings around the Country with the public, court staff, judges and stakeholder groups. By the end of that process I will have seen 8 different Bar groups.

At the end of May the door for consultation will be shut and the Report will be written. The Report is still in draft form and feedback is very important. Work has been done on statistics. The statistical exercise as to how appeals work and what parts of the workload are currently overloading the CA will be published this week. As will a statistical study for the County court.

For the moment I have not done a similar study for ET's and EAT. I am primarily looking at boundaries.

The final report will be published in July.

The Review is only about structure. Not procedure, costs, court fees, substantive law, but it will have regard to them, including whether non-structural solutions are better than structural ones. The Report starts from the position that there will not be an increase for legal aid for civil / employment disputes. Also it has had to accept the position on court fees, the recent fee increases were to fund family and crime primarily.

Employment is on the edge of the current review, however there is much hard thinking going on. I gently favours option B. Namely bringing Employment closer to the court structure. That front-runner option is to align more closely to court structure, with a specialist employment and equality court to get a specialist judiciary to produce the right outcomes in a complicated area.

The main focus is the HMCTS reform programme. It is a partnership between judges and the Ministry. There is a £700 million plus commitment to the reforms. It is a bold programme to get the courts into IT where they have lagged behind. There is a 4-year timetable, and any leftover money will go back to the Treasury. I am only looking at the Civil jurisdiction.

The mission statement is under 4 headings:-

1. An online court for straightforward claims under 25k (this will not be a judge or lawyer -free zone.) There will be an initial automated triage process, to allow the case to be understood. A normal stage 2 of conciliation and 3rd determination stage by Judges. It is not intended to be a second class service. It will still be a court determining rights.
2. A complete digitization of processes above the line. The aim is breaking the tyranny of paper.
3. A greater use of case officers. To do routine work that does not involve the exercise of judicial skill.
4. A rationalisation of the court estate. To fewer centres. And A possible reform of means of enforcement of judgments.

The review looks at the civil system. It also considers more specialisation outside London. Too many cases currently get issued or sent up to London. The report also looks at how to modernise the divisional split between Chancery and QB. In addition how to relieve the burden on the Court of Appeal. There is a Rule Committee public consultation due to be published shortly.

Questions

Q: How would the EAT fit into the new structure.

A: There is a specific route of appeal to the CA which is not subject to a proper second appeal threshold test. The EAT will be a first appeal court from whatever replaces the ET. There is a proposal for the larger cases to have an original jurisdiction for the EAT.

Q: Access to justice and the online court. We have many litigants who may have huge difficulties accessing IT for socio economic reasons. Where is the thinking about how to avoid excluding them?

A: Lots of thinking about how to avoid that happening. There is a specific group to deal with engagement. HMCTS has a view that the current litigant in person community has a higher proportion of those who have computer literacy issues. There will have to be a means for those who are computer challenged to have access to the system. It will need to allow those with phones and tablets to be able to access the system. There will be prompts.

British Columbia is well ahead of us in this regard. Options are:

- A travelling team of helpers
- Or justice access centres, with assistance, and usually some pro bono advice

- The other option is to fund the pro bono bodies to assist. There is a large university student computer savvy body that can assist with access. The current voluntary agencies are very overstretched.
- Have had meetings with the voluntary agencies talking through at great length access issues. They are cautiously onside.

Q: If the EAT becomes a county court what is the structure?

A: They may become like a branch of the High Court, there is a model in other courts.

Q: What about wing members?

A: The general impression is that the original concept has struggled to cope with the increasing legislation such that the legal member has to deal with more and more of the work. Traditionally the High Court model would involve the wing members as assessors rather than members.

There is not currently a precedent in the court system for 3 judges. There is for assessors. However I am only looking at the boundaries. Whether the ET will move to the court system or the tribunal system.

Q: Why go towards the court system and not towards the tribunal system?

A: There is often an overlap of issues between statutory issues and common law issues. The view is that the courts are the natural place for party and party disputes. Whereas the tribunals are the place for party and state disputes.

Q: What is wrong with the status quo? There is talk of the ET being stranded outside. Not sure that the ET (or those who practice there) feel lonely or stranded. What about the option of leaving it alone?

A: The whole process of digitization and IT is backed by people thinking hard about that in the mainstream civil court system. As long as the ET is separately sponsored it is out of the loop because it is not being run by HMCTS and is in danger of being left on its own. A lot of tribunals (land registry, tax commissioners) have done well by being brought within the system. The ETs miss out on support and have taken a hit by fees. Even though the Court of Appeal have ruled it permissible, there is a clear causative link.

Uniquely among courts and tribunals that have had a fee hike, the ET has been hit the worst. Would it have happened if there had been the analysis given to other areas?

Q: Re the division between the EAT and the ET. Currently the EJs do the full range of work from £250 to 5million claims. Re the terms of reference, it seemed there was a limit to what could be recommended. Do we potentially see in the final report a firmed up recommendation as to what happens to ET.

- A: Yes there is likely to be a firmed up position in the paper. The Scots are going the other way (putting it as part of the tribunal system). Those who are considering which way the ET's in the UK are going are militating towards convergence with courts.
- Q: Assuming the ET moves towards courts. What criteria would be applied, as complexity and value don't go hand in hand.
- A: Have not formed a view as yet. There is scope for the stage 3 cases to be sent to a specialist judge. If you have big centres with scope for specialisations, there is much more scope for expert determination. The stage one triage may be challenged by doing that.
- Q: There is high degree of value in the case management process in ET's to understand what the case is about. Not having that specialist input may make it difficult for that to happen.
- A: There is a practice in the county court of calling in the parties for early evaluation. The stage 2 conciliation may assist in that regard.
- Q: At early case management stage the judge will often give a view as to the merits and steer. Often a case gets knocked into shape by that.
- A: Have to look at the economics of it. If a judge can get through even 5 or 6 cases a day. A huge saving can be achieved.
- Q: I understand that the driver is the technology is to take advantage of the spend but it is worth bearing in mind that there was meant to be a system outside the courts.
- A: The view is that that has now passed shelf life. Now intensely legalised. Not necessarily viable.
- Q: Important to bear in mind is that the small holiday claims have largely disappeared. They might be dealt with under court regime. A lot of what we deal with in tribunal are complex discrimination claims. Can't see how an online system can deal with the subtle determination of discrimination.
- A: Those who are litigants in person will be assisted by a triage process. No intention to bypass hearings.
- Q: Even accepting not online determination. There will still be a need to online documents and evidence.
- A: Currently documents are often problematic. The new system should be better than coming to court with a lot of documents in plastic bag as sometimes currently happens. You may need to scan documents, but that is feasible.
- Q: When the claim is lodged online. What is the timeframe for submitting the evidence?
- A: Don't know as yet. Cannot believe there will be as single rigid time limit. The online court concept helps get matters uploaded at the start.

- Q: I am happy to help with drafting. Question. Worry is that the ET becomes part of county court now and there is a costs regime introduced soon.
- A: Re Drafting, if anyone wishes to assist, do pass on their details and they will be logged as willing to assist. Re costs, there will be huge resistance in the MOJ to creating a new costs recovery regime. The move is rather towards fixed costs.
- Q: Contract claims have to go to county court. Would you be able to bring that in the ET?
- A: Fundamental to deal with that. Possibly concurrent jurisdiction.
- Q: Understand that it is financially driven?
- A: Don't know if it is financially driven. There is a perception that sponsoring by BIS is not working.
- Q: The second concern is what is the appropriate structure. Slightly concerned that the wrong question is being determined first.
- A: The review is only making recommendations about courts. Simply looking at the boundaries. If the decision is to converge the system it is likely that digitization will have consequences.
- Q: An attraction for litigants of convergence is to put all of the issues before the same judge. Wonder if you could explain how that would work with employment claims with personal injury and with defamation claims which often arise in parallel.
- A: My feeling is that we should be able to have system where the whole of the disputes between the parties to be dealt with before the same judge. Challenge to system should be able to provide a single route.
- Q: The concern of many is that by merging you lose the experience and benefit of what the ET is good at. Dealing with LIP's. Dealing with low value claims of complexity. What you have is a system that works with working with the average person. Is successful in a way the court system is. If going to digitize that process and do it online etc. you should use as a template the good elements of the ET. The fear is you jettison the good of the ET and the way around that is to try and work out what is good about the ET and hold on to that. Should we not 'tribunalise' the courts not the other way around.
- A: That is very much the thinking. The civil courts have a lot to learn from the ET rules. I don't see convergence as squashing what the ET do. Not part of the objectives. Cross-fertilization to good effect has happened in chancery and family. There is starting to be convergence between ET Judges and civil judges.
- Q: I regularly rep the Met Police. I have case worth only about 25k for 15 days. If only going to get 2 days to hear that then that is going to be a different beast to how dealt with now.

A: How is that funded? [There followed a discussion of funding and self-representation in the Tribunals.]

Only commenting on boundary issues. Will be saying that the ET is slightly anomalous.

Q: I think it is very important that those considering the ET's bear in mind the huge normative effect of matters determined in Employment Tribunals, and not regard their importance merely in financial terms. The legislation about which determination is made in the ET includes race, sexual orientation, disability etc., which have far reaching effect. The ET provides a tribunal where determinations about the overlap and effect of those matters are carefully determined by experienced lawyers and skilled judges. A case that might not be worth £25,000 in monetary terms may have far reaching consequences in terms of discrimination. [example given of the boundary between the rights of LGBT workers and orthodox Christians who believe homosexuality to be wrong, in the work place]. A conceptual ring fencing needs to be clearly in the minds of anyone determining reforms given the importance of such issues.

A. Can see that is important.