

## Employment lawyers association response

### Ministry of justice consultation paper – court fees: proposals for reform

#### WORKING PARTY RESPONSE

##### 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 than 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, chaired by David Widdowson was set up by the Legislative and Policy Committee of the ELA, to consider and comment on the consultation on fees in the High Court and Court of Appeal. Its report is set out below.

The Government has invited views on proposed changes to the fee charging system in the High Court and Court of Appeal Civil Division.

We are restricting our comments mainly to those aspects of the consultation that affect employment practitioners. While members deal primarily with claims in the Employment Tribunal and in the appeal courts (post Employment Tribunal), claims in the County and High Court are an important part of many of our members’ work, for example in relation to contractual claims beyond the Employment Tribunal jurisdiction, claims for breach of fiduciary duty, judicial review, breach of restrictive covenants and in respect of misappropriation of confidential information. Our responses are directed only to those questions which are relevant to the above.

##### **Question 1 – What do you consider to be the equality impacts of the proposed fee increases (when supported by a remissions system) on court users who have protected characteristics? Can you provide any evidence or sources of information that will help us to understand and assess those impacts?**

- 1.1. We note from the Equalities Impact Assessment at Annex C to the Impact Assessment document that, as the fee increases are universally applicable, no direct discrimination arises (with which we agree) and neither is there any significant risk of indirect discrimination on the basis that the steps proposed are a proportionate means of achieving a legitimate aim. Whilst that ultimately may be a valid defence to any alleged indirect discrimination it does not in our view adequately address the issue as to whether these proposals are indirectly discriminatory in respect of any of the protected characteristics. The correct approach would be to consider first whether any such indirect discrimination may arise and only then consider whether the means of achieving the legitimate aim is proportionate in the circumstances. The distinction is an important one if the obligations inherent in an Equality Impact Assessment are to be achieved.
- 1.2. The comments at paragraphs 5.2 and 5.3 of Annex C seem to us to be correctly analysed however though much will depend on the level at which the fees remission scheme applies.
- 1.3. Insofar as any fees are referable to the estimated length of the hearing, consideration should be given to include an obligation in the relevant rules upon the judge to consider at that point of listing, whether there are grounds for departing from the usual fee structure and instead applying a lesser fee to avoid discrimination on the grounds of any protected characteristic. For example, where one of the litigants is not a fluent English speaker (as might be more likely to be the case with litigants from certain racial/ethnic minorities) such that a translator is required at the hearing, or is disabled

with communication difficulties, the hearing could be significantly elongated. It may be appropriate, therefore, in order to avoid any discriminatory effect in the hearing fee in those circumstances, for the fee payable to be calculated according to the length of hearing if the effect of the interpreter or communication difficulty were ignored.ion of the disability were ignored.

**2. Question 11 – Do you agree with the proposed fee levels for judicial review cases? Please give reasons for your answer.**

- 2.1. In order to achieve a charging system which closely reflects the cost of providing the service, fees must be based on meaningful information concerning the cost at each stage and the number of cases which, if permission is refused on paper, do not proceed to request an oral hearing.
- 2.2. As judicial review cases have a very strict time limit for commencement of an action, ELA believes that a three stage charging process – consideration of the merits of the case on paper, on requesting an oral hearing where permission has been refused and on continuation - may be more appropriate. ELA believes that this is likely to represent a closer reflection of the level of the Court's resources at each stage and ensure access to justice is maintained for those of more limited means who have, in principle, a good claim. Following the case of *R (Shoemith) v Ofsted and others* [2011] EWCA Civ 642, it was made clear that judicial review is not necessarily a remedy of last resort. There may be circumstances where a public law remedy would be more valuable than an Employment Tribunal decision.

**3. Question 13 – Do you agree with the proposed fee levels for cases taken to the Court of Appeal? Please give reasons for your answer.**

We do not see any objection to the proposed fees.

**4. Question 18 – Do you believe that unspecified claims should be subject to the same fee regime as specified money claims? Or do you believe that they should have a lower maximum fee of £5,000? Please give reasons for your answer.**

The main type of action in an employment context which would fall within this category are claims involving the enforcement of post-employment restraints. Although there may ultimately be monetary damages at issue the principal purpose of such actions is to obtain injunctive relief to prevent alleged unlawful activity. Whilst it is acknowledged that an appropriate fee to address the cost of providing a hearing for such actions is considered desirable, it is our view that that is more appropriately set at the lower level.

**5. Question 19 – Is there a risk that applying a different maximum fee could have unintended consequences? Please provide details.**

We do not believe so. Many of the employment related claims of this nature in the High Court would be likely to be treated as commercial claims and charged as such. See our comments below in respect of the two charging options for such claims. If Option 1 were selected it would in many post termination restraint cases provide a second opportunity to address fees by reference to value as, by the stage a matter is set down for a full hearing, the sums at issue are likely to have become quantified.

**6. Question 20 – Do you agree that it is reasonable to charge higher court fees for high value commercial proceedings than would apply to standard money claims?**

- 6.1 Looking at the table shown within the consultation document setting out the proposed hearing fee structure in the UK and comparing this with hearing fees in other countries it is ELA's view that our hearing fees would remain competitive within this group, particularly for longer running trials. ELA does not therefore envisage that this proposal is likely to result in an overall reduction and High Court litigation being brought in this country in favour of other jurisdictions. Further it is ELA's view

that if a party were forum shopping for their litigation, or considering the jurisdiction clause to be inserted into a contract, cost may well not be the pre-eminent consideration, and that the high regard our legal system is held in internationally might be a weightier factor in the UK's favour.

6.2 In that the time that litigation occupies in the courts in large part drives the cost and given that high value commercial disputes, as a general proposition, are likely to take up more time, ELA's view is that the proposal to charge higher rates is reasonable.

**7. Question 21 – We would welcome views on the alternative proposals for charging higher fees for money claims in commercial proceedings. Do you think it would be preferable to charge higher fees for hearings in commercial proceedings? Please give reasons for your answer.**

Our preference would be for Option 1. Loading the cost at the point of issue would not be conducive to settlement of disputes and would be likely to increase the cost to the taxpayer rather than contain it.

**8. Question 22 – Could the introduction of a hearing fee have unintended consequences? What measures might we put in place to ensure that the parties provided accurate time estimates for hearings rather than minimise the cost.**

In previous court fee consultations the idea of charging hearing fees based on the actual duration of a trial by day or half day after a trial ends has met with some opposition. This has been due to its administrative complexity and because those whose hearings were particularly long may be faced with particularly large fees to pay to the conclusion of their case, and because of concern over fees becoming unpredictable for litigants. To guard against the possibility that time estimates will be understated in order to minimise the hearing fee, the additional daily cost of a trial that overruns could be a matter for the judge to take into account when addressing the issue of costs generally, perhaps with an increased daily rate to act as a penalty and deterrent against under estimates.

Furthermore the reasoning behind limiting the maximum fee to £10,900 is not immediately apparent. It might cogently be argued that trials exceeding this duration have a disproportionately higher cost attached to them in terms of, for example, the space required, the technology needed and the personnel involved. If the concern is that this may adversely impact on London as a forum for international litigation, this seems unlikely in view of the comparative costs quoted and the general point that the sums at issue in cases of this duration are likely to be such that factors other than cost of the use of the courts will dictate the parties' choice.

**9. Questions 24 – Please see our comments at above at Questions 20 and 21.**