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**Consultation by HM Courts and Tribunal Service on  
Transforming the Court and Tribunal Estate**

**Response from the Employment Lawyers Association**

**29 March 2018**

**Consultation by HM Courts and Tribunal Service on its consultation paper “Fit for the Future: transforming the Court and Tribunal Estate”**

**Response from the Employment Lawyers Association**

**INTRODUCTION**

- 1) 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, rather it is to make observations from a legal standpoint. Accordingly in this consultation we do not address such issues. 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 new legislation.
- 2) The Legislative and Policy Committee of ELA set up a sub-committee to consider and comment on the consultation paper from HM Courts & Tribunal Service which, having consulted the membership, its report is set out below. The members of the sub-committee appear in Appendix 1 to this response.
- 3) Whilst our members litigate in all courts where employment disputes may be heard we have focussed our attention where our specialised practice may provide the most valuable contribution, namely in connection with Employment Tribunals. In this regard we believe our members have unrivalled knowledge of its operation, its benefits and its shortcomings.

**Executive Summary**

- A. Nothing in these proposed changes should contribute to any further deterioration in the desired distinctions between formal courts of law and the relative informality of employment tribunals.
- B. In the move to 'improve the estate' employment tribunals cases are now being heard in shared venues with magistrates courts for example in Plymouth and Cardiff which our members complain creates entirely the wrong atmosphere for workplace claims.
- C. We wish hearing rooms to be quite different from traditional courts that only encourage an adversarial atmosphere. On the whole in the past this is a distinction that has been recognised and we wish that to continue. Separate waiting rooms for respondents and claimants are necessary and sufficient rooms for private consultations with clients should also be provided.
- D. At present the arrangements to permit evidence to be given by video conferencing are cumbersome and not efficient. Too much is left for the parties to arrange and often Judges are not well informed about what is feasible. This will become an increasing requirement and all design plans will need to provide for it in a manner that makes such requests routine and easy to arrange.

- E. Large communal waiting rooms for all and sundry in mixed court environments such as that for Birmingham Civil Justice Centre are not suitable for employment tribunals. Design guides need to accommodate the difference between civil courts and employment tribunals.
- F. We commend to HMCTS making use of the possibility of canvassing Employment Tribunal User Groups for these suggestions to take into account local factors.
- G. Whatever the nature of future consultations on this subject we plead again for adequate time to respond without timing consultations around summer holidays and other predictable events which makes obtaining replies from disparate representatives so difficult and the responses are accordingly diminished in quality.
- H. Too many recent consultations have shown a wholly inadequate appreciation of what has gone before and an inadequate appreciation of the subject matter of the consultation. Fewer and better informed consultations that provide adequate time for responses will lead to better decision making in the long run.

## **The background**

- 4) We welcome and support all the objectives set out in this consultation and endorse wholeheartedly the idea that the nature of the buildings in which cases are heard should be well-located, well connected, welcoming and easy to use. Employment law practitioners can claim to have been well aware of these needs since employment law began to expand in the 1970s given the unique nature of workplace claims and the different environment in which it is desirable in which they be heard. That reality has to a large extent also been accepted by all governments and generally kept in mind when selecting and designing the buildings in which cases are heard which in the main are more informal and very different in nature from traditional courts.
- 5) It is worth recalling that in 1968, the Donovan Commission identified four characteristics which should distinguish what were then called industrial tribunals from ordinary courts: these included that tribunals would be more accessible than ordinary courts and that tribunals should be less formal than ordinary courts. It was also hoped that tribunals would be less legalistic than ordinary courts.
- 6) In many ways, and for different reasons these objectives have been eroded over time. Factors include: the greater formalisation of employment tribunal procedures; the huge increase in the number of jurisdictions in which employment tribunal claims are determined by Employment Judges sitting alone diminishing the role for 'lay members'; the introduction in 2013 of tribunal fees since struck down and other contributing factors. The increase in formality and legalisation has in our view generally been regrettable but the important point in relation to this consultation is that nothing in these proposed changes should contribute to any further deterioration in the desired distinctions between formal courts of law and the relative informality of employment tribunals. Whilst we naturally acknowledge the legitimacy of efficiency and the need to save costs, where possible, the risks we concern ourselves with are well illustrated by the fact that in the move to 'improve the estate' employment tribunals cases are now being heard in shared venues with magistrates courts for example in Plymouth and Cardiff which our members complain creates entirely the wrong atmosphere for workplace claims. In the search for efficiency it is hoped that consideration will still be given to creating the right environment for such cases adhering as far as possible to the ideal of informality and distinction from civil courts.

- 7) As a general point our members also seek improved facility for private consultation with clients, separate waiting rooms for respondents and claimants, and improved resources such as availability of photocopying machines. Large communal waiting rooms shared with criminal and civil courts are inappropriate and will just encourage more vertical meetings in corridors and add to the inevitable anxiety and tension of hearings.
- 8) We also comment that where administration is separated from the location of the hearing rooms as at present our experience is that this makes the administration of cases less efficient and does not improve matters. Too often decisions on interlocutory matters are delayed, As a policy decision has apparently been made in this regard we limit our observation to say that the IT systems used will have to be infinitely better than they are at present for this to work well. We would of course be delighted if this proves to be the case.
- 9) We now address the specific questions in the consultation paper as they apply to employment tribunals.

**Question 1: What is your view of the proposed benchmark that nearly all users should be able to attend a hearing on time and return within a day, by public transport if necessary?**

- 10) We believe this standard is too vague in its reference to 'one day' particularly when one keeps in mind the frequency of multi-day hearings. Journeys of more than an hour and a half are undesirable at the beginning and end of a hearing day. Also calculating appropriate times by reference to historic usage could be very misleading in the case of employment tribunals because of the impact of fees introduced in 2013 and their abandonment this year. Historic figures will have to be considered together with decent estimates of future use as impacted by external factors such as possible new jurisdictions.

**Question 2: What is your view of the delivery of court or tribunal services away from traditional court and tribunal buildings? Do you have a view on the methods we are intending to adopt and are there other steps we could take to improve the accessibility of our services?**

- 11) As set out above we wish hearing rooms to be quite different from traditional courts that only encourage an adversarial atmosphere. On the whole in the past this is a distinction that has been recognised and we wish that to continue. Separate waiting rooms for respondents and claimants are necessary and sufficient rooms for private consultations with clients should also be provided. Waiting rooms need to be decently maintained as far too many have a shabby and neglected appearance at present. It has become a common feature of tribunal hearings for tribunals to take time at the beginning of a hearing day to read-in to the documents. Whilst this is done parties have to wait in the waiting rooms which can become excessively crowded because of this practice. Design of the rooms has to take this factor into account.

**Question 3: What are your views regarding our analysis of the travel time impacts of our proposals? Are there any alternative methods we should consider?**

- 12) As stated in paragraph 10 we believe this standard of one day is too vague particularly when one keeps in mind the frequency of multi-day hearings. Journeys of more than an hour and a half are undesirable at the beginning and end of a hearing day. Also calculating appropriate times by reference to historic usage could be very misleading in the case of employment tribunals because of the impact of fees introduced in 2013 and their abandonment this year. Historic figures will have to be

considered together with decent estimates of future use as impacted by external factors such as possible new jurisdictions.

- 13) We endorse the idea that government should make use of local knowledge taken from those within the catchment area of the hearing centres. There is a ready means of obtaining this information in relation to employment tribunals through the many User Groups that exist throughout the country. We suggest these be canvassed in relation to their requirements.

**Question 4: Do you agree that these are the right criteria against which to assess capacity? Are there any others we should consider?**

- 14) Subject to what we have said about looking ahead and external factors as well as considering past user figures we accept these criteria are all relevant. In considering the expected workload we mention the growing need for advisory services for litigants in person. In the Employment Appeal Tribunals there are rooms set aside for the Employment Lawyers Appeals Advice Scheme (ELAAS) scheme and at London Central a room for the Employment Litigant in Person Support Scheme (ELIPS) volunteers. We envisage a growth of these pro-bono services and request that provision be made for them. These rooms should have access to printing, photocopying and Wi-Fi facilities if they are to work well.

**Question 5: What is your view on the proposed principles and approach to improving the design of our court and tribunal buildings? Do you have any further suggestions for improvement?**

- 15) We repeat what has been said above about the need for adequate room space to advise and take instructions privately with clients. Large communal waiting rooms for all and sundry in mixed court environments such as that for Birmingham Civil Justice Centre are not suitable for employment tribunals. Design guides need to accommodate the difference between civil courts and employment tribunals.
- 16) We agree what is said about current shortcomings in maintenance also a general air of neglect and shabbiness that pervades many of the hearing centres at present, especially in the areas reserved for waiting rooms. We welcome and support all efforts to address these issues.
- 17) At present the arrangements to permit evidence to be given by video conferencing are cumbersome and not efficient. Too much is left for the parties to arrange and often Judges are not well informed about what is feasible when requests are made at case management conferences. As envisaged in this paper this will become an increasing requirement and all design plans will need to provide for it in a manner that makes such requests routine and easy to arrange.

**Question 6: What are your views on our approach to people and systems? How do we best engage with the widest possible range of users as we develop scheduling and listing systems? What factors should we take into account as we develop our plans?**

- 18) Again we commend to HMCTS making use of the possibility of canvassing Employment Tribunal User Groups for these suggestions to take into account local factors.
- 19) On the issue of listing generally this is in practice not a judicial function but is a function carried out by administrative staff. In case management conferences no judge will allocate a date without asking staff what is available and the judicial role is limited to ordering the length of the hearing after hearing submissions. The problem this causes is that administrative staff are frequently poor at making good

estimations of capacity. They in turn often lay the blame for this on late settlements throwing out their calculations but this is usually a function of lack of communication between staff and parties representatives which needs to be improved. A lack of dialogue is at the root of these failings as is hinted at in this consultation when it refers to making 'well-informed' decisions.

- 20) One suggestion might be to invite parties, as part of any Case Management Directions issued at a preliminary hearings, to inform the Employment Tribunal of possible settlement of a case, where they consider it is likely to settle in the next month. This would provide Employment Tribunals with a better feel for when cases were likely to come out of their lists and in turn improve the listing of cases.

**Question 7: Do you have views on our approach to evaluating proposals for estates changes or any suggestions for ways in which this could be improved?**

- 21) We have nothing to add to what has already been said.

**Question 8: What is your view on our proposed approach to future estate consultations?**

22) We agree the need to consult locally and repeat our suggested use of User Groups for this purpose. In addition whatever the nature of the consultations we plead again for adequate time to respond without timing consultations around summer holidays and other predictable events which makes obtaining replies from disparate representatives so difficult and the responses are accordingly diminished in quality.

- 23) In addition too many recent consultations have shown a wholly inadequate appreciation of what has gone before and an inadequate appreciation of the subject matter of the consultation. Whether this is because of the turnover of staff or inadequate preparation is not known to us but it leads to such repetition and wasted effort. Fewer and better informed consultations that provide adequate time for responses will lead to better decision making in the long run.

**Question 9: What is your view on how these proposals are likely to impact on groups of court and tribunal users with particular protected characteristics as defined in the Equality Act 2010? Are there any sources of evidence or research that you think we should consider?**

- 24) We have no comments in addition to agreeing the need to take these issues into account when considering compiling an impact assessment in each case.

**Question 10: Do you have any other general comments on our future estates strategy?**

- 25) When we canvassed our membership about this consultations the additional issues they raised included a need for better waiting rooms/more hearing rooms, a lack of general accessibility and parking facilities, the need for good public transport links; poor décor/effective heating and air conditioning and better acoustics in tribunal hearing rooms and excessive security when moving around the building.

29 March 2018



## **APPENDIX 1**

### Members of the Sub-Committee

Paul McFarlane: Weightmans LLP (Chair)

Stephen Levinson: Keystone Law