Employment

All change at the Employment Tribunal?

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Employment lawyers, as well as their clients, might well be forgiven for hoping that the only change on the horizon in regard to the system of employment litigation would be clarity as to the status and effect of Tribunal fees. In this age of rapidly changing legal trends, however, it appears that they will have no such luck. Not only has such clarity yet to emerge, but many other potential changes have begun rapidly to drift into view.

In response both to a suggestion by the President of the Employment Tribunal that the time may have arrived for single Employment and Equalities Court, and to various consultations carried out on the future of the court system, Devereux Chambers hosted a seminar in early October 2016 on the changes which Tribunal users could expect to experience over the coming years. Featuring the President of the EAT (and former Head of Chambers), Mrs Justice Simler, the discussion was wide-ranging, and full details of it can be found within an article penned for the Employment Lawyers' Association Briefing (click here to view).

Delegates discussed the likely rationalisation of the tribunal estate, enhanced IT infrastructure and online case management systems, delegated decision-making by case officers, more flexible deployment of the judiciary and even an 'online court' for the resolution of less complex disputes. All of this was discussed in the context of the civil courts within the final report of Briggs LJ (click here to view). Whilst Briggs LJ expressly declined to reach a firm conclusion about the applicability of such measures within the employment context, he described the Employment Tribunals as living a 'rather lonely existence'. There were strong hints that the employment tribunal's unusual position as an independent 'third pillar' of the justice system – neither fully in the tribunals service with public law claims nor in the Courts system with other civil disputes - was coming to an end.

The two Government departments responsible have moved relatively quickly to put forward proposals about how reform of employment litigation could be implemented in the relatively short term. The New Year saw a joint consultation from the Ministry of Justice and the Department for Business, Energy & Industrial Strategy, straightforwardly named "Reforming the Employment Tribunal System" (click here to view).

Due to the alarmingly brief consultation period when bearing in mind the festive period (the consultation was issued on 5 December 2016 and ended on 20 January 2017), ELA and others have had to be quick on their feet to address the questions raised. The opportunity to formally comment has now passed – but the document is nevertheless revealing when seeking to understand the Government's intentions.

As predicted at the October 2016 seminar, proposals for digitisation of the claims process and the eventual introduction of an online court remain very much 'front and centre' of the Government's thinking. The rationale is put somewhat controversially in the consultation: "overall, Employment Tribunals and the Employment Appeals Tribunal have not kept pace with the drive towards simpler justice seen in other tribunals". Although that premise is perhaps false, it must be admitted that the system whereby nearly all employment tribunals claims are lodged online, but then everything is

immediately printed out for a paper file is absurd. It is proposed to digitise the entire process of pursuing an employment claim until a face-to-face hearing. Any practical system which makes file management by the employment tribunal staff must be welcomed as inefficiency and ineffective case handling is all too common at present. Further, the Government wishes to explore whether "some cases might be suitable for online decisions". Whilst the consultation explicitly agrees with the view that "whilst some simple wage claims might be suitable for alternative approaches, complex claims such as discrimination would be wholly unsuitable for online determinations", it nevertheless appears very likely that some claims will eventually be determined online. If online determination of simple wage claims means that the prohibitive fees on such claims is removed, then it might be thought that some justice is at least better than a denial of justice.

The Government is also keen to find efficiencies within the current Tribunal set-up, and to rationalise processes where they differ from the rest of the court and tribunal system. For that reason, rule-making for the Employment Tribunal is proposed to be put into the hands of the Tribunal Procedure Committee (a move, it might be thought, which runs contrary to any drive towards a single employment court and aligns it with the tribunal service. The revised ET Rules have been broadly welcomed by practitioners so it seems unlikely that this committee would envisage wholesale change, but the consultation proposes that an Employment Judge and practitioner bolster the committee membership. Of greater concern is the proposal that some procedural decision making is to be delegated to 'trained' caseworkers. As was raised by a number of delegates to the October 2016 seminar, whether such a move is advisable will largely depend on the quality and training of the caseworkers and whether they are supported to make sensible and rational decisions at an appropriate level. It seems to be a step away from the Courts' approach which revolves around early and ongoing judicial case management. The Government proposes more 'flexibility' in the composition of Employment Tribunal panels, a move which some will see as a Trojan horse for moving more cases to judge only tribunals. True flexibility would have much to commend it – if judges had proper discretion (and funding was in place) to ensure that a full panel was directed for all factually complex cases.

Interestingly, of the issues discussed at the October 2016 seminar, co-location of tribunal facilities and staff with the civil court system is not mentioned within the consultation. Given that such co-location is already occurring across the country (with notable stories of both success and failure) it would seem that the Government is simply not consulting upon them. The other notable (many would say crucial) omission within the consultation, which is disappointing and frustrating, but perhaps no surprise, is the impact of tribunal fees. All that is included within the consultation on this important issues is the now familiar mantra, namely that "we will publish the conclusions of the review in due course". A close inspection of the impact assessment might suggest that the new status quo in terms of numbers of claims is anticipated. Has the Government already decided to ignore the conclusions of its own (still unpublished) review?

Whilst it is to be hoped that the Government will not take as long to deliberate over this consultation, there is an overt acknowledgement within the document that changes to the Employment Tribunal may take time. As the Government puts it: "many of these reforms cannot be delivered under the current primary powers… we need to make some changes to the legislative framework". Even the proposed changes (never mind the more radical proposal for a single Employment Court which appears now to be in the long grass) require amendment to the Employment Tribunals Act 1996. The consultation paper seems to view this as an unnecessary inconvenience rather than statutory safeguarding of the standard of justice required to adjudicate disputes about what for the vast majority of working people Is the most important contractual or legal relationship in their life. The consultation paper concludes that "Employment Tribunals and the Employment Appeal Tribunal are likely to be amongst the last major tribunals to be fully reformed". It seems that employment lawyers will continue to have plenty to discuss over the coming months – and years.

Andrew Burns QC specialises in complex commercial, employment and industrial disputes, particularly injunctions. He has featured in some of the leading appellate cases in insurance, employment and trade disputes in recent years. Having served as a member of a disciplinary panel for a major public sector employer and a former union representative at a national charity, Matthew Sellwood has experience of employment law from the perspectives of both Claimant and Respondent and is establishing himself as a specialist pracititioner across all aspects of this area of law.

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