

EMPLOYMENT LAW APPEAL ADVICE SCHEME

NOTES FOR THE GUIDANCE OF ADVISERS

1. Thank you for agreeing to do a day's duty at the Employment Appeal Tribunal (EAT) as an ELAAS Representative.
2. This guidance has been prepared by the ELBA Committee to assist ELAAS Representatives, the ELBA Committee and the EAT with the smooth running of the ELAAS Scheme.
3. You should find enclosed: -
 - a. Specimen letter about the Scheme sent to Appellants and
 - b. Your papers for the day.

Criteria For Eligibility

4. Barristers are eligible to be ELAAS representatives if they:
 - a. hold a current practising certificate.
 - b. have at least three years Post Qualification Experience. This means at least 3 years rights of audience. Hence, second six months of pupillage can count if the rep was on his/her feet during the second six.
 - c. Have EITHER (i) acted as advocate in at least 10 employment cases; OR (ii) handled at least 5 EAT cases as an advocate.
5. The current ELBA Committee take the view that the requirement at (c)(i) requires barristers to have acted as sole advocate in at least 10 substantive hearings in the Employment Tribunal i.e. full trials and/or a preliminary hearing at which a substantive issue of law has been determined. Further, that the requirement at (c)(ii) requires barristers to have acted as sole advocate in at least five EAT cases.

6. If you wish to be added to the list of ELAAS representatives held and maintained by the EAT, please forward (i) your CV , (ii) a covering letter/email signed by the barrister concerned confirming that they meet the above criteria, and (iii) any supporting information demonstrating this to Claire Darwin at clairedarwin@matrixlaw.co.uk

Allocation of ELAAS Hearings

7. ELAAS Hearings are allocated by the EAT to participating chambers and barristers/solicitors. As soon as hearing dates are confirmed, chambers are encouraged to 'book' the hearing dates into the diary of the relevant ELAAS representative. That barrister/solicitor should then treat the ELAAS Hearing as a professional commitment, in accordance with their professional obligations under the BSB Code or equivalent.
8. Whilst the ELBA Committee does not seek to prohibit chambers from moving ELAAS hearings between eligible barristers within their chambers, it is concerned that this practice can sometimes lead to chambers letting the EAT and Appellants down at the last minute (see further below on the removal of some chambers/barristers from the ELAAS Scheme). Accordingly, chambers are encouraged to resist moving ELAAS hearings between eligible barristers within chambers unless this is absolutely necessary.

ELAAS Papers

9. Your papers for the day are comprised of a copy of the material papers held on the EAT's file relating to the appeal/s. The EAT will normally provide a hard copy of these papers to you at your chambers' address (not your home address) 7 days prior to the hearing. Absent exceptional circumstances, the EAT cannot arrange for further copies to be provided, or for an electronic version of the papers to be provided to you.
10. You may be provided with further information about the appeal/s in the run-up to the hearing/s, either by an Appellant/s or by someone else. Please bear in mind that the EAT might not have a copy of this information, and that the EAT will not retain your copy of the papers if they are handed back to the EAT after the hearing (see below on whether you

need to retain your papers after the hearing).

Replacement Representatives

11. In the event that you are unable to attend the ELAAS hearing/s for whatever reason, it is your chambers' responsibility to secure a replacement ELAAS representative from the list of approved ELAAS representatives in good time prior to the ELAAS hearing. It is also your chambers' responsibility to notify the EAT that this has been done, and to ensure that the replacement ELAAS representative has a copy of any papers (if they are available). Please do not contact the EAT and expect the EAT to organise this for you.
12. The current ELBA Committee takes the view that securing a replacement ELAAS representative in good time prior to the ELAAS hearing means **at least 14 days before the ELAAS hearing**. It notes that any last-minute arrangements are likely to lead to the EAT and the Appellant in question being let down.
13. The Appeal Tribunal understands how the ELAAS scheme works and may be prepared to accommodate you if you are stuck in a different court in the EAT when another client's case is coming on elsewhere. However, should you take on another commitment outside the EAT (on the same date as your pre-existing ELAAS case) it is your chambers' responsibility to secure a replacement, notify the EAT once this has been done, and ensure that any papers (if they are available) are forwarded to that replacement in good time prior to the ELAAS hearing (see above on the meaning of good time).
14. The EAT will make the ELBA Committee aware of any incidents of a chambers failing to comply with its obligation to secure a replacement ELAAS replacement in good time ahead of an ELAAS hearing, or failing to provide them with a copy of the papers, or any other matters of concern in relation to this guidance and/or ELAAS hearings more generally. The ELBA Committee will give the chambers or ELAAS representative concerned an opportunity to provide an explanation for any concerns. The ELBA Committee reserves the right at its sole discretion to remove all members of that chambers and/or that particular ELAAS representative from the list of approved ELAAS

representatives.

On the Day

15. Please be at the EAT (on the 5th floor) 1 hour before the hearing/s is/are listed to commence. Please call the Listing Office on 0207 273 1021/1049/1068/1059 from the phone by the public lifts. The EAT staff will then come out and show you where you will be based, as you have the use of a conference room, which they will need to unlock.
16. Your job initially is to see those Appellants who wish to speak to you. The papers you have received are from Appellants who have indicated they wish to have your assistance. Some may decide, after talking to you, that they want to present their own case and simply seek advice on procedure, or on how to address the Tribunal. Others may ask you to present the case. It is possible that Appellants will have obtained other representation or will not turn up and that therefore you will have no work to do!
17. The ELAAS Scheme is available to all unrepresented Appellants, regardless of means, and so you should be prepared to act for both employer and employee Appellants.
18. If the Appellant does not turn up you should not make submissions. The EAT does not expect you to offer your services as an amicus. There is no merit in sustaining an appeal which the Appellant is not pursuing, especially given the needs of other Appellants. There are also difficulties in making submissions without instructions.
19. You must obtain the Appellant's agreement before abandoning any points in his/her Notice of Appeal, even if you are doing so in favour of points which seem to you to be better ones. If an Appellant is reluctant to abandon points, you should be careful of wasting valuable preparation time, and also damaging the confidence of an Appellant who has not met you before, by investing too much energy in explaining difficulties in the case if you find the Appellant is hard to persuade. A constructive compromise may be to agree that you will focus your oral argument on certain points to the exclusion of others, without

formally abandoning claims. In that case, you must, of course, follow through by explaining to the EAT that the Appellant maintains all the points in the papers, and not only those on which you make oral submissions.

20. You have the discretion to appear before the Tribunal or not as you think fit. In particular:

- i. If it is your view that the appeal is simply devoid of any arguable point of law you should say so to the Appellant rather than to the Tribunal.
- ii. Even if you have contacted the Appellant (having obtained his or her details from the EAT) the day before the hearing to say you see no arguable point of law, it remains your duty to still attend the EAT on the day and let the Appellant know your views in person.
- iii. You may not wish to appear if friction develops or seems likely to develop between you and the Appellant.

21. Do not forget that you should consider:

- i. Whether there is a conflict of interest with any of your existing clients or public duties. If so, please notify the EAT as soon as possible of the difficulty and pass the file unread to another ELAAS rep.
- ii. Whether the case can proceed on the day - perhaps the relevant documents are not there?
- iii. Whether you can suggest one or two firms of solicitors who might be able to help.
- iv. Whether there are costs risks in appealing which should be pointed out.
- v. Whether the Employment Judge's notes are needed and how to ask for them.

22. It will often be helpful to write a note to give to the Appellant to help them to remember what you have advised (and for the record). If you do this, you may want to keep a copy of your note for your own purposes.

23. Please make it clear to the Appellant that you are NOT going on the record, i.e. acting for him/her in the full appeal if it is allowed to proceed. Your functions under the scheme are limited to the one day.

24. You may help the Appellant draft a letter or an Amended Notice of Appeal, but these should not be signed by you; they will be the Appellant's documents.

Further Representation

25. If the Appellant wishes, do make sure you complete the Free Representation Unit/Advocate referral form left in the ELAAS rooms – it's not for the Appellant take the form away to complete. The EAT will then pass the form on with the bundle. Please ensure you hand both the papers and the completed form to the EAT before you leave.

26. It is not for ELAAS representatives to decide whether an Appellant should benefit from representation from the Free Representation Unit/Advocate, that is for those organisations to decide. Therefore, ELAAS representatives should complete the form if the Appellant has asked you to do so. However, ELAAS representatives can indicate on the form whether or not they would be willing to represent the Appellant under the guises of FRU/Advocate. You are, of course, under no obligation whatsoever to continue to act if you do not wish to do so.

27. If the client wants you to act after the hearing, and you are willing to do so, please make sure that s/he understands that s/he is under no obligation to you, that the advice already given by you at the EAT is entirely voluntary and that s/he will not be charged for it.

Final Things

28. Once your ELAAS hearings have finished, and you have completed all of the relevant paperwork (see below), you are free to leave the Rolls Building. You are not required to stay at the Employment Appeal Tribunal all day, although please be aware that sometimes ELAAS hearings listed at 10 or 10.30am may continue into or not commence until well into the afternoon.

29. Do not forget to leave the completed Advocate/FRU referral forms (if the Appellant has asked you to complete them) with the Court Usher before you go.

30. You may leave your papers at the EAT to be destroyed if you wish, however you should ensure that any such papers are handed to the EAT staff in person and not merely left in the building. Please be aware that any papers you hand back to the EAT staff will be destroyed by the EAT. Further, that in cases in which permission is refused by the EAT, the ELAAS bundle is destroyed by the EAT. Accordingly, barristers may decide that they would prefer to retain a copy of their papers in case any issues arise at a later date in relation to their work on the appeal. Barristers should protect any information provided to them by the EAT or by Appellants in the normal way, and in accordance with their obligations under the GDPR.

31. Barristers will be reassured to know that the Bar Mutual Indemnity Fund has confirmed in 2015 (in writing) that claims arising from work done by members of the Bar Mutual will be covered under the Bar Mutual Terms of Cover.

Coronavirus Arrangements

32. During the course of the coronavirus outbreak in the UK, it is likely to be necessary to modify the above arrangements.

33. The ELBA Committee has discussed the situation with the President of the EAT, and has agreed the following:

- a. That ELAAS representatives can attend remote ELAAS hearings, held over skype or similar, in the same way that they would normally attend in person ELAAS hearings.
- b. That ELAAS representatives can meet with their clients remotely ahead of any hearing, rather than in person at the EAT.
- c. The EAT may not always be in a position during this time to send out paper

bundles. That in cases where the EAT is able to send ELAAS representatives the appeal papers in electronic format, most ELAAS representatives should be able to assist the EAT Judge by making an electronic bundle for use at the hearing. ELAAS representatives are referred to Benjamin Gray's excellent paper for ELBA about how to do this.

Feedback

34. Thank you very much indeed for volunteering your services to ELAAS. Your contribution is enormously valued by appellants in person and also by the EAT. You are rendering a great public service. Please let me or the Chair of the Employment Law Bar Association (currently Diya Sen Gupta QC) know of any comments you may have on your experience, particularly if you have suggestions for improving the operation of the ELAAS Scheme.

GOOD LUCK!

CLAIRE DARWIN on behalf of the ELBA Committee

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