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Ministry of Justice Consultation:

Fees in the High Court and Court of Appeal Division

Response from the Employment Lawyers Association

7 February 2012

EMPLOYMENT LAWYERS ASSOCIATION RESPONSE

MINISTRY OF JUSTICE CONSULTATION PAPER CP15/2011 – FEES IN THE HIGH COURT AND COURT OF APPEAL DIVISION

WORKING PARTY RESPONSE

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/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather than to make observations from a legal standpoint. The 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.

A sub-committee, chaired by David Widdowson was set up by the Legislative and Policy Committee of the ELA, to consider and comment on the consultation on fees in the High Court and Court of Appeal. Its report is set out below.

The Government has invited views on proposed changes to the fee charging system in the High Court and Court of Appeal Civil Division.

We are restricting our comments mainly to those aspects of the consultation that affect employment practitioners. While members deal primarily with claims in the Employment Tribunal and in the appeal courts (post Employment Tribunal), claims in the County and High Court are an important part of many of our members' work, for example in relation to contractual claims beyond the Employment Tribunal jurisdiction, claims for breach of fiduciary duty, breach of restrictive covenants and in respect of misappropriation of confidential information.

Issue fees in the High Court

1. **Question 1 – Do you agree that additional bands should be added for issue fees above the current maximum threshold? Please state the reasons for your answer.**

    1.1. Generally, given the stated Government aim of fees for litigating being set at a level which (save in respect of fee remissions) imposes no further cost on the tax payer, ELA follows the logic behind the Ministry of Justice's proposals to achieve a closer match between fees charged and the cost of the service provided. It is clear that the current system has been in place for an appreciable length of time and the type of cases with which the High Court and Court of Appeal deal frequently have a value which exceeds the highest current fee threshold. The result is that there is currently a broad category of matters which are charged an identical fee irrespective of the fact that they may differ significantly in terms of the likely resource they will use.

    1.2. ELA recognise that given the vast range of disputes dealt with by the High Court and Court of Appeal it is not possible to group claims by type and complexity and that value usually (although not always) is a good guide to the complexity of the action. It is also recognised that notwithstanding the changes proposed, the issue fees are likely to remain a small proportion of the total costs of any action brought in the High Court and Court of Appeal where the majority of litigants, especially in connection with the higher value claims, will be represented. As changes are not proposed in relation to the issue fees in connection with the lower value claims, and provided that the fees remission system continues to ensure that fees are met from public funds for those below the relevant income level, the important issue of access to justice should not be affected.

1.3. ELA is, however, concerned to ensure that access to justice is maintained for small employers who do not benefit from the remission scheme where an action may be critical for their survival or demise, for example, in a claim for breach of fiduciary duty, restrictive covenant or misappropriation of confidential information against a key employee. The overriding objective must be to provide justice in a cost effective manner.

1.4. The Consultation and Impact Assessment document contains limited data concerning the cost of each step of the court process. ELA consider that it is not appropriate for disproportionate fees to be incurred at the start of the process which do not reflect the cost of providing the service, for example, if the administrative burden and cost of issuing a claim form is the same regardless of value and complexity of a case. This requires careful consideration if the Ministry of Justice's proposals to both increase the current bands of issue fees and time-related hearing fees are to be implemented. Issue fees should not be a penalty for higher value Claimants, rather a true reflection of the level of the Court resources required to manage the claim. A process of fee charging later in the Court process when the parties have better information (and are equipped to inform the Court of the likely resource required) is likely to achieve a closer match to the cost of providing the service. ELA's view is that this is also likely to create an incentive for parties to narrow the issues in dispute and consider settlement and issues of proportionality at an early stage.

1.5. ELA welcomes a change to the fee charging system which would require Claimants to provide particulars of a more precise range in relation to the value of their claims. However, it considers that it is necessary for the Court to provide practical guidance to Claimants who are unable to quantify their claims at the issue stage, for example, until disclosure is provided.

Bills of Sale

2. Question 2 – Do you agree that the fee for issuing a Bill of Sale should be increased to £60? Please state the reason(s) for your answer.

2.1. This is not an issue which is likely to affect ELA members.

Judicial Review fees

3. Question 3 - Do you agree that the fee for permission to apply for judicial review should be increased from £60 to £235? Please state the reasons for your answer.

3.1. The Consultation and Impact Assessment document does not provide information about the cost of considering cases at the permission stage. In order to achieve a charging system which closely reflects the cost of providing the service, fees must be based on meaningful information concerning the cost at each stage and the number of cases which, if permission is refused on paper, do not proceed to request an oral hearing.

3.2. As judicial review cases have a very strict time limit for commencement of an action, ELA believes that a three stage charging process – consideration of the merits of the case on paper, on requesting an oral hearing where permission has been refused and on continuation - may be more appropriate. ELA believes that this is likely to represent a closer reflection of the level of the Court's resources at each stage and ensure access to justice is maintained for those of more limited means who have, in principle, a good claim.

3.3. Following the case of *R (Shoesmith) v Ofsted and others [2011] EWCA Civ 642*, it was made clear that judicial review is not necessarily a remedy of last resort. There may be circumstances where a public law remedy would be more valuable than an Employment Tribunal decision. Accordingly, it is essential that access to justice in these circumstances is maintained and that the fee for issuing proceedings (incorporating both the fee at the permission stage and continuation stage) must not create a bar to the Claimant using the most appropriate forum to pursue their claim.

4. Question 4 – Do you agree that the fee for continuation of a judicial review should be increased from £215 to £235? Please state the reasons for your answer.

4.1. Subject to ELA's answer to question 3, ELA do not consider that the proposed increase is likely to have a substantial impact on Claimants commencing judicial review actions.

Schemes of arrangement

5. Question 5 – Do you agree that the fee for schemes of arrangement should be increased from £155 to £340? Please state the reason(s) for your answer.

5.1. This is not an issue which is likely to affect ELA's members.

Fees for applications where no other fee is specified at the High Court

6. Question 6 – Do you think that an increase in the fee for applications on notice within proceedings from £80 to £105 is justified? Please state the reason(s) for your answer.

6.1. ELA believes that the proposed increase is unlikely to significantly impact on Claimants or Respondents bringing applications in the High Court and Court of Appeal. Where the fee better represents the cost of the service, parties may be encouraged to act proportionately, consider the merits of any application and, where possible, resolve issues by consent before issuing the same.

7. Question 7 – Do you think that introducing a new fee of £105 for urgent applications in the High Court is justified? Please state the reason(s) for your answer.

7.1. ELA does not oppose the introduction of a new fee in relation to applications requiring an urgent hearing. ELA's view is that, due to the nature of urgent applications, the proposed increase is unlikely to have any impact on Claimants or Respondents bringing these types of applications.

7.2. ELA's view is that Claimants or Respondents bringing these types of applications should be provided practical guidance to ensure that only truly urgent applications are correctly issued under this new category of application in order to avoid wasting the Court's time with applications wrongly issued under this head. Urgent applications, if appropriate, should not be discouraged and the increased categorisation of types of application should not slow the well established process for processing and hearing such applications. In the circumstances, the Court should be careful in attributing the increased fee to a more fast-tracked service (paragraph 58 of the consultation) and make clear the requirement of urgency.

Fees for general searches at the High Court

8. Question 8 – Do you agree that the existing fee of £45 for an official certificate of the result of a search should be expanded to include the search itself? Please state the reason(s) for your answer.

ELA has no objection to this proposal. If the majority of those caught by this fee change are the press a) they are likely to be able to afford the modest fee and b) it will not impact on access to justice (albeit it might impact on the extent to which it is seen to be being done).

9. Question 9
Do you agree that banding hearing fees by projected time is a fair way of reflecting the increased cost of providing longer trials without increased administrative burden? Please state the reason(s) for your answer.

In ELA's view the proposal for achieving the stated objective of having the cost of High court litigation met by those using it by relating hearing fees to trial duration would seem ostensibly fair, and fairer than basing court fees on the value of a claim alone.

In principle, subject to maintenance of the fees remission system and subject also to the points made below, in ELA's view this proposal could work, without affecting access to justice for any particular group or being unnecessarily administratively burdensome.

Banding/Hearing fee predictability

According to the consultation paper, during the course of this consultation and in previous court fee consultations the idea of charging hearing fees based on the actual duration of a trial by day or half day after a trial ends has met with some opposition. This has been due to its administrative complexity and because those whose hearings were particularly long may be faced with particularly large fees to pay the conclusion of their case, and because of concern over fees becoming unpredictable for litigants. We are not sure, however, that the currently proposed structure involving banded hearing fees necessarily does a great deal to allay concern about the unpredictability of hearing fees for litigants, save for those litigants expecting their trial to exceed ten days. Arguably, as a result of the banded fee structure there is less predictability than if one-off fees were charged based on the estimated trial duration on a daily rather than a banded basis. A party attending a case management discussion/listing hearing hoping that their matter might be set down for a five day trial, but who actually has their matter set down for a six day hearing would find themselves paying an extra £2,725 so that that one extra day in trial will in effect cost 2.5 times the cost of a one day hearing.

Furthermore the reasoning behind limiting the maximum fee to £10,900 is not immediately apparent. It might cogently be argued that trials exceeding this duration have a disproportionately higher cost attached to them in terms of, for example, the space required, the technology needed and the personnel involved. If the concern is that this may adversely impact on London as a forum for international litigation, this seems unlikely in view of the comparative costs quoted and the general point that the sums at issue in cases of this duration are likely to be such that factors other than cost of the use of the courts will dictate the parties' choice.

Underestimation of hearing duration – increasing the likelihood and burden of claims going part heard.

Within the consultation paper it has been suggested that the fee structure proposed might lead to an increased risk that the parties would attempt to underestimate the time needed in court, and without the active/robust involvement of the court staff in the case management process, ELA share the concern that this could lead to an increase the number of cases which go part heard. Such cases must place considerable additional burden on the judiciary (where they are obliged to re-read and re-familiarise themselves with a matter they might previously have sat on weeks or months earlier). In part this might be dealt with by the proposed daily rate for cases and, where a culpable underestimate is identified, a combination of costs and a penalty system

Split trials / preliminary issues hearings

It is not clear in the current proposal how it is proposed that hearing fees be set in the case of split trials. Presumably when a matter is set down for trial consideration would need to be given to the likely duration of both parts of a split trial and any hearing fee might be charged based on their combined duration? Likewise, is it suggested that the duration of any preliminary issues hearing be counted towards the overall estimated trial duration on which any hearing fee is calculated? The alternative would be separate fees for each but, either way, it would be helpful for the issue to be addressed,

Joined claims

It is similarly unclear what is proposed regarding who would pay the hearing fee where more than one Claimant's claims involving similar issues are joined and heard together. In the absence of a group litigation order presumably one court fee would be payable by both parties, but would it be split between them equally, or split in some way by reference to the proportion of the overall hearing duration likely (in the view of the listing judge) to relate to each matter?

Judicial obligation to apply discretion on fees to alleviate discriminatory effect

If, the presently proposed hearing fee structure is adopted, such that upon a trial date or trial week being fixed the listing judge is effectively setting the hearing fee, ought the relevant rules to include an obligation upon the judge to consider at that point, whether there are grounds for departing from the usual fee structure and instead applying a lesser fee to avoid discrimination on the grounds of any protected characteristic. For example, where one of the litigants is not a fluent English speaker (as might be more likely to be the case with litigants from certain racial/ethnic minorities) such that a translator is required at the hearing, this can significantly elongate the likely hearing duration. Is it appropriate therefore, in order to avoid any discrimination effect that the hearing fee in those circumstances is based upon the period of time the hearing might have taken but for the involvement of the interpreter? Similarly in a case involving a disabled litigant, who may perhaps have communication difficulties for example, ought the hearing fee not to be based on the likely duration of the hearing if the effect on hearing duration of the disability were ignored?

When the hearing fee falls due

As far as the time for payment of the hearing fee is concerned, the ELA has concerns about a litigant being required to come up with a hearing fee of up to £10,900 at only 14 days notice. As stated above, as little as an additional day or half day's hearing could result in an additional hearing fee of £2,725, and for many litigants, 14 days would simply not be long enough to come up with such a sum. Might a more sensible proposal be that the fee is payable within 14 days of dispatch of the notice of the trial week/trial date or within say eight weeks of the commencement of the trial/trial week whichever is the later? Sometimes the court will set down a very extensive list of directions including setting a matter down for hearing at a very early stage within the case management process, in which case the hearing fee would become payable, under the existing proposals, at a particularly early stage when there might still remain extensive procedural steps and every prospect that the matter might settle well in advance of trial. Whilst the ELA appreciates that in that situation the trial fee may well be refundable under the existing, unchanged, refund arrangements the Claimant having to pay the fee and wait for it to be refunded is still more financially burdensome (on top of the other costs of the litigation) than if the fee were not payable until closer to trial.. This issue is particularly significant bearing in mind that the potential consequences to a party of failing to pay the hearing fee promptly can be quite draconian including a strike out without prior notice.

Transitional arrangements

Presumably if the fee changes currently being consulted upon are adopted, they will apply to all cases set down for hearing after the date the new fees come into effect. Therefore, they are likely to apply to existing cases where Claimants might already have received a cost estimate, and assessed whether they could afford to bring the claim in question based on that estimate. For Claimants bringing a claim where the hearing might be expected to last ten days or more, they might then be looking at having to come up with an additional £9,810 in relation to the hearing fee alone. Some judicial flexibility about the dates that this payment would have to be made, at least during an initial period might lessen any detrimental impact on access to justice for affected Claimants. ELA is thinking here less of high value litigation (where such a fee might be a drop in the ocean compared to the totality of legal fees being incurred), and more about litigants who might be bringing a factually or legally complicated matters involving a lengthy hearing but which perhaps does not have particularly significant financial value.

Many types of employment claim e.g. stress at work claims, harassment claims etc. might fall into this category.

The UK Courts remaining competitive with the Courts of other jurisdictions.

Looking at the table shown within the consultation document setting out the currently proposed hearing fee structure in the UK and comparing this with hearing fees in other countries it is the ELA's view that our hearing fees would remain very competitive within this group, particularly for longer running trials. ELA does not therefore envisage that this proposal is likely to result in an overall reduction and High Court litigation being brought in this country in favour of other jurisdictions. Further it is the ELA's view that if a party were forum shopping for their litigation, or considering the jurisdiction clause to be inserted into a contract, cost may well not be the pre-eminent consideration, and that the high regard our legal system is held in internationally might be a weightier factor in the UK's favour.

LEI funded matters

Given that many legal expenses insurance policies provide £25,000, £50,000 or maybe £100,000 worth of insurance funding indemnity, an increase in High court hearing fees of up to £9,810 is likely to result in a proportionately significant reduction in the budget of insurance dependent litigants unless legal expenses insurers respond to any significant overall increases in court fees by increasing the level of indemnity offered when they sell new policies.

Fee Exemption

ELA is of the view that if the proposed hearing fees are introduced then there is likely to be a very significant increase in the number of applications for fee exemption on remission scheme 3 (based on net disposable income). This will create some administrative burden. Further some thought ought perhaps to be given to whether the 14 days presently proposed for payment will allow sufficient time for such applications to be made and determined and if necessary for any appeal. We wonder whether the level of awareness in the profession is such that there is wide appreciation of in fact how much disposable income a party might have and still be entitled to some fee exemption. Ought this scheme and the "exceptional circumstances" grounds for exemption/remission be publicised more within the legal profession if the current fee changes are introduced?

Small Businesses

A typical High Court employment claim might involve a relatively small newly set up business seeking to enforce restrictive covenants / prevent the misuse of its confidential information to protect its business interests from a departing employee intent on stealing it away to a competitor or setting up on their own account. Fee remissions are not available to corporate Claimants but we would suggest that there is a real issue as to whether access to justice is satisfied in respect of these without it. Ought fee exemptions to be considered for such companies? We understand that companies can get fee exemptions in relation to proceedings in the Gambling Tribunal, for example.

CFA funded matters

Whilst it is appreciated that Jackson will have an effect on CFAs and success fees, under the terms of many existing CFA agreements the success fee is dependent on/justified by reference to the party's solicitor having borne the disbursements during the conduct of the matter including any court fees. It will obviously have huge cash flow implications for those firms doing significant CFA funded High Court work if hearing fees on some matters suddenly increase tenfold overnight. Having the payment fall due closer to trial as suggested above might lessen the cash flow impact for these firms.

10 Question 10 - Do you agree that the current permission to appeal fee in the Court of Appeal should be increased from £235 to £465?

Yes. We agree that the current permission to appeal fee does not represent the true administrative costs of processing such applications, and we do not believe that the proposed sum will significantly impede access to justice.

11 Question 11 - Do you agree that the fee for permission to appeal in the Court of Appeal should be limited to a decision outside of a hearing, with an applicant liable for the full appeal fee of £1090 – but no further appeal fee – if they request a hearing? Please state the reason(s) for your answer.

Yes.
It does not seem unreasonable to expect applicants to cover the cost of a permission to appeal hearing, particularly if the fee can then be set against the cost of the full hearing.

However, given the fact that most permission to appeal hearings are relatively short, we do not believe that the cost of a permission to appeal hearing should exceed a flat fee of £1090, no matter what is decided about fee bands for main hearings.

12 Question 12 - Do you agree that each ancillary application to an appeal should attract a separate fee of £465?

Yes. We agree that ancillary applications impose the same judicial and administrative burden as the primary application and that this should be reflected in the fee structure.

13 Question 13 - Do you agree that that fees of £45 (without notice or by consent) or £105 (on notice) should be charged at the Court of Appeal Civil Division for any request or application to which no other fee applies (including extension of time requests)? Please state the reason(s) for your answer.

No.

While we agree that the Court of Appeal Civil Division should be able to charge a fee for applications to which no other fee applies, this should be a flat fee for all requests and applications, regardless of whether or not a hearing is required.

Given the proposed listing fee and (substantially increased) hearing fee, there seems to be no justification for charging a higher rate for applications which will require a hearing. A higher fee for on notice applications would simply result in the applicant being charged twice for administrative costs which are covered elsewhere.

14 Question 14 - Do you agree that a listing fee of £110 should be charged at the Court of Appeal? Please state the reason(s) for your answer.

ELA has no objection to this proposal. It seems reasonable that the Court of Appeal should try to cover (at least some) of its administrative costs through fees, and we do not see why listing at the Court of Appeal should attract no charge when listing at the lower courts involves a fee. Given the substantial amount of time involved in co-ordinating each Court of Appeal hearing, we believe this to be a reasonable charge.

15 Question 15 - Do you agree that the current appeal fee of £465 should be aligned with the multi-track hearing fee of £1090? Please state the reason(s) for your answer.

ELA does agree to this proposal in principle. There is no reason why a hearing in the Court of Appeal should be cheaper than in the High Court. Given the costs involved in bringing an appeal, the current fee seems extraordinarily low, and we do not believe that it is unreasonable to expect applicants to bear a greater proportion of the cost.

Please note, though, that this is subject to our comments below on the proposed level of hearing fees.

16 Question 16 - Do you agree that time-related hearing fees are a fair way of reflecting the cost of hearing appeals in the Court of Appeals Civil Division? Please state the reason(s) for your answer.

In principle, ELA agrees that a time-related hearing fee is a fair way of reflecting the cost of hearing appeals in the Court of Appeals Civil Division. However, we do have concerns about the proposed charging structure.

The banding system seems inconsistent, with appellants having to pay 3 times more for a 2 day hearing than for a one day hearing. In spite of the administrative difficulties involved, we would support a daily fee. We have already touched (in our response to Question 10) on the potential problem of applicants underestimating the length of their hearing. We would propose that the daily fee will be payable after the hearing for any overrun on time. This would be a fairer system and would allow applicants to assess more accurately their potential costs.

We do, however, have concerns that the sums involved will seriously affect access to justice, particularly given the enormous increase in fees that will be faced by applicants who anticipate longer hearings. The overall effect of the proposed changes would be to take the cost of court fees for a 10 day appeal hearing from £700 to a minimum of £11,475. We are concerned that this would render appeals unaffordable to many potential appellants.

As discussed in the consultation paper, access to justice at the Court of Appeal stage is especially important, since the Court of Appeal deals with complex points of law and sets precedents. We believe that the proposed increase in fees at the early (application) stages will deter many who do not have solid grounds for an appeal. Contrary to our view on High Court hearings, however, we believe a cap on fees in the Court of Appeal is appropriate and we would suggest capping hearing fees at, for example, 7 days, after which the daily fee would no longer be payable (except for the time by which a hearing overruns).

Please see our comments on potential discrimination, transitional arrangements, competitiveness in the international market and LEI funded matters at question 9.

17 Question 17 - Do you agree that applications under CPR 52.17 to reopen final decisions should be charged the appeal fee of £465? Please state the reason(s) for your answer.

Yes.

The Court of Appeal should be entitled to reclaim some of the administrative costs of dealing with such applications, and we believe this to be a fair charge that many applicants would expect to pay anyway. There is no reason why a fee should be payable to bring a case to the Court of Appeal in the first place, but the reopening of the final decision should be free. Nor do we believe that such a fee would significantly impede access to justice, since so few applicants are successful after reopening a final decision.

Members of the Working Party

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