Senior President of Tribunals

Consultation – panel composition in the Employment Tribunals and the Employment Appeal Tribunal

Introduction

1. When it is brought into force, section 35 of the Judicial Review and Courts Act 2022 will substitute new sections 4 and 28 into the Employment Tribunals Act 1996. Those new provisions will give the Lord Chancellor the responsibility to make regulations determining the number of members who are to compose the Employment Tribunal ("ET") and Employment Appeal Tribunal ("EAT") in a particular case. The Lord Chancellor can discharge that responsibility by delegating it to the Senior President of Tribunals ("SPT").

2. The Ministry of Justice have shared draft regulations under which the Lord Chancellor's responsibility will be delegated to the SPT on the basis that for each matter in the ETs, the SPT will be required to determine whether the tribunal should be composed of one, two, or three members, having regard to (1) the nature of the matters to be decided and the means by which they are to be decided, and (2) the need for members of tribunals to have particular expertise, skills or knowledge. The EAT would be composed of a single member by default, unless the SPT determines that it is to consist of two or three members.

3. The SPT is issuing this consultation with the aim of seeking views about how these new powers will be exercised. The SPT's view is that it would be right to aim for a more efficient and consistent pattern of panel composition. This would involve pursuing reductions in panel size where that is justifiable in itself, and having in place a system where like cases are treated alike in this way. The SPT's proposals are set out below, but it is important to emphasise that these are subject to the views expressed by consultees. All responses will be carefully taken into account before decisions are made.

4. In making his final decisions, the SPT will also take into account:

    (1) The matters mentioned at paragraph 2 above;
    (2) The need –
        (i) for tribunals to be accessible;
        (ii) for proceedings before tribunals to be fair and to be handled efficiently;

(iii) for members of tribunals to have appropriate expertise in the subject-matter of, or the law to be applied in, the cases they decide, and;

(iv) to develop innovative methods of resolving disputes brought before tribunals; and

(3) Equality, diversity and inclusion.

5. On equality, diversity and inclusion, it is relevant to note that most of the proposals being considered involve cases being heard by panels with fewer non-legal members than before. The proportion of people from ethnic minorities is higher among non-judge members of the tribunals (18%) than it is among judges in the tribunals (12%) and in the courts (9%). There is also a higher proportion of women (56%, compared to 52% and 35%). Recent appointments of non-legal members have included a significantly higher proportion of people with disabilities (11%) than appointments of judges (6%)[1]. Reduced sittings for non-legal members could affect the representation of these groups among the judiciary in several ways. For example, if members are sitting less often, the proportion of judicial sittings carried out by judicial office holders from those groups will be reduced. Fewer sittings available could lead to a reduced need for recruitment in future.

6. The promotion of diversity in the judiciary is one of the SPT's main strategic objectives. However, it would not be appropriate to pursue that objective by deploying judicial office holders to hear cases in which their expertise is not required. In circumstances where resources are constantly under pressure, an equally fundamental consideration must be the efficient and proportionate delivery of justice, and the provision of access to justice.

7. Equality is also potentially relevant to the impact on users of the tribunals. For example, there is a significantly higher proportion of people from ethnic minorities among claimants in the ET than in the workforce as a whole[2].

The ETs

8. When originally set up, the panel in the industrial tribunals was a kind of "industrial jury" consisting of a legally qualified chair and two non-legal members, one drawn from a panel of people nominated by the Confederation of British Industry, the other from a panel of people nominated by the Trades Union Congress.

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[1] *Diversity of the judiciary: Legal professions, new appointments and current post-holders - 2022 Statistics* (https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2022-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2022-statistics)

[2] *Employment Tribunal claims* (https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/courts-sentencing-and-tribunals/employment-tribunal-claims/latest)

9. There have been significant changes since then. Non-legal members are no longer nominated by the CBI and TUC, but are still split between an "employer panel" and an "employee panel", with one member from each joining a judge to make up the full panel. Many new types of cases have been added to the ETs' jurisdiction, including some – for example, "short-track" claims like unlawful deductions from wages – where the requirement to sit with a panel has been disapplied and the cases are instead heard by a judge alone by default, with a discretion for the judge to decide that the case should be heard by a panel instead. In 2012, unfair dismissal cases, which until then had been decided by panels, were added to this category. These "judge only by default" jurisdictions are set out in section 4(3) of the Employment Tribunals Act 1996.

10. All other kinds of cases in the ETs must be heard by a panel unless the parties agree in writing for the case to be heard by a judge alone. The most significant types of cases in that category are discrimination and whistleblowing detriment claims.

11. This only applies to substantive hearings. Preliminary hearings in all kinds of cases are conducted by a judge alone, unless a party has requested in writing that the hearing be conducted by a panel and a judge has decided that this would be appropriate.

The EAT

12. When the EAT was first established it was required to sit with a panel for all cases. For some time its default position was to mirror the panel arrangements in the ET case under appeal. Since 25 June 2013 the EAT has been composed of a judge sitting alone by default, with a discretion to sit with a panel. That discretion is currently exercised in about 15% of cases.

The SPT's proposals

13. Including non-legal members on the panel may often affect the length of time involved in the hearing of a case and delivering a decision or judgment. Time must be allowed for the members to ask questions, and to contribute to the preparation of the decision or judgment. Listing hearings convenient for three members of a panel is often more difficult than it is for a judge alone. The cost to the justice system of deploying members is significant. For these reasons, as well as for the general imperative of using the resources of the tribunals efficiently and prudently, it is important that non-legal members are used only where they are needed.

14. The SPT gives little weight to the suggestion that a full panel is, in principle, required to give parties the assurance of a fair hearing. It cannot be maintained that there is inherent unfairness in a hearing before a judge alone. Facilitating the participation of

all parties in all proceedings and in all hearings, including litigants in person, is a basic part of the work of a judge.

15. The SPT also gives little weight to the suggestion that the involvement of non-legal members in proceedings and hearings where their presence is not required in the interests of justice in the case in hand is vital to the credibility of the tribunals. Justice has to be done in every case, and be seen to be done, but these essential principles in the rule of law do not extend to the concept of shaping panels in the tribunals merely to satisfy public perception alone.

16. The original panel arrangements in this tribunal jurisdiction have been described as being "intended to help overcome the mistrust by labour and the unions of traditional courts"[3]. Despite that supposed mistrust, the ETs and EAT have over several decades successfully established themselves as judicial bodies. Their standing is not dependent on public opinion. What is important here is the actual contribution that non-legal members make to the tribunals' decisions, in the interests of justice and access to justice.

17. The significance of that contribution can of course be difficult to gauge. For example, it would not necessarily be reflected in split decisions, because the input and influence of non-legal members in a particular case might well affect the course of deliberations and lead to a unanimous decision different from the decision that a judge sitting alone might have made.

18. The strongest argument for deploying non-legal members is that their experience informs the tribunals' decision-making on crucial issues. Many of the questions which an ET or the EAT may have to decide – such as whether the adjustment that an employee requested for their disability was reasonable, or whether an employer's decision to dismiss an employee was reasonable – are questions in which workplace experience may have a real bearing on a just outcome. In some cases, decisions on these issues, if made by a panel, might be stronger than the decision a judge might make when sitting alone.

19. The challenge here, therefore, is to identify the kinds of case in which that is likely to be so. The current provisions do not fully achieve that. For example, the use of panels for discrimination and whistleblowing cases may be too broad and not sufficiently concentrated. Given the complexity of discrimination and whistleblowing cases, such claims often succeed or fail on legal points which members' knowledge may have little bearing upon. Deploying members as a rule in such cases seems a wasteful use of hard-pressed resources.

20. It is also difficult to justify some of the present distinctions between cases which require a panel and cases which do not. For example, dismissal for the making of a protected disclosure is automatically unfair under section 103A of the Employment

[3] Peter Burgess, Sue Corby, Armin Höland, Hélène Michel, Laurent Willemez, et al. *The Roles, Resources And Competencies Of Worker Lay Judges*. [Research Report] Hans-Böckler Stifftung. 2017. halshs-01616783 at p 76

Rights Act 1996. An employee who is subjected to any other detriment by reason of having made a protected disclosure can bring a claim under section 47B. A case in which a whistleblower had been subjected to detriments short of dismissal would normally be heard by a panel, whereas a case where the whistleblower had been dismissed would not be. It is hard to see a good reason for that difference.

21. Deploying a judge on a long hearing is unavoidable. But adding the expense of non-legal members in some broad categories of case seems disproportionate and unjustified. There will still be, for example, discrimination cases where the use of non-legal members would be justified, but there is a strong argument that they should be identified case by case, as they are now for unfair dismissal.

22. Restoring the previous position of mandatory panels for unfair dismissal in the ETs does not seem justified. A more just approach would be to continue to assess what each case requires on its own merits, as has been the case for unfair dismissal for the past 10 years or so. Before the change introduced in 2012, some were concerned that the removal of non-legal members might reduce the confidence of those contemplating a claim for unfair dismissal to engage in the process, especially if they were unrepresented. Those concerns do not seem to be borne out by the data. There were 49,036 unfair dismissal claims presented in 2012/13, which is comparable to the numbers in previous years (47,884 in 2010/11, 46,326 in 2011/12)[4]. There does not seem to be any sound reason to change the current practice for any other kind of case currently heard by a judge alone by default.

23. The SPT's view is that the EAT system works well, and provides a good model for the ETs. Trusting to the discretion of judges to identify cases where the input of non-legal members will be valuable seems the correct approach. The SPT proposes that the EAT should remain, and the ETs should become, tribunals where substantive decisions are taken by a judge alone by default, with a discretion for the judge to sit with two non-legal members.

24. Consideration will have to be given as to how best to guide that discretionary approach for the much higher caseload of the ETs compared to the EAT. This could be done by the SPT establishing new criteria to guide the exercise of the discretion, or leaving this question to be dealt with by guidance issued by the ET Presidents. The SPT will value consultees' views on this topic.

25. The current statutory criteria bearing on the discretion to sit with a panel in the ETs refer to the "likelihood of a dispute arising on the facts which makes it desirable for the proceedings to be heard" by a panel. But this does not mean that factual disputes are necessarily better resolved by a panel than by a judge alone. Judges in most parts of the justice system are required to resolve factual disputes alone. This is one of the essential parts of the work of a judge.

[4] *Tribunal Statistics Quarterly* – Main Tables (https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2022)

26. The existing discretion to have preliminary hearings in the ETs heard by a panel is unusual. The matters decided at preliminary hearings, such as case management, strikeout, and preliminary issues, are classic functions of a judge. The SPT proposes to remove that discretion so that preliminary hearings are always conducted by a judge sitting alone.

27. In cases where members are not deployed, the SPT proposes to allow for the possibility of a two-judge panel, to deal with particularly complex cases or for the purposes of development. Similar provisions are already in place in various chambers of the First-tier Tribunal. The development proposal does not involve the panel including a judge who is not qualified to hear the case, but rather it is a tool to assist with developing the skills of judges. For example, sitting in a panel with a more experienced judge could assist by increasing judges' familiarity with particular types of case. The SPT believes that the ability for the judge to actually participate in making the tribunal's decision gives the use of development panels an advantage over merely having judges observe hearings.

Questions

28. In each case, please give your reasons for agreeing or disagreeing. If disagreeing, please explain any proposal which you suggest should be adopted instead.

    1. Do you agree that cases in the ETs which are currently heard by a panel should instead be heard by a judge alone by default?
    2. Do you agree that unfair dismissal claims in the ETs should continue to be heard by a judge alone by default?
    3. Do you agree that other kinds of claims in the ETs which are currently heard by a judge alone by default should continue to be?
    4. Do you agree that cases in the EAT should continue to be heard by a judge alone by default?
    5. Do you agree that there should be a power to direct that a case be heard by a panel of two judges, to deal with particularly complex cases or where other circumstances justify it?
    6. Do you agree that decisions other than at substantive hearings should be made by a judge alone in all cases?
    7. In cases which are judge alone by default, how should the discretion to sit with a panel be guided and exercised?
    8. Do you have any other comments?

29. Please provide any comments no later than 27 April 2023 by email to SeniorPresidentTribunalsOffice@judiciary.uk or by post to:

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Please state whether you are responding as an individual or on behalf of an organisation.

Confidentiality

30. Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily FOIA, the UK General Data Protection Regulation (UK GDPR) and the DPA 2018).

31. If you would like the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding.

32. Your personal data will be processed in accordance with the UK GDPR and DPA 2018. In the majority of circumstances this will mean that your personal data will not be disclosed to third parties.