Written evidence from the Employment Lawyers Association

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 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 Gareth Brahams (Brahams Dutt Badrick French LLP), was set up by the Legislative and Policy Committee of ELA to comment on the Commons Select Committee Inquiry into courts and tribunals fees and charges. Its submissions are set out below. Members of the sub-committee are listed at the end of this paper.

“How have the increased court fees and the introduction of employment tribunal fees affected access to justice? How have they affected the volume and quality of cases brought?”

1. ELA has serious concerns about the impact of Court fees, particularly on individual litigants and small businesses

2. The increased fees present a considerable barrier to access to justice

3. Although it is a little too early to draw definitive trends, ELA expects the changes to affect considerably the way parties choose to conduct their cases, as well as settlement discussions in favour of those with the deepest pockets.

1. ELA members who have experience of litigating employment and related disputes in the civil courts have expressed serious concerns about the recent increase in issue fees, and of the further proposed increase which would see the maximum issue fee raised to £20,000. The changes are increasing the entry fee for litigation and represent a further hurdle for anyone other than the largest companies and richest individuals in accessing the courts. The remission system does not go anywhere near far enough to protect access to justice for those of ordinary means.

2. The recent changes seem to go against the fundamental principles which drove the Jackson reforms, particularly those regarding cost budgeting. The reforms accepted that high costs
usually associated with High Court proceedings had the effect of restricting access to justice, and should be reduced, yet the recent changes are disproportionately affecting parties with more limited funds.

3. Whilst increased fees have only recently been introduced, and it may be too soon to draw definitive conclusions on the long term effect of such an increase on employment disputes heard in the civil courts, some initial and worrying trends have been observed by ELA.

**Impact on individuals, both claimant and defendant**

4. Claims involving small sums which are being brought by individuals against bad employers will continue to be affected. Although it is still early to assess the long term impact, ELA expects a decrease in the number of claims brought by individual claimants as the issue fee represents a considerable upfront cost.

5. This additional cost restricts access to justice to precisely the group who needs it the most, namely individuals who fall outside the limited contract jurisdiction of the Employment Tribunal and yet are not high net worth individuals. Those falling within that category will see their options limited, as the issue fee may prove to be prohibitively high, and tip the balance in favour of not bringing proceedings. It rewards employers for breaching contracts.

6. Claimants of ordinary means, who most often seek legal representation under a Conditional Fee Agreement, combined with the protection of after the event insurance, already face very large irrecoverable costs, making much litigation which was viable pre-Jackson pointless to pursue. This imposes an additional and early stage financial burden which also has to be financed. The cost of financing again has to be borne out of damages.

7. Another significant expected impact is on individual defendants, who may have to bear the issue fee when settling costs. Take, for example, an individual earning £30,000 per year who is injunction for breaching a ‘non-compete’ clause in their employment contract. The fee they would have to meet would be £20,000. After tax, that is around a year’s pay. Even if they have a good case they are not going to risk that kind of sum to defend themselves. This is likely to be an influencing factor on settlement discussions – causing employees to agree to restraints of trade which courts would not enforce as a matter of public policy.
Impact on small and medium enterprises (SMEs)

8. ELA considers that small and medium enterprises (SMEs) are also among the most affected by the recent changes, as they will continue taking into account the issue fee when considering whether to litigate.

9. For owner-managed businesses and SMEs, an issue fee of up to £10,000 is already a large cost to bear up front. It will continue to be weighed up in the pros and cons of commencing litigation, for instance to pursue a debt or take action against a breach of covenant. Such businesses will have to choose whether they are willing to enforce their rights at a cost. This is a particularly regrettable effect where the litigation is required to keep small businesses alive, as is the case with enforcing restrictive covenants.

10. This proves a particularly relevant point in the case of an injunction. At an early urgent stage, it is difficult to get a sense of the scale of the potential damage caused by the breach. Presumably the claim form will include a claim for damages in the alternative, but as damages are difficult to estimate, businesses are having to pay the maximum fee, unless they are willing to limit damages with no proper investigation being carried out. This is a risky approach, and one which not many businesses are willing to take.

Further observations on remaining cases

11. Larger corporations will not be dissuaded by the cost of bringing proceedings; neither will high net worth individuals. Indeed, the biggest beneficiaries will be rich claimants suing impoverished defendants.

12. Another initial observation is that, since the increase in fees, there have been considerably fewer cases brought in the Queen’s Bench Division. In contrast to this, the Chancery division of the High Court, where higher value and more complex claims are issued, seems to remain very busy. One explanation for this would be that the fees are already prohibitively high to those bringing smaller claims.

Effects on settlement discussions
13. ELA considers that the recent changes will have the effect of bringing forward settlement discussions, as parties will aim to reach settlement before proceedings are issued, and before the fees are incurred. In any case, the issue fee will certainly be an influencing factor in settlement discussions even after proceedings are issued. That would be a good thing were it not for the way in which the scales will be tipped at that time, namely in favour of those with the financial means to take the risks of litigation.

14. In particular, defendants who are individuals will have an increased interest in settling the case, as they may be responsible for the significant issue fee.

15. In cases where there have been interim applications, costs are often an impediment to settlement after such applications, and an increase in fees only aggravates the problem.

16. ELA is particularly concerned by the Ministry of Justice’s latest proposals to increase the issue fee to £20,000, which will only exacerbate all of the concerns highlighted above in employment cases for the enforcement of covenants in particular.

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