Further Submission of the Employment Law Bar Association

on the Civil Courts Structure Review

Further to an extremely informative Q&A session with Briggs LJ on 18 May 2016, the Employment Law Bar Association (ELBA) wishes to submit these further brief observations in respect of the proposal to integrate the Employment Tribunals (ETs) and Employment Appeal Tribunal (EAT) into the civil court structure. We do not repeat points made in ELBA's previous submission to the Review.

We understand that the remit of the Review is to consider the 'boundary' question of the appropriate home for the ET/EAT. It is not intended to make detailed proposals as to the future design of an Employment Court. We also understand that the fate of the ETs and EAT are not central to the wider reforms contemplated by the Review. However, given the high profile of the Review among policy makers and the legal community, it is inevitable that the Review's Final Report will be influential in any further consideration as to the future of employment dispute resolution. We make these further observations to emphasise the extent of the complex and difficult questions of policy, principle and practicality which will necessarily require further consideration if a decision is taken to integrate the ET/EAT into the civil court structure. We urge caution and restraint in any recommendations that the present Review may make about the future of the ET/ EAT which may limit or set the tone of any further consultation.

As to the boundary issue itself, if funding and stability of resourcing were a neutral issue, ELBA would not be convinced of the case for integrating the ETs and EAT into the civil court structure, rather than retaining their separate structure. If the ETs and EAT are not to retain their separate identity, we favour a move to the civil court system, rather than to the Tribunal system.

If the ET/EAT are to be moved we highlight the following important questions that would require further careful consideration:

(1) How would the new system ensure that the valuable body of specialist knowledge and experience of Employment Judges is not lost or dissipated?

(2) How would the new system ensure that good practices which have developed over the decades in the ETs are not lost or overwhelmed by the dominant culture existing in

the civil courts (for example the usually effective process of ET case management through which the claims of litigants in person are clarified with the assistance of an experienced Employment Judge at one or more case management hearings)?

(3) How would the system ensure the maintenance of the deep understanding of the importance and requirements of discrimination claims that has been built up over decades within the ETs?

(4) How to delineate the categories of claim that would fall within the jurisdiction of an 'Employment Court' within the civil court structure: which claims (if any) currently heard within the civil courts would be brought within the purview of the 'Employment Court' (e.g. claims for injunctive relief in respect of industrial action, restrictive covenants or disciplinary/capability procedures; negligent reference claims; claims about harassment in employment under the Protection from Harassment Act 1997; high value contractual claims arising from employment contracts; etc)?

(5) Whether and how to align the different existing costs and fees regimes of the ETs/EAT and civil courts: are civil costs rules to be introduced for the first time in respect of claims by workers seeking to enforce important employment and/or discrimination rights currently within the jurisdiction of the ETs/EAT? If so, will the fees regimes also be aligned? Or is the current ET/EAT regime to be adopted in a new 'Employment Court' and applied to claims currently within the jurisdiction of the civil courts?

(6) Will defendant employers to any claim in an 'Employment Court' be permitted to make counterclaims in circumstances where presently they would not be able to do so (because counterclaims can only be made in the ETs for breach of contract, and then only if the claimant has him-/herself brought a contractual claim)? If so, will that not enable unscrupulous employers to threaten costly counterclaims to deter claims against them in a way that is not possible at present? If not, would that not be contrary to the principle of efficiency of justice by requiring separate proceedings? What costs/fees regime would apply to any counterclaims and how (if at all) would that vary depending on the cause of action of the counterclaim?

(7) What impact will decisions on all of these questions have on access to justice for employees and workers in respect of their important employment and discrimination rights? How will such access be maintained (and/or restored)?

(8) Will the role of lay members (who at present continue to play an important role in the sensitive and inferential fact-finding required in discrimination cases) be maintained or replicated in an 'Employment Court' within the civil court system?

(9) If employment disputes are to be brought within the 'online court' proposals of the Review, how will access to justice be maintained for disabled and socially/educationally disadvantaged litigants, who form a significant proportion of ET users?

(10) Will an 'Employment Court' within the civil court system maintain two tiers, equivalent to the current ETs and EAT? Will the higher tier be given a first-instance jurisdiction for the first time? If so, how will the first instance jurisdiction of the higher tier be distinguished from that of the lower tier, bearing in mind that complexity and monetary value of employment cases often do not correlate? Will higher tier judges thus be expected to hear multi-week discrimination claims currently heard (successfully) by Employment Judges sitting with lay members? Will first tier Employment Judges with long experience of more complex and/or high value employment/discrimination claims cease to hear them?

ELBA does not pretend to have answers to all of these questions at this stage, but we hope that identifying them illustrates the level of complexity and difficulty that will inevitably be entailed any process of integration between the ETs/EAT and the civil courts. We therefore hope that if the present Review remains minded to recommend the integration of the two systems, it will nevertheless sound an appropriate note of caution and identify the extent of further work required before any final decision, let alone any action, is taken.

ELBA Committee

2 June 2016