



Your employment tribunal needs you!

JUDGE BARRY CLARKE, President of Employment Tribunals in England and Wales

This autumn, the Judicial Appointments Commission will launch two selection exercises to recruit more Employment Judges in England and Wales. One is for new fee paid judges; the other, for new salaried judges.

Background

Perhaps more than any other audience, ELA's membership knows the pressures faced by employment tribunals in recent years.

The number of claims presented started to rise immediately after the Supreme Court's judgment in the *Unison* case in July 2017. That judgment resulted, of course, in the abolition of the fees regime. The size of our outstanding caseload rose steadily over the next couple of years. Our ability to tackle it was hampered by a range of resources problems, including not having recruited judges for several years.

We were beginning to make inroads after being joined by over 50 new salaried judges in 2019. For a short while, the outstanding caseload began to fall. Then Covid happened.

The pandemic has had many consequences for employment tribunals, but I will focus here on two of them. First, it slowed the system down. Staff could not work remotely with our case management software, which, at the time, was a server-based package physically tied to each regional venue. Although HMCTS staff members were key workers, civil servants in the justice sector faced the same pressures as everyone else. The result was long delays in dealing with correspondence, especially in London. Also, like other jurisdictions, our ability to conduct hearings in person was greatly impaired. It took time to develop our capacity to do so by video.

Secondly, the pandemic led to an increase in claims, a result of the disruption it caused to the labour market. The pages of the *ELA Briefing* over the last 18 months have highlighted the complexities of the Coronavirus Job Retention Scheme and the legal issues that have followed.

So it is that, in the autumn of 2021, employment tribunals face an all-time high outstanding caseload. ELA members who wish to know more about these pressures can study the public minutes of the national user group meetings and the various roadmaps and guidance documents that I have issued alongside Judge Shona Simon, my counterpart in Scotland.

Waiting times are unacceptable, especially in London and the South East of England. Your recent survey laid bare some of the difficulties we face. We need many things to help us tackle this caseload, but you can help with one of them. We need more judges.

The Judicial Appointments Commission (JAC)

Recruitment to the judiciary is undertaken by the Judicial Appointments Commission (JAC). This is the statutory body responsible for running selection exercises and making recommendations for most judicial roles. In the courts and employment tribunals, the JAC's recommendations are sent to the Lord Chancellor.

Because of the JAC's independence and rigour, recruitment to the judiciary is a world apart from the so-called 'tap on the shoulder' of decades past. You can read more about the JAC's work and sign up for its newsletter, here: www.judicialappointments.gov.uk. The website is a rich source of information about how exercises are run. It contains over 20 individual case studies, as well as evaluation reports from historic exercises. It is full of excellent tips on choosing the best examples for your application form, selecting the right referees (known as independent assessors) and maximising your chances of selection.

There is also much of value on the judiciary's own web pages, including descriptions of various career paths and announcements of judicial appointments.

Salaried and fee paid judges

The JAC appoints to both the salaried and the fee paid judiciary. What is the difference?

Salaried judges are sometimes said to be 'appointed for life'; in practice, that means until they retire. Some judges retire at their state pension age. Many continue beyond then, until the mandatory age by which they must retire; the Government proposes to increase this age next year from 70 to 75. Salaried

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judges must forego their professional practice, so it is a big step indeed. They are often, but not always, recruited from the ranks of fee paid judges. In addition to the daily judicial tasks you would expect, in terms of managing and deciding cases, salaried judges may have additional responsibilities in areas such as training, appraising and mentoring, or they may join committees on policy or procedure topics.

A fee paid position is similar to a salaried one but, at least in the early years, it generally involves less complex cases. In employment tribunals, for example, fee paid judges sit first on claims like unpaid wages and unfair dismissal, progressing later to complex case management and claims about discrimination and whistleblowing. Appointment is for a renewable term of four years. Fee paid judges are paid according to the number of days they sit; in employment tribunals, that is a minimum of 30 days a year (although some sit many more days than that). Most fee paid judges remain in professional practice the rest of their time, with its usual range of demands.

A fee paid role enables a person to decide if they are temperamentally suited to life on the Bench. It also enriches and deepens their understanding of legal process, the interests of justice and their own specialist discipline. A few fee paid judges develop a portfolio of such appointments across various jurisdictions, and enjoy the flexibility and stimulation that such a wide purview can deliver.

Two exercises

Over the next two months, the JAC will launch two selection exercises to recruit more Employment Judges in England and Wales. The first, opening in October, seeks to recruit 50 fee paid Employment Judges. The second, opening in November, seeks to recruit a number that, after taking account of fractional working arrangements, equates to 50 full-time equivalent salaried Employment Judges. To be eligible to apply in either exercise, you must have accrued five years of post-qualification experience by the time that outcome letters are sent; this is likely to be during the autumn of 2022.

I will deal with each in turn.

Those wishing to become a fee paid Employment Judge can already subscribe to email updates on the relevant page of the JAC website. A two-week registration window is open between *5 and 19 October 2021*. If you decide to register, you will receive an invitation to complete a first stage qualifying test; this includes a 'situational judgement' test and a 'critical analysis' test (both of which are multiple choice). The most meritorious candidates will proceed to a second stage qualifying test, based around a written scenario

and requiring a narrative response. Those who succeed in the second stage are invited to complete a full application form and attend a selection day, involving a role play and an interview. You can, if you wish, register your interest at the same time for appointment as a fee paid judge in one of the seven chambers of the First-tier Tribunal.

Those wishing to become a salaried Employment Judge must wait a little longer – probably until late September or early October – to read about the exercise on the JAC website. This is because the web pages are still under construction. But you can start thinking about it now, and there are certain things I can tell you.

I expect the exercise to launch in early November 2021. In order to encourage as many candidates as possible, I have decided – as happened in the 2018/19 exercise – to waive the requirement for previous judicial experience. So, if you think you are ready, you can move straight from professional practice to the salaried judiciary of the employment tribunals. I can also tell you that, when the exercise launches, the relevant web pages will state that candidates must have employment law expertise and explain how that can be demonstrated.

If you would be entirely new to judicial office, there is nothing to stop you applying in both exercises.

Finally, I can tell you that there will be vacancies across all areas of England and Wales. That said, there remains a particular need for salaried Employment Judges in London and the South East of England. That part of the country generates half of the national caseload and holds over 60% of the stock of outstanding cases.

Salaried part-time working

Salaried part-time working opportunities are available. You can find a copy of the Lord Chancellor's policy on part-time working on the JAC website. In summary, all applications to work part-time will be considered, provided that they equate to no less than 50% of the full-time equivalent (FTE) post and in multiples of 10% (ie 50%, 60%, 70%, 80% and 90% FTE.)

In employment tribunals, salaried Employment Judges take on the bulk of the long hearings. To list cases effectively, we require salaried judges to work five-day weeks in blocks of four weeks or more. Term-time working is especially popular.

Diversity and inclusion

The judiciary must capture talent across all sectors of society and reflect the diverse population it serves. The most recent expression of this essential aspiration is the Judicial Diversity and Inclusion Strategy, published in November

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2020. Employment lawyers will be especially interested in the introduction to the strategy document written by Lady Justice Simler, Chair of the Judicial Diversity Committee and a past President of the EAT.

I strongly encourage applications in these two exercises from suitable candidates of all backgrounds, characteristics and personal circumstances. Additionally, you are welcome to apply regardless of whether you work as a solicitor, barrister or legal executive, whether you are in practice or academia or work as a professional support lawyer, whether your professional time is spent in the public sector or the private sector, and whether you gained your experience in large firms, on the High Street, or in-house.

Webinar

Together with the lead judges involved in these exercises and a JAC commissioner, I will hold a special free webinar/Q&A with ELA members at 5pm on 12 October 2021. Indeed, by the time you read this article, you should already have seen emails from ELA on the subject. I encourage you to register for the webinar and then follow the instructions on how to submit questions in advance.

If you cannot attend 'live', the webinar will be available for you to view online on the ELA website later.

Training and support

Successful candidates in either exercise will be well supported by a sophisticated programme of observation, induction and continuation training. Every newly appointed judge will be assigned an experienced mentor, who will be available to act as a confidential sounding board and support you in the initial stages of your judicial career.

Observation of a hearing

If you would find it helpful to observe an employment tribunal hearing before deciding to apply, followed by a conversation with an existing Employment Judge, please email my support office at: presidents_office_employment_e_and_w@justice.gov.uk

Subject to demand, my office will put you in touch with a Regional Employment Judge to arrange a suitable opportunity for you.

To help us manage demand, please only express an interest if you meet the eligibility requirements. Your email should identify your name, a contact address and your preferred regional office. (It would be sensible not to observe a hearing or speak to a judge in a region where you regularly practise

or appear.) You will be told the names of the parties so that you can identify any conflicts that might arise.

Given present circumstances, this would not be a full 'work shadowing' experience. The observation of the hearing, and the discussion with a judge, would likely be conducted using the Cloud Video Platform. There may be several other observers present for the same reason.

Those not yet interested in applying for judicial office, but perhaps thinking about it for the future, can apply for the formal Judicial Work Shadowing Scheme.

Is this for you?

Only you will know if the time feels right, in the words of the judicial oath, to 'do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will'.

To be a judge is to support the rule of law, and to be an Employment Judge is to support the rule of law in the workplace. It is a fascinating and rewarding job; no two days are ever the same. It is also intellectually and emotionally demanding. I would go so far as to say that the role of judge is a noble one. This is because, although a judge assumes a role with great power over the lives of people, it is a power best exercised with clarity, humility and courtesy.

You don't have to take my word for it. Below, you will find the thoughts of three Employment Judges appointed to salaried office in 2019.

I hope you will consider applying. Your employment tribunal needs you!

Three views from the Bench: Judge Catherine Rayner

'I thoroughly enjoyed my career at the Bar. I was unsure whether to apply to become a salaried judge, because I had no previous experience as a judge. I was encouraged to apply by colleagues who were fee paid and salaried judges. I am glad that I did.

'The transition from barrister to salaried Employment Judge has been a challenge, but one with real rewards, and one I would recommend. It may seem obvious, but judicial work requires a different skill set from that of a professional advocate. Judges make final decisions, while advocates predict chances of success and work to deliver the best result for a client. The judicial skills of fact finding, and drawing conclusions from them, use skills of legal analysis but require a completely different approach.

'The best thing in making the transition has been the incredible support and the focused and helpful training I

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have received. The message from day one has been that you are not alone, and help is at hand. The transition has been made easier and more enjoyable by the support, encouragement, friendship and general goodwill from other members of the judiciary and from court staff.

'Last but not least, the opportunity to benefit from the experience and insight of panel members and the sharing of decision-making with others committed to the delivery of justice is one of the most surprising and satisfying aspects of my job.'

Judge Benjamin Burgher

'Timing was key in my decision to apply to be a salaried Employment Judge. I felt it was the right time to retire from the adversarial fight; the right time to seek a new challenge; and the right time for me to pursue a different way of living. While you really have to reflect and ask if you are truly ready to become a salaried judge and leave private practice, I can assure you that once you make the decision to do so, and commit to it, you won't look back!

'A salaried Employment Judge's outlook is different to that of a fee paid judge, a role I had previously performed for over 10 years. A fee paid judge must juggle competing professional commitments and obligations; as a barrister, I was always on duty, with the stress of preparing and presenting cases. As a salaried judge, there is undoubtedly pressure of work but the stress is less so. There are no post-hearing conferences to attend, no advices to write and no urgent emails to attend to. The predictability has massively enhanced my work-life balance, and my ability to fully appreciate family and social occasions.

'Private practice expectations relating to administrative support and resources must also be set aside. Patience is required. For example, a 'ticket' needed to be generated to resolve the air conditioning problem in my office, and the authorised contractor eventually actioned the ticket ... a year later.

'Back to the positives. You'll find that being a judge provides you with a diet of complex and varied cases. I have been assigned fiddly holiday pay calculations, intricate minimum wage claims, appeals against health and safety executive improvement notices, multi-week unlawful discrimination, victimisation and whistleblowing claims, multiple claims involving thousands of claimants and numerous judicial mediations.

'It's not all judging either. For a salaried judge, there are ample opportunities to get involved in training, outreach events and student shadowing, should you wish. So, if you are ready, apply, and don't look back.'

Judge Emma Burns

'I had been a solicitor in private practice for 20 years, specialising in employment law, when I was appointed as a salaried Employment Judge in 2019. I had worked for two large regional commercial law firms, becoming a partner in 2008 and leading a team from 2011. I enjoyed my job hugely, but it was time for a change.

'I had also been the chair of the board of trustees of a leading charity. My term of office in that role had come to an end, but it left me wanting to find a new challenge that offered the same sense of fulfilment from being involved in something worthwhile that chimed with my values. Becoming a judge has done just that. I have been able to continue to use my legal knowledge and skills in a leadership role which feels important and valuable. It has been a great move for me.

'I work in a very busy centre and we have a huge variety of cases. I really enjoy not knowing what is coming up next. It is a real privilege to see snapshots of people's working lives and learn something new every day. A great day at the office is when a hearing has gone well and both sides felt heard. Inevitably emotions can sometimes run high, but an important part of judgecraft is managing that. It can be challenging at times, but very rewarding. I also work with great colleagues who are very supportive.'