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Proposals for Transforming our Justice System: Assisted Digital Strategy

Response from the Employment Lawyers Association

9 November 2016

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Assisted Digital Strategy**

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The Employment Lawyers Association (“ELA”) is a non-political group of specialists in the field of employment law. We include those who represent both claimants and respondents/defendants in the courts and employment tribunals. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal and practical standpoint. Our Legislative & Policy Committee is made up of both barristers and solicitors who meet regularly to consider and respond to proposed new legislation.

ELA initially prepared its response to *Transforming our Justice System: Summary of Reforms and Consultation*, in order to deal with the questions on **Assisted Digital** and **Panel Composition in Tribunals**. We subsequently discovered that these issues had formed the subject matter of two separate papers, namely *Transforming our Justice System: Assisted Digital Strategy, Online Conviction and Statutory Fixed Fines* and *Transforming our Justice System: Panel Composition in Tribunals*. We have therefore separated out our responses, and submitted them to each of the two new Consultations.

A list of the members of the working party with responsibility for (what is now) the separate paper on Assisted Digital Strategy is attached at Appendix 1.

Introduction

Employment lawyers have no fear of change. To the contrary, it is something we are very used to in our area of the law.

ELA is much looking forward to engaging in HMCTS consultations on various aspects of its reform programme as they relate to the work of our members, and sees this initial consultation on assisted digital strategy (as well as the related consultation on Panel Composition which was originally part and parcel of a consolidated paper) as being the first of many.

It is in this context that we have considered the current proposals on an assisted digital strategy.

Tribunal Fees and Legal Aid

We note at the outset that the 'summary of reforms' does not consider the implications for court and tribunal fees or for legal aid. We understand these items may form the subject of a separate consultation in the future. We believe, a justice system that is "Just, Proportionate and Accessible" (JPA) simply cannot ignore these issues. ELA would suggest that fees, in particular, should be taken into account as part of the current consultation, as should the scope of assistance which will be provided prior to the payment of fees and/or afterwards.

Suitability of the proposed communication channels for the Employment Tribunal

As we made clear in our Response to Consultation Proposals for a Single Employment Court in April 2016 (see annexed extract), ELA is very much in favour of increased digitalisation in the Employment Tribunal System. However, for this to assist the administration of justice and accessibility, suitable assistance will need to be provided to certain users. In this respect we believe it is important to maintain multiple channels of access in order to improve access to justice. Solutions which might replace, rather than augment, current methods of interaction and communication will inevitably favour some groups of potential users at the expense of others. A particular concern in the employment sphere is the group of low-paid workers who may have limited digital facilities and access.

Telephone

With regard to contact by telephone, there are concerns about long hold times or the inability to remain on hold, with the call simply being cut off. This inevitably increases frustration with the tribunal system and unpredictability concerning the process. We believe that contact over the telephone is important for all users of the employment tribunal, even Digital Self Servers (DSSs), but in particular for those classed as Digital with Assistance (DWA) and Digitally Excluded Persons (DEPs). At present, unrepresented users will frequently phone the tribunal for help.

Specific instances of impressive and effective telephone contact include a system whereby after a set period of time on hold the system asks you to leave a number and then calls you back. We believe that telephone contact is an important method of communication for users of employment tribunals. However, increased digitalisation of the system means that the telephone service will need to be able to deal with demand. If it is not able to, users may feel alienated and that their matter is not being dealt with in a just way.

Webchat

ELA does not believe that, if considered in isolation, a webchat system would be a proportionate method of increasing accessibility to employment tribunals. ELA supports systems that increase access to justice, but suspects that the costs of implementing, running and staffing such a system would not be proportionate to the amount of users. There is a general consensus that webchats are not particularly useful and that those struggling with the use of technology would not wish to use a webchat, preferring the telephone, for example. However, if used to supplement existing methods of communication, then for some groups (especially those who have high levels of digital competence and access, and in particular those who may have hearing impairments), webchat support could be very helpful.

Face-to-face

ELA notes the proposition that some of this service may be supplied by third party organisations (**TPOs**). This is a cause for concern, since there are a number of issues which do not appear to have been addressed in relation to the TPOs. The consultation also makes the assumption that completing an online application form is a relatively simple process. This is not always the case. Many claims raise complex legal issues. If TPOs are being paid by HMCTS to provide assistance, are they simply helping to complete a form online, or would they be advising on legal issues such as limitation dates? Would they be required to carry out conflict of interest checks and would they also be subject to confidentiality obligations? How would HMCTS enforce these obligations?

If TPOs are able to offer other legal services to **DEPs**, as is suggested in the consultation, this could result in taking advantage of vulnerable people, similar to the situation which has arisen with certain Litigation Friends. In this regard, will the TPO be an organisation regulated by The Legal Services Board (via delegated authority)?

We understand it will still be possible to complete a paper form, but instead of sending it to the HMCTS office by post or delivering it in person, the DEPs will need to attend at a TPO. However, no information is provided as to where a TPO should be based, and how many there should be within the jurisdiction HMCTS.

We also query the protection that will be provided to ensure the TPO supplies a receipt of the date the paper form was received, and should that be taken as the receipt date for limitation purposes? If the appointment is not immediate or the TPO delays in submitting the form online (or makes errors in the copying) which means the limitation date has passed, would the TPO then be liable?

Paragraph 16 refers to the 'chance to ask questions' and the assistance on how to fill out forms but it is not clear whether this would involve legal questions and what safeguards would be provided?

If hearings are provided digitally or by telephone rather than face-to-face in a court room, will the TPOs be providing facilities on behalf of HMCTS? Or will a HMCTS building be made available? Again, this does not appear to have been fully considered.

ELA considers that face-to-face assistance would facilitate access to justice and would increase the confidence and satisfaction of users. However, there would need to be stringent regulation with adequately trained staff.

Paper

Most claims in the Employment Tribunal are lodged through an online system. However, paper claims can still be submitted by post or delivered in person. Accordingly, for those who struggle to access digital platforms, the paper option should still be retained even if its use over time will decrease.

Channels of communication particularly suited to the employment tribunal

General comments

ELA suggests that a key issue when considering the range of potential methods of communication is the particular purpose(s) for which any specific channel is to be utilised. Some will be suitable for a wide range of interactions (e.g. in person hearings or meetings in a tribunal), while others will be limited to very specific forms of support (e.g. webchats will be useful tools to support the completion of online forms, but not appropriate for receiving and considering witness evidence).

Many types of employment claims require an assessment of the particular employment and industrial setting, the credibility of witnesses, and in a forum which allows the judiciary to explore and understand the nature of any particular legal claims which may be expressed by lay claimants in a confused or inchoate way.

Most current digital platforms, including those identified in the consultation, are effective tools for overcoming the cost and difficulty associated with geographic distance and/or restrictions on availability at particular times. However, they often permit much narrower and limited forms of expression, which do not lend themselves to free-flowing discussion and the assessment of verbal and physical communication in addition to and alongside the consideration of documents.

The scope of use of particular communication tools should therefore be linked to an assessment of their appropriateness for specific court and tribunal functions, connected also to the particular types of claims being managed. A one-size-fits-all approach would not be beneficial, and could hinder both access to justice, and the fair resolution of claims.

Ensuring that the process is not de-humanised

ELA considers that it is important that users do not feel that the process is de-humanised or 'without a face'. Many users of the Employment Tribunal will be feeling vulnerable and will have been affected by their treatment, either financially, emotionally, mentally or physically. We would therefore stress the importance of an effectively run telephone service. This service provides a cost-proportionate outcome, with the process remaining humanised for the user. Face-to-face assistance is also important to maintain access, although it may be less cost-proportionate.

Vulnerability

The Employment Tribunal deals with cases of discrimination. It therefore cannot discriminate against users through its process. The Government acknowledges that 18% of the population are DEPs' and that 52% are DWA. We assume the latter includes clients without access to a computer or scanner, for instance, as well as those who would require actual assistance.

No details are provided of the profile of these DEPs. It is assumed that this category would mostly comprise older people and those on low incomes or state benefits. It may also include some people with disability. In this regard, whilst some people with disability rely on digital access with specially adapted computers, those with manual dexterity issues, who need more time, can experience difficulties with government websites which 'time out' forms, or do not allow them to be saved. Sufficient resources need to be applied to address these issues.

As to the figures in the Impact Assessment, we consider many victims of discrimination are less likely to fall in the DSSs category and are more likely to be DEPs. ELA believes that unrepresented Tribunal claimants will therefore be more likely to utilise and feel supported by the use of the telephone or face-to-face assistance, rather than webchat services.

ELA urges the Government to consider carefully the position of these vulnerable people and to ensure that they are afforded adequate protection as part of the reforms.

Contingency process

In order to provide a contingency operation in the event of digitalised systems failing, there will need to be adequate systems in place. In particular ELA believes the telephone service could provide significant back-up in this respect.

Equalities impacts

Increased digitalisation of the Employment Tribunal System will inevitably affect users, a number of whom use the system specifically because they have been discriminated against on the basis of their protected characteristic. It is therefore essential that the Tribunal Service is just and accessible for them, whilst being proportionally provided.

There is already an impact on those that have limited access to the internet, even if they are able to use it competently. ELA has in mind those users that only have access to the internet through a smart phone and the current system where additional documents can only be uploaded in a Rich Text format from a computer.

The proposed reforms will increase the effectiveness and efficiency of the system for DSSs, but there are nonetheless concerns that the interests of others will be prejudiced. It is therefore vital that appropriate and sufficient digital assistance is provided to those who require it.

ELA urges the Government to consider carefully the position of these vulnerable people, to ensure that they are afforded adequate protection as part of the reforms, and that sufficient resources are accorded to digital assistance and access.

Equalities Impact Assessment

The Government has successfully identified the range of equalities impacts in their Assisted Digital Impact Assessment.

Ongoing relationships

ELA wishes to highlight that a number of users of Employment Tribunals are still currently employed with the employer that they are seeking recompense from. Therefore, an increase in digitalisation and the services put in place to provide assistance should not further harm the relationship between the parties. We believe that an effective and efficient service can help to facilitate an ongoing relationship by resolving disputes swiftly and justly.

Consideration should also be given to the perceived (lack of) formality and seriousness of bringing proceedings electronically, particularly in circumstances in which internal workplace and mediated resolutions are emphasised.

Increased digitalisation

At present, claimants who do not have legal representation tend to be at a disadvantage if they lack full digital access or ability. ELA is concerned that further digitalisation may put such claimants at further disadvantage, and so their position needs to be carefully considered in the context of these proposals.

If moves are made to process claims without the need for a face-to-face hearing, for example over the telephone or via video conferencing, it will need to be considered whether users have the appropriate facilities to achieve justice. Document uploads may prove an obstacle for those that are not DSSs and there will need to be increased regulation about the format in which documents will be accepted. Staff will need to be trained adequately to assess which matters would be suitable for a telephone or video hearing to ensure that users do not feel that their matter has not been adequately addressed, or that they have not had the opportunity to represent their matter. Participants may feel that their matter has not been adequately assessed because they have not heard the reasoning in person. This may lead to an increase in appeals. Also, the potential loss of Preliminary Hearings would prevent the, often useful, time for all parties involved when a user is able to talk through the issues with a Judge.

Any future changes need to ensure that the user feels that they are able to achieve justice in a fully accessible way.

Finally, it is essential that sufficient resources are applied to ensure that the justice system is just, proportionate and accessible.

Appendix 1

Members of Working Party

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