Discrimination in Employment/Industrial Courts

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1. Thank you for inviting me to speak to you on the above topic. It is a pleasure to welcome members of the CMJA to Cardiff and to speak alongside Lady Justice Mugisha, Chief Judge of the Industrial Court of Uganda.

2. I begin by surveying the historical background by which the Employment Tribunals in this country were given responsibility for deciding employment law disputes and, subsequently, allegations of workplace discrimination. I will consider three questions against that historical background:

   - First, whether there is a need for a specialist employment law jurisdiction at all;
   - Second, whether such a jurisdiction is the best place to decide disputes about alleged discrimination in the workplace; and
   - Third, whether such a specialist jurisdiction might also decide cases of alleged discrimination outside of the workplace, such as in respect of the provision of goods, facilities and services.

   As requested, I will then speak briefly about the challenge of leading such a jurisdiction nationally, particularly following the experience of the pandemic.

History

3. The Employment Tribunals in this country (and their predecessors, the Industrial Tribunals) were established by the Industrial Training Act 1964[1]. More precisely, that Act of Parliament enabled a Minister, by further Regulations, to provide for the constitution and procedure of Industrial Tribunals. Those Regulations were the Industrial Tribunals (England and Wales) Regulations 1965[2], which came into force on 31 May 1965 (separate regulations applied to

[1] https://www.legislation.gov.uk/ukpga/1964/16/section/12/enacted
[2] https://vlex.co.uk/vid/industrial-tribunals-england-and-812636405.

the Employment Tribunals in Scotland). That is probably the most accurate date of birth for this jurisdiction, meaning that we are nearing our 60th birthday.

4. The early years of the Industrial Tribunals were not very auspicious; at that point in time, the jurisdiction dealt with rather obscure appeals against what were known as "industrial training levies"[3] and, shortly afterwards, appeals concerning the entitlement of employees to statutory redundancy payments. It would be more accurate to say that the jurisdiction came of age about six years later. This is because, in 1971, the Conservative administration of the day, led by Edward Heath, introduced new workplace measures. It did so in response to a report that had been issued in 1968 by a Royal Commission on trade unions and employers' associations, chaired by Lord Donovan[4]. These measures included a new right to complain of unfair dismissal, which came into force on 28 February 1972[5]. Appeals against unfair dismissal decisions by industrial tribunals went to a short-lived body called the National Industrial Relations Court[6]. Before long they were heard by the newly-created Employment Appeal Tribunal (the EAT), which came into being on 12 November 1975[7].

5. I would like to go back further in time, to paint on an even broader canvas. In the Victorian era in England and Wales, few people could conceive of working under a contract of employment. These were the decades following the Industrial Revolution. It was possible that a gentleman, working in the sort of middle-class profession satirised by Charles Dickens[8], might have had such a contract. But the vast bulk of workers did not; indeed, I suspect many would have viewed the notion as laughable[9].

6. What legal labels were used in those days to describe the relationship that workers had with the owner of the house, the owner of the land or the owner of the factory? The answer is found in a book in my possession, the first edition of which appeared in 1883. Its title says much about where we have come from; it is "*The Law of Master and Servant*". Its author, Sir John Macdonell, was a Scottish lawyer, a holder of the office of King's Remembrancer, a professor of London University, and a leader writer for *The Times*[10]. The labels he used, referring explicitly to servitude, tell you all you need to know about the inequality of bargaining power in the workplace a century ago[11]. In the opening chapter, he refers to the Roman law principle of labour as a "commodity".

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[3] Such appeals are still made to this jurisdiction; see https://www.citb.co.uk/levy-grants-and-funding/citb-levy/levy-assessment-registration-review-and-how-to-appeal.
[4] https://www.erudit.org/fr/revues/ri/1968-v23-n4-ri2805/027959ar.pdf.
[5] Under the Industrial Relations Act 1971, https://en.wikipedia.org/wiki/Industrial_Relations_Act_1971. For further discussion see https://uklabourlawblog.com/2022/03/03/happy-birthday-unfair-dismissal-at-50-by-hugh-collins.
[6] The NIRC was abolished by the Trade Union and Labour Relations Act 1974: https://www.legislation.gov.uk/ukpga/1974/52/contents/enacted.
[7] This being the date that the Employment Protection Act 1975 received Royal Assent: https://www.legislation.gov.uk/ukpga/1975/71/contents/enacted.
[8] When working for a firm of solicitors in Gray's Inn, a young Charles Dickens witnessed a contract of employment; see https://www.bonhams.com/auction/26079/lot/200.
[9] For further discussion, see *The Contract of Employment: A Study in Legal Evolution*, by Simon Deakin (https://www.cbr.cam.ac.uk/wp-content/uploads/2020/08/wp203.pdf).
[10] https://theodora.com/encyclopedia/m/sir_john_macdonell.html.
[11] Even though trade unions had been declared lawful by the Trade Union Act 1871.

7. Insofar as legislation evolved over this period, it focused on addressing rights of health and safety at work, rights of trade unions, and the prohibition of child labour, rather than workers' rights in respect of pay, detriment and dismissal. There existed statutory mechanisms limiting the ability of an employer to pay workers in anything other than the coin of the realm[12]. A system of trade boards and wages councils emerged in the early twentieth century to deal with rates of pay. Then, over the second half of the last century, something curious happened: the notion gained ground that an individual contract of employment was the repository for the wage-work bargain. Today, in a way that lawyers of many years ago would find surprising, an ordinary employee easily finds the words to complain of a "*breach of my contract of employment*".

8. The aforementioned introduction, just over 50 years ago, of the right to claim unfair dismissal foreshadowed a paradigm shift away from voluntary collective bargaining as the basis for resolving workplace disputes. We now have a series of individual contractual and statutory rights that are enforced against employers[13].

More on unfair dismissal

9. Unfair dismissal, a statutory tort, has been something of a political football over the years, with different administrations in power either extending or limiting its scope, especially in respect of the length of time that a person – save in certain prescribed circumstances – must be employed to qualify for the right. Academics and policy-makers have debated whether such legal rights go far enough to provide workers with protection against losing their livelihoods on capricious grounds[14], or whether they can act as a brake on economic growth[15]. These are matters where it would not be appropriate for a judge to comment.

10. I can, however, tackle the historical question of why the Heath administration introduced this right in 1971, since the answer is neither contested nor controversial. One need only look at the industrial relations scene of the late 1960s and early 1970s. Much of the workplace was unionised and many sectors were governed by collective agreements negotiated between

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[12] The Truck Act 1831: https://www.legislation.gov.uk/ukpga/1831/37/pdfs/ukpga_18310037_en.pdf.
[13] Although the Central Arbitration Committee remains as a judicial body, outside the Ministry of Justice, for dealing with collective labour law matters such as trade union recognition disputes; see https://www.gov.uk/government/organisations/central-arbitration-committee. The traditional laissez-faire approach to industrial relations is well captured by Otto Kahn-Freund, who wrote in 1954: "there is, perhaps, no other major country in which the law has played a less significant role in the shaping of labour-management relations than Great Britain" (in his essay "Legal Framework" in *The System of Industrial Relations in Britain*, edited by Flanders and Clegg).
[14] For a fuller discussion, see *Justice in Dismissal: The Law of Termination of Employment*, by Hugh Collins, and "The Inadequate Protection of Human Rights in Unfair Dismissal Law" by Philippa Collins, in *Industrial Law Journal*, Volume 47, Issue 4, December 2018 (pages 504–530).
[15] See, for example, the 2011 Beecroft Report on Employment Law (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31583/12-825-report-on-employment-law-beecroft.pdf).

employers and trade unions[16]. The economy was losing millions of manufacturing production days to industrial action[17]. It was thought that, if employees could have a speedy resolution of their dispute before an informal tribunal, it would discourage the alternative: sympathetic colleagues taking industrial action, such as going on a "wildcat" strike. Perhaps it was also thought that the new tort would help ameliorate the harsher consequences of contract law; while contract law had replaced the antiquated notion of "master and servant", it took no account of unequal bargaining power (and no account of "fairness").

11. In the half a century since the right to unfair dismissal entered the statute books, the Employment Tribunal jurisdictions in England and Wales and in Scotland, together with the EAT, have had a profound influence on principles of workplace fairness[18].

12. From the outset, the Employment Tribunals and the EAT were majority lay tribunals; parties would generally come before a panel of three individuals. The chair of the first-instance tribunal would be a lawyer[19], but he or she would be flanked by two lay members, one embodying the interests and experiences of trade unions and employees, and the other embodying the interests and experiences of employers and managers. This tripartite arrangement emerged from the political consensus of the day, and it reflected the industrial relations reality of the day. It was believed that this arrangement would lend credibility to the decisions of the tribunal in an arena where, until that point, most workers had looked to a collectively bargained agreement (or industrial action) to resolve a workplace dispute[20].

Discrimination law

13. For the purposes of this talk, an even more significant change came from the UK's membership of the European Union, which commenced on 1 January 1973. There is no EU law concept of an unjustified or unfair dismissal, but there is much EU law about equality in employment and occupation. EU law has been the principal source of British law concerning discrimination at work. So it was that, later in the 1970s, the Industrial Tribunals were handed the weighty

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[16] See figure 1, page 7, of this statistical bulletin: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1158789/Trade_Union_Membership_UK_1995-2022_Statistical_Bulletin.pdf.
[17] https://www.nationalarchives.gov.uk/cabinetpapers/alevelstudies/1960-radicalisation.htm.
[18] Although there is a wealth of academic debate about whether the law on unfair dismissal has departed from its statutory origins. See, for example, "The 'Range of Reasonable Responses' Test: A Poor Substitution for the Statutory Language", by Aaron Baker, *Industrial Law Journal*, Volume 50, Issue 2, June 2021 (pages 226–263); and "Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal", by Philippa Collins, *Industrial Law Journal*, Volume 51, Issue 3, September 2022 (pages 598–625).
[19] Originally "chairman" but, since 1 December 2007, "Employment Judge"; see https://www.legislation.gov.uk/ukpga/2007/15/schedule/8/enacted. Industrial Tribunals were renamed Employment Tribunals on 1 August 1998, by s.1 Employment Rights (Dispute Resolution) Act 1998.
[20] The Senior President of Tribunals has recently consulted on the future arrangements for panel composition in the Employment Tribunals and the EAT: https://www.judiciary.uk/guidance-and-resources/senior-president-of-tribunals-consultation-on-panel-composition-in-the-employment-tribunals-and-the-employment-appeal-tribunal-2.

responsibility of deciding workplace disputes about alleged sex discrimination, equal pay, and race discrimination[21].

14. Influenced by EU law, the number of protected characteristics grew in the decades that followed. The expansion of those characteristics says much about how, over the years, inequality is identified and tackled. In 2000, a Framework EU Directive outlawed discrimination on the grounds of philosophical or political belief, disability, sexual orientation and age[22]. Completing the set of protected characteristics in Great Britain are gender reassignment, marriage and civil partnership, and pregnancy and maternity. The law in this area has been consolidated and codified in the Equality Act 2010[23]. How discrimination law will develop in the light of Brexit remains to be seen.

15. Today, the legal landscape has become even more complex. In 2023, the Employment Tribunals decide well over one hundred types of claim. These include a type of complaint similar to discrimination, which concerns the treatment in work of those who make protected disclosures (colloquially referred to as "whistleblowing"). The Employment Tribunals receive somewhere between 600 and 750 single claims per week, about half of which concern allegations of unlawful discrimination and/or whistleblowing detriment. We receive many more multiple claims – our version of "class actions".

Demarcation with the civil courts

16. The demarcation between the Employment Tribunals and the civil courts has sometimes been a source of confusion, but there is a near universal consensus that the specialist Employment Tribunals, despite facing significant resource challenges, remain the most appropriate jurisdictional home for legal disputes arising from the workplace.

17. A prominent example of this jurisdiction's recent impact came in early 2016, when an Employment Tribunal decided that the government's reforms to the pension arrangements for judges and firefighters amounted to unjustified direct discrimination on grounds of age[24]. It has been estimated that the process of undoing the public sector pension reforms of 2012 may cost many billions of pounds[25]. Judicial rulings in respect of equal pay in the public and private sector also carry significant costs for legal compliance[26].

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[21] The Sex Discrimination Act 1975 and the Equal Pay Act 1970 came into force on 29 December 1975. Although there had been prior incarnations of race relations legislation, the Race Relations Act 1976 contained the right of complaint to a tribunal and came into force on 22 November 1976.
[22] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0078. It was implemented through a series of regulations: the Employment Equality (Sexual Orientation) Regulations 2003; the Employment Equality (Religion or Belief) Regulations 2003; the Employment Equality (Age) Regulations 2006. The Disability Discrimination Act 1996 was in fact home-grown.
[23] https://www.legislation.gov.uk/ukpga/2010/15/contents.
[24] As upheld by the Court of Appeal at [2018] EWCA Civ 2844. See https://www.judiciary.uk/wp-content/uploads/2018/12/lord-chancellor-v-mcloud-and-ors-judgment.pdf.
[25] https://committees.parliament.uk/committee/127/public-accounts-committee/news/155759/treasurys-17bn-mistake-that-will-take-generations-to-resolve-only-part-of-perfect-storm-brewing-in-public-pension-costs.
[26] By way of example, see https://www.theguardian.com/business/2018/feb/07/tesco-equal-pay-claim-could-cost-supermarket-up-to-4bn.

18. Our rules of procedure[27], more flexible than the Civil Procedure Rules albeit with a similar overriding objective, allow our judges to act less formally where that is in the interests of justice, and they support the significant efforts we make in respect of alternative dispute resolution (such as judicial mediation)[28].

19. The Employment Tribunals now decide the bulk of disputes arising from the workplace, but the civil courts retain a common law jurisdiction to hear disputes arising from the contract of employment. Examples include high value wrongful dismissal claims and contractual disputes arising from alleged breaches of contractual terms relating to confidentiality and non-competition (and where, unlike in the Employment Tribunals, injunctive relief is available)[29]. Claimants do end up in the wrong forum from time to time[30].

20. In answer to the first and second issues I mentioned at the outset, and with the benefit of a historical survey, I suggest that there remains a strong basis for the continued existence of a specialist jurisdiction dealing with workplace disputes and, moreover, that it should deal with matters of discrimination and equality law insofar as they pertain to the workplace. I am aware of no sensible suggestions that have been made to the effect that cases of workplace discrimination should be rehoused within the general civil courts.

21. In fact, insofar as there has been discussion of this topic, it has been in the other direction. The proposition that has been more vigourously debated in recent years is whether the jurisdiction of the Employment Tribunals should expand to encompass allegations of discrimination outside of the workplace, in respect of the provision of goods, facilities and services.

22. At the moment, such cases of non-workplace discrimination are heard by the County Court, which sits below the High Court in the determination of civil proceedings in England and Wales. In deciding such cases, a judge of the County Court will often sit alongside a lay assessor and there is a presumption in the Equality Act 2010 that an assessor will be appointed[31]. The assessor, by convention although not of necessity, is appointed from among the ranks of lay members of Employment Tribunals[32].

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[27] https://www.legislation.gov.uk/uksi/2013/1237/schedule/1.
[28] See the Presidential Guidance on ADR: https://www.judiciary.uk/wp-content/uploads/2013/08/PG-ADR-July-2023-final1.pdf.
[29] The Employment Tribunals gained their contractual jurisdiction on 12 July 1994, but there are important limitations. For example, such claims can only be considered by a tribunal where they arise from (or are outstanding upon) the termination of the contract of employment, and even then up to a financial limit of £25,000. Certain claims are specifically excluded from the tribunal's contractual jurisdiction, such as those alleging breach of a term relating to intellectual property, confidentiality and restraint of trade. See the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994: https://www.legislation.gov.uk/uksi/1994/1623.
[30] For a more detailed discussion about the interface between unfair dismissal and other causes of action, see paragraphs 51 to 59 of *Johnson v. Unisys Limited* [2001] UKHL 13: https://publications.parliament.uk/pa/ld200001/ldjudgmt/jd010322/johnso-3.htm.
[31] See s.114(7) Equality Act 2010.
[32] See the discussion at paragraph 66 of *Cary v. Commissioner of Police for the Metropolis and Equality and Human Rights Commission* [2014] EWCA Civ 987 (https://www.bailii.org/ew/cases/EWCA/Civ/2014/987.html).

An Employment and Equality Court?

23. Before considering whether Employment Tribunals should hear cases about alleged discrimination outside of a workplace context, I will discuss how this has been debated over the last decade.

24. In 2014, one of my predecessors as President, Judge David Latham, suggested that the time was ripe for the Employment Tribunals to be reconfigured as a "one-stop shop" for all employment disputes, including those remaining elements still heard by the civil courts. It was suggested this would assist parties who would otherwise need to embark on a process of choosing their forum. He also advocated having all equality matters, whether they arose in the workplace or not, coming before one judicial body. His tentative proposal for naming such a jurisdiction was that it be called the "Employment and Equality Court"[33]. His successor, and my immediate predecessor, Judge Brian Doyle, picked up the vision for a "one-stop shop"[34].

25. My predecessors may have had in mind a point sometimes made that discrimination outside of the workplace is under-litigated: it has been speculated that the costs regime in the civil courts may deter individuals from bringing meritorious claims about discrimination which, although they may be of relatively modest financial value, have great social importance[35].

26. In 2023, such cases might concern alleged disrupted access to a shop, restaurant, hotel, university, or other business service, because of a protected characteristic. They might concern the disparate impact of commercial arrangements (such as insurance premiums) on groups where a certain protected characteristic may predominate. Increasingly, they might also relate to the way that algorithms used by AI and machine learning, developed from large data sets, may incorporate and reflect back discriminatory assumptions about group behaviour[36].

27. The point about costs is that, in the civil courts in England and Wales, the loser generally pays the costs of the winner (although there are various exceptions to

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[33] No paper of Judge Latham's talk is available but there is commentary online from a solicitor who listened to it: https://www.lexology.com/library/detail.aspx?g=4dde4043-3417-4d56-bbed-dcd9cef8313a. Judge Latham's proposal was intended for England and Wales only; separate considerations apply in respect of the boundaries between the Employment Tribunals in Scotland and the Sheriff Courts, bearing in mind the rich and differing traditions of the Scottish legal system.
[34] See Judge Doyle's contribution to the 2015 Salford Lecture Series: https://vimeo.com/144148484.
[35] Although cases of alleged discrimination outside the work context are few in number, they tend to be high profile. See, for example, *Bull & Bull v. Hall & Preddy* [2013] UKSC 73 (a case where Christian providers of B&B accommodation refused to permit gay customers to share a double room); *Firstgroup plc v. Paulley* [2017] UKSC 4 [2014] EWCA Civ 1573 (a case about the policy of bus companies towards dedicated spaces for wheelchair users); and *Lee v. Ashers Baking Company Ltd* [2018] UKSC 49 (a case where Christian owners of a bakery refused to make a cake with a message promoting same-sex marriage). See also the discussion in *R (Leighton) v. Lord Chancellor & Inclusion London* [2020] EWHC 336, where the High Court rejected a judicial review challenge over an asserted decision of the Lord Chancellor not to extend Qualified One-Way Costs Shifting ("QOCS") to discrimination claims in the County Court.
[36] See, insofar as the workplace is concerned, https://commonslibrary.parliament.uk/research-briefings/cbp-9817.

the cost-shifting principle in the case of personal injury). By contrast, in the Employment Tribunals, and with rare exceptions, each side pays their own costs. Furthermore, as the jurisdiction that has been dealing daily with the interpretation and application of discrimination law, the Employment Tribunals may be said to have greater expertise in this area.

28. It has often been said that the Employment Tribunals are tribunals in name only, or at least that they resemble the structure of civil justice[37]. The label of "tribunal" may be considered a relic of the days before the introduction of the right to claim unfair dismissal, when this jurisdiction dealt with a limited number of appeals about state decisions concerning training levies and redundancy payments. As a jurisdiction that chiefly now decides disputes between private parties, rather than appeals against administrative decisions by the state, I believe it is right to regard the Employment Tribunals as a civil jurisdiction in all but name. Whether that requires a change in nomenclature or increased formality of our rules of procedure are different questions, and which should be answered by reference to whether they enhance access to justice and improve the efficient administration of justice.

The Leggatt Report

29. The notion that the Employment Tribunals should be relabelled as a court was floated before it was raised by my predecessors. In 2000, the government of the day appointed a High Court judge, Sir Andrew Leggatt, to review the entire tribunals structure.

30. The subsequent Leggatt Report[38] resulted in the creation, in 2007, of a new system comprising a First-tier Tribunal and an Upper Tribunal[39]. Various chambers of the First-tier and Upper Tribunal now deal with appeals against administrative decisions about matters such as entitlement to welfare benefits, immigration and asylum status, and liability to pay tax. The Leggatt Report was amply satisfied with the label "tribunal" to describe the jurisdiction of the Employment Tribunals. Instead, noting their special nature as a body deciding disputes between private parties, the Leggatt Report decided that they should be kept outside of the Chamber structure. That is where we continue to sit. The rather clunky expression now used to describe the Employment Tribunals in England and Wales, the Employment Tribunals in Scotland, and the EAT is "the separate pillar"[40].

31. Thus, for the time being, the Employment Tribunals continue to occupy the territory between the main administrative tribunals of Great Britain on the one hand and the civil courts on the other hand. A similar debate can be had about

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[37] For an in-depth discussion, see "Employment Tribunals and the Civil Courts: Isomorphism Exemplified", by Susan Corby and Paul Latreille, *Industrial Law Journal*, Volume 41, Issue 4, December 2012 (pages 387-406).
[38] https://webarchive.nationalarchives.gov.uk/ukgwa/+/http:/www.tribunals-review.org.uk/leggatthtm/leg-00.htm.
[39] Tribunals, Courts and Enforcement Act 2007, https://www.legislation.gov.uk/ukpga/2007/15.
[40] As shown by this organisational chart: https://www.judiciary.uk/guidance-and-resources/tribunals-organisation-chart.

whether the EAT is closer to the Upper Tribunal or better considered as a division of the High Court.

The Briggs Report

32. The matter was considered afresh eight years ago. Lord Justice Briggs (now Lord Briggs, a Justice of the Supreme Court) undertook a review in 2015 of the structure of the civil courts.

33. Lord Briggs described the Employment Tribunals as "uncomfortably straddled" between the main tribunals and the civil courts. In an interim report issued in December 2015[41], he spoke of the desirability of finding this jurisdiction the "right home". He thought that leaving the Employment Tribunals where we were (and, I add, where we remain) was the least satisfactory option. He discussed the pros and cons of moving the Employment Tribunals into the civil court structure[42]. In a final report issued in July 2016[43], he declined to make any recommendations but instead offered a number of observations intended to inform the ongoing debate. He could see the force in the argument for creating an Employment and Equality Court, with high-end work being considered at first instance by judges of High Court seniority and experience; ultimately, however, he decided to leave the matter to those who, in his words, were "better qualified" to resolve them[44]. It seems that he envisaged that any such restructuring would require the input of Parliament, with a concomitant need for policy consultation and legislative drafting.

The Law Commission report

34. The body with responsibility for law reform in England and Wales is the Law Commission. In view of the comments made by Lord Briggs, the Law Commission chose the machinery for deciding workplace disputes for one of their coveted projects for consideration. So it was that, in 2018, the Law Commission commenced a consultation process on "employment law hearing structures". Its final report was issued in April 2020[45].

35. Among other matters it considered, the Law Commission tackled head-on the question of whether the Employment Tribunals should hear claims about alleged discrimination outside of the workplace. Having consulted widely, the Law Commission decided that it would not be appropriate to transfer non-employment discrimination jurisdiction entirely and exclusively to the Employment Tribunals. Instead, the Law Commission considered the topic of "concurrent jurisdiction". After a lengthy analysis, it proposed a different solution: that Employment Judges with experience of hearing discrimination cases should be deployed to sit in the County Court to hear claims about

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[41] https://www.judiciary.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf.
[42] See paragraphs 11.8 to 11.19 of the interim report.
[43] https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf.
[44] See paragraphs 11.11 to 11.21 of the final report.
[45] https://www.lawcom.gov.uk/project/employment-law-hearing-structures.

alleged discrimination outside of the workplace[46]. I emphasise that this proposal was made in respect of England and Wales only[47].

36. The Law Commission issued its report a few weeks into the Covid pandemic. It was therefore understandable, if not inevitable, that the machinery of government was focused on more important matters. The Department for Business, Energy and Industrial Strategy responded in June 2021[48]. The Ministry of Justice and the Government Equalities Office responded in June 2022[49]. In the latter response, the government welcomed the proposals and said this:

> **Employment Judges are already judges of the County Court[50] and cross ticketing of judges between the Employment Tribunal and the County Court already occurs; albeit on a more informal basis than proposed by this recommendation. While judicial deployment is a judicial function and we are unable to specifically comment on this recommendation, we have shared it and the views expressed in your consultation with the judiciary for their consideration when planning future deployment of judicial resources.**

37. It seems, therefore, that the matter is back with the judiciary. As President, I continue to make the argument that Employment Judges are eminently capable – as much as any other judge – of sitting in the civil courts, whether to hear non-employment discrimination claims or any other type of civil claim. I supported a deployment exercise in 2022 by which judges of the Employment Tribunals were eligible to express an interest to sit in the County Court in London and the South East of England. Also, I continue to support the ambitions of the Lord Chief Justice and the Senior President of Tribunals to create a single judiciary (the "One Judiciary" agenda)[51]. By this approach, a judge is just a judge: all are part of one judicial family; all at the same pay grade have equivalent status; and all are able (if they wish to do so, and subject to appropriate training) to sit in more than one jurisdiction.

38. The advantages of such flexibility are obvious, allowing judges to move between jurisdictions to address the peaks and demands of different types of

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[46] See chapter 3 of the report, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/04/6.6527_LC_ELHS-Main-Report_FINAL_WEB_210420.pdf.
[47] For completeness, it should be noted that the Law Commission made 23 recommendations in total. They included the creation of a specialist "Employment and Equalities List" in the High Court; increasing the jurisdiction of Employment Tribunals to hear claims for damages for breach of contract by employees (and counterclaims by employers) during the currency of a contract of employment and not just upon its termination; increasing the financial limit on contractual claims from £25,000 to £100,000 and thereafter aligning it with the limit of the County Court's contractual jurisdiction; and extending the tribunal's jurisdiction so that it covered breaches of contract claims by workers and not just employees. The government's responses to these recommendations can be seen in the links in the next two footnotes.
[48] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/04/20210524-BEIS-Response.pdf.
[49] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/04/97422-Law-comm-letter-GEOMOJ.pdf.
[50] See ss.5(1)(c) and 5(2)(v) of the County Courts Act 1984.
[51] https://www.judiciary.uk/pursuing-one-judiciary-by-the-lord-chancellor-the-lord-chief-justice-of-england-and-wales-and-the-senior-president-of-tribunals.

judicial work, which rarely align. The Law Commission's proposal that Employment Judges be deployed to the County Court, specifically to hear non-workplace discrimination cases, is outstanding. That said, as a result of their flexible deployment to the County Court, there are several Employment Judges who do in fact hear such cases. The concept of "One Judiciary" should yield many such dividends.

The pandemic

39. I was asked to cover the pandemic briefly. So as not to distract from the main topic of this paper, I will simply make three observations.

40. First, the pandemic acted not just as a disruptor of our operations, but as an accelerant. Several of our processes were reformed at breakneck speed simply so that we could keep workplace justice moving. Of all of these processes, the pivot to hearing cases by video was by far the most culturally challenging and by far the most transformative. Even today, a significant number of our cases, including complex, multi-day hearings, are still heard using video channels. The availability of video channels means that we can hear far more cases than would be possible if we were limited only to our physical estate.

41. Second, the pandemic revealed the resourcefulness, innovation and resilience of the judiciary of the Employment Tribunals, of the HMCTS staff who provide us with support, and of the parties and their representatives who use the system. We have all watched with concern the significant increase in our outstanding stock of cases and the lengthening of our waiting times, but everyone played their part in keeping the justice system operational during the height of the pandemic. I do not want to single us out from the efforts made by all branches of the judicial family, but – looking back at 2020-2021 with the benefit of hindsight – I marvel at how well the judiciary, staff and users of the Employment Tribunals coped.

42. Third, the pandemic offered a chance to rethink the way workplace justice is delivered. One should look for the opportunity in every threat. In April 2021, I launched a "virtual region", a sort of "flying squad" of judges able to pick up cases at short notice and hear them remotely by video, meaning that those hearings can now proceed rather than risk cancellation for lack of a judge or for lack of a physical venue. This has been especially useful in efforts to reduce waiting times in London and the South East, where we face a shortage of judges. The concept has since gained traction, with the creation of virtual regions in other tribunals and the courts.

43. My final thought is that we must take care in the rush to embrace technology, even more so as we consider the way that AI and large language models can assist in the creation of draft judgments and the analysis of documentary evidence. There is no doubt that technology can deliver enormous benefits to the efficient administration of justice, but it must serve the public good and the rule of law. Put pithily, technology must be the servant of justice, not its master.