The Law Society

The Hon. Mr. Justice Langstaff
President
Employment Appeal Tribunal
Audit House
58 Victoria Embankment
London
EC4 Y 0DS

via email: MrJustice.Langstaff@judiciary.gsi.gov.uk

4 July 2012

Dear Sir

Observations on the proposed changes to the Employment Appeal Tribunal Rules

This is a joint response from the Law Society and the Employment Lawyers Association.

The Law Society is the representative body for more than 140,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

For the Law Society this response has been prepared by its Employment Law Committee ('the Committee'). The Committee is made up of senior and specialist employment lawyers from across England and Wales. Committee members provide advice and representation to employers and employees through practice in City and regional firms, local government, industry, trade unions and law centres. Some Committee members are fee-paid employment judges.

The Employment Lawyers Association ('ELA') is a non-political group of specialists in the field of employment law and includes those who represent both Claimants and Respondents in the Courts and Employment Tribunals. It is not, therefore, ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint.

ELA's Legislative & Policy Committee is made up of both barristers and solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A working party was set up by ELA's Legislative & Policy Committee to join with the Law Society to respond to the President's request for comments on the proposal to review the rules of the Employment Appeal Tribunal.

A full list of the members of the joint working party is annexed to this report.

The general opinion is that in substance the rules themselves are working reasonably well.

However, the rules are the result of several amendments and additions, since the existing statutory instrument was prepared in 1993. It is also felt that the language in which the rules are expressed would be particularly difficult for a litigant in person to understand, and there are an increasing number of these litigants using this Tribunal.

With that preamble, our general observations are as follows:-

1 It is important that the format of these rules is consistent with those that are being prepared for the Employment Tribunals following the review carried out by Mr. Justice Underhill.

2. Generally, we believe it is appropriate that the rules follow the process of a 'journey' through the course of an action in the Tribunal.

3. As a result of the many amendments and also the fact that several different jurisdictions are catered for in the one set of rules, there are a number of provisions which are excessively complex, because they try and deal with a variety of alternatives in one clause. Good examples of this are rules 3(7) and 3(8).

4. Our suggestion is that there should be a standard set of rules dealing with appeals from Employment Tribunals. There should then be separate schedules following the same format dealing with other jurisdictions, such as the Certification Officer, the CAC and National Security. Whilst this may increase the length of the rules, we believe that they would be much easier to use in practice. This would also be consistent with the approach adopted in the Employment Tribunal Rules.

5 We believe that improvements could be made to the language and layout of the Rules to make them clearer and less opaque.

6 In addition, we believe that it would be useful if guidance to the Rules could be published in a similar format to that provided by ACAS, so that the practical operation of the Tribunal was made clear. For example, rule 3(3) specifies the fact that there are time periods expressed in days in which appeals have to be received. It is not made clear that on the last day, the cut off point is 4.00pm, nor is it clear that all of the document has to be received if sent by fax by that cut off time. Such practical points ought to be made clear for all users.

7 The practice of frequent cross-referencing to other statutes is confusing and time consuming. By separating rules relating to different jurisdictions into different schedules, much of this cross-referencing could be removed.

In addition we make the following specific recommendations:

8 In Rule 2, the definitions should be limited to those for terms used in the main rules, with separate definitions sections in each schedule.

9 Rule 3, even with the national security material taken out, is lengthy and clumsy and covers matters that really belong in separate rules. It should be split into four separate rules, with one covering the time limit for appealing (including the 4pm limit and the extension for days when the offices are closed), the second the format and accompanying documents required, the third the permitted methods of presenting (by hand, post, fax or email) and the fourth the action taken on receipt (the present rr 3(7)-(10)).

10 It would be helpful for the last of these to make it clear to what extent what are now rules 3(8) and (10) may be used sequentially (i.e. you can ask for a rule 3(10) hearing having had a rule 3(8) revised notice sifted out, but cannot put in a revised notice having been unsuccessful at a r 3(10) hearing). We also believe that the way in which the process of allowing for an oral hearing after the sift has found there is no reasonable point of law should be more clearly expressed in the rules so that it would be understood by all users and not just experienced practitioners.

11 At present the rules do not specify to which EAT office you should address an appeal - this could be made clear.

12 The rule that all required documentation be presented in time or the appeal is treated as out of time generates a lot of appeals, and is we think, too rigid. It could be relaxed to the extent that if a notice of appeal is presented in time but a required document is missing or incomplete, the EAT will not act on the Notice of Appeal but notify the appellant of what is missing, giving 7 days to provide it; the appeal would then proceed on the basis of having been submitted in time, provided the documentation is supplied as required. This would be less draconian, less unfair to confused or disorganised litigants in person, and also save a number of rather technical appeals, a number of which have got to the Court of Appeal.

13 If the point above is accepted, the present Rule 4 would need amending so that an appeal is only notified to other parties once accepted as fully constituted.

14 Rule 6(5) (allowing appeals by consent) does not reflect what happens, i.e. that the EAT will require a hearing if the effect of allowing the appeal is that the litigation continues, such as by remission to the ET.

15 Although not a point on the Rules as such, Orders made on the sift are often unreasonably prescriptive and onerous. We have in mind in particular that Respondents to an appeal may be *ordered*, not just invited, to make submissions against an appeal which has been referred to a preliminary hearing, thus incurring costs in a case where it has not yet been decided that the appeal merits a full hearing (and it may not). It is reasonable to invite or permit Respondents to make submissions but not to order them to do so. Secondly the practice of making orders for affidavits particularising allegations of bias as Unless Orders, with appeals struck out for non-compliance within a quite tight time limit, may create injustice and generate avoidable additional hearings. It is also our view although without statistics to support it, that there is a relatively high incidence of debarring respondents to appeals for less than egregious non-compliance with directions, in circumstances, which if applied

in the ET would be open to appeal. This is an area where some relaxation of the demands on parties might be considered.

16 Rule 21(1) gives only 5 days from the date of the decision for appeals against Registrar's Orders. That is very tight (particularly so if there is any delay in communicating the decision), and we suspect this too leads to avoidable litigation over applications to appeal out of time. 14 days would not be unreasonable.

17 Rule 23 needs to be rewritten, so far as it can be within the limits of the enabling provisions in the 1996 Act, to cover the range of restricted reporting and anonymity orders the EAT has recognised it has jurisdiction to make (see general *F v G*) and if possible to address some deficiencies in the scope of powers identified in the cases.

18 Rule 35 appears to require service of notices (on and by the EAT) by post. It should be updated to provide for service by fax or email, in the case of a party subject that party having agreed to the method of service.

Members of the Working Party

Daniel Aherne	Olswang LLP	The Law Society
Sundeep Bhatia	Beaumonde Law Practice	The Law Society
Iain Birrell	Thompsons Solicitors LLP	The Law Society
Jennifer Eady QC	Old Square Chambers	ELA
Stephen Levinson	RadcliffesLeBrasseur	ELA (Chair)
Emily McCarron	Policy Adviser	The Law Society
Michael Reed	Free Representation Unit	ELA
Peter Wallington QC	11KBW Chambers	ELA