



MINUTES OF THE EMPLOYMENT TRIBUNALS (SCOTLAND) NATIONAL USER GROUP

DATE OF MEETING: Tuesday 11th August 2020

Chair: Judge Shona Simon

ATTENDEES	
Name	Organisation
Judge Barry Clark	President, ET (England & Wales)
Stephen Miller	Clyde & Co
Andrew Munro	Scottish Engineering
Jillian Paton	Thomson Reuters
Katie Russell	Burges Salmon
Deborah Miller	MacRoberts
Laura McKenna	Morton Fraser
William Lane	Peninsula
Marie MacDonald	Miller Samuel Hill Brown
Catherine Greig	Greig Employment Law
Margaret Gribbon	Bridge Litigation
Steve McLaren	Kippen Campbell
Lindsey Miller	Scottish Engineering
Aileen Irvine	CMS Cameron McKenna Nabarro
Sarah Crowe	DLA Piper
Gillian Riddell	Glasgow City Council
Adam Watson	CLO-NHS
Claire McKee	Dentons
Russell Bradley	Faculty of Advocates
Laura Lilburn	Renfrewshire Council
Lynsey Smith	Brodies
Tariq Sadiq	ELBA Regional Rep
Diane Inglis and 4 others	Strathclyde Law Clinic
Ian Burke	Bannerman Burke
Alan Philp	RBS and Natwest Mentor Services
Rachel Blair	North Lanarkshire Council
Carlyn McCallum	Harper MacLeod
Katie Sloan	Cameron McKenna
Brian Campbell	Brodies

Also in Attendance

Judge Susan Walker, Vice-President of Employment Tribunals
(Scotland)

Stephen Toal, Head of Operations (Scotland), HMCTS

Daniel Flury, Deputy Director of Tribunals, HMCTS

Nige Edgington, Head of Jurisdictional Support Team, HMCTS
Shona Ferguson, Acting Senior Operations Manager, HMCTS
Derek Hutchison, Acting Delivery Manager, HMCTS
Richard Boyd, Senior Policy Advisor, BEIS
Laura Matthews, BEIS
Tony Lowe, Acas

Agenda item 1 – President’s update

The President (Judge Simon) welcomed everyone to the rather unusual remote meeting of the ET Scottish National User Group(NUG) being held by Cloud Video Platform (CVP). The last Scottish NUG meeting was in January of this year; Judge Simon apologised that there has been a longer gap than usual between meetings but hoped system users would understand that she had been dealing with a variety of challenges in the interim and note that there had been written communications with user group members at various points between meetings.

Covid response

The President summarised key features of the judicial response to the Covid-19 pandemic – in particular the current position in terms of service provision and how things will be developing in the months to come. She explained that she has been working particularly closely with her counterpart in England and Wales since early March 2020. At that point the Employment Tribunal President in England and Wales was Judge Brian Doyle.

Judge Simon and Judge Doyle were both acutely aware in early March that the situation they faced, and that judicial officeholders, staff and system users faced, was very confusing, characterised by profound uncertainty, a high level of anxiety and health and safety risks which were quite hard to fully comprehend because the situation was developing every day. She explained that of course each President has their own jurisdictions and are entitled to develop judicial policy as they see fit but it seemed to both Presidents from the outset that it would make sense to collaborate and act in unison insofar as possible to maximise certainty and reduce confusion – they were conscious that many representatives and respondents have cross border operations, so felt it would help all concerned if the Presidents worked together. Judge Barry Clarke took over as Employment Tribunal President in England and Wales in May 2020 and his view is the same as Judge Doyle’s was – the two Employment Tribunal Presidents have continued to work together very closely and intend to do so going forward in managing this crisis.

Judge Simon reminded system users that on 18 March 2020 she and Judge Doyle issued joint Presidential Guidance on the conduct of ET hearings during the pandemic which had quite a lot to say about hearings being conducted remotely, using video technology and phones, even at that early stage before the ET was fully geared up to conduct video hearings. Users were sent a link to the Presidential Guidance when it was issued, it is readily available on the internet –

<https://www.judiciary.uk/publications/directions-for-employment-tribunals-scotland/>

At the time when they issued the Presidential Guidance in mid-March (5 days before the big lockdown) both Presidents emphasised that if a hearing took place by video conference then that would reduce the health and safety risk to parties/reps etc and the stress occasioned by having to travel to hearing centres or not being able to do so because one or more of those involved in the case were shielding. That was one of the main concerns at that stage – the health and safety of system users and judicial office holders. This remains a very good reason to provide a remote hearing facility for system users.

In terms of remote hearings, as well as conducting a large number of TCMPHs the salaried judges have been conducting an increasing number of substantive hearings using CVP since March. In recent weeks training has been delivered to all fee paid judges and those non-legal members wishing to sit in remote hearings on the effective conduct of such hearings. More licenses for CVP hearing rooms are to be provided shortly. Judge Simon stressed that hearings conducted by CVP are going to be an important component of the way we deliver Employment Tribunal hearings for the foreseeable future. The joint strategic plan Judge Clarke and Judge Simon have put together for Employment Tribunals (the roadmap) can be found online – appendix to the latest FAQ document (version 4) found here:

<https://www.judiciary.uk/publications/directions-for-employment-tribunals-scotland/>

Judge Simon indicated that it is envisaged there will be strong reliance not just on fully video hearings but also on hybrid or partly remote hearings – for example you could have the tribunal and parties/reps in a physical hearing room but all witnesses by CVP and press/public access by CVP too.

Given this focus on remote hearings Judge Simon has also taken the step of issuing a Practice Direction on the Fixing and Conduct of Remote hearings in Scotland – aimed at tribunals but also at parties – if users have not read that yet Judge Simon encouraged them to do so before taking part in a remote hearing and also to read an associated informal practical remote hearings guidance document issued the same day which

deals with a whole range of practical matters and which is being kept under constant review as lessons are learned about the conduct of remote hearings. These can be found at the internet link above.

It is hoped that in cases where both parties are legally represented it may be possible for the representatives to cooperate with the Employment Tribunal so that electronic bundles can be used – this will lower the Health & Safety risks by removing paper handling as an element of the process. The Remote Hearings PD and the practical guidance provide a lot of information about how it is envisaged this will operate. The judges have been provided with software for managing electronic bundles and there have been a few notable successes already of cases being conducted using electronic bundles.

Judge Simon indicated that it is expected that video hearings will be particularly useful in short track cases – users will remember that pre Covid these would be listed on receipt of the ET1. We are planning to return to that and are considering the possibility of writing to parties as soon as possible after the claim is made (when ET1 is being sent to the respondent) asking for views on whether there is any reason why the case could not be done by video hearing (which would require each party to have an internet connection and a device to use on the internet). We are very interested in obtaining user group views on that proposal so please feedback to Judge Simon's office.

It is entirely accepted by Judge Simon and the ET(S) judiciary generally that video hearings are not suitable for all cases. As is made clear in the various documents that have been issued, they will only be used where it is possible to deliver a fair and just hearing by that route. The overriding objective of the tribunal requires the tribunal to do that; the fact a hearing is conducted remotely does not release the tribunal nor indeed the parties from acting in accordance with the overriding objective nor does it release the tribunal or the parties from meeting the requirements of all the other rules of procedure.

It is hoped that we can begin face to face hearings at all Employment Tribunal locations in Scotland from early September but not all of the hearing rooms are big enough to accommodate the full range of participants on a socially distanced basis. In addition, the tribunal needs to accommodate press and public attending (open justice) – at the very least this will involve having a facility for them to come in remotely by CVP and for them to see what is going on. This means that equipment has to be provided to achieve this objective in each hearing room that will be used for face to face hearings. and to have the necessary equipment in each hearing room for that purpose – that part of the jigsaw was currently being worked on. Judge Simon thanked members of the HMCTS team for

all they were doing in this regard. Judge Simon also indicated that when face to face hearings commence – as well as social distancing in the rooms- we will also stagger start times of hearings to manage traffic flow through buildings. For example, a hearing notice may say it is a face to face or hybrid hearing but starting at 9.45 or 1.15 etc. System users should pay particular attention to this. There will also be strict limits on the number of people who can be in witness waiting rooms at any one time so the judiciary are going to have to rely on users to work with the tribunal to timetable witnesses in a way which minimises delay between witnesses not located in the building, as would have been the case previously.

Judge Simon reassured users that detailed risk assessments have been done for all Employment Tribunal buildings (except Dundee at the moment – closed due to a problem with water supply). (N.B. Dundee office has subsequently been reopened.) Those risk assessments can be made available on request to parties/ reps.

So far as waiting times for face to face hearings are concerned in Scotland – as things stand there are plans in place to deal with the backlog of face to face hearings between Sept and the end of year and other cases will be offered dates from Jan onwards but that depends on having obtained the necessary video and other equipment to do that. Despite what users may have read in some journals etc Judge Simon indicated we are not in a position in Scotland (nor indeed, as she understood it, in most parts of England & Wales) where multi day hearings cannot be listed till 2022.

Judge Simon indicated that it was also necessary to bear in mind that it is very likely the caseload will begin to rise as the furlough scheme comes to an end with an increase in redundancy related claims – payments, protective awards, unfair selection and discrimination in selection process. Judge Simon was unable to give users a categoric assurance that the timescales for hearing will not be pushed out beyond what users are used to in Scotland by developments of this kind but efforts are being made by all to reduce that risk.

New EJ appointments

Judge Simon referred to the fact that at the last user group meeting she had indicated that more EJ s were to be recruited. The update from the last user group re recruitment of new EJs in Scotland was that Amanda Jones and Michelle Sutherland have been appointed as salaried Employment Judges in Edinburgh. David Hoey and Peter O'Donnell have been appointed as salaried Employment Judges in Glasgow. They were all previously fee-paid Employment Judges in Scotland and are all employment specialist practitioners.

13 new fee-paid judges are due to be appointed from 2nd November 2020; their induction training is planned for later in November and it is hoped they will begin sitting from December. As at the date of the meeting their names had not been released but they all have strong employment law backgrounds. (N.B. Those names are now in the public domain.)

Estate Matters

Glasgow office – the move from the Eagle Building to the Glasgow Tribunals Centre (GTC) takes place on the weekend of 22nd August 2020.

Inverness – moved into the Inverness Justice Centre in July 2020. The Employment Tribunal have the use of a big sheriff court room there which has been designed for civil business.

Dundee – closed due to water supply issue. Hoping to get good news on that soon. Employment Judges McFatrige and Kemp have been doing remote hearings.

Extended opening hours -evening sittings

A working group chaired by Regional Employment Judge Carol Taylor, representing both ET Presidents, had been convened. Judge Simon reminded users we were going to reintroduce evening sittings in Scotland on a purely voluntary basis, which had previously worked well in Scotland and been appreciated as a service addition, just as the pandemic hit us. We had been working on the basis that it would be face to face hearings but there would be nothing to prevent (again on a purely voluntary basis) an evening list of video hearings. It might suit some parties quite well particularly unrepresented parties who have the technology but perhaps some representatives might like the flexibility it could offer. If users have views on that idea Judge Simon would be glad to hear from you – Glasgow.President@justice.gov.uk

Ethos and ECM system

Judge Simon asked Daniel Flury to provide a strategic level update on the work of HMCTS and then asked Shona Ferguson to provide users with some information regarding Scottish ET performance.

Agenda Item 2 – HMCTS Update – including HMCTS response to the Covid-19 pandemic – *Daniel Flury, Deputy Director of Tribunals, Scotland*

Daniel gave an overview of issues faced nationally by HMCTS, such as: capacity constraints, social distancing, physical hearing capacity etc. Daniel talked about the increase in claims and the expected further rise when the job retention and furlough schemes came to an end in the months ahead. Daniel referred to the ET roadmap and the plans to maximise sitting capacity in all regions and in Scotland.

Daniel explained that the Cloud Video Platform (CVP) was the preferred video conference platform being used by ET. He explained that MOJ was working closely with the commercial company, Kinly, that the platform was readily available and could be expanded quickly to meet growing demand, and the recording facility it provided was well suited for HMCTS. The primary factor was that no software was required to be downloaded to use the platform and it appeared to provide a suitable format for parties.

Shona Ferguson, Acting Senior Operations Manager gave an update on performance figures over the past few months since the Covid-19 pandemic. Shona talked about the Health & Safety measures in place within the new building (GTC); one way systems in place, hand sanitisers, a strict 2 metre rule and extra cleaning regimes in place throughout the day. There is clear signage in place and limits on numbers in lifts etc and the air conditioning is circulating fresh air to all areas of the building. Face to face hearings will commence in GTC week commencing 7th September 2020.

Agenda Item 3 - Update from Department of Business, Energy and Industrial Strategy (BEIS) – including proposed ET Rule changes and proposal to introduce Caseworkers in the ET – *Richard Boyd and Laura Matthews*

ET and Early Conciliation Rules

BEIS provided an update on the continuing work with Acas, Ministry of Justice, HM Courts & Tribunals Service, and the ET Presidents to consider ways to improve capacity and facilitate swift dispute resolution.

Update: Since the meeting, BEIS has laid legislation to make changes to the early conciliation and employment tribunal rules of procedure. The press notice is available here:

<https://www.gov.uk/government/news/government-to-boost-capacity->

[in-employment-tribunal-system-giving-quicker-outcomes-for-employees-and-employers](#)

Redundancy Protections

BEIS had laid legislation, which commenced on 31 July 2020, which will ensure that pay received in relation to statutory redundancy pay, statutory notice pay, unfair dismissal compensation and pay for short-time working is based on an employee's normal pay, rather than their furlough pay (potentially 80% of their normal wage).

Zero Hours contracts

Post Implementation Review into the 'Exclusivity Terms in Zero Hours Contracts (Redress) Regulations'.

These regulations were introduced following a ban on exclusivity clauses in zero hours contracts under the Small Business, Enterprise and Employment Act. The regulations provide individuals a means of redress if their employer is not complying with the ban. BEIS want to understand how effective these regulations have been.

As part of this work, BEIS are looking to contact a range of stakeholders, including those with a legal background, as well as both businesses and worker representatives who have a view on these redress regulations. BEIS will be starting to contact stakeholders in the next few weeks with a range of questions, which can be answered either by email or through an interview.

If you are interested in getting involved, please contact BEIS by email, laura.matthews@beis.gov.uk. Or if you have any suggestions for stakeholders we should engage with, please do let Richard know.

Agenda Item 4 – Update from Acas – including early conciliation levels and resourcing – *Tony Lowe*

Due to technical difficulties Tony Lowe was unable to join the remote user group for which he sends his apologies; the Acas update provided after the meeting is noted below:

“Working arrangements:

Firstly, just to touch on present working arrangements. Like many organisations we've been impacted by the Covid-19 pandemic and the restrictions that have been in place during lockdown. Following government advice, we quickly moved to full home working to support and protect our staff. I'm pleased to report that our conciliators are

keeping safe and well, and availability remains high. There are no major issues with the technology and indeed we have managed to offer our conciliation service remotely and effectively via platforms such as Skype, Teams and Zoom.

We are working on how to get our offices open - planning practicalities and talking to the Government Property Agency who look after our buildings, about how to create safe workplaces. We aren't yet able to re-open, and we don't expect anything to happen until at least the end of September. That said, as there are no operational problems with our current working arrangements, we intend to take a measured approach overall, whilst addressing any individual concerns our staff have about continued homeworking.

Recruitment:

We are in the middle of a recruitment drive to increase conciliator numbers – though this is bringing its own challenges as we recruit, on board and train people that we haven't met in person.

The interview process is relatively straightforward using platforms such as Skype, Teams etc but helping people feel part of a team when they have never met anyone is a bit trickier. We are however, seeing some pretty good outcomes and this has given us the confidence to carry on our recruitment programme ahead of opening up our offices. We have taken on 22 Early conciliation support officers and are in the process of increasing the number of conciliation officers to add to the 40 conciliators we took on and trained earlier in the year.

To increase availability of conciliators, we are also trialling a small team-based conciliation approach for monetary and contractual cases. This means you might not speak to the same conciliator all of the time but should be able speak to someone when you need to. Early results are pretty successful, but we will keep assessing.

Notifications:

In terms of notifications coming through to Acas, we are seeing the obvious patterns that you would expect to see given the current climate, so for example redundancies and claims for failure to consult are coming in. However, the number of notifications received is only just starting to gradually increase, more noticeable in relation to group claims or multiple claims. These multiples are not all Coronavirus related – equal pay and holiday pay cases still feature heavily. We suspect the modest increase in the volume of notifications is down to the cushioning effect of the CJRS. Going forward, as the furlough scheme ends in October, and we see a reduction in the financial support from the government from the start of August, it's inevitable that there will be increasing financial pressures on employers. Some employers, especially in the travel, retail

and hospitality sectors, have been hit hard by the lockdown and announcements of significant redundancies and the potential for significant numbers of claims are likely to follow. We are keeping a close eye on volumes over the coming months.

From the most recent figures I have, I can tell you that we've received just under 18,000 individual Notifications in the first few months of this operational year, so from beginning April to the end of May 2020. The make-up of these notifications by track are - Fast Track 38%, Standard Track 22% and Open track 26%. The remaining 14% are where we've been unable to attribute a jurisdiction – most commonly where we've not been able to contact the claimant following their submission. Currently we're seeing that around 24% of notifications go on to yield an ET1 (based on the 3 months prior to the beginning of this reporting period) however we know there may be some inevitably delays in ET1's reaching Acas and so this number may change. More detailed information for the year 2019 – 2020 is set out in our annual report which is now published and available on our website.

Current initiatives:

We are continuing to look at developing the online notification form and in particular considering the option for a user to request the early conciliation certificate immediately following submission. There is a fine balance to be achieved here, we obviously want to promote the benefits of early conciliation especially to those who have never used the service before. On the other hand, we recognise that some users, including professional representatives, simply want the certificate without unnecessary delay. We hope to be able to find the right balance and have something developed in the Autumn.

We have also been working with BEIS on the legal framework for early conciliation and some areas for reform. There are some aspects of the current regulatory requirements that cause us difficulties for example the requirements around the Respondent name. What was intended as a simple way of demonstrating early conciliation compliance has now become something of a distraction. The key issue for us is that the claimant notifies Acas of an employment dispute in a manner that is enough for Acas to contact the employer. BEIS are therefore consulting on a package of measures to improve the early conciliation and employment tribunal procedures and a document has gone out to stakeholders for comment.

Large group claims – we have a postal redirect from Nottingham, and whilst this seems to be working well, if you are looking to submit large groups it may be advisable to telephone us first to discuss options. The submission of multiple notifications to Acas also features as part of the BEIS consultation. For example, currently the EC regulations do not allow the submission of notifications via email – hard copy or on line only

so one possibility is to get e-mail added to the regs to enable us to accept that way in times of major disruption.”

Questions received in advance:

Two questions were received in advance.

The first questioned why certain documents which one would have expected to be scanned and sent by e-mail from the ET were being sent by post.

Shona Ferguson, Acting Senior Operations Manager explained that there had been a National scanning issue affecting all offices over a sustained period of time but that had now been resolved.

The second question related to whether CVP would allow an audio recording, introduced as evidence, to be played during the course of a hearing. It was explained that audio evidence could be relayed through Microsoft Teams (which can be used in conjunction with CVP) and that Teams could also be used to show video evidence.

System users were given the opportunity to ask any questions they wished by no further matters were raised.

Judge Simon closed the meeting by thanking all system users for attending and being willing to participate using the CVP.

Next meeting: date to be confirmed in due course.

Useful Contact details

Jenny Demir - President's Private Office:
Glasgow.President@justice.gov.uk

Sandra Muir - Vice President's Private Office:
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