Employment Tribunal Rules: review by Mr Justice Underhill - response form

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is **23 November 2012**

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If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group from the list below.

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Response from the Employment Lawyers Association

INTRODUCTION

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both barristers and solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

The Legislative and Policy Committee of the ELA set up a sub-committee under the co-chairmanship of Bronwyn McKenna of Unison, Joanne Owers of Fox Williams and Jonathan Chamberlain of Wragge & Co to consider and comment on the consultation paper Employment Tribunal Rules: review by Mr Justice Underhill published by BIS in September 2012. Its report is set out below. A full list of the members of the subcommittee is annexed to the report.

Question 1: Are the new rules less complex and easier for non-lawyers to understand? Do you think that the drafting style could be further improved and if so how?

☐ Yes ☐ No ☐ Not sure

Comments:

We consider that, whilst the rules have not been the subject of wholesale reform, the revised drafting is undoubtedly written in a more user-friendly and comprehensible style, such that the rules are much easier to understand and should be easier to follow. The use of subheadings will aid understanding particularly by non lawyers. It may be of further assistance to include diagrammatic explanations of the key stages of a tribunal claim with cross references to the relevant ET Rule.

Any specific drafting issues are addressed in the responses to individual questions below.

Question 2: Do you think Presidential guidance will provide all parties with clearer expectations about the Employment Tribunal system and ensure consistency in case management and decision making?

☐ Yes ☐ No ☐ Not sure

Comments:

In 2010, ELA carried out an extensive membership survey on the topic of Employment Tribunal Practice and Procedure. The result of that survey indicated in strong terms our Members' concerns in relation to the lack of uniformity in Tribunal practice and procedure. ELA therefore welcomes the suggestion that guidance is given by the ET President with the aim of improving uniformity. ELA considers that the guidance will provide all parties with clearer expectations about the Employment Tribunal system. The guidance will be particularly helpful for unrepresented parties who will be given a clearer insight into what considerations will be taken into account and what is expected of them.

ELA further considers that guidance, such as the examples given, will help to achieve, but not ensure, consistency in case management and decision making. Whilst we understand the need to preserve judicial discretion, we are concerned that the use of the words "Tribunals must have regard to any such guidance, but they will not be bound by it" in Rule 7 and in particular the phrase "An Employment Judge or Tribunal will be expected to have regard to such guidance, but is not bound by it" in Annex B (which waters down its relevance further), could undermine the effectiveness of this new tool. We also consider that the same language should be used in both Rule 7 and Annex B.

Provided that the guidance itself is drafted in non-prescriptive terms and builds in sufficient flexibility, we consider that the wording should clearly require parties and the judiciary alike to follow that guidance as appropriate, save in very exceptional cases (which may be related to the specific facts of a particular case).

Despite those reservations, any step which attempts to deal with the criticisms expressed by users in relation to the lack of uniformity in Tribunal practice and procedure and encourage greater use of Presidential Guidance which has previously been extremely rare is, in our view, a step in the right direction.

Insofar as guidance to users is concerned, we would make the following (non-exhaustive) list of suggestions where guidance would be welcome:

- Time limits for bringing a claim and the impact of late submission of claims/responses
- Jurisdiction issues
- Limiting evidence as envisaged by rule 50
- How to apply to amend claims
- How to deal with disclosure (including bundling)
- Guidance for the completion of a statement of loss
- Dealing with witness orders
- How to apply for costs and preparation time orders
- Process for seeking deposit orders and for strike out

What is of key importance, once the guidance is available, is to ensure that all parties have ready access to the guidance and know of its availability.

Obviously ACAS will be able to advise of its existence but it will not always be apparent from the documentation which guidance is available. Will judges be expected to adjourn for parties to be referred to guidance before proceeding in any relevant matter? We think the use of guidance should be clarified in this regard.

We also consider that there should be provision for regular review and feedback so that the guidance does not remain static.

Provided any guidance is readily available then ELA believes that its use will engender more confidence amongst all Tribunal users as to how these matters are viewed and dealt with.

Do you have any comments on the draft example guidance on postponements and default judgments provided at Annex B

Comments:

Aside from the wording differential regarding the statements of the Guidance noted above, we consider that the Guidance is clearly drafted and is well written. It provides specific and clear examples and will be helpful to unrepresented parties in particular.

Question 3: Will the recommendations for new rules on the initial paper sift and strike out powers lead to better case management early in the Tribunal process?

☐ Yes ☐ No ☐ Not sure

Comments:

Paper Sift

We welcome the fact that the new rules introduce a mandatory review by an Employment Judge at the outset of the claims - a practice which, in our view, has worked well in the Employment Appeal Tribunal, albeit that the sift in the EAT is confined to ascertaining whether there are arguable points of law. Here, the Employment Tribunal will be dealing with a blend of factual and legal issues and it may prove difficult to determine at this stage whether a claim has "no reasonable prospect of success" and should be struck out early. We consider that there will be particular difficulties in doing so in relation to discrimination claims, as demonstrated in the recent decision by the Court of Appeal in *Community Law Clinic Solicitors Ltd v Methuen [2012] EWCA Civ 571* reaffirming the House of Lords' decision in *Anyanwu v South Bank Students Union [2001] ICR 391*.

In principle, we consider that the 'paper sift' will lead to better case management (and may act as a deterrent to unmeritorious tactical claims, particularly when combined with the introduction of fees) and follows current practice in many Tribunals. However, where Tribunals differ is that some list the case for a hearing at the same time as issuing directions and allowing the parties 14 days to apply for different dates depending on availability of witnesses and time estimates, others will deal with the hearing separately at a later date.

Rule 22 is silent on listing the case for a full hearing and it would appear that the only reference to listing in the new rules is at Rule 44 which provides that 'the parties will be given not less than 14 days notice of the date of the final hearing'.

The rules should address the issue of whether the case should be listed for a hearing as part of the 'paper sift' or some time later to ensure there is consistency in all Tribunals. This may be a matter for judicial guidance. Clearly, it is in the interests of justice for cases to be heard at the earliest opportunity although this will depend on resources.

Strike out Powers

Although the current rules allow the Tribunals to strike out claims which have no prospect of success etc and issue deposits for weak claims, in our experience, these powers have been little used in practice, thus allowing weak claims to proceed to a hearing. As such, we welcome any re-emphasis in the rules which brings the potential strike out of weak claims to the fore.

Part of the problem may have been due to Government targets requiring cases to be listed for a full hearing within six months which left inadequate time for dealing with preliminary issues. This issue has now been addressed by combining PHRs and CMDs.

It seems that there will now be increased pressure on the Tribunals to strike out claims at an early stage. If the Tribunals are under pressure to exercise this power then we are likely to see an increase in preliminary hearings to allow the Claimant to put forward their case at a hearing. Whilst this may be helpful, we would question whether the Tribunals have sufficient resources to deal with the increase in preliminary hearings which may be required.

We note that Rules 23 and 24 require there to be a hearing if a party wishes to challenge the strike out of all or part of their claim / response. However, Rule 34(2) dealing with strike out powers enables the strike out to take place after representations have been made in writing and without the need for a hearing. In order to avoid problems arising if a hearing occurs under Rule 23 or 24 in the absence of the opposing party and the Tribunal then wishes to turn its attention (in the interests of efficiency and combining hearings), to case management directions with one party absent, we question whether it

would be appropriate to allow for a process of written representations in relation to Rules 23 and 24 in common with Rule 34. If the requirement for a hearing only remains, we consider that there may be little to gain in practice by informing the opposing party under Rule 23 or 24 that they need not attend and that the Respondent/Claimant should be required to attend the preliminary sift hearing at the direction of the Tribunal, particularly if there is a possibility of going on to deal with case management matters as suggested in the rules and outlined above. This should definitely apply if only part of a claim is at risk of being struck out.

The pressure to strike out claims may impact unfairly on unrepresented Claimants and it would be helpful if clear grounds for striking out claims could be addressed thoroughly in Presidential guidance.

Question 4: Are there any practical problems with combining pre-hearing reviews and case management discussions into a single preliminary hearing?

☐ Yes ☐ No ☐ Not sure

Comments:

We welcome the proposal, as reflected in draft Rule 39, that a preliminary hearing will combine both preliminary issues of law and practice with case management directions (including directions relating to the conduct of the final hearing), although it is our experience that this often happens in practice already.

Further, we are pleased to note that the revised Rule 40 partially addresses the concerns we raised through our participation in the Expert User Group and our letter to Mr Justice Underhill dated 1 May 2012, and which appear from paragraph 36 of the Consultation Paper to have been shared by others, that the Notice of Hearing will specify the preliminary issues to be determined.

But, for the reasons explained below, we do not believe that Rule 40 goes far enough to address those concerns: it is our view that the parties should also receive advanced notice of the other matters referred to in Rule 39, particularly in Rule 39(c) and (d). We would also suggest that the notice should in general terms cover the likely directions under Rule 39(a). This reflects the current practice of advising the parties in advance of the issues which are to be determined by way of Case Management Directions (see below). We would propose that Rule 40 is amended accordingly. There are also further issues relating to conducting such hearings by telephone (as highlighted below).

As we pointed out in our letter of 1 May 2012, a failure to give the parties advanced notice of the "agenda" albeit in general terms may mean that one or both of the parties are taken by surprise at the Hearing. This could lead to

more adjournments which would defeat the underlying purpose of the amendment.

The extent to which this can be addressed by way of Presidential Guidance is considered below, but even with such Guidance, it is important as a matter of natural justice and fairness that parties know the "agenda" in advance of a hearing

Unlike the other matters referred to above, we do not consider it necessary for the parties to be given advanced notice of issues relating to settlement or alternative dispute resolution as it is normal practice for this to be raised at the Hearing itself.

Further consequences of combining these hearings and the proposed amendments to the Rules are addressed below.

Issues relating to Case Management Directions

It is our understanding that it is proposed that in future case management directions may be made in one of two ways: either by way of written directions under Draft Rule 25 or at a preliminary hearing under Draft Rule 39(b).

We note that the scope of the specific directions identified in Draft Rules 27, 28, 29 and 30 is more limited than the list identified in Rule 10(2) of the 2004 Rules.

In this context we note that a "case management direction" is defined as an order or decision of any kind in relation to the conduct of proceedings but does not include the determination of the final issue. In other words, the power to give case management directions is extremely wide.

We make no criticism of this per se as it reflects the flexibility necessary to give directions which are appropriate to the particular circumstances of a case.

We also acknowledge that the Employment Tribunal still has power to give directions in respect of all the matters identified in Rule 10(2) of the 2004 Rules by virtue of the general power under Draft Rule 20 which clearly states that the particular powers identified in Rules 27 to 30 do not restrict the general power to give case management directions and is also reflected in Draft Rule 47 which sets out the general power to give directions.

However, we are concerned that parties, particularly unrepresented parties, should know what Directions can be sought by way of Case Management Directions, or perhaps equally important, what directions can/will be given by the Employment Judge.

We therefore believe that the illustrative list in the current Rule 10(2) is helpful (although some of the specific powers could be expressed more

clearly in plain English). Alternatively, we would suggest this is an appropriate topic for Presidential Guidance.

We would observe that many Tribunals already provide the parties with a 'shopping list' of items to be addressed by way of Case Management Directions and some Tribunals send the parties a list in advance of the Case Management Discussion. This practice could be universally adopted by all Tribunals.

Issues Relating to Preliminary Hearings

We have no further comments on the scope of preliminary hearings (Draft Rule 39), fixing of preliminary hearings (Draft Rule 40), or composition of panels (Draft Rule 41).

As far as Draft Rule 42 is concerned, we note that preliminary hearings which raise preliminary issues will, subject to draft Rule 55, continue to be held in public (Rule 39(b)) as will strike out applications (Rule 39(c)).

In our experience, it is very common for an application to be made for a deposit pursuant to Draft Rule 36 as an alternative to a strike out. It would be somewhat bizarre if part of such an application was heard in private and part in public. We would therefore suggest that the power under Draft Rule 42 be extended to cover preliminary hearings under Draft Rule 39(d). Under the wording of Draft Rule 42, it would still be open to the Employment Tribunal to direct that such a hearing be held in private where appropriate.

We would also point out that one consequence of holding Case Management Directions and Hearings relating to these other issues at the same preliminary hearing is that part of the Hearing would be in private and part in public. This is primarily an administrative question but is nonetheless a practical problem in merging/combining the two.

Electronic Hearings

We note that draft Rule 51 makes provision for hearings by way of electronic communication. We have no objection to this in principle but it does raise certain issues in relation to the proposal that Case Management Directions and Preliminary issues should be determined at the same preliminary hearing.

In our experience, it is not uncommon these days for Case Management Meetings to be conducted over the telephone and generally speaking we support this practice where it is convenient to the parties. It is more unusual for Pre-Hearing Reviews to be conducted over the telephone.

A potential consequence of combining Case Management Meetings with Pre Hearings into a single preliminary hearing is the greater use of electronic communication to conduct such hearing.

In this context, we would repeat our earlier concerns that hearings by way of electronic communications may not be appropriate where issues are raised under Draft Rule 39(b) as there is a risk that the parties may submit incomplete, incorrect or even doctored documents. It is also important to ensure that each party is in possession of the relevant documentation. A further concern is unrepresented parties may not be used to using the telephone as a means of formal presentation and may find that process difficult or intimidating.

It may be that such issues could potentially be addressed by way of a preliminary direction under Draft Rule 40 although it would be helpful if this could be made clear by, for example, stating that the Tribunal was empowered to make "such directions as appropriate for the conduct of such a hearing". It would also be helpful if this issue could be addressed in the Presidential Guidance to ensure some uniformity in approach.

Question 5: Will a stand alone rule help to encourage parties to consider alternative such as independent mediation to resolving their workplace disputes?

☐ Yes ☐ No ☐ Not sure

Comments:

While we are broadly in favour of the inclusion of a stand alone rule (Rule 2) to encourage parties to consider alternative dispute resolution methods (ADR), we have some doubts about how successful any such rule will be. We believe that steps beyond the mere insertion of a new rule are required to effect a long term cultural shift in attitudes towards ADR.

We consider that, in general, parties to a workplace dispute are reluctant to consider ADR (such as independent and judicial mediation), as such methods are often as complicated and costly as pursuing a case to full hearing owing to mediators' costs and preparation costs/time. Simplifying ADR processes, and removing the often substantial fees involved in ADR, would therefore be beneficial. Further, we note that the current absence of a free-standing rule does not hinder tribunals from making suggestions regarding ADR and settlement. We therefore doubt whether the mere inclusion of Rule 2 will have any real benefit.

That said, we consider the creation of Rule 2 to be harmless and, on balance, encourage its inclusion (provided that it does not impose an absolute duty on tribunals to encourage ADR, or put undue pressure on parties to mediate or settle). We consider that the proposed positioning of Rule 2, next to the overriding objective (Rule 1), sends a useful message to parties that ADR methods will be encouraged and facilitated by the tribunal "wherever practicable and appropriate". The long-term impact of Rule 2, however, will depend on how actively ADR is encouraged by judges (i.e. how frequently Rule 2 is implemented); which is heavily dependent on

judges' personal preferences. After all, if judges have negative experiences of ADR, or doubt its success, they are less likely to encourage or facilitate ADR within their case management directions.

We consider that a long-term cultural shift in attitudes (amongst both tribunal judges and disputing parties) is required for ADR methods to be more actively employed; and this shift will not be effected simply by the inclusion of a new Rule. We would propose that, to encourage the necessary cultural shift, ADR should be addressed in detail within the Presidential guidance and most importantly judges should receive thorough training on the best ways to facilitate ADR within the tribunal process.

Question 6: Do you agree that a respondent should not be required to apply to the Tribunal to have their case formally dismissed when the claimant has chosen to withdraw? Are there any disadvantages to this approach?

☐ Yes ☐ No ☐ Not sure

Comments:

The proposed rules simplify the existing system for dismissing proceedings but also provide for Claimants who have withdrawn the claim with the specific intention of bringing fresh proceedings in a different jurisdiction. ELA welcomes this change as it considers that the current requirement to make an application for proceedings to be dismissed on withdrawal involves an unnecessary layer of administration.

One potential disadvantage may occur if a Claimant withdraws a claim, unaware of the implications and the dismissal takes effect before they express any intention of bringing fresh proceedings (thus potentially depriving a Claimant of a good claim). However, we believe this disadvantage is addressed by the possibility of applying for the dismissal order to be reconsidered under Rule 63 and 64.

Mr Justice Underhill proposes a simplified method for a claim to be formally dismissed when the Claimant has chosen to withdraw (Rules 37 and 38). Under the proposed Rules of Procedure, the Tribunal will normally issue a judgment formally dismissing the claim (or part of it) unless:-

(a) the Claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim, and

(b) the Tribunal is satisfied that there would be a legitimate reason for doing so.

However, no further guidance on what constitutes "normal" is given. It will be obvious if the Claimant has expressed an intention to bring fresh proceedings but as it is an exercise of judicial discretion, the parties may not

have a clear idea of what a legitimate reason is. If the word "normally" is to be retained this might be a situation which would be suitably dealt with by Presidential Guidance in order to ensure that Tribunals deal with these matters consistently.

In ELA's view, introducing an automatic process for dismissing proceedings, without a need for an application will meet the aims of the review in saving expense, minimising administration and increasing certainty.

Question 7: Should judges, where appropriate, limit oral evidence and questioning of witnesses and submissions in the interests of better case management?

☐ Yes ☐ No ☐ Not sure

Comments:

Pro-active case management of this nature has the potential to save the parties and the Tribunal system time and expense by restricting the length of hearings to a level that is proportionate. Whilst judges already have, and exercise, this power, clear Presidential Guidance as to its appropriate use would be very welcome and would instil a uniform approach. Similarly, one might anticipate that such Guidance would also have the effect of focussing the parties' minds on efficient management of the hearing from the outset. The practice of timetabling is standard in the Commercial Court, with the Admiralty & Commercial Courts Guide (9th. Ed.) stating (at section J 5.5), "*When lodging the reading list the claimant should also lodge a trial timetable. A trial timetable may have been fixed by the judge at the pre-trial review … If it has not, a trial timetable should be prepared by the advocate(s) for the claimant after consultation with the advocate(s) for all other parties*."

However, there are features of the employment tribunal that will at times obviate against precise timetabling. For example, parties who are self-representing will often have little idea about how long cross examination or submissions will take and be unable to assist the Tribunal with realistic time estimates.

Therefore, on balance while the explicit inclusion of the discretionary power to timetable claims is welcome in order to encourage consistency, some direction in Presidential Guidance on the use of the discretion will help to ensure that timetabling at the start of a claim is not used inappropriately or too rigidly or in a way that may not reflect how long is actually needed for the claim to be heard fairly.

Separately, it may be appropriate to include an express discretionary power to specify a sensible limit on the length of witness statements. This is a practice which is already followed in some Employment Tribunals. A disproportionately long witness statement can, of itself, have a knock-on

effect on the length of a Tribunal hearing. For example, it can cause an opposing party to resort to lengthier cross-examination or oral submissions (where, for example, they are concerned about leaving certain factual assertions unchallenged, even though they are not relevant to the issues that the Tribunal is required to determine).

Question 8: Do you agree with the recommended approach to make the privacy and restricted reporting regime more flexible?

☐ Yes ☐ No ☐ Not sure

Comments:

ELA considers that the current restricted reporting regime required overhauling. In particular the introduction of greater flexibility is necessary in order to achieve a better balance between the competing rights of freedom of expression and privacy under the European Convention of Human Rights. It therefore broadly welcomes the new draft rule subject to the caveats expressed below.

We approve the removal of the concept of a temporary restricted reporting order and therefore the extension of the right to make an application for the revocation or discharge of such orders to any person "with a legitimate interest". This will, for instance, potentially enable the Press to challenge more effectively the making of such orders, in appropriate cases, and fills the gap in the existing Rule 50 identified in *Dallas McMillan and A V B and Davidson UKEATS/0006/07*.

We are however concerned that Rule 50(2) (e) goes further than the existing rules in two respects:

i. Restricted orders will be able to be made in any circumstances (rather than be limited to the current regime); and

ii. The orders can extend indefinitely.

Although this drafting will ensure that Employment Judges are not limited in any way from making appropriate orders in the interests of justice, the wideness of the drafting imposes even greater responsibility to exercise such power sparingly, and with due regard to the proviso in the proposed Rule 55(3). The power should not, for instance, be used merely to spare the blushes of those involved in Employment Tribunal proceedings, no matter how well known. The existing practice that such Orders should be the exception rather than the rule should not be eroded. It would be appropriate for there to be Presidential Guidance to this effect.

Section 12 of the Human Rights Act 1998 ("HRA") arguably imposes an obligation on an Employment Tribunal to notify those affected by a restricted reporting order. The current Rule 50 makes no reference to this. The

obligation under s.12 (2) HRA could arise because “the person against whom the application for relief is made” - e.g. the media - is not represented at the hearing. There is an argument that no order should be made until the applicant had taken all practicable steps to notify (in the example given) the media, or there are compelling reasons why the media should not be notified.

Although the new Rule 55(3) requires the Tribunal to give full weight to the principle of open justice and to the Convention right to freedom of expression, Rule 55(4) begs the question of how the party with a legitimate interest (e.g. the media) can make representations without being notified of the application, as s.12 HRA seems to require. We suggest that the new Rule 55(3) and 55(4) be amended to mirror the wording, and the notice requirements, with necessary amendments, of section 12 HRA.

Question 9: Is there a need for a lead case mechanism for dealing with multiple claims? What are the potential impacts of this approach?

☐ Yes ☐ No ☐ Not sure

Comments:

Whilst, in practice, Tribunals are already able to give effect to the envisaged "lead case" mechanism set out in Mr Justice Underhill's proposed Rule 31, the codification of that mechanism is to be welcomed. It has the potential to increase certainty and consistency in its application to the benefit of all parties involved in multiple claim disputes. That said, the new codified rule ought to provide guidance to a sufficient level of detail. At present, the draft Rule falls short of addressing the following three issues (which could undermine the potential impact of the new rule):

(i) determination of the lead case

In most circumstances involving multiple claimants, the claimants themselves will be represented by one or a small handful of representatives (typically trade union solicitors and, for example in equal pay matters, other solicitors generally acting under a damages based contingency agreement). In such cases, the usual approach has been to allow each of the claimant's representatives to select nominated lead cases for their groups of claimants.

This should be reflected in the Presidential Guidance - it would not be in the interests of justice for a claimant to be able to choose (and pay) a specific representative, only to have his or her claim stayed behind a lead claim in respect of which another representative (who the claimant may have declined to instruct) is instructed to act. This is especially so in the case of solicitors, who may often be acting under a damages based contingency agreement and therefore may be entitled to the same percentage of compensation awarded irrespective of the amount of work put in (i.e. in such

a case, there would be no cost saving for the claimant whose case was stayed).

It is suggested by ELA that the default position should be that the parties should seek in all cases to agree between themselves the lead cases. Ultimately, the parties will usually be in a better position to identify genuine overlaps in fact and law than the Tribunal. In cases with one or more claimant or respondent representative, each representative should be entitled, though not required, to put forward their own lead case, unless there are strong reasons why this would not be the most appropriate cause of action.

A paradigm case in which it may not be appropriate for all instructed representatives would be in a typical local authority equal pay claim which involved multiple TUPE respondents. In such a case, it would be usual for the local authority to have given a full indemnity to the TUPE respondents in respect of the transferred employees and it would be disproportionate in determining the pre-transfer liability of the local authority for the TUPE respondents to make separate submissions and call separate evidence, notwithstanding that they may be prima facie liable as a result of any finding of pre-transfer discrimination.

If the parties are unable to agree, the Tribunal has the power to order a case or cases to stand as the lead, hearing submissions on the issue from the parties at a preliminary hearing if necessary.

(ii) scope for applications to disapply the decision to particular related cases

In the event that a party wishes to apply for a determination made in a lead case to be disapplied to him, the new rules provide that he must make an application to that effect within 28 days of the Tribunal sending him the decision.

It is suggested that Presidential Guidance should set clear expectations as to in which circumstances an application will be granted. For example, if a party has in effect already agreed to be bound by the lead case, and whilst it is of course possible that new issues can arise which genuinely distinguish the lead case from related cases, the provision should not give scope to allow a party to effectively re-argue an unfavourable decision unless there are clear and cogent reasons for doing so. Only granting such applications in strict circumstances would force the parties to apply their minds to the issues properly at the outset of a claim, and should hopefully reduce further complications later in the proceedings.

For example, only substantive differences in fact between cases should be taken into account. A catch all "interests of justice" provision might usefully be adopted to allow the Tribunal to exercise a wider discretion in the borderline cases.

(iii) link with fee proposals

ELA considers that regard needs to be had to the proposals for fees in multiple cases in the Employment Tribunals and in particular to the risk that fees may create perverse incentives for the grouping of multiple claims in a manner which minimises the fees but militates against effective case management.

Question 10: Do you agree that written reasons should be provided, where requested to parties, but in a manner which is proportionate to the matter concerned?

☐ Yes ☐ No ☐ Not sure

Comments:

ELA notes that proposed Rule 58 and in particular Rule 58(4), state: "The reasons given for any decision other than a judgment should be proportionate to the significance of the issue and in appropriate cases may be very short".

The requirement that written reasons should be provided on all issues where they are requested is uncontroversial.

The difficulty with Rule 58(4) is that the Tribunal's view of the significance of an issue may differ from that of the parties and lead to additional appeals. It may also fall short of the guidance from the Court of Appeal in *Meek V Birmingham DC [1987] I.R.L.R. 250*, where it was held that a decision of the employment tribunal:

> "*… must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted*."

Prior to the 2004 Rules, the Tribunal could provide summary or extended reasons for its judgment. The change to a requirement for reasons without further qualification perhaps reflected the difficulty of a prescriptive approach to their length.

Question 11: Are there any disadvantages to removing the £20,000 cap for awards before they are referred to the county or sheriff court (please provide examples where possible)?

☐ Yes ☐ No ☐ Not sure

Comments:

Although there is no reason, in principle, why Employment Judges should not have the same powers, in this respect, as District Judges in the County Court (who are not subject to a cap), possible disadvantages resulting from the proposed removal of the £20k cap include:

- The higher amounts claimed will make the summary assessments longer and more complex, making it less likely that Employment Judges will have the time to assess costs summarily. Additional time may have to be included in the listing of Hearings to allow for this (with the additional costs associated with that). Jackson LJ (in his review of costs) has recommended that, in such circumstances, the Judge should consider directing a detailed assessment, and ordering a substantial payment on account of costs. However, under both the existing and the proposed rules, the Employment Judge does not have the power to order a payment on account of costs. Granting the Judge such a power should be considered.

- The Judge hearing the case may also lack the necessary expertise to conduct a large summary assessment. A detailed assessment allows the option of referring the matter to a Judge with such expertise. The practice in the County Courts is to have a District Judge in each Region who specialises in conducting detailed assessments. The same practice could be adopted in each Employment Tribunal region.

- The level of information before the Judge on a summary assessment is very much less than that on a detailed assessment, as is the preparation of the parties to address any points arising. The higher the award, the more substantial the possible injustice which may result from this.

- Preparation for a possible summary assessment is a distraction from the Hearing for parties and their representatives. The higher the potential award, the more of a distraction this aspect is likely to be – particularly if relevant documents have to be released to enable preparation of a statement of costs.

- It is, arguably, perverse to be extending the powers to summarily assess costs in the Employment tribunal at the same time as there is pressure to abolish summary assessments in the County and High Courts because of the large variations in the awards made on summary assessment.

- Summary assessments are made by the Judge hearing the case. Where there are side-members they are likely to play a part in this process, despite (in most cases) having no relevant expertise or training to do so. The higher the potential award, the greater the possible injustice resulting from this.

Question 12: Are there other measures that can be taken to ensure greater use of the costs regime?

☐ Yes ☐ No ☐ Not sure

Comments:

The question of costs cannot be considered in isolation. It is hoped that many of the potential problems with the current system will be dealt with by the new initial sift of cases by Employment Judges and the greater use of Deposit Orders in appropriate cases so that Claimants and Respondents are made aware of weak claims and responses at an earlier stage of the proceedings and the possible cost consequences of continuing with weak claims and responses. A further proposal might be to limit the amount of costs Respondents can recover at the final hearing where a claim has passed through the sift and also where deposit orders have been refused.

The apparently low incidence of costs orders under the current rules may derive from the original philosophy of the Tribunals to provide a straightforward route to the resolution of workplace disputes without the risk of an adverse costs award. Enquiry into the Claimant's financial status (ability to pay) may also inhibit the making of a cost award. The introduction of Presidential Guidance is likely to give some encouragement to Judges to make awards in appropriate circumstances whilst noting that the objective is compensatory as opposed to punitive and that any costs awarded should be proportionate to the loss suffered as a result of the paying party's conduct.

A barrier to the making of costs orders in favour of claimants may be limited awareness amongst Claimants about the existence and scope of the costs regime. This could be remedied through the provision of information online and/or at the Employment Tribunals themselves or through CABs and advice centres.

In order to improve the effectiveness of the costs regime, ELA suggests that consideration is given to a party who seeks costs could be required to produce a pro forma statement of costs detailing the amount of the costs claimed preferably at the end of the final hearing or when judgment is sent to the parties.

Presidential Guidance and or case reports would assist in highlighting circumstances in which an award has previously been made. They could outline the criteria to be considered by a Tribunal when making an award with comments on how to approach the issue of the party's ability to pay.

ELA also considers that HMCTS should continue to publish the suite of regular statistics on the incidence of costs awards which were published by the Tribunals Service.

ELA members who advise claimants report that increasingly, Claimants are being threatened with costs by Respondent's representatives from an early stage. This is often a deterrent to Claimants bringing or continuing with claims, particularly where Claimants have limited means and/or who have lost their jobs as they could face costs orders of up to £20,000 if they lose their cases. Consideration might be given as to whether unwarranted or extreme costs warnings might themselves give rise to liability to costs in appropriate cases.

Question 13: How should the Tribunal calculate awards for costs for lay representatives?

Comments:

If lay representatives do charge fees or incur expenses, it is uncontroversial in principle that appropriate fees or expenses (or a proportion of them) should be recoverable in the same way as fees or disbursements incurred by legal representatives, provided they have been passed on by the representative to the litigant. However, it is recognised that calculating costs awards for lay representatives can be a particularly difficult exercise.

There is little guidance on the appropriate level of costs awards for lay representatives, whether in the Employment Tribunal or in other courts and tribunals.

There is, however, some guidance on costs awards for litigants in person. For example, under the existing Employment Tribunal rules (and the new proposed rules), unrepresented parties can apply for a preparation time order.

In recognising the limitations set out in paragraph 61 of the consultation document, it is suggested that costs awards for lay representatives should be based on the prevailing hourly rate for preparation time orders. This could be made subject to the Employment Tribunal's discretion to make an award based on a higher hourly rate in exceptional circumstances, where they consider such costs are properly incurred and it is in the interests of justice to do so.

An alternative would be to adopt the CPR approach to costs for litigants in person. Under CPR 48.6, costs can be recovered by litigants in person but must not exceed two-thirds of the amount of costs recoverable if the litigant had been represented by a legal representative. However, it is envisaged that this may result in a more complex method of calculating costs awards, which may create a barrier to costs transparency for litigants who seek to use lay representatives.

Question 14: Are there any disadvantages to allowing those who choose to represent themselves be able to claim both for preparation time and witness expenses (as part of a claim for costs)?

☐ Yes ☐ No ☐ Not sure

Comments:

There are no obvious disadvantages to allowing litigants in person to claim both for preparation time and witness expenses, provided that such costs or expenses are legitimately incurred and the Employment Tribunal is satisfied that both awards should be made, applying the criteria set out in each of the relevant rules.

Question 15: Do you agree that employment judges should be able to require deposit orders on a weak part of a claim or response as a condition of it continuing through the Tribunal process?

☐ Yes ☐ No ☐ Not sure

Comments:

In short, yes but subject to the caveats expressed below. In principle, deposit orders are a useful mechanism for ensuring that weak claims do not cause disproportionate expense to (primarily) a respondent, particularly if a claimant is representing himself or receiving advice from a non-lawyer. Deposit orders may have a role to play in managing a Claimant's expectations. Judges may understandably be hesitant to award costs against a lay litigant, so a deposit order seems a useful way of ensuring that matters are dealt with proportionately. The greater flexibility proposed under the draft rules should be welcomed.

At present, deposit orders can only be made on the whole of a claim or the whole of a response. The unnecessary hardship, particularly for Claimants at the moment, is that where a deposit order is made against them, their stronger claims may not succeed and/or have to be withdrawn. For example, a Claimant may have a weak claim for unfair dismissal but a strong claim for unlawful deduction from wages and if a deposit order is made then the Claimant most likely will have to withdraw all their claims. However, under the new proposal, if a deposit order is made solely in respect of the unfair dismissal claim then this should encourage the respondent to consider settling the unlawful deduction of wages claim.

Accordingly, this proposal should work to encourage better case management and act as a disincentive for Claimants to pursue weak(er)

elements of their claims. It should also encourage Respondents with weak responses to reconsider their position in defending claims and perhaps consider settling all of the Claimant's claims at an earlier stage.

It is noted that the power to order a Deposit Order has been restricted to a preliminary hearing, notwithstanding the introduction of the new initial sift procedure (at which a claim may be struck out). This appears a logical position. It is difficult to envisage that the Tribunal would be able to satisfy its duty to make reasonable enquiries into the paying party's financial means to pay the deposit absent a preliminary hearing. Moreover, if a claim is dismissed and a preliminary hearing is subsequently held to hear an appeal against that dismissal, that would seen to provide an appropriate first juncture at which for the issue of a deposit order to be considered.

There is a risk which we must point out that deposit orders of £1000 may be perceived as another hurdle to access to justice which may detract from the main objective of ensuring that unmerited cases and behaviour be discouraged. It may also be questionable as to whether the overriding objective of putting parties on an equal footing is achieved.

The imposition of a deposit order is unlikely to lessen the deterrent effect of a deposit order as in many cases it is the Claimant's firmly held belief that drives the litigation.

By way of an alternative, the introduction of a formal "Costs Warning" (without requirement to pay a fee) procedure, may achieve the same objective as a deposit order, by warning the party of the financial risks if they proceed with an unmerited limb of their claim. The terms of the "Costs Warning" should be recorded on the ET file and the offending party, if unrepresented, encouraged to seek independent legal advice. Thus, a representative who comes into the case late should be aware of the risks of pursuing the unmerited limb of the claim.

The adoption of the principle in *Calderbank V Calderbank* may be encouraged through Presidential Guidance that if the warnings are ignored and the head of claim is unsuccessful the Respondent should be awarded their costs. *Cf. Kopel V Safeways (2003)*.

In new draft Rule 36(2), It is unclear at what stage the ET must make the "reasonable enquiries" and when should the paying party produce evidence in support of financial circumstances. If the information is to be available for consideration at the preliminary hearing the party at risk may need to be told in advance of the hearing. It is unclear whether in fact a second preliminary hearing will be required to determine the issue of ability to pay.

A proforma means questionnaire should ensure a degree of consistency in the information obtained /required for consideration.

ELA considers that in Rule 36 (4), the Payer should be allowed a "good reason" defence for non payment.

R36(4) should make it clearer that the Response will be struck out in so far as it relates to the head of claim in issue.

Question 16: Do you have any comments on the ET1 and ET3 forms attached separately (including the provision for multiple claims)?

Comments:

See forms attached.

With the current forms, although ELA members found the information required useful, this was often disproportionate to the effort in obtaining it. We had in mind a party who was unadvised and was trying at the last minute to find some fact that actually is not required by the Rules but is there on the current form.

So, all the information which the Rules say is essential is now clearly identified as such and is at the front of each document, albeit with a reference to a continuation sheet at the back (this being the logistically least inconvenient solution). We have suggested adding further sections to each form, clearly labeling their purpose.

ELA suggests retaining albeit on a clearly voluntary basis provision for the information previously required. On balance, it was thought to be useful either to the parties or the Tribunal.

Question 17: Do you agree that any power to deploy legal officers in Employment Tribunals in relation to interlocutory functions should be modelled on the wider Tribunals' template under the Tribunals Court and Enforcement Act?

☐ Yes ☐ No ☐ Not sure

Comments:

ELA considers that there is scope to deploy legal officers on a more extensive basis in the Employment Tribunals and that the template of the First tier Tribunal rules provides a good model. In particular we welcome the mechanism for judicial reconsideration of contested decisions by Legal Officers given that the absence of such a facility would lead to applications for judicial review against the Tribunals Service as the only alternative means of challenge.

As ELA commented in its response to the Resolving Workplace Disputes consultation, legal officers should be introduced first on a pilot basis so that the costs and benefits of legal officers might be fully evaluated before their introduction throughout the entire system. This would avoid the risk that the cost of the additional staff required and/or the cost of properly training staff for these important functions, may outweigh any saving in judicial time.

In our view, the use of Legal Officers may bring a positive contribution to the running of Employment Tribunals by reducing the current delays in the system at all levels and by providing the opportunity to appoint one legal officer to see the case through to give continuity.

ELA would wish to make the following points:

- 'adjourning or postponing hearings' could be delegated to legal officers in respect of unopposed applications. However, the practical and tactical significance of contested requests particularly in respect of merits hearings suggest that such applications should always be determined by Employment Judges;

- 'listing cases' should normally be referred to an Employment Judge to assess the ET1 and ET3;

- 'witness orders' could be delegated to legal officers in respect of witnesses that will only attend if they are ordered to do so and applying set criteria e.g. the reason why the order is being sought and the relevance of the evidence of the witness;

- applications to amend pleadings will generally need to be referred to an Employment Judge; and

- decisions as to whether or not to reject claim forms and responses should remain with Tribunal judges. In this connection, we note that giving Tribunal staff these powers has been tried previously without conspicuous success. Regulation 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 gave Tribunal staff the power to reject claim forms, and responses. The problems which followed were eventually resolved by the Employment Appeal Tribunal - *Grant V In 2 Focus Sales Development Services Limited UKEAT/0310/06*). Given this background, we respectfully suggest that the better course is for the Employment Tribunal staff to refer any defective claim form to an Employment Judge under the new Rule 11.

- The proposed new Rule 17 does not specify whether this power can also be exercised by tribunal staff, but the implication is that it is so. Rule 17 should be amended to make this point clear.

We believe it would be wrong to consider this question without referring to the problems that may result from the proposed changes. There is evidence that some Employment Tribunal staff are struggling to cope with their

existing workload, and our concern is that they will not be able to cope with additional tasks of this sort. The East London Employment Tribunal, for example, currently has a six week delay in responding to correspondence.

Question 18: What changes that should be made to the EAT rules to ensure consistency with the new rules of procedure for Employment Tribunals?

Comments:

Question 19: Do you agree that the introduction of a time limit of 14 days for the payment of awards, (with interest also accruing from this date), will encourage more prompt payments from parties?

☐ Yes ☐ No ☐ Not sure

Comments:

In principle 14 days for the payment (following receipt of a written decision) is a reasonable period to make the payment, subject to any appeal. However, to underpin this provision the ET will need to be able to send a written decision to the parties soon after the conclusion of the final hearing.

Given however the relatively low average awards for unfair dismissal, the imposition of interest may not provide any real incentive to make earlier payment in particular where the sum owed is small. The MOJ research into tribunal awards (2009) found that only 61% of interviewees had received payment of which only 53% were paid in full. The reasons cited for non payment were the employer's refusal to pay and the company no longer continuing in business. In conclusion, the issue of late payment may be attitudinal.

Question 20: What, in your view, are the main reasons for non payment of awards? What more can be done within the current Employment Tribunal system to better enforce these awards?

Comments:

Anecdotally, delayed payments may be explained, in part, by administrative delays on the part of the ET and the lack of enforcement within the ET. The absence of an ET enforcement mechanism allied with lack of public funding to enforce awards in the County Court may to some extent explain the non- payment of awards. Also, in practice the Respondent's instructing

solicitor will often leave the issue of payment to be dealt with by the client directly with the Claimant.

Delays by the Tribunal in sending the final order to the parties may also be another contributory factor. On occasion the Respondent might not be able to pay due to financial difficulties, particularly if the Respondent is an SME or might have been dissolved or gone into administration since the hearing.

Imposing a time-limit for Respondents to pay awards such as 14 days as proposed, seems sensible but subject to the reasons given above, Respondents might not be able to pay awards within that timescale. Consideration may be given to linking the final disposal of a claim e.g. by way of discontinuance, withdrawal or dismissal with the payment of the amount due. Therefore, proceedings would only be formally concluded once payment is received although it is not certain if this would necessarily prompt Respondents in every case into paying the awards within the proposed 14-day timescale.

Question 21: Do you have any other views on Mr Justice Underhill's recommendations?

Comments:

We have some concerns regarding the multiplicity of changes which we understand are scheduled to be implemented on or around the same time as the new Employment Tribunal rules and which will have a bearing on how they are drafted (e.g. introduction of fees, mandatory ACAS conciliation) but which do not to date form part of the new rules. We consider that, from a users perspective, it would be helpful if the new rules were introduced (with those elements included) in a single change, rather than this being done piecemeal which may create confusion and uncertainty. We also consider adequate judicial resourcing of the Employment Tribunals to be critical to ensuring that the new rules have the desired effect.

Do you have any other comments that might aid the consultation process as a whole? Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Comments:

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply x☐

At BIS we carry out our research on many different topics and consultations.

As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒ Yes ☐ No

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URN 12/1039RF