The future of the employment court

ANDREW BURNS QC and MATTHEW SELLWOOD, Devereux Chambers

In September, Devereux hosted a packed seminar on the potential new Employment and Equalities Court. Mrs Justice Simler DBE, Paul McFarlane from ELA and Andrew Burns QC, the co-author of this article, outlined the proposals for reform of the employment tribunals within HMCTS.

Keen readers of *ELA Briefing* will recall the article penned in these pages only a few months ago by the President of the Employment Tribunal, Judge Brian Doyle (July 2016). His view was that now was the time to move to a single Employment and Equalities Court.

ELA's recent consultation of its members revealed significant support for such a move, with 64% of those who responded feeling that, in the context of a post-fees tribunal, a single employment court was the best way forward.

At the outset of a debate involving an audience of partners and senior employment lawyers from firms across the sector, Mrs Justice Simler confirmed that the status quo is not an option. This was clear from the Government's ongoing justice reform programme and the final report of Lord Justice Briggs. The September paper from the Lord Chancellor, the Lord Chief Justice and the President of Tribunals, 'Transforming Our Justice System', emphasised that change is approaching in a number of areas that will have an impact on employment lawyers.

These areas include rationalisation of the court and tribunal estate, enhanced IT infrastructure and online case management systems, delegated decision-making by case officers, more flexible deployment of the judiciary and an 'online court' for the resolution of less complex disputes. What is more, the available information strongly suggests that such innovations will be introduced across a civil justice system that will include the present employment tribunal. Therefore its present status as a unique 'third pillar' of the justice system (described by Lord Justice Briggs as a 'rather lonely existence') will not last.

Once the floor was thrown open to questions, answers and opinions, a wide range of employment lawyers expressed both positive and negative opinions in relation to the reforms proposed by the Government and the judiciary. Participants agreed that an outline of the discussions should be published, to encourage a wider debate and early engagement by the profession with those responsible for implementing these radical proposals.

Co-locating tribunals

The co-location of tribunals within existing civil or criminal court buildings is not just a proposal, but is already a reality in locations such as Bristol, Southampton, Huntingdon, Bodmin and Liverpool.

In Southampton the tribunal shares a side entrance to the magistrates' court with the youth court. It has no office or proper reception, and the waiting areas allow for little privacy for case conferences before and after hearings. The hearing rooms vary in size from the snug to ones that are significantly larger than a standard tribunal room, with all the challenges that come with such changes in dimensions.

Liverpool tribunal is a good example of positive co-location, featuring a dedicated area on the top floor of the civil and family court with an accessible administrative office and a number of useful waiting rooms. What is more, the tribunal rooms are comfortable and a sensible size.

As tribunal leases come to an end (including, it was suggested, in Central London) further co-location is inevitable and there are already proposals for courts to move to tribunal premises in Bedford and Watford. It will be necessary to address the logistical problems associated with such moves.

One example was the unedifying spectacle of an employment judge having to contact administrative staff in a different city via his own mobile phone. Another was

'co-location could present a real opportunity for improvements in terms of facilities, access to court wi-fi and better entrance security'

the use of unsuitable hearing rooms, such as sensitive discrimination cases being heard in traditional criminal court rooms with judges and members seated above the parties and the intimidating presence of a secure dock. Nervous claimants having to share facilities with users of criminal courts could pose a barrier to access to justice, but co-location in HMCTS buildings with appropriate hearing and waiting rooms could present a real opportunity for improvements in terms of facilities, access to court wi-fi and better entrance security.

Delegated decision-making

The principle of delegated decision-making by case officers rather than by judges appeared to be regarded by many as a *fait accompli*. Mrs Justice Simler pointed out that such a system is already working effectively at the EAT where the registrar takes many preliminary and administrative decisions, and other attendees pointed out that the First-tier Tribunal (Tax Chamber) has already piloted such a scheme at first instance.

The practicalities of ensuring that the proposal works in practice were discussed; in particular, the necessity for significant investment in online case management and IT infrastructure before delegated decision-making or remote administration could work effectively. At present, the only digital process is the submission of ET1 and ET3 forms after which everything is conducted through paper files – both in the employment tribunal and EAT.

Close judicial supervision of case officers is vital, and it would be prudent for such officers to be co-located with at least some members of the judiciary for that reason, rather than all case officers being located in one central administrative hub, remote from the hearing centres.

Digitalisation

While it is easy to be cynical about the prospects of digitalisation, both the crown court and Rolls Building schemes for online case and document management appeared to be working effectively. The crown court now uses a digital case system in which all pleadings, documents, applications and letters are uploaded by the parties to a single online storage area.

'DCS' is already used in most preliminary and case management hearings and some simple trials. Lord Justice Briggs stated recently that DCS now has 17,000 users adding more than 500,000 pages each week. PCU wi-fi was installed in all crown courts so that clients and legal representatives can access the DCS in court, albeit with some teething difficulties. However, given that all tribunal case files are still only on paper and most tribunal buildings cannot provide wi-fi at this stage, there is clearly a long way to go in the employment setting.

Online case management is crucial for employment tribunals to move properly into the 21st century, regardless of any other reforms. The current paper files are cumbersome and lead to slow decision-making. However, too rapid a push towards a 'digital by default' approach has the potential for serious detriment to the disabled, elderly and vulnerable. It is vital that the Government be reminded of the barriers to justice which may be faced by those who find it hard to access online or electronic services.

The more radical option of virtual hearings (by video link as well as existing telephone hearings) has been proposed as a way of saving time and expense on courts and hearing rooms. Although the advantage of conducting a hearing from the comfort of the office desk had its attractions, many commented on the drawbacks of poorly functioning technology and the delays and confusion that video links can create.

If all parties were on video at a hearing with evidence, that would require everyone to have adequate size screens and compatible software. There would be special challenges in running discrimination claims where the drawing of inferences from all the evidence can be vital or even more acutely where the claimant's disability posed a real barrier to using electronic or digital systems effectively or at all. It was thought that virtual hearings would normally only be suitable for procedural or preliminary hearings and then only once it was ensured that reasonable adjustments had been put in place for those who would otherwise be denied access to justice.

Single employment court

The idea of a single employment court received broad support, with concern largely focused around the preservation of the no-costs jurisdiction for statutory employment claims. One proposal is for a multi-track 'Employment and Equalities Court', with simple cases being dealt with online or by a virtual hearing; main or fast track cases being dealt with by an employment judge in a no-costs forum; but the most complex or high value cases being heard by a EAT or High Court judge, potentially with a different costs regime.

'another round of radical change is approaching the profession'

The suggestion that a judge would 'triage' the case at a preliminary stage to allocate it to an appropriate track raised the prospect that a claimant bringing a complex and valuable claim could be placed into the top track and face a costs award if the claim is lost. The ability of claimants to bring claims would be further eroded should costs, or even the prospect of costs, be introduced. Several solutions to this were mooted, including a system similar to that in operation at the First-tier Tribunal (Tax Chamber), in which litigants are able to opt out of the no-costs jurisdiction even in more complex cases. One downside of the multi-track proposal is that this could lead to a surfeit of satellite litigation in the future as parties argue over which track is most appropriate.

While the need for amending legislation means that a single employment court seems some way off, it should be noted that it is not just in terms of co-location that the courts and tribunals are becoming integrated already. Employment judges are starting to be retrained and redeployed as district judges in the county court as part of a flexible deployment pilot aimed at balancing the level of work available throughout the courts and tribunals service. Whether this will lead to a dilution of employment expertise, or bring beneficial new approaches and thinking into employment tribunal cases, remains to be seen.

Timeline of reforms

Finally, there is of course the outstanding question of when and which of these reforms will occur. As Mrs Justice Simler pointed out, although the single employment court is not likely in the immediate future, many of the other reforms mentioned above are likely to be brought forward with significant speed.

Within the next few months Parliament may be looking at draft legislation based on the Briggs Report, but he has left final proposals for reforms to the employment tribunals to 'others with more expertise'. The responsibility for employment tribunals currently lies with the Department for Business, Energy and Industrial Strategy rather than with the Ministry of Justice and they are already in discussions about how reforms should be taken forward with a working party, to include ELA and ELBA.

It was also pointed out that legislative reform might depend on the outcome of the long-awaited report on the impact of employment tribunal fees. Either way it appears incontrovertible that another round of radical change is approaching the profession and early engagement in these proposed reforms could help to steer them in a direction which is more beneficial to effective and efficient dispute resolution.

ela PRO BONO INITIATIVE: The 100 Days' Project

The 100 Days' Project was launched in spring 2010. We are delighted with the response to the project, but we are always looking for more ELA members to pledge a day (or more) of pro bono assistance, either via a day's advocacy or a day's casework. The aim of the ELA 100 Days' Project is to match those ELA members who would like to get advocacy and more hands-on employment tribunal experience with deserving cases for unrepresented parties, often struggling with a lack of knowledge and expertise. Our selected list of pro bono agencies refer suitable cases to ELA which we then send out to our 100 Days 'pledgees'. We aim to complete 100 days of pro bono work a year through the project and filled 151 days in its first two years.

Please email 100days@elaweb.org.uk if you would like to be added to our database of 'pledgers' for the 100 Days' Project.