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Ending the Employment Relationship

Response from the

Employment Lawyers Association

23 November 2012

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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 Stephen Levinson of RadcliffesLeBrasseur, Maeve Vickery of Pardoes and Ellen Temperton of Lewis Silkin LLP to consider and comment on the consultation paper Ending the Employment Relationship 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.

Our comments are divided according to the section and question numbers used in consultation paper.

Executive Summary

A Whilst we welcome the changes already made we believe the current drafting of the proposed new section 111A remains unsatisfactory and will lead to both uncertainty and consequences that are unintended.

B The scope of the proposed Code of Conduct and Guidance requires to be reconsidered and thought given to their relationship with the existing Code and Guidance relating to discipline and grievances.

C The proposed new procedure brings with it risks that appropriate performance management may be ignored or overlooked.

D The precedents provided to date will only be useable in very basic scenarios and do not cater for many more complicated situations. The draft also missed an opportunity to simplify dramatically the drafting of Settlement Agreements.

E The use of the templates should not be compulsory as there are to many varied situations for this to be sensible.

F There should be no guideline tariff for Settlement Agreements.

G There are alternative methods which would satisfy the aim of creating more realistic expectations on the part of claimants in terms of the awards they might expect to recover if they are successful at Tribunal. These would be less draconian than the proposals which could disproportionately adversely affect high earners and those who will take longer than 12 months to find alternative employment.

H The introduction of lower earnings related cap/ maximum award of 12 months pay may lead to greater certainty but this would actually impact on a very small number of cases as unfair dismissal compensation was only awarded in 2,300 cases out of the 46100 unfair dismissal cases disposed of in 2011-12. The median award was £5000.

I ELA is concerned that the potential impact on high earners and on those who will take longer to find work of the introduction of a lower cap has not been fully considered.

Question 1

Do you agree that these are the correct principles to underpin the use of a settlement agreement which is inadmissible in unfair dismissal cases?

1. We expressed our reservations about the effectiveness of the detail of legislation proposed in section F of our response to the '**Call for evidence to the Public Scrutiny Committee** in respect of the Enterprise and Regulatory Reform Bill 2012-13 (the "Bill")'. We welcome the change made to the words 'shall not be taken into account' and the substituted words which we believe will add to certainty, but there remain concerns.

2. In particular, we have misgivings about the use of the word 'improper' in the proposed new section 111A(3) of ERA 1996. We explained in our response to the call for evidence that:

"(a) The word "improper" introduces a novel concept, and is likely to create uncertainty for some time. It is our experience that very broad terms such as this will lead to a variety of interpretations and so lead to inconsistent attitudes being taken in different regions (or even in different tribunals in the same region). Additional uncertainties are also created by the fact that the Tribunal has the liberty to take into account any offer to such extent that it considers "just". This also implies some improper behaviour may be overlooked but there is no clarity as to how this is to be assessed. A complete and open discretion is given to the judge, and in practice any decision made would be almost impossible to appeal. Such arbitrary and unfettered discretions, although they exist elsewhere in the law, can generate discontent with the system of justice and are best avoided if possible. In unfair dismissal cases in the future this is most likely to be a discretion exercised by judge alone which will contribute to the lack of acceptance as historically all parties level of acceptance of the fairness of the system has been influenced by the tripartite nature of the adjudication.

(b) There are three separate levels of uncertainty.

(i) The meaning of improper
(ii) When will it be just to lift the veil
(iii) To what extent will the veil be lifted

This example illustrates one of our concerns:

Assume a conversation in which the employer says: "Your performance is unacceptable. We could put you on a Performance Improvement Plan, give you some training but my view is that would just be delaying the inevitable. I want you to go. Let's agree a severance payment?" The employee resigns and claims constructive unfair dismissal.

(c) ...

(d) We note that there is a possibility that ACAS or BIS will produce guidance as to what amounts to improper behaviour. Some reservations were expressed about yet another set of guidance to which tribunals and employers would have to refer and we doubt that judges would be constrained from giving words their ordinary meaning by guidance, however persuasive the authorship.

(e) Additionally, we noted that the phrase "connected with improper behaviour, "is very broad and presumably covers the possibility that further discussions might arise after there had been improper conduct, during which subsequent discussions nothing improper was said or done. However, because it would be connected with the initial improper behaviour, it would be open for the tribunal to take it into account."

3. In our view a statutory Code of Practice is unlikely to resolve the ambiguity around the word "improper" and indeed could exacerbate the problem. This could take the courts some three to five years to resolve and we do not believe government should legislate to create uncertainty. We considered whether it would be better to substitute the words 'unambiguous impropriety' for 'improper' and recommend government review this idea. The words may not be readily accessible to a number of users but their practical effect would be to reduce uncertainty, which is highly desirable and may do away with the need for a new Code.

4. It appears from the consultation paper that the Government intends that the proposed Code will do the following three things:

   4.1 clarify the meaning of the word 'improper';

   4.2 provide best/good practice guidance for those (particularly employers) seeking to engage in termination discussions;

   4.3 provide template documents to assist those who might wish to negotiate an agreed departure but who may not want to engage lawyers.

5. We are concerned that, in trying to achieve all of these aims in a single document, the distinction between behaviour that is 'improper' and that, which merely does not accord with best/good practice, may become blurred. If so, the effect will be to compound the uncertainty inherent in the Bill's drafting.

6. An alternative approach would be to confine the Code's remit to clarifying what constitutes improper behaviour. Any additional good/best practice guidance and template documents could then be covered in supplementary, but separate, guidance. This would be similar to the approach taken by ACAS to discipline and grievance, where the Code of Practice is supplemented by separate guidance. We think it is important, given the effect of a statutory Code that careful thought is given to exactly what material should be in a Code and what in guidance.

7. It is not entirely clear if it is intended that a failure to follow the Code may expose employers to increased compensation in the event of a successful claim. This might be an unintended consequence of relying on section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") to give statutory force to the Code. Under section 207A of TULCRA a failure to follow the Code could leave an employer exposed to uplift in compensation of up to 25% in the event of a successful Tribunal claim. The uplift regime

applies where there had been an unreasonable failure to follow a Code which 'relates exclusively or primarily to procedure for the resolution of disputes'. If the term 'resolution of disputes' is broad enough to cover disciplinary action it could equally be said to cover the Code proposed by this consultation paper. If there is no intention for this to be the case that should be made expressly clear.

8. Thought might be given to consolidating any Code dealing with improper behaviour with the existing ACAS code on discipline and grievance procedures. It is assumed that the policy is not to discourage the use of performance management where this is appropriate. There is a risk that two Codes, one aimed at performance management and the other at termination, may discourage use of performance management and a revised combined Code could be used to make clear where each approach is most appropriate. If this is done then the issue raised in the preceding paragraph will need to be attended to and perhaps distinctions made to different parts of the Code. The same principle could be applied to new Guidance. We recommend this be given further consideration as the idea divided our Committee and we certainly do not intend to suggest that the issues under discussion should be capable of giving rise to an uplift in compensation for breach of the Code by employers or a reduction in compensation for employees who refuse to accept an offer of settlement.

9. We are unable to comment constructively on the principle *'The Code will make clear that if an employer handles settlement in the wrong way (i.e. not as explained in the Code) there is a risk that this will give rise to a breach of the implied term of trust and confidence and allow the employee to resign and claim constructive dismissal'* until the definition of 'improper' is clarified and what is proposed as the *'wrong way* 'for an employer to *'handle settlement'*. It is currently unclear how an employer will be able to dismiss fairly an employee on the conclusion of any disciplinary proceedings if the proceedings began with the employee refusing a settlement offer. As we have said before if this matter is left to the Courts it may be three to five years before any certainty is achieved

10. Apart from this reservation we consider that the proposed principles should be divided into the two categories (i) Good/best practice; and (ii) Improper behaviour. We set out our proposed categories and also comments on some of the principles. We would want to comment further on any Code when the initial draft is made public.

11. One unintended consequence of the proposed procedure may be a decline by employers in their use of internal procedures and performance management where that route is clearly more appropriate than a termination. Poor performance, misconduct and absenteeism by employees may be caused by mistreatment by a colleague or manager. The existence of this process may encourage a course of action leading to dismissal rather than resolving the real cause of the problem. In addition and a further unintended consequence is the potential impact on the meaning of 'improper' behaviour by an employer. For example would a failure to examine an allegation of bullying or discrimination that emerged in the course of a negotiation that failed mean that the veil of inadmissibility was lifted or not? We cannot give an answer because of the inherent ambiguity of the word 'improper' and the many varied factual situations that can arise

Good/Best Practice Points

12. *(a) Either party may propose settlement.*

In this case we do not understand why none of the draft letters accommodate this option.

13. *b. The reason for being offered the settlement should be made clear.*

14. *c. Settlement offers should be made in writing and set out clearly what is being offered (e.g. settlement sum and if appropriate agreed reference) as well as what the next steps are if the individual chooses not to accept the offer.*

We recommend that there should also be mention of other possible sanctions or procedures to be followed if the settlement agreement is not reached.

15. *d. Individuals should be given a clear, reasonable period of time to respond.*

16. *e. No undue pressure should be put on a party to accept the offer of settlement.*

This is not a clear concept: when will pressure be 'undue'? (See paragraph 21)

17. *f. Where an individual refuses settlement, the employer must go through a fair process before deciding whether to terminate the relationship.*

18. *g. It would not be necessary for an employer to have followed any particular procedure prior to offering settlement.*

This should not preclude following an informal procedure or other procedure prior to offering a settlement.

19. *h. The protection in legislation (inadmissibility in evidence to Employment Tribunals) only applies in Unfair Dismissal cases.*

19.1 The cases where this protection would not apply should be made clear. This needs to be explained, as many employees are unlikely to understand the implications of this protection and its limitations. In particular it is unclear what the intention is in cases where (as often happens) a contractual claim for notice pay is under consideration together with the unfair dismissal claim. If it is intended that the inadmissibility of evidence extends to a combined offer to settle the contractual element as well as the unfair dismissal claim the drafting of the section will need to change as a contract claim is made under s3 Employment Tribunals Act 1996 and not s111 Employment Rights Act 1996.

19.2 As closely as possible, the application of the new principle should reflect current practice in "without prejudice" negotiations with which many employers and legal professionals are already familiar. That said it also has to be very clear that under the new procedure there is no requirement for an existing dispute to exist to allow the proposed process to be used. This separate approach will need to be clearly explained to employers and employees including those who are not familiar with the meaning of and use of without prejudice discussions. Many commentators have argued that the new regime existing side by side with the old will cause confusion and we can see that this is a substantial risk.

19.3 We consider it would be good practice to require some informal discussions regarding potential problems to take place before the stage where a settlement agreement is proposed. The Impact Assessment: Analysis and Evidence section regarding the rejected option 3 stated that one of the risks of creating a new system of off-the-record workplace conversations was as follows:

19.4 '*There is a high risk with this option that management practice suffers as employers rely in the "off-the-record" conversation in place of handling open and regular conversations with their staff'.*

19.5 Employees may have more concerns if settlement offers are made without any prior informal discussions regarding concerns being raised. If they are raised without any informal discussions employees may require additional legal advice on entering off-the-record conversations and may impede a settlement being agreed. It would also reduce risks for employers who may face allegations of improper conduct if the meeting arises 'out of the blue'. We consider that an informal discussion should be encouraged, as it is likely to be in both the employee and the employer's best interests.

Improper behaviour

20. It is a fundamental premise that making an offer or engaging in discussions with a view to an agreed termination of employment is not, in itself, improper in the sense that the word is used in the Bill. If that is the case this should be one of the principles underpinning the Code and should be spelled out in the section of the Code of Practice dealing with "improper" behaviour.

21. Turning to two of the principles identified in the consultation paper:

a. The Code should give specific examples of what constitutes "improper" behaviour.

The fact that a degree of 'pressure' is inevitably felt on occasions such as the proposed meeting needs to be acknowledged. There will be a need for guidance to be given as to when such pressure becomes 'undue'.

b. The employer should not make discriminatory comments or act in a discriminatory way when making an offer of settlement.

In addition, there are other issues, which may arise regarding an employee's concerns, such as not curtailing union activities, health, and safety issues and whistle blowing and these should also be addressed.

Question 2

Do you agree that model letters proposing settlement and a template for producing a settlement agreement should be included in a Statutory Code?

22. A variety of precedents are already available free of charge on the Internet and many larger organisations already have precedent model letters and template agreements.

23. Nevertheless we believe that the inclusion of model letters and template settlement agreements could provide comfort for employers however, for the reasons given in response to question 1, we do not think they should appear in a Statutory Code.

24. We believe that employers will consider their use of these documents will create an additional layer of protection from successful claims of unfair dismissal. We recommend that our suggestions made in answering questions 3, 5 and 6 be considered when finalising the documents.

Question 3

If you currently use settlement or compromise agreements, what impact would these templates have on the costs to your organisation of using agreements?

25. Most law firms provide clients with their template settlement agreements at no cost and only charge to tailor the agreements and negotiate clauses. Any template has to be checked to ensure it meets the needs of a particular situation and the templates in the consultation document may therefore not reduce the employer's legal costs. We consider that use of the template agreement and model letters may even (at least initially) increase legal costs as the employer is likely to want to take advice on the extent to which their current template documents are in accordance with BIS drafts.

26. It would assist employers and employees if BIS included explanatory notes with the templates in which key provisions are explained. This may give some employers the confidence to proceed with some settlements without the use of external lawyers and as a result this will reduce their legal costs.

27. The costs for employees incurred for independent advice from a legal advisor is unlikely to change with the provision of templates. Although explanatory notes on the model templates will also be helpful in clarifying the standard clauses in settlement agreements for employees advisers will still be required to go through the agreement with the employee to ensure that they understand each provision as well as provisions that are specific to their agreement.

Question 4

Would model letters proposing settlement and a template for producing a Settlement Agreement be likely to change your use?

28. Our experience is that many employers already use a standard Compromise Agreement. The introduction of model letters and a Settlement Agreement template is unlikely to change that use. As stated in our answer to Question 3, we believe there may even be an increased legal cost if such model letters and templates create a need for further advice.

29. The models will be of greatest utility for small businesses, which may not currently use Compromise Agreements. However, to encourage use of the model letters and the settlement template, it will be necessary to ensure that those employers understand how to use these documents which is why explanatory notes should be available.

30. The proposed settlement template falls far short of what many employers currently adopt in their standard Compromise Agreements. We appreciate that adopting a far more complicated template would be likely to make matters far too complicated for small employers. This does raise the issue whether there should be two forms of template settlement agreements, one for more complex employment relationships and a basic version along the lines of the present draft. Our committee divided on this issue and this may have to be determined according to the identity of the principal audience for whom the new settlement procedure is intended.

Question 5

Do you have any comments on the content of the model letters?

31. As drafted, the model letters set out why the employer wishes to discuss a severance package. If agreement is not reached with an employee, then the status of such letters needs to be

considered. An employer will not have to disclose the letter but will want to demonstrate a proper procedure has been followed, including writing to the employee setting out the issue causing concern. It is therefore important that employers understand that if they are going to start the process with a model letter, then they will need to consider preparing a second letter, instigating the disciplinary process when any attempted settlement fails. This would be the disclosable letter in any proceedings. This potentially adds to complexity, rather simplifying matters.

32. Another issue that needs to be considered is the status of the model letter if an employee subsequently raises issues of discrimination or harassment by a colleague as a defence to an allegation of poor performance or misconduct. Will the letter then become disclosable in any subsequent claim for unfair dismissal and discrimination? Also if a prior dispute does exist then it would be sensible for that to be mentioned.

33. Finally as general comments (as we say above) the letters seem to assume that no prior meeting has taken place before they are given to the employee. This does seem contrary to most standard advice about the best HR practice and is to be discouraged so we suggest the letter and any guidance be altered to accommodate this point. In addition no model letter is provided for an employee to send to an employer and this procedure is supposed to be implemented by both. That seems to us a serious omission.

34. We do not comment on the drafting on a line-by-line basis, but have comments on the following clauses of all model letters:

Paragraph 1: The first paragraph of each letter needs to include sufficient detail and examples of the employee's poor performance/conduct/unsatisfactory attendance record so that the employee understands why their performance/conduct/attendance record is considered unacceptable. If this is not included, there is a risk that the employee will be not be sufficiently informed to decide whether to accept any settlement offer made. It also ought to be clear that dismissal is not the only sanction that may be imposed.

Paragraph 2: The second paragraph may often need to be adapted to ensure that it is consistent with the employer's disciplinary/poor performance procedure. This should be made very clear in any guidance.

Paragraph 3: Explanatory notes should explain that if the employee's contractual notice were greater than the minimum statutory notice, then this would apply.

Paragraph 5: Explanatory notes should explain that only the first £30,000 of any lump sum payment would be tax-free.

Question 6

Do you have any comments on the content of the model settlement agreement and guidance?

35. The settlement template, as drafted, does not cover many of the issues that currently appear in a standard Compromise Agreement, for example a warranty that no job is in the offing, which is now almost universal in templates used by employment lawyers. It would, however, not be helpful to adopt as a settlement template, many of the clauses that appear in a standard Compromise Agreement because it would almost certainly discourage the use by small businesses unfamiliar with the terminology. We therefore consider that the settlement template needs to be kept basic, but a more detailed explanatory note will need to make clear that there could be significant other issues that would need to be covered in any settlement agreement. Alternatively two versions could be produced as suggested above.

36. We do not comment on the drafting on a line-by-line basis, but have comments on the following clauses of the settlement template.

Clause 1: The explanatory notes should inform employers that the termination date should not be too far in the future because there are potential tax risks in concluding the agreement too far in advance of the termination date and warranties may become outdated.

Clause 3: The explanatory notes for this clause could cause confusion. The clause does not adequately explain what instructions are normally given to anybody if they are placed on garden leave and does not deal with the risks that occur if an employee should have a significant period of time on garden leave. It would be normal in these more complex claims to have a second Compromise Agreement to cover the period of garden leave in order to avoid tax problems and to renew undertakings and warranties to the termination date.

Clause 5.1: Payment should be dependant on the receipt of a signed Independent Adviser's letter as well as a signed copy of the Settlement Agreement.

Annex A: We consider the reference to grievance procedure is unnecessary. We believe that any particular claims can be dealt with under the first part of Annex A. The claims set out in Annex A are far more detailed than appear in very many Compromise Agreement. These issues have been highlighted in the guidance notes. Small employers without legal advice will be unclear as to which claims should be deleted. We regret that the opportunity has not been taken to provide by statute a method of incorporating all such claims by a standard and formulaic reference and deal with five pages of detail in a single sentence. More than anything else this would have simplified the appearance of compromise agreements for the business community. We suggest this lacuna be reconsidered.

Annex C: The Independent Adviser's certificate should include the names of the parties concerned in case this certificate gets separated from the Settlement Agreement.

Additional clauses: Without wishing to over complicate the settlement template, we consider that clause 5.2 is insufficient and that a more detailed tax indemnity clause is required.

Question 7

Do you agree the use of templates should not be compulsory?

37. We do agree. Indeed, if it were otherwise the template would need to cover all additional clauses required for senior employees..

Question 8

Do you think it would be helpful if the Government set a guideline tariff for settlement agreements?

38. No: however, we supported the alternative approach suggested in paragraph 69 – providing a list of issues, which employers and employees could consider in deciding their own figure. There are too many possible circumstances to make a tariff sensible.

Question 9

What would you expect to be the impact of having a guideline tariff?

39. Each situation and reason for contemplating a settlement agreement is different. Either the employee or the employer might suggest a settlement agreement so a guideline tariff which could be acceptable for both these circumstances would be difficult to achieve.

40. For example, a legally or non-legally binding financial formula guideline might appear to set a tariff for wrong-doing or a tariff for compensation in circumstances where arguably the employee should simply resign or where dismissal is appropriate.

41. We would expect unrealistic expectations from employees and that difficulties would be created for employers who do not take legal advice and who are not experienced at negotiating. It might even make negotiating impossible because parties might consider the guideline as the starting point from which to negotiate. We agreed with the view expressed in paragraph 68 that a guideline tariff would lead to employers paying out more than they might have done.

42. In summary, too low a tariff would inhibit settlement, too high would create unrealistic expectations and a range of financial tariffs (by reference to the reason for termination) would put a price on levels of conduct and capability, which must be bad for industrial relations.

43. Any guideline tariff (legally binding or not) would have a relationship (real or perceived) with the cap on compensatory awards for ordinary unfair dismissal. At the moment discussions are taking place about the possibility of varying the cap. Any mechanism for future variation of the cap could be complicated by a pre-existing financial tariffs or formulae. This could result in higher costs to employers or set higher expectations from employees, which would be harder for employers to manage.

44. There may also be an unnecessary administrative burden to ensure that any financial tariff or formulae did not result in disproportionately high "guideline" calculations when compared with any prevailing maximum compensatory award or the levels of awards in tribunal cases.

45. We believe a tariff might tempt employers to dismiss where they should not if it could be seen that the tariff fixed the cost of so doing. Everything that was wrong with the Beecroft proposal (rejected by Government) would arrive by the back door.

Question 10:

If you do favour a guideline tariff for settlement agreements, do you have a view on the approach or formula that should be used?

46. We are not in favour of a financial or formula based guideline tariff for settlement agreements for reasons set out in our reply to Question 9, but we support the alternative approach suggested in paragraph 69 of providing a list of issues that employers and employees could consider in deciding their own figure. It is important that such a list does not become too complicated making it difficult to use. Also this guideline should not detract from the parties' need (or duty) to take legal advice over what is potentially a major event, at least for the employee and we understand this to be the intended policy.

47. The list of factors identified in paragraph 69 is a good starting point. Consideration of the reason for proposing settlement can help employers avoid what could be costly mistakes if there are underlying matters of which the person holding the conversation with the employee is unaware.

48. More details of why/how certain factors are relevant would be helpful. For example, the factor "the terms of the employment contract" is very broad; an employer may be unsure what to look for. A further example is the factor "the individual's perception of how long it will take them to find another job". There is nothing to indicate on what the perception should be based and this could result in employers making higher payments. Other factors that might also be useful are: the value to the employee of a reference (if given), the value (to the employee) of not having dismissal on their employment record, the cost (in time and money) of litigation for both parties.

49. The factor "the perceived strength of any potential claim an employee might have in tribunal" is very broadly expressed and could encompass some very complicated circumstances and uncertain factual situations. The example provided is a simple assessment of the seriousness of the alleged misconduct or poor performance. Our experience tells us that a number of the issues relating to the strength of the claim may well require legal advice to determine, or risk becoming both risky and complicated. Employers who handle such matters on their own would be dealing with employees who would always have legal advice. Accordingly, this factor may only be workable if limited to issues that could be identified without legal input but employers who do take legal advice should not be inhibited from continuing to do so.

50. Another factor to keep in mind is that in practice where the fee for advising on a compromise agreement is low the advice given is often limited in scope to the effect of the agreement (explaining the meaning of the terms of the agreement and its implications) rather than including wider issues about the advisability and value of the deal done and the strength of each claim in detail. Any assumption by government that the legal advice will always be wider than this would be incorrect in a number of cases.

Question 11

Do you have a view on what level of tariff would be appropriate?

51. We do not support a figure or formula based tariff for reasons set out in our reply to Question 9.

Question 12

Do you have ideas for other ways to help effectively disseminate the guidance and materials?

52. ACAS and the Citizens Advice Bureau network could be useful, in addition to the government website and promotion of the use of materials through trade associations and business representative bodies, especially as settlement discussion may also be initiated by employees.

53. We considered (and rejected) the idea of a television campaign or campaign using social media. TV was not considered an appropriate medium for a message that could be summarised as an erosion of employment rights. The same issue would apply in mounting a social media campaign. The expense of providing SMEs with paper copies of materials was rejected as too costly.

Question 13

Would the introduction of a cap of 12 months' pay lead to more realistic perceptions of Tribunal awards for both employers and employees?

54. Unrealistic perception of value is often down to uncontrollable elements such as poor legal advice, no legal advice, and media reports about cases of high levels of award which do not reflect the norm.

55. Indeed there is a risk that unless the message is carefully managed a cap of 12 months' pay will create a less realistic perception of the value of a claim for Claimant. It may create the impression among Claimants who do not have access to good advice that they are entitled to 12 months' pay. In our experience, where there is an expectation, it is often around £30,000. This is because this figure is the sum that may, in certain circumstances be paid tax free on termination of employment.

56. There are alternative methods which would better satisfy the aim of creating realistic perceptions. A number of measures have already been implemented to create more realistic perceptions of the value of individual claims. These include a requirement for a schedule of loss in the ET1, compulsory ACAS conciliation and the publication of details of the median award on claim forms and guidance. Insufficient time has really been given to allow the impact of such methods to be measured before this consultation exercise.

57. Less draconian steps would help to ground the expectations of those who believe their claim is worth more than it is. These could include requiring early valuation of claims and/or providing easily accessible advice and guidance and/or data being provided as standard by ACAS at the outset with regards to the average level of awards. These measures are likely to achieve the aim of managing expectations but would not have the same negative impact on higher paid employees or workers nearing retirement age. They will of course be subject sufficient resource being allocated, particularly in relation to ACAS where their duties are going to be extended.

Question 14

Would the introduction of a cap of 12 months' pay encourage earlier resolution of disputes?

Table 1[1]

Total Number of Unfair Dismissal Complaints: 46,300		
Total Number of Unfair Dismissal Complaints Disposed of:46,100		
	Number of Claims	**Percentage of those disposed of**
Withdrawn	11,300	24%
ACAS Conciliated	19,500	42%
Struck Out	4,000	9%
Dismissed at PHR	1,300	3%
Unsuccessful at Hearing	4,800	10%
Default Judgment	1,200	3%
Successful at Hearing	3,900	8%

58. Table 1 shows that the proposals regarding unfair dismissal compensation are only relevant to a very small percentage of the total number of claims disposed of by the Employment Tribunal in 2011-2012. Of the 46,100 claims disposed of 42% were settled utilising the services of ACAS and 47% were disposed of by other means, leaving 11% where compensated was awarded. Significantly, the Table does not provide a complete picture as (1) there is no data on settlement figures and in particular, on those cases which settle before litigation commences (2) there is no way of knowing how many of the "total" number of unfair dismissal complaints were "pure" unfair dismissal cases which did not involve any other claim.

59. There is an argument to say that the proposed changes seem unlikely to affect the outcome of the **11%** of cases referred to above that do proceed to hearing.

Table 2[2]

Total Number of Successful Claims: 5,100		
Remedy	**Number of Claims**	**Percentage of successful claims**
Reinstatement/Re-engagement	5	0.1%
Remedy left to the parties	120	2.4%
No Award	2,600	51%
Compensation	2,300	46%

[1] Employment Tribunals and EAT Statistics 2011-12
[2] Ibid.

60. Table 2 shows that the Employment Tribunal awarded compensation in 46% of successful unfair dismissal claims. According to the impact assessment there were 46,100 unfair dismissal cases disposed of and compensation was awarded in 2,300 cases.

61. On that basis, the proposal to implement a cap on unfair dismissal claims will affect only **5%** of the total number of claims for unfair dismissal that are made in the Employment Tribunal.

62. Settlement is specific to the circumstances of each case; there will always be cases which will not settle (sometimes for good reason).

63. In our experience, most settlements are significantly below the level of 12 months' salary and will continue to be so. There is an argument to say that employers will view 12 months' pay as a worst case scenario and that Claimants will become more entrenched and believe that they are entitled to 12 months wages. This may result in the removal of an incentive to settle early and the reduction in room for negotiation.

64. The number of cases brought that involve a straightforward claim of unfair dismissal are becoming less frequent. The number of pure unfair dismissal claims has fallen by 19% in the last 3 years. (see Table 3, below).

Table 3

Claims Accepted by Employment Tribunals			
NATURE OF CLAIM	**2009-10**	**2010-11**	**2011-12**
Unfair dismissal	57,400	47,900	46,300
Unauthorised deductions (Formerly Wages Act)	75,500	71,300	51,200
Breach of contract	42,400	34,600	32,100
Sex discrimination	18,200	18,300	10,800
Working Time Directive	95,200	114,100	94,700
Redundancy pay	19,000	16,000	14,700
Disability discrimination	7,500	7,200	7,700
Redundancy – failure to inform and consult	7,500	7,400	8,000
Equal pay	37,400	34,600	28,800
Race discrimination	5,700	5,000	4,800
Written statement of terms and conditions	4,700	4,000	3,600
Written statement of reasons for dismissal	1,100	930	960
Written pay statement	1,400	1,300	1,300
Transfer of an undertaking - failure to inform and consult	1,800	1,900	2,600
Suffer a detriment / unfair dismissal – pregnancy	1,900	1,900	1,900
Part Time Workers Regulations	530	1600	770
National minimum wage	500	520	510

Discrimination on grounds of Religion or Belief	1,000	880	940
Discrimination on grounds of Sexual Orientation	710	640	610
Age Discrimination	5,200	6,800	3,700
Others	8,100	5,500	5,900
Total	**392,800**	**382,400**	**321,800**

65. Most claims are settled before reaching a full hearing under the existing regime. This suggests that the existing cap does not, in reality, prevent the vast majority of cases from settling.

66. We do not believe that a new cap will be likely to assist in settling claims involving unfair dismissal which are brought together with other heads of claim such as discrimination or whistle-blowing. These are the vast majority of the claims bought. Nor would the consequence of the introduction of a new cap necessarily be that cases will settle any earlier than before.

67. There are a number of new rules, which are already being implemented to promote early settlement (as referred to above), such as compulsory ACAS conciliation, which in our view, will have more of an impact on early resolution than the proposals relating to the cap.

68. We are also of the view that these existing measures should be given more time to bed down further, more draconian measures are introduced.

Question 15

Would the introduction of a cap of 12 months' pay provide greater certainty to employers of the costs of a dispute?

69. The proposed individual and overall cap on compensation will create a degree of certainty but it is far from clear whether it will have a significant impact overall, and certainly one which justifies the potentially adverse impact on those who do benefit from the current level of cap.

70. The certainty will be as to the upper limit of an employer's liability for compensation in successful claims. That already exists in that unfair dismissal compensation is already capped. As the current maximum award is irrelvant to the vast majority of claims brought, whereas a new lower cap will be more relevant, an employer may have a clearer idea as to what their actual liability will be.

71. This is deceptively attractive however as an employer's maximum exposure could still conceivably be lower than the cap. The amount of any liability should an employer lose is measured according to the losses following from the dismissal and takes into consideration an employee's ability/failure to mitigate. In practice therefore, if employees perceive 12 months as a flat rate tariff to be applied in every situation, the employer may have a more difficult task in managing those expectations, and find himself in more protracted negotations. There is an argument to say that the current regime is more flexible. What may be missing,

however, is the availability of easy to use information about how the compensatory award is calculated and how, in particular, it is the employee's actual financial losses which are compensated. We have suggested in our response to question 13, ways this might be achieved.

72. Should a maximum cap of 12 months' pay be introduced, it is very important that it is stressed that this is a maximum, and not a tariff, and the factors which are applied to ascertain the actual amount of the award should be publicised.

Question 16

Do you support the introduction of a cap on compensation of 12 months' pay?

73. On balance we do not.

74. On the basis that the median award for unfair dismissal is £5000, introducing the proposed cap or caps is going to have no impact on the majority of Claimants whose cases proceed to hearing and determination by the Tribunal.

75. The impact will be felt by higher earners and by those who find themselves out of work for more than 12 months. This will therefore include certain more vulnerable groups who may need to have the protection afforded by the higher cap, such as those with a disability, those returning to work after a lengthy absence, such as maternity leave, and those above 50. There has been insufficient analysis on the impact on these groups in terms of the time it takes them to find re-employment.

76. There are no figures available to show the period of time for which losses are currently awarded. For example, a Claimant may only earn £12,000 per year but have been awarded 2 years' loss. This is much less than the total cap and employee median salary levels but, under the new proposals, these types of Claimant would lose out on what is to them a significant amount of money because they would only be able to recover £12,000.

77. Accordingly, there needs to be consideration given to those employees that have life or career long losses where they should be compensated beyond a period of 12 months and how this is to be dealt with if the cap is to be reduced. The danger is that they may look for other ways around the cap, bringing discrimination claims, for example.

78. It is not clear from the consultation document whether the Government are proposing a cap of the sum equivalent to 12 months' salary or whether the cap is for 12 months' loss. This has an impact where a Claimant mitigates part of their loss but not all of their losses. If they have ongoing losses can they recover up to the value of a full 12 months' salary or does their compensation stop at their actual loss for a period of 12 months; is it 12 months in time or 12 months in value?

79. The Government states it intends to use the standard definition of a weeks' pay to calculate the 12 month individual cap. The standard definition of a weeks' pay does not include pension loss.

80. The new proposals will have a significant impact on employees that are closer to retirement age. It is more difficult for older employees to find alternative work and they may have to consider drawing their pension early.

81. Thus, in cases where employees are still on final salary pension schemes and close to retirement age, they may suffer substantial losses in respect of their pensions, which they may be less likely to be able to recover.

Question 17

Do you have any comments on the impact of this proposal on Claimants?

82. The number of Tribunal awards made at or near the current cap may be low but this does not necessarily reflect the number of Claimants affected, given how many claims settle before the full hearing.

83. For those likely to achieve a figure in excess of 12 months' pay or average earnings or a multiple thereof, Claimants are less likely to be properly compensated for the loss they have suffered as a result of the unfair dismissal. The measures will disproportionately affect particular groups who may take longer to find a new role, as stated above. In other words, the most vulnerable will be worst affected by any lowering of the cap, which has wider social policy considerations.

See Table 4 on the following page

Table 4

Data from Jun-Aug 2012	Unemployed over 1 year 000s						Unemployed 000s						Chance of being unemployed for over 1 year		
	ALL		M		F		ALL		M		F		ALL	M	F
All aged 16+	897	100.00%	558	100.00%	338	100.00%	2,528	100.00%	1,444	100.00%	1,084	100.00%	35.47%	38.67%	31.20%
16-17	30	3.30%	13	2.38%	16	4.38%	193	7.63%	95	6.58%	98	9.03%	15.35%	13.97%	16.70%
18-24	241	26.86%	162	28.99%	79	23.36%	764	30.21%	469	32.48%	295	27.19%	31.54%	34.52%	26.80%
25-29	430	47.95%	249	44.56%	181	53.54%	1,162	45.96%	611	42.28%	551	50.85%	37.00%	40.75%	32.85%
50-64	182	20.34%	127	22.70%	56	16.43%	389	15.37%	255	17.66%	134	12.32%	46.92%	49.70%	41.62%
65+	14	1.55%	8	1.38%	6	1.83%	21	0.83%	14	0.99%	7	0.61%	66.33%	53.65%	93.93%
TOTAL	897	100.00%	558	100.00%	338	100.00%	2,528	100.00%	1,444	100.00%	1,084	100.00%	35.47%	38.67%	31.20%

These figures are taken from the Office for National Statistics

84. Therefore, these measures may have a disproportionate effect on older people, who are more likely to be higher earners *and* are likely to take longer to find a new role. Both of these factors are acknowledged in the Equality Impact Assessment (p.17), which states that, for example, the re-employment rate for individuals over 50 three months after being made redundant is 11% lower than for individuals aged 16+. Similarly, average earnings are highest between 30-50 year olds. Despite this the Equality Impact Assessment states that there is no evidence to show that individuals in the age group 30-50 are more likely to be affected by a lower cap (p.18) but there does not appear to be any analysis around this.

85. The proposals will also affect Claimants who are members of a final salary pension scheme as, even with a relatively low salary, they often suffer losses well in excess of a year's pay or the proposed lower cap.

86. While these measures would potentially lead to more certainty relating to the likely level of award there are other ways of doing this without such an impact on fairness, or a disproportionate impact on certain groups. For example, printing the average awards on the ET1 cover sheets has a far less serious impact on fairness and no assessment has been made as to its effectiveness in increasing certainty. Also, an increased role for ACAS in explaining the way financial awards are measured, including through compulsory ACAS conciliation, would potentially be more effective without having a negative and potentially discriminatory impact on fairness.

87. Reducing the cap will not only reduce the upper limit on settlements to the level of the cap (as employers will have no reason to offer more than this) but one possibility is that it may drive settlements to a level lower than this. Damages at the level of the cap will be seen by Respondents as the worst case scenario and they will seek to negotiate down from this by pointing out to Claimants litigation risk, accelerated receipt and the costs of Claimants bringing claims.

88. The proposals could potentially render the ACAS Code less effective as the impact of the potential uplift will be reduced with a lower cap (as more awards pre-uplift will reach the cap in any event). This could encourage unfairness in the workplace and potentially more incidents of bullying and stress. This would be a backward step in workplace fairness, albeit given the median level of awards, it is difficult to determine how real a concern this should be.

89. If the cap is applied it may encourage Claimants to find ways around the cap such as bringing discrimination or whistleblowing claims, (subject to the effectiveness of the relevant provisions in the Enterprise Regulatory Reform Bill) especially for higher earners, even where such claims have little merit. This will only add to the burden on the Tribunal, as well as legal costs and time for both parties (as relevant) as these claims are more complex and take longer to deal with.

90. Others may be encouraged to pursue High Court litigation, as higher earners will seek longer notice periods and other contractual protections.

91. If the cap is applied it may even be less likely that Claimants will take legal advice as it would not be cost effective. This will lead to an increase in litigants in person with potentially unrealistic expectations resulting in a greater burden on Tribunals in dealing with Claimants without experience of the system. The cap will encourage Claimants to find alternative methods of maximising their award which is likely to place time and cost burdens on Courts and Tribunals.

92. A radical proposal would to be to remove the cap altogether, place emphasis on settlement, and encourage employers to utilise the protected conversation process.

93. Other suggestions are outlined above (at question 13).

Question 18

Do you have any comments about the impact of this proposal on employers?

94. A reduction in the unfair dismissal cap could have a positive impact on employers' morale because it potentially limits their exposure in the event that a successful unfair dismissal claim is brought.

95. It is difficult to gauge whether it will encourage attempts at early settlement by creating more realistic expectations for both the employer and the employee as to what a successful Claimant may realistically achieve at Tribunal, because of the limited information on settlements.

96. In our experience, the current cap can lead to unrealistic expectations particularly for litigants in person particularly when considered in the context of the average level of awards.

97. In practical terms however it is difficult to measure whether these aims would be realised. There also considerable downsides:

    97.1 There will not be a significant impact on the ultimate level of settlement in the majority of cases as, in our experience of acting for employers, where a (potential) claim is limited to pure unfair dismissal, the settlement amount is usually significantly lower than the statutory cap.

    97.2 Given the practical reality as to how many employees get anywhere close to the award, the number of employers impacted by this would be minimal.

    97.3 There is an argument in fact to say that there would be a reduction in the deterrent effect of such a high cap and that this would influence the behaviours of employers.

    97.4 Perhaps most importantly, there is the potential increase in individuals seeking to find grounds to bring claims where damages are uncapped (for example, discrimination and whistleblowing) which could lead to an increase in spurious claims. There are measures in force which go some way in addressing this fear such as pre-claim

conciliation, the introduction of Tribunal fees and the proposed "public interest" requirement for whistleblowing claims.

97.5 There is also a potential knock-on effect of more stringent negotiations around contractual provisions, particularly for higher earners, who may seek to secure longer notice periods and/or higher bonuses, for example, with the aim of mitigating the impact of a lower unfair dismissal cap. This could in turn lead to an increase in High Court Litigation, with the additional costs that would ensue from this.

97.6 A reduced cap could mean a rise in the number of Claimants deciding to litigate themselves on the basis of their reduced expectations as to what they may recover. This would also have a detrimental impact on employers due to the additional resource (including in respect of legal fees) that is generally required when acting against litigants in person.

Question 19

Do you have any other comments on the proposal?

98. No.

Question 20

Do you consider that the overall cap on compensation for unfair dismissal is at an appropriate leave (£72,300)?

99. Yes.

100. There is a general feeling among employment law practitioners that the current level of cap is set at an appropriate level. The cap as it existed prior to 2000 did not feel fair, but the increase in that year and the subsequent annual increases based in RPI now work well.

101. In saying this, it is acknowledged that this is a feeling rather than evidence based view. Although there is evidence that the median (and mean) awards at Tribunal are much lower than the current cap, this evidence (as noted before in these submissions) only reflects the cases that actually end up in a full hearing and therefore represents a very small number of employment disputes. Although information is available with regard to settlements conciliated via ACAS, many employment disputes are resolved through the use of negotiated exit agreements where payments made under them are significantly higher than the median awards at Tribunal. There is therefore an incomplete picture with regard to the potential impact of the change due to this gap in the evidence.

102. The calculation of the compensatory award also allows for significant reductions from the cap and so it is not surprising that median and mean awards do not reflect the cap. This arises where employers who have legitimate reasons for dismissal, but who fail in some respects to achieve a fair dismissal, can expect to have an employee's award reduced for contributory conduct and/or in response to a *Polkey* argument and where employees mitigate their losses quickly between termination and a hearing date. [There is no information as to how these deductions have affected the median and mean awards.]

103. There is an existing concern that the current cap on the compensatory award has a disproportionately negative impact on higher earners and particularly those that do not have any of the protected characteristics giving rise to discrimination claims under the Equality Act. The fact that compensation for discrimination claims is unlimited means that successful claimants are able to recover compensation based more realistically on their actual financial losses.

104. Within the Impact Assessment it is recognised that as men are likely to earn higher salaries than women they will be more adversely affected by a reduced cap. The current difference in methodologies for calculating compensation for unfair dismissal claims and discrimination claims has a similar impact. This raises the question as to why an employee who is unfairly treated by their employer, but not on a discriminatory ground, should not be eligible for compensation to the same degree as an employee who can establish discrimination on the grounds of a protected characteristic.

105. For some high earners, the unfair dismissal cap operates as an absolute limit of their potential recovery even though it may not reflect their actual likely loss. Such individuals are not likely to pursue Tribunal claims where they are offered severance payments that reflect the cap and will instead accept termination on those grounds. If the cap is reduced, this group may well be adversely affected. That said, it is unclear how many higher earners negotiate packages which are based on predicted losses at the time of termination, but who successfully find new highly paid employment resulting in them effectively benefitting from a windfall.

106. It is currently open to this group of higher earners to attempt to maximise their potential compensation by pursuing whistleblowing claims, based on alleged breaches of their own contracts of employment (following *Parkins v Sodexo*) as a means to trying to overcome the cap. It is noted that this "loophole" is to be closed. The combination of the failure to successfully close the "loophole" and a reduction in the cap could be that increased litigation is generated in this area, at least in the short term.

107. As noted elsewhere in our response, the other group disproportionately impacted by the current cap are also possibly older employees and/or those other more vulnerable employees referred to above who will have higher losses flowing from being unfairly dismissed due to being unable to mitigate their losses by finding fresh employment as quickly as other employees. Again this is acknowledged as a possibility in the Impact Assessment.

Question 21

What do you consider to be an appropriate level for the overall cap, within the constraints of full-time annual median earnings (c£26,000) and three times full-time annual median earnings (c£78,000)?

108. As set out above, on balance ELA supports the retention of the existing overall cap. In setting any alternative cap, the following should be taken into consideration:

109. The amount should be set at a level so as to reflect the actual losses that a Claimant is likely to suffer as a result of being out of work. It should be noted that in order to recover

compensation at all, through an unfair dismissal claim, the individual is likely to have paid to pursue a claim, both in relation to new Tribunal fees and potentially also legal costs.

110. If the cap is set too low, it could encourage employers to adopt poor employment practices as they will simply be able to "buy" an employee's exit. Although this regularly occurs in practice, the current limit ensures that a "fair price" is paid for such circumvention of the legal framework.

111. There is a need to set the cap at a level which will allow head room between the possible maximum award and the award with contributory conduct/Polkey reductions in place.

112. The potential for disproportionate impact of an award set at a low level on various groups including:

    112.1 higher earners - we consider that the cap needs to be set at a level which will enable higher earners to be in a position to negotiate severance packages that will properly compensate them for the actual likely losses they will recover.

    112.2 employees who may have median level basic pay earnings, but who enjoy a range of other benefits in kind. One example of this would be rail workers who have as a benefit unlimited concessionary travel for themselves and their families which has a significant value. The other area of concern is final salary pensions.

    112.3 older or other more vulnerable employees who may not be in a position to mitigate their losses as quickly as other employees and therefore could continue to be out of work as a result of being dismissed more than a year after termination of employment.

113. Finally, although not directly addressed in the consultation document ELA wanted to add a note on the provisions of Section 13 of the Enterprise and Regulatory Reform Bill, and in particular, on section 13(3).

114. We note that this subsection contains a provision enabling the Secretary of State to adopt different caps for different types of employers.

115. It is difficult to see how this could operate in practice other than in relation to the employer's size (number of employees/financial metrics). The law on unfair dismissal requires that in determining the fairness or otherwise of a dismissal, the size and resources of an employer is taken into account. However, adopting a lower cap for a smaller employer could be used as a further mechanism to enable SMEs increased scope to be released from the aspects of the current legal framework that are considered unduly onerous. It would in effect enable them to "buy" themselves out of difficult employment situations by paying less than larger organisations. ELA has expressed its concerns about the possibility of a "two tier" workforce in earlier consultation exercises. We have the same concerns in respect of the effect of section 13(3) should the Secretary of State exercise such a power.

116. We have considered whether this power could be used to address some of the concerns regarding disproportionate impact as described above, but this would not appear to be

possible as it is the characteristics of the employees rather than the employers that create the potential for disproportionate impact.

Question 22

Do you have any other comments on the level of the overall cap?

117. No.

APPENDIX

Members of the Sub-Committee

Stephen Levinson	RadcliffesLeBrasseur (Co-Chair)
Maeve Vickery	Pardoes LLP (Co-Chair)
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