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Civil Procedure Rule Committee

Appeals to the Court of Appeal: proposed amendments to Civil Procedure Rules and Practice Direction

Response from the Employment Lawyers Association

24 June 2016

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INTRODUCTION

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. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. 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 proposed new legislation.

A sub-committee, whose members are listed below, was set up by the Legislative and Policy Committee of ELA to consider and comment on CPRC's Questionnaire. Its report is set out below.

Members of ELA sub-committee

Co-chairs: Sean Jones QC, 11KBW; Anthony Korn, No5 Chambers
Andrew Burns QC, Devereux Chambers
Kiran Daurka, Slater and Gordon (UK) LLP
Akash Nawbatt, Devereux Chambers

Question A: Do you agree that the threshold for permission to appeal to the Court of Appeal should be raised to “a substantial prospect of success”?

☐ Yes ☒ No

Please give reasons:

We share the Court’s concerns about the delay in hearing appeals. In the experience of members of our committee such delays can be as long as 18 months from application to hearing and judgment can sometimes add a further substantial delay. We readily acknowledge the adverse impact that this can have for parties in terms of finality and, where a claimant is ultimately successful, obtaining their remedy. Matters are still more complicated in cases where the employment relationship at the heart of the litigation is continuing. We equally share the Court’s apparent concern about the level of resourcing presently being provided. We recognise that a substantial increase in the Court’s resources is an unlikely eventuality.

However, we are also acutely conscious that the proposals may have an adverse impact on access to justice. In particular we are concerned that there should be no increase in meritorious appeals “sifted out” as a result of the application of a higher threshold. Justice delayed is justice denied, but justice is also denied where a meritorious appeal is left unheard.

Employment Tribunal litigation is often conducted by litigants in person. Employment Law has grown formidably complex. We are concerned that combining an increase in the merits threshold with a limitation of oral hearings will adversely impact such litigants, most of whom have no prior familiarity with the law and who (given the Tribunal’s discrimination jurisdiction) may not have English as a first language or have disabilities which make meaningful written applications very difficult. However, we also have experience of represented parties who have appeals which are rejected on the papers and nevertheless are ultimately successful. Particularly problematic cases where the EAT has found a tribunal ruling to be perverse and the Court has held that the ET has substituted its view for that reasonably taken by the ET, examples being London Borough of Brent v Fuller [2011] IRLR 414 and t a lesser extent last year’s ruling in Newbound v Thames Water Utilities [2015] IRLR 734.

We are also concerned that the meaning of "substantial prospects" is not clear. ‘Substantial’ in some contexts (particularly in the employment law sphere) means no more than ‘significant’ or more than minor or trivial. This would suggest a modest (if any) change from the existing ‘real’ prospect threshold. However, the consultation wording on page 7, paragraph 4, suggests that "substantial prospects of success" will require the appeal to demonstrate that a "seriously arguable error has been made (and not merely arguable so that it cannot be said to be fanciful)". We believe that a “seriously arguable” threshold would be setting the bar too high and would present an unreasonably high barrier to justice. We believe that imposing a higher threshold for permission to appeal than the test that will continue to be used in most other courts and tribunals will result in confusion and potential injustice. The fact that there is a current lack of resource in the Court of Appeal is an understandable but, we believe, an insufficient ground for imposing such a higher test for permission to appeal.

Notwithstanding all of the above, it is the view of ELA that any change in the sift threshold must allow appellants the right to further consideration in the event than an appeal is refused on the papers. Please see our response to question E below.

Finally, in respect of equality claims appealed from the EAT, we anticipate that the main impact of these proposals will be on groups of appellants with particular protected characteristics. We anticipate, for example, that a large number of disability cases may be subject to appeal given (a) the relatively new causes of action introduced by the Equality Act 2010; and/or (b) the complexity of those cases in the employment and goods/services sphere. An Equality Impact Assessment should be completed in order to consider the impact on appeals from the EAT (and to a certain extent from the County Court) which relate to equality issues and to assess the protected characteristics of appellants. It would also be worth

considering whether appeals relating to equality issues are more or less likely to be brought by litigants in person. It would be premature to bring in these changes without due regard to equality matters.

Question B: Do you think that amendment of CPR Part 52.3(6)(a) will assist in reducing delays in determination of appeals in the Court of Appeal?

☒ Yes ☐ No

Please give reasons:

Reducing the numbers of appeals to be heard in the Court of Appeal will inevitably reduce the workloads within the Court. We anticipate that it will reduce delays, but are concerned, as we explained above, about the concomitant impact on access to justice.

Question C: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

☒ Yes ☐ No

Please give reasons:

These changes are likely to adversely impact on appellants who will be required to establish a higher standard within a short space of time. Litigants in person will be under pressure to seek legal advice from the outset to ensure that their appeal meets the required threshold. It will be more advantageous to Respondents who are likely to see a a reduction in appeals to which to answer.

ELA was concerned to note at paragraph 8(1) of the Annex that one of the concerns raised about the delays within the Court of Appeal was that "the delay for the determination of appeals risks seriously damaging the attractiveness of the UK as a venue for litigation in large commercial cases". In ELA's view, the main impact of the proposals made in this consultation in relation to appeals from the EAT will be to litigants in person in the employment context. We would be concerned if the driver behind the reforms is to enable global corporates more accessible justice at the expense of litigants in person dealing with disputes impacting on them personally.

Question D: Do you have any other suggestions for assisting the Court of Appeal to reduce delays in the hearing of appeals?

There are alternatives which merit consideration, including:

(a) Permission to appeal to be sought from a different judge in the lower court/tribunal from which the judgment/decision is being appealed. In the majority of cases, the Judge having made the decision is unlikely to give permission to appeal nearly always passing the burden for the decision to the Court of Appeal. In the case of appeals from Employment Tribunals this would have the added advantage that the judge considering the application for permission would have a specialist expertise;

(b) Provision of additional resource, including High Court Justices sitting up in the Court of Appeal as one of the panel. As some Circuit Judges sit in the Criminal Division of the Court of Appeal, we

propose that this could be a suitable way within which to increase judicial resource;

Question E: Do you agree that the right of oral renewal for an application for permission to appeal should be removed and replaced by a system allowing for determination of such an application by a single LJ on the documents coupled with a case-management power to call the application in for an oral hearing if it assessed to be appropriate to do so? If not, why not?

☐ Yes ☒ No

Please give reasons:

Coupled with the increased threshold for permission to appeal, this proposal is of great concern to ELA. It seems to us that litigants in person will be significantly and detrimentally impacted by this change, and saving court time is not a sufficient reason to proceed with this proposal given that access to justice will be seriously impacted.

The statistics show that during 2015/16, 21% of EAT/QBD and other A1/A2 cases that were sifted out on the papers and were subsequently granted permission at an oral hearing, went on to succeed. This is a significant percentage of successful cases which would not have been progressed but for the existing two tier system. In other words, for every five cases sifted out on the papers and subsequently allowed on oral renewal, one is ultimately successful. This is not an insubstantial amount and we would be concerned that access to justice to those 20% of cases would have been denied had these proposals already been in practice.

ELA understands that the workload within the Court of Appeal is causing delays. However, alternatives to removing the oral renewal process in its entirety warrants re-consideration.

Given the short time frame within which appeals are to be identified and presented, it is conceivable that an appeal may be of substance, but may not have been adequately set out within the Notice of Appeal. A good point could well go unrecognised, particularly where a litigant in person has drafted the document. We do not believe that a single LJ will be able to identify at the preliminary stage all the appeals which would be assisted by an oral hearing. However once an LJ has turned down the appeal on paper and the appellant has seen and understood the grounds for rejection, an appellant (particularly a litigant in person) may be able to better articulate the reasons why the single LJ has missed the meritorious point. At which stage the single LJ will have more and better information on the papers to decide whether the appeal is truly hopeless or whether the point needs an oral hearing to explore it.

Therefore the time for a single LJ to decide whether the appeal merits an oral appeal hearing should be after his/her preliminary decision on the papers, not at the same time as that initial consideration.

Question F: Do you think that amendment of CPR Part 52.3(4) and (4A) will assist in reducing delays in determination of appeals in the Court of Appeal?

☒ Yes ☐ No

Please give reasons:

Delays may be reduced. The extent of any reduction will depend on the percentage of cases that proceed to an oral hearing if refused on the papers.

However, we are concerned that access to justice will be substantially adversely affected.

Question G: Do you agree that CPR Part 52.15(1A) and Part 52.15A(2) should be amended as proposed? If not, why not?

☐ Yes ☒ No

Please give reasons:

Question H: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

☒ Yes ☐ No

Please give reasons:

As stated above, litigants in person are the most likely group to be adversely impacted by these changes within the employment context.

Question I: Do you have any other proposals as to how the procedure for considering applications for permission to appeal could be made more efficient or effective?

☒ Yes ☐ No

Please give reasons:

Please see our response to Question J.

Question J: Do you have any other proposals how the procedure for considering applications for permission to appeal could be changed so as to help reduce delays in the Court of Appeal?

☒ Yes ☐ No

Please give reasons:

There are alternative possibilities to the proposal as follows:

1. The permission to appeal application can be decided on the papers. Where refused, the appellant should be given a reasonable opportunity to set out why an oral hearing is to be allowed. Where the single LJ thinks that there are reasonable grounds for an oral hearing, the appellant would then be invited to one.

2. Oral hearings could be restricted to 1 hour and some may be appropriate to be conducted on the telephone to save time and resources.

3. A duty lawyer system might be re-trialled to allow litigants in person an opportunity to seek advice and/or representation to speed up any oral renewal hearing.

Question K: Do you agree that CPR Part 52.16 should be amended as proposed? If not, why not?

☒ Yes ☐ No

Please give reasons:

We agree that decisions relating to interim applictions can be determined on the papers unless there are compelling reasons requiring a hearing.

In addition, ELA notes that the consultation does not set out a discussion as to the proposal at CPR 51.15C. ELA welcomes the proposal in CPR 52.15C(3) to give discretion to the LJ considering a permission application to order that the substantive case proceed in the EAT. Where an LJ considers that an appeal in the EAT should have been allowed, s/he should be entitled to direct it back to the EAT for a substantive hearing.

Question L: Do you think that amendment of CPR Part 52.16 will assist in reducing delays in determination of appeals in the Court of Appeal?

☐ Yes ☐ No

Please give reasons:

It may. We lack the data to determine how significant any effect would be.

Question M: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

☐ Yes ☐ No

Please give reasons:

We lack the necessary data to express an opinion.

Question N: Do you have any other proposals for amending CPR Part 52.16 to make the procedure for consideration of ancillary applications more efficient and effective?

☐ Yes ☐ No

Please give reasons:

Question O: Do you have any other proposals how the procedure for considering ancillary applications in the Court of Appeal could be changed so as to help reduce delays in the Court of Appeal?

☐ Yes ☐ No

Please give reasons:

Amendment of Practice Direction 52C

Question P: Do you agree that Practice Direction 52C should be amended as proposed? If not, why not?

☒ Yes ☐ No

Please give reasons:

Simplifying the Practice Direction is welcomed. The index template on the Justice website should be clearly signposted as the website can be complex to follow.

Question Q: Do you think that amendment of Practice Direction 52C as proposed will make it more user-friendly for litigants and assist in limiting the volume of documentation placed before the Court of Appeal in determining appeals?

☒ Yes ☐ No

Please give reasons:

Question R: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

☒ Yes ☐ No

Please give reasons:

The changes should assist appellants to understand more clearly which documents are required to be filed and when.

Question S: Do you have any other proposals for amending Practice Direction 52C to make it more user-friendly for litigants?

☒ Yes ☐ No

Please give reasons:

A glossary of terms used in the CPR would provide useful guidance. Explaining terms such as "serve", "statements of case", "file", for example, would be useful for litigants in person.

Question T: Do you have any other proposals for amending Practice Direction 52C to limit the documentation presented to the Court of Appeal for determination of appeals?

☒ Yes ☐ No

Please give reasons:

As suggested above, telephone hearings to determine whether permission to appeal is to be given may limit the numbers of documents presented to the Court of Appeal.

Thank you for responding.