

Call for Evidence document: Open Justice, the way forward

Response from the Employment Lawyers Association

7 September 2023

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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. A Working Party, co-chaired by Felicia Epstein and Jennifer Sole, Curzon Green, was set up by the Legislative and Policy Committee of ELA to respond to the open consultation call for evidence on open justice, the way forward. Members of the Working Party are listed at the end of this paper.
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 ELA membership.

EXECUTIVE SUMMARY

4. As a non-political organisation, ELA does not get involved in questions of policy. Having said that, we have detailed ongoing support for the principle of open justice and our understanding of the meaning of that term. We have emphasised the need for greater public legal education (PLE) to ensure that there is greater understanding of the powers of the Tribunals, possible claims and awards and their limitations, ET rules of procedure, powers of ACAS, and enforcement of awards¹. We have detailed the ways in which ACAS could be better utilised and the current lack of clarity of role that ACAS can play to support litigants in person. We have provided examples of the plethora of information available about the Tribunal systems and employment law while noting that access to the official government information could be improved. We have noted that transparency and open access to the Tribunal system is affected by the difficulty in getting responses from and being able to communicate with Tribunals. Finally, we continue to promote access to court information, documents and the promotion of

¹ See also ELA's [Response to BEIS Consultation - Good Work Plan: Establishing A New Single Enforcement Body For Employment Rights](#) and [Post-pandemic economic growth: UK Labour Markets: Call for Evidence](#)

broadcasting while at the same time explaining the inherent risks with the sharing of information and online broadcasts more widely.

QUESTIONS ON OPEN JUSTICE

QUESTION 1

Please explain what you think the principle of open justice means.

5. The principle of open justice allows everyone (i.e. the public) to witness and gain an understanding of the judicial process and how decisions are made.

QUESTION 2

Please explain whether you feel independent judicial powers are made clear to the public and any other views you have on these powers.

6. Some members of ELA suggest that the independent judicial powers of Employment Tribunal judges are not made clear, or clear enough, to the public.
7. In members' experience there is some misunderstanding amongst claimants about what judges may be able to award as a remedy should a finding be made in their favour. Frequently, claimants seek to obtain an apology from their former employer for the harm (or perceived harm) that has been inflicted upon them whilst at work, or an order requiring their former employer to take disciplinary action against a particular former employee who has played a part in their matter.
8. As it stands, in a basic unfair dismissal claim, a judge may only make an order for compensation, reinstatement and/or reengagement. Even then, in practice, orders for reinstatement and re-engagement are awarded in very rare cases (less than 1% cases). Additionally, except where a claim for discrimination has been successfully pleaded, any compensatory award is subject to a cap (at the date of writing, it's the lower of £105,707 or 12 months' gross pay). On many occasions, ELA members have found that claimants have submitted a claim significantly overestimating what they would be entitled to receive.
9. There is also some limitation in the judges' ability to enforce employment awards in situations where employers are failing to pay awards. For the claimants that pursue Tribunal claims through to decision, an outcome in their favour doesn't guarantee employers will comply with the Tribunal's findings. A significant proportion of employers don't pay claimants the money that they are owed. Tribunal awards are 'judgment debts' which means it is the claimants who have to take further legal action if the employer does not automatically pay the money.

QUESTION 3

What is your view on how open and transparent the justice system currently is?

10. In the Employment Tribunal, open justice is the default. The public may attend many types of hearings, view documents and find out about the outcome reached at the end of the process (via the gov.uk website). The language and processes have been simplified to help lay people to participate and understand.
11. However, despite this, the backlog in processing claims in the Employment Tribunal is significantly impacting users of the service. Data for December 2022 shows 50,518 outstanding cases compared to 47,041 in December 2021. Cases are often listed for hearing more than 12 months from when the request was first made, while more complex claims can take more than two years to get a judgment².
12. Contacting Tribunals can be challenging. Members of ELA have found that many Tribunal offices are poor at answering telephone calls due to a lack of resources, and it might take many weeks for the Tribunal to respond to an email (although this has not been the case in every Tribunal).

QUESTION 4

How can we best continue to engage with the public and experts on the development and operation of open justice policy following the conclusion of this call for evidence?

13. ELA members would welcome greater engagement with employment bodies, such as ACAS or the various trade unions, and would find greater engagement useful with these organisations. It is important that there is an open continual dialogue for feedback with them and the messages being shared with them is consistent.

QUESTION 5

Are there specific policy matters within open justice that we should prioritise engaging the public on?

14. Yes. ELA believes that educating the public is key to promoting the principle of open justice particularly in terms of understanding ACAS's role and alerting participants to the limitations that an Employment Tribunal has, for example, in relation to the case load backlog and awards that a Tribunal can make.
15. Access to specialist employment law advice is also very important with a view to reducing the pressure on the Tribunal system. If employees are not members of a trade union or do not have a qualifying insurance policy (as part of their home insurance, for example), then they are left to rely on pro bono services (such as the Employment Tribunal Litigants in Person Support Scheme ('ELIPS')) or the Citizens Advice centres, if they cannot afford legal advice. It has been reported that appointments are limited with these schemes, and if an appointment can be arranged, they are usually only very brief (up to fifteen minutes). It is hoped that early advice would help reduce the risk of claims that are highly unlikely to be successful from reaching the Tribunal. Professional guidance when drawing up claims

²<https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/spiralling-50000-employment-Tribunal-backlog> (9 July 2023)

and engaging with the Tribunal system can also prevent simple administrative errors from causing overly long delays.

QUESTIONS ON LISTINGS

QUESTION 6

Do you find it helpful for court and Tribunal lists to be published online and what do you use this information for?

16. Yes. For hearings conducted in the Employment Tribunal Service, it is helpful to have this information, the Employment Appeal Tribunal has a daily list that is easy to find on the Courts and Tribunals website. However, the Employment Tribunal does not have a similar list on this website. It is currently provided by Court Serve which requires setting up an account and logging in to access a daily court list.
17. The majority of the members of ELA will have direct correspondence with relevant Tribunal offices and notices of hearings so do not regularly use these lists.

QUESTION 7

Do you think that there should be any restrictions on what information should be included in these published lists (for example, identifying all parties)?

18. No. In the Employment Tribunal service all relevant information (names of the parties, the matters being determined at that hearing) should be as a default be published for the Employment Tribunals, as they are an open court procedure. This was available in paper form pre-pandemic as the cause list for the day was published at each hearing centre. This should include all the parties' names and the nature of the hearing that is listed. Information withheld should be where a party has successfully applied for a Rule 50 reporting restriction, the amended details need to be taken account of. There should also be appropriate procedures in place that when a Tribunal Judge makes a Rule 50 Order that any future listings are prioritised for the appropriate anonymisation before publication.
19. It is crucial to strike the right balance between greater publicity and rule 50. ELA questions whether greater guidance and understanding of when restricted reporting orders and anonymity orders would be granted. It is one thing for witnesses and claimants to face a small number of interested parties in a public Employment Tribunal setting but very different for the possibility, even if remote, that there be much wider access and possibly ongoing access (in the case of recordings) to those proceedings. There may be issues which are not immediately relevant to the case which may make people reluctant to come forward. For example, cases involving victims of domestic violence who don't want to be tracked down by former partners and cases involving children in settings such as schools, nurseries etc. The possibility of much wider publicity may put off genuine claimants and some defendants from participating in the Tribunal process.

QUESTION 8

Please explain whether you feel the way reporting restrictions are currently listed could be improved.

20. It is unknown to ELA how well reporting restrictions are generally dealt with throughout the whole of the Employment Tribunal Service, as these are dealt with by each Tribunal office. It is also not common to have reporting restrictions in Employment Tribunal Claims. Where these are directed by judges, these are most commonly seen in judgments dealing with specific matters, such as determinations on disability and a claimant's name is redacted from the judgment.

QUESTION 9

Are you planning to or are you actively developing new services or features based on access to public court lists? If so, who are you providing it to and what are they interested in this data?

21. ELA is not currently planning on developing any new services or features.

QUESTION 10

What services or features would you develop if media lists were made available (subject to appropriate licensing and any other agreements or arrangements deemed necessary by the Ministry of Justice) on the proviso that said services or features were for the sole use of accredited members of the media?

22. ELA is not currently planning on developing any new services or features.

QUESTION 11

If media lists were available (subject to appropriate licensing and any other agreements or arrangements deemed necessary by the Ministry of Justice) for the use of third-party organisations to use and develop services or features as they see fit, how would you use this data, who would you provide it to, and why are they interested in this data?

23. ELA is not currently planning on developing any new services or features.

QUESTIONS ON ACCESSING COURTS AND TRIBUNALS

QUESTION 12

Are you aware that the FaCT service helps you find the correct contact details to individual courts and Tribunals?

24. Members of ELA are mainly legal professionals and, while would therefore be able to access the FaCT service, would not generally need to do so to access information about specific Employment Tribunals.
25. Insofar as access by members of the public is concerned, however, it should be noted that a Google search for the location of a local Employment Tribunal does not bring up the FaCT service as one of the top results. Instead, the first result is for the Courts, Sentencing and Tribunals page under the Crime, Justice and Law section of the Gov.uk website. This page will link to contact details for Employment Tribunals but with fewer details than the FaCT page. It may well be that employees and/or workers seeking information who do not have legal representation will not find their way to the FaCT page.

QUESTION 13

Is there anything more that digital services such as FaCT could offer to help you access court and Tribunals?

26. For the reason explained above, it would be useful for other pages on the Gov.uk website which list Employment Tribunals to cross-link to the FaCT service as this provides more detailed information about the contact details and services at each Employment Tribunal. As set out in ELA's response to question 61, we further note that there is a very large volume of information on employment rights available online so further thought could be given to the best way to signpost all users of the system to a centralised source of information on UK employment rights and how to enforce them. This should include how to access the Employment Tribunals.
27. ELA further notes that accessing Employment Tribunal information may be difficult for the public from the FaCT page if the person searching for the information is not already aware of the claim they wish to bring or the appropriate forum. For example, to access information about Employment Tribunals, the person searching will need to tick the option for a money claim and employment claims are listed as 'job disputes related to pay'. It may not, therefore, be clear that this option also covers matters such as discrimination claims which may not be related to pay³.
28. The listing for each Employment Tribunal contains useful information. However, while this resource cannot be expected to provide detailed advice on the Employment Tribunal process, the link to further information about how to submit a claim could be clearer so that the public are better signposted to other resources.

QUESTIONS ON REMOTE OBSERVATION AND LIVESTREAMING

³ <https://www.find-court-Tribunal.service.gov.uk/search-option>

QUESTION 14

What are your overarching views of the benefits and risks of allowing for remote observation and livestreaming of open court proceedings and what could it be used for in future?

29. The benefits would be to allow members of the public, students and other junior/training lawyers access to Tribunal hearings they would not normally be able to see. This would promote education, development and understanding of employment law and the Tribunal process, especially when this process has a high proportion of litigants in person.
30. The risks are possible that personal information would be disseminated into the public domain, whilst most Tribunal hearings are public the amount of dissemination of information about a person's employment history and claim is relatively small. It is generally contained to the parties and representatives in that case. If the public do attend public hearings in the Employment Tribunal Service, it is generally limited to relatives of the claimant or employees of the respondent. Anecdotally it is a very small number of independent people who attended in person hearings. If these hearings are broadcast, they will become available to all with internet access to watch.
31. There could also be a risk of interruption by observers if they were not automatically muted and camera off on any remote observation. This would need to be controlled by the clerk or judge to ensure that those taking part in the proceedings can conduct this without interruptions. Issues with contempt of court may arise if observers continually disrupt proceedings as the Tribunals ability to actually take action in relation to contempt is limited.
32. A serious concern for remote observation or livestreaming is the risk of 'covert' recording, where an observer uses software or external hardware to take an unauthorised recording of the proceedings. In a in person hearing, this sort of recording is much harder to achieve as the Judge and parties are in a more optimal position to potentially spot someone starting recording equipment, especially if this is recording video. In a remote environment, this is likely to be impossible as no one is able to observe what a remote observer is engaged in. These recordings could then be used for any number of purposes, including being edited to provide a false or amended portrait of what took place in that hearing.

QUESTION 15

Do you think that all members of the public should be allowed to observe open court and Tribunal hearings remotely?

33. In principle, yes, anyone should be able to observe an open Employment Tribunal hearing. These have been open to the public to attend in-person in any event. With the more integrated use of Cloud Video Platform for hearings and the slow return to in-person hearings, the public should be allowed to attend these hearings.

QUESTION 16

Do you think that the media should be able to attend all open court proceedings remotely?

34. Yes, if the hearing is an open hearing, then the press should be able to attend, remotely and/or in-person. If there are any reporting restrictions these should be communicated to the press before the hearing commences.

QUESTION 17

Do you think that all open court hearings should allow for livestreaming and remote observation? Would you exclude any types of court hearings from livestreaming and remote observations?

35. All Employment Tribunal hearings should be open to, in principle, livestreaming and remote observations. This digitally reflects members of the public being able to attend the hearing centres with the exclusion of any closed hearings or hearings to determine rule 50 applications.

QUESTION 18

Would you impose restrictions on the reporting of court cases? If so, which cases and why?

36. In the Employment Tribunal where there has been a successful rule 50 application made then these restrictions should be carried over into the reporting of a case.

QUESTION 19

Do you think that there are any types of buildings that would be particularly useful to make a designated livestreaming premises?

37. Any building that is set out like a courtroom and has the relevant digital and camera functionality to broadcast/livestream hearings. Current Employment Tribunal hearing centres do have some of this functionality.

QUESTION 20

How could the process for gaining access to remotely observe a hearing be made easier for the public and media?

38. Listing on case lists that remote hearings can be accessed via contact with the relevant Tribunal office. The Employment Appeal Tribunal, when conducting remote hearings, publicise details on its hearing lists and who to contact to obtain access to the virtual hearing.

QUESTIONS ON BROADCASTING

QUESTION 21

What do you think are the benefits to the public of broadcasting court proceedings?

39. The benefits would be to allow members of the public, students and other junior/training lawyers access to Tribunal hearings they would not normally be able to see. This would promote education, development and understanding of employment law and the Tribunal process, especially when this process has a high proportion of litigants in person.

QUESTION 22

Please detail the types of court proceedings you think should be broadcast and why this would be beneficial for the public? Are there any types of proceedings which should not be broadcast?

40. Final hearings should be broadcast as any preliminary matters will have been dealt with. The giving of evidence and submissions for each party should be available to the public to watch if they are interested. The general public were previously able to attend any preliminary hearing and final hearing in the Employment Tribunal, except where these were closed hearings.
41. It would be beneficial to the public as they will be able to more effectively see how Employment Tribunals work on a variety of employment matters. It will aid education of the public and those in a legal education being able to see the Tribunals at work.
42. Closed hearings by default should not be broadcast as the judge has determined that there are elements of the case that should be dealt with by the parties and judge alone. Parties should be able to make applications to the Tribunal to have hearings prevented from being broadcast and the judge can make this determination. There should also be appropriate procedures in place that when a Tribunal Judge makes a Rule 50 Order that any future listings are prioritised for the appropriate anonymisation before publication/broadcast.

QUESTION 23

Do you think that there are any risks to broadcasting court proceedings?

43. Risks include the possibility that personal information would be disseminated into the public domain, whilst most Tribunal hearings are public the amount of dissemination of information about a person's employment history and claim is relatively small. It is generally contained to the parties and representatives in that case. If the public do attend public hearings in the Employment Tribunal Service, it is generally limited to relatives of the claimant or employees of the respondent. Anecdotally it is a very small number of independent persons who attended in person hearings. If these hearings are broadcast, they will become available to all with internet access to watch.

44. There are also issues with risks of covert recording, as set out in the response to question 14.
45. Access to a copy of the court documents being used for the broadcasted hearing is also a matter to be considered. During in person hearings, there is usually a copy of the bundle that is available for the public and or press to read. This copy is not allowed to be taken away or copied by anyone in attendance. However, in a remote hearing access to and being able to read the bundle becomes very difficult. Any publication or access to these documents, risks them being copied or retained by observers not party to the litigation and obtained without permission of the court. This could lead to concerns of the protection of personal data. Whilst everything in a court bundle is nominally in the 'public domain' as it has been submitted into public proceedings, the dissemination of this personal data is usually very limited, being to the parties, counsel and the Tribunal staff and judges. In the rare occasion outside observers are present at the hearing they are usually interested parties (family, friends) so the impact on the persons rights and freedoms is very limited. Where this access is expanded to the world at large through access on the internet the dissemination of this information can and will expand greatly without any effective control.

QUESTION 24

What is your view on the 1925 prohibition on photography and the 1981 prohibition on sound recording in court and whether they are still fit for purpose in the modern age? Are there other emerging technologies where we should consider our policy in relation to usage in court?

46. Employment Tribunal hearings are not recorded in any manner at the moment. It would benefit if the hearing were recorded (audio) in any event. This is the subject of review as we understand the position. In general, the ban seems no longer to be fit for purpose. However, the impact that this has on Employment Tribunal proceedings is limited. Whilst it likely does take place, there is no evidence to suggest that hearings are covertly recorded by parties, even when this does happen it will more likely that not be for their own purposes related to the proceedings.
47. Allowing parties, especially litigants in person, to obtain copies of an audio recording or take their own may be beneficial. It may have the benefit of reducing stress as they are able to obtain a full recording of the hearing to supplement any notes they took at the hearing and therefore be more able to concentrate on the matters being determined by the Tribunal. Recordings, in ELA's view should however be closely controlled by the Tribunal and transcripts etc obtained to prevent editing and unauthorised use of any recording.
48. Permitting photography in a Tribunal hearing is unlikely to have significant impact as the majority of cases are unlikely to garner much interest from those not involved in proceedings. It is also unlikely that parties to the proceedings would take photographs themselves as they would already have the documents in the bundle.
49. Where the matters are of significant interest, the allowing of photography is again unlikely to cause significant interest. There is unlikely to be any significant issues related to data protection as parties' names and other details are again in the public domain in a public

hearing. Where press may be interested in taking photographs this is likely to be similar to high profile cases in other courts and Tribunals, where it is of the person giving evidence on the stand, which is currently provided by court artists. Many witnesses might find photography intrusive and off-putting at the stage at which they are giving their evidence. Where there is sufficient public interest there is opportunity for photography both before and after the proceedings on any one day.

QUESTIONS ON SINGLE JUSTICE PROCEDURE

QUESTION 25

What do you think the government could do to enhance transparency of the SJP?

50. As employment lawyers, ELA cannot comment on the SJP.

QUESTION 26

How could the current publication of SJP cases (on CaTH) be enhanced?

51. As employment lawyers, ELA cannot comment on the SJP.

QUESTIONS ON PUBLIC ACCESS TO JUDGMENTS

QUESTION 27

In your experience, have the court judgments or Tribunal decisions you need been publicly available online? Please give examples in your response.

52. Yes. Copies of Employment Tribunal judgments and written reasons have been made available online since 2017. ELA members access these documents.

QUESTION 28

The government plans to consolidate court judgments and Tribunal decisions currently published on other government sites into FCL, so that all judgments and decisions would be accessible on one service, available in machine-readable format and subject to FCL's licensing system. The other government sites would then be closed. Do you have any views regarding this?

53. The Ministry of Justice has terminated its contract with the British and Irish Legal Information Institute (Bailii). Whilst Bailii's format and accessibility needed modernisation, it is a useful source of information, particularly as it set out databases for the whole of the UK, Ireland and other jurisdictions. It is a useful tool, particularly for legal students. It appears that the FCL does not provide for Tribunal judgments in Scotland, Northern Ireland or the Republic of Ireland. As some of ELA's members advice on employment law

matters within the entirety of the UK and Ireland, it would be beneficial to include judgments from all these jurisdictions.

QUESTION 29

The government is working towards publishing a complete record of court judgments and Tribunal decisions. Which judgments or decisions would you most like to see published online that are not currently available? Which judgments or decisions should not be published online and only made available on request? Please explain why.

54. Where the parties to a case in the Employment Tribunal reach a settlement, the ET will usually issue a judgment dismissing the claim on withdrawal. Prior to 2020, these were published online, meaning that a claim and names of the parties (as well as the 'jurisdiction code', identifying the type of claim, i.e., unfair dismissal) would be publicly available, even though no hearing had taken place. After 2020, these types of judgments were not published. Publication of these judgments raise potential concerns as set out below.
55. If an employee could see that their employer has a pattern of settling particular claims similar to their own, this may encourage them to bring a claim with a view to attempting settlement.
56. Whilst inappropriate and potentially discriminatory, an employer may use this service to vet job applicants and to help establish whether they're a serial litigant and avoid hiring them for this reason.

QUESTION 30

Besides court judgments and Tribunal decisions, are there other court records that you think should be published online and/or available on request? If so, please explain how and why.

57. By publishing pleadings and submissions, it will help litigants in person with preparing their own cases, particularly where they cannot afford legal representation.
58. This should allow access to justice for more individuals who either do not have the education and/or legal skills or do not have the funding to get advice.
59. This in turn will make it easier for Respondents, who are more likely to be represented, and the overall process. Litigants in person should have a better understanding of the actual legal questions and understand how to adequately/appropriately produce pleadings without the need for the Respondent's representative explaining the issues where documents are not in the right format. It may also lead to less judicial input, as on occasions, they are required to support the Claimant in determining the issues.
60. Publishing judgments and decisions online will allow easier access to them.

QUESTION 31

In your opinion, how can the publication of judgments and decisions be improved to make them more accessible to users of assistive technologies and users with limited digital capability? Please give examples in your response.

61. Individual judgments and decisions sent out do tend to be accessible and that's because this has been in place from the start of the case. If someone wants to look up a judgment, then it can depend on the type of assistive technology they are using and on what device they are using. For those who are digitally excluded then it will depend on their preferred format and how reasonable it is to provide this.

QUESTION 32

In your experience has the publication of judgments or Tribunal decisions had a negative effect on either court users or wider members of the public?

62. The publication of Employment Tribunal decisions and written reasons (which is likely to have a significant amount of factual detail) can have a negative effect on court users. However, without publication of such judgments the open justice principle would be seriously eroded, as the public would be less able to understand how and why a Tribunal came to its decision. Whilst we set out below the drawbacks of publishing of decisions and written reasons it remains a fundamental part of an open justice system that judgments and written reasons are published in full. Any matters that should not be published can be controlled by case management powers such as restricted reporting orders. These principles override any other interests in the three succeeding paragraphs.

63. From a respondent employer's perspective, it may want to protect its reputation, particularly where it has been reported in the media. There is also the risk that confidential information will be shared as part of this process.

64. From the perspective of a claimant employee, they may not want the details of their case made public, particularly where this may impact future employment and their own reputation.

65. Wider members of the public may be affected where they're referenced within an Employment Tribunal claim, for example, allegations may be made against a manager and their details will be included within claim. Even if the Tribunal does not uphold the Claimant's claims, the details of the manager will likely remain searchable for the rest of their career.

QUESTIONS ON THE COMPUTATIONAL REUSE OF JUDGMENTS ON FIND CASE LAW AND LICENCING

QUESTION 33

What new services or features based on access to court judgments and Tribunal decisions are you planning to develop or are you actively developing? Who is the target audience? (For example, lawyers, businesses, court users, other consumers).

66. As employment lawyers, ELA does not intend to develop such services/products.

QUESTION 34

Do you use judgments from other territories in the development of your services/products? Please provide details.

67. ELA does not intend to develop such services/products.

QUESTION 35

After one year of operation, we are reviewing the Transactional Licence. In your experience, how has the Open Justice and/or the Transactional Licence supported or limited your ability to re-use court judgments or Tribunal decisions. How does this compare to your experience before April 2022? Please give examples in your response.

68. ELA has no such experience.

QUESTION 36

When describing uses of the Transactional Licence, we use the term 'computational analysis'. We have heard from stakeholders, however, that the term is too imprecise. What term(s) would you prefer? Please explain your response.

69. ELA has no such experience.

QUESTIONS ON TRIBUNAL DECISIONS PUBLISHED ON GOV.UK

QUESTION 37

Have you searched for Tribunal decisions online and if you have, what was your experience, and for what was your reason for searching?

70. It is common for ELA members to search for Employment Tribunal decisions online. We are also aware that both respondents/employers and claimants/employees use the online facility to locate and/or to obtain copies of Employment Tribunal decisions.

71. Reasons for using the search function generally involve checking to see whether named parties have been involved in other Employment Tribunal claims or to understand the outcome where the party searching was not a party to the proceedings.

72. Anecdotally, we are aware that it can take some time for Employment Tribunal decisions to be available online and that users do not always find decisions which they expect to be available. We are also aware of confusion with members of the public as to what is available online, particularly given that the database for Employment Tribunal decisions only goes back to 2017 and a separate, manual request process is required for earlier decisions with not all earlier decisions being available.

QUESTION 38

Do you think Tribunal decisions should appear in online search engines like Google?

73. Given that access to judgments forms part of the principle of open justice, it is appropriate for Tribunal decisions, including those of the Employment Tribunal, to appear in online search engines such as Google. ELA's view is that making decisions easily available to the public increases awareness and understanding of employment law issues. It is also important for legal practitioners and other users to have access to decisions, not just to summaries written by third parties as these can be inaccurate or focused on specific points. Easy access to decisions is therefore important to enable all users of the Employment Tribunal system to understand legal developments.

74. However, it is also the case that the public availability of decisions, particularly those which are reached without a full hearing, can impact the parties involved in a way which may be disproportionate. Prior to 2020, the regulations governing the Employment Tribunals⁴ required the publication of all judgments and written reasons and this included the publication of the dismissal of claims following withdrawal by the claimant under Rule 52 of the Employment Tribunal Rules of Procedure ('the ET Rules'). We are aware of examples of other members of the public viewing these withdrawal judgments and interpreting the fact of the withdrawal as a finding against the respondent, for example in relation to discrimination.

75. ELA is therefore of the view that it is in the interests of both claimants and respondents for settlement of employment claims at an early stage and without judicial consideration to remain private and that details of dismissal judgments in these circumstances should not be publicly searchable. Further consideration is given below to the contents of decisions which are available on the register.

QUESTION 39

What information is necessary for inclusion in a published decisions register? What safeguards would be necessary?

⁴ Regulation 14(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations (S.I. 2013/1237)

76. ELA's response to this question relates to the publication of Employment Tribunal decisions in accordance with the ET Rules. Regarding the publication of the decisions following a substantive hearing into matters of liability and/or remedy, it is beneficial for the full decision to be published and publicly available. For the reasons considered above, the publication of part only of a decision is potentially misleading and legal professionals and the public need to be able to consider in full decisions reached at Employment Tribunal level as even though these decisions are not legally binding precedents, they form an important resource for parties considering litigation on analogous matters.
77. However, it should also be noted that Employment Tribunal litigation can involve consideration of matters that, while relevant to the proceedings, are commercially sensitive and/or of a highly personal nature. This is particularly the case in relation to sexual harassment claims under the Equality Act 2010 although similar concerns also arise on claims in relation to other protected characteristics. There is already a power under Rule 50 of the ET Rules which permits the Tribunal to grant anonymity/restricted reporting in appropriate cases. However, this is not always granted and should decisions be more readily searchable, further consideration may be required as to the safeguarding of the privacy of both parties and, in particular, third parties whose personal details may appear in judgments and who may have no control over the process and no advance knowledge of the inclusion of their personal details within a judgment. However, such considerations should be balanced against the default position that open justice is required, so that decisions can be understood and courts, Tribunals and parties can be scrutinised. Further, of course, as a common law system, a full record of cases is essential to the development of English and Welsh law.

QUESTIONS ON PUBLIC ACCESS TO SENTENCING REMARKS

QUESTION 40

Do you think that judicial sentencing remarks should be published online / made available on request? If that is the case, in which format do you consider they should be available? Please explain your answer.

78. As employment lawyers, ELA cannot answer this question.

QUESTIONS ON ACCESS TO COURT DOCUMENTS

QUESTION 41

As a non-party to proceedings, for what purpose would you seek access to court or Tribunal documents?

79. ELA members would generally be acting for a party in respect of Employment Tribunal proceedings. However, there are circumstances where legal professionals seek access to Employment Tribunal documents in order fully to understand the factual background to a particular judgment, where it impacts on other cases or advice provided to the parties to other proceedings and/or may shape best practice in relation to HR/employment law in the workplace.

QUESTION 42

Do you (non-party) know when you should apply to the court or Tribunal for access to documents and when you should apply to other organisations?

80. ELA members would generally be acting for a party in respect of Employment Tribunal proceedings and our response therefore relates to access to Employment Tribunal documents. In most cases, access is via the Employment Tribunal but on occasion non-parties do contact parties to proceedings directly to request access to documents.

81. The right to inspect witness statements during the course of a hearing is dealt with expressly at Rule 44 of the ET Rules and this information is therefore available to non-parties but would require either knowledge of the ET Rules or the ability to search for this information. It is also the case that further information on the application of Rule 44 is set out in Presidential Guidance issued by the Employment Tribunal⁵. This guidance contains details of the rights of access to witness statements and to supporting documents referred to in them during hearings. It is unclear how readily accessible this guidance is and we further note that the scope of the right of access to Tribunal documents has been subject to judicial consideration in a number of cases.

82. Post-Covid with the increased use of virtual hearings, there is a lack of clarity on how long documents are available once a claim has concluded. This issue is considered further in our response to question 44 below.

83. ELA's understanding is that members of the press are aware of the rights of access to witness statements (and supporting documentation) and do exercise this right. It is less clear whether other non-parties, for example, the public, academics and students studying employment law, or litigants in person, would be as readily aware of this right of access.

84. Further, given that the right applies (as a starting point) during the course of a hearing, the ability to access this material also requires knowledge that the hearing itself is taking place. The issues relating to the public availability of listings of hearings are considered elsewhere in this response.

QUESTION 43

Do you (non-party) know where to look or who to contact to request access to court or Tribunal documents?

⁵ <https://www.judiciary.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf>

85. Please see ELA's response to question 42.

QUESTION 44

Do you (non-party) know what types of court or Tribunal documents are typically held?

86. ELA's members have knowledge of the process for accessing documents in the context of acting for parties to proceedings. We do, however, note that there is a potentially a lack of clarity in the ET Rules as to the extent of the right to access Employment Tribunal documentation. As noted in the response to question 42 above, Rule 44 addresses the right to access witness statements that have been admitted into evidence however the broader right to access supporting documents is not set out in Rule 44 but instead appears in Presidential Guidance which may be less readily known about or accessible to non-parties.

87. As noted in the response to question 42, there has been a lack of clarity as to the right of access to materials after the conclusion of Employment Tribunal proceedings. This issue was the subject of an application to the Employment Tribunal by a media organisation and its right to access was granted on the basis of the importance of the principle of open justice only after appellate consideration of the issue, the request having been refused at first instance⁶.

QUESTION 45

What are the main problems you (non-party) have encountered when seeking access to court or Tribunal documents?

88. ELA's observations on the barriers to the access to Employment Tribunal documents are set out above in responses to questions 42-44. In addition, we also note that there may be increased issues with access to Employment Tribunal documentation as a result of the ongoing use of virtual hearings following their introduction during the Pandemic. Previously, access to copies of the witness statements and to the Tribunal bundle was facilitated via the provision of an additional hard copy which was made available to the public (including the press) during hearings which took place in person. One of the implications of the use of virtual hearings via the CVP platform is that the parties and the Tribunal make use of electronic bundles. The technology does not allow other observers to the hearing to access the bundle online and there is a lack of clarity over the process by which access to the documents can be obtained which may make it more difficult for non-parties to obtain the materials. Assuming that virtual hearings remain a feature of the Employment Tribunal process, it would assist users for updated rules on the access to Tribunal documents to be issued.

QUESTION 46

How can we clarify the rules and guidance for non-party requests to access material provided to the court or Tribunal?

⁶ Guardian News & Media Limited v (1) Rozanov 2) EFG Private Bank Limited [2022] EAT 12

89. Given that the rules for access to Employment Tribunal documents are contained in the Employment Tribunal Rules, Presidential Guidance and case law, it would assist non-parties for the rules to be consolidated and more readily accessible.

QUESTION 47

At a minimum, what material provided to the court by parties to proceedings should be accessible to non-parties?

90. In Employment Tribunal proceedings, there is frequently a tension between the open justice principles which require wide access to materials and the confidential nature of the matters under consideration. This is particularly the case where discrimination or harassment is alleged or where the nature of the claim means that confidential or confidentially sensitive information belonging to employer respondents and, in many cases, to their clients who are not a party to the proceedings, may be included within Tribunal bundles.

91. Employment Tribunals are used to considering this balancing exercise and it is clear that the principle of open justice is treated as being of 'overriding importance'. Given this and far greater use of electronic documents, it is difficult to justify an approach other than the current approach of allowing access to witness statements and the documents which are referred to within them subject to any orders already made for restricted reporting and/or anonymity. However, this does place high importance on Rule 50 and the power it contains for Tribunals to consider and grant appropriate restrictions on public disclosure. In this context, it may also be more likely that parties with legal representation are more likely to understand and utilise the protection offered by Rule 50 whereas litigants in person and non-represented third parties are less likely to be aware of the protection potentially available.

92. Further, the current position which permits access to documents when they are considered at a hearing remains appropriate. As considered in our response to the questions on judgments, it is appropriate that the contents of Claims/ET1s and Responses/ET3s should not be publicly available at a preliminary stage as this enables parties to consider their approach to claims, which may include settlement, before the claim becomes public knowledge.

QUESTION 48

How can we improve public access to court documents and strengthen the processes for accessing them across the jurisdictions?

93. ELA members' experience of access to documents is predominantly in respect of access under the rules of the Employment Tribunals. However, it is clear that there is no standard approach which applies across different jurisdictions. This presents a barrier, in particular for non-parties with less access to legal support who may be unaware of the differences and lack access to information on the process to be followed for different courts. As part of any future policy on access, it would therefore be of assistance if a standardised approach could be adopted. However, any such approach would still need to take into account the competing interests identified in the consultation paper and should include the ability for a balancing exercise between the principle of open justice as against the rights of privacy and confidentiality of the parties involved in the proceedings to be considered. ELA notes that these issues are commonly of concern in Employment Tribunal matters but that similar issues are likely to arise in other forums.
94. ELA would like to note that increasing digitalisation risks cutting off vulnerable communities and older employees who may not have access to digital resources or have difficulty navigating them. As such, there is a place still for physical documents in e.g., public libraries etc in languages relevant to the local community and e.g., text to speech facilities for people unable to read.

QUESTION 49

Should there be different rules applied for requests by accredited news media, or for research and statistical purposes?

95. The principle of open justice underpins the right of access to court documents and the information contained within them both for press and for research/statistical purposes. With that context in mind, introducing different rules for different categories of requesting entities is likely to add unnecessary complexity and cost to any standardised process.
96. However, in an employment law context, how the data is used will be different depending on who is using it. Where data is used for research and statistical purposes, the focus will generally be on the legal issues and any consideration of the factual background is needed only in that context. By contrast, it is clear from the relevant case law that the press will often wish to report on more specific factual details, in particular with reference to the names of organisations and/or individuals.
97. It has been accepted by the courts and Tribunals that this gives a better point of reference for the public, thereby making the reporting of the principles more accessible. However, this leads to a greater potential infringement on privacy rights, particularly for third parties. Without an ability to report individuals then a news report loses traction and interest.
98. On that basis, a possible approach may be to allow wide public access to court documents on a redacted basis, with additional rules applied for applications from accredited news media (or other bodies) for access to documents with fewer redactions applied although this may present its own challenges. To the extent that access is granted to documents with bespoke redactions applied, however, it should also be noted that the process of applying such redactions may be prohibitively expensive for the parties involved and further consideration may be needed on whether any reasonable associated costs should be borne by the party requesting access to the documents or whether this in itself would

act as a bar to open justice. Further, on balance, this two-tier system strikes us as a possible solution but is practically unworkable and creates the risk of two tiers of access without sufficient good reason; the better method is to rely on current case management decisions where the right to privacy is one of the factors which is considered.

QUESTION 50

Sometimes non-party requests may be for multiple documents across many courts, how should we facilitate these types of requests and improve the bulk distribution of publicly accessible court documents?

99. ELA's experience is based on the Employment Tribunals and their appellate jurisdictions, thus the making of requests across multiple courts is not an issue which members tend to face.
100. As a general observation, centralising the process of requests would assist non-parties in these situations however it would be important that a centralised system was flexible enough to account for specific issues which may arise in different courts, for example ensuring that any Employment Tribunal documentation provided was consistent with any Rule 50 orders for the relevant claim.

QUESTIONS ON THE COMPUTATIONAL REUSE OF JUDGMENTS ON FIND CASE LAW AND LICENCING

QUESTION 51

For what purposes should data derived from the justice system be shared and reused by the public?

101. Data derived from the Employment Tribunal system should be shared and reused for the following purposes:
- 101.1 By researchers for the purpose of noticing trends, i.e., whether there has been a rise in a particular type of claim, which in turn may influence government policy or generally educate the public;
 - 101.2 By legal students/trainees for the purpose of preparing their reports and dissertations;
 - 101.3 By legal advisers for use in their advice to clients (particularly to respondent employers);
 - 101.4 Employers could use this data to frame their HR policies and the training of managers, i.e. taking into account the specific types of Tribunal claims being submitted with a view to avoiding those types of claims;
 - 101.5 By the media for use in the preparation of their stories. This helps towards educating the public; and

101.6 Published and be available to the public so that they can hold the Tribunal system to account and be informed as to how it is operating.

102. As it stands, the data collected does not provide a complete picture of the Employment Tribunal and its users. Further data must be collected on this. As an example, it is currently unknown how many people are represented by non-legally qualified representatives in the Tribunal. The enforcement of Tribunal awards has already been referred to elsewhere in this response, but it is important to gather information in relation to failure to enforce awards and the financial cost of this.

QUESTION 52

How can we support access and the responsible re-use of data derived from the justice system?

103. Ultimately, people need to know that the information has been collected and prepared for use. It's unclear in the employment law sector whether people are aware of the relevant pieces of data and how to obtain it. Therefore, there needs to be more promotion and advertising of the data collection in an understandable format. The publication of the data should also be shared with all relevant employment organisations.

QUESTION 53

Which types of data reuse should we be encouraging? Please provide examples.

104. This has been addressed in question 51, although ELA would suggest that a priority would be to encourage data reuse for the purpose of understanding how the Tribunal system is working and ways of improving it for all parties.

QUESTION 54

What is the biggest barrier to accessing data and enabling its reuse?

105. Education is the key barrier preventing access to data and enabling its reuse. Individuals do not know it is there, and if it is, it is not in a format that can be used.

QUESTION 55

Do you have any evidence about common misconceptions of the use of data by third parties? Are there examples of how these can be mitigated?

106. As mentioned in the response to question 2, claimants often claim large sums inconsistent with their type of claim, which makes it difficult to settle claims. It would be helpful if the Government could provide a service/website/application, using the data

taken from similar cases, to set out what claimants are likely to get if they are successful. ELA understands that attempts have been made in Canada and the USA to prepare data in a format which would allow people to get a realistic sense of what their claim is worth.

QUESTION 56

Do you have evidence or experience to indicate how artificial intelligence (AI) is currently used in relation to justice data? Please use your own definition of the term.

107. AI can be used to support ELA members with legal research, i.e., by analysing vast amounts of legal data, including statutes, case law, and regulatory guidance. AI can also be used to undertake litigation analysis to predict the outcome of legal cases based on historical data and trends. This helps advisors develop legal strategies and advise clients on potential risks and liabilities.

QUESTION 57

Government has published sector-agnostic advice in recent years on the use of AI. What guidance would you like to see provided specifically for the legal setting? In your view, should this be provided by government or legal services regulators?

108. Guidance should be prepared setting out the rules where the use of AI is unacceptable or inappropriate. Whilst not in the field of employment law, as an example, a US lawyer has been fined for referencing non-existent judicial decisions produced by ChatGPT for research in a personal injury claim. The lawyer claimed that he did not know that the content could be false⁷. Guidance (and training on this) would have been useful in this scenario.

109. There should be guidance on how to contest and/or review (in other words, appeal) the use of AI, especially where decisions have been made in an employment setting.

110. Thought should be given to data protection and consideration of what measures are in place to protect sensitive information held by those in the legal profession when using AI.

111. It would be helpful to have advice prepared by the legal regulators, although ELA is mindful that this is a rapidly growing technology and therefore it will need to be regularly reviewed to ensure that it is fit for purpose.

QUESTIONS ON PUBLIC LEGAL EDUCATION

QUESTION 58

Do you think the public has sufficient understanding of our justice system, including key issues such as contempt of court? Please explain the reasons for your answer.

⁷<https://www.bbc.co.uk/news/world-us-canada-65735769> (10 July 2023)

112. In the employment rights context, an understanding of our justice system should include:

Knowledge or rights and responsibilities in law relating to the workplace

112.1. There is a need to address wide gaps in the public's knowledge on law in the workplace. This is a particularly acute problem for vulnerable workers including those who are:

112.1.1.1. From migrant communities. Many migrants do not recognise that they are being exploited or, if they do, are unaware that they have legal rights and recourse within the UK⁸.

112.1.1.2. Parents including pregnant women. A 2016 report prepared by IFF Research on behalf of the Department for Business, Innovation and Skills and the Equality and Human Rights Commission found that a lack of knowledge was a barrier to raising complaints⁹.

112.1.1.3. From sectors where there is higher risk of non-compliance with basic workplace rights, including those in cleaning, hospitality, domestic work, cleaners, construction, car washes and nail salons¹⁰. For example, the 2023 Resolution Foundation research into social care workers found that many were being paid below the minimum wage once travel time was taken into account. Many were not aware of this¹¹.

112.1.1.4. Those on irregular contracts including zero hours contracts, agency contracts, gig economy contracts¹².

Knowledge of how to advocate for oneself to ensure those rights are complied with

112.1.2. Raising issues at work can be stressful and frightening. Many fear repercussions from their employer. This means that many struggle with raising their workplace issues at the very start of the justice system.

112.1.3. A recent Resolution Foundation report on enforcing labour market rights found that one in twenty workers would do nothing if they thought their

⁸ 'Rights and Risks: Migrant labour exploitation in London Research report' Victoria Boelman, Dr Alessandra Radicati, Amelia Clayton, Sophie De Groot and Oliver Fisher June 2023

⁹ 'Pregnancy and Maternity Related Discrimination and Disadvantage: Experiences of Mothers' Authors: Lorna Adams, Mark Winterbotham, Katie Oldfield, Jenny McLeish, Alice Large, Alasdair Stuart, Liz Murphy, Helen Rossiter and Sam Selner. 2016 p14

¹⁰ 'THE UNHEARD WORKFORCE Experiences of Latin American migrant women in cleaning, hospitality and domestic work' Nahir de la Silva, Lucila Granada and Dolores Modern Latin American Women's Rights Service July 2019

¹¹ Who cares? The experience of social care workers, and the enforcement of employment rights in the sector Nye Cominetti Resolution Foundation January 2023

¹² 'THE GIG IS UP: PARTICIPATORY RESEARCH WITH COURIERS IN THE UK APP-BASED DELIVERY SECTOR' Focus on Labor Exploitation 2021

employer violated their rights, with those in the bottom income quintile more unlikely than those in the top income quintile to take any steps¹³.

- 112.1.4. The 2016 IFF research found that one in four mothers (27%) considered but chose not to go through their employer's internal grievance procedure, as they said the prospect was too daunting¹⁴.

Knowledge of where to go and what to do in the event of non-compliance

- 112.1.5. The UK labour market enforcement system is highly fragmented compared to many other countries. In addition to the local authorities, there are several enforcement bodies:

- 112.1.5.1. Employment Agency Standards Inspectorate
- 112.1.5.2. Gangmasters and Labour Abuse Authority GLAA
Pensions Regulator TPR
- 112.1.5.3. Health & Safety Executive
- 112.1.5.4. Statutory Payments Disputes Team
- 112.1.5.5. Equality and Human Rights Commission (EHRC)
- 112.1.5.6. National Minimum Wage Unit (HMRC NMW)

- 112.1.6. There is very poor knowledge of these enforcement bodies with 61% of private sector employees saying that they would not know of any organisation to approach¹⁵. Just 6% of private sector employees said they would approach one of the state enforcement bodies¹⁶.

- 112.1.7. Workers are left having no option but to individually enforce their rights in an Employment Tribunal. There is generally poor knowledge of the existence and role of ACAS in this process and very poor knowledge of the time limits for bringing a claim in the Employment Tribunal. ACAS does not have a policy of telling employees about time limits. Many migrant workers come from jurisdictions where workplace rights do not exist and where structures such as Tribunals do not exist. Terms such as 'ACAS' and the 'Early Conciliation process' are not commonly known. The ACAS website is only available in English and Welsh.

Knowledge of how to navigate the system in order to obtain rights.

- 112.1.8. The process of accessing justice in employment rights can be quite complex. It helps to have support from an expert in workplace rights. However only

¹³ 'Enforce for Good - effectively enforcing labour market rights in the 2020s and beyond' Lindsay Judge & Hannah Slaughter April 2023 p57

¹⁴ 'Pregnancy and Maternity Related Discrimination and Disadvantage: Experiences of Mothers' Authors: Lorna Adams, Mark Winterbotham, Katie Oldfield, Jenny McLeish, Alice Large, Alasdair Stuart, Liz Murphy, Helen Rossiter and Sam Selner. 2016 p14

¹⁵ 'Enforce for Good - effectively enforcing labour market rights in the 2020s and beyond' Lindsay Judge & Hannah Slaughter April 2023 p59

¹⁶ Ibid p60

22.3% of employees are members of a Trade Union¹⁷. There is no Legal Aid available for common complaints such as unauthorised deductions from wages, holiday pay claims or unfair dismissal. The not-for-profit sector is unable to meet demand, as it is underfunded and under-resourced. For low paid, non-unionised workers with no resources to pay for legal advice, there is often little option but to navigate the justice system alone.

112.1.9. The third sector relies on grant funding, with lawyers and caseworkers often in precarious employment positions, leading to a deskilling of the sector and attrition of qualified advisors. Without practical access to the Employment Tribunal, individuals have no way of enforcing their statutory rights. There are even more barriers to successful navigation of the justice system:

- 112.1.9.1. Very short time limits for a claimant to bring a claim;
- 112.1.9.2. Lack of clarity on firewalls between the Tribunal system and immigration processes;
- 112.1.9.3. Long delays in the Employment Tribunal process; and
- 112.1.9.4. Non-payment of a significant number of Employment Tribunal awards, with high civil court fees (which may be higher than the amount claimed) to enforce such awards.

QUESTION 59

Do you think the government are successful in making the public aware when new developments or processes are made in relation to the justice system?

113. Social media has become the main source of news online with more than 2.4 billion internet users, nearly 64.5 percent receive breaking news from Facebook, Twitter, YouTube, Snapchat and Instagram instead of traditional media¹⁸. In these spaces there is often knowledge being shared of the justice system but not by official government channels.

114. For example, over 33,000 members of just one Facebook group called 'UK employment law and HR advice' share their thoughts on the employment issues of other members. There is no regulation of the advice shared, and no guarantees of the quality of the advice, and yet many rely on the opinions of others to make decisions about their workplace issues. On Tik Tok, Valla posts short films about various topics. 1.2 million have viewed their film on wage theft. These are just two examples of where many people go to find information and yet there is very limited, if any, presence of official government or government funded organisations in these spaces.

115. ELA believes that the government could do more to make the public aware of developments by placing information in places that people visit to seek knowledge.

¹⁷https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1158789/Trade_Union_Membership_UK_1995-2022_Statistical_Bulletin.pdf

¹⁸ 'How Social Media Has Changed How We Consume News' Nicole Martin Forbes Nov 30 2018

QUESTION 60

Do you think the public has sufficient understanding of our justice system, including key issues such as contempt of court? Please explain the reasons for your answer.

116. In employment law, there are some crucial gaps in knowledge that are fundamental to the issue of accessing the justice system:

- 116.1. **Status** - Many low paid workers, particularly in the construction industry, cleaning and care are labelled as self-employed by their employer, often incorrectly. They do not have the knowledge or skills to challenge this and do not therefore understand that the Employment Tribunal might have jurisdiction to determine their claim.
- 116.2. **Awareness of the role of ACAS** - as stated above, there is confusion around the different roles of the advice team and the conciliation team. Some litigants in person believe they have started the conciliation process when they have just spoken with the advice team. There is also confusion around the role of ACAS in providing advice. The website states: 'Acas gives employees and employers free, impartial advice on workplace rights, rules and best practice' and yet many are disappointed to realise that ACAS is unable to provide individual legal advice. ACAS does not have a policy of telling people about time limits from the moment of their first call and this causes confusion and frustration when individuals realise that their case is out of time at the point where they try to access the justice system.
- 116.3. **Time limits** - Many individuals approach advice services about their workplace problem and have missed the deadline of 3 months less one day. There is a misconception that ACAS will inform them routinely on time limits but this is not the case.
- 116.4. **Quantum of claim** - there is confusion about what compensation means in an Employment Tribunal in comparison with personal injury claims for example.
- 116.5. **Duty to mitigate loss** - there is a general lack of awareness of the obligation to try and mitigate loss.
- 116.6. **Understanding of the Employment Tribunal Rules of Procedure** - there is very poor knowledge of the rules that apply to running a case in an Employment Tribunal in spite of the fact that many applicants are litigants in person.
- 116.7. **Enforcement** - many individuals are surprised to find that they receive a judgement from an Employment Tribunal but their employer does not pay. They are then in a situation of having to choose to move on without the money or enter into yet another legal process. There is a lack of knowledge about which regime to use - the penalty regime, the fast-track regime or the county court regime -

which one to choose, potential benefits and risks, time and cost. There is no information on the government website to help make the right choice¹⁹.

QUESTION 61

Do you think there is currently sufficient information available to help the public navigate the justice system/seek justice?

117. There is an abundance of generic information on workplace rights to be found online. For example, a Google search of 'what to do if my employer doesn't pay me UK' produces 27,000,000 results. The challenge is for the public to understand which website to go to first, how to assess credibility and quality of the source and how to apply the information to their own set of facts.

118. The application of information to facts and personal circumstances is a very important part of accessing a justice system. This includes:

118.1. knowledge of applicable rights

118.2. understanding of the merits

118.3. understanding of the burden of proof

118.4. an informed estimate of the potential award in the event of a positive outcome

118.5. awareness of the possible risk of the employer not paying.

This is not possible for many in the Employment Tribunal justice system.

119. Individuals might seek help from ACAS. However, they are unable to provide more than generic advice. They might be signposted by ACAS to the not-for-profit sector; however, the not-for-profit sector is unable to meet demand. There are often long delays in accessing services and they can usually offer no more than a one-off advice call.

120. With particular focus on migrant workers, there is very poor information sharing. The gov.uk website is only available in English and Welsh. There are some good examples of where information is now being made available in other languages such as the GLAA videos for seasonal workers and the Mayor of London's Employment Rights HUB being made available in twenty languages. More could be done to recognise the language barriers of many workers contemplating arriving in the UK to work and already working in the UK.

121. Migrants are disproportionately represented among NHS workers, carers, construction workers, cleaners, delivery drivers and farm workers. Ethnic minorities make up 42 per cent of the London cleaning workforce and migrant workers make up 53 per cent of its cleaning workforce²⁰. The third sector is regularly contacted by migrants working in

¹⁹ <https://www.gov.uk/employment-Tribunals/if-you-win-your-case>

²⁰ If I Could Change Anything About My Work... Participatory Research With Cleaners In The UK

modern slavery conditions, facing discrimination, contract violations, abuse and exploitation, and unsafe working conditions. Many rely on Whatsapp groups with other workers from their countries of origin and share incorrect information from unreliable sources. Many are targeted by so-called 'street accountants' who offer assistance for a fee through social media. They often provide incorrect information and the workers end up losing money from the process and losing out on their ability to access justice through Employment Tribunals.

QUESTION 62

Do you think there is a role for digital technologies in supporting PLE to help people understand and resolve their legal disputes? Please explain your answer.

122. There is definitely potential for a role for digital technologies in supporting people understand and resolve their legal disputes. Recent research with over 400 Turkish and Kurdish workers showed that 40% of workers were not aware of any employment rights²¹. The research authors thought an app might be a good way to assist these workers understand and enforce their rights. In the US there is an example of technology being used for this purpose. Reclamo is a new web app created by Justicia Lab, a nonprofit innovation incubator. It helps documented and undocumented migrant workers who have experienced wage theft. The tool launched last October in New York focusing on the construction industry, a sector identified as particularly rife with abuse, and helped recover \$1 million in lost wages—more than double what it cost to build²².
123. In social care, the charity, Access Social, has created a chatbot which is proving very successful at providing tailored information²³.
124. It is crucial for the success of any digital technologies that they are designed with the intended users of these resources. They should be made as accessible as possible to those with limited or no English and other learning support needs. Digital tools should never replace the human delivery of services in their entirety as many vulnerable users of Employment Tribunals have additional needs requiring human support.

QUESTION 63

Do you think the government is best placed to increase knowledge around the justice system? Please explain the reasons for your answer.

125. The government should start with improving existing government information resources. The employment pages of the gov.uk website could:

Focus on Labour Exploitation January 2021

²¹ 'Perspectives of migrant workers from Turkey in London's labour markets' - Research by the Refugee Workers Cultural Association, funded by Trust For London.

²² The MIT Technology review by Patrick Sisson 27 June 2023

<https://www.technologyreview.com/2023/06/27/1074330/app-helps-workers-reclaim-millions/>

²³ <https://www.accesscharity.org.uk/resources>

- 125.1. Be reviewed with focus groups made up of a range of employees who currently find the information inaccessible and employers who are confused about their obligations as employers;
 - 125.2. Be made available in different languages. There are website add-ons that can achieve this;
 - 125.3. Be updated to include the information in different mediums such as in short films; and
 - 125.4. Be redesigned with the intention of drawing emphasis on key aspects of the employment justice system such as time limits, burden of proof, quantum, mitigation and enforcement with examples and FAQs.
126. These steps will help employers and employees. Many employers do not comply with the workforce regulations because they are unaware of the rules. Many employers do not speak fluent English. Information in their language and in a way that makes sense to them will be helpful in upskilling employers and reducing non-compliance.
127. In addition, the government could adopt new and innovative methods for educating the public. There should be a real incentive to do this as every penny that is not paid to an employee is a loss of tax and NICs from the public purse. In addition to the current loss from the public purse, workplace justice also includes pension rights. The failure to comply today leads to greater consequences when today's workers retire and have poor financial resources.
128. However, there is a key challenge to the notion that the government is best placed to provide information. There is a lack of trust amongst many workers especially when information is shared by HMRC or Home Office. For many migrant workers, even those with the right to work, there is fear that raising concerns about the workplace will lead to losing their right to remain in the UK. Third sector bodies working in the space of migrant workers advocate for a firewall between institutions managing workplace rights and those managing immigration issues.

QUESTION 64

Who else do you think can help to increase knowledge of the justice system?

129. Participatory research is crucial to ensuring that any funds used to improve knowledge achieve the outcomes set at the beginning of the process. The third sector has developed considerable material using participatory research methods and they can bring in the voices of those vulnerable workers that are currently without access to knowledge of the justice system and help determine how best to make a difference.
130. If these stakeholders are involved in building new resources to improve knowledge, there are various methods of dispersing the information. To highlight a few that exist already:
- 130.1. The Greater London Authority (GLA) has commissioned the Work Rights Centre to provide services which aim to improve community organisations' understanding and awareness of employment rights and relevant pathways to

justice so they can better advise and support Londoners facing issues at work²⁴. This project will run for 18 months and will produce useful data for future decision-making;

- 130.2. The GLA has also created an Employment Rights Hub;
- 130.3. There is a well-developed law school project called Streetlaw that runs in several universities around the UK and Ireland. More could be done to capture learning from these activities;
- 130.4. Some charities are specifically positioned to improve knowledge of the justice system including Young Citizens and Law for Life.

QUESTION 65

Which methods do you feel are most effective for increasing public knowledge of the justice system e.g., government campaigns, the school curriculum, court and Tribunal open days etc.?

- 131. Public Legal Education (PLE) has been defined by the Public Legal Education and Support (PLEAS) taskforce as activities that provide ‘people with awareness, knowledge and understanding of rights and legal issues together with the confidence and skills they need to deal with disputes and gain access to justice’²⁵.
- 132. There is no one method that is most effective for improving knowledge and skills. The government might consider adopting short-, medium- and long-term strategies.
- 133. For the longer term, a school curriculum including citizenship education and education on rights and responsibilities in law (not just employment law) could help improve long term knowledge in communities.
- 134. Information about employment rights can also be included in the Life in the UK exam and booklet. Currently the Life in the UK booklet only includes information about discrimination rights. This should include knowledge about employee rights and employer obligations and why compliance with the workplace rules matters in society.
- 135. In the shorter term, there are various examples of public legal education projects evaluated in the 2021 report for the Legal Services Board. This report concluded that ‘there was strong evidence that well-designed PLE initiatives can increase the legal capability of participants by increasing knowledge as well as having a short-medium term impact on confidence building. There was some evidence that PLE can improve recognition of early action by individuals as well as supporting groups to act early to improve prevention and influence change’²⁶.

²⁴ <https://www.workrightscentre.org/news/everything-you-need-to-know-about-the-employment-rights-advice-and-support-for-underserved-london-communities-programme>

²⁵ Effectiveness of Public Legal Education Initiatives A literature review February 2021 Authors: Dr Lisa Wintersteiger, Sarah Morse, Michael Olatokun and Dr Christopher J Morris. Prepared for: The Legal Services Board <https://legalservicesboard.org.uk/wp-content/uploads/2021/02/PLE-systematic-review-report-Feb-2021.pdf>

²⁶ Ibid

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