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EHRC Survey on Litigation Strategy

Response from the Employment Lawyers Association

12 December 2014

ELA Response to EHRC Litigation Survey

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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, 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.

A sub-committee was set up by the Legislative and Policy Committee of the ELA under the chairmanship of Kiran Daurka of Slater & Gordon Lawyers to consider and comment on the EHRC Litigation Survey. Its considerations are set out below. A full list of the members of the sub-committee is annexed to the response.

1. ELA has members across the United Kingdom

2. ELA is a group made up of employment law specialists.

3. ELA does not carry out litigation.

4. **Which of our litigation powers do you think might be most effective if used in partnership with you? Please give reasons for your choice and any relevant further comment on the exercise of these powers.**

   ELA represents a wide spectrum of employment practitioners, including those who act for Claimants and Respondents as well as in-house lawyers, lawyers employed by Trade Unions and others. Accordingly, ELA as an organisation does not have strategic aims to be fulfilled through the use of litigation other than clarifying employment law where it is unclear. Accordingly, ELA would not anticipate that it would be involved in litigation in partnership with the EHRC.

   However, we have sought to respond to this question by considering how the EHRC's litigation powers could most effectively be used to clarify existing employment law and improve access to justice, for the benefit of all ELA's members. In relation to the power to intervene, ELA notes that the latest statistics on Employment Tribunal claim receipts indicate a significant drop in the number of claims brought following the introduction of fees to be paid by claimants. The most recent Ministry of Justice statistics (relating to the period April - June 2014) indicate a 70% reduction in the number of claims received as compared with the same period in 2013. Although the statistics indicate that there was significant variation quarter on quarter in the number of claims brought prior to the introduction of fees, it does appear reasonably clear that the introduction of Employment Tribunal fees has resulted in a significant fall in the number of claims brought. In light of that reduction, ELA considers that the EHRC's power to intervene (whilst important) is secondary to ensuring reasonable claims are not deterred because of the fee regime.

With that in mind, it may be that the EHRC's power to provide legal assistance may be the most effective way for it to achieve clarification in the area of discrimination law insofar as it pertains to employment and to underline the importance of accessing justice in discrimination cases. ELA considers that the EHRC's financial support (for example, with claim fees) at an early stage with certain claims may enable parties to pursue claims which ventilate issues of wider importance and achieve clarification in the law. However, identifying claims which genuinely raise such issues is of course not straightforward. Inevitably, this is dependent on the parties having access to advice from a skilled representative who is able to identify such issues. Commenting on mechanisms by which such identification can best be achieved is outside the scope of the consultation and is a matter best addressed by relevant Claimant representatives.

By its nature, judicial review has a limited role in mainstream employment practice. Again, this is not an area in which ELA itself undertakes such litigation.

5. **What is or is not of value in the principles and criteria of the litigation strategy, in relation to the Commissions role as a National Human Rights Institution and as the National Equality Body?**

Principles

Appendix 2 EHRC – Strategic litigation Policy 2012-13, states that the Commission will take into account the principles when deciding whether or not to use its legal powers (under s.28 and s.30).

We have set out in the table below our feedback in relation to each principle.

Principle	**Feedback**
i. Prioritise cases that advance the objectives in the Commission's Strategic and Business plans.	It is ELA's view that the principles be self contained so that they are clear and can be easily referred to by referring parties. However, if the Strategic and Business Plans are incorporated, they should be easily accessible. The use of the term 'prioritise' throughout the principles is not helpful as they are nearly all being prioritised.
ii. Prioritise cases that help to prevent equality and human rights abuses and proactively tackle continuing equality and human rights abuses, ahead of individual cases brought or determined after such problems have been addressed.	In our view, this principle requires clarity. In particular, it may not be possible to determine whether a case might be precedent-setting or otherwise at the outset of the case. With regard to cases that 'help to prevent' etc. would be better described as cases that "seek to clarify, increase or extend protections for equality and human rights".
iii. Prioritise use of the	ELA would query whether this priority

	Commission's section 30 Equality Act 2006 own-name proceedings legal power in relation to strategically significant human rights issues.	would only apply where no other party is willing to commence a legal action. If others are willing to do so, we are unsure why this power would assist any more than an intervention or legal assistance.
iv.	Identify and prioritise cases where the Commission is uniquely placed to act, or where it can act best in partnership with others (including, where appropriate, to bring litigation jointly with other regulators, who have overlapping jurisdiction in a particular area of equality or human rights), as opposed to cases where others are best placed to address/tackle the issue.	It is unclear exactly what this means. It would be useful to give examples of the regulators with whom the Commission might collaborate on equality or human rights issues. It would also be helpful to understand the cases where the Commission would expect other regulators to address/tackle the equality or human rights issue.
v.	Assess if non-litigation options are available to resolve the identified problems, and whether those options are more proportionate than litigation.	This might be better placed as one of the 'criteria'.
vi.	Retain the capacity to react to individual cases in its role as guardian of the law, as far as resources allow.	'Retaining the capacity' etc, is not a principle. It is also unclear what 'react' means in this context.
vii.	Have the capacity to respond to new and emerging strategically significant issues, as far as resources allow.	It is unclear what this adds. Where the Commission has identified new and emerging strategically significant issues, it would be useful for this to be publicised so that parties seeking funding are aware of them. It would also assist employers to understand the Commission's strategic objectives and how its priorities might change in response to developments in industry, technology etc.

Criteria

Appendix 2 EHRC – Strategic litigation Policy 2012-13, states that the criteria are some of the relevant factors that the Commission will consider when deciding to intervene, support or take a particular legal case. They are:

Criterion	Feedback
the legal case has good prospects of success (or there are other compelling reasons to support the case if the prospects of success are not good), and	The standard threshold of prospects of success is 'reasonable prospects' or 'more than 50%'. The threshold of 'good' may be too high resulting in the Commission deciding not to support important cases. In most discrimination cases it is not possible to give a final assessment of prospects until disclosure has taken place and or witness statements have been exchanged. It would be helpful if 'other compelling reasons' could be set out in a list, which for example could be based on previous cases taken on that basis. For example, where the litigation would involve the hearing of an important point of law.
it is a cost-effective use of limited resources, and	This criterion needs clarification. What is the Commission's test for 'cost-effectiveness'? Consider the overlap here between the need to consider non-litigation options (in the principles above).
it is the right tool/lever for the Commission to select on the issues raised in the case, and it will:	This criterion and the ones that follow are clear and adequate.
clarify, extend, strengthen or otherwise test compliance with equality and/or human rights law, where the outcome would have wider tangible benefits for vulnerable and/or protected groups, and/or	
secure better understanding of rights and obligations under equality and/or human rights law, and/or	
advance one or more of the three key agendas in the Commission's strategic plan 2012-15, and/or	
challenge a decision, policy or practice that is significantly detrimental - based on the scale or severity of adverse impact - in terms of human rights	

and/or equality law, and/or	
improve the equality and/or human rights policies and practices of a strategically significant organisation or sector, and/or.	
address widespread or systemic equality and/or human rights problems that litigation brought by others has failed to tackle, and/or	
improve public discourse on human rights and/or increase public respect for human rights, and/or	
raise the public profile of a priority equality and/or human rights issue and thereby help to promote positive change, and/or	
in relation to interventions in proceedings brought by others, the Commission's submissions provide added value to the court/tribunal beyond the arguments advanced by any of the parties to the case, and/or	
an opportunity to positively advance arguments using European and international law to improve/develop interpretation of domestic equality and/or human rights law.	

6. **Your views on the strategic priority issues listed under paragraph (c) in the current strategy are not sought as this list will not be included in the revised document. We are aiming to produce a revised strategy which is focused, concise, effective and reflects the limited level of Commission resource. The strategic priority issues which guide our litigation decisions will derive from the Commission's Strategic Plan, on which we are consulting separately and which we plan to review further in 2015.**
Please list up to 3 legal issues which you consider most pressing in the areas of discrimination and/or human rights law. These will help to inform our litigation policy, our strategic plan and the Quinquennial Review, due for publication in autumn 2015.

This is a subjective question and ELA is made up of many members who will each have different responses to this question. Notwithstanding, in our view, the most pressing issue at present remains access to justice. This would also encompass Legal Expenses Insurance funding which

requires better clarity around funding arrangements with non-panel, specialist firms advising in complex discrimination claims.

7. **Which are the three legal issues within the fields of discrimination or human rights where you believe a test case could most effectively be brought? Please give reasons for your choice and explain how a test case might be brought.**

As with question 6, the answers to this question would vary amongst ELA members. Following discussion within the working party, the following legal areas would benefit from clarity and/or development:

(i) Equal pay claims in the County Court, particularly when such claims might be brought and use of pre-action protocols to obtain early disclosure;

(ii) The s 17 Equality Act 2010 protection for breastfeeding mothers in non-work cases provides that it is unlawful discrimination to treat a mother unfavourably because she is breastfeeding, for 26 weeks after she has given birth. The s 18 protection for breastfeeding mothers at work only covers the protected period, i.e. if a breastfeeding mother returns to work, then unfavourable treatment of her because she is breastfeeding is not necessarily unlawful discrimination, as it would be under s 17. Given that the WHO recommends breastfeeding for two years after birth, and the shared parental leave provisions are aimed at encouraging women to return to work earlier, the law on breastfeeding mothers at work, including breaks, expressing and storing milk at work, flexible working because of breastfeeding would be a good area for a test case. In the USA where, because of the lack of maternity leave, a lot of women return to work whilst still breastfeeding and many workplaces have established policies, practices and facilities for it;

(iii) A test case on the limits of employers' liability for acts of third party harassment following the abolition of s.40(2)-(4) of the EA 2010. A test case could provide valuable guidance to employers as to the limits of the responsibilities of employers to their workers when placing them in environments where they are likely to be subject to harassment by third parties.

8. **Which provisions of the Equality Act 2010 are not working or need clarifying?**

(i) Section 13(3) exception to treat a disabled person more favourably doesn't work in recruitment if there is more than one disabled person with different characteristics.

(ii) Despite the EHRC supporting the successful appeal in *Jessemey v. Rowstock Limited* [2014], it might be helpful if only for its normative effect, to redraft s.108(7) so it is made explicitly clear victimisation after employment ends is outlawed by the Equality Act.

9. **Are there any issues arising out of the Human Rights Act 1998 where you believe the Commission is particularly well-placed to bring or support a challenge?**

<u>Right to a fair hearing (Article 6(1))</u>

The Employment Tribunal fee regime and the dramatic decline in the number of claims being issued, particularly discrimination claims, highlights an area where the EHRC remains well-placed to bring or support a challenge based on the right to a fair hearing under Article 6 of the Human Rights Act 1998.

(a)Existing intervention-first judicial review application

The EHRC has already intervened to support UNISON's challenge to Employment Tribunals and Employment Appeal Tribunals Fees Order 2013 (S.I. 2013 No. 1893) (the **Fee Order**)[1]. In the first judicial review application, four challenges were put forward including challenges based on the principle of effectiveness and indirect discrimination, both of which are relevant to Article 6[2].

(i) Principle of effectiveness

With regard to the principle of effectiveness, the EHRC noted that this right derived from but was wider than the requirements imposed by Article 6 of the European Convention on Human Rights (the **Convention**)[3]. The High Court considered the circumstances of notional claimants put forward by UNISON but concluded that the principle of effectiveness was not violated: "The mere fact that fees impose a burden on families with limited means and that they may have to use hard-earned savings is not enough. But it is not possible to identify any test for judging when a fee regime is excessive. **It will be easier to judge actual examples of those who assert they have been or will be deterred by the level of fees imposed[4]**."

UNISON provided evidence of the deterrent impact of the fee regime but the High Court agreed with the Lord Chancellor that it was premature to reach any firm conclusions. The High Court stated: "Far better, we suggest, to wait and see whether the fears of Unison prove to be well-founded. The hotly disputed evidence as to **the dramatic fall in claims may turn out to be powerful evidence to show that the principle of effectiveness, in the fundamentally important realm of discrimination, is being breached by the present regime.** If so, we would expect that to be clearly revealed, and the Lord Chancellor to change the system without any need for further litigation.[5]"

(ii) Indirect discrimination

The indirect discrimination challenge, based on the adverse impact of the Fee Order on ethnic minorities, women and the disabled, also relied on Article 6 of the Convention. The High Court acknowledged that women were more likely to bring Type B claims which attract the higher fee regime[6]. The disparate impact on ethnic minorities and the disabled was not analysed in any detail for the purposes of the judicial review application. The High Court concluded that, "we have **a strong suspicion that there will be some disparate effect** on those who fall within a protected class who bring Type B claims and therefore incur significantly higher fees than those bringing Type A claim[7]."

With regard to whether any disparate impact could be objectively justified, the High Court was unable to reach any firm conclusions as the fee regime had not been in force for a sufficient period of time (the judicial review challenge being subject to a short time-limit which prevented detailed analysis of the impact)[8].

(b) Continued challenge to the fee regime and the role of the EHRC

[1] The Queen on the application of UNISON [2014] EWHC 218 (Admin). See the full decision: http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/unison-v-lord-chancellor-and-ehrc.pdf
[2] See para 18 of [2014] EWHC 218
[3] See para 24
[4] See para 42
[5] See para 46
[6] See para 78. NB BIS have recently published further statistics (October 2014) which reverse the position.
[7] See para 84
[8] See para 88 and 89

The Court of Appeal granted permission to appeal[9] and UNISON were allowed to submit a further judicial review challenge based on statistics from the preceding 12 months[10]. The outcome of the second judicial review application is not yet known.

This remains an area where the EHRC is well-placed to gather evidence of the impact of the fee regime on discrimination claims and support challenges, whether on a collective or individual basis. In the first judicial review application the High Court stated, "We believe both Unison and the Commission will be, and certainly should be, astute to ensure that **accurate figures and evidence** are obtained as to the effect of this regime[11]."

We note that prior to the introduction of the Fee Order the EHRC provided a response to consultation in March 2012 which raised concerns about the disparate impact of the fee regime[12]. The EHRC could make further representations and/or push for a call for evidence on the impact of the Employment Tribunal fee regime in advance of the anticipated ministerial review of the Employment Tribunal fee system[13].

In that regard, it is worth noting that BIS have recently published statistics for Employment Tribunal claims which have been used in support of the Government's position that the fee regime does not have a disparate impact on women[14]. As the second judicial review application has not yet been reported, we do not know how those statistics were analysed and deployed in the High Court and whether the findings were accepted.

Nevertheless, it remains important for the EHRC to continue to review the impact of the Fee Order on protected groups given the sharp decline in the overall number of claims, which is widely acknowledged.

In ELA's view, further investigation is also required in relation to the fee regime in the EAT. Whilst there may be some merit in an issue fee, where an appeal has been sifted and determined to have at least reasonable prospects of success, it is a hurdle to justice for a further fee of £1200 to be payable before a hearing.

(c) Other areas

The Employment Tribunal fee regime represents the most obvious area where continued intervention is required.

The other areas of the Human Rights Act 1998 which engage with employment law are Article 8 (right to privacy), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of association and assembly). However, it is difficult for ELA to identify areas where a challenge or support for a challenge would be appropriate as there would be a varied response from within ELA's membership.

We suggest that the EHRC should have regard to the response to question 8 (provisions of the Act which are not working or need clarifying) in relation to future challenges generally as ELA welcomes certainty for employers and employees.

10. **Is it likely that you may have cases which might be appropriate for referral to the Commission and, if so, would you be interested in making us aware of them?**

[9] http://www.unison.org.uk/news/general-secretarys-blog/the-price-of-justice
[10] http://www.unison.org.uk/new-date-set-for-high-court-hearing-into-tribunal-fees
[11] See para 89
[12] http://www.equalityhumanrights.com/legal-and-policy/our-legal-work/consultation-responses/response-to-consultation-on-charging-fees-in-employment-tribunals-and-employment-appeal-tribunals
[13] http://www.justice.gov.uk/downloads/tribunals/employment/stakeholder/nug-minutes-october-2014.pdf. See page 4 Fee Report
[14] https://www.gov.uk/government/statistics/survey-of-employment-tribunal-applications-2013-further-findings (24 October 2014)

ELA is unable to respond to this question on behalf of its varied membership.

11. **Would you be interested in working with us in any other way? If so, please specify.**

ELA provides educational and update sessions to its members, as well as a monthly briefing. An annual update via its monthly briefing as to cases of relevance to ELA members as supported by EHRC would be insightful.

12. **Is there an opportunity for us to share knowledge and expertise? If so, please indicate the particular type of training or topic.**

Our response to question 11 is repeated here.

Working party:

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