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Open Justice Consultation

Response from the Employment Lawyers Association

Friday 6th January 2012

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Applicants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or policy aims of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative & 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.

A sub-committee was set up by the Legislative & Policy committee of ELA to consider and comment on the Justice and Security Green Paper. A list of those who have contributed to this response appears at the end.

Before dealing with the detail of this response, it is important to explain ELA's general position. The use of closed material procedures to protect sensitive material almost inevitably involves prejudice to parties and the risk of unfairness. ELA, as a non-political organisation, does not express a view on the appropriate policy balance between the potentially conflicting objectives of openness and secrecy. Nonetheless, a number of important practical issues arise and these are addressed in this response.

How can we best ensure that closed material procedures support and enhance fairness for all parties?

1. ELA does not believe that closed material proceedings can support or enhance fairness for all parties. The use of closed material proceedings inevitably harms the interests of the excluded individual. They cannot respond to the material or produce evidence to rebut it.

2. This is a significant departure from the principle that all parties are able to see and challenge the evidence relied on before a court.

3. This is not a merely technical problem or simply rooted in a traditional legal principle. Not being able to see and challenge the evidence presented to a court is a serious disadvantage for any litigant. All litigators are familiar with cases where apparently compelling evidence turns out to be flawed or simply wrong. And with cases where, seemingly, there can be no possible explanation or justification – only for a simple and convincing explanation to be presented.

4. In addition a closed material procedure conflicts with the principle that the justice system should operate in public. Lack of public and press scrutiny is harmful both to the system itself and the perception of that system. The common negative perception of the UK family courts show how easily lack of scrutiny can lead to mistrust.

5. The departure from these ordinary principles is explained by the government's desire to protect sensitive material. But it is a departure and a disadvantage nonetheless. The members of this ELA Working Party consider that it is wrong to describe a closed material procedure as 'supporting' or 'enhancing' fairness for the excluded person.

6. Based on the combined experience of members of the working party, we consider that the use of a closed procedure creates unfairness for the private party, in an attempt to achieve the policy objective of protecting sensitive material.

7. Nonetheless, it is important to recognise that the use of a closed material procedure disadvantages the excluded individual. The procedure is inherently unfair for the reasons described in this response. The involvement of Special Advocates, and other procedural attempts to mitigate this unfairness, can only ever be palliative.

8. The Green Paper appears to take the view that with proper procedural safeguards closed material proceedings can avoid disadvantaging the excluded individual. ELA does not believe this to be the case.

9. The experience of Open Representatives and Special Advocates is that the current system operating in employment tribunals does not work effectively for the reasons outlined in this response and does not deliver real procedural fairness when compared with the ordinary tribunal system. This is despite the current system being less restrictive than what is now proposed.

10. In great part this is an inherent in the nature of closed material proceedings. But it is also because of problems with the current and proposed procedures, as well as because of practical difficulties involved in the process. These issues are dealt with in more detail below.

Communication

11. One of the most significant limitations on the ability of the closed material proceedings to deliver procedural fairness is the limit on communication between the Special Advocate and the excluded party.

12. The Special Advocate system within employment tribunals is currently governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. This does permit direct communication between the Special Advocate and the excluded party after the disclosure of closed material – save in relation to the substance of the closed material.

13. The proposal in the Green Paper is to abolish this approach and prevent any communication after the Special Advocate receives closed material.

14. We note that this is a more restricted approach than exists in other jurisdictions. For example:

15. In Canada, Special Advocates are permitted to communicate with Open Representatives, save in relation to the substance of closed material. Communications involving the substance of closed material may be made if sanctioned by the Court, without necessarily requiring the approval of the Government.

16. In the United States, there are no Special Advocates. Rather, Open Representatives themselves are security-cleared and trusted not to reveal any information of any sensitivity to their clients.

17. Limits on communication exacerbate all the inherent problems with a closed material process. The Special Advocate process is intended to reduce the disadvantages of closed material proceedings by allowing challenge and comment on the closed material on behalf of the excluded person.

18. This does mitigate the disadvantage. Plainly, it is better for the excluded person to have someone who can see and respond to the closed material, than to have no one.

19. But the Special Advocate process is not a panacea. The ability of the Special Advocate to challenge evidence is heavily restricted by the inability to take instructions from the excluded person. It is often impossible to effectively challenge evidence without information from the client not only about the closed evidence, but also what evidence might be available to rebut it.

20. The greater the limitations on communication, the more limited the ability of the Special Advocate to challenge the closed material and therefore the less fair the process.

21. ELA's view is that the restrictions on communication create particular problems in civil cases, such as employment litigation. There are a number of reasons for this:

22. First, many employment cases need to be formulated precisely and with reference to the relevant factual circumstances. This can be complex and particularly difficult when those factual circumstances are obscured by the closed procedure.

23. For example, indirect discrimination claims require the Claimant to identify a provision, criteria or practice (PCP) that has a disproportionate impact on them because of a protected characteristic. Unless a PCP can be properly formulated the claim will fail. Inevitably, formulating the PCP requires the Claimant to understand the Respondent's decision making process, but this will often be hidden from the Claimant by the closed procedure.

24. In ordinary proceedings such elements are often refined through the litigation process. A claimant who suspects indirect discrimination brings a claim, phrased comparatively vaguely. The process of discovery and case management refines the case before it is determined by the tribunal. This process relies on interaction between the parties and the tribunal, which is interrupted by the closed procedure.

25. Second, litigation strategy may be complex. The more factually and legal complex the case the more decisions need to be made about how to present it. Such decisions are difficult when the closed procedure prevents communication between parties and their lawyers.

26. Third, in general employment litigation is focused on the actions of the employer, rather than the actions of the claimant. This increases the impact of restricting information about the respondent's position.

27. Fourth, the absence of communication creates real difficulty in settlement situations. ELA suspects that this problem does not arise in the same way in other types of cases where Special Advocates have been used, because - unlike employment cases - negotiated settlements are rare. For settlement to be reached, both parties must be able to assess the strength of their case. The excluded individual and his representatives cannot do this - because they do not know what the excluded material contains. The Special Advocate can, but cannot communicate his conclusions. This means that it is, in practice, extremely difficult to settle this type of claim.

28. This limitation damages all those involved in the claim. Both parties continue with expensive, lengthy and stressful litigation, which they would rather settle. The tribunal system is forced to spend time and resources in dealing with a claim that should have been settled.

29. We would expect employment tribunal proceedings to be similar in nature to other civil litigation and therefore for similar problems to arise elsewhere, if the closed material procedure is extended.

30. The proposed changes to Special Advocate communication are dealt with below.

Other Problems

31. Members of ELA on the Working Party with experience of the closed material procedure, including Special Advocates and Open Representatives, identified a number of other problems with the process:

a) The inability to effectively challenge non-disclosure;
b) The lack of any practical ability to call evidence;
c) The lack of any formal rules of evidence, so allowing second- or third-hand hearsay to be admitted, or even more remote evidence, frequently with the primary source unattributed and unidentifiable and invariably unavailable for their evidence to be tested, even in closed proceedings;
d) A systemic problem with prejudicially late disclosure by the Government;
e) Where AF (No.3) applies, the Government's approach of delaying disclosure that it accepts to be required until specific requests are made by the Special Advocate and the practice of 'iterative disclosure';
f) The increasing practice of serving redacted closed documents on the Special Advocates, and resisting requests by the Special Advocate for production of documents to them (i.e. as closed documents) on the basis of the Government's unilateral view of relevance;
g) The lack of a searchable database of closed judgments.

Practical Issues

32. Members of the Working Party with experience of instructing Special Advocates report a number of practical problems.

33. Lack of Special Advocates in correct disciplines: There is a relatively small number of Special Advocates with experience outside the core areas of crime and immigration. Members have experienced difficulties in finding an appropriate Special Advocate who is available to conduct employment cases. The limited pool also means that, where there is a problem with a Special Advocate continuing (for example because of ill health) they are difficult to replace. This contributes to the difficulties of delay that are dealt with below.

34. Difficulty identifying Special Advocates: In addition the information provided with the list of Special Advocates is relatively scant. This means that it is difficult to identify suitable Special Advocates to instruct. It would be useful for there to be separate lists of Special Advocates with expertise in different areas and for more information to be provided about the extent of their experience.

35. Delay: Cases using a closed procedure are also dogged by significant delay. It is not unusual for cases to take several years to resolve because of delays in instructing a Special Advocate and listing in front of a judge cleared to consider the restricted evidence and then delays in finding security cleared employment tribunal staff to type up judgments and/ or reasons. There is an acute shortage of security cleared Employment Judges, lay members and ET staff. Such delays are particularly harmful where the parties have an ongoing relationship.

36. These delays are compounded by the public/private open/closed nature of proceedings, which leads to many more Case Management Discussions and hearings than would be necessary for open cases of a similar nature.

37. Funding: The closed material procedure creates real problems with the funding of claims, particularly in areas such as employment where legal aid is not available. Few employment tribunal litigants are in a position to privately fund their case – especially given that the nature of closed proceedings means that they are long and expensive. The normal funding mechanisms, such as conditional fee agreements, after the event insurance, legal expenses insurance and union funding require an accurate assessment of the prospects of success. As noted above in relation to settlement, this cannot be given in a closed material case.

38. Judicial Training: ELA believe that judges dealing with Closed Material Proceedings would benefit from further training specific to this role. Closed Material Proceedings involve vital issues in areas where judges often have limited experience. Better training would assist them in making confident and robust decisions

What is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of closed material without jeopardising national security?

39. As noted above the absolute bar on direct communication between Special Advocates and the excluded individual is the most significant restriction on the ability of the Special Advocate to operate effectively. It is therefore also the most significant limitation on the ability of the closed procedure to operate fairly.

40. As noted above, employment tribunals currently operate a less restrictive regime than proposed in the Green Paper. ELA is not aware that this has ever led to problems in relation to sensitive information. Special Advocates are experienced practitioners, selected after a rigorous security vetting process. To our knowledge their ability and integrity in relation to closed material has not been challenged.

41. We question whether 'harmonisation' is an adequate justification for imposing further restrictions given the important issues of principle involved and the consequences for the excluded party. We are not aware of any Special Advocates who have experienced difficulty in operating within employment and other cases, regardless of the slightly different rules.

42. In relation to facilitating Special Advocate communication we would make the following proposals:

43. First, there should be no restrictions on one-way communication from the excluded individual or his representatives to the Special Advocate. This would allow the excluded individual or his representatives to provide valuable procedural and administrative information. It would allow the excluded individual or his representatives to inform the Special Advocate about their strategy for the case and the approach they intend to take. Such one-way communication could not endanger sensitive material, but would assist the Special Advocate.

44. Second, we believe that the Special Advocate should be allowed to communicate freely on open matters and on matters unrelated to the substance of the closed material. This would reflect the current procedure in Employment Tribunals – which has not endangered sensitive information.

45. Third, there should be an opportunity for the Special Advocate to communicate about the substance of the closed material through the Court (possibly a designated Judge), without automatically revealing the substance of the proposed communication to the Secretary of State. Where no question of any sensitive disclosure arises, the Court should have the power to authorise the communication without reference to the Secretary of State. Where there is any doubt, the SA should have the option of pursuing the application on notice to the Secretary of State, or abandoning it.

46. Fourth, separate to the above suggestions, we do not agree with the Green Paper's suggestion that it is impractical to characterise some communications as purely procedural. Even accepting that the Special Advocate is not in a position 'to fully determine harm to the public interest', it does not follow that any Special Advocate would be unable reliably to distinguish a communication that related to the substance of the closed evidence from one that was purely procedural.

47. ELA welcomes the government's intention to strengthen the "Chinese wall" between those responsible for vetting communication and those responsible for conducting litigation. The stronger these safeguards, the more trust parties and Special Advocates will have in the system.

48. In relation to the use of a separate judge to deal with applications to communicate, ELA believes the concerns over exposing weaknesses or strategy to the trial judge are legitimate. These needs to be balanced with the need to avoid undue delay. ELA suggests that parties be able to request that a particular application be dealt with by a separate judge. We note that, in the ordinary course of employment tribunal litigation, it is common for case management decisions to be taken by a different judge.

If feasible, the Government sees a benefit in introducing legislation to clarify the contexts in which the 'AF (No.3)' 'gisting' requirement does not apply. In what types of legal cases should there be a presumption that the disclosure requirement set out in AF (No.3) does not apply?

49. ELA does not believe that it is practical to define types of case where gisting is unnecessary. We note that the Green Paper makes no attempt to propose which types of cases would be excluded from gisting.

50. Specifically in relation to Tariq, ELA does not believe that the Supreme Court intended to say that gisting was unnecessary in all employment cases concerning security vetting. It merely said that gisting was not always necessary. It is noteworthy that the Supreme Court remitted the issue of whether any further gist was needed to the Employment Tribunal.[1]

51. We begin from the position that the limitation imposed by the closed procedure rules should be no more than is necessary to protect sensitive information. Like the closed procedure itself, withholding the 'gist' of the Respondent's case from the Claimant is inherently disadvantages them. We would not have thought that the government wished to do this, unless there was a corresponding 'benefit' in safeguarding information.

52. The reason that a case should not be gisted, therefore, is a combination of a) the importance of the information being protected; b) the likelihood that gisting will endanger the protection of the information and c) the ability of the excluded individual to conduct their case without being given a gist. The factors are largely unrelated to the type of case involved.

53. Even if certain types of case are more likely not to require gisting, there will be exceptions where gisting is appropriate. This means that any presumption will need exceptions. ELA is doubtful that such an approach is likely to offer any greater clarity than the current system. We think that it is unrealistic to expect that any legislative guidance would reduce the need for the Courts to rule on the question in any individual case.

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[1] See, for example, Lord Mance at ¶69