EMPLOYMENT LAWYERS ASSOCIATION RESPONSE

MINISTRY OF JUSTICE CONSULTATION PAPER CP6/2011 – SOLVING DISPUTES IN THE COUNTY COURTS; CREATING A SIMPLER, QUICKER AND MORE PROPORTIONATE SYSTEM

WORKING PARTY RESPONSE

1. Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather than to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee, chaired by John Wiggins of Mary Ward Legal Centre, with Holly Dobson of Wake-Smith and Helen Buczynsky of Unison was set up by the Legislative and Policy Committee of the ELA, to consider and comment on the proposals for Solving Disputes in the County Court CP6/2011. Its report is set out below.

The Government has invited views on a wide range of proposed legislative changes. Our comments are divided according to the Chapter arrangement in the consultation paper. We are commenting only on those aspects of the consultation that affect employment practitioners. While members deal primarily with claims in the Employment Tribunal and in the appeal courts (post Employment Tribunal), claims in the County and High Court are an important part of many of our members' work, for example in relation to contractual claims beyond the Employment Tribunal jurisdiction and in relation to work-related personal injury claims.

Question 12-Do you agree that a system of fixed recoverable costs should be implemented, similar to that proposed by Lord Justice Jackson in his Review of Civil Litigation Costs : Final report for all Fast Track PI claims that are not covered by any extension of the RTA PI process?

No. This is too prescriptive for the wide variety of non-RTA PI cases and would cause significant injustice. The current Civil Procedural Rules and case law provide a sufficient code to ensure recoverable costs are proportionate (for example, CPR 44.5). The Court is already directed to have regard to factors or proportionality and reasonableness in accessing costs and under 44.5(3) specific factors to which the Court is mandated to have regard include the amount or value of money or property involved; the particular complexity of the matter or the difficulty or novelty of the

questions raised; the skill, effort, specialised knowledge or responsibility involved and the time spent on the case. Case law Home Office v Lownds (2002) EWCA Civ 365 requires the Court in assessing costs to step back and have overall regard for proportionality before proceeding with costs assessment. We fear that a "one size fits all" cost solution by way of fixed costs would restrict access to justice and be counter-productive. For example, it could discourage complicated yet meritorious cases being taken, leaving Claimants unrepresented. It may lead to Defendants, who can be wealthy compared to some Claimants, trying to outspend the Claimant, leading to delays, in the hope that the Claimant might drop the case, having reached the fixed cost limit. It could also affect service quality and potentially cause conflict, in relation to continuing the case/trying to settle the claim early, where the lawyers had already reached the fixed fee sum. Capping costs may also lead to fewer lawyers being prepared to take on certain cases, reducing access to justice.

Further for personal injury cases, fixed costs could also affect health and safety issues, as the deterrent for employers in having to pay not only compensation, but also the true cost of any negligence claim, may diminish. There are already adequate cost control mechanisms in place under the current court rules and case law.

Question 13-Do you consider that a system of fixed recoverable costs could be applied to other Fast Track personal injury claims that are not covered by an extension of the RTA PI process?

No. This response is limited to those matters which ELA members deal with – employment or employment related disputes and in some cases Equality Act claims. Fixed recoverable costs would be overly prescriptive given the existing rules of Court. See comment to question 12. The points raised above would also be applicable to employment cases and the affect on access to justice would be the same. A fixed cost regime would fail to deal properly with the wide variety of cases brought before the courts. Further, in employment matters (as in 12 above) there could also be an imbalance of power (the Claimant usually being an individual with often limited means, as opposed to the Defendant/employer who may well have access to greater resources). Imposing fixed costs may impact more severely on Claimants in such cases.

Question 14. If your answer to Question 13 is yes, to which other claims should the system apply and why?

Not applicable.

Question 15 Do you agree that for all other Fast Track claims there should be a limit to the pre trial costs that should be recovered ?

No. Again this could work unjustly in some cases and the existing rules of Court limit pre trial costs by applying the procedural code. See answer to question 12. The Court already has power to pay regard to factors of proportionality and reasonableness in assessing costs.

Question 16 Do you agree that mandatory pre action directions should be developed? If not please explain why

No. The response is limited to those cases covered by the members of ELA. Given the variety of cases and the existing Civil Procedure Rules and protocols it would be counter productive to enforce an overly rigid regime. We could foresee potential for satellite litigation. This would also be a substantial and expensive exercise introducing significant changes, and it could lead to unnecessary front-loading of costs.

Question 17 If your answer to Question 16 is yes, should mandatory pre-action directions apply to all claims with a value up to

i. £100,000
ii. Some other figure

Not applicable.

Question 18 Do you agree that mandatory pre-action directions should include a compulsory settlement stage? If not please explain why.

No. We do not consider that there should be mandatory pre action directions. Again this could lead to front loading of costs. In any event we disagree with a compulsory prescribed ADR.

Question 19 if your answer to question 18 is yes, should a prescribed ADR process be specified? If so, what would that be?

Not applicable.

Question 20 Do you consider that there should be a system of fixed recoverable costs for different stages of the dispute resolution regime? If, not please explain why.

No, as we do not agree with the introduction of fixed costs (see our responses to questions 12 and 13).

Question 21 Do you consider that fixed recoverable costs should be

i. For different types of dispute or
ii. Based on the monetary value of the claim?
If not how should this operate?

(i) No please see question 20 above and questions 12 and 13. Costs awards should be those that are reasonably and necessarily incurred. However, where an award is imposed it should also take into account different factors to try and protect litigants, as detailed in (ii) below. There should also be appropriate escape clauses to cover unusual cases in terms of their complexity/specific needs. Any such new fixed cost regime would require further detailed

consideration/consultation and input from appropriate stakeholders/practitioners, to ensure access to justice is preserved.

(ii) No. Any fixed recoverable costs should predominantly depend on the type of case as it is the type of case, which in general terms governs the work required, the stage the case reaches and potentially the value of the claim following consultation. Again, fixed recoverable costs should not apply to that tiny minority of cases, which would be above any Fast Track level either on the basis of the current £25,000 ceiling or an amended ceiling.

Question 22

Not applicable.

Question 23

Not applicable.

Question 24 What do you consider can be done to increase the use of electronic channels to issue claims?

The online Employment Tribunal claim (ET1) system broadly works well and perhaps the County Court could adopt a similar "customer" interface to promote the use of electronic channels to issue claims. The principal, practical difficulty is that the submission of an Employment Tribunal Claim does not currently require a fee and it is the submission and management of fee payments, which may create an obstacle. The recent Resolving Workplace Disputes Consultation indicated the Government's intention to introduce fees for Employment Tribunal claims. The system would also need to be secure. In summary, we consider that the development of an electronic channel could be a positive step forward, as long as any practical issues are overcome and provided that such a system would not detract litigants from seeking appropriate representation.

Question 25 Do you agree that the small claims financial threshold of £5,000 should be increased? If not, please explain why.

Members have diverging views on this issue. While some members see advantages in such a proposal, others have concerns that it may restrict access to justice by removing legal representation from those who are at a substantial disadvantage without it. This may be particularly problematic in employment claims where there is an imbalance of power. While a change would mean in more claims there was less of a risk to a parties on costs, it may also mean that litigants who cannot represent themselves without difficulty would lose access to legal assistance (as those providing such assistance would not recover their costs and thus not be prepared to assist). It could also lead to increased pressure on courts, with more litigants in person coming through the system.

Question 26 If your answer to Question 25 is yes, do you agree that the threshold should be increased to

i. £15,000 or
ii. some other figure

(1) If the limit were to be increased (in relation to which, as stated above, ELA members have divergent views) then £15,000 is considered to be too high. £10,000 may be more reasonable in line with inflation/future inflation. This would achieve the Government's objective significantly to increase the amount for the small claims track jurisdiction and allow more business to pursue trade debtors. The practical experience of those who have had involvement with the small claims jurisdiction already is that there is an increasing tendency for parties to take advantage of CPR 27.14(g) "unreasonable behaviour" and apply for an additional element of costs to be awarded. Increasing the jurisdiction by too great an amount is likely to lead to 'costs by the back door'. The small claims procedures allow the Court to make appropriate awards based on the fact sensitive issues in the case and should be retained as a simple procedure for smaller, more routine cases.

One potential disadvantage of increasing the small claims track limit, which this association has identified, is in connection with funding of legal claims. Despite the increased availability of government provided information many employees who have employment related claims have insufficient access to justice. For those of limited means and who are unable to obtain some public funded assistance, currently Before The Event legal expenses insurance ("BTE") enables a significant number to initiate claims. Whilst the vast majority of BTE funded claims are conducted within the Employment Tribunal system there are circumstances in which some may be conducted in the County Court. BTE insurers currently underwrite meritorious claims, which are proportional to bring but where costs recovery is non-existent or unlikely. It would be necessary to ensure that the BTE insurance market continued to engage in the support of the individual's employment rights either through the Tribunal or through the Court irrespective of costs recovery. There are also concerns from some members that BTE insurance is not a funding option for many Claimants who are low paid. Some members also have concerns that if more Claimants were to rely on such insurance in a no cost regime, that insurance policies may be altered to remove cover for such litigation, or alternatively the premiums of such policies might increase. In addition, Claimants who are not articulate/literate, or who have mental health problems, or other disabilities, may struggle to obtain legal assistance with worthwhile claims, if the small claims limit is increased too substantially. This is also likely to become increasingly problematic, if large areas of advice and assistance under the Legal Help scheme and legal aid are removed from scope as currently proposed.

Question 27

Not applicable.

Question 28

Not applicable.

Question 29- Do you agree that the fast track financial limit of £25,000 should be increased? If not, please explain why.

No, £25,000 is considered to be a substantial sum already and there would be little advantage in tinkering with the amount.

Question 30- If your answer to question 29 is yes, what should the new threshold be?

See above, however if increased it would be logical to increase for inflation/future inflation. A proportionate increase would be to £30,000.

Question 31 Do you consider that the CMC's accreditation scheme for mediation providers is sufficient?

Yes. ELA has insufficient expertise to comment in an informed way but does not have any evidence that it is not.

Question 32 If your answer to question 31 is no, what more should be done to regulate civil and commercial mediators?

Not applicable.

Alternative Dispute Resolution

We have commented on some of the issues raised in relation to ADR in our response to the Resolving Workplace Disputes Paper.

Question 33 Do you agree with the proposal to introduce automatic referral to mediation in small claims ?

No.

(i) Many disputes are between individuals or individual leaders of businesses, who have formed polarised views and where the most cost

effective method of dispute resolution is to get the final small claims track hearing quickly.

(ii) At the defence stage an automatic referral to mediation might be premature prior to some judicial scrutiny, which might readily identify a wholly unsustainable claim/defence/missing information.

(iii) There is insufficient evidence provided as to the difference in outcomes between an automatic referral to mediation and what we understand is the current practice of referring to mediation as a norm or standard.

(iv)

(v) The small claims jurisdiction is meant currently to involve a reduced degree of formality and cost. The addition of a compulsory mediation stage is not likely to assist with this and may be counterproductive and add to costs. Members feel there should be continued encouragement of mediation, but not an automatic referral. There needs to be flexibility in the system, particularly with employment claims, where there can often be an imbalance of power. This is even more polarised when the Claimant is unrepresented. Often by the time matters reach litigation the relationship has broken down to an extent that mediation simply cannot resolve the issues. There is also an issue as to how such mediation would be resourced, if it were made automatic, particularly were the small claims limit to be increased.

Question 34 If the small claims financial threshold is raised, do you consider that the automatic referral to mediation should apply to all cases up to

i. £15,000
ii. the old threshold of £5,000
iii. some other figure

No. See answer to question 33.

Question 35 How should small claims mediation be provided?

Our experience is that the current system works well with telephone appointments and the mediator shuttling between the parties by way of telephone appointments or calls or occasionally arranging a telephone meeting. This is proportionate.

Question 36 Do you consider that any cases should be exempt from the automatic referral to mediation process?

We do not consider that automatic referral should apply (see question 33 above). However if it were to be imposed, then there would need to be exemptions. It is difficult for us to readily identify all such cases, but we can see the possibility of

unprotected litigants in person reaching a settlement without the intervention of any legally qualified person. We would be particularly concerned by 'imbalance of power' in cases like employment disputes. There would be inherent dangers, hence we see that judicial scrutiny at some point would be necessary to protect unrepresented parties.

Question 37 If your answer to Question 36 is yes, what should those exemptions be and why?

See above.

Question 38 Do you agree that the parties should be given the opportunity to choose whether their small claims hearing is conducted by the telephone or determined on paper ?

Yes. Each party currently has the option to ask for the hearing to be decided on paper. This would not therefore represent any significant change. We agree that the parties should be able to express a preference for a telephone hearing but we can foresee that there may be circumstances where the Court considers that inappropriate. However, as the current rules permit either or both parties to require the Court to reach a decision on paper we can see that if the Court were given the power to refuse a hearing conducted by telephone it might simply lead to an all paper hearing in any event.

Question 39 Do you agree with the proposal to introduce compulsory mediation information sessions for cases up to a value of £100,000?

No. The question implies that parties are not subject to mediation information sessions currently. If that is the implication we question it. Mediation has been with us for some time and is codified and promoted within the County Court system. We suggest that it would be extremely rare for represented parties not to have already received mediation information sessions, probably on more than one occasion, in a number of suitable formats. We accept that that would not apply to unrepresented parties. We question the assertion in paragraph 164 of the paper that "currently, this is often not explored with the parties throughout the Court process and the principles behind the pre action protocols are at times ignore by parties and their legal representatives". What is the evidence based research behind this assertion? It pre supposes that there is never a reason for ignoring or refusing to mediate which would be an incorrect proposition. It further ignores the fact that parties sometimes choose not to pursue ADR even though they have had full information. Having made these points, providing that the time and costs involved were proportionate we would not disagree with a proposal to provide information in a suitable format. For example a widely promoted website with video link might be desirable.

Question 40 if your answer to Question 39 is yes, please state what might be covered in these sessions and how they might be delivered?

Not applicable.

Question 41 Do you consider that there should be exemptions from the compulsory mediation information sessions?

Yes. As stated above we do not consider there should be compulsory mediation information as this is sufficiently covered by professional obligations on legal advisers; Court initiatives and promotions. Were there to be an additional system of compulsory mediation information we consider that the costs are likely to be disproportionate to the benefits.

Question 42 If your answer to question 41 is yes, what should those exemptions be and why?

See our answers to questions 39 and 41.

Question 43 Do you agree that provisions required by the EU Mediation Directive should be similarly provided for domestic cases?

Yes, although we suggest that domestically there is compliance in large part with the directive in any event, for example with regard to quality assurance of mediation and Court intervention/promotion of mediation. We therefore see no need for changes there. Our experience of most mediation agreements is that they provide for enforcement mechanisms already and we are not aware of any unmet need with regard to the enforceability of agreements. Our understanding of the current case law development is that by virtue of the contractual agreements reached between parties and a mediator and Court interpretation of these, confidentiality is already very largely addressed and in so far as there is any need to make further changes in domestic law, this may simply be limited to codifying the current position. So far as limitation is concerned we have insufficient information on whether the cross border mediation provisions relating to limitation periods are required. For example, it is already the case in domestic law that parties close to a limitation deadline can issue protective proceedings and apply for a stay or, more usually, agree a 'standstill agreement'. It would, however, promote mediation and limit expense if time periods did not run during a mediation process. We rather suspect that the satellite litigation involved might outweigh the benefits.

Question 44 If your answer to Question 43 is yes, what provisions should be provided and why?

See answer to above question.

Debt Recovery and Enforcement

Question 45 Do you agree that the provision in the TCE Act to allow creditors to apply for charging orders routinely, even when debtors are paying by instalments and are up to date with them, should be implemented?

Yes.

(i) This is becoming effectively the County Court practice in any event by virtue of the County Court discharging Instalments Orders and listing applications to vary at the same time as an application for Charging Order in order to allow Judgment creditors; where appropriate to obtain Charging Orders but not to be able to enforce them without leave whilst a new instalment rate is ordered. Changes would simply follow what is effectively the current practice.

(ii) By enabling Judgment creditors to apply for Charging Orders where debtors are still paying by instalments this would provide those Judgment creditors who were granted Charging Orders the security. They would then be more likely to give debtors longer time to pay and avoid bankruptcies.

Question 46 Do you agree that there should be a threshold below which a creditor could not enforce a charging order through an order for sale for debts that originally arose under a regulated Consumer Credit Act 1974 agreement?

This is outside our remit.

Question 47 if your answer to question 46 is yes, should the threshold be £1,000, £5,000, £10,000, £15,000 , £25,000 or some other figure?

This is outside our remit.

Question 48 Do you agree that the threshold should be limited to Consumer Credit Act debts?

This is outside our remit.

Question 49- Do you agree that fixed tables for the attachment of earnings should be introduced?

Yes. This would provide certainty and consistency for the Courts, creditors and debtors.

Question 50 Do you agree that there should be a formal mechanism to enable the court to discover a debtor's current employer without having to rely on information furnished by the debtor?

Yes. The current system is overly cumbersome, time consuming and leads to considerable time delay. We agree that this would just be a means of "closing a current loophole".

Question 51 do you agree that the procedure for Third Party Debt Orders "TPDO's" should be streamlined in the way proposed?

Yes.

Question 52 Do you agree that TPDO's should be applicable to a wider range of bank accounts, including joint and deposit accounts?

Yes.

Question 53 Do you agree with the introduction of periodic lump sum deductions for those debtors who have regular amounts paid into their accounts? If not please explain why?

Yes.

Question 54 Do you agree that the court should be able to obtain information about the debtor that creditors may not otherwise be able to access?

Yes.

Question 55 Do you agree that government departments should be able to share information to assist the recovery of unpaid civil debts?

Yes. Subject to the relevance of that information solely for proper enforcement reasons.

Question 56 Do you have any reservations about information applications, Departmental Requests or Information Orders?

Yes. Our only reservation is that it is possible to obtain a Judgment by default, for example, if there is incorrect service of legal process on the Defendant so that the Defendant is unaware of the legal process leading to a Default Judgment or where this is correct service of legal process and the Defendant does not act sufficiently promptly. Accordingly it is possible for information to be accessed inappropriately if it subsequently transpires that the Default Judgment was inappropriately obtained or that it would be unjust to allow the Judgment to stand. Accordingly it will be essential as suggested in paragraph 208 of the consultation paper to ensure that the debtor is notified that the Court intends to make an information request or Order to give them the opportunity to object.

Question 57 Do you consider that the authority of the court judgment order should be extended to enable creditors to apply directly to a third party enforcement provided without further need to apply back to the court for enforcement processes once in possession of a judgment order?

No. There is insufficient information to enable us to positively comment upon such a proposed change at present. More information is required as to those third party enforcement providers likely to be engaged and how such systems would work in practice and what safeguards there would be for the vulnerable consumer.

Question 58 How would you envisage the process working in terms of service of documents, additional burdens on banks, employers, monitoring of enforcement activities etc?

As above, see question 57. We have insufficient information to comment. At first sight, it is not clear that there would be proportional costs savings for Judgment creditors and such a system might simply be a way of costs shifting.

Question 59 Do you agree that all Part 4 enforcement should be administered in the county court?

Yes.

Structural Reforms

Question 60 Do you agree that the financial limit of £30,000 for county court equity jurisdiction is too low?

This is outside our remit.

Question 61 If your answer to Question 60 is yes, do you consider that the financial limit should be increased to i. £350,000; ii. Some other figure?

It is suggested that the current distinctions and provisions between different types of civil Court are historical and are in need of significant reform in any event. In reality the systems and procedures are increasingly harmonised and a cost effective method and the issues really centre upon the level of the judiciary available to deal with the different types of work. There is no reason why the financial limit on the equity jurisdiction of the County Courts should not be increased to at least £350,000, if not more and such increase would not cause any difficulty and would considerably assist Court users.

Question 62 Do you agree that the financial limit of £25,000 below which cases cannot be started in the High Court is too low?

Yes.

Question 63 If your answer to Question 62 is yes, Do you consider the financial limit other than PI claims should be increased to i. £100,000; ii. Some other figure.

We can see no reason why the limit should not be increased, provided that court users are not prejudiced by the delays in the London County Court system, to £50,000 and perhaps thereafter £100,000. Both in London and outside the same Judge will be dealing with all case management and other decisions irrespective of whether a claim is initiated in the County Court or the High Court. In a vast majority of cases the Trial Judge will be a Circuit Judge sitting as a High Court Judge under section 9(1) of the Senior Courts Act 1981 where the case is suitable for trial by that Judge even if the case is initiated in the High Court. Arguably financial limit should be higher but as a first step the increase should be £50,000. .

Question 64 Do you agree that the power to grant freezing orders should be extended to suitably qualified Circuit Judges sitting in the county courts?

Yes. There is no good reason why a suitably qualified Circuit Judge should not have the power to make a Freezing Order.

Question 65 Do you agree that claims for variation of trusts and certain claims under the Companies Act and other specialist legislation such as schemes of arrangement, reductions of capital, insurance transfer schemes and cross border mergers should come under the exclusive jurisdiction of the High Court?

Outside our remit

Question 66 If your answer to Question 65 is yes, please provide examples of other claims under the Companies Act that you consider should fall within the exclusive jurisdiction of the High Court.

Outside our remit.

Question 67 Do you agree that where a High Court Judge has jurisdiction to sit as a judge of the county court, the need for the specific request of the Lord Chief Justice, after consulting the Lord Chancellor, should be removed?

Yes. This would appear to be an historic anomaly, which is unnecessary.

Question 68 Do you agree that a general provision enabling a High Court Judge to site as a judge of the county court as the requirement of business demands should be introduced?

Yes. As stated above, we consider that a number of the distinctions between the High Court and County Court are historical in nature and the processes are in need of streamlining and reform.

Question 69 Do you agree that a single county court should be established?

Yes. Some current anomalies should be removed making the justice system simpler and more efficient. Our concern, however, is that a local County Court provides access to justice for the ordinary individual and it is therefore essential that every citizen, particularly those with limited resources, can travel to a local County Court, easily and without any significant expense. Equally, whilst the business case for a "back office" or "back offices" for much County Court business is understood, care needs to be taken to ensure that this does not in fact add to inefficiencies or delays. For example, citizens and legal representatives who currently attend local County Court without difficulty to carry out prompt Court processing. There is a concern "back offices" will add to a lack of information and administrative muddle.

Employment Lawyers Association

30 June 2011