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ELA L&P Committee: The Government Response to the Independent Review of Administrative Law ("IRAL")

Response from the Employment Lawyers Association

29 April 2021

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INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We 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 regulation or calls for evidence.

2. A Working Party, chaired by Matt Jackson was set up by the Legislative and Policy Committee of ELA to respond to the consultation questions in The Government Response to the Independent Review of Administrative Law ("IRAL"). Members of the Working Party are listed at the end of this paper.

3. A previous working party, chaired by David Widdowson responded to IRAL's call for evidence. That response included an Appendix on the scope of judicial review in the employment sphere which is replicated in this document at Appendix 1.

4. While ELA has particular expertise in the employment sphere, the nature of the questions asked by the consultation document inevitably overlaps with other fields. Unless a consultation question raises points of general application, such as the concept of the rule of law for example, we have tried to focus our answers on the potential impact on employment law.

EXECUTIVE SUMMARY

5. ELA is concerned that some of the proposals designed to limit the impact of Judicial Review on the ability of the Executive to legislate would undermine the rule of law. This would be the case in employment law. Workers affected by

unlawful decisions and or the exercise of powers bring their cases not simply prospectively to correct unlawful actions and decisions, but to seek to correct the past consequences of unlawful action and its impact on them in an area of the first importance to all of us - the ability to earn a living.

6. ELA would welcome a mechanism by which time limits for Judicial Review could be made more certain and to permit extensions of time to facilitate Alternative Dispute Resolution. These changes would lead to quicker and more effective justice both for public bodies and individuals saving time and costs. ELA makes detailed suggestions as to the other proposed changes below.

EMPLOYMENT LAWYERS ASSOCIATION

QUESTION 1

Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?

7. Section 102 Scotland Act 1998 is a limited provision that arises in a context of the legislative competence of the Scottish Parliament. Realistically its use only arises in circumstances where the Advocate or Attorney General, or the Lord Advocate refers a question of legislative competence or protected subject-matter in respect of bills before the Scottish Parliament to the Supreme Court.

8. There is, so far as we are aware, no analogous provision in respect of any other area of law, including statutory instruments, whereby a law officer can require the Supreme Court (or any other court) to consider whether legislation was, effectively, ultra vires.

9. Given that it will only ever be a law officer, whether of the UK Government or one of the devolved administrations who will be a party to a reference to the Supreme Court, as well as the appropriate officer of the Scottish Parliament, it is hard to see how section 102 Scotland Act 1998 is properly analogous to a party seeking for secondary legislation to be quashed.

10. The political settlement entrenched by the Scotland Act 1998 is an unusual example in administrative law where primary legislation might be struck down by the courts. In those circumstances, a specific obligation to consider the extent to which non-parties might be affected is hardly surprising as many may have organised their affairs in accordance with the legislation and there could be significant parliamentary time wasted if a whole bill requires reconsideration.

11. In an employment law context, applications for JR may potentially arise in:

    11.1. Dismissals;

    11.2. Disciplinary matters; or

    11.3. Policy decisions.

12. ELA provided examples of relevant employment law cases to IRAL on the following issues:

    12.1. Challenging public bodies not otherwise amenable to review;

    12.2. Challenging delegated legislation;

12.3. Interpretation of statutes; and

12.4. Challenging dismissal / discharge decisions of persons in Armed Forces.

13. We do not propose to repeat the same points but wish to reiterate our overall view to IRAL that the present rules on JR strike an appropriate balance between ensuring that the rule of law is upheld and restricting the ability of those with no proper interest in the matter under review to improperly interfere with the process of government.

14. Notwithstanding the recommendation of IRAL to amend section 31 Senior Courts Act 1981, with regard to the most likely types of employment law matters amenable to judicial review, it is difficult to imagine a scenario where a suspended quashing order would be preferable to the current remedial powers.

15. If suspended quashing orders are introduced, then the overall effect must be to ensure that the decision-maker complies with the law and should not impede the exercise of existing employment rights, particularly those that are underpinned by equalities legislation and / or international human rights law.

16. If additional remedies are to be introduced to judicial review claims, the likely circumstances in which such claims arise would seem to indicate that there is no real need to prescribe what matters must be taken into account, beyond those matters already in section 31 Senior Courts Act 1981 (for England and Wales) and the equivalent provision under Part II Judicature (Northern Ireland) Act 1978, if a suspended quashing order is to be made.

QUESTION 2

Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?

17. The proposals regarding ***Cart*** judicial reviews are not generally relevant to employment law. However, the findings by IRAL seem surprising when the UKSC itself declared in ***Cart*** that "…no system of decision-making is perfect or infallible" and the proposals appear, to ELA, likely to reduce the right of appeal.

18. A recent report by the Public Law Project on the empirical data relied on by IRAL suggests that the Government's analysis may need to be double-checked.

19. In terms of the intention to legislate away the right to judicially review the Upper Tribunal, as currently constituted, the employment tribunals system, sitting outside the structure of the unified tribunal system under the Tribunals, Courts and Enforcement Act 2007 would be unaffected. ELA is however aware that

various governments have considered whether to introduce primary legislation to transfer the employment tribunals out of their own system by repealing the Employment Tribunals Act 1996.

20. Under the current system, a right to appeal to the Court of Appeal (Civil Division) and the Inner House of the Court of Session from the Employment Appeal Tribunal exists. That includes where the Employment Appeal Tribunal refuses permission to appeal under rule 3 Employment Appeal Tribunal Rules 1993. Although such appeals are rare, there currently exists within the unified tribunals the right to ask for permission to appeal to the Upper Tribunal from the First-tier Tribunal. No equivalent right currently exists in England and Wales.

21. ELA would be concerned if legislating to overturn ***Cart*** could have the future effect of reducing rights of appeal, which have existed continually since the late 1970s in the (then) Industrial Tribunals system. While we therefore do not currently have a view on the principle of whether to overturn ***Cart*****,** it may well be controversial if there are future attempts to integrate the employment tribunals into the Tribunals, Courts and Enforcement Act 2007 system.

22. So far as suspended quashing orders are concerned while we cannot see where such an order might potentially be more appropriate than the existing powers, we note the Government's concern in its response to IRAL about a 'metaphysic of nullity' and scope of post-***Anisminic*** cases, including ***UNISON***. To some extent we answer this point below in respect of questions 5 to 7. Other than simply introducing the remedy (if it is necessary to do so) in primary legislation, we are unable to assist with any proposals on how to introduce the new remedies or introduce legislation to overturn ***Cart***.

QUESTION 3

Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?

23. ELA does not answer this question.

QUESTION 4

(a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?

24. While we do not have any concerns for a discretionary remedy that is prospective, in practice it seems difficult to see what the practical benefit of

adding such a remedy would be. It is already settled law in England and Wales and Scotland, that a declaration (or declarator) of the existence of a right or of a correct legal position is available as a remedy where other action would not be appropriate.

25. It is therefore difficult to see in what context such a remedy would be granted other than in relation to delegated legislation. Quashing (or reduction) of an administrative, quasi-judicial or tribunal decision (where such causes of action exist) is the only sensible way of dealing with a Claimant/Petitioner succeeding in a claim for judicial review of that decision; otherwise their success in their individual case would be futile. This is particularly so in respect of Employment Disputes where an individual, or a group of individuals have suffered past consequences. A prospective remedy hulls out the purpose of an employment law judicial review claim.

26. To the extent that the consultation provides for either a presumption or higher standard for quashing/reduction orders in respect of statutory instruments, we do not agree it would be appropriate. A presumption or other standard for a prospective-only remedy would almost certainly act as a deterrent to those seeking a remedy for unlawfully enacted secondary legislation.

27. In practice, the majority of those who sought the remedy of quashing/reduction would only be fighting over the matter of costs, as they would not themselves obtain any benefit from the outcome of their case. Such a rule would almost certainly require modification of the existing rules on standing to reflect the fact that a party would likely have no personal interest in the outcome of the case they brought.

28. It is also unclear the extent to which the consultation has considered whether such a rule would infringe the United Kingdom's treaty obligations, particularly in respect of the European Convention on Human Rights. While not part of UK law in the Human Rights Act 1998, article 13 of the Convention obliges the High Contracting Parties to provide to:

    Everyone whose rights and freedoms as set forth in this Convention are violated…an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

29. It is doubtful that a presumption against quashing/reduction of statutory instruments in respect of cases brought under the Human Rights Act 1998 would comply with that treaty obligation. That rule may well lead to significant satellite litigation in respect of the interpretative obligation contained within section 3 Human Rights Act 1998.

QUESTION 5

Do you agree that the proposed approaches in (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?

30. For the reasons set out above, we do not support either a presumptive or mandatory approach requiring any remedy being prospective only. If such an approach is to be introduced, we are of the view that only approach (a) would have any likelihood of complying with treaty obligations and the rule of law.

31. We sympathise with the consultation's wish to give effect to Sir Stephen Laws's views about the philosophical nature of secondary legislation. We are unsure whether Sir Stephen has any evidence for his statement that "*Retrospective invalidation of legislation will, in almost all cases, impose injustice and* unfairness *on those who have reasonably relied on its validity in the past.*" Not least because in general "those who have reasonably relied" on legislation that is challenged in a judicial review are generally government departments; often the ones who drafted the legislation and are responsible for the unlawful conduct which has led to the successful review. The suggested approach would remove some incentive for lawful exercise of powers by Government.

32. From a more practical perspective however, such a move would create an incoherent, and likely more costly to the government, set of circumstances, including increased litigation about the scope of the rule.

QUESTION 6

Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in (a) or the mandatory approach in (b) would be more appropriate?

33. We note the example given of the difficulties faced by the government following the decision in ***R (British Blind and Shutters Association) v Secretary of State for Housing Communities and Local Government***.[1] It has however, been the experience of the working group that the government often has the ability to consult over a very short period, and we do not believe that the current state of the law would require the government to simply ignore all that it learned during an initial consultation.

[1] [2019] EWHC 3162 (Admin)

34. In practice our view is that any difficulties caused by the lack of a presumption in favour of prospective remedies is of limited real impact. We do not agree that there is merit in requiring any particular order to be made in a particular case. We support the existence of a remedy being available on a prospective basis in appropriate cases. We are not currently aware of any occasion on which a party has sought to argue that this power is not already available in the relevant supervisory jurisdictions.

35. If, however, uncertainty remains, we can see no objection to the existence of the power being put beyond doubt.

QUESTION 7

Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?

36. We do have concerns about the legal analysis behind the propositions advanced in the consultation under this section, not least as Professor Feldman's interpretation of the ***Anisminic*** case appears at odds with the recent Supreme Court decision in ***R (on the application of Privacy International) v Investigatory Powers Tribunal***.[2]

37. Attempting to carry out that change on the basis of changing how remedies are given is, we think, an impractical way of obtaining the desired result. Legislative change of the type identified by IRAL as codification, or amendment, to the grounds of review would almost certainly provide a more coherent means of achieving the objective sought although IRAL rejected the proposals.

38. In any event, the proposal sought by the consultation to place almost all cases into what is described as a category (i) case would be unworkable in practice. The reason why, in the experience of the working party, most decisions are treated as a nullity is that there are real practical problems in seeking to rescue a decision which is based on a fundamentally flawed legal basis. It is for this reason that in private law cases, appeals in which there has been an error by the inferior court, are only dismissed where there is only one correct answer.[3]

39. The consultation seeks to effectively reverse this position. While the courts are of course, not immune from criticism, the reason why the "plainly and unarguably correct" doctrine has arisen is that the experience of the judiciary is

[2] [2019] UKSC 22; [2020] AC 491
[3] Often referred to as the decision being "plainly and unarguably correct" notwithstanding an error of law or principle

that it is rarely the case that an error or principle is incapable of changing a decision.

40. To take the ***UNISON*** example as the breach of principle of legality, if, as it was found, the introduction of a Tribunal fee was unlawful, what other remedy would properly be available other than quashing the fees order? Any other remedy would be engaging in a negotiation with the judiciary as to what level of fee would be lawful and inviting them into the realm of policy making. This would be undesirable.

41. We also note that the Supreme Court has considered suspending a quashing order previously in ***Her Majesty's Treasury v Ahmed and others***.[4] There does not appear to have been any difficulty in such an order being considered as a matter of principle in that case. Moreover, the judgment makes clear that it is a power held by the High Court (in England and Wales) as well. We do not support the proposals under this head. They are apt to create confusion, incoherence and practical unworkability.

QUESTION 8

Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?

42. We do not comment on whether the introduction of ouster clauses would be a desirable outcome. We cannot however see how the proposals advanced in the consultation would achieve the aim stated.

43. The principal difficulty in this and previous governments in obtaining practical benefits from ouster clauses stems from two factors:

    43.1. the judiciary's unwillingness to give effect to those clauses except in "the clearest cases". We note as a matter of practicality even those words which a layperson would consider clear, rarely achieves the desired effect; and,

    43.2. the erosion between justiciable and non-justiciable errors of law.

44. To some extent, 43.1. and 43.2 go together. Short of fundamental constitutional change as to the way that the judiciary are treated and the status of the High Courts in England and Wales and Northern Ireland, and the Court of Session in

[4] [2010] UKSC 5 [2010] 2 AC 534

Scotland,[5] we do not see how any proposed method would be any more successful than current attempts.

QUESTION 9

Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.

45. Yes, we agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims.

46. Judicial Review is a vital part of the justice system and allows individuals and bodies to assert rights, challenge the lawfulness of decisions and seek remedies. Like most legal action, this must be done within a certain time period.

47. However, the rules in Judicial Review are arguably more burdensome in that "promptness" has been an additional, important consideration which leaves claimants with a very short window, of potentially less than three months, to take advice, prepare for and bring a claim.

48. Considering the Civil Procedure Rules ("CPR"), CPR 54.5(1)(a) confirms that the primary test for issuing a claim is that it is done "promptly". CPR 54.5(1)(b) adds that in any event, claims are to be brought within three months after the initial decision which is being challenged is made:

    CPR 54.5(1)
    (1) The claim form must be filed-
    (a) promptly; and
    (b) in any event not later than 3 months after the grounds to make the claim first arose.

49. This needs to be read in the context of section 31 (6) Senior Courts Act 1981 which provides:

    (6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
    (a) leave for the making of the application; or
    (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially

[5] And the extent to which Court of Session has adopted in Scots Common Law a different means and standard of exercising its supervisory jurisdiction

prejudice the rights of, any person or would be detrimental to good administration.

50. The first limb of the test means that the court can refuse permission to proceed with a Judicial Review claim (orally or on paper) if it decides it was not brought promptly after the act of which the complaint is made. We consider the effect of this further below.

51. The second limb of the test, namely the three-month longstop time limit, is already one of the shortest time limits in the judicial system,[6] particularly where parties are required to comply with the Pre-Action Protocol for Judicial Review and required to consider Alternative Dispute Resolution ("ADR"). The Pre-Action Protocol for Judicial Review makes it clear at paragraph 9 that "both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. Parties are warned that if the protocol is not followed (including this paragraph) then the court must have regard to such conduct when determining costs."

52. There are only a few limited claims or legal actions which have shorter time limits than three months. Many time limits for other types of claim are longer, for example, claims in tort and contract can normally be brought within six years from the act complained of.

53. In the employment sphere, the three months' time limit is seen as a tight deadline for claimants adequately to explore their options, take legal advice and draft and prepare claims for submission. It is notable that Employment Tribunal cases do not need to comply with any specific pre-action protocol in that three-month time frame. The three-month time period in Judicial Review claims is short and limiting, considering what has to occur in the period, but it is accepted as being generally appropriate and sufficient to balance the parties' and Governments' interests, for example as follows:

    53.1. to allow parties to seek legal advice*,*

    53.2. to prepare and draft their claims properly and succinctly,

    53.3. to comply with the Pre-Action Protocol for Judicial Review (noting that the pre-action protocol requires a Pre-Action Protocol letter to be sent by

[6] Similarly short time limits apply for the vast majority of claims to the Employment Tribunals (3 months, see for example section 111 Employment Rights Act 1996), for interim relief in the Employment Tribunals (7 days – section 128 Employment Rights Act 1996), to judicially review a refusal of permission to appeal by the Upper Tribunal (16 days – rule 54.7A CPR), to judicially review a planning decision (6 weeks – rule 54.5 CPR), to challenge a procurement decision (30 days – regulation 92 Public Contracts Regulations 2015).

claimants to the defendant. The letter usually sets out the essence of the claim and the defendant is then obliged to respond within fourteen days of receiving. After the fourteen day period has expired, a claimant is then permitted to issue proceedings and remain in compliance with the protocol); and

53.4. to offer a period to resolve disputes.

54. The existing time limit is generally seen as being short enough to achieve an effective and swift review of decisions, to provide certainty for the Government and third parties, and to prevent delays in good administration. It is generally accepted that a fair balance is struck by way of the three-month period. Further, the application of this three-month time limit is already strictly applied by the courts. The parties cannot agree to extend it, as set out at rule 54.5(2) CPR. The time limit can only be extended at the court's discretion.

55. In ***R. (on the application of Crompton) v South Yorkshire Police and Crime Commissioner***,[7] the principle in ***R v Department of Transport ex p. Presvac Engineering***[8] was confirmed, namely that where a claim is brought promptly upon a Claimant becoming aware of grounds for challenge but outside three months it is nonetheless technically out of time. This indicates to us that the three-month element alone provides certainty, and that a case will fail if not brought within it (unless an application for extension is granted).

56. Bringing a claim outside the three month timeframe will always be out of time, but bringing a claim within the three month timeframe will not always be in time. It is also well-established that bringing a claim within three months is not necessarily "prompt": ***Finn-Kelcey v Milton Keynes BC***.[9] The initial requirement of promptness opens up uncertainty and unpredictability to time limits and for the parties; if one brings a claim within three months, but is not necessarily prompt in doing so, will their claim be rejected? Potentially, yes. This is demonstrated by cases which have been held to be out of time despite being brought within three months, such as in ***R (Sustainable Development Capital LLP) v SSBEIS***.[10] This is a difficult requirement for claimants to navigate, particularly if they intend to act as litigants in person: if they seek legal advice they have limited time in which to take it. Equally it can introduce uncertainty and satellite litigation for defendants who do not know whether they have a good limitation defence or not.

[7] [2018] 1 WLR 131
[8] (1991) 4 Admin LR 121, 131
[9] [2009] Env. L.R. 17 at [21]
[10] [2017] EWHC 771

57. Decisions as to what amounts to promptness have, to date, been a matter of judicial discretion as there is no strict definition of promptness. For example, in ***R (Macrae) v County of Herefordshire District Council***,[11] the High Court dismissed an application for judicial review of a decision to grant planning permission for a dwelling due to lack of promptness; the claim was made just two days before the three -month time limit expired. The Court of Appeal later disagreed with the High Court judge's exercise of his discretion. The Court of Appeal's view was that the judge was wrong to refuse the appellant's application on the ground of lack of promptness. Following the landmark ***Uniplex*** case, where the Court of Justice of the European Union ("CJEU") decided that the ability of the domestic courts to dismiss a case brought within three months on the basis that it was not brought "promptly" was contrary to the EU principle of certainty, a claimant seeking permission to apply for judicial review which relates to an EU directive no longer has to overcome the hurdle of promptness. The requirement in these cases which rely on retained EU law in the form of directives is simply that claims must be brought within three months of the relevant decision. It seems sensible to us to harmonise this with all decisions.

58. Further, the promptitude requirement could arguably amount to a restriction of rights of access to a court, and therefore restrictions on rights of redress, even where action is taken within the limited period of three months. While the promptitude requirement is argued to be necessary to avoid prejudice being caused to third parties who may have altered their situation on the strength of administrative decisions, and we accept that this is an important consideration and a legitimate aim, the underlying position is that the long stop of three months is a relatively short period of time. The promptitude requirement arguably does not sit with the legitimate aim of allowing the parties' an opportunity to resolve disputes by other available means before leave for Judicial Review has to be sought. We do not believe that it sits within the legitimate aim of saving time and costs either; for instance, if resolution can be achieved before a Judicial Review claim is brought, the time and costs associated with court proceedings can be avoided. Further, the promptitude requirement does not properly deal with situations where, for example, a claimant is disabled and needs additional support or where a claimant has a caring responsibility for a child or adult, which may in both cases legitimately impact their ability to act "promptly" within the three months.

59. The promptitude requirement is also more likely to lead to claims being submitted prematurely or with undue haste, without proper legal advice on merits or otherwise. This can put public bodies under greater pressure and lead to procedural untidiness, where claims have not been fully particularised.

[11] [2011] EWHC 2810 (Admin)

Further, the promptitude requirement seems to encourage judicial discretion in an area where steps are being taken to limit the judiciary overextending their powers. Applying a strict three-month time limit removes the need for a subjective determination of promptitude when initially assessing Judicial Review claims, and the judiciary maintains their ultimate discretion to extend time where they deem appropriate under the CPR.

60. Conversely, by removing the promptitude requirement, we must acknowledge that some claims that would otherwise have failed for not being prompt, may well now proceed through the court and to a substantive hearing. Narrowing the court's right and discretion to refuse claims for not being prompt could have a knock-on effect on court resources, which are already limited. There will be no need for a claimant to explain why it has taken them a certain period to seek leave for Judicial Review within the three months. There is also a practical impact for potential defendants. For example, in the case of planning challenges, suppliers and third parties who are in receipt of planning permissions and have been awarded contracts to commence work will face a full three-month wait during which a judicial review challenge may potentially be brought. Businesses require certainty within a reasonable period of any Government decision in order to invest, to start work and not to delay with projects. The three month approach brings that certainty with a balance of sufficient time for Claimants. These third parties will no longer have comfort that they can have a claim thrown out on lack of promptness, as time passes (noting that the closer one is to the three month, the more likely a promptitude argument could be advanced). This will inevitably impact practical business considerations.

61. It is our view that the provision requiring claims to be brought promptly, failing which they may be dismissed, fails to give clear and consistent time limits to the parties, whereas an unqualified entitlement to bring the claim within three months provides much needed certainty. The resulting time limits follow on swiftly (service of the claim form within 7 days, acknowledgment of service within 21 days) and so in theory claims should be disposed of promptly after being started. The removal of the necessity for a prompt presentation of a claim within the CPR would not of course, affect the discretion in section 31 Senior Courts Act 1981 without an amendment to primary legislation.

62. It seems that removing the promptitude requirement will bring our position into line with other European countries too, which in light of Brexit may provide more certainty, especially as CJEU decisions continue to bind and act as a persuasive influence for the UK courts, and EU law does to some extent retain supremacy.

63. In conclusion, the promptitude requirement appears on balance to act as a greater potential bar to justice than it is an effective measure. Whilst there are practical consequences that will need to be prepared for, removal of the promptitude requirement ought to achieve greater certainty, harmonises the position and should hopefully equate to more focus on resolution pre-issuance of a claim.

QUESTION 10

Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?

64. Extension of the three-month time limit is already generally within the court's discretion. For example, in ***Thornton Hall Hotel Ltd v Wirral WBC***[12] a judicial review claim against a grant of planning permission was allowed notwithstanding that it had been brought some five years out-of-time. In that case the planning permission had erroneously omitted conditions specified by the planning committee, including a five-year time limit on the permission, and the claimant had issued the claim with reasonable speed on becoming aware of the mistake. The judgment was upheld on appeal.[13] There is however, no express extension of time for the purpose of pre-action resolution.

65. In theory, an extension of the time limit strictly to encourage pre-action resolution is welcomed, but behind this ideal there is a real need to consider the impact on third parties by any delayed claim, as outlined for example in question 9 above. It goes without saying that it is always important to try to achieve resolution and encourage settlement without issuing proceedings and going to court. This saves court resources, and considerable stress, time and costs for parties. The issue is that pre-action resolution may not always be appropriate nor is it always desirable to settle, and in certain matters judicial intervention is needed. This may be particularly the case in Judicial Review cases: a wronged claimant may feel that a judicial decision is necessary and rectification of errors by a defendant public authority not truly feasible.

66. Extending the time limit in Judicial Review claims for the purpose of pre-action resolution becomes unworkable if it is not properly implemented, which could cause problems for the authorities trying to progress decisions. Any extension rights will also impact the certainty and clarity that is needed on time limits, as set out above. Such potential delays and uncertainty could have significant impact and cost money, for example in the planning and procurement context with contractors and suppliers directly affected. Therefore, any extension rights

[12] [2018] PTSR 94
[13] [2019] EWCA Civ 737

need to be implemented in a way that they cannot be abused, simply for the claimant to gain more time for example, even if that claimant has no genuine intention to engage in pre-action resolution.

67. We have considered whether it may be appropriate to consider a "stopped clock" mechanism similar to ACAS Early Conciliation under section 18A Employment Tribunals Act 1996. In Early Conciliation if the parties are interested in trying to resolve matters (or think there is scope to do so, without judicial involvement) then they can agree to pause the time limit for the claim to be brought for a certain period. In Employment Tribunal claims, the time limit is 6 weeks (unless ended sooner by one of the parties), during which a conciliator seeks to assist the parties with settling matters. If a party does not want to conciliate, the certificate entitling them to proceed to Tribunal can be issued almost immediately.

68. The key factor is that it is a statutory requirement for the parties to at least focus their minds on pre-action resolution before proceeding with a claim via the pause, and in our experience, this often facilitates early resolution much more readily than in civil disputes. Settlement discussions are dynamic and varied and claimants come to realise that resolution can be found in different terms than those afforded by a court or tribunal.

69. The overarching time limit for the claim remains three months in the Tribunal, but by way of the six week pause, a specific time period is created purely for the purpose of settlement discussions. This does involve the need for an independent conciliator to issue a statutory certificate to show that the clock has been properly stopped and to show when it restarted, which would require an additional resource although compulsory conciliation should create savings, based on the Acas system, further down the line for HMCTS.

70. The method of calculating how the "pause" impacts the final limitation date can raise confusion however (e.g., "Day A" and "Day B" calculations),[14] and this element of the pause mechanism should be avoided, particularly where the CPR enforce a very strict approach to time limitation. However, the promotion of settlement consideration for a specific period of time outside the three-month time limit, with a view to avoiding becoming engaged, or indeed entrenched, in court proceedings in an already overburdened court system, should be implemented clearly in the rules in some way.

71. An alternative to the stopped clock mechanism (to avoid the confusion mentioned above and to provide greater clarity) is to implement a specific framework in the Pre-Action Protocol, whereby parties must positively put their

[14] See for example section 207B Employment Rights Act 1996

minds to exploring alternative dispute resolution for a set period of time, which would not impact the three-month deadline and rather would act as an extension, only where a party is interested in relying on it. This could be fixed at 4 weeks, or 6 weeks similar to Early Conciliation, with rules built in to seek to avoid abuse of this time period i.e. to avoid parties' using the additional period to draft their claim, for example, and failing to have any meaningful consideration of resolution. If the parties have no intention of exploring settlement, then a blanket extension for all claims only serves to increase the time limit for reasons other than exploring ADR.

72. Whilst there may be some initial delay to claims brought in light of the extended period, it ought to save time, costs and resources in the long run if focus can be put on resolution pre-action. Further, following the mechanism in the Employment Tribunals, the other party will be notified of the intention to bring a claim (and the intention to settle) by way of the Pre-Action Protocol requirements, dealing with uncertainty of whether or not the action is being brought within time, thus allowing a defendant public body time to prepare and allocate resources appropriately. It could be built into the rules that a positive approach must be made by a party to notify the other party that they are the relying on the ADR extension, that the extension will last for a certain number of weeks from the date of the notification, and that the parties must now use that time to explore ADR.

73. With any approach to extend time for the purpose of resolution, it is important that clarity is maintained by the other parties – if settlement is explored, it must be for a specific, capped period and must be for the strict purpose of exploring settlement. This approach is also in line with the principle of "making good errors" which we understand to be the driving force behind the proposed implementation of quashing orders. This would ensure that only parties actively engaging in resolution discussions would be able to benefit from a longer time limit, which in turn would hopefully avoid delayed claims, negating the need for such claims to be commenced.

74. Settlement is common in Judicial Review cases, and the earlier this can be achieved in proceedings, then clearly the more beneficial it is to the court and to Government resources. As a comparator, ACAS early conciliation in Employment Tribunal matters results in over 50% of claims notified settling without the need for a claimant to issue a tribunal claim.[15] The early conciliation mandatory rules, in our experience, has facilitated settlement discussions, given the parties have a specific period of 6 weeks to engage failing which a claim can proceed.

[15] Acas Annual Report 2019-2020

75. In summary, we support the encouragement of pre-action resolution and settlement considerations. We have concerns with how a general extension of the time limit could be reasonably implemented beyond three months, with third parties and others' positions in mind and the risk of abuse of a general extension and suggest that the better approach is a statutory mechanism to extend the time limit strictly to allow the parties to explore settlement within clear and refined limits (for example 4-6 weeks).

QUESTION 11

Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?

76. The obvious, and fairly significant, risk of allowing parties to agree an extension to the time limit to bring a Judicial Review claim between themselves is the disproportionate impact on third parties: it removes certainty for those not directly involved. As we have stated at question 10, any extension would need to be subject to an upper and clear limit. Anti-abuse mechanisms would be needed, to avoid any extension being used for something other than considering pre-action resolution and exploring settlement. Without anti-abuse mechanisms, it may lead to the parties agreeing to extend the time limit between themselves for other reasons: because of a legal representative's availability, because of personal commitments, because the claimant is still gathering evidence or exploring their options, because the defendant needs more time to review a letter of claim, amongst other things. It cannot be open to being used simply to gain more time and abuse the strict limitation which is needed and in place to equalise the position between claimants and defendants. As suggested at 10, any extension must put the focus purely on pre-action resolution for that period.

77. An extension also risks removing the urgency from Judicial Review claims. Currently only the court can allow an extension within its discretion. An alternative proposal to the stopped clock mechanism is to include a provision within the CPRs so that the parties can make an application to the court to permit an extension, which will be granted if the court considers that it would be "just and equitable" (in similar way to claims brought under the Equality Act 2010, for example) to allow an extension beyond the three-month period, but purely for the purpose of pre-action resolution. Policing this could be difficult, especially if the parties merely want more time, and it does not cover the third-party impact. Therefore, an automatic period of pre-action resolution is likely to prove more effective and ensure fairness amongst claimants, as well as

between claimants and defendants and so that third parties have a clear understanding of the process and time limits involved.

78. Paragraph 9 of the Pre-Action Protocol on Judicial Review states that "*parties should also note that a claim for judicial review should comply with the time limits set out in the Introduction above. Exploring ADR may not excuse failure to comply with the time limits. If it is appropriate to issue a claim to ensure compliance with a time limit, but the parties agree there should be a stay of* proceedings *to explore settlement or narrowing the issues in dispute, a joint application for appropriate directions can be made to the court."* An equivalent provision is not contained within Part 54.

79. In summary, an extension of time to permit consideration of resolution is welcomed but it must be very carefully implemented and with limitations and caps on what the parties can agree to. We suggest the better approach is the stopped clock method.

QUESTION 12

Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?

80. The introduction of a track system for Judicial Review claims is likely to add complexity to cases, rather than assist with streamlining the process and providing clarity.

81. Given the lack of a monetary or financial value element, allocation to a track would likely include an early detailed consideration by the court of the relevant factors of each case. Whilst value is not determinative in the Civil Courts, it is generally the key matter for allocation. The court provides a notice of proposed allocation to the relevant track, and parties can indicate if they think the matter should be allocated to an alternative track within the directions questionnaire. If adopted within Judicial Review claims, would parties be able to challenge allocation to a particular track? If so, on what grounds and by what process? Would there be cost limits imposed on a particular track? Can claims fall off a track and if so, how? These questions, and challenges, could result in uncertainty, delay and additional court resources which are precisely the elements to be avoided via the Judicial Review reforms.

82. It is possible that the court could make the determination on which track a claim should be allocated to when considering whether to give permission, however that means that all cases up to that point will still be treated in the same manner.

83. There is no specific or obvious line to be drawn within Judicial Review proceedings on allocation such as value. The Employment Tribunals have their own form of track where unfair dismissal claims proceed more quickly than more complex claims of discrimination or whistleblowing, for instance. Unfair dismissal claims tend to have shorter final hearings before a single Judge, whereas discrimination and whistleblowing cases tend to require multi-day final hearings before a panel. While it could be the case that Judicial Review claims are allocated pending the length of the proposed hearing, due to the breadth of Judicial Review, and types of cases that it can cover, this type of approach does not seem suitable or beneficial.

84. There is an element of streamlining inherent in the system already, for example applications for permission will generally proceed on paper unless the court wishes to hear submissions on whether it is highly likely the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred, and if so, whether there are reasons of exceptional public interest which make it nevertheless appropriate to give permission, in which case the court may direct a hearing (CPR 54.11A).

85. Further, if all parties agree, the court can decide the claim for Judicial Review without a hearing (CPR 54.18). Parties could be explicitly asked to confirm if they agree to claims being heard on paper, and these claims could be fast tracked. Cases are also already entered on a warned list by the Listing Office, and urgent cases entered on a expedited-warned list. There is also a short-warned list.

86. In practice, it appears that allocation to a track would create a greater administrative burden compared to any benefits achieved in streamlining the system further. We are aware that some informal “tracking” is undertaken at certain Administrative Court Centres. It is not uncommon for, parties at oral renewal hearings, in judicial review to be asked to indicate whether a particular case is thought suitable for determination by a deputy High Court Judge, High Court Judge or Divisional Court.

87. This might form the basis for any “tracking system” if thought necessary and could be indicated on a claim form and acknowledgment of service. If any other more formal system is thought to be appropriate possible factors for allocation could include:

    87.1. The urgency of the claim;

    87.2. Significant wider public interest;

    87.3. The likely length of the hearing; and/or

87.4. Whether there was a claim for a significant breach of human rights.

88. These allocations give rise to challenge in themselves, as we have flagged above, and do not appear to provide a neat solution, nor one that saves valuable judicial time.

QUESTION 13

Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?

89. There is some uncertainty about what is being asked here. IRAL recommended that criteria for permitting intervention should be developed and published but the Government's response states that a Claimant should file a 'reply' within seven days of receipt of the Acknowledgement of Service ('AoS').

90. While more guidance on the important role of an intervener may be useful, if it is the Government's intention to suggest that any intervener (and supporting materials) must be provided within 7 days of receiving the AoS, then the effect might introduce a very high bar to the number of interveners who may otherwise support an applicant's case. It will often take considerable time for an intervener to become aware of a relevant case in order to conduct its own assessment of whether it has the capacity and or the resources to make an application to intervene. Further time is also needed to collate relevant materials and evidence in order to liaise with the other parties to proceedings.

91. There are a number of recent employment law cases where a party has acted as an intervener. There are a variety of other organisations and bodies to assist the court. Given the role of interveners being to assist the court rather than advancing one party's position, if such a duty were to be imposed, it should, logically, be one where both claimants and defendant are obliged to identify parties who may assist the court. Given the nature of judicial review proceedings, we would not support any such duty being imposed prior to a permission decision. The increase in cost and time would exceed any benefit prior to permission to proceed being granted.

QUESTION 14

Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply, as outlined above?

92. Where a defendant has opted to file summary grounds (as is the current practice), it is common practice for claimants to file a brief Reply. It is rare for defendants to object to the filing of a Reply and the Court has discretion as to

whether to take a Reply into account. The filing of a Reply is now such common accepted practice, that it is appropriate for it to be recognised formally as part of the litigation process. It is crucial to ensure that the permission stage of proceedings remains focused on the question of arguability.

93. We do have some anecdotal evidence that defendants are increasingly not providing "summary" grounds of defence at the stage of acknowledging service. There is currently no costs (or other) penalty, as there is with providing prolix and unnecessary skeleton arguments or pleadings. Similar but opposite problems have also been encountered where defendants do not in fact identify relevant issues in their summary grounds of defence simply providing bare denials.

94. Where this is the case, it may be appropriate to dispense with both summary grounds of defence and the claimant's consequential Reply as this would reduce both costs and complexity at the permission stage, without hindering the Court's ability to determine the application.

QUESTION 15

As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?

95. This may be sensible but in practice defendants will continue to opt to file summary grounds of resistance while such a right remains. We consider it to be a sensible proposal because, if followed by defendants, it would reduce the costs at the permission stage which is properly only about the arguability of claims, not about their detailed substantive merits. There is an increasing trend for defendants to provide scant pre-action responses which fail to address issues raised by claimants, followed by lengthy summary grounds of resistance which go beyond what is required in order for the Court to determine the only issue before it at the permission stage - whether the claim is arguable. In order to have a real effect, this proposal would need to be linked to a revised costs regime applicable at permission stage that creates an onus on Defendants to provide appropriate responses.

QUESTION 16

Is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?

96. Any time limit, regardless of length, must be strictly abided by and not subject to extension except in very limited circumstances. This must be true for both

parties. In practice defendants will often fail to comply with the current deadlines and the Court is reluctant to impose sanctions for non-compliance given the public law nature of claims.

97. At the point that defendants are preparing their detailed grounds, they will almost always have already engaged in pre-action correspondence and responded to the claim with summary grounds. It is therefore unlikely that an extension to 56 days would increase the quality of defendants' detailed grounds and would only serve to delay progress. If the CPRC is minded to extend the time limit, we consider it should be accompanied by guidance requiring that defendants use this period of time to fully comply with their duty of candour and setting out that any further extensions to a new time limit are only to be granted in exceptional circumstances.

QUESTION 17

Do you have any information that you believe would be useful for the Government to consider in developing a full impact assessment on the proposals in this consultation document?

98. We do not believe we can assist with this question.

QUESTION 18

Do you have any information that you consider could be helpful in assisting the Government in further developing its assessment of the equalities impacts of these proposals? We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about Cart Judicial Review Claimants, and their protected characteristics.

99. We do not believe we can assist with this question.

QUESTION 19

Are there any mitigations the Government should consider in developing its proposals further? Please provide data and reasons.

100. We do not believe we can assist with this question.

APPENDIX 1[16]

CHALLENGING PUBLIC BODIES NOT OTHERWISE AMENABLE TO REVIEW

126. The main example is the Central Arbitration Committee ("CAC") which was established by section 259 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") and whose main function for present purposes is the role it plays in determining applications for recognition by trade unions under Schedule 1 to TULRCA. Applications for judicial review have been made against decisions:

    126.1. as to whether the relevant persons in respect of whom recognition is sought are "workers" within the meaning of the Act based on Article 11 of the European Convention on Human Rights – see *R (on the application of The Independent Workers' Union of Great Britain) v Central Arbitration Committee & Ors [2019] EWHC 728 (Admin*) (a case involving drivers working in the "gig economy" for Deliveroo);

    126.2. as to whether a bargaining unit approved by the CAC was compatible with effective management – see *R (on the application of Cable & Wireless Services UK Limited v Central Arbitration Committee & Anor [2008] ICR 693*).

127. In respect of the duties carried out by the Advisory, Conciliation and Arbitration Service ("ACAS"), one of the members of our working party was involved in a recent challenge to a decision it had made in nominating independent job evaluation experts in existing equal pay proceedings where that challenge had to be on judicial review grounds.

CHALLENGING DELEGATED LEGISLATION

128. The recent challenge in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 to the legality of an order requiring fees to be paid by many claimants when making claims in the Employment Tribunal where the Supreme Court held that the legislation breached both the common law principle that citizens should have proper access to justice and the EU law obligation to provide an effective remedy for breaches of rights granted by EU law, and that it was indirectly discriminatory against women in its application.

129. The application in *R v Secretary of State for Employment ex parte Nicole* Seymour-*Smith & anor ([2000] UKHL 12)* seeking the annulment of an Order

[16] The paragraph numbering reflects the original Appendix 1

increasing the qualifying period of service required by an employee in order to be able to bring a claim for unfair dismissal on the basis that this increase unlawfully discriminated against the female workforce.

130. The application in *R (Amicus) v Secretary of State for Trade and Industry [2007] ICR 1176* for an annulment of certain regulations in the Employment Equality (Sexual Orientation) Regulations 2003 introduced by the then Labour government on the basis that they failed properly to implement its obligations under EU law to introduce laws to protect gay people at work because they included exemptions in favour of organised religions that operated unfairly against gay people.

INTERPRETATION OF STATUTES

131. As employment lawyers we are concerned not only with employees employed under a contract of service but with a much wider group of workers. As Helen Mountfield QC (sitting as a deputy High Court judge) said in the very recent decision of the Administrative Court in *Simple Learning Tutor Agency & Ors v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 2461 (Admin)* (a decision made on a challenge by judicial review to establish the ambit of the relevant legislation regulating employment agencies):

"*Unlike much employment legislation, the [relevant legislation] does not rely on a common law understanding of who is 'an employee'. The meaning of "employment …. is a wide and compendious one, intended to include both those workers who would fall within the normal common law definition of employment under a contract of service, but also the many workers who would fall outside the definition of "employee" in employment law, who offer their services in some other way.*" (paragraph 47).

CHALLENGING DISMISSAL / DISCHARGE DECISIONS OF PERSONS IN THE ARMED FORCES

132. The lawfulness of the discharge of a member of the Armed Forces is amenable to judicial review as is the level of any award of any compensation awarded as part of the Service Complaint process (see *R (on the application of Wildbur) v Ministry of Defence [2016] EWHC 821 (Admin)*). Moreover, the seminal judicial review case of *R v Army Board of the Defence Council, ex parte Anderson [1991] Q.B. 169* related to a successful challenge by a soldier in respect of the procedure adopted by the Army regarding his complaint of race discrimination. Ministers of the Church of England, some of whom have protection under ecclesiastical law akin to employment rights whereas others do not, may be able to use judicial review in certain circumstances (see *Sharpe v The Bishop*

of Worcester [2015] EWCA Civ 399 and *R v Bishop of Stafford, ex parte Owen (2000) 6 Ecc LJ 83*). Finally, certain posts in local authorities are underpinned by statutory protections designed to protect the holder from political retribution for carrying out their duties, for example a local authority monitoring officer *R (on the application of Lock) v Leicester CC [2012] EWHC 2058 (Admin)*). See also the case of *The Lord Chancellor and anor v McCloud and ors [2018] EWCA 2844* where a successful challenge was made to transitional provisions in two public sector pension schemes (for judges and firefighters) on the basis that it unlawfully discriminated against younger workers.

133. On occasions judicial review will be required to challenge decisions made by public bodies where there are legitimate concerns as to whether the body has acted lawfully. In 2011 the Court of Appeal held that the process to remove Sharon Shoesmith by Haringey Borough Council following certain directions given by the Secretary of State for Education under the then Labour government was tainted by procedural unfairness (*R (on the application of Shoesmith) v Ofsted & ors [2011] EWCA Civ 642*) and some 25 years ago the same court held that the decision by British Coal and the then President of the Board of Trade (Michael Heseltine) to close a number of collieries without consultation was unlawful because it breached a number of statutory obligations to consult (*R v British Coal Corporation ex parte Vardy [1993] ICR 720*). Challenges have also been made to the operation of the civil service compensation scheme see *R (PCS) Minister for Civil Service (No 1) [2010] ICR 1198* and *Public and Commercial Services Union & Ors v Minister for Cabinet Office [2018] ICR 269*.

134. Although an ordinary employment dispute is not governed by public law merely because the employer is a public body (see *R v East Berkshire Health Authority ex parte Walsh [1985] QB 152* addressed in more detail in our response to Question 4 in the Call for Evidence) a number of decisions have, however, demonstrated there is real scope for judicial review. In *R (on the application of Shoesmith) v Ofsted* (above) the Court of Appeal considered the availability of judicial review for the former Director of Social Services in the London Borough of Haringey. There was no doubt that the Claimant was entitled to pursue a judicial review claim against the Secretary of State for Children's Services, who had directed the local authority to remove Ms. Shoesmith from her statutory position. However, there was doubt over whether she was entitled to claim judicial review against the local authority who had dismissed her following her removal from her statutory post or whether she could only pursue her remedy of unfair dismissal in the employment tribunals. Maurice Kay LJ explained that a distinction had to be drawn between the issues of amenability to judicial review and alternative remedy.

135. In the great majority of cases, proceedings in the employment tribunal would be the better, if not the only, remedy. However, there were cases which were amenable to judicial review and where the remedy in the employment tribunal would be inappropriate or less appropriate due, for example, to the inadequacy of compensation (note the cap on compensation for ordinary unfair dismissal claims that can be paid or the superimposition of wider issues than those which are the subject of inquiry at the employment tribunal). See further on the aspect of justiciability at paragraphs 50-78 above. See also *R (on the application of Bakhsh) v Northumberland Tyne & Wear NHS Trust [2012] EWHC 1445 (Admin)* where a local authority failed to comply with an order made by an employment tribunal for reengagement , ostensibly because of the claimant's militancy, thereby raising issues pursuant to Article 11 of the European Convention on Human Rights, and *R (A) v B Council* [2007] ELGR 813, where a self-employed driver was debarred from being used in educational transport contracts with the Council because of serious criminal convictions in her youth despite having led a blameless life for 30 years. Permission was given for the claimant to raise arguments that the action was both disproportionate and contravened her Article 8 rights, although those arguments failed on the facts. See also on the issue of justiciability generally our response to Question 4 in the Call for Evidence.

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