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The Law Society of Scotland's discussion paper:

"Legal Assistance in Scotland Fit for the 21st Century"

Response from the Employment Lawyers Association

30 January 2015

Response from the Employment Lawyers Association to the Law Society of Scotland's discussion paper: "Legal Assistance in Scotland Fit for the 21st Century"

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

A sub-committee was set up by the Legislative and Policy Committee of ELA under the co-chairmanship of Eleanor Mannion of Renfrewshire Council and Jonathan Chamberlain of Wragge Lawrence Graham & Co to consider and comment on the Law Society of Scotland's discussion paper entitled "Legal Assistance in Scotland Fit for the 21st Century". Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

Although the discussion paper deals with both criminal and civil legal aid, this report is concerned with the proposed changes to the civil legal aid and in particular the impact these proposals will have on the practice of employment law and the ability of individuals to litigate and raise tribunal action concerning their employment rights. The sub-committee sought the views from the ELA membership to ensure that practitioners were given the opportunity to be heard on this important topic.

It is ELA's view that there is no merit in the proposals to remove employment cases from the scope of legal aid. The potential savings from this change are minimal, there are serious access to justice and Article 6 concerns and the alternative sources of funding are not workable in an employment law context. These finding are expanded upon below.

Why is change necessary?

The sub-committee considered why it is perceived necessary to remove legal aid for employment law cases. One of the primary reasons cited in the discussion paper is to balance the requirement to keep expenditure at an affordable level for the Scottish Government with the need for individuals to access legal advice so as to maintain the legal aid system in the long term. On reviewing the Scottish Legal Aid Board's (SLAB) Annual Reports from the last five years, the current expenditure on employment law cases in both advice and assistance and ABWOR is minimal and a tiny percentage of the overall legal aid spend. A summary of the SLAB Annual Report findings are set out at Annex 1. Unfortunately a detailed breakdown of the 2013-2014 figures was not appended to that report to allow for detailed analysis from that period.

What the Reports clearly show is that the amount paid out by SLAB to practitioners in employment cases has fallen year on year with both civil advice and assistance and ABWOR. There is also a decrease in the number of actual accounts paid. In 2011-2012, SLAB paid out on 1,393 employment cases under advice and assistance. In 2012-2013 they paid out on only 980. This is a 30% reduction in accounts paid. In 2011 – 2012 SLAB paid out on 403 employment cases under ABWOR. This was almost halved the following annual period to 212 cases.

The primary explanation for the need to rethink the current legal aid system is cost. Advice and assistance is the most common form of legal aid for employment cases and year on year a higher proportion of employment cases funded through legal aid do so through on an advice and assistance basis. When looking at the level of advice and assistance paid out in employment cases as a percentage of other civil advice and assistance cases and legal aid as a whole, it is quite clear that employment cases are not a burden on the current legal aid system.

- In 2010 – 2011 the employment accounts paid as a percentage of civil advice and assistance spend was **2.3%**
- In 2010 – 2011 the employment advice and assistance accounts paid as a percentage of the total legal aid spend was **0.3%**
- In 2011 – 2012 the employment accounts paid as a percentage of the total accounts paid for civil advice and assistance was **2.2%**
- In 2011 – 2012 the employment advice and assistance accounts paid as a percentage of the total legal aid spend was **0.2%**
- In 2012 – 2013 the employment accounts paid as a percentage of the total accounts paid for civil advice and assistance was **1.4%**
- In 2012 – 2013 the employment advice and assistance accounts paid as a percentage of the total legal aid spend was **0.1%**

Similar percentages levels can be seen with civil ABWOR which is granted in fewer cases.

- In 2010 – 2011 the ABWOR employment accounts paid as a percentage of the total accounts paid for civil advice and assistance was **13.9%**

- In 2010 – 2011 the ABWOR employment accounts paid as a percentage of the total legal aid spend was **0.4%**

- In 2011 – 2012 the ABWOR employment accounts paid as a percentage of the total accounts paid for civil advice and assistance was **13.2%**

- In 2011 – 2012 the ABWOR employment accounts paid as a percentage of the total legal aid spend was **0.3%**

- In 2012 – 2013 the ABWOR employment accounts paid as a percentage of the total accounts paid for civil advice and assistance was **6.6%**

- In 2012 – 2013 the ABWOR employment accounts paid as a percentage of the total legal aid spend was **0.2%**

While ABWOR as a percentage of advice and assistance is higher, especially given the lower number of cases where ABWOR is granted, it must be remembered that ABWOR is granted owing to the complexity of the case or length it is expected to run. Even so, the percentage level between 2011 – 2012 and 2012 – 2013 halved.

It is clear from even a cursory glance of these figures that employment law is not a particular drain on the legal aid fund. In 2012 – 2013 both advice and assistance and ABWOR was **0.3%** of the total spend. If the expectation is that removing this area of law from the scope of legal assistance will free up funds to be reinvested elsewhere, any saving will be nominal at best.

It is ELA's submission that these contentious proposals in terms of employment cases will not be of financial benefit to SLAB and so the balance lies with providing individuals access to advice.

Access to Justice

One of the primary concerns raised by members was that the removal of legal aid for employment cases would have a detrimental impact upon access to justice. It is ELA's view that the proposals outlined at page 39 of the discussion paper may impede the exercise of the Article 6 right to a fair hearing. This is particularly concerning given that legal aid for employment law was introduced following an Article 6 challenge. This was discussed in an article published in the Journal of the Law Society of Scotland on 1st December 2000 entitled "*Legal aid for employment tribunals - at last*" by Roger Mackenzie and Ken Hogg. The article recorded that "*the Executive took advice that continued refusal to grant legal aid* [in employment cases] *would almost certainly breach the Article 6 right to a fair hearing.*" It would appear that the advice taken was in light of a devolution issue point taken by a Claimant in the employment tribunal case of *Gerrie v Ministry of Defence S/100849/99.* The Journal article suggested that *Gerrie* had been "*instrumental in forcing the Executive's hand*". It had been argued before the Employment Tribunal for Mr Gerrie that the failure by the Scottish Executive to provide for legal aid representation for him in that case was a breach of his rights under Article 6 of the European Convention on Human Rights.

It appears to ELA that if the reason for the introduction of legal aid for employment cases was in order to ensure compliance with Article 6, then its removal from those cases will re-open the argument on the question of compliance with Article 6.

Gerry Brown, then the Convener of the Society's Legal Aid Committee, stated in the above mentioned article that "*The introduction of legal aid to employment tribunals is a welcome step towards extending access to justice and equality of arms. These regulations are a direct result of the introduction by the Executive of the Human Rights Act.*" It appears to us that not only did the Legal Aid Committee recognise that Article 6 was the catalyst for the introducing legal aid for employment cases but that the Legal Aid Committee welcomed its introduction.

The discussion paper refers to the inclusive scope of legal aid as "admirable" as though it is a moral choice that goes beyond the minimum legal protection for individuals in Scotland. It is ELA's submission that providing and retaining legal aid for individuals in employment cases is more than an admirable position to be held; it is an established and respected requirement in terms of Article 6. It was noted by one member that "*this is an issue that has been raised repeatedly in England in the wake of the withdrawal of legal aid from most family disputes, particularly by the President of the Family Division of the High Court, Sir James Munby, who has made it clear that in some complex custody disputes, for instance, the absence of an opportunity to be legally represented would be a breach of Art 6; Sir James has even raised the possibility of ordering the Ministry of Justice to fund representation in one case*. "

Another member opined that "*My experience of funding cases through legal aid is that it allows many cases to be brought to Tribunal which would not otherwise be brought because of the cost of doing so.....For many, the bottom line in these matters is cost. Given the costs associated with instructing a solicitor, particularly when considering the relatively modest average Employment Tribunal awards, many clients are priced out of the market*". Without

legal aid, many clients would not be able to afford to bring these cases. Already legal assistance is dependent on the potential value of the claim. Employment cases are decidedly different to other areas of civil law where compensation is a remedy. Firstly, compensation is only one remedy. There is also the possibility of reinstatement or reengagement. In discrimination cases, a Claimant can request a declaration, that they were discriminated for example, or a recommendation from the Employment Tribunal which can be as varied as amending a discriminatory policy or ordering that members of staff undergo training. Secondly, where compensation is sought by the Claimant, it is calculated in terms of their loss of earnings. The compensatory award is capped at £76,574 or a year's salary, whichever is lower of the two. The median award for an unfair dismissal case in 2013 – 2014 was £5,016. Each side bears their own cost irrespective of who wins. Added into the mix is the particularly high percentage of cases where an employer defaults on paying the award ordered by the Tribunal. A survey by the Department of Business Innovation and Skills in 2013 found that only 53% of Claimants were paid their award in full or in part. A Claimant of limited means who does not have access to legal aid is unlikely to raise a claim. Employment practitioners have already seen the dramatic fall in the number of cases brought due to the introduction of Tribunal fees. It is felt that the removal of legal aid will be the final straw so that only those who can pay can assert their rights.

It is suggested in the discussion paper that there are alternative sources of advice for individuals over and above a solicitor such as law centres, advice shops or specialist organisations. ELA recognises the integral part law centres and the Citizens Advice Bureau play in assisting individuals assert their employment rights and representing them before the Employment Tribunal. These alternative advice sources rely on legal aid themselves. Removing legal aid for these cases will place pressure on their already strained financial resources. One member notes "*The Equality and Human Rights Commission has had its funding for supporting litigation cut to such a degree that it can only support a very small fraction of discrimination cases*". Another noted that some law centres only deal with particular types of claim such as discrimination or wage claims and that they "*are often approached by clients who have had their initial advice from a law centre or advice bureau but who require further specialist assistance to bring their case to Tribunal because that is not something offered by the bureau, for example because of the complexity of the situation*". Quite apart from these, the discussion paper does not offer any suggestion on how these advice sources can continue to operate to the current level if legal aid is removed.

Alternative funding options

As outlined above the justification for removing legal aid for employment cases is a "reduction in expenditure". Further the discussion paper asserts (without any material evidence to support that assertion) that the issues that arise in employment law cases "*are such that [funding] could easily be provided either by the advice sector or on a private client basis through a range of funding options including speculative fee arrangements, loans for legal services, and payment plans involving deferral or instalments*" (page 39).

It is difficult to see how these alternative funding options in employment law cases would have any practical, let alone significant impact on filling the gap that would be created by the removal of legal aid from those cases. The rules governing the award of expenses in the Employment Tribunal and the Employment Appeal Tribunal are very different from the regime that operates in the ordinary courts. The general rule in the Employment Tribunal is that expenses do **not** follow success. In fact, an award of expenses is still a rare occurrence and may be made in very limited circumstances. The rule governing the general power to make an award of expenses in the Employment Tribunal is that an order may be made where the Tribunal considers that a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted or any claim or response had no reasonable prospects of success (The Employment Tribunal Rules of Procedure rule 76 SI 2013/1237). A similar, although not identical, rule applies in the Employment Appeal Tribunal. An award of expenses remains the exception rather than the rule, something that was recently commented upon by the Court of Appeal in *Unison v Kelly* [2012] IRLR 951 at 952, para 17: "… the jurisdiction is essentially a cost free one at the lower levels of the hierarchy and I accept that there is an important public policy objective which is in issue here…".

It is surprising, therefore that the discussion paper should advance the proposition that speculative fee agreements are "*particularly useful for … employment*". The opposite is the case. One member noted that "*these agreements are themselves becoming increasingly difficult to manage for anything but the highest value cases*". Another stated that they are rarely offered "*perhaps [because of] the inability to recover costs from the losing party*." Unbundling/staged fees and instalment plans were also viewed as being unrealistic due to the difficulty with managing the client and collection, particularly after the event. In many cases those bringing claims to the Employment Tribunal do so because they have lost their jobs. In that circumstance, borrowing to fund litigation may simply be unaffordable and unadvisable. The suggestion that solicitors lend to clients was described by members as "incredible" and one that presents a potential conflict of interest. For the majority of members, if there is an alternative funding option such as trade union membership or legal expenses insurance, it is already utilised. Legal aid is a last resort but often the only option for low-paid workers.

Sub-Committee members

Eleanor Mannion, Renfrewshire Council – Co-chair

Jonathan Chamberlain, Wragge Lawrence Graham & Co – Co-chair

Laurence G. Cunningham, Westwater advocates

Russell Bradley, Ampersand

Paul Brown, DWF LLP

Kenneth McGuire, Westwater advocates

Annex 1

2011 – 2012 Annual Report – 'Civil Legal Assistance' Appendix

Intimations of civil advice and assistance for Employment:

- 2010-2011: 1,903
- 2011-2012: 2,068

Accounts paid and average case costs – civil advice and assistance – Employment (2011-2012):

- Number of Cases: 1,393
- Solicitor: £358,000
- Solicitor Outlays: £12,000
- Counsel Outlays: £7,000
- Total Outlays: £19,000
- Total Paid (2011-2012): £377,000

- Total Paid (2010-2011): £404,000
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- Average Case Cost (2011-2012): £271,000
- Average Case Cost (2010-2011): £222,000

Employment accounts paid as a percentage of the total accounts paid for civil advice and assistance (2010-2011) = 2.3%
Employment accounts paid as a percentage of the total legal aid spend (2010-2011) = 0.3%

Employment accounts paid as a percentage of the total accounts paid for civil advice and assistance (2011-2012) = 2.2%
Employment accounts paid as a percentage of the total legal aid spend (2011-2012) = 0.2%

Accounts paid and average case costs – civil ABWOR for Employment (2011-2012):

- Number of cases: 403
- Solicitor: £434,000
- Solicitor Outlays: £25,000
- Counsel Outlays: £23,000
- Total Outlays: £48,000
- Total Paid (2011-2012): £482,000

- Total Paid (2010-2011): £598,000

- Average Case Cost (2011-2012): £1,195
- Average Case Cost (2010-2011): £1,528

Employment tribunals – civil ABWOR – accounts paid as a percentage of the total accounts paid for civil advice and assistance (2010-2011) = 13.9%
Employment tribunals – civil ABWOR – accounts paid as a percentage of the total legal aid spend (2010-2011) = 0.4%

Employment tribunals – civil ABWOR – accounts paid as a percentage of the total accounts paid for civil advice and assistance (2011-2012) = 13.2%
Employment tribunals – civil ABWOR – accounts paid as a percentage of the total legal aid spend (2011-2012) = 0.3%

2012-2013 Annual Report – 'Civil Legal Assistance' Appendix

Intimations of civil advice and legal assistance for Employment:

- 2011-2012: 2,068
- 2012-2013: 1,857

Accounts paid and average case costs – civil advice and assistance for Employment (2012-2013):

- Number of cases: 980
- Solicitor: £208,000
- Solicitor Outlays: £6,000
- Counsel Outlays: £2,000
- Total Outlays: £9,000
- Total Paid (2012-2013): £216,000

- Total Paid (2011-2012): £365,000

- Average Case Cost (2012-2013): £221,000
- Average Case Cost (2011-2012): £265,000

Employment accounts paid as a percentage of the total accounts paid for civil advice and assistance (2012-2013) = 1.4%
Employment accounts paid as a percentage of the total legal aid spend (2012-2013) = 0.1%

Accounts paid and average case costs – civil ABWOR for Employment (2012-2013):

- Number of cases: 212
- Solicitor: £291,000
- Solicitor Outlays: £15,000
- Counsel Outlays: £18,000
- Total Outlays: £33,000
- Total Paid (2012-2013): £324,000

- Total Paid (2011-2012): £493,000

- Average Case Cost (2012-2013): £1,529
- Average Case Cost (2011-2012): £1,186

Employment tribunals – civil ABWOR – accounts paid as a percentage of the total accounts paid for civil advice and assistance (2012-2013) = 6.6%

Employment tribunals – civil ABWOR – accounts paid as a percentage of the total legal aid spend (2012-2013) = 0.2%