



**MINUTES OF THE EMPLOYMENT TRIBUNALS (SCOTLAND)
NATIONAL USER GROUP
DATE OF MEETING: Tuesday 25 October 2022**

<u>ATTENDEES</u>	
<u>Name</u>	<u>Organisation</u>
Amy Gordon	Dentons
Megan Jenkins	MacRoberts LLP
Calum MacNeill	Westwater Advocates
Alan McCormick	Jackson Boyd, Lawyers
Laura McKenna	MCM Solicitors
Lindsey Miller	Scottish Engineering
Ross Milvenan	Just Employment Law
Graham Mitchell	Clyde & Co
Alan Philp	NatWest Mentor
Chris Reeve	NHS
Katie Sloan	Valla
Amie Trainor	Scottish Engineering
William Lane	Worknest
Steven McLaren	Kippen Campbell
Carlyn McCallum	Harper MacLeod LLP
David Hutchison	Dallas McMillan
Eilidh Wood	Burgess Salmon
Laura Bowie	
Laura Lilburn	Renfrewshire Council
Kirsty Simpson	
Kelly Ann Fraser	Aberdeen CAB
Raymond Farrell	Glasgow City Council
Cameron Paterson	
Ruth Strain	DLA Piper
Katie Hendry	BTO Solicitors
Caroline Carr?	BTO solicitors
Claire Heggie	CMS
Adele Pacitti	Brodies LLP
Robin Turnbull	Anderson Strathern
Kirsty Simpson	ACAS
Becky Robertson	Glasgow City Council
Ross MacKenzie	
Marie MacDonald	Miller Samuel
Margaret Gribbon	Bridge Litigation
Stuart Swann	Legal Services Agency
Sarah Shiels	Balfour Manson
Paman Singh	Law at Work

Also in Attendance

Judge Susan Walker, President of Employment Tribunals (Scotland)
Judge Frances Eccles, Vice President Employment Tribunals (Scotland)
Mark Lewis, Employment Tribunal Service Manager
Stephen Toal, Head of Operations (Scotland)
Sandra Martin, Senior Operations Manager ET (Glasgow)
Michael Nuna, Senior Project Manager, Employment Tribunal Project
Richard Boyd, Senior Policy Advisor, BEIS
Freddie Everitt, Labour Markets Directorate, BEIS
Alan Hope, ACAS
Ian Proctor, ACAS

Agenda item 1 – President’s update

The President, Judge Walker (SW), welcomed users attending in person at the Glasgow Tribunal Centre (GTC) and those participating via Microsoft Teams. She also welcomed the new Vice President of Employment Tribunals (Scotland), Judge Eccles.

Future User Group Meetings

Judge Walker explained that the meeting was being run as a hybrid partly at the request of a user and said that there had also been a request that future user group meetings be conducted entirely remotely. Judge Walker is happy to do that but would be grateful for the views of users as to whether they consider there is value in continuing to hold these meetings in person with a Teams option or whether the preference would be for wholly remote.

Hearings

Following the latest version of the Joint Presidents’ Roadmap issued in March this year, the ET in Scotland has continued to return to more in person hearings. With social distancing restrictions being removed, more in person hearings are now being listed than remote. In terms of the Roadmap, there is capacity to list all final hearings of unfair dismissal cases as well as discrimination and whistleblowing cases in person.

Hybrid hearings, in which some participants attend in person, some remote, are now common and, the President believes, will be a permanent feature of some hearings in the future. It would be unusual for a judge to require a peripheral witness to travel a distance to attend but that doesn’t mean that any witness who wishes to attend to give

evidence by video will be permitted to do so. Key witnesses, in particular where there are disputed facts, will often be required to attend in person to give evidence and be cross-examined. Parties themselves and representatives will usually be expected to attend if a case is listed for in person hearing, even if some people are joining remotely. The same is true of the judge and members. Other arrangements would only be permitted if there were specific reasons.

Witnesses based overseas.

An issue that continues to cause difficulties is where a party wishes to lead evidence from a witness by video and the witness is abroad. Although video evidence has been permitted for many years it had never been suggested that there was a problem if the witness was outside the UK.

A decision of the Upper Tribunal Agbabiaka 2021 UKUT 286 (following on from an intervention by the Foreign Office) has changed that. The Upper Tribunal accepted that it is a diplomatic matter whether a court can essentially extend its reach to another country for the purpose of taking evidence from a witness based there and that consent should be obtained through the foreign office. Some of the difficulty is because agreements were in place through the EU and , after Brexit, the UK ceased to be covered by those agreements.

Although not strictly bound by a decision of the Upper Tribunals, as this was seen as a diplomatic matter, both Presidents decided it was appropriate to follow the same approach and Presidential guidance was issued following the last user group meeting. That has since been updated and the most recent Presidential Guidance on this was issued in July and sets out the process to follow.

The Tribunal will make the necessary enquiries and there is no fee but parties should contact the tribunal in good time so that the necessary steps can be taken to seek consent. It can take a long time. Sometimes the Foreign office don't get a response at all and sometimes it comes with conditions. Parties should not assume consent will be given. For example, countries such as US, Australia and Canada have consented but countries such as Germany and Denmark have refused.

Public Access to Hearings

For video hearings, public access is provided by sending a link to CVP, the cloud video platform, available on request to anyone wishing to observe the hearing. Once ET (Scotland) started back to in person hearings, some of the hearing rooms could still not accommodate a public gallery because of social distancing and so public access was provided to those in person hearings, by a video link to the hearing room.

This facility has continued even after the public have been able to access the hearings in person. Partly, because, although it was possible to attend to observe a hearing, it was recognised that it is still desirable to reduce the number of people mixing in a confined space where that is not necessary. Judge Walker advised that she was considering, with HMCTS colleagues, whether that facility should continue to be offered.

The President's instinct is that wider public access is a good thing generally but it does bring its own issues.

- More people observing a hearing. For some cases, it can be a significant number of people. Often observers come in and out of the hearing which can be very disruptive.
- Problems can arise where witnesses are using the same method to join a hybrid hearing .
- The facility is not available in every hearing room.
- Live tweeting, for example, is something that has arisen and has to be controlled. Although this is often permitted in E&W, there are specific Scottish issues . Witnesses are kept out of the hearing room, for example, before they have given evidence so they are not influenced by other evidence. That is endangered if evidence is freely tweeted verbatim. So, the President advised she was considering whether Presidential Guidance might be helpful. She was not saying no but consent was required from the Tribunal hearing the case and that is likely to come with conditions.

Recording

The judiciary have been asking for recording in employment tribunals for a long time. Some users may recall a limited recording pilot in Glasgow

over 10 years ago. However, the pandemic has brought it into focus, especially in Scotland.

The SPT gave a direction that during the pandemic, all hearings (even private hearings) should be recorded. ET (Scotland) complied with that direction. All telephone hearings and video hearings are recorded and, where the equipment is there, the Tribunal aims to record in person hearings too (because we can). However, again, that creates satellite issues with users (and others) asking for access to recordings.

A Practice Direction and PG were issued to users for comments and the final version will be coming and is quite advanced in drafting. In the meantime, following a decision of the EAT in *Kumar v MES Environmental* (a decision in March this year) 2022 EAT 60, the position is that if there is a recording of an ET hearing, a party can apply for a transcript, for cost, using the online form used by other HMCTS jurisdictions. EX107.

HMCTS will not provide a copy of the recording itself. Exceptionally, perhaps as a reasonable adjustment, a party may be permitted to come into the tribunal office to listen to a recording under supervision.

Website

There is a new website for Scotland. It is part of a general overhaul of the judiciary.uk website and is still being amended. The President invited users to alert her office if they spot something that is not correct.

Colleagues in Employment Tribunals England & Wales have added to their part of the website lists of external sources of employment law advice and support (where that is available at no cost). It includes Citizens Advice and Acas but also law centres and so on. There is a strong disclaimer to say that the tribunal does not give advice and is not responsible for the advice given by such organisations. Employment Tribunals (Scotland) are considering doing something similar. However, before doing so, we will consult with users in case there is any objection to doing that. The President stressed that being on the list would be a voluntary “opt-in” process.

HMCTS reform

In the context of the Employment Tribunals, HMCTS reform aims to provide a paperless, digital system that works more efficiently for judiciary, staff and most importantly ET system users.

Instead of sending and receiving letters and emails to and from ET offices, the plan is for parties and their representatives to access their case information through a portal designed for that purpose. In the case of legal representatives, the MyHMCTS portal will be used and for litigants in person, or non-professional users, CitizenUI will be the portal. HMCTS intends that these will be the main way to communicate with the Tribunal. There will be a new ET1 and ET3 submission process, again through the relevant portal.

With regard to applications in the proceedings, It is hoped that parties who want to apply for an order or make some sort of application to the tribunal will be prompted to identify the kind of application they wish to make and given some guidance about what information the tribunal will need to decide it. The aim is to produce a more focussed application than some of those currently received, which it is hoped will improve efficiency and turnaround time.

The judiciary are very heavily involved in assisting the Project team who are designing the new system and writing the software. However, the President stressed that this is a product which is being delivered by HMCTS. The judiciary are consulted and may influence what is developed but ultimately do not have control over the product, the timescale or the budget.

Scotland and Leeds are early adopter offices for Reform. This means they get the new system before others and can provide feedback.

The first release was in the middle of July and applies to a specific and limited case type. Currently only discrimination cases where the claimant is a litigant in person (and not part of a multiple), are filtered through the reformed system. Currently the changes are simply internal and users will not have noticed any difference. However, for those cases there is no paper file and all communication between judges, legal officers and the administration is being done digitally.

The online ET1 for these cases is due to be rolled out on 31 October. (Note; this was delayed until 29 November)

Some comments on Reform:

1. the judiciary have emphasised how important it is to have proper consultation with a full range of system users as the reformed system is being designed. Contact details of Scottish User Group members have been passed to the reform project team to facilitate this.
2. Since the beginning of this project, the judiciary have emphasised how important it to provide access to justice for those who are not confident with technology or who are unable to use it for any reason. Assurance has been given that it will remain possible to submit a claim and response on paper and to correspond with the tribunal in that way. The tribunal staff will scan in any paper documents so they are added to the digital file but all contact with the user will be on paper, if that is their preference.

The President invited users to contact her office if, as they begin to engage with the new process, they have any concerns or suggestions

Special identity of Scottish Employment Tribunal

The President referred to the special identity of the Scottish ET. The President noted that Scottish leadership have worked closely with judicial colleagues in E & W through the pandemic. That mutual support was essential to much of what has been achieved and they would continue to work together on matters of common concern such as Reform. However, The President said that she was acutely aware that there was a danger that the two Tribunals became so closely aligned that ET (Scotland) lost its special identity. She knew that this was a concern for many judges and users too. She assured users that she would continue to emphasise where appropriate that ET (Scotland) was not just another Region of a bigger ET system but a separate Tribunal with its own culture and traditions grounded in Scottish civil practice which differ from those in E & W.

An important difference is the use of witness statements, almost universal in England and Wales but, until the pandemic, very rare in Scotland. Users will be aware that a practice direction and presidential guidance has been issued on witness statements which reinstates the Scottish practice of oral evidence in chief as the default. These documents were issued to the user group and are available on the website.

Agenda item 2 - Administrative update – Sandra Martin

Sandra confirmed that:

- Administrative targets such as the 10 day correspondence target are being met in the majority of cases.
- All Glasgow administrative teams are now located on the main administrative floor within the GTC. This has contributed to an improvement in both efficiency and morale.
- Hearing rooms re-configured to pre-covid layout.
- Successful move into Endeavour House, Dundee with the venue fully operational from 12th September.
- Glasgow is an early adopter office for reform products. Staff are enthusiastic and actively engaged in the projects and providing feedback on what works and what doesn't.
- Workloads continue to be stable across all teams despite a steady reduction in staffing since April 2022

Looking forward Sandra confirmed that:

- The focus is very much on reform, continuing to plan for that and to deliver training to ensure staff are skilled and confident in the processes as they roll out.
- We will continue to monitor staffing levels and workload.
- ET Scotland are exploring the possibility of piloting the use of Webchat.

Agenda item 3 - HMCTS Reform update - Mark Lewis And Michael Nuna

Performance Data:

Users are aware that following the migration from ETHOS to ECM it has been a challenge to get relevant and accurate performance data. Mark confirmed that the performance analysis team have been focusing on

getting the performance data on the reformed system right. He confirmed that some performance data has recently been published with caveats and that he expects costs and awards to be available for publication in the next published data run (probably in December).

Reform:

To date the project has been working on improving the internal processes and the next step is to introduce the external user interfaces to allow Employment tribunal users to interact with the Tribunal using the external facing portals. The new internal reformed service is available to the early adopter sites, Glasgow and Leeds and this will be shortly expanded further to another 2 sites in England and Wales, (Note: post meeting, confirmed as Bristol and Nottingham.)

Citizen UI – This portal will allow those users who are not legally represented to submit and track their cases online.

MyHMCTS – This portal will allow Legal Representatives to submit and track their cases online.

In the next 5 months the project will expand the functionality to users by releasing the Employment Tribunal on the MyHMCTS portal.

Late 2022 (Note; Post meeting, this has been delayed to early 2023) ; the first release on MyHMCTS, will allow legal representatives to submit a new online ET3 form on the MyHMCTS portal which will be processed online.

The second release in early 2023, will allow Legal representatives to interact with the Tribunal via MyHMCTS, by giving the ability to submit applications and respond to any correspondence issued by the Tribunal.

Third release in Spring 2023, this release will complete the end to end digital journey. The reformed service will enable Legal Representatives to file claims (ET1) via MyHMCTS, upload hearing bundles and issue counter claims.

Michael Nuna provided a demonstration of what MyHMCTS will look like. This was a brief overview and Mark Lewis advised that there would be events to provide a more thorough review of the product.

Questions on Reform

Q1. What if the system were to crash when you are up against a deadline?

A1. from Susan Walker. Just the same as now although users be better protected because it would be caused by a system failure that we could track.

Q2 from Alan Philp

Given that the respondent's legal representative is not likely to be known when the ET1 is served, will they be able to forward the details to a legal representative.

A2 from MN and SW

Yes, instructions will be issued detailing how a legal representative can log on to MyHMCTS to file an ET3 response

Q3 from Becky Robertson

If the ET3 is lodged on MyHMCTS will we get an acknowledgement that the ET3 has been lodged successfully?

A3 From ML and MN

When a response is submitted via MyHMCTS, an automatic notification will confirm that the response has been submitted. The person who completes the response does not receive an email notification as well.

Q4 from Ian Proctor:

On setting up accounts whether you will monitor to make sure there aren't multiple accounts for the same organization or exposed individuals.

A4 from MN

Yes, the system will alert users that an account has been created for the organisation.

Q5 from Ian Proctor:

Will you be able to add to that account?

A5 from MN:

When the account is set up there will be an administrator who will be able to add solicitors from the organisation to the account

Q6 from Paman Singh

I have had a look at MyHMCTS - on the setting up an account, it requires a payment by account number.

A6 from ML :

That is not a mandatory field and, because ET is not a jurisdiction that incurs fees, there is no expectation that the payment by account is completed.

Q7 from Alan Philp:

Will the portal allow the submission of a late ET3?

A7 from SW & ML:

Yes, the portal will accept the submission of the ET3 but acceptance will still be a matter for judiciary

Agenda item 4 - Update from Department of Business, Energy and Industrial Strategy (BEIS) - Richard Boyd, Senior Policy Advisor

Expenses orders:

The obsolete legislative reference in the Employment Tribunals Rules of Procedure relating to taxation of Employment Tribunal expense orders has been corrected. There is no change to the way orders are made and comes into effect on **2 November 2022**. The amended legislation can be found <https://www.legislation.gov.uk/uksi/2022/1034/contents/made>

Policy

BEIS continue to work with Ministry of Justice, HMCTS and Acas on measures to address the flow of cases into the system and to improve their handling. Hearing about users' experience of what is working or not is a vital part of building understanding of what more can be done to improve people's experience of the system.

In relation to the online register of decisions, Richard said that there had been a lot of stakeholder feedback about concerns about the balance between access to justice, transparency and privacy concerns. BEIS are keen to hear of user experiences of the register, how they use it, and the impact of the register on clients and members. Please send any comment to richard.boyd@beis.gov.uk

Retained EU Law Bill – Freddie Everitt

Freddie Everitt confirmed that:

- We will not be removing all employment rights through this [Bill](#).
- The intention is to amend, replace or repeal any retained EU law which is not right for the UK.
- As retained EU law was made to apply to multiple Member States and not tailored to one country, we must now seize the opportunities provided by Brexit to review all retained EU law and ensure it supports the UK economy.
- This means revisiting the status and scope of this type of law on our statute book, and amending, replacing, or repealing it with laws that are tailored to the UK.
- BEIS are keen to hear your comments, views, and concerns. Please contact Frederick.Everitt@beis.gov.uk

Agenda item 5 - Acas Update – Alan Hope

Case receipts and outcomes

Acas have seen increased numbers of early conciliation receipts - 53,500 cases received April to September 2022 compared to 47,500 in April to September 2021. This amounts to approximately 2000 per week which remains well within their operating capacity. Acas are seeing a smaller increase in ET1 cases, 16,872 this year compared to 16,396 in the same period last year.

Resolution rates have remained steady at 36% in early conciliation and 77% in ET cases.

Smarter Resolutions

Assisted notification

As part of the ongoing trial of a new early conciliation notification form, and following consultation with users, from 24 October 2022 the trial will involve 50% of users and will continue till December 2022. The new form includes a save and return function, a change to the structure of the form so that long pages with several questions have been changed to one question per page with a clickable link. There are changes to the questions and the associated help text. There is also the addition of a task list to track progress through the form. The intention of the changes is to facilitate effective allocation from notification to the conciliator, to ensure that the conciliator has sufficient information to start the process and to help users make informed decisions about whether early conciliation is

the right choice. The next step is further research and evaluation of the new form before a final version of the form is delivered. Alan would welcome any comments from those who have used the trial form, he can be reached at ahope@acas.org.uk

Multiple Respondent Early conciliation (EC) notification – from December 2021 a change to the regulations allowed the use of one EC notification form to notify claims by one claimant against more than one respondent. However, if the form is completed incorrectly, one EC certificate number may be issued to cover more than one respondent. Alan drew attention to the link, in both the old form and the trial form, which allows users to add additional respondent details so that a unique EC conciliation number is allocated to each respondent.

Group Claims – Since 11 July 2022, representatives for groups of claimants are able to give information about a group dispute and give permission for conciliators to contact the respondent first. Acas are working on enhanced group conciliation software. Any user comments on group conciliation can also be sent to ahope@acas.org.uk

Agenda item 6 – AOB and questions:

Q1 From Clare Heggie

We are tending to see that, in respect of deciding whether to list hearings in person/via CVP and in the absence of any Presidential Guidance similar to that in E&W, EJ's are tending to list based on personal preference and not necessarily taking into account other considerations such as sustainability, practical arrangements etc. It would be good to know if anyone else is having a similar experience?

A1

Judge Walker referred to the system of defaults from the Roadmap which recognised that “face to face” is generally best but being pragmatic, shorter hearings such as final hearings in money claims cases; substantive preliminary hearings, and case management hearings are listed by video (or telephone). The default position for discrimination cases, whistleblowing cases and unfair dismissal cases is for a hearing in person. However, parties can ask for a change to the default or the judge may consider it appropriate in a particular case.

Where “face to face” is the default the judge will need to be persuaded that the circumstances in the case mean that it would be in the interests of justice to hold it by video (or hybrid) instead. Judge Walker acknowledged that some judges may need more persuasion than others in one direction or another but did not think decisions would be based on a simple preference but what they genuinely think is in accordance with the overriding objective. Judges would take all the circumstances into account. Judge Walker added the following comments:

- issues of cost are relevant but not determinative,
- convenience of parties, representatives and witnesses are relevant but not determinative
- These factors must be weighed against the important advantage of having an in person hearing. Although we managed to get most hearings completed remotely, that doesn't mean there were no difficulties.
- Where a party has a disability that impacts on the most effective mode of hearing for them, that will, of course, be a very significant factor.

Q2 From Robin Turnbull

We wondered whether guidance or clarification could be provided on calling the appeal decision maker in unfair dismissal claims?

In previous User Group Meetings, we've been told that it is often not necessary to have the appeal decision maker attend as a witness in an unfair dismissal claim. If little or nothing different has happened at the appeal stage, then the Tribunal does not need to hear from an additional witness and the correspondence – demonstrating that there has been an appeal and nothing changed – is enough. And in such circumstance, it has been surprising if they are called and it is seen as unnecessary.

A2

The President said there is no specific guidance on this, generally, it is important to think about and call only witnesses that are necessary to the issues to be determined and only to focus on the matters that are in dispute. However, it is a matter for the parties to call whatever witnesses they think are necessary.

Q3 from Paman Singh

Are there any plans to refine the search option on the online Register? Currently the search is very primitive and does not allow for an effective search of recorded Judgments. Specifically, are there plans to allow users to filter searches, for example by Respondent or Employment Judge? Further, can consideration be given to filter between Judgments with reasons and basic Judgments?

A3

Mark Lewis confirmed that there are ongoing discussions between, BEIS, MOJ and HMCTS in relation to file storage, how the online register is managed, what information is available and how it can be accessed. Richard Boyd said that they were looking at the balance between transparency and right to privacy. He is interested to hear how people are using the register and what they want to see in terms of what information is available and accessible.

Q4 – Paman Singh

The Law Society of Scotland Solicitor smart card allows holders to enter HMCTS buildings without going through searches, however, the same card is not accepted in England & Wales (or Northern Ireland). Conversely, the English equivalent Criminal Law Solicitors' Association (CLSA) card allows English users access to HMCTS buildings without search, however it is not accepted in Scotland (or NI). Can there be some uniformity of process here? The estate is all HMCTS, so there should be no need for practitioners who work cross-border having to register for multiple schemes.

A4

Mark Lewis was unable to answer this question on the day but, since the user group meeting, a meeting was held between Matthew Braham (HMCTS Head of Safety & Security) and Paman Singh. The meeting was positive and it's hoped that a simple fix is available that will mean professional users whose responsibilities lie either side of the border, will soon be able to access HMCTS estate with equivalence.

Useful Contact details

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