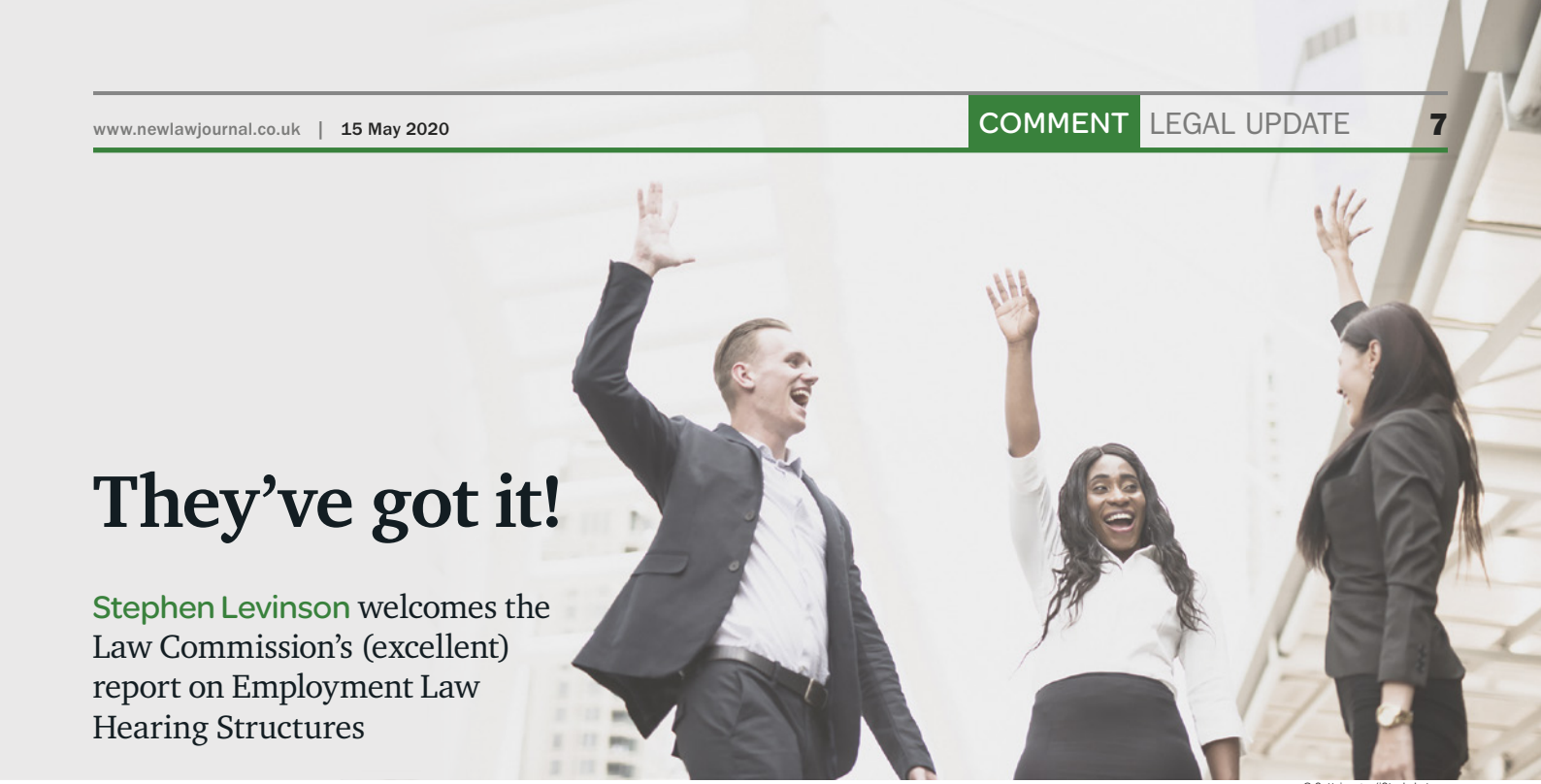

They've got it!

Stephen Levinson welcomes the Law Commission's (excellent) report on Employment Law Hearing Structures

It is a pleasure to welcome this report. Dry though the subject matter may seem it deals with issues of real practical importance. The Law Commission has not previously reported on employment law. Generally, they avoid anything politically controversial so most of the substantive law is out of bounds. This report deals with the jurisdiction of tribunals, the Employment Appeal Tribunal (EAT), and the civil courts in employment matters. It does not review the current discussions about the possible restructuring of the employment law system. What it does is discuss all of the possible changes to the structure ('Employment Law Hearing Structures: Report', (Law Com No 390), April 2020, *https://go.aws/3csG42K*).

The first thing to welcome is that the Commission clearly understand the unique ethos and role of the employment tribunal, declare what it is, and make clear they wish it preserved. This distinguishes them from all governments over the last twenty years which have shown no such understanding. The no-cost regime, relative lack of formality, a three-member constitution, relaxed rules of evidence and admission of lay representation are all acknowledged and supported. They get what tribunals are about.

The report is about reforms to the law of England & Wales, not Scotland or Northern Ireland, but representations from both those jurisdictions were considered. Without wishing to upset any devout nationalists it would be regrettable if ideas implemented, and most should be, were not applicable as far as is practicable, throughout the UK, to avoid forum shopping and advantages depending on where the case is heard.

The report of the Commission runs to some 200 pages. Of necessity, this can only be a summary of the principal recommendations. This article does not do full justice to all of the careful reasoning of the Commission, but it is hoped it will signpost areas of interest.

Exclusive jurisdiction & time limits

The Commission propose no changes where, at present, the employment tribunals have exclusive jurisdiction, as they are central to their specialist and low cost forum. Unfair dismissal, redundancy and employment, should, they say, remain where they are.

The recommendations on time limits is that all claims should be brought within six months with the discretion to extend time on a just and equitable basis. This may be disliked by some employers, but the simplicity is attractive and the 'not reasonably practical' test has generated too much litigation.

Non-employment discrimination cases

The issue here is the division of jurisdictions where all non-employment discrimination cases go to the county court and employment discrimination cases to the employment tribunal. The question is should all discrimination cases move to the employment tribunals given the greater experience in managing discrimination. The recommendation is to leave things as they are but allow employment judges with the necessary experience to be ticketed to sit in such cases in the county court for non-employment discrimination cases. Two comments are necessary. First, any such provision should not allow cross-ticketing in the other direction as most county court judges do not have appropriate experience. Second, the Commission suggest that employment judges should sit with assessors because that reflects their experience with lay members. That is to confuse the roles: lay members have equal decision making authority with the judge, assessors have no judicial function.

Contract issues

Here the law has managed to create quite a muddle. At present the maximum amount that can be claimed is capped at £25,000, the same limit that was introduced over 25 years ago. Also claims may only be made if the amount is outstanding at the end of employment. Both of these restrictions should go say the Commission. Also, the cap should increase to £100,000 and be uplifted to match any increase in the county court limit. Employers should also be permitted to counter-claim to the same extent. Note that this will enable tribunals to deal with any failures to pay under the terms of a settlement agreement. Time limits for such claims would be six months from commission of a breach if made during employment and six months from termination if the claim is brought after employment ends.

There are a number of excluded contractual claims that may not be made in a tribunal, such as for breach of restrictive covenant or for personal injury. None of these should change, according to the Commission, except any financial claim relating to living accommodation which they would permit.

One area which is very much in line with current thinking about employment status is the recommendation that all the areas of contractual jurisdiction (as extended) should also apply to workers. This was supported by 51 of 54 consultees. It would not extend to the genuinely self-employed.

After the consultation period closed judges raised the issue arising in *Antuzis v D J Houghton Catching Services Ltd*, [2019] IRLR 629, where, on shocking facts,

directors of a company were found to be personally liable for exploiting workers and inducing breaches of contract. Because this was not formally part of the consultation the Commission performed a graceful sidestep and merely 'relayed' a suggestion made by the Council of Employment judges that such claims should be able to be made in tribunals. It is anticipated this may cause considerable debate, but those who object should read the judgment in *Antuzis* to see where the impetus comes from.

Other restrictions

This section concerned other restrictions on jurisdiction. Most make one wonder at the minds that introduced them in the first place. For example, should tribunals be permitted to interpret employment contracts when considering the rules about written particulars? Should tribunals, when dealing with unauthorised deductions, be able to deal with unquantified amounts? Should tribunals be able to decide whether an employer deducted the correct amount as an 'excepted deduction'? Should tribunals be allowed to apply set-off in unauthorised deduction cases? To all of these questions the Commission answered 'yes', as did most consultees. One has to wonder why changes to these constraints have not been made already.

Equal pay & pension cases

There is concurrent jurisdiction in equal pay and pension equality cases. Claims can be brought in either the employment tribunal or the county court. There are different time limits so late-comers go to the county court. While transfers can be made the courts have prevented these happening from the county court if the tribunal time limit has expired. (*Abdulla v Birmingham City Council* [2013] IRLR 38). The questions raised were whether the time limit should be changed in tribunals and whether the concurrent jurisdiction should continue. The Commission decided not to recommend change to the concurrent jurisdiction falling back on a judicial favourite, the presumed intention of Parliament. Tribunals are easily more expert on equal pay issues, but the Commission did not want to deprive claimants of the extended time limit in the county court.

What was recommended instead was a change to the existing, limited, right to extend. This is six months after employment ends. It can only be extended if there has been deliberate concealment or in a case of incapacity. To relax this the Commission have suggested a right to extend on just and equitable grounds. On transfers the recommendation was to transfer cases to the tribunal with a presumption in favour of transfer.

On pension equality cases again a power to extend time on the just an equitable ground was recommended.

Other concurrent jurisdictions

The other areas of concurrent jurisdiction are under Transfer of Undertaking Regulations, Working Time Regulations and Trade Union blacklisting rules. Also, a 'qualifications body', which confers qualifications in professions and trades, must not discriminate (s 53 of the Equality Act). Tribunals have exclusive jurisdiction here unless there is a statutory appeal process which ousts the tribunals jurisdiction. Another slightly specialised area is that of the power of tribunals to hear complaints of discrimination by police misconduct panels even though there is also a Police Appeals Tribunal.

No changes were recommended here except to permit contractual claims for excessive working time in tribunals and to align the maximum award for blacklisting claims to the same level as for unfair dismissal and for this limit to remain in parity. One striking feature of this part of the report was to highlight the problematic record of the Health and Safety Executive in enforcing the Working Time Regulations.

Restrictions on orders

This section reviewed the idea of granting tribunals power to grant injunctions, apportionment of liability between respondents and enforcement powers.

Fairly short shrift was given to injunctions and no recommendation made. On apportionment however the Commission considered the history in detail. Tribunals had for years been apportioning liability between the employer and individual respondents in discrimination cases until, in 2011, the EAT looked a little more carefully at the law and concluded no such power existed. The result is that each respondent remains jointly and severally liable for the full sum awarded, which, in many cases, is unjust on the facts. The counter-argument is that this protects claimants in the event of non-payment by a respondent or on an insolvency. The discussion in the paper is extensive. The Commission concluded that the current system needs improvement but that the best solution was to permit respondents to claim contributions from each other, on a just and equitable basis, rather than to allow tribunals a choice between making a joint and several award or apportioning liability. They decided that retaining joint and several liability better protects claimants. It is likely, however, that such a rule would create more litigation as respondents have a go at each other. In addition, the Commission suggest that such contribution claims should be allowed against non-parties. This is an area that will cause considerable disagreement.

The Commission also made recommendations that government investigate the creation of a fast-track mechanism and other improvements to enforcing awards to address the clear fact that the current enforcement of awards is unsatisfactory. Perhaps one of the most anomalous facts is that at present a claimant does not pay a fee to bring a tribunal claim but has to do so to enforce the judgment in the county court.

The Employment Appeal Tribunal & a special list in the High Court

The jurisdiction of the EAT was considered in relation to appeals from the Central Arbitration Committee (CAC) and its original jurisdiction in relation to penalty notices following a CAC determination. No changes were suggested.

In relation to employment claims in the High Court the Commission trod carefully and decided that an 'informal' rather than a rigid structure was best to deal with employment and discrimination cases that appear in the Queen's Bench Division. They propose a list of appropriately experienced judges to hear such cases to be called the Employment and Equalities List. This does not extend in their view to claims for judicial review and the Commission also suggest that pension litigation should remain in the Chancery Division.

Conclusion

Employment tribunals have taken a battering. Remember the statutory dispute regulations, the unnecessary Gibbons Review, manufactured to get rid of them (see 'Better Dispute Resolution, A review of employment dispute resolution in Great Britain', Michael Gibbons, Department of Trade and Industry, March 2007, *https://bit.ly/3cvRzGM*). Keep in mind the removal of lay members from most unfair dismissal cases where they belong and the unlawful and shameful costs regime. The latest bad idea is that employment tribunals should be 'brought under the wing' of the Civil Courts.

After all of this poor judgement it is a real delight to read and welcome this careful and well considered report. NLJ

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