EMPLOYMENT
LAWYERS
ASSOCIATION

PO Box 1609
High Wycombe
HP11 9NG

TELEPHONE 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

Employment Tribunals: BEIS Proposals

Responding to Challenges in the System

Response from the Employment Lawyers Association

17 July 2020

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Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation.

A working party, co-chaired by Jennifer Sole and David Widdowson was set up by the Legislative and Policy Committee of ELA to respond to the request for response to proposals under the heading "Employment Tribunals: responding to challenges in the system" issued by the Department for Business, Energy and Industrial Strategy on 23 June 2020. The ELA working party members are listed at the end of this paper.

Proposal 1

Requirements around Respondent name

In practice, ELA members are finding that that some Employment Judges have already been allowing flexibility. The concern identified here is that there is no provision enabling a prospective Respondent's name to be amended where it has been incorrectly identified in the early conciliation form presented by the claimant. In our experience it is not uncommon for a claimant, particularly those unrepresented, to provide ACAS with the incorrect name for the employer and so a procedure whereby that can be easily corrected would be highly desirable. At the Employment Tribunal stage that could be achieved by use of rule 34 but we agree that a specific amendment to the Schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 would also be helpful.

Proposal 2

Correcting Minor Errors

We agree that a power to the Employment Tribunal to correct minor errors in early conciliation certificates would be desirable. Again, in practice, ELA members are finding that that some Employment Judges have already been showing some flexibility in this respect.

Proposal 3

Cases involving Multiple Claimants and Respondents

We acknowledge that ACAS resources may be an issue here but, subject to that, our feeling is that, given the purpose of early conciliation as a non-adversarial solution to an employment problem, so far as Claimants are concerned, each potential Claimant should access the procedure and obtain their own certificate. We say this because each person in a group of Claimants may well have different thresholds/considerations for settlement and it would be consistent with the policy behind early conciliation that the issue should be formally addressed on an individual basis before proceedings are commenced. We do not consider the same is necessarily true for multiple Respondents and we agree that ACAS certificates should be able to

The same ET3 is commonly used in practice and we do not see any requirement for change in this respect therefore although we do consider that a Respondent to multiple claims should be permitted to file Responses to each individual Claimant, if it so wishes.

Proposal 4

Prescribed Time Limits for Early Conciliation and Consent Process to Contact Respondents

The proposals regarding time limits and consent in principle are practical and may serve to support a more efficient use of resources and a more effective early conciliation system. Any proposed changes to the on-line form would need to make clear that the ACAS officer will not contact the Respondent without the Claimant's consent. It should be noted that, at present, ELA members report limited involvement of ACAS officers at the early conciliation stage. It may be that these changes to the prescribed time limits and consent process will provide for more involvement of the ACAS officers.

ELA members' experience is that that the current 4-week timeframe for trying to conciliate is often insufficient.

However, ELA members also recognise that ACAS appears to be under-resourced currently. If ACAS does not have the administrative resources, systems and officers to engage in early conciliation discussions then these proposed amendments to time limits and consent process will not lead to the proposed outcomes.

Additionally, consideration must be had to the backlog facing Employment Tribunals and the fact that hearings are currently being listed in 2022. Extending early conciliation time limits will necessarily prolong the conclusion to any adversarial process if conciliation is unsuccessful.

Proposal 5

Include Email as an Acceptable Means of Communication

It has not been clarified in the consultation documentation to what "schedules" is referring but we have assumed that feedback from User Groups/ACAS and the Tribunal may be to the effect that Form ET1A https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765200/et1a-eng.pdf may need to be amended at pages 13-15 such that the details of all relevant Claimants may be included/referenced through a separate Schedule and that this would help. Provided that the relevant information is supplied at the time of submission of the claim and the Tribunal receives the relevant information in a manner which ensures that the Tribunal administrative system as well as the multiple Claimants and relevant Respondent(s) are clear as to the indicated number of parties (as applicable at that point) then it would seem practical and proportionate to facilitate the submission by email but not to make it mandatory to do so.

Proposal 6

Automatic Listing of Short Track Cases Upon receipt of ET1

This is already the practice in some hearing centres. It is unclear which rule would prevent this It is often coupled with the issuing of standard directions. ELA would welcome a consistent national approach, provided that in fixing a date for hearing and giving standard directions that the Tribunal makes it clear that that any of the parties may apply to have that listing and those directions altered.

Proposal 7

Judgments without hearings where there is no received response

We agree that claims where no response has been received should be able to be dealt with by a default judgment, whether or not a preliminary hearing has taken place.

Proposal 8

Flexibility over judicial reconsideration of rejected claim or response

We consider that the use of the term “the Employment Judge” in rule 19 was intended to mean the same as “an employment judge” in rule 13 and that the difference was inadvertent. We therefore agree with the proposal of the addition, to remove any doubt.

Proposal 9

Witness Orders

Rule 32 currently gives an Employment Tribunal the power to require a person to attend to give evidence. It is not prescriptive as to how that requirement is communicated. There is Presidential Guidance (Employment Tribunals (England and Wales) Presidential Guidance – General Case Management 2013) which makes specific provision for witness orders. We would suggest that such amendment as may be necessary is made to this Guidance although we would observe that paragraph of 9 of Guidance Note 3 currently provides that

- an application for a witness order does not have to be copied to the other parties unless it is in the interests of justice to do so
- the other parties are informed that a witness order has been made “unless there is good reason not to do so”.

In our view the lack of prescription in rule 32, good data protection practice by the Tribunal offices (and legal representatives) together with the terms of the Guidance are such that the desired aim (which we support) can already be achieved, rendering the change unnecessary.

Proposal 10

Remove requirement for Withdrawn Claims to be entered onto Register of Tribunal Judgments

ELA recognises the increased strain current circumstances have placed on Tribunal resources. For the time being, therefore, ELA agrees that these claims should not be entered onto the Register.

However, the principle of 'open justice' runs throughout the justice system. The policy that requires claims made in the judicial system to be a matter of public record is well-established and the fact that a claim may be withdrawn does not, in our view, give it any special status which might justify a departure from that policy. Respondents who may wish claims asserted against them to attract some privacy if they are settled have plenty of opportunity to achieve that, not least because of the requirement for early conciliation. At the point, therefore, at which the Tribunal's automated case management system is capable of generating the necessary entry with minimal additional demand on Tribunal resources then Withdrawn Claims should again be entered onto the Register.

Proposal 11

Increased usage of Tribunal Case Workers

Broadly speaking we welcome the proposal and in particular the fact that in this proposal the suggested tasks to be handled by Case Workers have been more clearly and proportionately defined than in previous Consultations on which we have commented, (including Reforming the Employment Tribunal System in January 2017 and the Briggs LJ Civil Courts Structure Review in November 2015).

Overall we consider that, provided that the Case Workers have the necessary qualifications, training and competence in Employment Tribunal procedure and practice to undertake prescribed tasks and liaise appropriately with all Employment Tribunal users (specifically unrepresented Claimants), the proposal will assist in achieving the desired objective and should not create any undue risks for Employment Tribunal users or any decline in the quality of judicial process.

In our view, as long as the particular features of the Employment Tribunal system are taken into account (e.g. a relatively high proportion of unrepresented Claimants and the often highly specialist nature of the subject matter of employment disputes), then delegation of appropriate tasks should be encouraged as long as it is subject to careful planning and with meaningful scrutiny as to its efficacy.

Standardising case management practice and procedure across Employment Tribunal regions and significantly improving the Employment Tribunal's IT systems would also be of great assistance in achieving the laudable stated aims of saving judicial time and reducing delay in the system in our view.

Specifics

In our view there are three principal aspects to question 11:

1. Should there be delegation of administrative judicial case management activities assuming that the 6,700 judicial hours figure is correct?
2. If so, are the listed administrative tasks at Table 1 suitably categorised as capable of being dealt with by Case Workers?
3. Does the suggested allocation of delegable tasks between Senior Caseworkers (SC) and Case Workers (C) create any particular concerns?

<u>Point 1</u>

As indicated above we are supportive of the delegation of appropriate tasks to Case Workers. We are not in a position to comment on the amount of time it will save for Employment Judges not least as we are unable to source the evidence behind the suggested saving of 6,700 hours of judicial time: there is no underlying Impact Assessment accompanying the material. It would be helpful to understand this further. Based on our own estimations, utilising the number of Employment Judges currently as that given in the Senior President's 2019 report as circa 280, this would amount to circa 25 hours per head per year. Clearly

that may be distributed rather less equally but it gives a flavour. While it is not a trivial amount of time, individually or collectively, it is modest. Presumably there is not going to be a "big-bang" transition and presumably there will be some "shadowing" of the decision-making as part of the training that will be associated in training/up-skilling existing Tribunal staff or new recruits to SC and C roles. In the absence of this, these tasks may take more time than currently envisaged and be subject to challenge and appeal thereby reducing their efficacy. It would be helpful to understand the proposed procedure for challenge/appeal against any decision made by a SC or C or indeed whether there is to be one.

The availability of the 6,700 additional hours is presumably anticipated over a period of 12 – 24 months. So the justification for the introduction of SC and C roles is likely to be on a broader theme of recruitment and retention within HMCTS and the Employment Tribunal specifically rather than as a short-term injection of additional Employment Judge resource stemming from additional Employment Judge-time.

Points 2 and 3

In ELA's previous responses on this topic, we have made the point that a two-tiered structure of Case Workers is appropriate and we are pleased to see this reflected in the proposals for C and SC designations. What is missing is the substance regarding the supervision and oversight of the SCs by the Employment Judges.

We have also commented in some detail previously as to the type of case management tasks we consider suitable to be carried out by Case Workers. Our concern has been the importance of ensuring that the potential complexities of discrimination/whistleblowing claims in particular should be ones "where it would be inappropriate for Delegated Judicial Officers to be involved in determining any issues related to them…" We remain of the view that certain more complex claims do not lend themselves easily to effective case management by non-judicial staff at any stage of the process.

Overall we agree that the tasks listed in Table 1 should be an exhaustive list and broadly appear to fall within the categorisation of "straightforward and routine" case management tasks.

We have commented specifically on each of the 16 suggested tasks below:

1. We assume this should refer to "course of action" not "cause of action". We consider that any claim from an un-represented applicant should be referred automatically to an Employment Judge. It is sometimes very difficult to discern what is being claimed and we consider that the confidence of Claimants and Respondents alike will be bolstered if an Employment Judge and a SC review those particular claim forms.
2. Appropriate.
3. We are not entirely certain what is being suggested here as "referral for an extension of time for an employer responding to a claim…" If it is being suggested that a C can determine such an application we are of the view that is potentially problematic and if it is to be delegated at all it should be to SC level only.

4. From the description we are not clear whether this is suggesting that standard case management directions should be issued in all cases or not. As noted above, we are and remain supportive of increased consistency across Tribunals.
5. Appropriate.
6. We consider that the amendment of an ET3 should be explicitly subject to Employment Judge oversight.
7. Appropriate.
8. Duplication of 7.
9. Appropriate.
10. We consider that Requests for Additional Information (F&BP's) should be carried out by an Employment Judge/Senior Caseworker only.
11. Seems appropriate.
12. Seems appropriate given the narrow category.
13. Seems appropriate.
14. Given the particular challenges that will be faced by Claimants in respect of insolvent businesses we consider that this to be better dealt with by Employment Judges.
15. Seems appropriate.
16. Seems appropriate because of the narrow scope.

There are three follow-on points that flow from the previous responses and the points above, which relate to the practicalities of implementation. They are mainly operational issues for HMCTS but go to the heart of the credibility of the effective functioning of the Employment Tribunal system:

1. Is there an existing cohort of HMCTS staff who may be categorised as/already fulfil the roles with suggested designations of SC and C and has the Employment Tribunal established template C and SC job descriptions? Some HMCTS Tribunal Caseworker job adverts from 2018 regarding presumably non-Employment Tribunal roles suggest that SC level would be a Higher Executive Officer civil service grade which is reasonably senior and likely to be graduate level, although not necessarily law graduate specific.
2. How much training would be required in order to transition such tasks routinely from Employment Judges to SC and C?
3. Over what timescale?

Proposal 12

Electronic hearings

Using the CVP model being rolled out as electronic hearings by HMTCS, the parties and public have the same view as the Tribunal, and no change to the Rules is necessary in this regard.

There is an issue as to whether the public can easily access the Code to enter such virtual hearings and it is too early to know if the current situation put in place is working.

The Rules assume that the hearings will take place in person and does not consider a situation where a member of the public records a hearing. This could enable confusion if partial recording were then made more widely available and the public being able to hear everything the Tribunal hears. The ELA Working Party set up to respond and make recommendations relevant to employment law during the current coronavirus crisis put together a paper on virtual hearings dated 24 March 2020 [**Suggest inclusion of Link to the Paper**]. This paper made the point that if live streaming is used for some hearings, there is a higher than usual chance of participants/attendees recording the hearing. The Working Party suggested that a standard warning be issued at various stages of the hearing. Further, there was concern that whilst an Employment Judge would give a warning at the commencement of the hearing that these proceedings were not to be recorded, if a hearing were conducted by electronic means, members of the public could join it at any stage without being made aware of this warning. ELA suggested that a banner should be displayed on the screen at all times containing the warning issued to members of the public about the recording of proceedings.

In the event that there are significant breaches of the warning the issuing of proportionate sanctions could be considered to deter future breaches.

Proposal 13

Witness statements

The ELA Working Party paper dated 24 March raised significant concerns around the issue of document sharing with the public during remote hearings. There was consensus within the working party that rules around sharing bundle documents and witness statements ought to be relaxed so that the parties are not obliged to share witness statements with members of the public / journalists to ensure that information cannot be taken outside of the hearing.

There was concern that documents shared on screen could be subject to screenshots without clear and constant reminders that this is prohibited. Unless a consistent warning can be placed on the screen to prevent members of the public from taking photos of documents, the preference is that this practice is relaxed for remote hearings.

In the event, there are technical difficulties in sharing documents and witness statements through CVP.

Proposal 14 (in cover letter)

Increasing time limits

ELA has previously expressed a view in favour of increasing time limits for bringing claims to six months. The arguments for that increase would seem to us to be enhanced by the current situation. This does have the possible disadvantage of resulting in claims being heard after a greater amount of time has elapsed. As aforesaid, the backlog facing Employment Tribunals means that hearings are currently being listed in

2022. Extending early conciliation time limits will necessarily prolong the conclusion to any adversarial process following unsuccessful early conciliation and so we think there would be good grounds for amending the early conciliation process to require that to be commenced and concluded within that six month period without the extension to the three month period that can currently arise. This would have the added attraction of removing the complexity in calculating the time limit for bringing a claim that arises where the extension comes into play.

Proposal 15 (in cover letter)

Non-employment judges

The acknowledged delays in the system in dealing with cases and scheduling hearings, even before the current coronavirus situation, were such that remedial action was clearly needed. A significant number of employment judges – salaried and fee-paid – were recruited to address this in 2018 and this was supplemented by recruitment of non-legal members in 2019.

The possibility of judges of the various tribunals being able to move around has been canvassed before. Whilst there is clearly an attraction in existing resource being more effectively deployed, we are concerned that the complexity of employment law in terms of the extensive body of legislation, the continuing impact of case law and the interaction with EU law are such that, in broad terms, we do not believe the quality of justice is likely to be improved if non-specialist judges are used to hear cases in the Employment Tribunal. Indeed to do so would be contrary to the direction of travel in the courts generally, where the increasing emphasis on specialism within the profession generally has in recent years resulted in the creation of specialist lists, where cases are heard by judges experienced in those particular areas. ELA members believe that leads to fewer appeals (saving time and cost). In saying this we, of course, mean no disrespect to the expertise of judges working in other tribunals.

Alternative ideas

From the perspective of users of the Employment Tribunals, it is clear that there are systemic problems, which mean that the service does not run efficiently or deliver fast or even reasonably fast justice. Hearings are now being routinely listed for 2022 and even preliminary hearings are being listed for mid-2021. We understand that there is a lack of judicial resource and difficulties in some areas due to a lack of administrative resources. If fees are reintroduced into the system consumer rights may be affected by the lack of service and delays provided.

ELA has many “war stories”, reflecting the inconsistency between the practices adopted by different Employment Tribunal offices in dealing with the same problems. In particular, case management in different Tribunal offices is dealt with in varying ways, some more efficient than others but producing inconsistencies in the system which are not conducive to public or professional confidence in it. It is not uncommon for us to have delays of up to 6 months to a response asking for judicial intervention on the failure of one party to complete directions, up to six months for an Employment Tribunal to set directions and for delays of up to eight months to receive judgment after it has been heard. This does not lead to efficient responsive dispute resolution.

Alternative solutions could include par

1. Directions by the Presidents of the Employment Tribunals having more force so that Tribunal practice and procedure is more consistent across the whole Employment Tribunal Service.

2. A more consistent approach to directions in Employment Tribunal claims.

3. More proactive case management. We suggest that:

    a. Cases of more complicated claims, such as discrimination, equal pay, and whistle-blowing should be listed, either at the time of issue of the ET2 or acknowledgment of the ET3, for a telephone preliminary hearing as soon as possible, at which directions can be considered, including whether a formal preliminary hearing is necessary and whether the hearing can be heard remotely.

    b. In other cases, we suggest that a more standardised approach be taken to directions where the claim is automatically listed for directions, if not for a full hearing, as a matter of course on issue of the ET1 or ET2. Whichever approach be adopted; it must be nationwide (see 1).

4. For both preliminary hearings parties should be required to complete the Preliminary Hearing Agenda, and that should include questions about technical issues, to see if the hearing can be undertaken virtually.

5. In all instances where proactive case management is undertaken, there needs to be a robust appeal system for people to object if they cannot, for example, attend a telephone or virtual hearing or meet the deadlines.

6. We suggest that, where there is a backlog of administrative or judicial tasks (and we understand that the Tribunal operates longer working hours), administration be shared with Tribunals who are not as busy in different parts of the country. There is an enormous disparity between different tribunal offices. In the long term we suggest that administration should be carried out centrally, perhaps in a facility shared between other tribunals in other areas of the legal system (for example social security appeals, VAT etc.).

7. A uniform document management system which can produce pro forma directions or default judgments, for instance, must be introduced.

8. Increased recruitment of further employment judges. One possibility to speed up the availability of those might be to provide judges currently working in other tribunals with the same training as is currently required for employment judges.

Generally, ELA is very supportive of steps to reform Employment Tribunal procedure to improve access to justice and would very much appreciate the opportunity to continue to contribute to the discussion.

Members of the ELA Working Party

Emma Burrows	Trowers and Hamlins LLP
Jonathan Chamberlain	Gowlings WLG
Robert Davies	Walbrook Law
Felicia Epstein	London Borough of Brent
Joanne Owers	DAC Beachcroft
Jennifer Sole (Co-Chair)	Curzon Green
David Widdowson (Co-Chair)	Abbiss Cadres LLP