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Fee remissions for the courts and tribunals

Response from the Employment Lawyers Association

16 May 2013

1. Introduction

The Employment Lawyers Association ("ELA") is a non-political group of lawyers working in the field of employment law. Our membership includes those who represent claimants and respondents in courts and employment tribunals. ELA does not comment on the political merits of proposed legislation, rather making observations from a purely 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.

The Legislative and Policy Committee of the ELA set up a sub-committee under the co-chairmanship of Paul Statham of Pattinson & Brewer and Michael Reed of the Free Representation Unit to consider and comment on the consultation paper 'Fee remissions for the courts and tribunals' published by BIS in May 2013. A full list of the members of the subcommittee is annexed to the report.

2. Executive Summary

A ELA are very concerned that there was only a 4 week consultation period.

B ELA are concerned at the fairness of a system that sets disposable capital limits different to the means assessment for legal aid.

C ELA are concerned that the disposable capital test does not take account of the very short (3 month) time limit in most employment tribunal cases and that claimants are likely to be claiming at a time when their financial circumstances may be drastically changing.

D ELA are concerned that there are a lot of practical difficulties with regards to the proposed evidence requirements as to capital and income bearing in mind the very short time limit.

E ELA believe the Government have underestimated the resource issues for processing applications for remissions and fear it will lead to delays and satellite litigation .

F ELA believe there are a lot of practical difficulties with regards to the proposal that household means should be used to assess eligibility for a remission.

G ELA believe the time limit for making a retrospective remission should not be reduced to 2 months in employment tribunal cases.

H ELA repeat their submissions about the practicalities of multiple claims first made in the response to the Consultation on the Introduction of Fees in the Employment Tribunal.

I ELA are concerned that the proposals will have adverse equality impacts especially for older workers and this could give rise to legal challenges

3. Preliminary: Time scale of consultation

Before dealing with the consultation itself, ELA wishes to express our concern about its short timescale. This is a matter we have raised both formally and informally in the past, but it is important enough to repeat.

The consultation launched on the 18th April 2013 and closes on the 16th May. This is only four weeks. This is simply not enough time for ELA to consistently produce high quality responses.

Like many organisations ELA has a process for responding to government consultation. Primary responsibility lies with the Legislative and Policy Committee of ELA. Work on an individual consultation, however, is conducted by a working group made up of ELA members with interest in and expertise relating to the consultation.

A working group must meet to discuss the consultation and their views. In general, the consultation document is divided between the members of the group, who prepare draft answers. These drafts are then circulated between the working group for comment, before a final draft is prepared. The final draft must be approved by the Legislative and Policy Committee.

ELA believes that this process is best way of producing high quality responses. It allows us to take advantage of the wide range of experience and knowledge among our membership — and to reflect their range of views. Indeed, given that ELA has only a small paid staff in administrative roles, it is the only practical way of organising a response.

It does, however, take time. Furthermore, when a consultation raises important and complex issues members of the working party need time to consider and formulate their views. Substantial reform of the remission system in all civil courts and all tribunals, save immigration, is an important matter. An off the cuff answer is simply not good enough — yet it is all we have been given the opportunity to provide.

If the government persists in consulting under such short timescales, it is likely to undermine the purpose of consultation. Not only will the quality of responses drop, but stakeholders will become reluctant to engage. Not least because they may come to believe that the timescales being provided reflects the government's level of interest in the responses.

ELA has always been keen to assist the government in formulating policy. We hope that our expertise and experience is useful. But it is becoming increasingly difficult to make a meaningful contribution within the truncated timescales being required.

For the above reasons, the sub-committee have confined their responses to the effects of the proposed remission scheme on the employment tribunal system even though employment related cases are brought in the County Court and High Court for breach of contract and members of the sub-committee have relevant experience of such claims.

4. Answers to Individual Questions

Question 1: Do you agree that there should only be one remission system in operation within HMCTS operated courts and tribunals and the UK Supreme Court? Please state the reason(s) for your answer.

ELA agrees that there should be a single remission system. Multiple systems are likely to create confusion, not only among litigants but also lawyers (and other advisors). They are also likely to be more difficult to administer effectively.

Question 2: Do you agree that disposable capital should be considered when deciding fee remission eligibility? Please state the reason(s) for your answer.

This is a policy question, on which ELA cannot comment.

Question 3: Do you agree with the proposed disposable capital limits? Please state the reason(s) for your answer.

ELA will not comment on the policy decision to set disposable capital limits at a particular level.

ELA do however note the significant difference between the proposed capital limits and the capital limit in the civil legal aid means assessment, which except for CLR immigration matters is £8,000.

ELA also note that those in receipt of passporting benefits will remain subject to the capital test although capital is not taken into account in the assessment of legal aid for those in receipt of Income Support, Income Based JSA, Income Based ESA or Guarantee Credit.

Given that one of the aims of the single fee remission scheme is to provide consistency, it is surprising that there is inconsistency with the means assessment for legal aid, a system similarly designed to provide those on low incomes with access to justice. It is quite possible to qualify for Legal Help for advice and assistance regarding a discrimination claim to be brought in the Employment Tribunal but not for fee a remission.

ELA are also concerned that the relatively low capital limit of £3,000 for fees up to £1,000 will have a disproportionate impact on Claimants in the Employment Tribunal given that the type B claim hearing fee of £950 falls just below the threshold beyond which the capital limit would be £8000. Type B Employment Tribunal Claimants will have to pay an issue fee of £230 and hearing fee of £950 within a few months. Those with little more than £3,000 capital may find themselves using more than one third of that capital to pay fees. This is further compounded by the fact that many Employment Tribunal Claimants will have recently lost employment and will be relying on their savings to fund day to day outgoings.

Question 4: Do you agree with the proposed terms of the disposable capital test? Please state the reason(s) for your answer.

ELA will not comment on the policy decision behind the terms of the proposed capital test.

ELA are however concerned about the inclusion of assets that are not realistically realisable within the 3 month time limit to bring an Employment Tribunal claim or where short notice is given to pay a hearing fee. Assets such as fixed rate bonds and notice savings accounts attract financial penalties for early withdrawal. Other assets such as market linked investment bonds or savings, stocks and shares are generally held as medium to long term investments and early sale or withdrawal may result in financial loss. A second home is extremely unlikely to be sold within the 3 month time limit enabling the Claimant to use the capital. Equally, it may be difficult to obtain finance using the asset if the Claimant has recently lost employment. It may be impossible to do so within the 3 month time limit.

The government should also be aware that many employees who are dismissed and wish to bring claims will have received some form of lump sum payment, such as notice pay, accrued holiday pay

or redundancy payments. Under the proposed terms of the capital test these sums will be taken into account. The purpose of some of these payments, such as redundancy payments, is to cushion the impact of unemployment. They do not reflect an accumulation of capital in the ordinary way of indicating that a individual has financial reserves. This cushion will be eliminated or reduced if claimants are required to use these payments to pay Tribunal fees.

The timing and extent of other payments are, to a great extent, arbitrary. For example, in many cases an employer may choose to dismiss an employee on notice (meaning they receive their salary over the weeks or months of the notice period) or dismiss immediately but make a payment in lieu of notice (meaning the same money is paid in a single lump sum). In some cases these arbitrary decisions will make the difference between receiving a remission or not.

The inclusion of redundancy payments will also have a disproportionate impact on Employment Tribunal Claimants who bring a claim that their redundancy was unfair or discriminatory. Older Claimants and those with significant service may find that their redundancy payment alone takes them over the capital limit. Those whose redundancy was unfair or discriminatory will face a double penalty if a large proportion of that redundancy payment is used to pay Tribunal fees.

It is further unclear why redundancy payments but not unfair dismissal payments are treated as disposable capital given that both are designed to cushion the impact of unemployment. It is not clear to ELA how these payments are to be distinguished. Clear guidance to Claimants will be necessary to ensure that monies received from employers upon termination of employment are correctly included or excluded from disposable capital.

Question 5: Do you agree with the proposed evidence requirements and enforcement mechanism of the capital test?

Question 8: Do you agree with the proposed evidence requirements for the income test

These questions are considered together, as they involve interlinking issues relating to the documentary evidence required for remission.

In general ELA believe that the consultation documents significantly underestimates the likely difficulties obtaining, and resolving difficulties with, the necessary evidence.

ELA notes the following general points in relation to documentary evidence:

- that the remissions system is being introduced into the Employment Tribunals and Employment Appeal Tribunal for the first time, without trialing the assessment of documentary evidence for these claimants first;

- a large number of litigants in person are involved in Employment Tribunal claims. This will increase substantially given the removal from 1 April 2013 of most legal aid/legal help advice and preparation of employment claims. The remissions system as a whole will also have to deal with an influx of far more litigants in person, given the cuts to legal aid in many other areas of law from 1 April 2013. It is not clear that a proper assessment of the numbers likely to apply for remission under the new remissions scheme has been made. The documentary issues arising are likely to be considerable;

- the new system will be operating remotely through central processing centres. This requires the provision of documentation by post or on-line, without the chance for claimants to clarify issues of documentation in person with court or tribunal staff, as is possible at present for many claimants applying in person at court. In our experience, at present, many difficulties are resolved informally by court staff performing a preliminary assessment of the documents provided and giving informal indications if necessary documents are missing. The absence of this immediate feedback will create new problems for the process of assessment;

- on-going correspondence is very likely to have to take place between the central processing centre and claimants to clarify issues of documentation. This is likely to cause delay during the claims process and could become protracted;

- there are particular issues arising over providing satisfactory documentary evidence quickly, given the short limitation periods for claims in Employment Tribunals and the short time scales for many Employment Tribunal claims to proceed. It will be necessary to decide how these are to be dealt with and whether claims are to be stayed, while clarification of documentation is sought;

- most claimants will have lost their job recently, resulting in a significant change in financial circumstances, immediately prior to the point at which remission would be assessed. This may create problems obtaining up to date documentation quickly;

- employment claimants are also particularly likely to require reconsideration of remission part way through their case. Many claimants with sufficient capital to be ineligible for remission at the point they lodge their case, will have used their capital to meet their expenses while unemployed and therefore fallen below the capital threshold by the time the hearing fee is payable

- claimants may have literacy or special needs problems or English may not be their first language. They may have problems understanding what documentary evidence is to be provided; and

- based on research into the assessment fees system in courts and on the experience of assessment of clients by solicitors under the Legal Help and Legal Aid schemes and on the assessment of benefits by the Job Centre and DWP, there are likely to be considerable evidential problems and delays with the new system.

- once a hearing is listed and therefore a hearing fee payable, subject to remission, delay in resolving remission issues will put the hearing a risk. The government will need to consider how cases will proceed when the hearing is imminent, but there is an outstanding remission application that has not been finally resolved.

In December 2009 PricewaterhouseCoopers LLP produced a research paper for the Ministry of Justice entitled "Is the 2007 court fee remission system working", pointing out problems in the operation of the remission scheme with regard to documentation.

While the MOJ noted in its response to the Consultation CP22/2011 "Charging fees in Employment Tribunals and the Employment Appeal Tribunal" at paragraph 140 that changes had been made to the remissions system, no research seems to have been carried out into remissions since 2009. Many of the problems noted are likely to persist and increase with a remote system with large numbers of additional claimants.

The PricewaterhouseCoopers paper noted at page 16:

- "Being presented with out-of-date or insufficient evidence was a common difficulty experienced by court staff."

- "Evidence from the e-survey of staff indicated that approximately two-thirds of staff found processing applications for remissions complex or very complex, with the main issues related to processing scenario applications for Remission 3, verifying evidence, and applicants' understanding (or lack of) the supporting documentation required."

- "These findings were supported by respondent's answers to the application scenarios, which indicated that in a significant minority (30% on average) of cases the processing of applications was incorrect. Staff respondents were more likely to select the correct answer where Remission 1 should be granted. Where the correct decision was to improve remissions 2 or 3, the majority of staff gave the wrong answer".

Experience from those assessing clients in the legal aid/legal help scheme sphere is likely to be very relevant. Solicitors operating under the legal aid/legal help scheme often have considerable difficulties and delays obtaining documentary proof of income or capital from clients. This is the case even with skilled advisers and administration staff being able to clarify in person, or over the telephone, the issues involved and documentation required.

These problems are likely to be faced by HM Courts and Tribunal Service on a very large scale, in operating the new scheme remotely with very considerably increased numbers of litigants in person.

ELA recommends consideration of the following practical points:

- the need to trial the new system in relation to the provision of documentary evidence;

- a recognition that there are likely to be problems with many litigants in person being unable to provide satisfactory documentary evidence when first applying. Flexibility will be needed;

- there will be a need to resolve what will happen with claims while the remissions are being sorted out and while correspondence is taking place between the remote centre and claimants in relation to documentation. A decision will be needed as to whether these claims would be stayed while this is happening and what happens in relation to limitation periods and hearing that have been listed;

- it would be sensible to carry out further research with the Legal Aid Agency (formerly the Legal Services Commission) and operators of the legal aid scheme into likely problems arising with dealing remotely with a large number of litigants in person having to provide documentation clarifying their means. Research with the DWP/Job Centres may also be sensible;

- consideration of the advisability in terms of public costs and smooth administration, in waiting until Universal Credit comes in, rather than introducing one system of means assessment starting in July 2013 and then changing over to another after only 3-4 months. This is on the assumption that tribunal fees are introduced in July and that the new remission system is introduced in the Autumn of 2013;

- the need for clear appeals mechanism in relation to refusal of remissions; and

- the need to have proper information available for claimants on the means information/documentation required.

Question 5: Specific points

ELA agrees that is sensible in principle to minimise the documentation provided for the capital test and to declare the value of the household disposable capital by a statement of truth. To date a statement of truth is usually explained by a solicitor or member of court staff in person when applying for remission. Now without advice, it is likely to be difficult for many litigants in person to understand the significance of the statement of truth and possibly intimidating for them.

It does not appear that much, if any, thought has been given to enforcing the accuracy of statements of truth as distinct from reviewing the documentary evidence that will instead be required if there is doubt on the face of the application that the statement of truth could be correct.

It appears that actually there will be no real checks whether capital sworn to be correct really is, and even where the statement of truth is ostensibly incorrect the penalty set out in the consultation paper is merely payment of exactly the same fee as should originally have been paid – which is hardly much of a deterrent to fraudulent claims for fee remission.

So if the accuracy of the statement of truth is apparently treated so lightly and not in fact verified even on a sample basis, the question then is whether it really adds much, if anything, to the process other than potentially to intimidate honest applicants. Does it have sufficient practical purpose to outweigh its likely intimidatory effect to those honest applicants?

In relation to the discretionary power of a Tribunal manager to request documentary evidence, there should be clarification as to how the discretion would be exercised, what factors would be considered and what documentary evidence could be sought.

There ought also to be a mechanism for challenging refusals of the discretion to remit by way of appeal, to accord with Article 6 of the European Convention on Human Rights, as incorporated within the Human Rights Act 1998. If not, the scheme will potentially be subject to judicial review; the bringing of such a review case may cause uncertainties and delay for the whole system.

A blanket proviso that where the party has provided incorrect information on the remission form, the party will be liable for any relevant fees, is likely to be too prescriptive, not taking into account the substantial risk of error or misunderstanding. There should be scope for clarification of information if there are problems and for flexibility to be shown towards claimants. This is particularly the case given that such a high proportion of claimants are likely to be litigants in person.

In relation to capital assessment and Income Support, Income-based Jobseeker's Allowance and Pension Credit the Job Centre/DWP will have already carried out an assessment of capital eligibility when deciding whether people are entitled to these benefits. It would duplicate work and costs to have a separate assessment of capital carried out by HM Courts and Tribunal, rather than automatically passporting claimants in receipt of such benefits for remission as is the case with the current Legal Help scheme.

As explained below, where household capital is being assessed requiring the assessment of a partner's assets that may present problems for some applicants.

There is also the issue of whether respondents should be allowed to present evidence once proceedings have been issued as to whether a remission has been correctly granted. ELA can

envisage substantial practical difficulties to such an approach. However, since the granting of a remission could have a substantial effect on the attitude of a Claimant to settlement of their claim, and where the Respondent may have relevant evidence, fairness dictates that they should be able to challenge a decision to grant a remission.

Question 8: Specific points

Since all income is to be assessed remotely by documentation consideration needs to be given to the problems that are likely to arise with the proposed evidence test for income.

A number of the members of the working group have experience with assessing income for the purposes of legal aid eligibility. Their experience is that many claimants come to solicitors with incomplete or out of date information. Obtaining full information and relevant evidence is challenging, even for experienced lawyers and caseworkers who are able to meet the client in person.

Many claimants, even when in work, do not have bank accounts. A blanket requirement only to provide bank statements, or benefit evidence, will not work for all claimants. ELA drew attention to the significant statistics on the "unbanked" in paragraphs 10.5 to 10.6 of our response to the MOJ Consultation on Charging Fees in Employment Tribunals (29th February 2012). We said

"HM Treasury Statistical Release-Households without access to bank accounts 2008-2009 (December 2010)- records that there are still some 0.85 million households without access to bank accounts (referred to as "unbanked"), covering 1.5 million adults. 58% of these households had an adult of working age. 89% of unbanked households were in receipt of a state benefit compared with only 69% of "banked" households. 20% of unbanked households contained a person not in work due to ill-health. Unbanked individuals would not be able to use electronic methods of payment, since of necessity they will not have debit cards, and almost certainly not credit cards either. Failure to provide alternative ways of paying fees not requiring access to a bank account can be anticipated to have a disproportionate effect on disabled users and a potential equality impact.

10.6 The statistics for unbanked Black and Minority Ethnic Groups do not appear to differ significantly from those for white households but this may mask the number of the unbanked who are migrant workers from Europe, who in the experience of ELA members often do not have access to a bank account and so would have to pay fees in cash. This may have a potential equality impact with regard to national origin. There are a substantial number of holiday pay claims under the Working Time Regulations by building and casual agricultural workers, many of whom are paid in cash and do not have access to bank accounts."

ELA consider that the same points apply with regards to supplying evidence of income.

It is often difficult and time consuming for claimants to obtain proof of benefits from Job Centres. Documents issued by the Department of Work and Pensions / Job Centre confirming entitlement to JSA often fail to make it clear what category of JSA has been awarded — in particular whether it is income related or contributory JSA. Flexibility will be needed to allow claimants time to obtain clear and up to date documentation from the DWP/Job Centre

Original documentation may be lost for a number of reasons including accidents or personal disasters and may take time to replace.

Claimants may not have been supplied with up to date payslips by their employer. Some employers do not supply payslips at all. There is likely to a correlation between employers who fail in this regard and those who have tribunal claims brought against them. One of the claims that can be brought in the employment tribunal is a claim for an itemised pay slip where an employer has failed to provide it- section 11 Employment Rights Act 1996.

Claimants may experience problems obtaining suitable documentary evidence of their partners income, particularly if they are experiencing relationship problems/breakdown.

Moving from an in person process of application to a remote one is likely to increase costs for many claimants particularly if an extended process of clarification needs to take place.

Question 6: Do you agree that these proposals strike the right balance in targeting eligibility for full and partial remission through a simple and workable system?

There are policy reasons behind the decision to use gross income to determine eligibility for remission on which ELA will not comment.

There is no doubt that using gross income rather than calculating (and evidencing) disposable income simplifies the test. We are however concerned that the failing to take into account housing costs will disproportionately affect Claimants in areas where housing costs are high, such as South East England, and that failing to take into account childcare costs will disproportionately affect those with children.

The system of partial remission may be difficult for Claimants without legal assistance to understand (although the provision of an online calculator goes some way to assist). Those without access to the internet may find it difficult to calculate partial remission.

We are also concerned that the system for evidencing income is not simple and workable. It is likely to result in eligible Claimants not receiving a remission or partial remission because they are unable to provide evidence in time to meet the 3 month time limit for Tribunal claims or where short notice is given to pay a hearing fee. Further detail of our concerns is given at our answer to Question 8. Claimants may resort to borrowing money from pay day lenders at high interest in order to pay a fee pending application for retrospective remission. Again we anticipate problems in the proposed 2 month limit for such an application of which further detail is given in our answer to Question 14.

ELA are concerned that Tribunals will not have the resources to deal with large numbers of fee remission applications, many of which will be from self represented litigants who may not include the correct supporting evidence. It is confirmed in the Q&A accompanying the Regulations published on 26 April 2012 that applications will be made by post and that Tribunal offices will not have facilities to take payments. The system will therefore be administered differently to County Courts where administration staff are available to check remission applications and documentary evidence over the counter. There will therefore be delay if remission applications are rejected for lack of evidence and then re-submitted. This delay may take a Claimant beyond the 3 month time limit, particularly where the Tribunal takes some time to make a determination.

Tribunal staff have no experience of the remissions system and are therefore likely to take time to understand and process applications. We repeat the points made in answer to Question 5 and 8 above concerning the PricewaterhouseCoopers LLP Research Paper. If inexperienced staff make mistakes about eligibility for a remission and claims are not lodged or are lodged out of time, claims can be expected against the MOJ.

Again, the Q&A confirms that there will be no extensions to time limits to allow for payment of the fee or for remissions. We therefore anticipate litigation on whether or not it was reasonably practicable for a Claimant to present a case within 3 months where an application has been returned for lack of documentary evidence or where the Claimant has mistakenly believed he/she is entitled to remission (or has incorrectly calculated partial remission and paid the wrong fee). Similar arguments will be made as to whether it is just and equitable to extend time to present discrimination claims on this basis. This will increase costs to both parties and be a further drain on Tribunal resources. This issue is also likely to be subject to appeal.

Question 7: Do you agree that there should be a gross monthly income cap so that those with a certain amount of income would be ineligible for a part remission and would pay the fee in full? If so do you agree that a single cap of £4,000.00 is appropriate or should the Government consider varying the cap for different levels?
Please state the reason(s) for your answer.

ELA will not comment on the policy decision of whether there should be a gross monthly income cap so that those with income exceeding a certain amount should be ineligible for a partial remission and therefore pay the fee in full.

ELA is however concerned that the combination of assessing the income in the month prior to the application with the fact that most employment claimants have very recently been dismissed is likely to distort assessment of income.

First, many Claimants will have received a one-off lump sum payment, such as redundancy pay, pay in lieu of notice or accrued holiday pay. These payments are common on termination of employment and temporarily inflate monthly income. Where the individual does not find new employment quickly they will be used to fund living costs in the same way as savings. Consideration should be given to excluding them for the purposes of the income calculation.

Second, Claimants who have been dismissed will have lost their main source of income, meaning that their monthly income is substantially reduced. Well advised claimants will therefore delay presenting a claim until they can rely on their post-dismissal income. This is undesirable for a number of reasons. Claimants who act promptly should not pay a larger fee than those who delay for purely tactical reasons. Claimants who delay are more likely to mistakenly lodge their claim out of time. Furthermore, it is to the benefit of respondents, if there is to be a claim, for it to be made as soon as possible, rather than the time from dismissal to resolution of the claim being extended.

Question 9: Do you agree that eligibility to remission should be based on an assessment of household means?

This answer is provided in addition to the comments raised in response to question 8 and 17.

In the ELA's view assessing an applicant's household income rather than confining the assessment to the 'user' could cause practical issues. The proposed system seeks to ensure simplicity, cost efficiency and that the correct remission is applied to the user. As the Ministry of Justice quite rightly highlights throughout its consultation paper on employment tribunal fees, the focus on fee application should be on the user of the system, the individual who is seeking protection of their rights. The user initiates the process, takes an active role in the conduct of proceedings and is responsible for any costs incurred. In ELA's view this focus on the individual should similarly be reflected in any fee remission scheme.

ELA consider that assessing the user to the proceedings is the correct approach and would dispute the rationale that "both the applicant and partner gain" from proceedings to justify assessing eligibility for remissions on household means. Any remedy awarded to the claimant will not take into account the impact of the breach upon the partner nor will they be called upon to provide evidence to determine the merits of the claim. Indeed, the partner may oppose the claimant's cause of action for reasons set out in answer to question 10, below. There is no facility to force a partner to comply with the remission or tribunal process and the respective timetables set down therein. A huge reliance will be placed upon an individual to comply with a very complex, restrictive and time-consuming process for a dispute that they do not necessarily have an interest in.

The remedies applicable solely to discrimination claims, e.g. declaration, recommendations, reasonable adjustments, are specific to the applicant and not the household as a whole. The applicant will directly benefit from the remedy and there will be no such benefit to the partner.

We commented in our response to the Ministry of Justice Consultation on the Introduction of Fees in Employment Tribunals (29th February 2012) at 10.6 that providing documentary evidence is a "nightmare" for those assisting the applicants. The removal of legal aid will move this requirement to the applicant at a time when they will need to be fully focused on ensuring they have submitted a claim correctly and within the time limitation. In ELA's view these issues will be exacerbated if an applicant's partner's income must also be assessed.

A final observation is we are aware of instances where an applicant has not raised with their partner the issues that give rise to their tribunal complaint with their partner. This may be a number of reasons such as privacy (for example in a case of harassment on the grounds of sex or associative discrimination) and/or to protect the partner from worry (for example where they suffer from a disability). Currently the applicant is able to keep the whole process private without concerning their partner but this proposal requires the partner to take an active role. We would therefore submit that it would be wholly inappropriate to involve the partner in the fee remission assessment.

Our concerns over the provisions of evidence as raised in response to questions 5, 8, 14 and 17, extend to the partner's assessment.

Question 10: Do you envisage other circumstances where a contrary interest could apply?

ELA does not envisage contrary interest being applicable to the remission system for employment tribunal fees in many cases. It is clear that contrary interest is directed primarily towards family proceedings where the existence of a family dispute will more likely have an impact on the assessment of household income.

ELA do, however, envisage that contrary interest could arise in an employment context in the following scenarios:

- Where the applicant's partner also works for the respondent employer. It may be that the partner will not be willing to provide financial evidence in support of a remission application for fear of reprisals from the employer as the implication would be that the partner supports their claim and/or is being disloyal. ELA are concerned that in such circumstances the partner could be hesitant to provide evidence. They should therefore be exempted from having to do so. We would propose a provision within the remission application form whereby the applicant can indicate their partner is employed by the respondent and their income should not be taken into account.

- As highlighted in a recent tribunal claim brought in Northern Ireland, circumstances may arise where the partner in the 'household' is the respondent or has an interest in the respondent, such as sitting on the board of directors, a majority shareholder or partner in the business. In such instances the applicant may implicate their partner and/or their partner may have a vested interest in the claim, i.e. the reputation of the company may be damaged, having a direct impact on share value and/or the partner's tenability.

Such cases will be unusual, but ELA believe that the remission system should be flexible enough to avoid injustice where they do occur.

Question 11: Do you agree that the existing process for third party applications should be applied to all courts and tribunals subject to this consultation, and that the current practice in the Court of Protection should continue?

ELA responds only in respect of how this would impact upon the remission system for the ET and EAT. There is no provision for litigation friend within the ET/EAT rules and therefore it should be made explicit that there will be no consideration of any party's income other than the applicant's.

Question 12: Do you agree that providing copies of documents and searches should be exempt from the remission system? Please state the reason(s).

ELA will not comment on the policy decision of whether providing copies of documents and searches should be exempt from the remission system.

Copy documents in Employment Tribunals will usually be copies of documents that the requesting party already has access to, either as they have their own originals or by requesting them from the other party.

Search fees are not common in the Employment Tribunal cases, so ELA anticipate that most searches will be undertaken by persons who are not party to the action seeking copies of a Tribunal decision from the Central Register.

Question 13: Do you envisage circumstances where charging for copy or search fees would restrict access to justice? Please state the reason(s) for your answer.

No, as there are currently no copy or search fees in the Employment Tribunal except to obtain copies of a Tribunal decision from the Central Register.

Question 14 Do you agree that the time limit for making a retrospective remission should be reduced to two months?

In ELA's view the period of time for applying for a refund known as a retrospective remission should not be reduced from six months to two months. In Employment Tribunal cases, the time limit for submitting claims is three months less one day from the date of dismissal or act complained of with very little scope for the tribunal to exercise a discretion to extend the time limit. This can place considerable pressure on claimants, many of whom are unrepresented at the time of lodging a tribunal claim. The priority will be to ensure the claim is lodged in time and gathering documentary evidence in respect of household gross income may well be treated as a lesser priority. A claimant may borrow the money to pay the fee from family or a payroll loan company.

The claim is then likely to come to a final hearing within 12 weeks when the claimant may be concentrating on preparing the case for hearing, preparing disclosure, witness statements or obtaining witness evidence in rebuttal of the respondents case which is normally received within 28 days of lodging the claim. Again making an application for a retrospective remission will be a lower priority than preparing the case.

Many claimants will have lost their jobs or making claims for unpaid wages. Therefore any wages shown on bank statements may well have come to an end but they will not have the opportunity of producing sufficient representative documentary evidence such as bank statements if they can only apply retrospectively for 2 months from when they apply to the tribunal. They are likely to delay applying to the end of the limitation period in any event but having a 2 month time limit to apply retrospectively will only compound the problem.

It is anticipated that some legal expense insurers, employment advisors, solicitors or trade unions will pay the fee up front by loaning the fee to the claimant conditional on the claimant making an application for a remission if suitably qualified. It would be unfair to penalise the claimant by not allowing a retrospective remission after only 2 months.

Further, a claimant may submit a claim for benefit that will be a qualifying benefit for remission purposes but the application may take longer than 2 months to process and grant. In particular employees who are dismissed may be initially refused income based jobseekers allowance on the basis of a former employer's response that they were dismissed for misconduct but following an appeal by the claimant benefit is reinstated allowing the claimant to apply for a remission. That could take more than 2 months.

Finally, it is the experience of some members of the ELA sub-committee responding to this consultation who deal with similar applications for legal assistance that there can be considerable difficulties in obtaining the necessary paperwork particularly from partners. It is anticipated that similar problems would arise in obtaining appropriate paperwork for applications for remissions.

In ELA's view any increased administrative burden in retrieving and reviewing the file may be outweighed by the unfairness of denying the claimant a retrospective remission because 2 months has passed. Further, the file in an employment tribunal case is likely to be electronic and the only points that will need checking is whether it is a type A or type B claim and whether a hearing notice has been issued for the case and the date of issue of the claim and the notice of hearing.

Question 15 – Your views are welcome on whether there are any other factors we need to take into account for claimants seeking remissions in multiple claims.

The administration involved in processing applications for remissions will differ considerably as between a five claimant case and a 500 claimant case. There is a severe risk that in cases with

higher numbers of claimant, the resource commitment in processing remission applications in a multiple claimant case could exceed the value of the fee itself. Thus, requiring fees in some cases may be counterproductive and uneconomical.

ELA repeats the points made in paragraphs 13.3 following of our response to the MOJ Consultation on Charging Fees in Employment Tribunals (29th February 2012). We said

"13.3 There is a strong public interest in encouraging litigants whose claims arise from the same or similar circumstances and are against the same respondents to combine their claims as multiples, since despite these factors, multiple claims are more cost effective to deal with what could otherwise have been a large number of single claims covering the same or similar issues. Therefore the fee structure, including remission criteria, should not act as a disincentive to claimants bringing their claims as multiples. For that and other reasons ELA considers there is merit in either excluding multiples from the fee regime altogether or limiting the fee to that charged for a single case. The observations which follow are based on the proposals as they stand as to the rate at which fees will be charged.

13.4 The great majority of multiple claims involve no more than 10 claimants (84.9%, according to the analysis at paragraph 3.8 of the Regulatory Impact Assessment; over 60% have no more than 4 claimants). Claimants in these smaller multiples will still, if the fee structure adopted incorporates the fee levels proposed, face having to pay a fee which many cannot reasonably pay.

13.5 Claimants in smaller multiples are, in the experience of ELA members, more often unrepresented than those in the larger multiples and the processing of claims for remission of fees by such claimants will not add significantly to the administrative cost of processing payments by individuals (and it cannot be expected that a group of unrepresented claimants will co-ordinate the payment of a joint fee).

13.6 In the light of the foregoing, for multiples with up to 10 claimants, ELA considers that the fee should be treated as payable in equal shares by each claimant, with each claimant entitled if meeting the means criteria to a full or partial exemption from his or her share of the fee. We do not accept that the fee thus remitted should have to be paid by the other claimants in the multiple, even with the cap proposed of no claimant being liable for more than the single claim rate of fee. It is in our view unfair to claimants that they should have to pay more than their share of fees simply because their co-claimants are entitled to remission of their share....

13.7 Thus in a 10-claimant multiple, if four of the claimants are entitled to remission, they would pay nothing, and the other 6 would pay 1.8 x the single fee between them (60% of 3 x the single fee). Wherever possible parties should be encouraged to make a single joint payment, but this should not be mandatory as it would tend to discourage claims being presented as multiples if the financial arrangements are made too complex for unrepresented parties. However, as between themselves, the liability to pay would be divided equally between those not entitled to remission.

13.8 On the other hand, ELA accepts that in the larger multiples, the fee payable by or on behalf of each claimant will not exceed, and in most cases will be much less than, 40% of the full fee for single claims. We accept that it is unlikely that real hardship will be caused by not offering remission of fees for the larger multiples. If any individual would suffer real hardship through having to contribute to the multiple fee, this can be avoided by presenting a separate claim, seeking remission of the fee, and then applying for the claim to be joined into the multiple. Accordingly we accept that remission of the fee payable should not apply if there are more than 10 claimants.

13.9 Elsewhere in this submission the point is made that the applicable fee for the hearing under Option 1 should be calculated according to the number of claimants in the multiple at that stage (which may be more or less than at presentation). We consider that the rules as to remission should also apply or not according to the number of claimants at that stage. However, the maximum fee that would be payable by a claimant for a category three hearing in a multiple of 11 would be 1/11 of (£1250 x 4), or £450. That is too high for there to be no facility for remission in cases of inability to pay. We propose that where... an individual claimant would be liable to pay a share of £200 or more, remission should be available on the same criteria as for fees in single claims."

ELA consider that our proposals are still valid with regards to a workable system for multiple cases with a fair system of remissions. The reference to option 1 in paragraph 13.9 is to the option the government chose following the consultation exercise.

In Employment Tribunals, the availability of multiple claimant cases is intended to aid the more efficient management of claims, and avoid Tribunals being inundated with individual claims needing to be handled separately. It is to the benefit of all parties, as well as the Tribunal service, that where claims can be pursued on a multiple basis, they are.

ELA suggest that the provisions governing fees for multiple claims, including remission arrangements, should not be a deterrent against claimants joining together.

ELA notes the Draft Employment Tribunals and the Employment Appeal Tribunal fees Order 2013 provides in regulation 12 for a member of a fee group to notify the Lord Chancellor that they no longer wish to be part of the fee group where the fee has not been paid and the case is liable to be struck out. ELA are concerned as to how this work in practice.

Question 16: Overall, do you agree that this provides a fair, transparent and workable structure for determining fee remissions for HMCTS and the UK Supreme Court? Please state the reason(s) for your answer.

ELA will not comment on the fairness of the proposed scheme. We view this as a policy matter outside our remit.

But we do not think that the proposal is either transparent or workable. There are profound practical difficulties, not only in the scheme itself, but in its impact on the tribunal system, as set out in the rest of this response.

In our view, the government is likely to face considerable practical problems in setting up and administrating the scheme. This is likely to produce substantial delay, particularly in areas, like employment, where the time-limits for claims are short and where fees are due shortly before a hearing. If delays in dealing with remission cause delays in tribunal hearings or worse, the cancellation of scheduling hearing this will cause considerable distress and expense — not only to those paying the fee, but other parties to the litigation.

We are also concerned that the government intends to introduce fees to the employment tribunal under the existing remission system, only to introduce radical change only a few months later. This is likely to create considerable disruption and confusion.

Question 17: Do you think the proposed remission system is likely to have any positive or adverse equality impacts? Please state the reason(s) for your answer.

General

We do not accept the assertion that the remission system will necessarily provide justification for adverse impacts of the proposals on the various "equality groups". Many claimants, especially those with on-going discrimination claims and who are still employed will not be entitled to any form of remission. Likewise those who have been dismissed or whose employment is at an end may also find it difficult to satisfy the conditions for having fees remitted. Time limits for presenting claims are very short; in most cases three months from the time of the incident or discrimination in question. Many claimants will not have the means to pay the initial fees whilst they are, for example, waiting to see if they are entitled to state benefits. Many claimants will not be entitled to benefits for some months and therefore will not satisfy the rules on remission of fees before the three month time limits expire. This will prevent many worthwhile cases being brought in the ET and undermine any potential justification of the acknowledged adverse impacts that the Ministry of Justice may seek to establish.

In the response to the Ministry of Justice Consultation on the Introduction of Fees in Employment Tribunals (29th February 2012) ELA stated:-

"8.2 The remission system will have to be understood both by Claimants and ET staff, and operate efficiently, to provide the mitigation suggested. In that regard consideration must be given to the impact on those with protected characteristics and in particular]claimants with a learning or sensory disability, or whose first language is not English, who as a consequence are more likely to have difficulty accessing remission from paying fees...

8.5 We do not accept the assertion that the remission system will necessarily provide justification for adverse impacts of the proposals on the various "equality groups" identified in the Initial Equality Impact Assessment. Justification entails not just mitigation of adverse consequences but proportionality between the discriminatory effect and the legitimate aim pursued (in this case making users of the ET service responsible for meeting part of the cost of providing the service, an aim we fully accept as legitimate).

8.6 Many claimants, especially those with on-going discrimination claims and who are still employed will not be entitled to any form of remission. Likewise those who have been dismissed or whose employment is at an end may also find it difficult to satisfy the conditions for having fees remitted. Time limits for presenting claims are very short; in most cases three months from the time of the incident or discrimination in question. Many claimants will not have the means to pay the initial fees whilst they are, for example, waiting to see if they are entitled to state benefits, or during a period of disqualification. Many claimants will not be entitled to benefits for some months and therefore will not satisfy the rules on remission of fees before the three month time limits expire. This will prevent many worthwhile cases being brought in the ET and undermine any potential justification of the acknowledged adverse impacts that the MoJ may seek to establish.

8.7 Also, there are deterrents for potential claimants who weigh up the fees they will have to pay against the sums they will be likely to obtain, particularly where there is no automatic right to recovery of fees from an unsuccessful respondent. This could be partly addressed by making reimbursement automatic rather than discretionary. However, there is still the issue of respondent failing to pay when ordered to do so by the ET. Non-payment of ET awards is common enough that this must be a real concern for many potential claimants."

ELA submit that these points are just as valid today when looking at the proposals to amend the remission system.

Disability

In the same response ELA stated;-

" 1.13 It is clear from the Section 14 of the Initial Equality Impact Assessment that both Options 1 and 2 will have a profound adverse impact on disabled people, perhaps more so than any other equality group. The authors acknowledge that a significant proportion (22%) of those bringing ET claims of all types including 40% of those bringing discrimination claims are disabled: proportions well in excess of the incidence of disability in the adult working population. Disabled people are therefore over twice as likely to be bringing such employment claims as the population as a whole, and over three times as likely to be bringing discrimination claims (which attract the highest level of fees). The effect therefore is that disabled ET claimants are three times more likely to be charged the highest level of fees under the current proposals.

1.14 Other than the general statistics set out at paragraph 25.4, the Initial Equality Impact Assessment contains no evidence or analysis of how the remission system might mitigate the acknowledged adverse affects both Options 1 and 2 will have on disabled people. On the MoJ's own measure, only 26.4% of ET claimants will be entitled to full remission. The authors acknowledge at paragraph 4.13 that information on claimants' incomes is not routinely collected and instead they rely on an adjusted analysis of the Family Resources Survey from 2008/2009 – i.e on data collected before the impact of the recession, public sector wage freezes and inflation can have been fully reflected in the survey results. Further, changes to eligibility for state benefits have been introduced since the survey period and these too may well have had an effect on incomes. In the absence of reliable primary data, it is therefore difficult to see how much weight can be attributed to the analysis advanced or the speculative assessments of the effects of Options 1 or 2 on rates of available remission.

1.15 Further, the analysis does not assess the personal circumstances of disabled people presenting employment claims and whether they are more likely or not to be in employment or otherwise entitled to remission of any kind. In the absence of reliable information it cannot be said with any certainty that the remission system will have the purported effect of mitigating the acknowledged and significant adverse impact of Option 1 and 2 on disabled people. It follows again that the MoJ's proffered justification for the acknowledged adverse impacts on disabled people is no more than an assertion, not founded on reliable evidence."

ELA submit that the above arguments are only reinforced by the proposals to change the remission system with a disposable capital and gross income test.

It is not clear from the consultation paper whether the intention is to use online applications for remissions although the recently issue questions and answers accompanying the draft Tribunal Fees Order suggest online applications will be encouraged and payment and remission applications will be dealt with remotely. ELA draw attention to the fact that the Office for National Statistics ("ONS") Bulletin found that 23% of households did not have a household internet connection-Internet Access-Households and Individuals, 2011 (31st August 2011). That is 5.7 million households. Of those who used the internet, only 27% currently use it to submit official forms electronically. It is anticipated that an even smaller number make payments with official forms submitted electronically. Accordingly, relying mainly on the internet for payment of partial fees where a partial remission is granted is likely to present barriers to
access to justice for a significant proportion of tribunal users.

The ONS Internet Access Quarterly Update 2011-Q3 issued on the 16th November 2011- indicates that 4.25 million disabled adults had never used the internet, which is just over half of the 8.43 million adults who have never used the internet. ELA considers this is a significant number and a failure to provide accessible alternatives to electronic payment over the internet can be anticipated to have a disproportionate effect on disabled users, amongst others.

Age

In ELA's view there will be adverse equality impacts with regards to older workers as flagged up in paragraph 2 of chapter 6. It is expected that claimants are likely to increase their earning capacity as they age because of service related increments, experience and training. They are also more likely to have savings for retirement and other disposable capital. As such they are less likely to qualify for a remission. ELA are not in a position to point to any other statistical evidence to support this proposition but would suggest this is self-evident. As such, older claimants may be disproportionately affected by a remission system where disposable capital, followed by gross income are the criteria to qualify for a remission.

Question 18: If you think the proposal is likely to have any adverse equality impacts, how could these impacts be mitigated? Please state the reason(s) for your answer.

ELA consider that the widest possible methods of submitting evidence for remissions should be provided for in addition to online applications and when it comes to paying fees in partial remission cases the widest possible methods of payment should be offered. In the response to the Tribunal Fees Consultation-paragraph 31.10-, ELA suggested allowing for fees to be paid in cash at Post Offices who then issue a receipt/reference number that can be used to prove payment to the tribunal service.. We repeat that suggestion.

The disproportionate effect on older workers could be mitigated by introducing different limits for disposable capital or gross income for older workers-it is noted that statutory redundancy payments are increased from 1 weeks pay to 11/2 weeks pay for years of service over 40. The definition of disposable capital could be changed to exclude "redundancy capital payments received" which ELA assumes is a reference to a statutory, contractual or ex gratia payment made because of redundancy. Further capital listed in categories 5 (a) to (c) in Annex E (page 39 of consultation document) could be disregarded if the claimant could demonstrate the intention was that they were long term investments to provide for retirement.

Question 19: Are you aware of any further evidence that could aid our analysis of potential equality impacts? If so please provide us with this evidence.

ELA are not aware of any further evidence that could aid the analysis of potential equality impacts.

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