



**EMPLOYMENT TRIBUNALS
England & Wales**

34th MEETING OF NATIONAL USER GROUP

**Minutes of the National User Group meeting
held at Victory House on 17th January 2018**

In attendance:

Judge Brian Doyle	President, Employment Tribunals E&W
Judge Shona Simon	President, Employment Tribunals Scotland
Simon Carr	Senior President's Office
Richard Boyd	BEIS
Leo Cotterell	BEIS
Omar Khalil	EEF
Emma Wilkinson	Citizens Advice
Richard Fox	Employment Lawyers Association
James Potts	Peninsula Business Services
Matthew Smith	Equality & Human Rights Commission
Philip Thornton	Lexis Nexis
Gareth Brahms	Employment Lawyers Association
Jennifer Beckwith	CBI
Michael Newman	Discrimination Law Association
Andrew Lingard	Pro Bono Unit
James Brown	Thomson Reuters
Roger Easy	Public Concern at Work
Tony Lowe	Acas
Noel Lambert	Acas
Mark Nutley	Methods
Jackie Hunsley-Wilson	HMCTS (minutes)

Apologies:

Marie Mannering	HMCTS
Sukvinder Phillips	HMCTS
John Sprack	Law Works
Rosemary Lloyd	Equality & Human Rights Commission
Jonathan Bell	Equality & Human Rights Commission
Natalie Johnston	Equality & Human Rights Commission
Paul McFarlane	Employment Lawyers Association
Max Winthrop	Law Society Employment Law Committee
Heather Humphreys	BEIS

Item 1 Welcome & introductions

The President welcomed members to the 34th meeting of the Employment Tribunals National User Group (England & Wales).

Item 2 Agree minutes of the meeting of 16th October 2017

The minutes of the previous meeting were approved and accepted.

Item 3 Action points and matters arising

Any matters arising and action points are dealt with in the President's report below.

Item 4 Employment Tribunals – President's report

The President confirmed that the latest official quarterly statistics had been published by the Ministry of Justice on 14th December 2017.¹ The next updated quarterly figures would be published on 8th March 2018. The President referred to the very helpful bar charts analysis of the statistics that was usually produced by Richard Dunstan on Twitter.

The Bristol ET had returned to the Bristol Civil Justice Centre in November 2017 after the flooding of that building earlier in the summer.

The President reported that the amended Practice Direction on Presentation of Claims had been approved by the Lord Chancellor.² It had effect from 26 July 2017. New Presidential Guidance on General Case Management and on Alternative Dispute Resolution was about to be published. All current Practice Directions and Presidential Guidance could be found at <https://www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/>.

The President informed members that since the *Unison* decision and the abolition of ET fees there had been a doubling (c100% increase) of single claims received compare with the period immediately preceding the *Unison* decision. Although that was a sizeable increase, single claims would have to triple (c200% increase) before the ET returned to 2013 pre-fees levels. Measuring the increase in single claims was a more accurate basis than counting multiple claims or multiple cases, which were always variable. The President had now seen 5 months of management information since the *Unison* decision. He was satisfied that the recovery in claims was stable and consistent.

The President reported that the increase in single claims did not appear to be influenced to any great extent by the *Farmah* decision. The reinstatement of claims rejected or struck out for a fees-related reason between July 2013 and

¹ See: <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-july-to-september-2017>.

² <https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-pd-presentation-of-claims-nov-2017.pdf>.

July 2017 also had no effect on the latest figures. Reinstated claims had already been counted in earlier statistics and would not be double counted. The President did not believe that deterred claims (claims that could have been made during the fees period, but were not because fees had had an alleged deterrent effect) were influencing the figures. What was being observed appeared to be renewed demand for ET claims.

The President informed the meeting that in response to the increase in ET claims HMCTS had taken a very welcome and flexible approach to the sitting days budget. The opportunities for fee-paid Employment Judges to sit again had been refreshed. The majority of fee-paid EJs were re-committing to sit often and regularly for between 30-70 days a year. The President had also agreed to lift the maximum annual sitting day cap for fee-paid judges from 70 days to 110 days in order to address the demand for judicial resources.

The President reported that a business case had been made for a recruitment exercise for additional fee-paid EJs and salaried EJs. That business case had been well received thus far and it was waiting final approval. He could not confirm the position until the business case had been signed off, but he was quietly optimistic about it. Assuming that the business case was approved, then the issue would be whether a slot could be found for it in the JAC programme and, if so, when. It could easily take 12-18 months for judges to be in position to hear cases once a recruitment exercise had been approved. The President also noted that there had been a reduction in the numbers of non-legal members and that a separate business case in that regard was in preparation.

The President was asked whether it might be possible to ask the EAT for assistance with the increased ET caseload. He replied that, while that was a matter for the EAT President as much as for him, he did not believe it to be possible, practicable or appropriate. The EAT was ahead of the ET in reinstating appeals that had been rejected or struck out for a fees-related reason and was also experiencing an increase in new appeals. The President thought that the EAT was likely to have more than enough work to keep its judges busy. He noted that a number of new judges had been deployed from the Circuit Bench and the High Court Bench to replenish the cadre of judges able to sit in the EAT. That was done as part of regular expressions of interest exercises.

The President was impressed by the positive response of HMCTS and MoJ to the implications of the *Unison* decision. There was an obvious commitment to increase judicial and administrative resources for the ET. Whatever future policy on fees might be,³ the response to increased demand for ET services was not in doubt. While performance was not yet back to where the ET would want it to be, it was holding up and additional resources would be very welcome.

³ On the question of future fees policy, see the contribution of the then Minister of State, Ministry of Justice (Mr Dominic Raab MP) to Justice Committee, *Employment Tribunal Fees* (HC 576, 19 December 2017): <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/employment-tribunal-fees/oral/76269.pdf>.

On refund of fees and reinstatement of cases, the President was able to give the meeting an unofficial and informal impression of the current position. The relevant minister had provided information to the Justice Committee on 19 December 2017.⁴ That represented 4,689 applications for refunds, of which 2,660 had been processed, resulting in 2,151 payments of £1.8m in value. That was the official position. The President's unofficial understanding is that applications and payments continue to be made such that there are approaching 6,000 applications resulting in payments closer to £2.9m. Clearly there is still some way to go towards the estimated refunds of £33m. The President would not be surprised if there were renewed communications on this during early 2018 once the new ministerial team was fully briefed. However, he stressed that that was a matter for ministers (and officials) and not for him.

The reinstatement of claims rejected or struck out for a fees-related reason was more easily identified. During November 2017 all relevant claimants had been written to by HMCTS. The President understood that to involve some 7,400 claimants rejected at issue stage and approaching 800 claimants struck out at hearing stage. Claimants were asked to indicate how they wished to proceed within 3 months. That is not a limitation period, but recognises the need to encourage responses while providing adequate time for advice to be sought and a decision to be made. Responses so far had been slow, but it was still very early in the process. Problems and issues could arise with claimants who had moved on in all senses (that is, either they were no longer easily contactable or they simply did not wish to return to litigate an historic dispute).

The reinstatement of claims is administrative rather than judicial. However, once a claim is reinstated, it then has to be vetted and case managed at whatever stage in the process it had otherwise reached. So, for example, the question might arise as to whether Acas Early Conciliation has been complied with (for a claim being reinstated at acceptance stage). EJs would have to consider what evidence of this might be acceptable.

The President was asked whether HMCTS/MoJ intended to give any publicity to the possibility of bringing deterred claims out of time. The President replied that he did not understand that to be intended or appropriate. It would not usually be the role of government or its agencies to excite litigation.

Item 5 HMCTS Update

There was no separate HMCTS report.

Item 6 BEIS report

Richard Boyd provided an update on the Parental Bereavement (Leave & Pay) Bill.⁵ The Bill was due to enter Public Bill Committee meeting on 17

⁴ Since confirmed in: Ministry of Justice, *Management Information Notice: Employment Tribunal Fee Refund Scheme – Provisional Management Information as at 18 December 2017* (published 18 January 2018) available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/674335/et-fee-refund-scheme-provisional-management-information.pdf.

January 2018 but has been rescheduled for **31 January 2019***. **Richard Boyd** also confirmed that Government is considering the Taylor Review and will respond in full shortly.

*<https://services.parliament.uk/bills/2017-19/parentalbereavementleaveandpay.html>

Richard Boyd said BEIS were still awaiting confirmation of the new Ministers' portfolios to see which BEIS Minister would be assigned Employment Law policy.⁵

Item 7 Acas report

Tony Lowe reported that early conciliation notifications had crept up to 2,000 a week from 1,600-1,700 in April and July 2017. Following the *Farmah* decision it had sometimes spiked at 3,000 per week, but this had since settled down and this effect had mainly been seen in Glasgow.

The latest Acas quarterly report for April to September 2017 can be accessed here: <http://www.acas.org.uk/index.aspx?articleid=6089>.

It was noted that reinstated cases were returning for conciliation and were easily identified as such.

Shona Simon indicated that it had been noted in Scotland, particularly following the abolition of fees, that a number of unrepresented claimants were indicating on their claim forms they were exempt from Early Conciliation on the basis they were making a claim for interim relief when in fact no such claim was being made. While the reason for this was unclear one might speculate that more people were now presenting claims without taking advice and that this increased the chance of them misunderstanding what was meant by interim relief. Consideration was being given to whether it might be necessary to change the wording of the ET1 and/or the associated guidance to reduce the risk of such misunderstandings.

Item 8 Overview of Acas Conciliation Notifications Process Project

Noel Lambert reported that the project was well underway. It would modernise the Acas early conciliation system making it more user friendly. It had gained valued input from 20 users. The feedback had been quite detailed and had highlighted what was and was not working. Noel Lambert had been working with Mark Nutley and his team at Methods. They had set up a working system to implement ideas and processes to modernise and reflect a more efficient & streamlined outcome.

Noel reported on the fact that Acas had to remain impartial and how this was not always fully understood by the users. Problems could arise from the requirement for the claimant to identify their employer and it not being appropriate for Acas to say if the claimant had got it right or not.

⁵ At the time of preparing these minutes the BEIS website did not yet record ministerial portfolios and responsibilities. The MoJ website records that Lucy Frazer QC MP, Parliamentary Under Secretary of State, is the minister in that department who has responsibility for tribunals.

Noel also highlighted the point of a claimant speaking to someone on the helpdesk, then being passed to a conciliation officer, and possibly a third person. This can give the user the impression that the more people they speak to at Acas the better the chance they have of winning and also thinking that Acas would get them a good deal. The outcome is that the user often does not relate to Acas being impartial.

Shona Simon noted that the joint research project done by the Universities of Strathclyde and Bristol into the experience of ET system users had touched upon user understanding of the role of Acas and experience of the service. She suggested it might be worthwhile for Acas to contact the lead researchers since they might be able to provide information relevant to the research now being undertaken by Acas. **Emma Wilkinson** supported the suggestion that this could prove beneficial.

Noel Lambert (Acas) and **Mark Nutley** (Methods) gave an overview of an Acas digital agile piece of work aimed at improving the notification process. The presentation is set out in the attached slides (Appendix A). There was a good deal of interest in the work and a desire to be kept up-to-date. Noel and Mark will ensure that User Group members have access to the video summaries of progress updates (and are invited to the Show and Tell sessions in the Nottingham office). It should also be possible to provide updates at User Group meetings. The initial user testing and design phase ("Alpha") will be finished by mid-March, and it may therefore be timely to provide a further update shortly after that.

Mark said that if anyone would like to come and meet the team at Methods and see how everything was progressing they could. The President also asked Acas to consider how to involve stakeholders and users in the project. Noel Lambert indicated that he would discuss how Acas might involve NUG members with the Methods team. He thought that there are some issues that will benefit from members' perspective and that it will be useful to keep them up-to-date on progress.

Item 9 Any other business

Roger Easy pointed out his concern in the difficulty in locating whistleblowing cases within the EAT website. The President informed Roger that Nicola Daly was the new EAT Registrar. He would let Nicola know that Roger would write to her about his concerns.

The President referred to the fact that the Law Commission's latest 13th Programme of Law Reform launched on 14 December 2017 would include consideration of "Employment Law Hearing Structures".⁶ He referred to the lecture to be given by Sir David Bean (the Law Commission's Chair) for the Industrial Law Society in London on 17 January 2018 on the topic "Where should employment cases be tried?"

⁶ See: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2017/12/13th-Programme-of-Law-Reform.pdf>.

Item 10 Date of next meeting

The President suggested a date in May 2018 (to be confirmed) for the next meeting. Members were in agreement. The President confirmed they would be canvassed via e-mail for the most convenient date in May.