HM Courts & Tribunals Service

EMPLOYMENT TRIBUNALS
England & Wales

42nd MEETING OF NATIONAL USER GROUP

Minutes of the National User Group meeting held via Cloud Video Platform (CVP) on 10 December 2020

In attendance:

Judge Barry Clarke	President, Employment Tribunals (E&W)
Judge Shona Simon	President, Employment Tribunals (Scotland)
Judge Carol Taylor	Regional Employment Judge (London East)
Judge Joanna Wade	Regional Employment Judge (London Central)
Richard Boyd	BEIS
Tony Lowe	Acas
Nige Edgington	HMCTS
Marie Mannering	HMCTS
Mary Towers	TUC
Caspar Glyn QC	Employment Lawyers Association
Shantha David	Law Society's Employment Law Committee
Philip Thornton	Lexis Nexis
Sophie McGuiness	Thomson Reuters
Andrew Willis	Croner Group Limited
Daniel Barnett	Barrister
Andrew Lingard	Advocate (formerly Bar Pro Bono Unit)
Michael Reed	Free Representation Unit
Simon Pender	Make UK
Paman Singh	Law at Work
John Sprack	Law Works
James Potts	Peninsula

Apologies

Laura Garner	Thomson Reuters
Sukvinder Phillips	HMCTS
Paul McFarlane	Employment Lawyers Association
Tim Sharp	TUC
Tom Barrett	CBI

Item 1 Welcome & introductions

The President welcomed members to the 42nd meeting of the Employment Tribunals (England & Wales) National User Group, held via the HMCTS Cloud Video Platform (CVP).

Item 2 Agree minutes from last meeting

The minutes were agreed.

Item 3 Employment Tribunals – President's report

People

The President paid tribute to Judge Fiona Monk, formerly Regional Employment Judge for the Midlands (West) region, who has been appointed as President of the First-tier Tribunal (War Pensions & Armed Forces Compensation Chamber) with effect from 1 December 2020. He wished her well and said that she would be greatly missed.

The President informed members that, following an expressions of interest exercise open to salaried judges, the Acting REJ in the Midlands (West) region from that date was Judge Lorna Findlay, who had previous experience in that role. A Judicial Appointments Commission competition was underway for the vacant REJ posts in both Wales and the Midlands (West) region. It was hoped that these posts would be permanently filled by April/May 2021.

The President informed members that a former salaried Employment Judge based at Croydon ET, Mary Stacey, had recently been appointed to the High Court bench, having spent several of the intervening years as a Circuit Judge. He congratulated Mrs Justice Stacey on her elevation, demonstrating the career progression available to those members of the ET judiciary who sought it. This was shown further by the recent promotion of several salaried EJs to the Circuit Bench, including two (HHJ Auerbach and HHJ Tayler) who were now permanently assigned to the Employment Appeal Tribunal.

Recruitment

Two recruitment competitions via the Judicial Appointments Commission were currently underway. The first competition seeks to recruit up to 25 salaried EJs, who are due to start in mid-2021; it is hoped that many of them can be deployed to the two ET regions most in need of judicial resources, namely the South East England region and the London South region. The second competition seeks up to 50 fee paid EJs. Their induction is planned for the Autumn of 2021.

Nearly 70 new fee paid EJs, who had been recruited in a 2019/20 competition, were successfully inducted during Autumn 2020. Their induction was done fully remotely; this was much preferred to waiting for a time when face-to-face

training might be possible. The President expressed his thanks to the team of training judges who quickly adapted the induction training to a video platform. Most of the new fee paid EJs had already begun their sittings. In the usual way, they had begun on short track cases (i.e. money claims) and standard track cases (i.e. unfair dismissal) and, after further training to be held in the next 12-18 months, they will be "ticketed" to sit on open track cases (i.e. discrimination and whistleblowing).

Law Commission report

The President said that he had heard nothing further about the Government's response to the Law Commission's report, published on 27 April 2020, on Employment Law Hearing Structures. The President explained that the protocol between the Law Commission and the Government is that the relevant Minister will provide an interim response to the Commission as soon as possible (no later than six months after publication) and a final response as soon as possible (but within a year of publication). The six-month period had now elapsed. He said he would ask Richard Boyd of BEIS to comment on whether there was any update he could provide.

ECM/Ethos

The President noted that Ethos – the ET's case management system – was an antiquated system. It worked reasonably well most of the time but was not reliable, because it would frequently and unexpectedly "crash". This would result in the loss of work (listing, settlements, orders, postponements etc) up to the most recent successful back-up; this might be several hours ago or, in the worst cases, several days ago. It was a server-based system physically housed in each of the ET's regional offices. It was not properly compatible with remote working. It was necessary for HMCTS staff working for the ETs to be physically present in ET venues, so that they could work with Ethos. The difficulties afflicting the ET's London offices in the early days of the pandemic, especially London Central, were because staff could not get to the office to work on Ethos. Instead, judges were themselves curating the general office inbox to look for the most urgent emails relating to their upcoming cases. In other regions, staff were able to attend the office but, because of the need for social distancing in administrative areas that are often quite small, not in sufficient numbers.

HMCTS colleagues were working hard to produce a better case management system. This process had begun long before the pandemic, but the pandemic had accelerated the need for a long-term replacement. That replacement is ECM (or "Employment Case Management"). It was intended that ECM would provide remote cloud-based access for judges and staff. This would increase the ET system's operational resilience because it was compatible with remote working. It was the first step in a long journey that would hopefully lead, in the fulness of time, to paperless files and to online access by users seeking updates on their cases.

The President reported at the last user group meeting that ECM was being piloted in the Leeds regional office, with the aim of extending it to other regions in England and Wales later in the calendar year. It was also being piloted in Glasgow. Regrettably, the system was not working as well as had been hoped and further testing was required, particularly around multiple claims and processing speed. The President said that he had been advised by HMCTS that the national roll-out was now more likely to be in January or February 2021. HMCTS would be able to say more later in the meeting.

The President in Scotland, Judge Shona Simon, reported that the ECM pilot in Scotland had been mostly successful, but that there were areas which needed improvement. All staff in Glasgow had recently lost 13 hours of work each due to Ethos failure. Given that Ethos performance may decline further, it was hoped that the replacement system would be installed as soon as possible.

The President thanked the HMCTS ECM team for their ongoing efforts.

HMCTS reform

Subject to funding, the HMCTS reform programme continues. The background and present state of the reform programme is discussed online here.

The proposal is that the Employment Tribunal system – both in England and Wales and in Scotland – will commence the reform process in the 2021/22 financial year. Some of the components of reform are already in place (such as the use of tribunal caseworkers), but the reform programme will bring major change to areas such as the scheduling and listing of cases, paperless files, and the interface between the ET system and its users. The discovery process had started in early 2020 but had been interrupted by the pandemic; it would recommence in early 2021. The two Presidents were working closely together and had set up a cross-border judicial working group on reform.

Changes to the ET rules and regulations

The President discussed the changes that had been made to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, SI 2013/1237 and the Rules of Procedure set out at Schedule 1. The vehicle for the various amendments is a new statutory instrument, entitled the Employment Tribunals (Constitution & Rules of Procedure) (Early Conciliation: Exemptions & Rules of Procedure) (Amendment) Regulations 2020, SI 2020/1003. This instrument came into force (for most purposes) on 8 October 2020 under the negative resolution procedure. Some of the changes had been long in the planning but others were introduced in response to the pandemic. The amended instrument had been prepared by BEIS in collaboration with MOJ. The two ET Presidents were consulted but the provisions were ultimately a matter for Government.

The President identified the main changes are as follows:

- **Flexible/cross deployment**. Prior to October, EJs could be deployed to sit in other jurisdictions, but it was one-way traffic; a courts judge or a tribunals judge could not act as an EJ unless independently appointed to that role. There has been a statutory power to cross-deploy judges into the ET since 2008, when s.5D of the Employment Tribunals Act 1996 came into force, but no regulations had been made under s.5D – until now.

  An amended regulation 8 identifies the courts and tribunals judges who may act as an EJ in a way that was not previously possible. The President noted that this measure had been reported in a way that appeared to misunderstand its effect; for example, one legal journal reported it under the headline "*Non-specialist judges enlisted to ease employment tribunal backlog*". The President assured national user group members that there was no prospect of judges being deployed to the ET under this mechanism who knew nothing of employment law. As the measure makes clear, it is subject to a series of consents and safeguards. Both Presidents can, and intend to, decline consent unless they can be satisfied that such a judge has employment law expertise. This is not an implausible prospect; there are many such judges sitting in the chambers of the First-tier Tribunal, the District Bench, and elsewhere. Additionally, an EJ in England and Wales can now be deployed to sit for the ET in Scotland, and vice versa. Judge Simon added that there was full agreement between the two Presidents that this measure would not dilute the expertise of the ET judiciary.

  The President said he would consider running an "expressions of interest" exercise in Spring 2021. However, he did not expect it to deliver a big injection of capacity from salaried judges, because such judges would remain with their primary jurisdiction and only be deployed to sit for the ET in England and Wales for about 30 days a year. It might deliver more capacity from fee paid judges in other jurisdictions.

- **Legal Officers**. Long mooted by the HMCTS reform programme, a new regulation 10A permits the Lord Chancellor to appoint Legal Officers. The President said that they would be known as Legal Officers (rather than "tribunal caseworkers", as in other tribunals) because that is what they are called in the enabling provision at s.4(6B) of the Employment Tribunals Act 1996.

  A new regulation 10B identifies the matters that may be determined by a Legal Officer under delegation, subject to being authorised by a Practice Direction of the Senior President of Tribunals (who, in turn, is required to consult the two ET Presidents). They include: ET1 vetting decisions made under rule 12; applications for extensions of time for presenting a response; applications for certain types of case management order (such

as extensions of time for complying with orders, agreed amendments and consolidation of claims); certain types of postponement request; agreed identification of lead claimants; the listing of a preliminary hearing for case management purposes; staying claims in certain insolvency situations; and the dismissal of claims following their withdrawal. This will free up judicial time and improve overall efficiency.

The President further confirmed that he and Judge Simon hoped to use the Legal Officers extensively in what is known as "case progression" – getting cases ready for hearing.

The President confirmed that Legal Officers will not determine substantive claims. Their decisions can, in any event, be considered afresh by an EJ upon a request made within a specified time limit.

This development also offers a new career path to HMCTS colleagues attracted to, and suited to, this type of work. Although Legal Officers are not members of the judiciary (and do not have to be lawyers) – they will be civil servants – the ET judiciary will be extensively involved in designing and delivering their induction and continuation training. The Legal Officers will also be mentored by judges.

The competition will recruit an initial cohort of 16: four in Scotland and 12 in E&W (one for each region, save that the three London regions will have four and the SE England region will have two). It is hoped that they will be ready to start work by the start of the new financial year in April 2021. An EJ will be sitting on each interview panel.

- **Remote hearings**. The President said that his Practice Direction on remote hearings and open justice (here) and accompanying Presidential Guidance (here) identified solutions to some of the difficulties that the ET system in England and Wales had encountered when conducting remote hearings, because of the terms in which rules 44 and 46 were drafted. Particular difficulties had arisen in respect of (a) making lengthy witness statements available for inspection by members of the press/public attending a hearing by remote means and (b) ensuring that members of the press/public could not only hear what the tribunal hears but could also "see any witness as seen by the tribunal" (which requires additional kit for the hearing room, such as a camera trained on the witness).

  Rule 44 has been amended so that witness statements can be inspected "otherwise than during the course of a hearing" held remotely, such as after the hearing in the same way as the bundle, written submissions etc can be inspected (subject to judicial permission) under the principle enunciated by the Supreme Court in *Cape Intermediate Holdings v Dring* [2019] UKSC 38.

Rule 46 has also been amended so that members of the press/public will see a witness as seen by the tribunal "so far as practicable".

- **Other matters**. The President noted that the S.I. has also made important changes intended to remedy some of the procedural difficulties that have arisen in recent years. In summary, these are: (a) rules 9 and 16 are amended to allow one prescribed form to be used in cases that give rise to common or related issues of fact or law, or where it is otherwise reasonable for a claim or response to be made on the same form (overcoming the difficulty identified in the *Farmah* litigation); (b) rule 12 is amended so that, in effect, there is more scope to accept claims where an error is made in respect of the information provided (overcoming the problems identified in cases such as *E.On Control Solutions v Caspall*, *Sterling v United Learning Trust* and *Adams v BT*); (c) rule 19 is amended to make clear that there is no need for the same judge to deal with the reconsideration of a decision to reject a response; (d) rule 21 is amended to make clear that a rule 21 judgment can still be issued even where a preliminary hearing has been held (such as on a time limit point); (e) rule 32 is amended to make clear that parties are to be notified that a witness order has been made (addressing the issue raised in *Jones v Secretary of State for BEIS* where it was suggested, contrary to longstanding practice, that the order itself should be copied); (f) rules 54 and 58 are amended to allow for more flexibility in the listing of hearings; and (g) rule 67 is amended so as to declutter the online register of judgments (here) by removing judgments dismissing withdrawn claims.

- **Early conciliation**. The 2014 EC Regulations have been amended so that the period for EC will always be six weeks, i.e. removing the option by which an Acas conciliation officer can extend the current one-month EC period by two weeks.

- **Transitional provisions**. The President noted that these Regulations are stated to apply "in relation to all proceedings to which they relate", which is the formulation used to mean that they will apply from 8 October 2020 to proceedings already in motion at that date (i.e. not the formulation by which they would apply to claims presented to the tribunal on or after 8 October 2020). In contrast, the amendments to the 2014 EC Regulations have the later effective date of 1 December 2020.

Performance/caseload

HMCTS is publishing management information online here. Members of the public and users can download a spreadsheet containing regularly updated information on the outstanding caseload of the ET system across Britain. The tabs along the bottom of the spreadsheet reveal the ET data on a weekly basis

since the “pre-Covid baseline” in March 2020. The data is subject to provisos identified at the bottom of the spreadsheet.

The President reported that the most up-to-date version of the spreadsheet shows that the outstanding “singles” caseload had, in the nine months between March and November 2020, grown from 30,687 cases awaiting determination to 43,209 cases awaiting determination. This was an increase of about 40%. Outstanding “multiple” cases had increased from 4,966 to 5,926. These multiple cases comprised about 440,000 individual claimants. The President reported that, within England and Wales, about 60% of the outstanding ET caseload was held in London and the South East of England.

The disposal rate was broadly back to where it was before the pandemic, and yet the outstanding caseload continued to rise. Partly this reflected a need for additional judicial resources, given that the caseload had inflated continuously since the fees regime ended in 2017. It also reflected a notable increase in the rate of receipts during the pandemic: in nine out of the last ten weeks, the ET system had received more than 1,000 “singles” claims a week (whereas, before the pandemic, the figure was closer to 850). The President said that he had asked for HMCTS to conduct more analysis of the incoming claims, but that the anecdotal view of the Regional Employment Judges (informed, in part, by EJs dealing with referrals under rules 12 and 26) was that recent months had seen an increase in the following types of claim:

- Unfair dismissal (for redundancy reasons);
- Public interest disclosure (alleged employer misuse of furloughing);
- Public interest disclosure/health and safety (alleging inadequate PPE);
- Unpaid wages (especially from individuals alleging that they were required to work despite being furloughed);
- Unpaid holiday (especially during periods of furlough); and
- Protective award claims (alleged inadequate collective consultation ahead of large-scale redundancies).

The President fully accepted that waiting times for hearings in many ET regions were unacceptable. He noted that the delays were especially acute in London and the South East. His office received a great deal of correspondence on the matter, as did the Regional Employment Judges. He also acknowledged that it was unacceptable that correspondence and telephone calls to short-staffed ET venues went unanswered. He apologised that this was the case and said that efforts continued to secure for the ET system the resources it needs, although he recognised the intense pressures on Government finances and that there were many competing demands for funding. On resources generally, he noted that the response of the ET system to the pandemic had recently been raised by the House of Commons Justice Select Committee. (*Postscript: the Senior President of Tribunals wrote to the Chair of the Justice Select Committee on 10*

December 2020, the same day as the user group meeting, about the resourcing difficulties of the ET system, and his letter is available to read here.)

In response to a question, the President said that, if users were encountering long delays and had received no response to their emails (even where properly marked "urgent"), it was acceptable for them to write to the relevant Regional Employment Judge, and exceptionally the President himself, to alert them to the difficulties and ask for enquiries to be made. However, because the ET's leadership judiciary is exceptionally busy, this should be done sparingly. The President noted that many law firms routinely marked their correspondence as "urgent" when it was not, and it would help the system cope with the demands placed on it if professional users only corresponded with the ET office when there was a need to do so, and if they did not copy emails to the ET for no good reason. The same point was made at the outset of the two Presidents' joint FAQ document from June 2020 (available online here).

Regional Employment Judge Taylor reinforced this point. She suggested that professional users did not need to contact the ET office where, for example, they had agreed extended dates for compliance with case management orders.

The President said he was working alongside HMCTS to develop the concept of a cohort of fee paid EJs able to hear "sit alone" cases (short track and standard track cases, as well as some preliminary hearings) on a fully remote basis. This offered another route by which EJs assigned to other regions could deliver extra sitting capacity to London and the South East. Such work would need to be confined to "sit alone" cases to accommodate the constraints set by the case of *Lawal v. Northern Spirit*. Much administrative work was needed to get the system up and running, and he would report progress to the user group in due course.

The President thanked users for their patience and forbearance.

Video hearings

The President said that, in his view, crucial to the recovery of the ET system, notwithstanding its resources constraints, was the Cloud Video Platform (CVP).

There were about 330 CVP rooms available across the ET system in Britain and the ET judiciary were regularly recording in excess of 2,000 hours of CVP use per week. Some hearings would use two CVP rooms, with one as a "retiring room" for the panel. This ET system was sitting more CVP hours than any chamber of the First-tier Tribunal. Freed from the limitations of a physical estate, some ET regions were running twice their usual number of hearings; for example, Regional Employment Judge Taylor reported that, in London East, the region had been able to hear 13 or 14 full hearings simultaneously, many more than normal, supported by fee paid EJs available to sit on them. The President said that this was an impressive achievement; he paid tribute to

members of the judiciary, the administration, and the system's users in adapting so quickly to the use of video hearings. It also meant that the ET system could be nimbler in moving to a "fully remote" means of hearing cases in the event of closure of an office or if the Government were to reimpose tighter restrictions in response to the pandemic (see paragraph 6.1 of the Practice Direction on remote hearings and open justice).

The President noted that a relationship of constructive engagement between the leadership judiciary and HMCTS had led, throughout the Autumn, to actual or pending distribution of much of the hardware and software needed to support video hearings in volume. This included effective pdf reading and editing software (for use with electronic bundles), the deployment of pool laptops (for use by fee paid EJs and non-legal members) and the deployment of high definition camera and screen equipment (for use in partly remote or hybrid hearings) to about 60-70% of hearing rooms. More was always needed, but it was good to recognise how far we had come. In many ways, the pandemic had acted as the biggest catalyst of reform.

The President said that a technically better video platform for hearings was on the horizon. Presently known internally as the "Video Hearings Service" (or colloquially as "CVP+"), it was being developed before the pandemic as part of the HMCTS reform programme and the concept, although not by that name, had been mentioned by Judge Brian Doyle at user group meetings in 2019. It was now being piloted in the South West England ET region subject to oversight by Regional Employment Judge Pirani. It was impressive, but not quite there yet. The President confirmed that a wholesale move to this new platform for video hearings would only happen if it could be shown to offer a significant and reliable improvement to CVP.

Document Upload Centre

The President further explained that a "Document Upload Centre" had been piloted in Wales ET, subject to oversight by acting Regional Employment Judge Davies, to support video hearings. It had been mentioned as a footnote in the Presidential Guidance on remote hearings. It was originally designed as a temporary solution to a problem whereby electronic bundles sent as email attachments were too large to get through the ET office in-boxes (with the result that some firms were sending them in piecemeal and expecting EJs to "stitch" them together), or else they were taking office in-boxes over their total limit on data size.

The DUC acts as a central online location, linked to the secure Office 365 system used by the judiciary, for professional users to upload bundles and witness statements, and to which only the assigned EJ and non-legal members (and clerk) have access. This was about to be rolled out to all ET regions in England. It could continue to work well with the supply of electronic bundles in

future, even with in-person hearings. The President said he would report on further progress at the next meeting.

Miscellaneous

Regional Employment Judge Wade said that Victory House, the home of London Central ET, was experiencing heating and ventilation problems. Users were warned that the premises were quite cold, and that they should dress accordingly for in-person or partly remote hearings.

Item 4 HMCTS

Nige Edgington of HMCTS agreed that ECM had required robust testing, especially in connection with multiple cases and processing speed, whereby fixes would then raise a need for regression testing. It was still hoped that the system could be rolled out in January or February 2021, but there was always a risk of slippage with a new product. The urgency of the task was appreciated.

Nige praised the high levels of CVP hours sat by the ET judiciary.

Nige acknowledged that it was difficult for HMCTS to retain good administrative staff, especially in London. HMCTS were relying heavily on agency staff and turnover levels were high.

Item 5 BEIS report

Richard Boyd confirmed the recommendations made by the Law Commission were being actively considered. He said that the Department would continue to review the efficacy of the ET rules and regulations and, more generally, the impact of the pandemic on the labour market.

Richard also said that the Department was working on consolidated rules, incorporating the 2020 amendments, and which would soon be available online. (*Postscript: they are now available here.*)

Item 6 Acas report

Tony Lowe thanked BEIS for producing a default early conciliation period of six weeks in the amended EC rules. This would reduce the administrative burden on Acas. The amendments to rule 12 of the ET rules were also helpful, as they would minimise technical arguments on matters such as a minor difference to the respondent's name.

He confirmed that the latest recruitment of staff had been in late summer 2020 and that Acas now had 48 additional conciliators who have completed training. This brought the total recruited since the start of 2020 to 80.

Item 7 Any other business

No AOB items were raised.

Item 8 Date of next meeting

The date of the next meeting, likely to be held remotely in the Spring of 2021, will be notified in due course.