Consultation by the Department for Business, Energy & Industrial Strategy and the Ministry of Justice on Reforming the Employment Tribunal System.

RESPONSE ON BEHALF OF THE EMPLOYMENT LAW BAR ASSOCIATION

The Employment Law Bar Association represents barristers working in employment law in the United Kingdom.

Question 1: Do you agree that with the right system in place the specific needs of users of Employment Tribunals and the Employment Appeal Tribunal can be accommodated in a more digitally based system?

General matters

ELBA is of the view that an appropriate digitally based system is a good idea subject to the following important considerations:

- Any such system must be sufficiently resourced and operated such that it works efficiently given the important and often time sensitive matters that it will deal with.
- The ET and EAT make decisions on rights of individuals of central importance both to the parties and to society as a whole. Claims are often made in the context of ongoing employment and are therefore of particular sensitivity. Any new system, or change to the current system must preserve the ability to deal with those matters justly.
- Employment law and the cases determined in the ET and EAT have a broad normative effect in society. Any changes to the system must be made only in such a way that preserves the ET and EAT's ability to determine those matters fully and appropriately.
- Those who appear before the ET and EAT are often unrepresented and require the active assistance of a Judge for their claims to be resolved justly.
- It is, in any event, vital to ensure that there is effective assistance in place to ensure people ready and equal access to the process

For all of those reasons, it is ELBA's strong view that the online resolution of factual and legal issues is not appropriate and will not work.

Case management and the determination of cases are distinct

A distinction must be drawn between case management on the one hand and the determination of claims. ELBA is concerned that the question may conflate those two issues.

Case management

In respect of case management a digital system would be of assistance. For example, the ET currently has a good initial online portal for filing claim forms, but that the subsequent necessity for matters to be printed off and placed on a paper file is

inefficient. A “start to finish” digital case management, allowing online sharing of documents by administrative staff, judges and parties would greatly increase efficiency.

However a number of aspects of case management require the application of legal reasoning and sometimes complex legal principles that can have a significant effect on the outcome of a case. Those matters will continue to require judicial determination. Determination at a hearing is in the vast majority of cases more appropriate than determination on the basis of written submissions (whether digital or on paper). Litigants in person often find it particularly difficult to put their case across in writing. A case-management hearing with the parties present is an efficient and very cost effective way of managing cases. It allows for discussion and exploration of the issues, and for directions to be tailored to the issues. In very many cases it would be a false economy to replace such hearings with digital case management as there are a number of imponderables that can be explored readily in person, but are not susceptible to digital or a box ticking approach. Practitioner experience shows that even telephone hearings can be less effective than a live hearing, particular with an unrepresented party.

There are some minor and specific decisions that are now made on paper and can be made digitally. But the ambit of those needs to determined on a carefully considered basis. Even in those limited categories of case, it would be a necessary safeguard to have the ability to make application in appropriate cases for a hearing.

<u>The determination of claims</u>

With regard to the <u>determination of claims</u> however, a digital system is not appropriate for the following reasons:

- Many Claimants are litigants in person may not be able to express themselves in writing, or fully set out their case without dialogue with a judge.
- Decisions determined online determination, are likely to be considered less seriously by the party against whom an order is made with the consequence that enforcement be harder. ELBA is concerned that the more a determination has the appearance of an administrative process, the less likely it is to be taken a Respondent, and Claimants will have to take further step, likely to be disproportionate to the sums they are trying to recover, to enforce such a decision.

<u>Video hearings (both case management and final hearings)</u>

In the event that online video hearings were possible, that would be useful in saving travel costs for parties. However such hearings would present their own problems in that a judge would have to manage a number of parties video presence, including litigants in person. Furthermore the giving of evidence by video is susceptible to

abuse. A witness might be receiving prompting or assistance from a person off screen. The risks of abuse of such as system would be increased where video attendance was not organised by a legal representative bound by professional obligations.

As such insofar as video attendance is being considered, there would need to be trials of such a scheme sufficient to ensure that such systems are good enough to replicate the parties being in a courtroom together.

Question 2: What issues do you think need to be considered when deciding whether a claim would be suitable for online consideration? Please give reasons

General considerations

The following matters are again relevant in relation to the issue of the online determination of claims.

- The rights of individuals of central importance are determined through the Employment Tribunals system, often made in the context of ongoing employment.
- Cases determined in the ET and EAT have a broad normative effect in society. As such any changes to the system must be done only in such a way that preserves the ET and EAT's ability to determine those matters fully and appropriately.
- Those who appear before the ET and EAT are often unrepresented and require the active assistance of a Judge for their claims to be resolved justly.
- Final decisions on cases should not in our view be dealt with online.

Matters not suitable for online determination

- Factual issues
  Factual issues are not suitable for online determination. That is so not just as a matter principle, but due to the importance of factual issues in employment disputes. The outcome of a case or legal principle, which may well set a precedent, will often on a factual determination.
- Matters of legal complexity
  Matters of legal complexity and evolving legal principles require live advocacy to determine the many imponderables that arise. Such issues are not best determined by each side simply stating its case in writing, whether online or not. A just result, and the principles decision can establish regularly require enquiry and discourse and benefit from questions, consideration and the live exploration of the issues. Further, an unrepresented party may not understand all of aspects of their case that need to be brought out when dealing with the matter purely online.
- Final decisions
  As set out above, final decisions should not be determined online.

Matters which are suitable for online determination

It is ELBA's view that only relatively straightforward procedural matters should be dealt with digitally. Even wages claims or holiday play claims involve both factual issues and complex issues, rightly because of wide application, that are most efficiently dealt in a live hearing.

Question 3: What factors do you think should be taken into consideration when creating the scope to delegate judicial functions in the Employment Tribunals and the Employment Appeal Tribunal? Please give reasons

ELBA is of the view that the delegation of judicial functions to caseworkers is not appropriate for the following reasons:

- Effective case management depends upon proper analysis and understanding of the issues in the case.
- Case management decisions may have a profound effect on the eventual outcome of the case. The examples given in the Consultation paper, staying claims and permitting amendments each have serious consequences for the rights of litigants. The amendment of claims involve often complex legal issues and can and be determinative of claims.
- The safeguard of having decisions referred to judge is not sufficient to render caseworkers dealing with judicial functions appropriate. An unrepresented claimant many not know that they need to refer the issue, whereas a judge would be live to such matters.
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- In any event, to be an effective safeguard the referral of an issue to a judge would have to be a fresh consideration, which seems therefore would increase the volume of work.

Question 4: Are there any specialist skills that a caseworker dealing with Employment tribunals and the Employment Appeal Tribunal would need, distinct and different from those required for carrying out casework in other tribunals? Please give details.

Please see the previous answer. Further, The ET is a party and party jurisdiction, not party and state, and as such anyone dealing with parties will need the skills to manage the different interests of competing parties, often with different levels of resource and legal assistance. There can often be a very significant inequality of arms that requires great and insight and robustness to perceive and redress.

Question 5: Are there any specific issues relating to Employment Tribunals and the Employment Appeal Tribunal that need to be taken into consideration in relation to making changes to the law regarding panel composition? Please give details.

ELBA understand that the current consultation concerns changes to the power to make rules as to panel composition, rather than the merits of changes to panel composition itself.

However, as to the substance of panel composition, ELBA would emphasize the great value in lay members in the ET. They have been a vital element of the ET system since its inception. The use of panel members in ETs enables a wealth of real 'life experience' (of business practice and the world of work) to be brought into the decision making process, assisting not only in forming judgments, but in ensuring confidence of the users, and is therefore advantageous. Having the experience of non-legal members ensures that alongside the essential application of relevant legal principle, there is a reality touchstone. The presence of lay members enhances the regard in which decisions are held by the litigants, thereby assisting in reducing appeals and in maximizing enforcement.

Use of lay panels, reflecting a range of experience and background is very important in discrimination cases which involve sensitive judgments, often in tense on-going work relationships. Anecdotally, being able to have a panel of three decision makers who between them have different characteristics (most obviously visibly, gender and race) adds considerably to the confidence users of the system, who very often consider themselves to be members of a "minority". A move towards decisions by a single judge alone risks undermining the authority of the tribunal's decisions in the area of discrimination and equality particularly.

ELBA will respond more fully when any changes to the rules on composition are proposed in due course.

As to the question of the power to make changes to the rules on composition, ELBA sees force in the point that rules for the ET, including as to panel composition should be made by a suitably composed rules committee, consulting appropriately with stakeholders. Any change to primary legislation should to allow for more flexible rules on panel composition should, in our view, start from a strong presumption in favour of using lay members particularly in discrimination claims, and other complex matters.

An approach which requires parties to request a panel with lay members would not reflect the importance of lay members. In practice, parties would tend not to ask for a full panel, or to be granted one. Section 4 of the Employment Tribunals Act 1996 provides for when cases in the ET are to be heard by a judge alone, and when by a full panel. Even where cases are generally to be heard by a judge alone, there is a power (s4(5) ETA 1996) for a judge to direct a full panel to hear the case if, having regard to any views expressed by the parties, there is a likelihood of a dispute on facts or law that make it desirable for the case to be heard by a full tribunal. Since the ET (Composition of Panels) Tribunal Order 2012 (SI 2012/998) unfair dismissal claims have "generally" been considered by a judge sitting alone. It is not understood that any statistics have been kept as to the number of unfair dismissal cases which have been determined by a full panel since the change came into force. Anecdotally, none are known of. Parties do not make the applications to have a full panel. Again, no research has been done into why this is so (presuming it to be).

Question 6: What criteria should be used to determine the appointment of the new employment practitioner member of the Tribunal Procedure Committee? Please give reasons.

ELBA is of the view that that such a practitioner should have demonstrable experience and expertise in managing cases in the ET and EAT, both from the perspective of Claimants and Respondents.

Question 7: Do you agree that the proposed legislative changes will provide sufficient flexibility to make sure that the specific features of the Employment Tribunals and the Employment Appeal Tribunal can be appropriately recognised in the reformed justice system? Please give reasons.

ELBA understands from paragraphs 45-47 of the Consultation Paper that this question relates primarily to the proposed legislative change to the power to make rules for the ET. We do agree that the proposed changes provide sufficient flexibility provided that:

- The TPC composition includes members with expertise in the ET and EAT's jurisdiction;
- The framework for the TPC, and its membership, recognize that the ET and EAT, as party/party tribunals are different in character to administrative tribunals, and have different needs; there must not be a "one size fits all" approach.
- Measures are taken to ensure appropriate focus on the needs of the ET/EAT e.g. establishment of an employment sub-committee of the TPC; ongoing consultation with stakeholders, e.g. through use of the National User Groups operated by presidents Doyle and Simon in Scotland and Wales respectively.
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Question 8: Do you anticipate the impacts of the proposed reform to be disproportionately large for small or micro sized businesses? Please explain your answer, referring to evidence as necessary.

ELBA is not of the view that the impacts would be disproportionately large.

Question 9: Do you agree we have correctly identified the range of equalities impacts, as set out in the accompanying Equalities Impact Assessment, resulting from these proposals? Please give reasons

ELBA believes that those have been correctly identified.

20th January 2017