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**Department for Business Innovation and Skills Consultation
Paper – Ballot Thresholds in Important Public Services**

Response from the Employment Lawyers Association

9 September 2015

Employment Lawyers Association Response

Department for Business Innovation and Skills Consultation Paper – Ballot Thresholds in Important Public Services

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.

A sub-committee, co-chaired by David Widdowson and Paul McFarlane was set up by the Legislative and Policy Committee of ELA to consider and comment on the consultation document on ballot thresholds in important public services. Its report is set out below. Members of the sub-committee are listed at the end of this paper.

Many of the questions in the consultation paper concern views on matters of policy. Given our role as an organisation of employment lawyers we have not commented on these but have restricted our response to areas of practical application of policy.

Question 3. What factors do you think are important in defining ‘important public services’

- **Protection against loss of life/serious injury**
- **Maintenance of public safety and national security**
- **Enabling economic activity across a significant area of the economy**
- **Enabling significant numbers of people to get to their place of work**
- **Other (please specify)**

ELA notes the factors that the government proposes to use when defining ‘important public services’. However, ELA cautions that if the provisions are not drawn as narrowly as possible then the Government runs the risk of a challenge on the basis that the imposition of the raised thresholds infringes Article 11 of the European Convention on Human Rights. Any restrictions on the right to strike must not be greater than necessary to pursue a legitimate aim and are necessary in a democratic society. (See the recent decision of the European Court of Human Rights (‘ECHR’) in *Hrvatski Lijecnicki Sindikat v Croatia Application no.36701/09 27th November 2015*).

ELA further notes that the International Labour Organisation (‘ILO’) defines restricting the right to strike in essential services to services “the interruption of which would endanger the life, personal safety or health of the whole or part of the population” (General Survey 1994, para 159). This appears to be narrower than the definition proposed in the consultation document and would not cover, for example Education or Transport.

In *Demir and Baykara v Turkey (Application No: 3450397, 12 November 2008)*, which held, inter alia (i) that the right to collective bargaining is ‘an essential element’ of the right to freedom of association in Article 11 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and (ii) embedded the jurisprudence of the ILO and the European Social Charter into that right. Accordingly, given that the United Kingdom is both a signatory to the European Convention of Human Rights and a member of ILO, it ought to have regard to above comments of the ILO,

Question 4. Do you agree these are occupations and functions in

- a) **Fire services;**
- b) **Health services;**
- c) **Educations services;**
- d) **Transport services;**
- e) **Border security; or**

f) Nuclear decommissioning

the Government should consider when drafting those subject to the 40% important public services threshold? When answering, please consider those key in avoiding the adverse impacts discussed above.

- a) **Fire services:** ELA acknowledges that the list of proposed occupations in relation to this sector, which includes civilian firefighters, control personnel, airport firefighters and firefighters from the armed forces, is sufficiently clear and comprehensive to identify the occupations directly involved in the provision of the frontline services in terms of responding to emergencies such as road traffic collisions, building collapses, natural disasters, fires, chemical spills etc. The adverse impacts of strike action in relation to this sector are stated as a reduction in the availability of fire appliances thus undermining the capacity and responsiveness in the performance of services which protect life and property. ELA's view is that there is sufficient clarity in the list of proposed occupations for this sector:-
- a. to demonstrate a connection between the role and its part in the performance of an important public service; and
 - b. to allow the relevant trade union to identify those who would be subject to the 40% threshold.
- b) **Health services:** ELA notes that the proposed occupations in relation to this sector are broadly drafted and includes all NHS "staff" which could presumably cover those engaged on an agency basis as well as employees. Given the breadth of this category it would clearly cover roles involved in both emergency and non-emergency services. For example, junior clerical staff would fall within the occupations susceptible to the 40% threshold. It would appear therefore that the policy intention is that all staff working in NHS Trusts are to be considered as engaged in important public services, regardless of their actual role. It must be a matter of debate, however, whether the absence of junior clerical staff could "quickly risk serious harm to the public". Whilst ELA acknowledges that such a broad description of occupations within the health sector will make it easier to identify who is subject to the 40% threshold and will minimise dispute in this regard, the roles covered may go beyond avoiding the adverse impacts stated and the reference to staff could include agency staff when this may not be what is intended. Furthermore, the process of balloting agency staff could be extremely complex as not all would be employed by the Trust but by an agency or even multiplicity of agencies. If the intention is to include agency staff it would be advisable to state so specifically.
- c) **Education:** ELA notes that the stated adverse impacts of strike action within education relate to the closure of schools, difficulty for parents in arranging alternative childcare and the knock-on effects on other workplaces including within the public sector. As with the occupations listed in the health service sector, the proposed category of affected roles in education is very broad and covers all staff working in state funded schools covering statutory school age pupils. There is the potential risk that such a wide range of occupations could go beyond the roles that are truly essential in the delivery of important public services. The proposed list is wide enough to cover employees, supply staff, consultants and secondees working within state funded schools. However ELA comments that occupations involved in providing education services to young adults with special educational needs over the age of 16 are not covered by the current proposal although the adverse impacts highlighted in the consultation would arguably be just as applicable to this sub-sector.
- d) **Transport services:** More clarity may be helpful in relation to the occupations listed in this sector. For example "Local bus services" is not, in itself, an occupation whereas staff working for local bus services would cover occupations in this sub-sector of transport. Alternatively, specific roles such as bus drivers, conductors and operations staff could be included in the proposed list to provide more clarity. In terms of aviation, ELA notes that pilots and cabin crew are not included in the proposed occupations. ELA appreciates that these are primarily occupations within the private sector however there does appear to be an inconsistency in relation to other transport

sectors such as rail, where services are run by private operators yet drivers, guards and conductors are listed as occupations providing an important public service whereas pilots and cabin crew are not. This may be because the underlying policy consideration is that that strike action within commercial aviation will not have the same level of impact on daily commutes to work and servicing supply chains to the health service.

- e) **Border security:** ELA has no comments in relation to the roles listed in this sector.
- f) **Nuclear decommissioning:** ELA does not have the relevant sector experience to comment on the occupations listed for this sector.

In general ELA's view is that clarity in relation to the occupations affected by the 40% threshold is essential to ensure that those susceptible to the threshold are easily identifiable. A lack of clarity will inevitably lead to disputes in relation to the adequacy of the ballot and whether there is the requisite support for official industrial action. Clarity is also necessary to avoid the potential for those in roles that are not essential to providing important public services being inadvertently caught by the 40% threshold when their duties do not directly have a bearing on the adverse impacts of industrial action highlighted. ELA highlights the need for consistency across all sectors.

The duration of any industrial action is likely to have a significant impact on which occupations are deemed to be involved in the provision of important public services. For example, in the case of a one day strike frontline occupations such as fightfighters and A & E nurses will be essential to the continuity of emergency services. However if the strike were to continue for a week it is conceivable that other occupations, not traditionally considered as essential frontline services, could become integral to the provision of important public services. These occupations may be covered by the Government's plans for "ancillary workers", however ELA can see the potential for ambiguity, confusion and dispute to arise over whether or not the absence of a particular occupation could have an impact on the delivery of a service unless the duration of the proposed strike is known at the time of the ballot.

Question 7 Do you agree with the Government's proposed approach to ancillary workers? Why / why not?

If the Government proposes to extend the additional 40% ballot threshold to ancillary workers, ELA is of the view that it will be important to provide clear guidance on those ancillary activities subject to the additional threshold. Without such guidance, parties will be left in considerable uncertainty about the applicable threshold.

This could be achieved by inserting into either the Trade Union Bill or secondary legislation (alongside the definition of "important public service") a definition of the ancillary roles in scope. Alternatively, if the Government takes the view that it will be too difficult to specify all ancillary roles subject to the additional threshold, a list of factors that should be taken into account would also be helpful for parties to assess whether the additional threshold will apply.

The consultation paper refers to support which is "critical" to the delivery of an important public service, and whose absence would have an "adverse impact" on its delivery. ELA is of the view that any such guidance / definition should be clear whether the test is one of:

critical importance i.e. without X ancillary service, Y important public service cannot be provided (or there is a risk to health / safety / security without X);

some adverse impact: i.e. without X ancillary service, there will be some adverse impact on the delivery of Y important public service; or

mere inconvenience: i.e. without X ancillary service, it will be more difficult / costly / inconvenient to deliver Y important public service.

In anything other than the most clear cut cases (falling within the "critical importance" category above) it will be difficult for such lines to be drawn in the absence of further guidance.

Question 10. Do you agree with the Government's proposed approach to private sector workers? Why / why not?

ELA acknowledges that, given the extensive involvement of private sector organisations in delivery of public services, if the 40% important public services threshold is to be introduced into legislation then, to achieve the policy aim, it should apply to both public and private sector staff, to the extent that their occupations and/ or functions were listed in the secondary legislation. As so many public services are now delivered by private sector employers a valid distinction between public sector and private sector employers cannot be made. ELA notes that except for police officers, prison officers and the armed forces there are no other distinctions in the law on industrial action between public and private sector employers. (Merchant Seamen cannot take strike action whilst at sea and not securely moored in a safe berth -Section 59 Merchant Shipping Act 1995).

Further, given that, in relation to proposed strike action where the service in question is delivered by both private and public sector employees, a separate ballot would need to be held in respect of those workers employed by each employer (as well as of any agency workers). It would be possible to conceive of an outcome where the threshold was met by, say, the workers employed by the public sector organisation (who might perhaps comprise quite a small proportion of those delivering the service) but not by those also involved in providing the service in question but engaged by private sector employers.

Question 11 How common are disputes involving some workers who would fall within scope of the 40% important public services threshold, and others who would not?

- Frequent
 Infrequent
 Never Not sure

Question 12. Please give examples of a dispute that has or could include only a small proportion of workers undertaking 'important public services' (using the definition used in this consultation).

Potential examples of such a dispute would be where, in a rail strike, not just drivers, but also ticket office and platform staff participated in the dispute. Such staff do not appear in the list at paragraph 18 of the consultation document. Ancillary staff involved in a dispute operating in different places, such as cleaners in different parts of a hospital, would also be a potential example – cleaners working on the wards would probably be undertaking an important public service in a way that cleaners working in pharmacies attached to hospitals, or in lecture theatres or offices in a teaching hospital, would not be.

ELA considers that this provision is likely to cause confusion and that there may well be difficulties complying with it, particularly as it may be difficult to identify whether someone is undertaking an important public service, such as where, in the example cited above, different cleaners work in different areas on different shifts. ELA repeats the caution given in question 4 above in relation to challenges to the introduction of this provision on the basis of infringement of Article 11 of the European Convention on Human Rights.

Question 14. What are the practical and administrative considerations a trade union would have to make to calculate whether a ballot ought to be conducted under the 40% important public services threshold?

For a trade union to know in advance the threshold it will be required to meet on a ballot to authorise a call for industrial action, the key consideration is the identity of those that it ballots. To the extent that

these are imprecisely defined, this will cause considerable uncertainty and would be likely to lead to undesirable litigation. The proposal that the 40% threshold should apply where a majority of the workers to be involved are within the occupations and functions defined does not assist if those definitions are insufficiently precise – see our comments on questions 4, 7 and 10 above. This is particularly so for ancillary workers where the connection to the defined occupations and functions is not direct. See also our comments under Question 3 as to the interrelationship with the ECHR – provisions which are defined sufficiently loosely to cause a trade union serious practical difficulties in knowing what will be lawful or unlawful action potentially provide a route for challenge.

Members of ELA Sub-Committee

Co-Chairs: Paul McFarlane, Weightmans LLP and David Widdowson, Abbiss Cadres LLP

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