MINUTES OF THE EMPLOYMENT TRIBUNALS (SCOTLAND)
NATIONAL USER GROUP
DATE OF MEETING: Tuesday 25 April 2023

ATTENDEES	
Name	**Organisation**
Jack Barratt	Brodies
Chelsea Clayton	Pinsent Mason
Rhidian Davies	NHS Scotland
Dawn Dickson	Eversheds-Sutherland
Kevin Duffy	Scottish Engineering
Raymond Farrell	Glasgow City Council
Kellyann Fraser	Aberdeen CAB
Andrew Gibson	Morton Fraser
Musab Hemsi	Anderson Strathern
David Hutchison	Dallas McMillan
Sarah Judge	CMS
Becky Kane	NHS Scotland
William Lane	Worknest
Sarah Leslie	Shepherd & Wedderburn
Laura MacDonald	Jackson Boyd
Calum MacNeill KC	Westwater Advocates
Carlyn McCallum	Harper MacLeod LLP
Laura McKenna	McKee Campbell Morrison
Steven McLaren	Kippen Campbell
Charlotte McLeod	Equality and Human Rights Commission
Lindsey Miller	Scottish Engineering
Ross Milvenan	Just Employment Law
Graham Mitchell	Clyde & Co
Laura Morrison	Dentons
Rebecca Mullins	Burges Salmon
Alan Philp	NatWest Mentor
Becky Robertson	Glasgow City Council
Anna Sauter	Eversheds Sutherland
Katie Sloan	Valla
Stuart Swann	Legal Services Agency
Amie Trainor	Scottish Engineering
Katie Wedderburn	Gunner Cooke

Also in Attendance

Judge Susan Walker, President of Employment Tribunals (Scotland)
Judge Frances Eccles, Vice President Employment Tribunals (Scotland)
Louise Hird, Deputy Director, Central Operations and Tribunals Scotland
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
Robin Rimmer, Employment Tribunal Policy lead for MOJ
Helen Nolan, HMCTS
Michael Nuna, Senior Project Manager, HMCTS
Alan Hope, ACAS

Welcome and Introductions

The President, Judge Walker, welcomed users attending in person and remotely to the meeting and introduced the above-named.

Agenda Item 1 – President's Update

Roadmap – Covid Recovery

The President confirmed that she and Barry Clarke, the President of Employment Tribunals (England & Wales) have decided there is no need to issue another Roadmap this year. That is partly because the picture in terms of backlog and recovery is so different geographically not just between Scotland and England and Wales but also across the regions in England.

In terms of hearings, the Roadmaps had a system of defaults where certain types of hearing would default to video, final hearings in the most complex cases would default to in person with the aspiration to move back to more hearings in person where that was possible.

Judge Walker confirmed that, in Scotland, we are in a position now to list as many hearings in person as the judges consider appropriate and most final hearings for unfair dismissal, discrimination and whistleblowing cases are now being listed in person. However, it is recognised that for shorter hearings, especially hearings involving little or no evidence, that a telephone or video hearing will often be proportionate and appropriate and that users have generally welcomed that innovation.

There are already some defaults in place for automatic listing. So, for example, fast track money claims have been listed on receipt for final hearing on video since 2020.

If the claimant indicates on the claim form that they cannot take part in a video hearing, these cases are listed for an in person hearing. There is no plan to change that.

The other automatic listing is of case management hearings for discrimination and whistleblowing cases. For these hearings, the default in Scotland before the pandemic was that these took place in person. It was felt that better progress could be made in person, especially if a party was not represented.

These hearings defaulted to telephone hearings in 2020 and that has been the position since then. There is no proposal to revert to having all case management hearings listed in person – it is recognised the cost and disruption that could cause. However, judges have expressed concern that telephone is not a satisfactory medium where one of the parties is representing themselves and the case is complex. They feel this is resulting in misunderstandings and lack of progress, and sometimes they are having to list a further hearing in person.

Judge Walker is therefore discussing with the administration whether to list, on a trial basis, some of these case management hearings on video where the claimant is a litigant in person. It is not planned to run tests for these hearings but, as users know, CVP does have a telephone number that allows participants to join the hearing for audio only, if the video doesn't work. The President indicated she would welcome users' views on that .
(*Post-meeting note: this is now to be introduced on a trial basis for some cases on Glasgow from August 2023*)

Judicial mediations defaulted to video during the pandemic and that was the default under the roadmap. Mostly these seem to work well and there is no discernible difference in the number of cases that resolve using that medium. However, some mediators have started to list some mediations in person where they feel that would work best for the particular case. The President does not intend to have a default for JM but to leave this as a matter to be discussed at the arrangements hearing telephone call. This is a voluntary process and it makes sense for this to be offered in the forum that maximises the chance of success and which parties are comfortable with. The President is aware that one of the benefits of a video JM is that it is less disruptive for parties and also, in some cases, it means that a claimant does not have to be in the same room with someone they say has treated them unfairly. Of course, that in-person dynamic is sometimes what unlocks the stalemate. So, if users have a strong view about what would work best in the particular circumstances of individual cases, that can be discussed with the mediator at the arrangements hearing telephone call.

It may well be that most JMs continue by video. Again, the President would welcome user views.

For other hearings, the President said that judicial colleagues find it helpful to have a default as a starting point rather than making a decision on every case. No final decision has been taken yet but the most likely option is to have a default that, for any hearing of any type listed for over a day, the default will be in person. If the hearing is listed for a day or less, the default will be video. That reflects the position in the roadmap. However, these are only defaults and users should feel free to propose the alternative. Ultimately it will be judicial decision.

The President noted that there is a valid argument that some short hearings, such as preliminary hearings on time bar or strike out, are very significant hearings and that may favour holding them in person. She is interested in user views on what would be an appropriate default for these shorter substantive hearings.
(*Post-hearing note : the President has advised Judges to operate a default of an in-person hearing for any hearing listed for over a day, for a day or less, the default will be video.)*

Outstanding Caseload
In Scotland, the picture is positive. The President advised that there is no "backlog" in Scotland in the sense that it is used in the media. There is always an outstanding case load of course, as cases move through the system, but as far as we know from the unaudited figures, our outstanding case load is reducing and we are disposing of more cases than are coming in. We are offering a standard listing period, at the moment, of July, August, September and we have space to list cases before that.

The listing of a first case management hearing in discrimination and whistleblowing cases is usually around the 8–9-week mark (that is 8 weeks after receipt of the ET1, and 4 weeks after the response due date) and fast track money claims are listed for a final hearing at the same point. So, for ET1s, for those types of cases, presented in week commencing 25 April '23, users could expect the case management hearing or final hearing to be listed by the end of June.

Case management
The President has been concerned for many years about the length of time some cases, primarily discrimination or whistleblowing cases take to get through the system. Sometimes there are good reasons for that. However, usually when she sees the file there have been lots of case management hearings, and a lot of effort by

everyone involved, without much obvious progress. The case may have become more complex and simply generated an enormous file of correspondence. This relates to a small percentage of the cases overall but they take up a disproportionate amount of judicial and administrative time. The President recognises that this type of case will no doubt take up a lot of the users' time as well.

The President said that is not good for anyone and that the stress on all parties while a discrimination case is ongoing is often underestimated. It also adds to the cost. Users may ask why is that happening and what the President is doing about it?

There appear to be two things going on.

Firstly, during the pandemic, the only way to progress many cases was case management. So, there were case management hearings in cases that previously would have listed for a final hearing without one or having several case management hearings where previously there might only have been one. Judges and users may have got used to that approach and it has begun to be seen as the norm.

Secondly, over the last 15 years or so, judges have focussed, in complex cases, on ensuring that the issues are clearly identified and recorded before the hearing. The President makes no apology for that approach which is really helpful in many cases but thinks that sometimes, with the best of intentions, the case gets "stuck" while judges and parties/representatives try to clarify every detail of each party's case.

The President has asked judges to adopt a proportionate case management approach and have an eye to delay as an important factor in all cases. So, the key question is whether the proposed case management step (whether it be asking for further specification, having another preliminary hearing or issuing further orders) is going to add sufficient value that it justifies the delay that will be caused to the case being determined. Or can the same outcome be achieved in another way?

The President said the Vice President, Judge Eccles, is working with the listing team to try and ensure single judge case management of more complex cases to ensure consistency of judicial approach. There is no doubt that having a number of judges involved in managing a case can cause inconsistencies and delays. This is not a new approach but we are re-focussing our efforts on the most complex cases.

The President has asked judges to aim to have only one case management hearing in a discrimination or whistleblowing case, perhaps 2 in an occasional case and, except in really exceptional circumstances, to list the final hearing at the first CMPH

even if there is still some case management to be done. For other case types, case management hearings should be rare and should not delay listing.

Experience tells us that fixing the length of hearing is not an exact science. We can always adjust the days if that becomes necessary. However, if we don't list the final hearing, the cases can simply drift and 6 months or more is added easily to the overall time before resolution.

This focus on listing a hearing is not new. It is set out in the hearing notice. However, the President appreciates there has not always been a consistent approach to this, especially during the pandemic. So, users are asked to have their witness availability at the first CMPH. If not, they can expect that a hearing will be listed without it.

To maximise the effectiveness of that first case management hearing the President thinks it is appropriate and in accordance with the overriding objective to seek to identify what the statutory basis is for the claim that is being made and which parts of the narrative in the ET1 fit where, hopefully having been clarified by completion of the agenda.

The President noted that this is not an easy task and the judges must not create a case for the claimant. The President and the judges recognise that respondent's agent is often an observer for much of that hearing. The judges appreciate their cooperation and ultimately, the President thinks that most respondent's agents understand it benefits their client as well to have the issues identified in that way. The President went on to say that representatives must feel free to intervene if they think the judge has gone too far.

Once that task has been done and provided the claimant has had a chance to reflect on the note that is produced setting out the complaints and the issues, then the President's view was that it should take some persuasion before any adjustment or amendment to that list is permitted.

Tied to that approach, the judges have been asked to try to avoid issuing orders for further written specification if the party is not represented. Instead, they should aim to get that detail from them at the first hearing if possible.

The President said that respondent's representatives can help, if, following this process of discussion with the claimant, they do not then ask for further specification in writing. If the claimant hasn't provided that in the ET1 or in the agenda document, it is unlikely they will be able to do much more.

However, if there is something important users feel still needs clarification, they should tell the judge what it is and the judge can try and get the information required from the claimant at the hearing in the format required. The President observed that there is a danger, otherwise, that the claimant will try to provide a lot of information but it won't be what has been requested. They may often produce more information but rarely more clarity. That leads to applications for unless orders or strike out or the claimant being required to amend.

In this jurisdiction, which is intended to be accessible by litigants in person, the President's strong view is that, sometimes, a case just needs to to get to a hearing. Despite everyone's best efforts, the case is not going to get any clearer. Provided the respondent knows in broad terms what the allegations are and there is no unfairness to them in pressing on, you can expect that Judges will be pushing to get the case to a hearing. The President believes this is in the respondent's interest as well. The case will be simpler, the hearing will be shorter and there will be fewer hearings and less correspondence.

It can also have the added benefit that the unrepresented claimant does not get into the position we all recognise where they feel out of their depth, they can't cope with the process, their mental health is suffering and they believe that the judge and respondent's rep are colluding against them.

Recording

The President confirmed that the Practice Direction and Presidential Guidance on recording is at the final draft stage. As this impacts on HMCTS who would have to provide the equipment, a number of sign offs are required before it can go to the Lord Chancellor. It is hoped the final version will be issued in the next few months and a link will be sent to users at that time. In the meantime, in Scotland, we continue to record all telephone and video hearings and, where the equipment is available, we record in person hearings as well. This is routine, for example, in 5 of the rooms in Glasgow.

Non-Legal Member consultation

The President drew the user group's attention to an ongoing consultation in respect of the cases that require to be heard by a full panel. The President said that users would know, the provisions that determine panel composition are in section 4 of the Employment Tribunals Act. Gradually over time, the types of cases in which a judge can sit alone have expanded, most controversially, in 2012 to include claims of unfair dismissal.

The Judicial Review and Courts Act 2022, provided for a new section 4 giving the power to determine panel composition to the Senior President of Tribunals instead of being set out in the statute. He has issued a consultation setting out his initial thoughts on the matter. In essence, what is proposed is that there would be no type of case that could not be heard by a judge sitting alone and that would be the default position for all cases. However, a judge could direct that any case be heard by a full panel. The discretion to list a full panel for a preliminary hearing would be removed. That mirrors the position in the EAT.

The President said that a number of questions arise and are posed in the consultation:

- Is this the correct approach?
- If so, what would be the criteria for listing members?
- Would/should those be set by the SPT? or,
- Would those be a matter for Presidential Guidance.

It is not said to be a cost cutting measure, however there is a clear focus on only listing nonlegal members if they would add significant value to the decision making process.

The President encouraged user group members to respond to the consultation by the closing date which was 27th April 2023

Devolution

In response to a question received, in advance of the user group meeting, about devolution of the functions of the Employment Tribunal to Scotland. The President stated that she had nothing to report. The last update was that a draft order in council was close to being finalised at Westminster and that would then be sent to the Scottish government. The President was unaware if that had happened yet. The Scottish government indicated some months ago that they had no plans to bring forward the devolution of reserved tribunals in the current parliament – which would mean no progress before July 2026.

EAT

Finally, the President informed users that she has been appointed to sit in the Employment Appeal Tribunal (EAT). The two ET presidents are among the judges who can be nominated to sit in the EAT under section 22 (2A) of the Employment Tribunals Act 1996. For the time being she will only sit on England and Wales

appeals. The President said that, while there is no prohibition on her sitting on Scottish appeals, she felt that appellants might be concerned about whether she would be truly objective in such cases. However, that may change as the practice becomes familiar to everyone.

Agenda Item 2 – ET (Scotland) update
Sandra Martin, Senior Operations Manager

Performance
Sandra confirmed that despite changes in staffing, workloads continue to remain stable across all teams. Administrative targets such as the 10 day correspondence target continue to be met in the majority of cases. Sandra has noted a steady decline in the volume of correspondence received and believes that is a sign that staff are on top of the workload which reduces the amount of correspondence seeking updates on earlier correspondence. Sandra also confirmed an increase in the number of in person hearings and has also noted a slight increase in the numbers of settlements and withdrawals being received.

There has also been a significant increase in postponement requests. Much of this is because of witness availability, some of which is unavoidable but sometimes is because of last minute holiday bookings etc. This causes additional work in the teams and contributes to the delays in getting those cases to hearing.

Staffing
There has been a significant amount of staff turnover with staff leaving on promotion. This has left a void in experience levels. 13 Agency members of staff have joined since January and 7 more are expected to join in the coming weeks. Sandra confirmed that full training plans are in place for new staff and they will have adequate support and ample time to consolidate training.

Looking Forward
A recruitment campaign has been launched for fixed term administrative assistants and administrative officers. There is also a campaign for permanent executive officers.

We continue to prepare and plan for the roll out of further reformed processes.

Work is continuing in relation to the Webchat pilot. Once links to the webchat facility have been placed on appropriate HMCTS web pages, user acceptance testing and training will commence locally.

Agenda Item 3 – HMCTS Reform Update
Michael Nuna, Senior project Manager

Michael confirmed that the aim is to design a digital system and to remove paper based processes. User researchers work closely with the project team, external stakeholders and litigants in person to provide feedback on the latest design work. A limited reformed service has been releases in 4 offices: Glasgow, Leeds, Bristol and Nottingham.

For litigants in person using the **CitizenUI** portal, more guidance has been provided before they begin the online claim process, they are able to complete the form in sections and return to it before submission and further guidance is provided as they complete the ET1 to help ensure that the submitted ET1 contains all required information. Once the claim has been submitted claimants will be able to log in to check the progress of their case. Users will also be notified of any progress in their claim via e mail notifications. In the coming months the service will be enabled to allow users to make applications via the portal.

Michael confirmed that Employment Tribunals will soon be part of the **MyHMCTS** portal for professional users. Users will need to register on MyHMCTS and create an account. Initially representatives will be able to submit the ET3 response form, this is anticipated to start in May 2023. If a new claim is a reform case a 16 digit number will be provided with the served ET1. This will allow representatives to gain access to the case on MyHMCTS. Later in the journey they will be able to submit applications using the platform and track the status of the case.

Agenda item 4
Update from Department for Business and Trade
Richard Boyd, Senior Policy Advisor

Richard advised the group that the BEIS select committee has published its post pandemic economic growth labour market reports. He said that Employment Tribunals features in the report in relation to time limits, backlogs and enforcement. The report also touched on the issue of artificial intelligence (AI) and in relation to that he drew the group's attention to the government's white paper on AI regulation and pro innovation approach and invited users to contribute to that. The closing date is 21 June 2023. *Links were posted during the meeting.*

Richard discussed recent media reporting about the enforcement of Employment Tribunal awards. He said that while the naming scheme has not yet named and is still under consideration by ministers, the penalty scheme continues in trying to help people get the money the are owed. Richard invited users to provide information to help identify the barriers to people being paid which they have encountered. Users can contact Richard at richard.boyd@businessandtrade.gov.uk.

Additional Item

The President then invited Robin Rimmer, Employment Tribunal Policy lead for the Ministry of Justice, to speak.

Robin spoke about ongoing discussions around the online register of Employment Tribunal decisions and said that the MOJ open justice team would shortly launch a call for evidence looking at the themes of open justice, access to information and data, and transparency across courts and tribunals. He drew users' attention, in particular, to questions around how Employment Tribunal judgments are published. The call for evidence can be found here. The deadline for responses is 7th September 2023.

On Devolution, Robin confirmed that work is ongoing on the Order in Council and MOJ is continuing to work across government to address some of the issues raised by the Scottish Judicial Working Group on Devolution. Robin said that whilst there had been some progress he could not say when an amended Order in Council would be produced and referred back to the Scottish Government.

Agenda item 5
ACAS update – Alan Hope, Conciliation Manager.

Smarter Resolutions
Alan confirmed that the first phase of the ACAS service transformation programme ended in March this year. With a focus on improving the journey for claimants and their representatives a revised landing page has been introduced. The aim is to make it simpler, to maximise the capture of the kind of information that conciliators need. 90% of early conciliation notifications are being made on the new form and early indications are that the new form is increasing buy in and may also be having an impact on settlement rates.

Alan confirmed that an automated allocations system has also been introduced. This applies to cases notified by claimants, respondents and ET. 60% are allocated to a conciliator within 15 minutes, Alan is hopeful that this can be increased to 70%.

Alan informed users that by the end of April 2023, a number of new videos will be available covering topics such as "early conciliation explained", "wages" and "breach of contract"

Alan confirmed that ACAS have received additional funding from the Department of Business and Trade. Some of this will be used to create a user interface to provide parties with information and case progress without needing to contact a conciliator. This is expected to save time for parties and conciliators.

Alan said that connection with the Employment Tribunal would see the auto processing of ET1s and ET3s begin in April '23. There will also be a gradual introduction of the automatic processing of case correspondence.

Case receipts and outcomes

Early conciliation receipts are up 12% on last year at 106,390**.** ET receipts are up 3% at 32,169. These figures are still below those prior to the coronavirus pandemic and the job retention scheme.

Early conciliation resolution rate remains the same at 36% and Employment Tribunal resolution rate at 77%. Alan stressed that these figures are provisional and users should check the ACAS annual report which will be published later in the year.

Questions from Users

Question from Alan Philp, Natwest Mentor, to Alan Hope:

"Do you have a stat on early conciliation cases that aren't resolved but don't end up in Employment Tribunal"

Answer:

Alan could not give an exact figure but estimated that about a third of early conciliation notification come back into the tribunal service.

Question from Laura MacDonald, Jackson Boyd to Alan Hope:

We have noticed an increased number of cases where settlement is reached after the end of the early conciliation period but before an ET1 is submitted. Would that be counted as a successful early conciliation for statistical purposes?

Answer:
Alan confirmed that such cases would be treated as EC positive outcomes.

Question from Andrew Gibson, Morton Fraser, to Judge Walker
Can judges make more use of the power to reject a claim if insufficient detail of the claim is provided in the ET1. He pointed out that, if insufficient detail is given, it is difficult for the respondent's representative to be sure what the case is about, to identify witnesses and provide their availability at a case management hearing.

Answer:
Judges are reluctant to reject claims because of potential time bar issues and take the view that it is better to address any issues in person.

Question from Rhidian Davies, NHS Central Legal Office, To Michael Nuna
Will users be able to download any document onto MyHMCTS as a PDF and keep a copy on their own in house filing systems.

Answer: Yes