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House of Lords Economic Affairs Committee
Call for evidence: Employment and COVID-19

Response on behalf of the Employment Lawyers Association (ELA)

9 September 2020

Introduction – About ELA

The Employment Lawyers Association ("**ELA**") is a non-political association of approximately 6,000 specialists in the field of UK employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. Accordingly, we have only provided responses to some of the questions in the call for evidence.

ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations. The Legislative and Policy Committee has set up a Standing Committee to respond to and make recommendations on measures relevant to employment law during the current coronavirus pandemic. A sub-group of the Standing Committee has prepared the response below to highlight employment law issues relating to the call for evidence. The sub-group members are as follows and the full ELA Covid-19 Standing Committee is listed at the end of this paper.

Clare Fletcher, Slaughter and May

Daniella McGuigan, Ogletree Deakins International LLP

Lorrelee Traynor, NHS Wales Shared Services Partnership

Executive Summary

A. Employment rights protect jobs by ensuring that procedures are adhered to prior to dismissal and also dissuade employers from unlawfully dismissing employees by granting rights to compensation to workers. These rights, in the time of COVID 19, are particularly important, especially for vulnerable groups and those who have been hit hardest by

the coronavirus pandemic e.g. young, old, BAME, shielded, furloughed, low paid.

B. ELA notes that the UK ranks in the bottom quartile for employment protection among OECD countries. This evidence might question therefore, whether reducing employment rights is an effective step towards protection and/or creation of jobs.

C. The English and Welsh Employment Tribunal backlog rose at 1% per week during the pandemic. The pandemic has brought into sharper focus issues related to whether the Employment Tribunal is adequately resourced.

D. Flexible working has increased during the pandemic. It can be a means of creating as well as protecting jobs (especially for more vulnerable members of the workforce). There are concerns expressed by some of our membership that the current legal framework is no longer fit for purpose due to the effects of the pandemic and the growth in the need for flexible working and it should be reviewed.

E. There should be greater clarity on employment status so that the employers' obligations and the workers' rights are clearly understood from the start of the relationship. Employers crave certainty. Uncertainty for the self-employed, workers, employees and their employers means that the status of a worker is often not known until years later in a Tribunal claim.

F. ELA notes that pre- COVID-19 businesses faced a challenging environment. Now in addition to that, with Brexit, IR35/Off payroll working rules coming in next April etc. businesses have even more to think about, and may not want to increase costs/create new jobs unless they have to.

G. The TUC has recently reported the pandemic has raised issues about the lack of affordable childcare or care provision - with two in five working mothers with children under 10 in Britain struggling to find the childcare they need, as breakfast and after-school clubs remain shut and care from friends and family remains limited.

H. Some members consider that the right to request time off for training could be extended, so that it applies to workers (not just employees) with any length of service (not just those with 26 weeks continuous service).

I. ELA suggests that government conducts research into:

    a. the impact on the mental health of workers of the pandemic;

b. whether there is a long-term negative impact on employees' physical health when working away from the employer's premises;
c. whether remote working has had negative impacts on training employees and particularly in training new and/or inexperienced members of staff;
d. whether the effects of the pandemic are more keenly felt by more vulnerable parts of the workforce, which risks accentuating issues like the gender, disability and ethnicity pay gaps;

and that government consider what further measures can be put in place to mitigate the impact of the pandemic on all employees and particularly on the more vulnerable parts of the workforce.

Questions:

1. **What steps should be taken to protect and create jobs over the next two years? What trade-offs should be considered?**

1.1 Employment rights protect jobs by ensuring that procedures are adhered to prior to dismissal and also dissuade employers from unlawfully dismissing employees by granting rights to compensation to workers. These rights, in the time of COVID 19, are particularly important, especially for vulnerable groups and those who have been hit hardest by the coronavirus pandemic e.g. young, old, BAME, shielded, furloughed, low paid. Accordingly, the first step in protecting jobs is to preserve employment rights and ensure their enforceability.

1.2 If the government is considering a reduction in the various employment rights currently provided for under UK law, then it is recommended that it considers the impact that this may have on equality rights.

1.3 ELA notes that the UK ranks in the bottom quartile for employment protection among OECD countries. This evidence might question therefore, whether reducing employment rights is an effective step towards protection and/or creation of jobs.

(see OECD Recent trends in employment protection legislation https://www.oecd-ilibrary.org//sites/1686c758-en/1/3/3/index.html?itemId=/content/publication/1686c758-en&_csp_=fc80786ea6a3a7b4628d3f05b1e2e5d7&itemIGO=oecd&itemContentType=book#section-d1e24760.)

1.4 Rights protect jobs. For the rights to be effective, they should be enforceable. The English and Welsh Employment Tribunal backlog rose at 1% per week during the pandemic. The pandemic has brought into sharper focus issues related to whether the Employment Tribunal is adequately resourced. At Appendix 1 below is a paper ELA has submitted to the House of Lords Constitution Committee's Call for Evidence on Courts and Tribunals where we set out our members' evidence on the measures that should and should not be put in place to ensure the system works more effectively.

1.5 Early effective resolution of employment issues protects jobs and saves money. Additional resources for ACAS so that it could offer, for example, increased written guidance on both pandemic specific employment issues and more general employment related issues would help. Further, a more effective early conciliation process may assist in trying to resolve issues before litigation.

1.6 Flexible working has increased during the pandemic. It can be a means of creating as well as protecting jobs (especially for more vulnerable members of the workforce). There are concerns expressed by some of our membership that the current legal framework is no longer fit for purpose due to the effects of the pandemic and the growth in the need for flexible working and it should be reviewed. The effects of the pandemic suggest to this constituency that it should not only be "employees" with 26 weeks service who are eligible to make the request and the speed at which circumstances are changing suggest that more than one application should be made every 12 months. However, some of our members expressed a view that these further burdens on business would create higher costs at a time when business was less able to bear them, that the current health and safety framework provides sufficient protections and that the wider impacts of changes to workplace practice should be researched more widely before implementation including, for instance negative effects of remote working which we consider. Accordingly, measures should also be put in place to support employers in managing multiple/competing applications. The latest Employment Bill was already proposing to make flexible working the default approach unless there is a good reason why the employer cannot support it.

1.7 ELA notes that the increase in flexible working brought about by the pandemic has reinforced the need for better

connectivity / broadband to enable businesses to allow workers to work remotely.

2. **What barriers to entering employment could be removed to support the labour market recovery?**

2.1 There should be greater clarity on employment status so that the employers' obligations and the workers' rights are clearly understood from the start of the relationship. Employers crave certainty. Uncertainty for the self-employed, workers, employees and their employers means that the status of a worker is often not known until years later in a Tribunal claim. The cases are hard to predict and the law remains uncertain. In addition, developing the themes in the Good Work Plan, but reviewed in light of changes in working patterns as a result of the pandemic, may support the labour market recovery (see https://www.elaweb.org.uk/resources/responses-to-consultations/ela-response-consultation-good-work-taylor-review-modern-1 which contains the submission from ELA on the consultation documents - Employment Status Consultation 1 June 2018).

2.2 ELA notes that pre- COVID-19 businesses faced a challenging environment. Now in addition to that, with Brexit, IR35/Off payroll working rules coming in next April etc. businesses have even more to think about, and may not want to increase costs/create new jobs unless they have to.

2.3 We refer also to our comments related to more support for flexible working (see paragraph 1.5 above).

2.4 ELA would add that the provision of good, safe and reliable transport links is necessary otherwise this will be a barrier to entering employment in another geographical area.

2.5 As recently reported by the TUC the pandemic has raised issues about the lack of affordable childcare or care provision - with two in five working mothers with children under 10 in Britain struggling to find the childcare they need, as breakfast and after-school clubs remain shut and care from friends and family remains limited – (see the recent article in the Guardian on 3 September 2020 - ,https://www.theguardian.com/money/2020/sep/03/childcare-crisis-risks-pushing-women-out-of-workforce-says-tuc). If this persists this will form a barrier to working mothers remaining in employment. ELA would suggest the government look at what measures it can put in place to address this issue.

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3. **Which sectors are likely to experience the most change in supply and demand?**

ELA does not offer a view on these policy issues.

4. **To what extent should any future intervention by the Government in the labour market be targeted sectorally and/or regionally?**

ELA does not offer a view on these policy issues.

5. **What lessons can be learned from previous recessions and active labour market policy interventions in the UK? What lessons can be learned from schemes and interventions that have been implemented in other countries?**

ELA does not offer a view on these policy issues.

6. **What steps should be taken to create a sustainable recovery over the medium and longer term?**

ELA does not offer a view on these policy issues.

7. **How should the Government support training and skills development?**

7.1 Some members consider that the right to request time off for training could be extended, so that it applies to workers (not just employees) with any length of service (not just those with 26 weeks continuous service). The right only currently applies to employees of employers with at least 250 employees; although it was originally intended to extend the right to all employees, this was never implemented (and could now be reviewed). Further, there is only one right to request time off every 12 months, like flexible working; this restriction could be removed or reduced to make the system more flexible. Some members expressed concerns that such a proposal would place further burdens on businesses that may be short of staff, have suffered a downturn in business and place burdens on smaller businesses less able to shoulder them.

7.2 More generally, consideration of the provision of more grants / incentives for employers to support training and placements not just for employees at the start of their career (such as the recently announced Kickstart Scheme), but throughout employment. The pandemic is likely to result in some existing roles disappearing and new ones emerging, meaning that there will be a greater need for employees to

retrain to fill existing skills gaps and to develop new skills for sectors which are recruiting.

7.3 The Apprenticeship Levy could be reformed and potentially broadened into a "skills levy" that employers could use more flexibly. As announced in the spring 2020 budget, a review was due to be undertaken to "look at how to improve the working of the Apprenticeship Levy, to support large and small employers in meeting the long-term skills needs of the economy".

7.4 Consideration could be given to the concept of "work shadowing" being clarified to ensure consistency, clarity and fairness such that interns and individuals undertaking work experience where work is undertaken for the benefit of the employer, are paid in accordance with National Minimum Wage ('NMW') legislation. Equally, if genuine "work shadowing" is taking place employers could be encouraged to offer this training opportunity to individuals at no cost to them.

8. **What positive and negative trends in employment may have been accelerated as a result of COVID-19?**

8.1 The most obvious example of an accelerated positive trend in employment is the rise in flexible or 'agile' working. Many companies are already announcing that the move to more flexible working which was necessitated by the 'lockdown' will become a more permanent feature of their working arrangements in the future. Prior to the pandemic flexible working was a less used right but during (and beyond) the pandemic it is very likely this will become a more used right. ELA considers that greater use of flexible working strengthens the case for a review of the legal framework around flexible working as mentioned in paragraph 1.5 above, to ensure that it grants rights that workers need but avoids placing undue burdens on employers at a difficult time for them.

8.2 In terms of negative trends:

8.2.1 the recession caused by the pandemic has led to an increase in redundancies;

8.2.2 the impact on the mental health of workers, has not been as closely examined as the risks to physical health associated with COVID-19;

8.2.3 there is a possibility of a long-term negative impact on employees' physical health when working away from the employer's premises – such as, by way of example failure to make simple provision of workstations or suitable chairs

and/or workstation assessments. Employers have less control over the health and safety of their employees in their home environment where equipment is not always provided, readily available or correctly used;

8.2.4 remote working has had negative impacts on training employees and particularly in training new and/or inexperienced members of staff who cannot, so readily, observe, ask, learn and be taught; and

8.2.5 there is also some evidence that the effects of the pandemic are more keenly felt by more vulnerable parts of the workforce, which risks accentuating issues like the gender, disability and ethnicity pay gaps.

8.3 ELA suggests that government conducts research into these issues and considers what further measures can be put in place to mitigate the impact of the pandemic on all employees and particularly on the more vulnerable parts of the workforce.

Members of ELA Covid-19 Standing Committee

Co-chairs: Paul McFarlane, Capsticks; Kiran Daurka, Leigh Day

Gus Baker, Outer Temple Chambers
Shubha Banerjee
Emma Burrows, Trowers & Hamlins LLP
Sarah Chilton, CM Murray LLP
Shantha David, UNISON Legal Services
Micheala Drazek, Greenwoods GRM LLP
Peter Edwards, Devereux Chambers
Manus Egan, Thomas More Chambers
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Beth Hale, CM Murray LLP
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Daniella McGuigan, Ogletree Deakins International LLP
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Sally Robertson, Cloisters
Bruce Robin, UNISON Legal Services
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Louise Skinner, Morgan, Lewis & Bockius UK LLP
Catrina Smith, Norton Rose Fulbright LLP

Caroline Stroud, Freshfields Bruckhaus Deringer
Lorrelee Traynor, NHS Wales Shared Services Partnership
David Widdowson, Abbiss Cadres

Appendix 1

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Covid-19: House of Lords Constitution Committee

Call for Evidence on Courts and Tribunals Response T

Response on behalf of the Employment Lawyers Association (ELA)

20 August 2020

Introduction

1. This Submission is made on behalf of the Employment Lawyers Association (ELA) in response to the call for evidence, dated 8th June 2020, from the House of Lords Constitution Committee ('the Committee') on the response of Courts and Tribunals to the Covid-19 pandemic.

About ELA

2. 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 in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations. A standing committee, co-chaired by Paul McFarlane and Kiran Daurka, was set up by the Legislative and Policy Committee of ELA to consider the impact of the COVID-19 crisis on employment law and practice. A working party of members of that standing committee was set up to respond to this call for evidence. Members of the working party are listed at the end of this paper.

Survey Conducted by ELA

3. In order to properly represent the views and experiences of the membership in these Submissions, between 11- 14 August 2020 ELA carried out a Survey to address the Questions that are raised in the call for evidence. The survey was sent to ELA's 5,852 and 256 responded, a response rate of 4.4%. When reviewing the responses to the Survey, ELA would invite the Committee to take into account that it was conducted during the holiday season, with a relatively short window of opportunity for members to respond.

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4. Responses to the Survey were provided by members across the whole of the United Kingdom and, in England, by those practising both in London and outside of London. Responses were also received from Solicitors in private practice, Chambers' based Barristers, In-house lawyers and those in the voluntary sector.

5. On the basis of the Survey, ELA is confident that it has sought information of the experiences of the Court and Tribunal system across the whole of the UK and across all branches of the legal profession practising in the field of employment law.

6. However, it is appropriate to point out that of those who replied to the Survey, 90% conducted cases exclusively in Tribunals (rather than in the Civil Courts).

ELA Response of the COVID-19 Working Party

7. Attached to this Submission are two documents the ELA Covid-19 Standing Committee has produced on the issue of how to address the delays and backlog that has developed in the Employment Tribunal system (Appendices 1 & 2).

8. Specifically, Appendix 2 addresses the proposals made by Her Majesty's Courts and Tribunal Service to extend the working hours of Employment Tribunals in order to address the ever-increasing backlog.

9. These documents address a number of the fundamental questions raised in the call for evidence. To avoid unnecessary repetition, the Constitution Committee is respectively referred to those documents.

The types of cases that are proceeding, both physically and remotely, during lockdown. The types of cases that are not making progress, and the resulting implications.

10. As set out above, of those who responded to the Survey conducted by ELA, around 80 to 90% conducted litigation solely in the Employment Tribunals. The responses summarised below therefore largely relate to the work of Employment Tribunals.

11. Since March 2020, of those who responded to the Survey, the position with regard to the progress of claims in person in the Employment Tribunal was as follows:

(a) Around 64% responded that none of their cases had proceeded in person since March 2020;

(b) Around 21% responded that some case management and preliminary issue hearings had proceeded in person since March 2020;

(c) Around 18% responded that some short final merits hearings/trials (up to 3 days) had proceeded in person since March 2020; and

(d) Around 14% responded that some longer merits hearings (over 3 days) had proceeded in person since March 2020.

12. With regard to remote hearings – by telephone or video platform – only 7.5% of those who responded to the Survey had had no hearings proceed since March 2020. 87% had experience of remote case management hearings and a 72% of substantive applications and preliminary issues being determined remotely. Nearly 25% had conducted short trials (1 to 3 days) and just over 5% had conducted long finals merits hearings/trials.

13. The delay in access to justice, uncertainty and additional cost were the most obvious implications in cases not making progress during lockdown. In the case of Employment Tribunals, the delays and cancellations caused by lockdown simply added to the already serious and backlog that existed before COVID-19.

Effectiveness of virtual court and tribunal proceedings, including their benefits, disadvantages and challenges, and their impact on litigants, lawyers, judges, court staff, media and the public.

14. Of those who responded to the Survey, 36.5% responded that remote hearings had been very effective, with a further 57.5% responding that they had been somewhat effective. Just under 6% responded that such hearings were not effective in their experience.

15. Of those who responded that remote hearings had not been effective or had only been somewhat effective, 55% cited technological or internet connection issues as being a problem. 48% cited difficulties with not being able to properly advise and take instructions from the client. Almost 30% cited an inability to effectively judge and assess the evidence given by witnesses. 44% cited an inability to properly access documents during hearings and the same percentage raised general audio or visual issues.

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16. When asked what had been affected negatively by the use of virtual hearings, 40% cited access to justice; 67% cited participation in hearings; 27% cited fairness of hearings; 36% cited transparency of hearings, including media reporting and 60% cited witness evidence.

17. The majority of the concerns identified related more to substantive hearings/trials than to case management matters.

18. When asked whether any of the following had been affected positively through the use of virtual hearings: 73% cited access to justice; 52% cited participation in hearings; 14% cited fairness of hearings; 12.5% cited transparency of hearings, including media reporting and almost 10% cited witness evidence.

19. Of those who were involved in CCMC's in the High Court, 87% of those who responded were in favour of them being held remotely going forward.

Whether there is a case for changing the number of members of the Employment Tribunal Panel in order that social distancing can be maintained?

20. In Employment Tribunals, three-member panels (consisting of an Employment Judge and to lay members) are already largely restricted to discrimination and whistleblowing cases[1].

21. Of those who responded to the Survey, 29% suggested that the number of panel members should be changed to maintain social distancing; 71% thought not. ELA COVID-19 Working Party endorses the view of the majority.

The issue of potentially extending the operating hours of Employment Tribunals going forward

22. The concerns of ELA about this proposal are fully explained in Appendices 1 & 2.

[1] The majority of cases heard by Employment Tribunals e.g. unlawful deduction of wages, unfair dismissal, failure to pay statutory redundancy pay etc. are heard by an Employment Judge sitting alone

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Summary of the findings from the Survey

23. Below we have summarised key findings, from the Survey, which are relevant to the questions in the call for evidence.

24. **The results of the Survey tell us that the impact of the COVID-19 pandemic to the Tribunal system has been significant.**

25. Since the Government announced the lockdown in March 2020, very few final merits hearings have gone ahead. It can be assumed that the majority of those hearings that were listed during the last few months have been delayed or postponed, rather than it being the case that fewer cases were listed to be heard during that period.

26. As mentioned above, the Tribunal system was already under strain before the COVID-19 pandemic, and the postponement of final hearings will further delay access to justice.

27. The majority of those that responded to the Survey had participated in case management hearings, but that would be expected given that these were routinely being heard via telephone prior to lockdown. Aside from availability of parties and judges, it would not be expected that these would be impacted by COVID-19.

28. Despite few hearings taking place remotely, most respondents to the Survey (94.07%) expressed the view that they found remote hearings to be, at least, somewhat effective. This should reassure the Ministry of Justice ('MOJ') that conducting hearings remotely was a positive move, albeit with some teething problems.

29. Those that felt that remote hearings were only "somewhat effective" or "not effective", gave a mix of responses as to what the issues were, including: technological/connections issues, difficulties in advising clients during the hearings, difficulties in assessing witness testimony, ability to access issues and general audio/visual issues all being given as areas that need improvement.

30. It is submitted that if these areas of concern can be worked on, remote hearings will become more effective.

31. Two thirds of those who responded felt there was a negative impact of the use of remote hearings. The majority of those indicated that participation in hearings and witness evidence had been detrimentally affected by hearings not being held in person. Although technology is very sophisticated, it is still a long way off from being able to replicate the feel of being in a tribunal or court room.

Further, although witness' evidence might be heard perfectly clearly through a computer screen, the skilled advocate will look for other, non-verbal clues to judge witness' testimony and these are unlikely to translate through a laptop camera.

32. However, respondents agreed that there were positive aspects to remote hearings; the main benefit seen was access to justice. As stated above, there has been on-going concern about the backlog of cases in the tribunal system and a complete freeze on hearings taking place during lockdown would have made that problem significantly worse.

33. Over 70% of the respondents were not in favour of the number of Tribunal panel members being changed to enable social distancing during in-person hearings.

34. The set-up of most tribunal rooms would enable a panel of 3 members to be socially-distance during a hearing.

35. It would be a concern if panels were reduced in size as it may mean either Claimants or Respondents would not be represented on the panel, or lead to situations where judges are being asked to determine cases on technical factual issues without experienced lay members to guide them.

36. The vast majority of those that responded were against the idea of in-person or remote (video) hearings (including preliminary hearings on substantive issues) being held on evenings or weekends to help clear the backlog. A variety of reasons were given for this including: the impact on work/life balance, child-care responsibilities and the worry that cases will not be given sufficient time and consideration.

37. Conversely the majority of respondents would be willing to attend case management hearings or preliminary hearings on procedural or management issues during the evenings, but only up to 6pm, which is likely not too far beyond the normal working day for most of our members to be considered a severe inconvenience.

38. Similarly, there was a negative response to the proposal of judicial mediations taking place outside normal working hours, except where they would be listed from 4pm to 6pm. However, some members wondered whether this would be sufficient time for any meaningful mediation discussion to take place.

39. Finally, it did not appear that there had been much of an impact by COVID-19 on the speed at which cases are being settled. An equal number of respondents felt cases were

taking longer to settle as they did that cases were being settle quicker or felt that it had no impact at all.

Conclusion

Given the experience and awareness of the issues currently facing the employment tribunal system, ELA would welcome the opportunity to discuss with the Committee any of the points contained in this response and its appendices.

ELA Working Party Members

Shubha Banerjee
Kiran Daurka, Leigh Day
Peter Edwards, Devereux Chambers
Sally Robinson, Cloisters
Paul Singh, National Education Union

APPENDIX 1

ELA Covid-19 Working Party

Thoughts and ideas to assist in reducing the Employment Tribunal backlog

July 2020

There is increasing concern over the delays building up within the Tribunal system, which have been exacerbated by (not caused by) the Covid-19 lockdown.

ELA sets out below some initial thoughts which may assist with the backlog facing the Tribunal system. They can broadly be divided into six categories – alternative dispute resolution, administrative processes and staff, case management, hearings, advice and assistance for litigants in person, and review of the ET rules of procedure.

Alternative dispute resolution

1. Conciliation – more pro-active and focussed conciliation could be used in the early stages of the claim being issued. The ACAS EC process has become a tick box exercise which rarely leads to a resolution. An initial two hour conciliation with the parties may lead to early settlement in more cases. We understand that a system such as this is used in Australia and manages to resolve a significant number of cases, thereby avoiding cases from reaching their court system.

2. Judicial Mediation (JM) – this proves effective in many cases and is particularly effective for resolving cases which might otherwise require long listings and extensive and expensive preparation. Such cases are most vulnerable to long listing delays for a final hearing. Successful JMs assist in reducing the backlog by allowing the Tribunal to reclaim multiple listing days. Different regions currently have differing practices on when to offer to JM. The Covid19 Presidential Guidance does not presently refer to JM but may be a useful inclusion, including encouragement to all parties to consider whether it may be appropriate in their case, not least because JM may be available far sooner than a trial. We suggest that any Employment Judge hearing a PH should be able to determine whether to offer a JM and to make directions through to a JM without requiring a separate TPH. Views on whether there should be a minimum hearing length to qualify for JM vary. Some consider that a minimum hearing length of 3 days remains desirable, however, others note that a 1 day

hearing estimate would likely result in a shorter JM. It would be useful and relevant to consider implementing an evaluation of JMs, looking at hearing length, outcomes and effect on backlog. We understand that the Bristol ET is accepting for JMs matters listed for hearings of 1 day or more. It would be helpful to know whether that exercise is being monitored specifically, and if so, the results.

Administrative processes and administration staff

3. We would suggest that there be a review of each region's backlog to identify those regions with the largest backlog and address resource & management issues in those areas. We would also suggest that additional help could be targeted in those areas, using for example judges and wing members from other regions where there is a far smaller backlog.

4. Has any work been done to address the reasons for what seems to be a high turnover in tribunal administrative staff, which also seems to be contributing to the backlog? Perhaps this could be considered.

5. Use of caseworkers, case officers and registrars - according to HMCTS' presentation to AJC webinar, case workers will be in situ by October 2020. Types of work caseworkers etc could undertake
    a. Sifting the incoming claims and correspondence and triaging both the types of cases and incoming post/emails (see further below)
    b. Identifying cases appropriate to list for a deposit hearing, ADR etc.

6. Introducing triage processes – both triaging of nature of claims as well as to deal with incoming emails and post. Some claims are more urgent and it is unclear if those cases are prioritised for listing. Cases where the employment relationship is on-going and cases where interim relief is sought, where there are allegations of discrimination or whistle blowing or maternity related cases are examples where listing might be prioritised. Similarly, some emails/post will be more urgent than others (relating to imminent hearings for example) and will need prioritising. A small number of senior, permanent administrative staff could be tasked with both types of triage work to try and reduce the backlog.

Case management

7. Can the Tribunal ask the parties to do more to assist with administrative processes to take the burden away from the Tribunal? Can standard directions apply in some less complex cases where both parties are professionally represented to circumvent the need for PHs to deal with directions and preliminary issues? It is recognised that if the matter is complex, parties are unable to reach agreement on directions or if there is an unrepresented applicant, this may well not be appropriate and/or efficient.

EMPLOYMENT LAWYERS ASSOCIATION

8. Applications – with the increased number of judges, is there capacity to deal with more applications on the papers, in less complex cases and where both parties are professionally represented, to ensure that interim issues are dealt with in a timely manner, without waiting for convenient dates for a PH? Presidential Guidance on which types of applications are apt to be dealt with in this way would be helpful.

9. We would suggest that there be consideration of whether all case management hearings should be dealt with via CVP as the default position, and only dealt with in person where there are specific reasons for doing so. This would necessitate expansion of CVP with adequate resources, training and equipment, but consider the learning from the SEND tribunal experience - its Chamber President reported they would have cleared their backlog by the start of the new school term through switching to CVP only hearings at the start of lockdown – since March they had heard approximately 1,500 appeals.

10. Standard practice for all PH bundles – during lockdown some Tribunals have adopted a standard practice that an agreed short PH bundle is provided to the Employment Judge with key documents, which helps overcome the challenges posed by lack of (timely) judicial access to case management systems. This practice enables PHs to be as effective as possible and allows Employment Judges to prepare efficiently and hear more PHs across the Tribunal day and potentially cuts down the need for further PHs for the parties. We would therefore suggest that this become a standardised practice across tribunals.

11. Receipt of relevant documents by EJ in advance of a PH – our experience has been that in a number of recent hearings the judge has not received the completed case management agendas/ list of issues / submissions / agreed mini bundle for PH which were submitted by the parties a day or two before the hearing as requested. This then leads to time wasted during the hearing as documents need to be resent to the EJ, who then has to review these documents before the hearing can proceed. This obviously causes delay, which on several occasions has been so substantial that there has been insufficient time remaining to go through all the issues raised, particularly where the EJ has no flexibility in their timetable for that day. This leads to some additional PHs being listed which otherwise would not have been needed, adding to pressure on the system, as well as additional costs, frustration and delay for the parties.

    This could be addressed in the following ways -
    (a) Introduce a procedure where a tribunal staff member has the dedicated and routine role to go through the email

inbox perhaps each afternoon searching for the names of all parties to cases due to take place the following day as a final check to ensure all relevant documents have been sent on to the relevant judge.

(b) From the representatives'/parties' side, ensuring that relevant documents had been provided to the ET in advance of a PH could be dealt with by including specific provision on the Case Management Agenda. The provision could require that all documents be sent to the ET by no later than 2 days before the PH. Ensuring that happened would also emphasise the parties' role in helping the tribunal system manage its work most effectively and dovetails with our point (7) above. The EJ could perhaps also check on the morning of the PH as a 'belt and braces' check. To ensure that a request for missing documents didn't land in the Sargasso Sea of general emails, having a specific email address with an admin worker allocated to deal with finding missing documents for hearings that day should help.

(c) setting out in Tribunal correspondence that unless documents are received from parties by X time / date there is a real risk that the documents will be not seen by the EJ.

(d) Alternatively, where parties are represented for the particular hearing (which must be known because Tribunals receive the details of the representatives in advance for CVP and telephone hearings now), the ET could send representatives the EJ's email address with a proviso that it is to be used only for the purpose of delivering documents for the hearings.

Hearings

12. Hybrid hearings – where listing due to room availability (or as lockdown is being slowly eased away) is causing delays, could aspects of hearings be carried out remotely? Generally parties wish to be face to face during witness evidence, but submissions and applications could perhaps be done remotely.

Advice/assistance for litigants in person

13. Is there scope for a duty solicitor scheme to assist with litigants in person? In some cases, Tribunals are relying on pro bono initiatives such as ELIPS to assist litigants in person. There is a clear need for some assistance to ensure that hearings are dealt with efficiently. A duty solicitor scheme, while involving an up-front cost, may ultimately save cost and time. Unrepresented claimants and respondents increase work for all. Unrepresented claimants are unlikely to appreciate the real value of their claim – so need realistic advice to facilitate settlements.

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Adequate representation also reduces the amount of judicial time required to agree lists of issues, resolve interlocutory disputes, get hearings completed within time estimates etc. Cutbacks in advice and legal help provision in recent years have exacerbated the problem. We would suggest the following to address this issue - reversing funding cuts to law centres, CABs etc, as well as targeted funding, eg of FRU, or expansion of ELIPs-type initiatives, so that more paid workers are available to assist self-represented litigants. Targeted funding also for organisations like YESS.

Employment Tribunal Rules of Procedure

14. We would suggest that there be a review of the ET Rules to reduce the administrative burden on Tribunals in group claims. For example, provision could be included to enable Tribunals to allow more claims to be issued on one claim form where claims are likely to be consolidated.

APPENDIX 2

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Extended Operating Hours (EOH) Working Group Survey

Returned by …Sally Robertson & Nadia Motraghi, counsel

On behalf of …ELA's Covid-19 Standing Working Party (with input from 5 colleagues at Cloisters, at all levels of call).

On …24.7.20 ……..

The questions below assume that attendance at any 'out of hours' hearings will be voluntary.

Please answer the questions on a scale of 1-5 –:

1 being not likely;

2 being very unlikely

3 being possibly

4 being likely

5 being very likely.

You = your constituency

Preliminary

There has been no time to consult with ELA's membership. The need to address the discriminatory effect of the proposals and the difficulties identified in this very short time mean that if HMCTS intends to pursue EOH, a wider and longer consultation exercise is required.

Different perspectives of solicitors & barristers

What comes across strongly is that the concerns of barristers are different from those of solicitors. This is likely to reflect the different experiences of the litigation process. Solicitors on the ELA Working Group, for example, viewed judicial mediations in the 4 to 6 pm time slot as being particularly intense and stressful after a working day and wondered why there seemed

to be a consensus among some counsel that virtual JMs in that 4 to 6 pm time slot were manageable.

Indirect discrimination & the Public Sector Equality Duty

More generally there is a concern about PSED issues and the need to undertake an Equality Impact Assessment, on judges, representatives and other users. There is a real and predictable significant adverse impact on those with caring responsibilities, whether they are judges, representatives, or participants. This does not just refer to child care, but to all types of caring responsibilities, both within and without individual households.

Collecting children from nursery/ after school clubs / childminders etc will become impossible and may mean not seeing children at all during the working week. EOH will have a disproportionate effect on working parents (especially women who still usually bear the greatest responsibility for childcare, particularly in single parent households) and others with caring responsibilities.

EOH is seen as predominately and unfairly benefiting male barristers who are more likely to be able to take on out of hours work.

For all, other commitments and the attempt to obtain any sort of work / life balance are likely to be illusory goals.

The issue of pressure on individual barristers to accept briefs for EOH hearings is relevant. Although HMCTS is not responsible for those pressures, because it can confidently predict their existence and that the proposed system will have a significant adverse impact on the equality of opportunity for women at the bar, they have to consider means of mitigating the measures or have a very strong justification for implementing discriminatory measures.

Practicalities – for representatives and judges

The issue of postponed EOH hearings must be addressed. Any EOH is non-standard. It requires booking/arranging additional child / elder / disability care. The notice required means that cancellation fees are payable even though the brief fee has not been incurred. The needs of young teenagers left at home unsupervised must also be addressed.

Extended hours, coming on top of a long working day (and preparing for the next day) will predictably cause more fatigue, increasing the chance of error, miscommunication, misunderstanding and accordingly raising greater access to justice considerations for participants who are pregnant, disabled, over 60, or facing health challenges.

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For each hour in Tribunal in a hearing or JM etc, several hours or more are required in preparation out of Tribunal. Accordingly, extending Tribunal opening hours til 6 or 8pm is in reality extending the working day for representatives by numerous more additional working hours beyond the 2 or 4 hours concerned. And then afterwards, the next day's case requires preparation, or work with a deadline must be completed. Burn-out is predictable.

Practicalities – getting going and slowing down

In terms of facilities, where parties arrive with documents which need to be photocopied on the day (although deprecated, this can arise and require copies to be immediately produced), the prospect of photocopying facilities being available nearby outside the Tribunal after 5pm, or on Saturdays is very limited. Will the Tribunal be providing photocopying facilities? At what cost?

The prospect of witnesses/ parties arriving in good time is much reduced, if attending in EOH after 4pm, where they are themselves travelling in rush hour and potentially after their day of work. (Most) witnesses are more likely to be tired if giving evidence at the end of the day and put at a disadvantage. The impact on those with fatigue related impairments is even greater.

Currently many judges are reluctant to sit beyond 4.15 or 4.30 because they recognise that beyond this time the impact of tiredness on critically assessing evidence and submissions can outweigh the benefit of ploughing through the hearing/ completing a hearing. This will be the very issue if judges/ parties/ witnesses are expected to work until 6pm/ 8pm etc.

It does not deal with the point about fatigue to suggest, for example, that fee paid judges could work in the EOH beginning only at 4pm. It is entirely unrealistic to expect that such a fee paid judge (or member, or witness or representative for that matter) would not engage in other work earlier in the day. On the contrary, if they are only to be retained for 2 or 4 hours during EOH it is almost inevitable that they would have to take other work earlier in the day. Also inevitable is the prospect of a 10 am start in another case the following day. And for witnesses, a normal working day with the added pressure and risks arising from fatigue.

The need for joined up thinking – other means of breaking the backlog

The content of the questions consider the position in isolation. In general it seems unnecessary to extend hours to break the backlog most of which originated pre-Covid. HMCTS reported to the

Administrative Justice Council this week that the backlog at the start of March 2020 was 30,867. At the end of May it was 35,078 and growing at about 500 single claims a week.

Other factors to address before extending hours included:

- Identification of the regions with the largest backlog and addressing resource & management issues in those areas. Targeting additional help in those areas.

- Use of caseworkers, case officers and registrars - According to HMCTS' presentation to AJC webinar, case workers will be in situ by October 2020.

    - What work has been done on the reasons for what seems to be a high turnover in tribunal admin workers?

- Types of work caseworkers etc could undertake
    - Sifting the incoming claims and correspondence
    - Eg triaging the anticipated increase in redundancy claims
    - Identifying cases appropriate to list for a deposit hearing, ADR etc

- Unrepresented claimants and respondents increase work for all. Unrepresented claimants are unlikely to appreciate the real value of their claim – so need realistic advice to facilitate settlements. Adequate representation also reduces the amount of judicial time required to agree lists of issues, resolve interlocutory disputes, get hearings completed within time estimates etc. Cut backs in advice and legal help provision exacerbates the problem.

    - Remedies include: restoring funding cuts to law centres, CABs etc; targeted funding, eg of FRU, or expansion of ELIIPs type initiatives, so that more paid workers are available to assist self-represented litigants. Targeted funding also for organisations like YESS.

- Expansion of CVP with adequate resources, training and equipment. Consider the learning from the SEND tribunal experience. Its Chamber President reported they would have cleared their backlog by the start of the new school term through switching to CVP only hearings at the start of lockdown – since March they had heard @ 1,500 appeals.

Q1 How likely would you/your clients be prepared to attend/participate in an in-person substantive hearing listed at:

1.1	4.00pm-6.00pm	1 – 3
1.2	6.00pm - 8.00pm	1 – 2
1.3	4.00pm-8.00pm	1 – 2
1.4	10-4.00 on Saturdays	1 – 2
1.5	Other comments or considerations	See Preliminary It is assumed the question is based on an additional separate substantive hearing taking place between 4-6pm and not that a hearing commencing at 10am would run until 6pm. Some clients might be willing to participate in a substantive hearing between 4-6pm but as regards the other options, we have not come across any clients prepared for witnesses to be required to attend beyond normal working hours. Employees who are witnesses very often have commitments outside working hours, especially caring responsibilities, or may have disabilities, or other regular commitments. Like lawyers, if a case is

		cancelled at the last minutes, witnesses may also incur travel and care costs.

Q2 How likely would you/your clients be prepared to attend/participate in a video substantive hearing listed at:

1.1	4.00pm-6.00pm	2 – 3
1.2	6.00pm - 8.00pm	1 – 2
1.3	4.00pm-8.00pm	1 – 2
1.4	10-4.00 on Saturdays	1 – 2
1.5	Other comments or considerations	See preliminary. Note additional pressures on newly qualified practitioners General feedback from @ 10 year call with no caring responsibilities is that post 7 pm is unrealistic. Clients reluctant or too tired to give evidence on top of a working day. Not suitable for witness evidence.

Q3 How likely would you/your clients be prepared to attend or participate in a telephone substantive hearing listed

1.1	4.00pm-6.00pm	3
1.2	6.00pm - 8.00pm	1 – 2
1.3	4.00pm-8.00pm	1 – 2
1.4	10-4.00 on Saturdays	1 – 2
1.5	Other comments or considerations	See preliminary. The 'possibly' at 1.1 refers to the type of telephone hearing. Case management or very straightforward PH only.

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Q4 How likely would you/your clients be prepared to attend or participate in an in-person judicial mediation or alternative dispute resolution hearing listed in person at:

1.1	4.00pm-6.00pm	1 – 3
1.2	6.00pm - 8.00pm	1 – 2
1.3	4.00pm-8.00pm	1 – 2
1.4	10-4.00 on Saturdays	1 – 2
1.5	Other comments or considerations	See Preliminary

Q5 Would you/your clients be prepared to attend or participate in a video hearing judicial mediation or alternative dispute resolution hearing by video listed at:

1.1	4.00pm-6.00pm	3 – 4
1.2	6.00pm - 8.00pm	1 – 2
1.3	4.00pm-8.00pm	1 – 2
1.4	10-4.00 on Saturdays	1 – 2
1.5	Other comments or considerations	See Preliminary. Of all the potential EOH options, a consensus among counsel (but not solicitors) has this as the most realistic option, i.e. ADR or JM by video. However, it should be undertaken on a voluntary basis (cf in Birmingham at present there is mandatory ADR being undertaken). If participating in ADR is mandatory, parties should not be required to attend in EOH, but rather it should take place during EOH only if both parties consent to it.

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Q6 Would you/your clients be prepared to attend or participate in a telephone judicial mediation or alternative dispute resolution hearing by telephone listed

Q7 How likely would you/your clients be prepared to attend/participate in an in-person case management hearing listed at:

1.1	4.00pm-6.00pm	1 – 3
1.2	6.00pm - 8.00pm	1 – 2
1.3	4.00pm-8.00pm	1 – 2
1.4	10-4.00 on Saturdays	1 – 2
1.5	Other comments or considerations	See Preliminary Part of Q6 looks as if it is missing. Clients would be as likely to participate in JM by telephone during EOH as by video. In any event, would be likely to be communicating with their representative by video link. In person case management hearings raised the strongest objections. For a 1 or 2 hour hearing, why add travel and waiting time at the end of a long day? There can be no practical purpose.

Q8 How likely would you/your clients be prepared to attend/participate in a video case management hearing listed at:

1.1	4.00pm-6.00pm	1-3
1.2	6.00pm - 8.00pm	1 – 2
1.3	4.00pm-8.00pm	1 – 2
1.4	10-4.00 on Saturdays	1 – 2
1.5	Other comments or considerations	See preliminary Video hearings would be less objectionable than in person hearings for case management. It is suggested that experience in lockdown supports the fact that the presumption for case management should be that case management PHs take place via video or telephone rather than in person.

Q9 How likely would you/your clients be prepared to attend/participate in a telephone case management hearing listed at:

1.1	4.00pm-6.00pm	1-3
1.2	6.00pm - 8.00pm	1 – 2
1.3	4.00pm-8.00pm	1 – 2
1.4	10-4.00 on Saturdays	1 – 2
1.5	Other comments or considerations	See preliminary

Q10 What types of claims are suitable for out of hours hearings? Yes/no/other comments of considerations

10.1	Discrimination/Public Interest Disclosure dismissal/detriment	No – complexity exacerbates fatigue of participants and tribunal
10.2	Unfair dismissal/redundancy	No – ditto
10.3	Small money claims	No – combination of maths, fatigue and lower chance of represented parties make errors more likely. If both parties represented, this is a potentially suitable area but should be considered after a questionnaire based triaging exercise and where parties / witnesses consented.
10.4	Preliminary hearings	Some. Virtual only. No to live hearings. Those capable of being heard in 1 hour, with no live evidence, so as to enable deliberation, judgment & consequential case management to all be concluded by 6 pm.
10.5	Case management hearings	Yes – virtual only. No to live in person hearings. PSED requires a questionnaire based triaging exercise to address actual suitability. Parties must consent to EOH
10.6	Other comments or considerations	A premature exercise

Q11 Assuming additional tribunal hearings held during usual tribunal hours of 10-4 could be made available conducting by CVP should parties whose hearings have been cancelled or delayed by the tribunal as a direct consequence of the recent shut down be given priority?

Yes/no/other comments or considerations

Sensible to give priority to covid-cancellations – but suitability for CVP needs to be triaged. Why not enable REJ, on application by the parties or of own volition, to expedite hearings for good cause, eg claims involving Redundancy Payments Office.

Q12 Assuming additional tribunal hearings could be made available by use of judges and members conducting CVP hearings should parties whose hearings have been cancelled or delayed by the tribunal as a direct consequence of the current crisis be given priority?

Yes/no/other comments or considerations

What is the intended difference between a shut down and a crisis? See Q11

Q13. Assuming additional tribunal hearings could be made available by use of judges and members conducting CVP hearings should certain types of cases be given priority?

Yes/no/other comments or considerations.

At REJ discretion. Minimum wage, deductions, WTR – low(ish) value claims by current employees. Not necessarily in all cases where the claimant is still employed – in open track, suggest best to have expedition only where the parties agree or where internal grievance/disciplinary procedures have concluded (sometimes xx in ET kills the employment relationship permanently).

Q14 Should alternative dispute resolution (ADR) be extended in most cases:

14.1 by offering the parties ADR immediately after a response has been received?

Yes/no/other comments or considerations.

If Claimant (or Respondent) is unrepresented, ADR is less likely to be successful. More likely if the parties are represented.

It is suggested that at the same time as offering ADR, the Tribunal should indicate when it is presently listing short and long hearings

so the parties have an understanding of how long they may be waiting until a substantive hearing. e.g. "The parties should be aware that at X Tribunal, hearings of 3 days or longer, which are being listed at preliminary hearings presently, are being listed for June 2021 onwards"

14.2 by offering the parties ADR at a case management hearing listed by the Tribunal immediately after witness statements have been exchanged?

Yes/no/other comments or considerations.

Seems far too late. Close to ET3 is best and in any event should be before the standard directions & costs kick in.

Further, offering ADR post exchange of witness evidence would add massively to the number of hearings the Tribunal would need to hold. It would mean (i) a case management hearing for every case which had reached the witness statement exchange stage (ii) a potential further 'hearing' for ADR for those interested.

It is suggested that instead it is framed that 'within X days following exchange of witness statements the parties confirm to the Tribunal whether they both wish to participate in ADR and if so for the Tribunal to list such a hearing'.

Views on whether there should be a minimum hearing length to qualify for JM vary. Some consider a minimum of 3 days remains desirable. It seems likely that a 1 day hearing estimate would result in a shorter JM. It would be relevant to consider an evaluation of JMs, hearing length, outcomes and effect on backlog. Is the Bristol ET exercise being monitored specifically?

Nadia Motraghi, Old Square Chambers

Sally Robertson, Cloisters