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Dear Ms Fox

Consultation on Amendments to Employment Tribunal Postponement Procedures

We write on behalf of the Employment Lawyer's Association in response to this consultation..
The Employment Lawyers Association (ELA) is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals.

The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to new legislation and regulations.

General observations

We note that the proposed changes have been prompted by the perceived high level of postponements.

Reference is made to information from Her Majesty's Courts and Tribunal Service which shows that in the two-year period to March 2013, there were approximately 67,750 postponement of ET's but there is no analysis of the reasons for postponement.

We believe that those figures, which pre-date the introduction of Tribunal Fees and the Early Tribunal Conciliation process, may exaggerate the scale of the problem for a number of reasons.

First, we suspect that the figures include postponement of hearings where a settlement has been agreed through ACAS. These applications may be listed as applications made by the Claimant but in fact it is the practice of Conciliation Officer to contact the Employment Tribunal to request a postponement in these circumstances. Tribunal statistics confirm that a large number of Claims are settled and this may explain the high level of 'postponements'.

Secondly, the statistics are also likely to cover cases where the postponement is not at the request of the parties but is caused by ET itself through the unavailability of Employment Judges and/or Tribunal members to hear the Claim. This is particularly frustrating for the parties who have spent a considerable amount of time and cost in preparing for the Hearing, some of which will be wasted, with no redress. It is our experience that, until recently, this was happening with increasing regularity. The Consultation paper does not address this issue or propose any form of redress.

The quoted statistics give the impression that postponement is easily and readily granted to Claimants. This is not our experience. In this context, we would also point out that the ET's standard listing notice already makes clear that once a case is listed for Hearing it will only be postponed in 'exceptional' circumstances and this is particularly so where the dates have been agreed by the parties. This is confirmed in the existing guidance and case law. For example when a postponement should be granted in cases of sickness (**Andreou v Lord Chancellor's Department [2002] IRLR 728**) and when postponement is applied for where a key witness is on holidays (two of the more common reasons for postponement). Presidential guidance has been given on these topics (Employment Tribunals (England and Wales) Presidential Guidance –seeking a Postponement of a Hearing (2013)).

It is our view that overall the proposals may not achieve the Government's principal purpose indeed we are concerned that there is a danger that the new rules will give the impression or perception that the parties have a "right" to apply for 2 postponements.

We would also point out that since the introduction of Tribunal Fees and the consequential decrease in the Tribunal workload, where a postponement is granted, cases can be fixed for re-hearing more quickly thereby mitigating some of the damaging effects of a postponement.

For all these reasons, whilst we agree that late postponements can be damaging and costly, we would question whether regulatory intervention of the kind proposed is really necessary or will have a significant impact on existing tribunal practice.

Specific answers to questions raised in Consultation Paper

Question 1

Is a limit of 2 successful postponement application per party per case appropriate?

The answer to this is generally "yes" but, as stated above, we are concerned that this may weaken the existing practice given the terms of the existing guidance and give the impression that there is a right to two postponements whereas any postponement of a hearing once the notice of hearing has been issued should be "exceptional".

Question 2

Is the deadline for postponement of no less than 7 days before the Employment Tribunal hearing reasonable?

Yes, particularly as the proposed rule allows for an application to be made at later date in "exceptional circumstances". However this proposed rule also does not cater adequately with the possible situation that there is an undue delay by the party applying for a postponement (in breach of the proposed new rule 30A(1)) but the application is made more than seven days before the relevant hearing.

We also thought the words 'less than seven days' in the draft order (30A (2)) did not achieve the objective in the paper of applications being made 'no less than seven days'. Perhaps, subject to the views of Parliamentary Counsel, 'seven days or less' might be substituted.

Question 3

Do you agree with the two specified exemptions to the new rules on postponements?

Occasionally a postponement is in the interest of the administration of justice, for example, where the case has been listed for a day and the parties agree (or one party reasonably considers) that the hearing is likely to last longer than this. In such circumstances, it is better for the hearing to be postponed rather than adjourned part heard. We would therefore suggest that there is a further exemption where the application is in the interests of justice or, more narrowly, in the interest of the administration of justice.

Otherwise generally we agree with the proposed exemptions. Perhaps the second exemption should be clarified to include the late service of a witness statement. Under the existing rules the ET would still have a discretion to determine whether postponement is a proportionate response in the particular circumstances.

The wording in the proposed rule 30 A (4) (a) is rather odd. It refers to 'another party' as opposed to the Tribunal. Possibly the intention was to refer to 'a party to the claim'. As currently drafted its meaning is unclear.

Question 4

Do you agree that a postponement or adjournment granted less than 7 days before the Tribunal hearing should be regarded as 'late' for the purpose of considering a Cost Order or Preparation Time Order?

We agree generally with this proposal but any new provision to impose costs inevitably creates the risk of additional hearings and further use of judicial time.

In addition we believe that the rules should also provide that where the administration of Tribunals fails to be efficient and a postponement is caused by the failure to provide a Judge or member at short notice (which has been happening with increasing frequency in the experience of our members) there should be provision for cost incurred by the parties to be paid from central funds.

Question 5

Do you agree with the basis of the cost elements that have been identified due to a postponement?
The data relied upon is very old (2008) and appears to us to be likely to be unreliable. We believe this view of the savings to be achieved is speculative.

Question 6

Do you have any evidence to clarify whether the cost of a postponement to any party changes if 2 or more postponements have already been granted?

We believe that all postponements are likely to increase costs but cannot see that these costs will increase simply because there have been two previous applications. It is the passage of time between any postponement and the hearing date that is the biggest factor in increasing costs because of the need to cover old ground and repeat preparation previously undertaken. One postponement that creates a long delay may increase costs more than two causing shorter delays.

Question 7

Do you have any evidence to clarify whether the cost of a postponement to any party changes if the postponement is request less than 7 days prior to a hearing?

The closer to the hearing the postponement occurs the greater the likely cost in wasted time by an advocate because of the intensity of effort required in detailed preparation as the hearing approaches. This will probably result in more professional fees being incurred. At this stage most of the heavy duty preparation such as drafting witness statements and collating the evidence has already been done so it will probably make no difference to these costs. This of course applies principally to represented parties.

Question 8

Do you believe that setting the deadline for postponements at 7 days prior to hearing (unless there are exceptional circumstances) will cause any party to incur additional costs?
See the answer to question 7.

Question 9

Can you identify any particular impact that the proposed changes to the Rules of Procedure for postponement would have on people with Protected Characteristics as defined in the Equality Act 2010

In relation to disability, difficulties may arise if special arrangements had been made for persons with disability.
In relation to pregnancy and maternity, late postponements may have an impact on child care arrangements and if one of the parties or witnesses was pregnant a delay at the wrong time could have a significant impact on the hearing arrangements.

Question 10

Can you identify any additional costs associated with a Tribunal postponement that would be incurred by people with Protected Characteristics?

See the answer to question 10 and in particular, in disability cases, additional costs may be incurred through the attendance of medical and other experts.

Yours sincerely

Anthony Korn
Stephen Levinson

Members of the ELA Sub-committee