employment lawyers association

Civil Justice Council's Procedure for Determining Mental Capacity in Civil Proceedings Working Group - Consultation Paper

Response from the Employment Lawyers Association

21 March 2024

Civil Justice Council's Procedure for Determining Mental Capacity in Civil Proceedings Working Group - Consultation Paper

Response from the Employment Lawyers Association

21 March 2024

INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We 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 and regulation or calls for evidence.

2. Ivor Adair and Jennifer Sole, members of the Legislative and Policy Committee of ELA have considered and respond to the Civil Justice Council's consultation on the procedure for determining mental capacity in civil proceedings.

3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

SUMMARY

4. While we agree that there is a lacuna in rules/guidance for litigants, judges and the legal representatives regarding investigating the issues that may arise prior to the provisions of Civil Procedure Rules (CPR) 21 being applied (which presuppose that a party lacks litigation capacity), this is such a sensitive issue that we would urge caution and discretion when considering change to the system.

NATURE OF THE ISSUE AND THE ROLE OF THE COURT

Q1 Do you agree that other parties to the litigation do not generally have any legitimate interest in the outcome of the determination of a party's current litigation capacity?

5. All parties (claimants, defendants, funders, legal advisors, the Court and the general public) have legitimate interests in whether a party to legal proceedings has litigation capacity given that a party's incapacity could render an outcome to a case

unsound/open to challenge appeal if, for example, such incapacity meant that a party was unable to make financial decisions by themselves.

Q2 Do you agree that the approach to the issue should be inquisitorial, with the court ultimately responsible for deciding what evidence it needs to determine the issue?

6. Under the CPR the Court has wide case management powers which can already be used to ensure that a dispute is resolved efficiently and in accordance with the Overriding Objective of enabling the Court to dispose of case justly and at proportionate cost and to ensure that parties are on an equal footing and can participate fully in proceedings. The Court could give effect to the Overriding Objective by way of use of these powers without changing the approach to inquisitorial, such change we perceive could have unforeseen negative consequences. In particular the boundary as to what is a permissible inquisitorial approach and what is a legal requirement could introduce complexity and uncertainty.

IDENTIFICATION OF THE ISSUE

Q3 Is clearer guidance needed as to the duty on *legal representatives* to raise with the court an issue as to the litigation capacity of their *own client*?

7. The Solicitors Regulation Authority, Law Society, Bar Standards Board and Bar Council have already produced guidance as regards dealing with vulnerable clients and those who may lack capacity. However, some of it is conflicting in terms of the other guidance and also in terms of a Solicitors' professional duties to the Court and to clients' best interests and the administration of justice; much emphasis is placed on legal representatives essentially trusting their gut instincts, suggesting "techniques" for assessments which legal representatives are not strictly speaking qualified to make (given the question of capacity is ultimately a medical one). As such, clearer guidance, where appropriate with examples, would be welcome.

Q4 What level of belief or evidence should trigger such a duty?

8. We believe that this is a question of policy and so we are not in a position to answer the same.

Q5 Is clearer guidance needed as to the duty on *legal representatives* to raise with the court an issue as to the litigation capacity of *another party* to the proceedings who is unrepresented?

9. Guidance for all parties would be useful/welcome.

Q6 What level of belief or evidence should trigger such a duty?

10. We believe that this is a question of policy and so we are not in a position to answer the same.

Q7 Should *other parties* to proceedings have a general duty to raise with the court an issue as to the litigation capacity of a party to the proceedings who is unrepresented:

a. In all cases?
b. In some cases (e.g. where the other party is a public body, insurer etc.)?

11. While we can understand the Court and legal representatives having a duty to consider parties' litigation capacity, we suggest a general duty would be difficult to manage and could lead to abuse of process by litigants in person.

12. Further, in employment cases, advisers are sometimes from trade unions. Accordingly, if the rules were changed to put this additional responsibility on lawyers, then consideration would need to be given as to whether it should also apply to trade union officials, who may not have quite the same training in exercise of balancing interests, as solicitors and barristers.

Q8 If so, what level of belief or evidence should trigger such a duty?

13. We believe that this is a question of policy and so we are not in a position to answer the same.

Q9 Should the Pre-Action Protocols be amended to require parties to identify issues of potential lack of litigation capacity at the pre-action stage?

14. If the Court's approach were to be more inquisitorial, we can see that it could assist parties, their representatives, and judges if amendment(s) were made to the Protocols, to assist the Court to direct what evidence of capacity might be required at an early stage in the proceedings and even stay proceedings while capacity is evaluated.

Q10 Should key court forms (claim forms, acknowledgments of service and defence forms) be amended to include questions about whether another party may lack litigation capacity?

15. We have concerns that this approach risks reducing the important and complex question of capacity to a "tick box" exercise.

Q11 Should there be any particular sanction(s) for a clear failure by another party to raise the issue?

16. As can be seen from this response, there is a lack of clear guidance for representatives to draw on when considering whether to raise the issue of legal capacity in proceedings. Until such time as such guidance is provided, we would not be minded to suggest that sanctions should be imposed on representatives for not raising this issue with the Court/Tribunal.

Q12 Do you have any examples of issues you have faced in practice when you have had to decide whether a client or another party was being 'difficult' or whether they might lack litigation capacity? If so, can you explain how these were dealt with.

INVESTIGATION OF THE ISSUE

Q13 Do you think any of the following should be involved in the investigation of an unrepresented party's litigation capacity:
a. The court?

b. Other parties and/or their legal representatives?
c. The Official Solicitor (Harbin v Masterman enquiry)?
d. Litigation friend (interim declaration of incapacity)?
e. Other (please specify)?

17. We have no firm views on this question – but would note that any approach would require appropriate funding/resources.

Q14 Do you have any comments to make in relation to your answers to the previous question?

17. If the system is to be changed, then additional funding is likely to need to be found for: case management; additional disclosure burdens; expert evidence; litigation friends/the official solicitor; stays to ensure the effective administration of justice.

Q15 Should the civil courts have more clearly defined powers to order disclosure of relevant documents for the purpose of investigating litigation capacity?

18. We consider that the Court has effective powers within the CPR (and Tribunal rules). Guidance for parties/their representatives may be helpful.

Q16 If so, in what circumstances should such powers be exercised?

19. N/A.

Q17 Should the civil courts have powers to call for reports, similar to those of the Court of Protection, for purpose of investigating and determining issues of litigation capacity?

20. It may be helpful for the courts to have this power, but could risk additional costs for litigants.

DETERMINATION OF THE ISSUE

Q18 Should there be a rule or presumption that other parties to the proceedings (and/or non-parties) cannot attend a hearing to determine a party's litigation capacity?

21. A rule may be problematic as a derogation from the principle of open justice. Consideration of rights under Articles 8 (right to respect for private life) and Article 6 (right to a fair trial) may be required, Given that all parties (claimants, defendants, funders, legal advisors, the Court and the general public) have legitimate interests in whether a party to legal proceedings has litigation capacity, such a presumption may be problematic and an approach where the departure from open justice is considered in context and competing interests are weighed in the balance is more likely to be just and appropriate.

Q19 Should the party be granted anonymity and/or should reporting restrictions be imposed in relation to the hearing?

22. In the Employment Tribunal context, it is possible to obtain an anonymity order or a restricted reporting order in a wide range of circumstances, for example that a hearing shall be conducted, wholly or partly in private, or that identities of specified parties should not be made public, either during the course of any hearing or otherwise on documents forming part of the public record. However, given clear and cogent evidence to establish a basis for derogating from the public interest in full publication, this may be difficult to achieve in a given set of circumstances and a special statutory framework may need to be considered for such a hearing.

Q20 What form should a party's right to challenge a determination that they lack capacity take, to ensure they are able to exercise that right effectively?

23. In the same way that the Court of Protection's decisions are challenged, parties must have the right of appeal. This could be by way of reconsideration in the first instance, rather than the Court of Appeal, to save time/costs.

Q21 Should a party's legal representatives be able to refer for review a determination on capacity which they consider to be obviously and seriously flawed?

24. As above, 20.

SUBSTANTIVE PROCEEDINGS PENDING DETERMINATION

Q22 Do you agree that pending a hearing to determine a party's litigation capacity, the starting point should be that no steps may be taken in the proceedings without the permission of the court?

25. Yes.

Q23 Do you agree that pending a hearing to determine a party's litigation capacity, the starting point should be that any existing orders in the proceedings should be stayed?

26. Yes.

Q24 If so, do you think those starting points should be subject to a 'balance of harm' test?

27. Yes.

Q25 What factors should be included in such a test?

FUNDING AND COSTS

Q26 Have you experienced problems securing legal aid for clients who appear to lack litigation capacity? If so, please summarise the nature of the problem.

28. Legal aid is not available for employment law matters, so ELA is unable to provide an answer to this question.

Q27 Should legal aid regulations be amended to enable a solicitor who has reasonable grounds to believe a client to be financially eligible to sign legal aid application forms and obtain a legal aid certificate, limited to obtaining an expert report?

29. Legal aid is not available for employment law matters, so ELA is unable to provide an answer to this question.

Q28 Should non-means tested legal aid be available for the limited purpose of investigating and determining the litigation capacity of a party to civil proceedings?
a. In all cases?
b. In cases within the scope of civil legal aid, as set out in the Legal Aid Sentencing and Punishment of Offenders Act 2012?

30. Legal aid is not available for employment law matters, so ELA is unable to provide an answer to this question.

Q29 Do you have any experience of issues arising in relation to payment of costs of investigating and determining litigation capacity by the party's insurers or other third-party funding?

Q30 Where it is necessary to investigate and determine a party's litigation capacity and the party does not have the benefit of legal aid (or other funding) to pay these costs, should the court have the power to require another party to the proceedings with sufficient resources to pay these costs up-front:
a. In all cases?
b. When the other part is the Claimant;
c. When the other party is a public authority;
d. When the other party has a source of third-party funding; or
e. Should the rules remain as they are (with the court able to order/invite such an undertaking in appropriate cases)?

31. This is a policy question which we are unable to comment on.

Q31 Should a central fund of last resort be created, to fund the investigation and determination of litigation capacity issues where there is no other feasible source of funding?

32. This is a policy question which we are unable to comment on.

Q32 On what principles should the costs of a determination be decided?

33. This is a policy question which we are unable to comment on.

Q33 Do you have experience of issues relating to the procedure for determination of litigation capacity in the civil courts not referred to above?

Q34 Do you have any other suggestions for changes that would improve the way the civil courts deal with parties who lack capacity?

34. ELA suggests that the CJC might want to consider if the Civil Courts may in some circumstances be obliged to commission advice on capacity, at public expense.

35. In the Employment Tribunal context, the rules of procedure could expressly include a relaxation of tests that apply to time limits, or inadequately pleaded claims so as to permit the claim to proceed, where capacity is a real issue.

36. Conduct including challenging capacity or seeking information regarding capacity as a means of gathering information generally in support of a case or undermine a Claimant's case to be a matter the Court should have regard to when determining costs.

On behalf of ELA's Legislative and Policy Committee

Ivor Adair Fox and Partners
Jennifer Sole Curzon Green

ELA Contact Person

James Jeynes, Head of ELA Operations
Email: jamesj@elaweb.org.uk
Tel: 01895 256972