Introduction

These comments are submitted on behalf of the Employment Law Bar Association ("ELBA"). ELBA represents those at the Bar who specialise in Employment and Discrimination Law. Whilst individual practices inevitably find different balances, almost all ELBA members will practise both in the tribunals (i.e. the Employment Tribunal ("ET") and Employment Appeal Tribunal ("EAT")) and in the civil courts.

Comments

As the Review deals briefly with the question of the future of the ET and EAT we have sought to follow the example and keep our comments succinct.

(1) **We believe that if the ET is to be found a new home it should be with the Civil Courts rather than the Tribunal.**

Not infrequently employment termination disputes will give rise to a number of potential claims some of which fall within the Tribunal's exclusive jurisdiction (e.g. discrimination and unfair dismissal issues); some of which could be considered in either the ET or the Court (e.g. equal pay, unpaid salary and wrongful dismissal) and some which may only be considered by the Court (e.g. injunctions restraining breaches of contractual post-termination restraints). The division of jurisdiction leads to unnecessary complexity and can produce delay and substantial duplication of costs.

(2) **We think that care needs to be taken to ensure that the specialist skills of the Employment Judges are properly utilised.**

In practice, the ET has long since evolved from the informal resolution body that was originally envisaged into an employment court. The volume of Employment Law and its inherent complexity has led to the need for and development of a highly-skilled and knowledgeable employment judiciary. Employment Judges have frequently to consider legally and factually complex cases, heard at trials whose length is measured in weeks and where compensation claims are valued in the millions of pounds. They must wrestle with and master the inter-relation between Domestic Law, European Law and European Human Rights Law. The subject matter of cases runs from a simple redundancy termination through to whistle-blowing cases that require a detailed understanding of the operation and regulation of international money markets. In particular, they have experience of the application of the principles of Equality Law that is, we have found, unmatched in other courts.

We would be very concerned if aligning the ET with the Civil Courts were to lead to Employment Judges being reserved for use in less complex cases. That would be a tremendous waste of their abilities.

(3) **Any proposal to align the ET with the Civil Courts would have to review the fees regime**

This week the Supreme Court gave permission to appeal in the judicial review of the imposition of ET fees. ELBA considers that the present regime has erected substantial barriers to access to justice. The cost of access to a civil employment court would need to be addressed specifically and with considerable care.

(4) **We have reservations about the use of an online court**

We see the attraction in online definition of issues and, perhaps, their online resolution. We think any form of state resolution of disputes should reflect at least the following principles:

(a) It should not, because of its mode of or cost to access, disproportionately deter those with good claims from pursuing them;
(b) The decision-maker should have properly identified and properly analysed the issues; and
(c) The parties should feel they have been heard.

We have referred to the problem of cost of access above. However, we would like to say something about mode of access. The online court requires, if it is to be used by unrepresented litigants, access to technology and at least a basic understanding of its use. Our experience of claimants in the ET suggests that that should not be readily assumed. Many claimants do not have the financial resources to access online services directly. Many have a disability that may make it particularly difficult and many will not have English as first language. Even if those barriers either did not exist or could be straightforwardly overcome, we are concerned that the expert diagnostic system that is envisaged to help identify claims is very much easier to propose than to build. The ET already permits litigants to commence their claims online. Our experience has been that despite the clarity of the form and the availability of guidance in plain English, it is very often necessary to put considerable further work into clarifying claims and issues. We are concerned that unrepresented litigants in employment cases should not be required to use an online court until it has been satisfactorily established that it is capable of ensuring that it does not create additional barriers to access to justice.