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FCA Consultation

Publishing Information about Enforcement Warning Notices

Response from the Employment Lawyers Association

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Employment Lawyers Association

Response to Financial Conduct Authority's consultation paper CP13/8, *Publishing information about enforcement warning notices*

I. Introduction

1. The Employment Lawyers Association (“**ELA**”) is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA’s role to comment on the political merits or otherwise of legislation or new statutory powers, rather to make observations from a specific legal standpoint. ELA’s Legislative and Policy Committee (“the L&P Committee”) and the working party set up to respond to this particular consultation are made up of both Barristers and Solicitors, working in private practice and in-house, who act for both Claimants and Respondents. The L&P Committee meets regularly for a number of purposes including to consider and respond to proposed new legislation.
2. Paragraph references (§) below are to the paragraph numbering in the Consultation Paper CP13/8. The Financial Services Authority (as was) and the Financial Conduct Authority are together referred to as the “**FCA**” below.

II. Executive summary

3. As a matter of principle, ELA is opposed to publication of information about disciplinary proceedings at an early stage and before any allegations of wrongdoing have been proven against an employing firm or individual employee. However, ELA recognises that the power to publish information about warning notices is contained in primary legislation and acknowledges that this statutory power will be exercised in certain circumstances. ELA’s view is that the FCA’s proposed approach to the exercise of this statutory power does not take sufficient account of the potential employment law consequences.
4. In particular, ELA wishes to highlight concerns about the adverse effect of publication on the following:
 - (i) the continuing employment relationship;
 - (ii) employers’ internal procedures;

- (iii) harm to future employment prospects and employees who are not the subject of the warning notice; and
- (iv) equality and diversity consequences of publication.

5. In addition, ELA wishes to highlight its view that the application of the test of when it would be 'unfair'¹ to publish should include wider considerations of natural justice rather than a narrow evaluation of 'harm'. Finally, ELA does not agree that any 'harm' caused by publication will be remedied by means of a notice of discontinuance.

III. Whether publication would be unfair

A wider concept of fairness

6. ELA's view is that the application of an 'unfairness' threshold should involve wider considerations than a simple balancing of harm from publication against the stated purpose of transparency in enforcement proceedings. ELA's members would consider 'fairness' to include additional elements of natural justice, including consideration of the individual circumstances of the disciplinary allegations levelled against the individual/firm.
7. It is noted that the FCA will consider the extent to which the person has been made aware of the case against him during the course of the investigation (§2.12). In ELA's view, this is only one element of fairness. The nature and merits of the allegations against an individual or firm are also, in our view, relevant to whether it would be unfair to publish information about warning notices.
8. Publication of the fact of enforcement proceedings at an early stage will impact most harshly on those individuals/firms who are ultimately cleared of wrongdoing, either by the RDC or the Upper Tribunal. ELA notes that the Consultation Paper does not contain details of the proportion of warning notices which have not resulted in findings of wrongdoing or where the warning notice was discontinued or resulted in no action being taken. ELA draws the FCA's attention to published analysis of historical data which suggests that roughly 20% of warning

¹ As found in the statutory threshold for publication in section 391 (6) FSMA "unfair to the person with respect to whom the action was proposed to be taken".

notices have not resulted in a Decision Notice². ELA's experience is that the outcome of those disciplinary procedures which depend on disputed fact or witness evidence are particularly difficult to predict in advance.

9. For these reasons, ELA invites the FCA to reconsider the proposal that the merits of the warning notice itself will not be material to publication decisions (§2.24). The strength or otherwise of the disciplinary case and the extent to which the outcome is dependent on findings made after a hearing before the RDC is, in ELA's view, a relevant consideration when determining whether publication would be unfair. A policy which excluded the merits or nature of the disciplinary allegations from consideration would, in our view, be a policy which expressly failed to take account of a relevant consideration.
10. ELA seeks to promote clarity in employment law and procedure. We invite the FCA to consider clarifying what is meant by "*disproportionate level of damage*" in its proposed test for 'unfairness'. ELA also invites the FCA to consider providing more detailed guidance and further illustrative examples of how this balancing exercise will be conducted.
11. To further the aim of clarity, ELA would encourage the RDC to adopt the practice of giving reasons for decisions to publish. This would be consistent with the FCA's stated aim of transparency (§ 2.5). Employing firms, individual employees, and their advisors would benefit from a clearer understanding of the FCA's policy on publication and how it was applied in practice. Providing reasons for a decision to publish will be particularly important because there is no right of referral to the Upper Tribunal against the RDC's decision to publish.
12. ELA invites the FCA to consider strengthening or at least clarifying the proposal to "*probably*" not publish where there was clear and convincing evidence that the physical or mental health of an individual or direct family member would "*seriously deteriorate*" (§2.18-2.19). ELA also wishes to highlight the disability discrimination and associative discrimination issues raised by this proposed approach which are considered in more detail in paragraph 35 below.
13. In respect of the FCA's proposed approach where the health of the subject or a close family member would be adversely affected from press intrusion (§2.18), it is noted that the FCA considers this may be "*less straightforward*" and ELA invites the FCA to consider the practical and evidential difficulties faced by individuals in these circumstances. Where the disciplinary

² See Warning Notices: Guilty until Proven Innocent? Bloomberg UK Financial Services Law Journal, (4 April 2011) authors Harvey Knight and Colin Smith, Withers LLP.

allegations have previously been kept confidential, such that there has not yet been any publicity, it will be particularly difficult for the subject to adduce evidence of the impact of media intrusion on their health (or that of their immediate family).

14. ELA invites the FCA to consider publishing certain warning notices anonymously. The FCA states that the principal purpose of the new power is to *“promote early transparency of enforcement proceedings. The financial services industry and consumers will be able to understand the types of behaviours that the FCA considers unacceptable at an earlier stage”*. This aim may be achieved, at least in part, by publishing notices anonymously – which would address many of ELA’s concerns about the employment consequences of publication as set out in this Response.
15. ELA also invites the FCA to consider those (admittedly unusual) circumstances where enforcement proceedings are brought against an individual employee only and not his or her employing firm. In such circumstances, publication of the warning notice may be the first occasion when the firm becomes aware of the enforcement proceedings, in particular where the individual has left the firm’s employment or has joined a subsequent firm.
16. ELA notes that the proposed policy will make clear that arguments made solely on the basis that it is unfair to publish information at this (early) stage of the enforcement process will not affect the FCA’s decision (§2.24). ELA’s view is that the fact that publication is being considered:-
 - (i) before any findings have been made as to wrongdoing; and
 - (ii) in circumstances where an individual employee or employer’s reputation in the labour market will inevitably be damaged even if proceedings are discontinued before a Decision Notice

means that the threshold of ‘unfairness’ should be set at a lower level than in the current proposals. In particular, ELA disagrees that, if proceedings are discontinued, the harm caused to individual employees and/or employing firms can be remedied by publication of a notice of discontinuance on the FCA’s website. Harm such as dismissal from employment (and related disadvantages such as claims brought, or compensation paid out, in respect of any such dismissal) cannot be remedied in this way (as considered in paragraph 27 below). An internet search for such individual or firm will produce reports of the warning notice from other

sources (which will not include the notice of discontinuance) such that the damage to the individual/firm's reputation and consequent handicap on the labour market/adverse impact on recruitment and retention will continue to be felt.

17. For these reasons, whilst recognising that the statutory power to publish warning notice information will be used by the FCA in appropriate circumstances, ELA opposes publication at this early stage of enforcement proceedings where it would have adverse consequences on the particular employment law issues summarised in paragraph 4 above and set out in more detail below.

IV. The continuing employment relationship

18. ELA wishes to highlight particular consequences of publication for the continuation of the employment relationship. We note the FCA's view that a negative impact on a person's reputation is an inevitable consequence of publication (§2.16) but invite the FCA to consider the following additional consequences for the employment relationship.
19. In the case of an individual employee who argues that publication would be unfair as it would cause potential loss of livelihood (§2.22-2.23), ELA wishes to highlight the following points.
20. The proposal expressly assumes that most employers will have already decided whether to support the employee prior to publication (§2.23). However, ELA is concerned that the possibility of early publication of enforcement proceedings may discourage employers from supporting staff.
21. Many employers will not have reached the stage of deciding whether or not to dismiss an individual who is the subject of the warning notice at the point of the RDC's publication decision. Internal investigations and procedures may still be on-going, in particular where the disciplinary allegations are complex and/or involve a number of employees. Individuals may have been suspended or moved to alternative positions during the course of the internal investigation but will nevertheless remain in employment.
22. ELA wishes to highlight that even those individual employees whom the employer has decided to support (as described in §2.23) pending completion of its own and/or the FCA's investigations could face the risk of losing their jobs because of the fact of publication.

23. In the circumstances described in paragraphs 21 and 22 above, individual employees could face the risk of dismissal (or loss of earnings from demotion or a move to a different position), not because of their alleged misconduct or regulatory breach, but because the fact of publication of enforcement proceedings has resulted or may result in a loss of custom or loss of market confidence in the affected franchise or business unit or the individual employee(s). Publication of a statement that “*the FCA considers that*” a named individual has breached the FCA’s Statements of Principle could of itself lead to a loss of custom and/or market confidence in the individual employee. The reason for such dismissal would not be the individual’s alleged misconduct but the fact that publication of enforcement proceedings against them had rendered their continued employment unsustainable. This could be a potentially fair reason for dismissal, in employment law terms “some other substantial reason³” justifying the individual’s dismissal.
24. ELA notes that the FCA would “*probably*” not publish if there was “*clear evidence*” that staff were likely to be made redundant and the firm could demonstrate that redundancies would be caused by the publicity rather than any other factors (§ 2.21).
25. ELA invites the FCA to consider the practical and evidential difficulties individual employees or ex-employees will face in presenting evidence of likely redundancies which will be within the knowledge of the employing firm. ELA also wishes to highlight the fact that the impact of redundancies from loss of business caused by the fact of publication of enforcement proceedings will be felt by colleagues or replacement staff who may have played no part in the subject matter of the disciplinary allegation and irrespective of whether the subject of the warning notice has resigned or been dismissed.
26. More generally, ELA’s view is that the likelihood of redundancies, in particular of staff who were not the subject of a published or any warning notice or who had not been the subject of any allegations of wrongdoing whatsoever, should be treated as clear evidence of disproportionate harm from publication. Such employees will not be named in or derive any benefit from any subsequent notice of discontinuance. The FCA’s proposal contains no means of redressing either (i) the harm these redundant employees will suffer from the fact of publication or (ii) the potential burden on employers if, for example, publication forces them into dismissal(s) or a collective redundancy situation. In our view, this is one example of ELA’s more general concern that the proposed policy does not give sufficient weight to the interests

³ Section 98 (1) (b) of the Employment Rights Act 1996.

of and risk of irremediable harm or unfairness to affected employees other than those who are the subject of published enforcement proceedings.

27. ELA does not agree that, for employees dismissed because of the fact of publication or their dismissing employers, if the FCA's proceedings are subsequently discontinued, any harm caused in the interim is adequately remedied by publishing a notice of discontinuance (§2.23). The harm caused by the fact of publication in these circumstances would be the dismissal of the employee in circumstances where, but for the publication, the employer would have wished to retain them in employment. In such circumstances, the individual has suffered loss of their livelihood and the employing firm has lost the services of the individual and incurred the cost of replacing them. These losses are not capable of remedy by publication of a notice of discontinuance. ELA notes that both the employee and the employer are prevented from seeking compensation from the FCA from the losses caused by publication (save in exceptional circumstances⁴).

V. **Employers' internal procedures**

28. ELA is concerned that the risk of publication of FCA disciplinary proceedings may have an adverse impact on internal procedures, forcing employers to conclude investigations and/or reach decisions in disciplinary procedures in advance of publication and against the backdrop of enforcement proceedings which are already in the public domain. This is a particular risk in large-scale internal investigations involving a number of employees, some of whom may not (yet) be the subject of warning notices or published warning notices.
29. Internal procedures are generally confidential and, in particular where certain employees may (for good reason) have not yet been informed of the scope or fact of internal investigations, publication of the fact of related enforcement proceedings may jeopardise the confidentiality of the internal procedures. In the employment context, suspension is often for a relatively short period but if it were necessary to suspend pending the outcome of the FCA's investigation, this could result in suspension lasting several months (which of itself may make dismissal more likely).

⁴ By the statutory restrictions on damages claims contained in paragraph 25 of Schedule 1ZA to FSMA.

30. ELA is concerned to preserve the integrity and fairness of internal procedures and is particularly concerned by the potential impact on investigations into other employees' conduct of the publication of enforcement proceedings against a colleague or former colleague. ELA invites the FCA to consider including the impact on internal investigations and procedures as a material consideration when determining whether it would be unfair to publish information about warning notices. This is another example of ELA's more general concern that the proposed approach does not take sufficient account of the potential impact of publication on employees other than the subject of the warning notice.

V. Harm to future employment prospects

31. ELA wishes to highlight that the threat of an individual's potential loss of livelihood will not only be felt by employees who remain in employment at the date of the RDC's decision on publication (as is assumed in §2.23). An employee who has resigned or been dismissed may face a lengthy period of unemployment between publication of the fact of the warning notice and any subsequent notice of discontinuance or a Decision Notice dismissing the allegations. Such an employee will have suffered irremediable loss of earnings in this period and may suffer further irremediable loss as a consequence of this period out of the market.

32. Further, employees or former employees who were employed in the business or part of the business affected by the published warning notice may subsequently be handicapped on the labour market in consequence of the 'stigma' of being associated with their colleagues who were the subject of enforcement proceedings. As noted above, publication of a notice of discontinuance in respect of their colleagues is incapable of remedying the harm suffered by these employees and may also fail to remedy the harm suffered by those who are the subject of enforcement proceedings themselves.

VI. Equality and diversity consequences of publication

33. ELA wishes to highlight our concerns on the potential adverse effect of publication on (i) employing firms' willingness to come out in support of employees before a decision on publication and (ii) the fairness and integrity of internal procedures, in particular, that the timetable may be driven by the FCA's publication decision and employers may feel under pressure to be seen to have taken action against employees in advance of publication of enforcement proceedings. The fact of publication may also give rise to dismissals for

redundancy and/or some other substantial reason. ELA invites the FCA to consider the potential for these adverse employment consequences of publication to have a disproportionate impact on groups which are already underrepresented in the City such as younger, female or ethnic minority employees.

34. ELA recommends that the FCA does not publish dates of birth (as proposed at 6.7D (2) of the draft Amendments to the EG). This is sensitive personal data and may create the potential for age discrimination. If it is thought necessary to provide information to identify an individual in addition to his or her name, ELA suggests that this be provided by way of the individual's FCA Registration Number.

35. As noted above, ELA invites the FCA to strengthen or at least clarify its position against publication where there is evidence of a risk to damage to an individual's mental or physical health. ELA wishes to highlight the protection afforded to disabled persons by the Equality Act 2010 both in respect of their employment and against discrimination by qualifications bodies⁵. ELA also wishes to draw the FCA's attention to the protection against "associative discrimination" on grounds of disability, in particular that the protection extends to individuals who are not themselves disabled but who are treated less favourably on the grounds of someone else's disability. ELA's view is that the FCA's proposed policy as described in §2.17-2.19 requires further consideration and clarification in light of the risk of disproportionate harm to disabled persons who are the subject of a warning notice or disabled individuals associated with the subject of a warning notice such as a direct family member and/or the need to make reasonable adjustments to the application of the FCA's test of 'disproportionate harm' as it is applied to disabled persons.

⁵ Sections 53-54 of the Equality Act 2012. A qualifications body being defined in section 54 as including an authority which confers an authorisation, recognition, registration, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.

APPENDIX

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