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Retained EU Law Consultation

Response from the Employment Lawyers Association

13 August 2020

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About ELA

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 Shubha Banerjee and Louise Taft was set up by the Legislative and Policy Committee of ELA to consider matters relating to the UK's departure from the European Union. A working party forming members of that standing committee and the incoming chair of the Legislative and Policy Committee has considered the appropriate response to this consultation. Members of the working party are listed at the end of this paper.

Executive Summary

1. ELA's published position is that power should **not** be extended beyond the Supreme Court. The reasons for this are:

   (a) confusion in stare decisis;

   (b) uncertainty;

   (c) delay;

   (d) unmeritorious defences and or claims; and

   (e) unintended consequences.

2. ELA agrees with the House of Lords Constitution Committee Report on the European Union (Withdrawal Agreement) Bill at paragraph 106 stated as follows '*… Allowing lower courts to reinterpret EU case law risks causing significant legal uncertainty that would be damaging to individuals and companies. It would also increase court workloads as judgments involving departures are contested on appeal.'*

3. EU law runs, like words in a stick of rock throughout UK domestic employment law covering following fields of employment law:
    (a) Sex discrimination;
    (b) Equal Pay and discriminatory pay;
    (c) Working Time and annual leave;
    (d) Pension discrimination;
    (e) Amendments to include indirect discrimination which was not intentional (indirect discrimination);
    (f) Justification of indirect, age and disability related discrimination;
    (g) Associative discrimination;
    (h) Collective redundancies;
    (i) Transfer of undertakings;
    (j) Pregnancy discrimination;
    (k) Fixed term workers;
    (l) Industrial action.

4. The law has developed in this one plane as a result of the decisions of the Court of Justice of the European Union (CJEU). Domestic law has then settled on top of that body of EU authority to create well understood areas of law. Cases examine the boundaries of the law but they do not challenge its foundations. There is certainty.

5. Extension of the right to change retained EU law below the Supreme Court would create uncertainty for all sides of industry. It would mean that businesses would be less able to predict the costs of employment and litigation, and employees would be less sure of their rights.

6. Further, uncertain law will lead to increased litigation, cost and delay. Legal certainty provides the benign conditions that promote settlement.

7. ELA is apolitical and adopts no position on whether the law should be changed so as to depart from previous CJEU decisions. We are however concerned that extending the power to depart from retained EU law will have unintended consequences, and brings with it immense uncertainty.

8. ELA is against any extension to the High Court or the Employment Appeal Tribunal because the law would become fractured. As one Court sat and departed from EU, another Court could adhere to it.

9. ELA's view is that courts and tribunals given the power to depart from retained EU case law should not be permitted to depart from retained domestic case law relating to retained EU law.

10. ELA is very strongly of the view that it is imperative that the doctrine of precedent, having been an established and fundamental principle of UK law for many years, is maintained and protected.

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11. As the Supreme Court (and the House of Lords, prior to the Supreme Court's establishment) has not codified the factors applicable for the test, ELA's view is that it becomes challenging constitutionally to suggest a meaningful list of factors that *should* be included in a test regarding departure from retained EU case law.

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Q1: Do you consider that the power to depart from retained EU case law should be extended to other courts and tribunals beyond the UK Supreme Court and High Court of Justiciary. Please give reasons for your answer.

1. ELA's published position is that power should **not** be extended beyond the Supreme Court. The reasons for this are:
   (a) confusion in stare decisis;
   (b) uncertainty;
   (c) delay;
   (d) unmeritorious defences and or claims; and
   (e) unintended consequences.

2. Currently, the UK Supreme Court and High Court of Justiciary are required under s6(5) of the European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020 to apply the "*same test as [they] would apply in deciding whether to depart from [their] own case law*" in deciding whether to depart from retained EU case law. The UK Supreme Court test in deciding whether to depart from its own case law is set out in the House of Lords Practice Statement of 26 July 1966, namely "*whether it appears right to do so*".

3. ELA's published position is that power should **not** be extended beyond the Supreme Court. The reasons for this are:
   (a) confusion in stare decisis;
   (b) uncertainty;
   (c) delay;
   (d) unmeritorious defences and or claims; and
   (e) unintended consequences.

4. We also note that the House of Lords Constitution Committee Report on the European Union (Withdrawal Agreement) Bill at paragraph 106 stated as follows '***We do not believe it is appropriate for courts other than the Supreme Court and the Scottish High Court of Justiciary to have power to depart from the interpretations of EU case law. Allowing lower courts to reinterpret EU case law risks causing significant legal***

uncertainty that would be damaging to individuals and companies. It would also increase court workloads as judgments involving departures are contested on appeal.' We concur. The reasons for our views are set out below.

EU Law is the Basis of a Considerable Number of Employment Rights

5. Most EU law in employment rights are the subject of long established authorities from the Court of Justice of the European Union which the UK Courts have applied consistently over a period of time. That body of law is settled with long established authority. That body of law has a broad and deep application.

6. The body of EU law in UK employment law is substantial. Many well understood rights are based on settled European authority. EU and domestic law have emerged from their own streams to mix their waters indistinguishably in the river of domestic UK employment law. That EU law runs, like words in a stick of rock throughout UK domestic employment law can be demonstrated by a brief consideration of only a few of the main EU cases in the following fields of employment law:
    (a) Sex discrimination[1];
    (b) Equal Pay and discriminatory pay[2];
    (c) Working Time and annual leave[3];

[1] *Marshall (No.2) [1993] ICR 893, Levez [1999] ICR 521, Arjona Camacho v Securitas Seguridad Espana [2016] ICR 389* requirement for effective remedies precluding a cap on damages, extended period of claim for back pay from 2 to 6 years and compensation must fully cover the loss and damages

[2] *Allonby v Accrington & Rossendale College & Others C256/01* extending the definition of worker and single source of employment under Article 141 EC Treaty, *Barber v Guardian Royal Exchange Insurance Group [1990] ICR 616* equal pay law covered all forms of pay relating to the employment relationship including ex gratia termination payments and pensions, *Enderby v Frenchay Health Authority [1994] ICR 112* where significant statistics disclose an appreciable difference in pay between two jobs of equal value (but no job evaluation study), the employer is required to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex.

[3] *Commissioners of Inland Revenue v Ainsworth [2005] IRLR 465, Stringer v HMRC [2009] IRLR 214, Pereda v Madrid Movilidad SA [2009] IRLR 959, KHS AG v Schulte [2012] IRLR 156, Neidel v Stadt Frankfurt am Main [2012] IRLR 607, Lock v British Gas Trading Ltd Case C-539/12, Robinson-Steele [2006] ICR 932* as to the amount of holiday pay, how it operates and how it should be carried over in cases of sickness, and how it cannot be replaced by a payment in lieu

(d) Pension discrimination[4];

(e) Amendments to include indirect discrimination which was not intentional (indirect discrimination)[5];

(f) Justification of indirect, age and disability related discrimination[6];

(g) Associative discrimination[7];

(h) Collective redundancies[8];

(i) Transfer of undertakings[9];

(j) Pregnancy discrimination[10];

(k) Fixed term workers[11];

(l) Industrial action[12];

(m) Disability[13];

(n) Gender reassignment[14];

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[4] O'Brien v Ministry of Justice Case C-432/17 on part-time pension discrimination

[5] Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996 (SI 1996/438

[6] Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84), HK Danmark, acting on behalf of Kristensen v Experian A/S: C-476/11,

[7] *Coleman v Attridge Law C-303/06, CHEZ Razpredelenie [2015] IRLR 746* extended discrimination protection to associative direct discrimination and then indirect discrimination

[8] *Junk v Kühnel: C-188/03, Atavan Erityisdojen AEK v Fujitsu Siemens Computers C44/08*

[9] *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S [1988] IRLR 315, Rask and Christensen v ISS Kantineservice A/S: C-209/91, Rygaard v Stro Molle Akustik A/S: C-48/94, Alemo-Herron v Parkwood [2013] ICR 1116* definition of an undertaking, unit of transfer, durability of protected terms and approaches to causation

[10] *Dekker [1992] ICR 325, Webb v Emo [1995] ICR 1021, Thibault [1996] ICR 160* pregnancy is unique to women, so that no comparator was required so that protection respectively was against: non-appointment to employment, dismissal because of pregnancy or maternity leave and discrimination in terms and conditions, save for pay during maternity leave

[11] *Tele Danmark [2004] ICR 610, Jimenez Melgar [2004] ICR 610* protection from pregnancy or maternity dismissal extended to fixed term contracts

[12] *Laval [2008] IRLR 160, Viking [2008] ICR 741 although the right to take collective action is a fundamental right under EU law, strike action which was aimed at compelling a foreign contractor to sign a collective agreement providing for rates of pay that were higher than the national minimum was not justified. This amounted to an interference with the freedom to provide services*

[13] *Chacon Navas [2007] ICR 1* Disability includes impairments which affected professional life, not just daily activities outside work

[14] *P v S [1996] ICR 795* discrimination on grounds of gender reassignment was a form of sex discrimination

(o) Post termination discrimination[15].

7. The law has developed in this one plane as a result of the decisions of the CJEU. The domestic law has then settled on top of that body of EU authority to create well understood areas of law. Cases examine the boundaries of the law but they do not challenge its foundations. There is certainty.

Stare Decisis and EU Decisions

8. Stare decisis is the legal doctrine that obligates courts to follow precedents, i.e. prior decisions of superior courts, when making a ruling on a similar case.

9. Many of the references to the CJEU were made by the Court of Appeal and the House of Lords / Supreme Court. This means that not only would legislation have to consider whether domestic lower courts could depart from CJEU precedent but also whether the domestic lower court could depart from the interpretation of that CJEU precedent by the domestic higher Court. Such legislation would threaten the system of stare decisis in understanding where the CJEU decision started and ended from which the domestic lower court could depart and where the domestic higher court decision started and ended (which, if stare decisis is to be maintained) from which the lower court could not depart.

Uncertainty

10. Extension of the right below the Supreme Court would create uncertainty for all sides of industry. It would mean that businesses would be less able to predict the costs of employment and litigation, and employees would be less sure of their rights.

11. The UK has the second largest legal services sector in the world. English law is one of our strongest global exports, used in 40% of commercial contracts internationally and making London a top choice for arbitration and for commercial disputes because of the

[15] *Coote v Granada Hospitality [1999] ICR 100* extended post-employment victimisation

fairness and certainty provided by its courts and the quality and effectiveness of its judiciary[16]. Uncertainty is the enemy of investment and puts England as the jurisdiction of choice at risk: as the UK Government will have observed during the period of uncertainty between the Referendum and the passing of the European Union (Withdrawal Agreement) Act 2020. It was widely reported that this uncertainty meant that businesses were less likely to invest. Once the decision was made then certainty was created and businesses were more likely to invest. So it is with legal certainty – employment costs and legal costs rise because outcomes are not certain. If Courts other than the Supreme Court were able to depart it would make it difficult for businesses to invest as they could not predict the cost of employment and whether rights would be extended or curtailed.

Increased Litigation and Unmeritorious Litigation

12. The second cost of uncertain law is increased litigation with its twin siblings of cost and delay. Legal certainty provides the benign conditions that promote settlement.

13. Uncertainty is the fertile ground that seeds litigation. Settled and certain law leads to predictable outcomes so that parties will settle disputes because they can predict outcomes. However, if a party can challenge hitherto accepted norms they are more likely to litigate whereas before they might compromise. Uncertain law is also the ally of the unmeritorious claim and the unmeritorious defence. Increased litigation creates increased delay as the system has to deal with cases in which challenge is made to existing law. The uncertainty is a charter to unmeritorious claims and unmeritorious defences predicated on the ability to challenge well understood principles and litigation at an early appellate stage of the case.

Changing Settled Law has far reaching consequences

14. The Courts and litigants are not best placed to change settled legal norms. Parliament is. The legislative process has far reaching consultations, examinations by Committees,

[16] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/668334/legal-services-are-great-brochure.pdf

legislative debate from a broad cross-section of society and review by a second Chamber. Judge made law relies on the abilities of the litigants to present all the arguments and relevant decisions. Judge made law is neither consultative nor can it deal with the full implications of its decisions. For instance, when the Supreme Court reversed the long held test of dishonesty in *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords) [2017] UKSC 67* or the law of joint enterprise in *R v Jogee* [2016] UKSC 8 the ramifications of the decisions were considerable in respect of ongoing cases, recently decided cases and, in the case of *Jogee*, for many past cases.

15. The Supreme Court with between 5-9 Justices is better suited than any other Court given the experience and number of the Justices to consider the ramifications of that which it does.

Allowing the Law to Develop

16. ELA recognises that there are those who believe that allowing lower courts to depart from retained EU law would give effect to the country's decision to leave the European Union and to allow courts in the UK to develop the law in a manner best suited to the needs of the UK and its citizens. The practical effect of limiting the power to depart to the Supreme Court would be to make it extremely difficult and expensive for parties to seek change via the courts. It would oblige cases to be fought through all inferior courts before reaching the Supreme Court and in all probability prevent all but the extremely well resourced to do so. Cases that would turn entirely on this issue would have to be considered by the inferior courts on a hypothetical basis which could be hugely frustrating for the parties involved. As the consultation paper suggests, such a rule would create an inflexible process. To further develop the stick of rock analogy, it would become a very sticky process indeed to create change.

17. There are some that believe that the more time moves on the more absurd it will be to follow old decisions of the CJEU and the sooner they are abandoned the better. CJEU decisions are predicated on avoiding unfair competition between integrated EU states. Many CJEU Judges come from civil law systems, and bring these traditions to their judgments. There are arguments that given these characteristics, to fossilise CJEU

decisions within UK law given entirely changed circumstances, would be both irrelevant and damaging to the health of the economy. As yet, however, we do not know the terms on which the UK's future relationship with the EU will be based – it may be that it will be agreed that EU law in areas such as employment and social policy will be preserved to maintain the "level playing field" in which case the potential for departure from retained EU case law may be more restricted.

18. We recognise the view that previous CJEU decisions have undermined the wishes of UK legislators; *Marshall (No.2)* cited above is a significant example, requiring as it did the lifting of caps on compensation for sex discrimination cases, a principle extended to all discrimination cases. However, it will now be open for Parliament to legislate to overturn retained EU law. Retained EU law will no longer take precedence over legislation.

19. ELA is apolitical and adopts no position on whether the law should be changed so as to depart from previous CJEU decisions. We are however concerned that extending the power to depart from retained EU law will have unintended consequences, and brings with it immense uncertainty for the reasons set out above. We do not believe that allowing what will still be appellate courts in the context of employment law to depart from retained EU law will necessarily lead to more rapid change than allowing Parliament to legislate as it sees fit. We do not believe it should be left to the courts to determine economic and social policy or labour market reform.

20. We recognise that it may be appropriate in some circumstances for courts to depart from retained EU law and that delay and difficulties may be caused by access to justice for litigants appealing from the Employment Tribunal through the appellate courts to the Supreme Court. We propose that there be a power for the Employment Tribunal to make a reference directly to the Supreme Court similar to Rule 100 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which has hitherto enabled the Employment Tribunal to make an Article 267 reference to the CJEU. Given the impossibility of distinguishing where the CJEU and domestic cases end and begin, only the Supreme Court will have sufficient authority to look at such decisions without threatening the principle of stare decisis.

Q2: What do you consider would be the impacts of extending the power to depart from retained EU case law in each of the options below? Please give reasons for your answer.

a. The Court of Appeal and equivalent level courts;

b. The High Court and equivalent level courts and tribunals;

c. All courts and tribunals.

21. As per our Question 1, we consider that the power to depart should be retained by the Supreme Court only. If courts other than the Supreme Court were able to depart from retained EU law the following issues would be created:
    (a) Uncertainty as to the Rule of Law;
    (b) A lack of coherence in the development of the law; and
    (c) Change of stare decisis in the Court of Appeal.

The Rule of Law

22. The Rule of Law requires that Courts take decisions that only affect a persons' rights prospectively. The Withdrawal Agreement preserves the EU Acquis in UK law unmodified until 31 December 2020. That is the law as interpreted by the CJEU and the domestic courts, incorporating where appropriate the direct effect of Directives, the horizontal direct effect of some other instruments and Regulations.

23. Normally, when a Court delivers a decision interpreting a statutory provision or a regulation all that the Court is doing is stating that which the law has always meant from its inception. The decision may surprise some people but there is no intellectual assault on the Rule of Law because the law is stated by the Court to have the meaning it always had and prospectively.

24. This is not the case where a Court departs from EU law. Where the Court departs from the settled meaning of EU law it is declaring a new meaning to that law. The new

meaning cannot, of course, precede 31 December 2020 because otherwise it would be retrospectively amending rights which were guaranteed to be subject to EU law until 31 December 2020. The Court then also has to consider the date from when the departed meaning should have effect. That should be a decision left only to the most senior Court.

Extending to all courts and tribunals

25. As the consultation paper recognises, extending the power to all courts and tribunals risks significant uncertainty given that lower courts and tribunals cannot bind each other. Lower courts and tribunals are not equipped to make decisions of this nature.

Extending to the High Court and the Court of Appeal - The Fractured Development of the Law

26. In the employment law context, the Employment Appeal Tribunal is the first Appellate body for all Employment Tribunal cases in England, Wales and Scotland. It is broadly equivalent in precedent terms to the High Court save that it conclusively binds all Employment Tribunals. It is staffed by a High Court Judge as its President, a Senior Circuit Judge and then High Court, Deputy High Court and Circuit Judges. Like the High Court its decisions are only persuasive on itself.

27. We are against any extension to the High Court or the Employment Appeal Tribunal because the law would become fractured. As one Court sat and departed from EU, another Court could adhere to it. Contradictory decisions in the High Court and the Employment Appeal Tribunal are not unusual. By way of example in Working Time there is the decision of *Miles v Linkage Community Trust Ltd [2008] IRLR 602* where it was held that an employee could only bring a claim for infringement of working time rights if his request was refused was departed from by *Grange v Abellio London Ltd UKEAT/0304/17/JOJ* which held that it was for the employer to ensure that the right was accessible and no refusal was required in order for a claim to be brought.

28. The point in *Miles / Grange* was one which was not the subject of settled case law so that the ramifications would not have been too serious. However, where there is one

strand of settled law which one court of the EAT prefers and one from which it departs then the uncertainty is amplified.

29. One other point is that the High Court has concurrent jurisdiction with the Employment Tribunal for equal pay claims following the decision in *Birmingham City Council v Abdulla*[17]. Extending the power to the High Court but not the Employment Tribunal could distort decisions about which is the most appropriate forum in which such claims should be litigated, particularly given that retained EU law plays a significant part in the interpretation of equal pay provisions in the Equality Act.

The Court of Appeal and Stare Decisis

30. The Court of Appeal binds itself unless there are two inconsistent decisions given by the Court, where the Supreme Court has overruled a previous decision or the previous decision is irreconcilable with the decision of the Supreme Court and finally only if the Court of Appeal considers that there has been a mistake.

31. In order to implement an ability for the Court of Appeal to depart from its previous decisions in the EU context a statutory test would have to be devised to ensure that the Court of Appeal was merely departing from the EU strand of its previous decision and not from the domestic strand of its previous decision. It is only in these circumstances that we envisage the Court of Appeal could have the power to depart from EU case law.

Q3: Which option do you consider achieves the best balance of enabling timely departure from retained EU case law whilst maintaining legal certainty across the UK. Please give reasons for your answer.

32. ELA does not consider that either of the above options achieves the best balance of enabling a timely departure from retained EU case law whilst maintaining legal certainty across the UK. EU law has grown organically onto UK law over many years. It has developed a settled meaning and understanding. The Supreme Court is the only

[17] [2012] UKSC 47

Court in the UK that has a settled test for departing from previous decisions. It has the most senior and accomplished jurists and sits in larger panels than the other Courts. It is best placed to consider whether or not EU law should be departed from.

33. Parliamentary sovereignty demands that policy decisions to depart from EU law provisions rest with Parliament and not the Courts as much as possible. As set out above Parliament is best able to consider the different considerations where the law is to be changed. The best way to maintain the legislative supremacy of Parliament is only to allow the Supreme Court to depart from EU law thereby ensuring that fewer policy decisions end up in the Courts and stay, where they should, in Parliament.

34. If however, it is determined that it is necessary for the power to be extended beyond the Supreme Court, we consider that there would be less mischief in extending it to the Court of Appeal and its equivalents than if it were extended further.

Q 4 If the power to depart from retained EU case law is extended to the Court of Appeal and its equivalents, do you agree that the list below specifies the full range of courts in scope?

i. **Court of Appeal of England and Wales;**
ii. **Court Martial Appeal Court;**
iii. **Court of Appeal of Northern Ireland;**
iv. **The High Court of Justiciary when sitting as a court of appeal in relation to a compatibility issue or a devolution issue; and**
v. **The Inner House of the Court of Session in Scotland.**

Please give reasons for your answer.

35. We consider that this list does specify the full range of courts in scope. However, for the reasons set out above ELA does not support the proposal to extend this power to the Court of Appeal.

Q5: If the power to depart from retained EU case law is to be extended to the High Court and its equivalents, do you agree that the list of courts below captures the full range of courts in scope?

i. **The High Court of England and Wales;**
ii. **Outer House of the Court of Session in Scotland;**
iii. **The Sheriff Appeal Court in Scotland;**
iv. **The High Court of Justiciary sitting at first instance; and**
v. **The High Court in Northern Ireland.**

Please give reasons for your answer.

36. We consider that this list does specify the full range of courts in scope. However, for the reasons set out above ELA does not support the proposal to extend this power to the Court of Appeal.

Q6: In respect of either option, are there other courts or tribunals to which the power to depart from retained EU case law should be extended? If yes, in what circumstances should this occur? Please give reasons for your answer.

37. Given our position generally and specifically to our answers to questions 4 and 5 above, our answer to this question is **no**.

Q7 - Do you consider that the courts and tribunals to which the power to depart from retained EU case law is extended should be permitted to depart from retained domestic case law relating to retained EU case law? If yes, in what circumstances should this occur? Please give reasons for your answer.

38. ELA's view is that courts and tribunals given the power to depart from retained EU case law should not be permitted to depart from retained domestic case law relating to retained EU law.

39. Appellate case law attempts to create certainty and consistency. There can be no good reason for the usual rule of precedent to cease to apply (see also our response to question 8 as regards the value of the doctrine of precedent). There are always circumstances in

which a court or tribunal, at any level, can depart from case law within its own jurisdiction and those tests can continue to be applied for consistency. However, an attempt by a lower court to unwind EU-based decisions of a higher domestic court will lead to significant uncertainty for both parties. Inevitably, where a lower court is given the power to depart from retained EU case law beyond its own jurisdiction, and may choose not to be bound by precedent set by an appeal court, many cases will advance to the Supreme Court for greater certainty in any event.

40. To give a lower court the power to depart from retained EU case law of the higher UK courts goes against the very basis of the legal system in this country. This proposal puts the Government in danger of undermining the credibility of the UK legal system.

41. Below are some examples of the concerns that ELA has on this issue:

- The uncertainty of such powers in relation to settled equal pay law, which is a complex area of equality protections, affecting mostly women. Much of the case law over the years has favoured female employees, bringing them clarity and added protections, including,
    - in relation to whom they can compare themselves;
    - greater understanding as to what amounts to a stable employment relationship during which the employer is liable for inequality;
    - establishing how discrimination can be shown where particular disadvantage is difficult to prove allowing a woman to use significant statistics to show a difference in pay; and
    - the ability to bring an equal value claim, which was subsequently added to the Equal Pay Act 1970 as a separate cause of action.
- The negative impact of such powers on the test for objective justification in direct age discrimination and indirect discrimination cases.
- The potential regression of equality law in relation to the concepts of associative and perceived discrimination.

42. Within the employment law context, the uncertainty would impact both employers and employees as both benefit from the consistency of established legal principles.

43. In fact, in our view, the group most likely to be disadvantaged by this proposal are women as they rely heavily on EU case law in equal pay claims (see Q11d below).

44. The circumstances in which a court or tribunal could depart from retained domestic case law are difficult to envisage given that it has formed part of the legal landscape for decades, as we have mentioned in our answers to earlier questions. A reversal of decisions would create waves within established areas of law, disadvantage the most vulnerable who have come to rely on retained domestic case law, re-open settled areas of law, and place a significant burden upon the Supreme Court.

Q8 Do you agree that the relevant courts and tribunals to which the power is extended should be bound by decisions of the UK Supreme Court, High Court of Justiciary and Court of Appeal and its equivalents across the UK where it has already considered the question of whether to depart from retained EU case law after the end of the Transition Period, in the normal operation of precedent? Please give reasons for your answer.

45. Very definitely, yes. ELA is very strongly of the view that it is imperative that the doctrine of precedent, having been an established and fundamental principle of UK law for many years, is maintained and protected. We strongly believe that undermining the doctrine in the manner suggested by this question would throw the UK's legal system into chaos and also into disrepute.

46. The doctrine of precedent provides certainty, not just to parties in litigation, but also to the wider public/business and industry, which enables decisions to be made in the confidence that they are in accordance with the law and are extremely unlikely to be successfully challenged. It also provides fairness as those in similar situations know and can be secure in the knowledge that they will be treated in a similar way to established cases/caselaw. It also prevents litigants from having a 'second bite of the cherry' and seeking to relitigate and re-raise arguments that have already previously

been aired, considered and deliberated upon by higher courts, which would result in unnecessary duplication of litigation. We also refer to the points made above about the rule of law in response to question 2 which refer to the fact that departing from retained EU case law will involve declaring a new meaning of provisions/rules upon which the litigation is predicated, and the fact that this should be a role only undertaken by senior courts.

47. To give an example, if lower courts could override decisions of higher courts on the issue of whether to depart from retained EU case law, as posited in the question, then the following could occur – a Respondent in an equal pay claim (for example) could consider that they would be able to defend their position based on the fact that the relevant provisions of retained EU case law did not apply, because a higher court in a previous case had considered the position and determined that those provisions should be disapplied. If the Claimant could reopen the argument and ask a lower court to reconsider whether retained EU case law could be departed from, and that lower court took a different view to the higher court, then that could completely change the position for the Respondent and they might find themselves liable for a breach of the Equality Act with all of the financial consequences that would follow from that. Whilst it could be argued that parties/the public/businesses are already vulnerable to changes in the law as court decisions can be challenged (and overturned) on appeal, the orderly nature of the appeal process coupled with the doctrine of precedent means that certainty can eventually be established once all routes of appeal are exhausted, and this would be undermined if the suggestion posited in this question were to be adopted.

48. In addition, we would point out that if the suggestion made in this question were to be applied, this would most likely cause significant amounts of 'follow on' litigation as the decisions of those lower courts and tribunals, being inconsistent with that made by the higher court, would be extremely likely to be challenged by way of appeal. We presume that the suggestion in the question is being considered in part at least as a means of saving time and financial resources by preventing parties from needing to appeal to a higher court to secure a decision about whether or not a specific area of retained EU law should be departed from. We strongly consider that this suggestion will in fact have no such effect and is more likely to have the **opposite** effect (i.e. that

the litigation in question ultimately involves a greater amount of time and resources to be invested), in that if a lower court reached a different decision in respect of a particular issue of retained EU case law to a previous decision of a higher court, the likelihood of that lower court's decision being appealed would be very high. We envisage that the parties would ultimately need to progress up the appeal court route in any event to secure a final decision on the case law in question from a higher court such that there would be no saving in terms of time or resources by having a lower court depart from existing precedent.

49. Already we are in a position where a degree of the certainty of a legal position is being lost as a result of the proposed introduction of provisions enabling higher courts to depart from retained EU case law, as explained above. As the consultation document and our answers to earlier questions make clear, the certainty that our legal system provides is a compelling and primary reason why the UK is chosen by many to resolve international disputes. To further increase this lack of certainty by moving away from the doctrine of precedent as suggested would undermine the certainty of our legal system further. As we mention earlier in this response, given that the UK courts are currently the forum of choice for the resolution of many international disputes, which brings in large amounts of revenue for the UK and gives the UK's legal system great international acclaim, to take active steps to undermine this position seems illogical and ill thought through. It is also only likely to harm the UK economy, both as a result of a reduction in international disputes being brought to UK courts, as well as because of an increase in uncertainty for UK business and industry as to what laws those businesses should be seeking to comply with.

50. ELA would therefore strongly advise against any attempt to dilute the doctrine of precedent in the manner suggested by this question.

Q9: Do you agree: a. that the test that should be applied by additional courts or tribunals should be the test used by the UK Supreme Court in deciding whether to depart from its own case law? b. that this test is capable of being easily understood and applied across the jurisdictions by reference to the relevant case law? Please give reasons for your

answers. If you do not agree, what alternative test do you consider should be applied? Please give reasons for your answer.

51. As stated above in our response to questions 1-3, it is our strong view that no court other than the Supreme Court should be given the power to depart from retained EU case law. If, as a matter of policy, it is considered that that power should be extended then we believe that option 1 would be the better course. Our answers below are predicated on this.

52. 9a. We can see little support for any test other than that which is used by the Supreme Court. Since its inception in Lord Gardiner's Practice Statement in 1966 it has been used sparingly and, it might be argued, only where public policy or social change demands a departure from a previous decision. For example, in *British Railways Board v Herrington*[18] the House of Lords departed from precedent that no common law duty was owed to trespassers and ruled that a duty of common humanity was owed to all including trespassers, justifying this by reference to "changes in physical and social conditions", Pearson LJ stating, with reference to the previous decision (*Addie v Dumbreck*[19]) that "…its rigid and restrictive character has impeded the proper development of the common law in this field. It has become an anomaly and should be discarded".

53. By contrast in the case of *Knuller v DPP*[20] the House of Lords, though doubting the correctness of its previous decision on the point under review, declined to depart from it, Reid LJ stating that, simply because it may be felt that a previous decision may have been wrong, that is not in itself a reason why it should be reversed – "In the general interest of certainty in the law, we must be sure there is some very good reason before we so act".

[18] [1972] AC 877
[19] [1929] AC 358
[20] [1973] AC 435

54. The contrasting cases above illustrate the undesirability we see in extending the ability to depart from previous decisions to lower courts. We have addressed in detail the compelling advantages that judicial precedent brings to certainty in the law and that, we would suggest, is never more necessary than now if the reputation and reliability of the UK legal system and its courts are to be maintained. In a number of the relevant House of Lords/Supreme Court cases, there has been extensive debate as to whether to depart from previous precedent, often with dissenting judgments. That quality of debate, where five or more senior experienced judges address their minds to the matter, is in our view highly desirable if departure from precedent is to be made. That is less likely to be the case for the Court of Appeal and much less so in fora where there is only a single judge.

55. That said, if power is to be given to lower courts in relation to retained EU case law, then we think it would be undesirable for any different test to be applied. We can see that some form of guidance might be of assistance in helping Judges to consider the question of departure but would suggest that that should perhaps be confined to a short statement along the lines of the opinions in the cases quoted above. The moment this ability is extended to lower courts it is to be expected that it will result in extensive additional legal argument in any case where an existing decision does not suit the interests of one of the parties. We will not rehearse the issues to which we see that will give rise – suffice to say, it will not make the law any quicker or cheaper.

56. 9b. We do consider that the test in the 1966 Practice Direction is capable of being easily understood, although, for the reasons previously advanced, that is not the same as it being easily (and reliably) implemented. If it is to be the case that lower courts are given this power, the limited guidance we have proposed may assist in producing some sort of consistency (and therefore certainty) in the process.

Q10: Are there any factors which you consider should be included in a list of considerations for the UK Supreme Court, High Court of Justiciary and other courts and tribunals to whom the power is extended to take into account when deciding whether to depart from retained EU case law? Please give reasons for your answer.

57. As the Supreme Court (and the House of Lords, prior to the Supreme Court's establishment) has not codified the factors applicable for the test, our view is that it becomes challenging constitutionally to suggest a meaningful list of factors that *should* be included in a test regarding departure from retained EU case law. We believe this particularly so at this stage as the approach to the public policy considerations applicable in each context will require very careful assessment indeed.

58. For example, it would seem inappropriate for different factors to be suggested as relevant for different areas of the law (whether employment law, competition law, environmental law etc.) as that would run an enhanced risk of being perceived as a checklist of political preferences in the guise of legal guidance.

59. We acknowledge that the test of "whether it is right to do so" is capable of being easily understood by the Supreme Court because that has been the basis of the approach to departure since 1966.

60. As an aside, it seems debatable whether such approach derives *solely* "by reference to the relevant case law" (as per the second paragraph of page 21 of the Consultation Paper) as opposed to a juridical "hard-wiring" of the principle that deviating from prior precedent requires a compelling reason so to do.

61. In overview, we consider that the most important consideration (certainly currently) is the need for great caution in the exercise of the discretionary power to reinterpret whether by the Supreme Court or more widely. Therefore, as stated in response to Question 9a we consider that any guidance which would be issued to lower courts in particular should emphasise this aspect. Our reasons underpinning this approach are described below.

62. The Consultation Paper refers (p21, para 2) to "…a range of relevant considerations sitting beneath that which have been developed in a significant body of case law". It is

noteworthy that the Consultation Paper gives two examples – where a previous decision does not reflect modern public policy or where a previous decision causes uncertainty.

63. The Consultation Paper does not seek to expand on these elements, which is perhaps consistent with the observation at page 21 of the Consultation Paper that there is "no settled jurisprudence relating to the exact circumstances when the UKSC will use the discretionary power".

64. We note that academic commentators have indicated just how difficult it can be for a consensus or unanimous position to be adopted in the Supreme Court on whether to depart in any particular circumstances and the particular reasons for departure[21]. *Austin and Southwark* (one of the cases cited in the Consultation Paper) is a case in point: the Justices applied the test with different points of emphasis and reached differently nuanced decisions. This emphasises that the "right to do so" test is a test that has to be grappled with in each set of circumstances and is necessarily multi-factorial.

65. It seems still to be (highly) unclear and a matter of constitutional debate as to what constitutes current public policy with respect to retained EU case law. The House of Lords Constitution Committee report at paragraph 105 captures this point in an apolitical manner[22].

66. By way of example, in the sphere of employment law, we consider that the assessment of what is the appropriate "public policy" approach to either *what is or what should be* the underlying purpose of the Working Time Regulations, which derive from the Working Time Directive, illustrates some of the challenges. Paraphrasing significantly for brevity, whether the Regulations and associated case law should be viewed from a foundation of a focus on health and safety or from a broader perspective of what is economically feasible/appropriate as regards the composition of remuneration packages.

[21] see for example https://d17g388r7ggnd8.cloudfront.net/2017/08/lecture_james_lee.pdf
[22] https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/5/508.htm#_idTextAnchor024

67. From the perspective of promoting legal certainty, it could be argued that there would be an advantage from removing (for example) the prohibition against the use of rolled-up holiday pay.

68. However, an argument can also be made that it would seem inappropriate to ask the Supreme Court to make that decision based upon an assessment of the desirability of divergence from the CJEU case law because public policy from 1 January 2021 should now treat the Working Time Regulations as subject to different considerations from the Working Time Directive.

69. Similarly, a debate may be had as to the interpretation of what amounts to detrimental changes post-TUPE transfer in the context of UK public policy in a post-Covid-19 environment.

70. Is workforce flexibility to be the priority to stimulate growth? Or, should policy dictate that employee protection needs to be the primary concern, such that a policy of term by term comparison should remain? The latter might be bolstered by an argument that market-familiarity with the restrictions that stem from the *Daddy's Dance Hall* (CJEU) principle is already "priced-in" to transactional practice and so change would increase employee uncertainty in circumstances where the applicable "modern public policy" has not evolved as of 1 January 2021.

71. This response is not advocating one position or the other as regards these two examples – but the need for some period for reflection and perspective seems an important consideration in the approach to the test as to whether there should be departure.

72. Picking up one of the themes from the House of Lords Constitution Committee report referred to above, we consider that Ministerial guidelines as to what is preferred government policy on employment law necessarily have their place in a democratic, political context and may well be a relevant factor to be weighed when assessing whether it is right to depart. Similarly though, if a commitment to preserve retained EU case law in order to anchor a commitment to retained EU law is to be observed it would seem important for the government to identify those aspects where policy divergence

and the removal of uncertainty merit revision and why and then permit Parliamentary scrutiny.

73. For example, a Law Commission exercise may be suitable to seek to identify which elements of retained EU case law in the sphere of employment law may need to be assessed as a priority and why divergence may be suitable rather than seeking to codify or collate factors relevant to the application of the test.

74. Given the significance of the issues it would seem advantageous for Parliament to have an opportunity to scrutinise the government's priorities as that might provide a valuable indication to the Supreme Court as to the direction of travel regarding "modern public policy"; and to enable it better to determine how much weight to apply to such factor when assessing whether it is "right to depart".

Q11: As part of this consultation process, we would also like to know your views on how these proposals are likely to impact the administration of justice and in particular the operation of our courts and tribunals.

a. Do you consider that the changes proposed would be likely to impact on the volume of litigation started in UK courts and tribunals? Please specify where, in your view, this would occur and why?

75. As we detail above, retained EU law plays an important role in the overall jurisprudence of UK employment law. Allowing lower courts to depart from established principles encourages parties to litigate where retained EU law does not support their position. Where only the Supreme Court can depart from retained EU law where it considers it right to do so, it is an enormous undertaking to bring proceedings in the hope that an appeal may reach the Supreme Court (likely many years into the future) to give an opportunity for them to depart from the relevant principle. Equally, an employer failing to comply with retained EU law in the knowledge that they would have to appeal judgments against them all the way to the Supreme Court takes an incredible risk.

76. Where the High Court or even only the Court of Appeal had the power to depart from retained EU law, such litigation involves less time and cost and so may be likely to be more of an attractive proposition. Where retained EU law is costly to an organisation (perhaps in a multiple party equal pay claim or holiday pay claim), there is greater incentive to litigate the principle again and seek to persuade a lower court that it is right to depart from that law rather than to settle a complaint, or even to avoid the complaint in the first place by ensuring that the organisation complies with the relevant principle. Conversely, if these powers are extended to lower Courts, there will also be a greater incentive for Claimants to bring proceedings that challenge the established retained EU law, again particularly where it affects a large number of people.

77. As we identify above, uncertainty as to the law drives litigation and is the enemy of compromise. Allowing lower courts to depart from retained EU law incentivises litigation by parties who wish to see change in that law. We believe that doing so will likely see an increase in the volume of litigation, which will have wide-reaching consequences for all court and tribunal users at a time when there is already a considerable and growing backlog of claims.

b. Do you consider that the changes proposed would be likely to impact on the type of litigation started in UK courts and tribunals? Please specify where, in your view, this would occur and why?

78. As we detail above, allowing lower courts to depart from retained EU law incentivises litigation on principles that have already been established. The proposal does not however extend to first instance decisions in the Employment Tribunal. We would therefore see litigation commenced or defended with a view to an appeal reaching the Employment Appeal Tribunal or Court of Appeal so that they can depart from retained EU law if they consider it right to do so. In other words, we will see more "test cases" that will be litigated to final hearing and then appealed. Litigation will be commenced with a view to changing the established law, rather than simply reaching a resolution of a dispute of fact. Such litigation by its very nature is unlikely to settle by way of alternative dispute resolution, placing significant burden on the court and tribunal system.

79. EU law has had a significant impact upon employment law generally and so we consider that much of the litigation concerning employment disputes will be affected, as can be seen from the areas of employment law affected by EU law set out in response to question 1. In particular, we consider that the areas of discrimination and equalities law may be affected, as well as working time issues.

c. Do you consider that the changes proposed would be likely to have more of an impact on particular parts of the justice system, or its users? Please specify where this might occur and why.

80. Any area of the justice system that regularly encounters retained EU law will face more of an impact than those that see relatively few cases where retained EU law is relevant to the issue being litigated. As we identify above, employment law is one area where retained EU law has significant application. We therefore consider that the Employment Tribunal System and its users will be impacted more than other parts of the justice system that do not regularly apply retained EU law. As we mention above, this would occur against a backdrop of an already pressurised Employment Tribunal Service.

d. Do you consider that the changes proposed would have more of an impact on individuals with particular protected characteristics under the Equalities Act 2010? Please specify where this might occur and why.

81. EU Directives concerning equality law have been brought into effect in UK law via the Equality Act 2010, which will obviously continue to apply. However, there is much EU case law interpreting those Directives and therefore some of the provisions of the Equality Act and generally expanding upon discrimination law and retained EU case law is therefore of direct relevance to claims brought under the Equality Act by individuals with the particular characteristics protected by the Act. Most of the cases we identify above relate to discrimination law, and whilst many pre-date the Equality Act, departure from them could change its interpretation in notable ways.

82. Allowing lower courts to depart from retained EU case law will incentivise litigation to seek to change that law, and lead to uncertainty as we identify above. By its very nature, the Equality Act is used by those with protected characteristics to assert their rights. Uncertainty in the application of retained EU case law to the Equality Act will therefore have more of an impact on individuals with protected characteristics. EU law has generally expanded discrimination law (see for example the decisions of *Webb v EMO Air Cargo (UK) Ltd (no 2)*; *Coleman v Attridge Law* and numerous judgments relating to equal pay law cited above) so ELA believes that the decisions to depart from it could adversely impact on those with protected characteristics who are seeking to assert their rights.

Q12: Do you have any other comments that you wish us to consider in respect of this consultation.

83. No.

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