EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

Consultation on the use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting:

Response of the Employment Lawyers Association to a Consultation paper issued by the Judicial Office for England and Wales dated February 2011

4 May 2011

Consultation on the use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting:
Response of the Employment Lawyers Association to a Consultation paper issued by the Judicial Office for England and Wales dated February 2011

i. The Employment Lawyers Association ("ELA") is an unaffiliated group of specialists in employment law including those who represent both employers and employees. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal standpoint.

ii. ELA's Policy and Legislative Committee consists of barristers and solicitors (both in private practice and in-house) who meet regularly for a number of purposes, including considering and responding to proposed new laws.

iii. We set up a working group under the Chairmanship of Robert Davies (Dundas & Wilson LLP) to consider and comment on the Consultation Paper on the Use of Live, Text-Based forms of Communications from Court for the Purposes of Fair and Accurate Reporting released by the Judicial Office for England and Wales dated February 2011.

iv. A full list of numbers of the working group appears at Appendix 1.

v. Our views are as follows (although please note that our comments have been confined to the perspective of the Employment Tribunal and the Employment Appeal Tribunal):

A Consultation on the Use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting

Q1: Is there a legitimate demand for live, text based communications to be used from the courtroom?

Our comments relate solely to the question of the use of text based communications in the Employment Tribunal and the Employment Appeal Tribunal ("EAT"). It has not been our experience that there is any significant demand or need for text based communications.

The experience of the practitioners within the Working Party to date has been that this has not been a topic which has prompted particular comment by Claimants or Respondents or Practitioners in the context of Employment Tribunal proceedings.

From the perspective of lawyers present at Tribunal hearings there would not be any particular need for the use of text based communications from the **courtroom itself**. On the occasions that contact needs to be made with the office or with third parties relating to the case (for example checking a particular point in evidence) then it is difficult to see how this could not be effectively managed by the parties or their representatives using text based communications *outside* of the courtroom. However, we note that this is not the key focus of the Consultation.

The Working Party recognises that text-based forms of communications, in particular, those relating to social networks and blogging, are now a well recognised form of communication. The broader public perception of the significance of a facility such as Twitter would inevitably be expected to reflect a spectrum of views.

Members of the Working Party, for example, have commented on the seeming ubiquity of Twitter and the trend/development of the reporting *by the mainstream media* of Twitter posts - for example in the context of football players being perceived to speak “out of turn”, whether inadvertently or deliberately, prompting disciplinary action by their employers - which itself **becomes** the news story.

This may prompt a perception of triviality or amounting to a peculiarly circular form of communication. Equally though, Twitter has been used as a forum to coordinate protest in favour of democratic change in various countries recently and attracted much positive comment in that regard. Similarly, blogs without the character restrictions imposed by Twitter have become an increasingly important and regularly consulted form of news/information via the internet.

As such, we believe that this is an important issue for the court system to address, given the importance for the administration of justice to be (and to be seen to be) a public process. Consequently, whilst we do not see a current (pent up) demand for such use that of itself is not a reason to determine that such matter must in some way be illegitimate and wholly restricted/prevented particularly given the increasing prevalence of such forms of communication.

Also, the balancing exercise inherent in Articles 6, 8 and 10 of the Convention on Human Rights, (given effect where appropriate via the Human Rights Act 1998) would also suggest that developments in the manner of the freedom of expression need to taken on board and accommodated appropriately by the Court and Tribunal system.

On a separate note, some members of the Working Party also felt that whilst the general frequency of reporting of Tribunal cases was (based on anecdotal experience), perhaps not surprisingly, rather low and that those cases which did attract press interest tended to be discrimination cases, often with salacious or prurient undertones or features, there could nevertheless be a significant public interest value in wider dissemination of examples of where equality laws in particular may be seen to work and promote an understanding of the role that they can play in the workplace.

Q2: Under what circumstances should live, text-based communications be permitted from the courtroom?

On the basis of and subject to the risks identified below, we do not believe that any significant additional restrictions need to be put in place to regulate text-based communications. The contempt laws and the ability of each Employment Judge to regulate and give directions for the proper proceedings of the hearing should be expected to provide an adequate framework.

Particular regard will need to be had in relation to:

(a) Restricted Reporting Orders which may apply in relation to sexual misconduct, disability and national security cases.

(b) The Rule 16(1) and Rule 54 exceptions under the Employment Tribunals (Rules of Constitution and Procedure) Regulations 2004.

(c) Prejudice to the purpose of any order excluding witnesses from part of the proceedings.

In respect of such cases, given their nature and the serious repercussions for breach, an absolute prohibition may be advisable and the practical way to address matters.

Likewise if there are insurmountable technical problems and the Tribunal's own equipment is being disrupted, although these may be rather exceptional circumstances.

However, if the permission to use Twitter and similar forms of communication is granted to a wider section of Tribunal attendees beyond the accredited media (see further in response 6), it would, in our view be appropriate and necessary to provide further guidance - for example in the waiting rooms, or in the public areas of tribunal hearing rooms - on the use of live, text-based communications in particular and all text-based communications. This could outline, in particular, that they should not be used in such a manner so as to cause disruption to the proceedings and refer to the duty to ensure that any communications relating to the proceedings much be fair and accurate, the consequences of it not being and the impact and ambit of contempt proceedings.

The latter would seem a practical and important step - unlike accredited journalists, the vast majority of members of the general public who may have an interest in posting comments about proceedings would not have the level of awareness of (or the experience of seeking to ensure that they do not fall foul of) the Contempt of Court Act 1981, etc. The point at paragraph 8.5 of the Consultation Paper is well made - it applies with even with greater force to members of the public outside the media, hence the need for guidance if wider rights are permitted.

Q3: Are there any other risks which derive from the use of live, text-based communications from court?

We would echo the various observations in the Consultation Paper.

Both the attraction and the potential (chronic) flaw of such communications stem from their very nature, in that they are instant, less formal in style and can be made with little opportunity to pause for thought. Hence, this gives rise to the following risks in the context of the Employment Tribunal system:

- a broader risk that such communications are seen to trivialise and misrepresent the proceedings and result, more seriously, in unfair and improper, reporting on the proceedings. This could impact and damage not only individual proceedings and those participating in them, but also, possibly, the Tribunal system as a whole. This risk is heightened by the difficulty of removing live text-based communications from the web.

- a risk, in individual proceedings, that communications made by live text-based communications, may be seen to or be intended to intimidate or unduly affect witnesses. The particular example we would have in mind is if an individual's evidence was the subject of (say) detailed comment which in turn is open to comment and/or criticism by those contributing to an online forum (such as Twitter or a blog).

However, we do not see that these risks of themselves should prevent text based communications from the Tribunal.

First, evidence in tribunals is already open to text-based communications and the problems with the nature of this communication, albeit that it may now only be undertaken from outside the tribunal room. As noted above, in our experience, text-based communications have not been widely used to date to comment on or about proceedings in an inappropriate manner.

Also, we see this risk as being much more limited in the EAT given the nature of appellate proceedings; the EAT is not dealing with matters of fact or witness evidence.

Moreover, as witnesses in England and Wales frequently attend an Employment Tribunal hearing before giving evidence in that hearing, we do not see that there is any risk caused by text-based communications in reporting evidence previously given. (Clearly the position would be very different in Employment Tribunal proceedings in Scotland given that witnesses are not permitted to hear the evidence of other witnesses before they give evidence.)

We also do not envisage that the use of text based communications would *inevitably* result in inappropriate or distracting behaviour in the Tribunal. Tribunal hearings frequently include a number of attendees taking written and typed notes, as well as notes being passed between counsel, the parties and witnesses. We do not think that text based communications would therefore prove any more distracting of itself - but it may add to the potential for distraction particularly in multi-party proceedings.

Also, certain members of the Working Party who are themselves active participants on Twitter have suggested that for the most-part users of Twitter have an understanding and appreciation of the nature of and culture of such short posts: they are snapshots of

expressions of opinion and are not purporting to be an in-depth critique or analysis, they are seen for what they are, no more no less.

It is worth noting, as highlighted by various members of the Working Party who have experience of attending Tribunals throughout the UK, that Tribunal rooms are often (much) smaller than Courts and it may prove highly impracticable, consistent with paragraph 7.3 of the Consultation Paper, to seek to designate a particular location in the Tribunal room from which text-based communications may be made. Again though we anticipate that Employment Judges will be able to exercise their good judgement in determining whether this may nevertheless be advisable or necessary should the equipment being used prove to be a distraction.

Q4: How should the courts approach the different risks to proceedings posed by different platforms for live, text-based communications from court?

Whilst risks may be heightened by different platforms, we do not think it is appropriate to make a distinction between different platforms. This would be difficult in practice to regulate given the scope for instantaneous cross-platform linking on the internet (and also noting that most news sites do themselves allow comments to be made on an almost instant basis).

Q5: How should permitting the use of live, text-based communications from court be reconciled with the prohibition against the use of mobile telephones in court?

In general we do not think that the prohibitions would necessarily conflict. The prohibition on use of mobile phones results from the risk of disturbance which would arise if they were to ring/vibrate during proceedings. The level of disturbance with text based communications would not be the same, provided that they were only operated on a 'silent/non-vibrating' mode. If a signal from any form of text based communications interfered with Tribunal equipment, this could be addressed by instructions from the Employment Judge that, in those circumstances, the communications were not to be used - as mentioned above in the response to question 2.

A minority view, albeit strongly expressed within the Working Party, considered that it may be better to err on the side of caution currently and prohibit text based communications being sent by mobile telephone and confining it to lap-tops or tablet computers such as the iPad.

Q6: Should the use of live, text-based communications from court be principally for the use of the media? How should the media be defined? Should persons other than the accredited media be permitted to engage in live, text-based communications from court?

The significant majority of the Working Party felt that if it is permitted to use live, text-based communications from court they should not be confined to the use of the accredited media, pointing to the potential advantages that may stem from a broader interest in and wider reporting of Employment Law matters. In other words, if the accredited media is considered (anecdotally at least, if not empirically) to be ignoring otherwise newsworthy Tribunal proceedings should not the interested lay person take up the slack?

Also, it was noted that sites which start as private weblogs have developed into increasingly consulted news sources, such at the Huffington Post.

The minority view of the Working Party is that incremental change, as far as text-based communications from the Tribunal is concerned, would be preferable.

This would reflect the suggestion made paragraph 8.7 of the Consultation Paper such that accredited members of the media may use all internet-based communications including Twitter and applications by non-accredited persons would be addressed on a case by case basis, via applications made in advance of a hearing.

4 May 2011

Appendix 1

Brona Reeves	Barclays Wealth
Anna Birtwistle	CM Murray LLP
Tara Newsome	Hill Hofstetter LLP
Laurie Anstis	Boyes Turner
Martin Pratt	Kingsley Napley LLP
Marc Jones	Turbervilles
Shelagh McKenzie	Biggart Baillie LLP
Simeon Spencer	