



**MINUTES OF THE EMPLOYMENT TRIBUNALS (SCOTLAND)
NATIONAL USER GROUP
DATE OF MEETING: Tuesday 05 April 2022**

<u>ATTENDEES</u>	
<u>Name</u>	<u>Organisation</u>
Samia Al-Midani	DLA Piper Scotland LLP
Rachel Blair	North Lanarkshire Council
Kathleen Bolt	Unionline Scotland
Katie Buchanan	Thomson Reuters
Julia Cunningham	
Dawn Dickson	Eversheds Sutherland
Kevin Duffy	Scottish Engineering
Raymond Farrell	Glasgow City Council
Greg Fletcher	NHS
Kellyann Fraser	Aberdeen CAB
Catherine Greig	Greig Employment Law
Fiona Herrell	Brodies LLP
Claire Heggie	CMS
Musab Hemsi	Anderson Strathern
Pauline Hughes	Just Employment Law
Emma Johnston	Pinsent Masons LLP
William Lane	Worknest Law
Kathleen Lavery	Strathclyde University
Sarah Leslie	Shepherd and Wedderburn
Marie MacDonald	Miller Samuel Hill Brown LLP
Malcolm MacKay	United Employment Lawyers
Carlyn McCallum	Harper McLeod
Alan McCormack	Jackson Boyd
Anne McFarlane	Glasgow City Council
Laura McKenna	Morton Fraser
Steve McLaren	Kippen Campbell
Eleanor Mannion	MacRoberts LLP
Lindsey Miller	Scottish Engineering
Stephen Miller	Clyde & Co
Laura Morrison	Dentons
Gillian O'Neill	
Becky Robertson	Glasgow City Council
Sarah Shiels	Balfour & Manson LLP
Paman Singh	Law at Work
Katie Sloan	Valla
Aime Trainor	Scottish Engineering
Adam Watson	CLO
Eilidh Wood	Burges Salmon
Joanna Wood	Citizens Advice Scotland

Also in Attendance

Judge Susan Walker, Vice-President of Employment Tribunals (Scotland)
Judge Lorna Findlay, Regional Judge (Midlands West)
Will Breame, Deputy Director of Tribunals
Mark Lewis, Employment Tribunal Service Manager
Robin Rimmer, Policy Advisor
Craig Robb, Deputy Director Governance and Assurance
Stephen Toal, Head of Operations (Scotland)
Sandra Martin, Senior Operations Manager ET (Glasgow)
Shona Ferguson, Delivery Manager, ET (Glasgow)
Gillian Davidson, Acting Business Change and Devolution Support Manager (Regional Support unit)
Alan Hope, ACAS
Ian Proctor, ACAS
Helen Nolan, Jurisdictional Office Support Team (JOST)

Agenda item 1 – President’s update

The President (Judge Simon) welcomed everyone to the meeting and expressed regret that her final meeting of the ET Scottish National User Group meeting was being held remotely because she had tested positive for Covid in the last week. Judge Simon confirmed that the Vice President, Judge Walker, will be Acting President from 2 May 2022 until Judge Simon’s successor is appointed. However Judge Simon will remain as President until 15 July 2022.

Covid update

Judge Simon acknowledged that covid has continued to impact on operations, particularly in person hearings. However, she noted that covid restrictions have begun to ease here just as elsewhere.

1 metre social distancing now applies in all ET offices including in hearing rooms so that means more people can be fitted in to rooms. Further developments are as follows:

From Tuesday 19 April in all ET offices:

- whilst no longer a legal requirement all system users will be encouraged to wear a face covering when moving around ET buildings in the interests of their own safety and of others; that will be in line with the ‘stand up, masks on’ policy that will apply to HMCTS staff and that judges will be asked to follow
- formal physical distancing restrictions will be removed, but people in HMCTS buildings will be encouraged to take a common sense approach to maintaining and respecting other people’s personal space that will be reflected in signage in the buildings.
- enhanced surface cleaning will continue– especially of high touch-point areas – and good ventilation will remain important. Judge Simon confirmed that funding has been secured from HMCTS to refurbish all the windows in the Edinburgh ET office to improve ventilation there.
- in line with the Scottish Government guidance, everyone coming into an HMCTS building in Scotland will continue to be asked to take a lateral flow test until 18 April, when national testing regimes are due to change.

Judge Simon noted that ETs have become adept at changing the way we do things at short notice. Among the many lessons learned over the last two years is the need to be as flexible as possible in connection with the mode of hearing delivery. All of our hearing centres now have the facility to run hybrid hearings – that means that if someone contracts covid and can’t attend in person there is a good chance that if they are well enough, they can join the hearing by video (using the Cloud Video Platform – CVP).

Document Upload Centre (DUC)

DUC has been operating in Scotland since January 2022. This provides a facility for users to upload document bundles electronically, thereby avoiding having to send numerous emails with attachments when there is a large bundle of productions. Once documents have been uploaded, they can then be shared electronically with judges and members and a copy is downloaded by a staff member. They are retained by HMCTS in the same way as hardcopy productions would be and then deleted after the case is concluded (assuming no appeal). Judge Simon expressed the hope that the facility had been working effectively for users and

acknowledged that it allows more flexibility about the way documents can be accessed for hearing. Judge Simon is very interested to receive feedback on new developments like this because we are keen to have these facilities working as well as possible for system users. Any suggestions for system improvement can be sent to Glasgow.President@justice.gov.uk

Video Hearings

Anecdotal information about the effective use of video hearings in ETs is supported by the findings of a report produced by HMCTS in December 2021

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040183/Evaluation_of_remote_hearings_v23.pdf

The report evaluates the use of video hearings during the pandemic. Judge Simon noted that ETs come out quite well from the research. For example,

- 61% of those surveyed who had attended ET hearing were particularly likely to agree that communication with their lawyer was easy during the hearing, compared to 46% overall
- ET system users were more likely than average to consider they could understand what was happening during the hearing, to have confidence about how the tribunal handled their case (75%) to say they felt they could express their views and that their views were considered (73%)

HMCTS is creating a new Video hearing platform, funded through the HMCTS reform process, which is specifically designed for the conduct of judicial hearings. Judge Simon noted that having seen it in its current state it has a lot of really good functionality but at the moment she does not think it is ready to be rolled out in ETs in Scotland – the platform still needs work done to improve its stability and that work is ongoing. Judge Simon expressed her thanks to the ET judiciary in England and Wales - South West region. The REJ there, Judge Pirani, and his colleagues, have been piloting the new system for almost two years and many improvements have been made to it based on their feedback. Judge Walker will keep users informed about the further development of this

new video hearing system. Judge Simon also informed users that the contract for the provision of CVP has been extended to April 2023 and that will remain the main platform used by ETs in the meantime.

Issues arising out video hearings

Judge Simon noted that, as system users are aware, video hearings were introduced in the ET s both rapidly and at short notice, as a result of the impact of the pandemic. Over time various judicial policy and practical issues have arisen which are now being addressed.

Issues arising include:

Taking Evidence From Abroad

If someone gives oral evidence by video from the territory of a foreign state is the permission of that state is required, even if the witness is giving evidence voluntarily and no judicial or other assistance is required from the state where the witness is located?

ETs in Scotland, before the pandemic, had occasional cases where a witness gave evidence from abroad (this was particularly common in Scotland in North sea oil related cases) and no-one (including judges) had suggested that there was a legal or diplomatic problem when this was done. However, the issue has come to the fore because of the decision of the Upper Tribunal (IAC) in the case of *Agbabiaka (Evidence from Abroad, Nare Guidance)* UK UT 286

<https://tribunalsdecisions.service.gov.uk/utiac/2021-ukut-286>

In this case the Foreign and Commonwealth Development Office's (FCDO) position was that taking oral evidence by video from a witness who is located in a foreign state without the consent of that state was contrary to the maintenance of good international relations.

In its decision the UT states at para 12:

“There has long been an understanding among Nation States that one State should not seek to exercise the powers of its courts within the territory of another, without having the permission of that other State to do so. Any breach of that understanding by a court or tribunal in the United Kingdom risks damaging this country's diplomatic relations with other States and is, thus, contrary to the public interest. The potential damage includes harm to the interests of justice since, if a court or

tribunal acts in such a way as to damage international relations with another State, this risks permission being refused in subsequent cases, where evidence needs to be taken from within that State.”

This is developed further at paragraph 23 where the UT says that the view of the FCDO as to what may risk damaging international relations is ‘determinative’ and that in the context under consideration ‘it is not for this (or any other) tribunal to form its own view of what may, or may not, damage the United Kingdom’s relations with a foreign State.’

The UT then goes on to set out the process which is to be followed to ascertain the position.

Judge Simon noted that, as a matter of law, a decision of the UT is not legally binding on ETs. However, Judge Simon is of the opinion that it would not be sensible to simply ignore *Agbabiaka* in light of the possible ramifications of doing so.

Judge Simon explained that in *Agbabiaka* the UT had given some guidance about how a party seeking to lead evidence from abroad should proceed to check whether the state where the witness was located had any objection. A new Taking of Evidence Unit (ToE unit) has been established in the FCDO to progress such enquiries. Judge Simon went on to explain what the procedure was for a party who wished to make an enquiry, as at the date of the NUG meeting, but advised that HMCTS was in the process of setting up its own procedure to assist parties on the basis that HMCTS would be responsible for making the enquiry to the ToE Unit. She indicated that she and Judge Clarke (President of ETs(E&W)) were considering whether it would be appropriate to issue Presidential Guidance on this topic but would wait to see the procedure that was being put in place by HMCTS before deciding how to proceed. **[Post meeting note: Joint Presidential Guidance on this topic was issued on 27 April 2022.]**

Recording of hearings -requests for copies and transcripts

Employment Tribunals are not legally required to record hearings. There is no recording equipment provided by HMCTS to record an in person hearing in an ET hearing room in Scotland. However, CVP has a facility which allows for the recording of hearings conducted by that means, as

does the telephone conference facility used by the tribunal. Since close to the outset of the pandemic ETs in Scotland have been recording video and phone hearings unless there is a technical problem with doing so. Technical difficulties do arise occasionally. The reason that recording was introduced at the outset of the pandemic is because it provides a record of what was said which could well prove useful, bearing in mind the need for a fair hearing and the principles of open and transparent justice, in circumstances where a technical problem might arise during a remote hearing which means one or more individuals lose their connection into the hearing temporarily.

Judge Simon explained that some parties/representatives have asked for a copy of the recording or for a transcript to be produced. As users are aware, it is an offence to record an ET hearing without consent. There are also limitations affecting broadcasting of any hearing. Judge Simon confirmed that there are no plans to release recordings of ET hearings to parties or anyone else for a range of what Judge Simon considers to be good reasons concerned with the administration of justice.

Access to transcription and the circumstances in which transcripts may be available is a matter which has been under consideration by both ET Presidents for some considerable time. There are a range of judicial policy and resource issues which require to be considered, such as how the production of transcripts would be funded, whether a judge must give consent to a transcript being produced (taking up judicial time), whether a judge needs to check the accuracy of a transcript (again taking up judicial time).

In this context Judge Simon stated it was important to bear in mind that ETs normally produce very detailed reasons for judgments (available in every case). In her view that should reduce to a minimum the number of occasions on which it is necessary to have a transcript of a hearing. Judge Simon and Judge Clarke have been working on a joint draft Practice Direction and Presidential Guidance for some time. These will be finalised as soon as possible. **[Post meeting note: Draft PD and PG now issued to system users for consultation.]**

ET roadmap 2022-23

Judge Simon emphasised that, while video hearings and hybrid hearings will continue to have a role to play in the ETs (particularly for more straightforward cases – short track) we are moving back to more in person hearings for open track (discrimination and public interest disclosure) and for many standard track (includes unfair dismissal) cases. That is in line with the new ET Roadmap both Presidents issued on 31 March 2022. The default position in Scotland is clearly stated to be in person hearings for open track. Also, in Scotland we are in a position where standard track hearings can take place in person and that will happen increasingly although if there are good reasons for a hearing to take place by video then that can still happen. Judge Simon expressed the view that in some instances, such as where parties and/or witnesses are based in locations far away from their nearest hearing centre, that a video hearing can help to improve access to justice. Any views of parties about how a hearing should take place would be considered, if made known to the tribunal, although ultimately the decision on mode of hearing delivery was one for an Employment Judge.

HMCTS reform

Judge Simon drew attention to the fact that in the ET roadmap system users will also have seen the Presidents refer to the reform process underway in ETs, as part of the wider HMCTS reform programme, which is impacting across almost all courts and tribunals, including the reserved tribunals.

In the context of the Employment Tribunals, HMCTS reform aims to take longstanding paper-based processes and make them digital, resulting in an electronic system of case data that better serves judiciary, staff and 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. If all goes well, HMCTS intends this to become the primary means of communication with the Tribunal, allowing for automated updates. There will be a new ET1 and ET3 submission process. With regard to applications in the proceedings, the hope is that parties who want to apply for an order or make some sort of application to the tribunal will be guided to do that through answering a series of questions online. 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 team who are designing the new system and writing the software. If a system can be designed that allows for digital files to be created, digital referrals to and responses from judges, and digital applications from parties then that has the potential to make the system considerably more efficient.

The plan is to use Glasgow and Leeds as what HMCTS refer to as early adopter offices. The first stage (release 1) will accommodate open track cases in which the claimant is unrepresented. Release 1 early adoption is expected to start in June this year. The current plan is all cases will go through the reformed ET system by the end of 2022. That timescale is very tight given the amount of work that needs to be done. Judge Simon and Judge Walker are concerned about whether there is enough time to do everything they think needs to be done to get the most out of this reform initiative – there are a lot of challenges to be met and bumps in the road ahead but Judge Simon hopes that what comes out at the end is something that results in service improvement for system users. That is definitely what everyone involved is working to achieve. Judge Simon confirmed that Judge Walker is very heavily involved in this initiative and will keep the user group informed in the months ahead.

Judge Simon introduced Mark Lewis, who is the ET reform ‘service owner’. Mark has been working on a FAQ document for system users which will be issued shortly. **[Post meeting note: issued shortly after the meeting.]** Judge Simon has agreed that if users find there are questions that have not been answered or the document raises new questions then those can be sent to Jen Brodie at glasgow.president@Justice.gov.uk Jen will forward them on to Mark who can then provide the answer at the next Scottish ET NUG and/or on the next occasion the FAQ document is issued –(the FAQ document may well be issued on more than one occasion as the ET reform project moves forward).

Judge Simon felt it important to stress two particular points. The first is that she has provided the Scottish NUG contact list to HMCTS and stressed how important it is that there is proper consultation with a full range of system users as the reformed system is being designed. The

second point she emphasised is that since the beginning of this project the judiciary have emphasised how important it is that parties can still access the ET system and move through it using hard copy documents. She has been reassured repeatedly 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. It has been recognised that if we are to ensure access to justice then HMCTS needs to provide a system that accommodates the needs of the digitally excluded and those who simply lack confidence in using digital systems.

Agenda Item 2 - HMCTS Reform and Management Information Update - Mark Lewis, ET Service Manager

ET Reform

Mark confirmed that the online portal, MyHMCTS, is for legal and other professional representatives who undertake Employment Tribunal Work to access the online system. This portal differs from the citizen user interface, which will be used by unrepresented parties. MyHMCTS gives an organisation the ability to allocate work to people within that organisation, whereas the citizen user interface is purely for the individual to upload, download, respond and make applications on their own.

The aim is also to integrate certain functions with ACAS so that we can obtain the Early Conciliation number automatically, and separately, to share information between both organisations, with updates being downloaded each night and actioned.

GB wide ET Performance

Mark acknowledged that the performance information from the new case management system (ECM) does not match the more accurate data received via the old system (Ethos). He confirmed that the senior management team have accepted that ECM cannot provide comparable data for the period between the move from Ethos to the date when new data will be produced by the new version of ECM which will support the reformed ET system.

However, the indicative data that is available for Scotland suggests that the caseload is reducing, and the system is generally performing well.

ET (Scotland) Update – Sandra Martin, Senior Operations Manager

Sandra was pleased to report that HMCTS is in a much better position administratively. Having experienced substantial staff turnover in a 9 month period, 17 members of staff have been recruited since September 2021 and a further 5 are expected to join in the coming weeks. This has helped immensely in getting on top of workloads and clearing backlogs. We are now experiencing a period of stability in terms of workloads and staffing. Sandra explained that having so many new members of staff does bring new challenges in terms of providing training and she thanked judiciary and legal officers for assisting in that process.

Sandra provided a performance update based on local statistics and was able to confirm that the 10 day correspondence target is being achieved in most cases and that judgments are being issued within one or two days of receipt from the judge.

Looking forward there will be an increased focus on in-person hearings albeit CVP hearings will continue to be used for some cases where it is judicially determined as appropriate.

Staff continue to work on a data cleanse exercise to ensure that all cases on ECM are updated correctly which will mean that we will get valid data. There is also an ongoing case file reconciliation exercise taking place to ensure that all cases are progressing to hearing in a timely manner. Team leaders will also be doing additional quality assurance checks.

Preparation and planning is now taking place for the roll out of Reform processes.

Building work is continuing at Endeavour House, Dundee and the venue is expected to be available from late June 2022.

Agenda Item 3 - Update from Department of Business, Energy and Industrial Strategy (BEIS)

Unfortunately, BEIS were not able to send a representative to the meeting but they did provide a written update which was sent to user group members on 4 April 2022. A copy of the written update can be requested from Glasgow.Vice.President@justice.gov.uk

Agenda Item 4 – Acas Update, - Alan Hope

Case Receipts

Alan noted a fall in case receipts for both early conciliation and for ET1s in the period to February 2022. Factors impacting this include the numbers and sizes of multiple cases and the impact of legislation relating to the respondent's designation and other prescribed information from December 2020. In addition, there has not been the anticipated rise in cases arising from the end of the furlough scheme (Coronavirus Job Retention Scheme) on 30 September 2021.

Case Outcomes

Alan said that while complete information on this will not be available until the publication of ACAS's annual report in the summer, he was able to confirm a continued rise in the EC cases settled/other positive outcome figure in the period to February 2022.

IDR Service Transformation. Smarter resolution.

CONTENT STRATEGY- Looking at innovative approaches to getting complex information across.

Video- First video (Conciliation) in production. Second (Wages) is at planning stage.

Written –

Starting to look at how customers interact with services such as the website and the helpline. Aim of identifying improvements to help resolve disputes even before escalation to EC.

All Conciliation content on the website being reviewed in the light of customer feedback. Advice and content gaps will be plugged as part of an overall content plan.

ASSISTED NOTIFICATION FORM-

Mapping 'reason for dispute' information to case track and jurisdiction to ensure that we are asking the right questions for accurate allocation and good quality information for customer and conciliator.

Technical development continues, including enhanced storage of new cases and a save and return feature for users.
Improved start page to take into account user feedback. 2 versions to trial.

OPTIMISED ALLOCATIONS

Ideas underpinning a plan for a new way of distributing work checked and tested.

Green light for automatic allocation in most cases.

Must balance conciliator availability and capacity with the even flow of cases.

Speedier allocation to conciliators.

Other Business

Update on Devolution of functions – Robin Rimmer, MOJ

Current stage is working towards finalising the Order in Council, Covid has impacted on that work but it has now resumed. Currently working on responding to the questions raised by the Scottish Judicial working group on the Order in Council. Once the Order in Council is agreed the Scottish Government will consult publicly although there is no timescale on that at present.

Shona asked if he was able to indicate when the objective of devolution of functions would be achieved. Robin said that it was dependent on a number of factors but working towards 2025.

Questions

Q – What has happened to the Practice Direction on Witness Statements?

A - Work is ongoing and Judge Simon hopes to issue before she retires in mid July.

Q – Was there an update on the Judicial Review and Courts Bill and, in particular, the protection of Scottish interests in relation to the issues raised in the transfer over of the Employment Tribunal Rules to the Tribunal Procedure Committee?

A – Shona confirmed that when the Scottish and E&W ET Rules of Procedure, which used to be separate, were merged into one single set of Rules the Scottish Employment judiciary had been assured that Scottish interests would be protected. She asked Robin Rimmer to comment on the questions raised.

Robin confirmed that the Bill is progressing through Parliament (***post-meeting note: the Bill was granted Royal Assent on 28 April***). He noted that the key measure in relation to Employment Tribunals is the transfer of rulemaking powers from BEIS to the Tribunal Procedure Committee. He confirmed the appointment of two additional ET members. He said that there have been no parliamentary concerns raised about the transfer. Robin said there are no nationality restrictions on the two additional ET members to be appointed and that one or both could be Scottish if that was the outcome of the public appointments process, and that it is also possible for the TPC to appoint additional members at the request of the SPT if it is felt that more specific Scottish input is needed.

Robin also wanted to mention another proposed amendment to the Bill in relation to pro bono costs orders in all MOJ administered courts and tribunals. This would give ET the same powers as civil courts to order an unsuccessful legally represented party to pay pro bono costs where the successful party has been represented pro bono. These costs are paid to a prescribed charity which is the Access to Justice Foundation which operates across the UK.

Q – Access to Glasgow Tribunal Centre – Concerns about slow entry because of security and Covid measures.

A – Shona invited Sandra Martin to comment. ~Sandra said that although restrictions are easing we have had no confirmation from the Scottish Courts and Tribunals Service about any change to reception and entry to the building. Sandra will liaise with Scottish Courts and Tribunals and will provide an update as soon as possible

Useful Contact details

Jennifer Brodie - President's Private Office:

Glasgow.President@justice.gov.uk

Sandra Muir - Vice President's Private Office:

Glasgow.Vice.President@justice.gov.uk

Stephen Toal, Head of Tribunal Operations (Scotland)

stephen.toal@justice.gov.uk

Sandra Martin, Senior Operations Manager, ET Glasgow

sandra.martin2@Justice.gov.uk

Shona Ferguson, Delivery Manager, ET Glasgow

shona.ferguson@justice.gov.uk