



**MINUTES OF THE EMPLOYMENT TRIBUNALS (SCOTLAND)
NATIONAL USER GROUP
DATE OF MEETING: Tuesday 23 February 2021**

| <u>ATTENDEES</u> | |
|---------------------------|---|
| <u>Name</u> | <u>Organisation</u> |
| Katie Buchanan | Thomson Reuters |
| Brian Campbell | Brodies |
| Caroline Cockbain | Just Employment Law |
| Serena Crawshay- Williams | Old Square |
| Rhidian Davies | NHS Central Legal Office |
| Dawn Dickson | Eversheds Sutherland |
| Kevin Duffy | Scottish Engineering |
| Catherine Greig | Greig Employment Law |
| Margaret Gribbon | Bridge Litigation UK |
| Fiona Herrell | Brodies LLP |
| David Hutchison | Dallas McMillan Solicitors |
| Aileen Irvine | CMS Cameron McKenna Nabarro Olswang |
| Emma Johnston | Pinsent Masons |
| Laura Lilburn | Renfrewshire Council |
| Laura MacDonald | Jackson Boyd |
| Ian MacLean | Ellis Whittam Limited |
| Carlyn McCallum | Harper McLeod |
| Anne McFarlane | Glasgow City Council |
| Laura McKenna | Morton Fraser |
| Steve McLaren | Kippen Campbell |
| Charlotte McLeod | Equality and Human Rights Commission |
| Sylvia Matheson | Miller Samuel Hill Brown |
| Lindsey Miller | Scottish Engineering |
| Stephen Miller | Clyde & Co |
| Haley Newton | |
| Sahira Rafiq | TLT Solicitors |
| Gillian Riddell | Glasgow City Council |
| Becky Robertson | Glasgow City Council |
| Sonia Sandhu | DLA Piper Scotland LLP |
| Paman Singh | Law at Work |
| Jennifer Skeoch | Burness Paull LLP |
| Katy Wedderburn | MacRoberts |
| Lauren Wilson | Just Employment Law |
| Eilidh Wood | Burges Salmon |

Also in Attendance

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

Judge Barry Clarke, President of Employment Tribunals (E & W)

Will Breame, Deputy Director of Tribunals

Stephen Toal, Head of Operations (Scotland)

Sandra Martin, Senior Operations Manager ET (Glasgow)

Shona Ferguson, Delivery Manager, ET (Glasgow)

Martin McCann, Delivery Manager (East Coast)

Bob Booth, Team Leader, ET (Dundee)

Suzanne Johnson, Team Leader ET (Edinburgh)

Tricia Ritchie, Team Leader ET (Aberdeen)

Richard Boyd, Senior Policy Advisor BEIS

Alan Hope, ACAS

Helen Nolan, Jurisdictional Office Support Team (JOST)

Agenda item 1 – President’s update

The President (Judge Simon (SS)) introduced the above-named individuals, thanked all for attending and welcomed all users to the meeting.

Recruitment

SS confirmed the appointment of Judge Mel Sangster as a salaried Employment Judge. Judge Sangster has been an employment lawyer since she qualified as a solicitor in 1998 and has been a fee paid Employment Judge since 2018. Judge Sangster will be based at the Edinburgh ET office and will start her salaried appointment on 1 June 2021.

Legal Officers

Judge Simon also confirmed the appointment of 4 legal officers in Scotland. The successful applicants are among 16 GB wide, selected from more than 1600 applicants. They are Jenny Demir, Christine Whelehan, David Ellison and Daniel Doherty. All four are highly competent and experienced existing members of ET staff. They are expected to start their new roles in mid to late April.

Judge Simon reminded users that regulation 10 A of the ET Regs 2013 (as amended towards the end of last year) gives the Lord Chancellor the power to appoint legal officers who can carry out such of the functions listed in regulation 10B as the Senior President of Tribunals authorises in a Practice Direction. Before making such a Practice Direction the Senior President of Tribunals has to consult both ET Presidents and he has done

that. The Presidents were of the view that the Practice Direction should authorise the legal officers to carry out all of the functions listed in regulation 10B. That is not the same as saying that immediately after their appointment all legal officers will be exercising all the listed functions. The Presidents will decide which functions they will in fact exercise and under what conditions. The legal officers will be trained in a way which builds up the range of judicially delegated powers they are exercising over time. The judiciary are currently working on devising their training programme and preparing supporting guidance documents.

Regulation 10 A also says that:

Within 14 days after the date on which a Tribunal sends notice of a decision made by a legal officer to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by an Employment Judge.

That is an absolute right to have the decision considered afresh. It is not like a reconsideration application where you have to show that it would be in the interests of justice for the decision to be reconsidered.

The delegated powers that can be exercised by legal officers are quite limited. In some instances they depend on both parties agreeing to the application being granted. The legal officers will be very well trained in the exercise of their powers before they are allowed to use them. In addition, they will all have judicial mentors to support them.

The Presidents also see the legal officers having an important role to play in assisting with case progression – for example, it is anticipated that they may do a file check a set number of days before a final hearing, certainly in multi day cases, to make sure that everything that should have been done has been done, by way of compliance with orders, and that all parties have been sent everything they need to minimise the risk of the hearing having to go off at the last minute.

Judge Simon believes that legal officers can make a very positive and significant contribution to the quality of the service provided to service users. She will keep system users up to date with the progress of this initiative.

Judicial delivery of Service

Most users will be aware that since January ETs(S) have been trying to do every hearing that they possibly can remotely using the Cloud Video Platform (CVP). SS is aware that it is not ideal for every case but hopes that users appreciate why we are trying to keep in person and hybrid hearings to a minimum at the moment. SS said that she has been

impressed by the efforts which the Employment Judges, non-legal ET members and system users have made to ensure that employment justice has continued to be delivered in Scotland. SS expresses her thanks to all system users for cooperating with the judges and members to ensure that many cases have been able to go ahead. There are many multi day hearings now being conducted on an entirely remote basis.

SS explained that ETs had been building up the number of in person hearings it had been holding in the latter part of 2020 but in January 2021 there was a reduction in the number of in person hearings and a rise in the number of CVP hearings for Covid related reasons.

In November there were just under 300 ET hearings in Scotland, and over 300 in both December 2020 and January 2021 [internal unaudited statistics so exact figures not yet publishable]. These were conducted using BT Meet Me telephone conferencing, CVP and in person/hybrid. SS suggested that this was a very commendable showing given the challenges the system faces at the moment.

When it comes to the level of claim receipts, SS is aware of various media reports suggesting the ETs are struggling to cope with their rising workload. The truth is that the position varies markedly across Great Britain. In Scotland the caseload has not risen as fast as in many other parts of Britain and we have the advantage of having all judicial posts available filled. Overall, comparing January 2020 with January 2021 claims outstanding (singles and multiple lead case combined) – that is claims waiting to be determined at a final hearing- have increased by around one fifth in Scotland. The vetting team in Glasgow has noticed a rise in single claims which include complaints of disability discrimination; the disability element in a noticeable number of these cases relates to mental health issues, such as anxiety and depression, with mention made in some cases of the impact of the pandemic. On the multiple claim front, there has been a rise in the number of Protective Award and redundancy claims. The construction and hospitality sectors seem to be particularly badly affected. This is not really a surprise, given what we know about the impact of the pandemic on economic sectors. Obviously one of the factors the ET judiciary are very conscious of is what might happen when the Coronavirus Job Protection Scheme (Furlough) comes to an end. That could lead to a further increase in workload and that is being factored into resource planning.

Witness Statements

SS referred to the recent communication sent to the members of the user group asking for comments regarding the use of witness statements in Scottish ET proceedings. Judge Simon asked users to let her have their

feedback which she would take into account when deciding whether it was appropriate to issue Presidential Guidance and/or a Practice Direction regarding the use of witness statements. Users should send any information to Glasgow.President@justice.gov.uk by 19th March 2021.

Agenda Item 2 – HMCTS update

SS introduced Sandra Martin (SM) who took up post as Senior Operations Manager on 15 February 2021. Sandra acknowledged that the pandemic has resulted in significant changes to administrative processes and a move towards a more digital way of working, particularly in relation to hearings.

This has brought with it significant challenges for the administrative teams, resulting in backlogs within some of the teams. SM acknowledged that, recently, users may not have experienced the same level of administrative service that they have been used to. Correspondence, in particular, has not been actioned as quickly as we would like and there have been occasions where we have not met the 10-day target for response. SM thanked users for their patience during this time, and confirmed that we continue to review admin processes and workflow processes between the teams to maximise efficiency. We are also looking at whether we have the correct staffing levels.

SM gave an assurance that all correspondence is prioritised depending on the urgency of the correspondence and date of hearing. She also asked that where possible users should only contact the office to check receipt of correspondence or send chaser e mails if absolutely necessary. Follow up e mails can result in the file being moved further back. You will get an automated response to e mails sent which gives targets. The Vice-President, Judge Susan Walker, is currently working with the admin staff to review the auto response. SM said we would welcome any comments from users as to how that can be improved and made more user friendly.

Performance update

Live load - slight decrease in January 2021 from previous month; that is predominantly as the result of the clearance of some large multiples. The single live load has increased by approximately 18% since January 2020. Trend from November is that multiple and single claims have been increasing since November. Currently local statistics (not yet validated by MOJ performance team) show 62% of single cases have been completed within 26 weeks which is against a GB wide average of 46%. The average weeks from receipt to disposal of claim is 38.5 against GB wide position of 58.8 weeks.

Judicial Mediations

In terms of Judicial Mediations, 6 successful mediations took place during January 2021 with a further 1 being unsuccessful. The successful mediations saved an estimated 25 hearing days.

ET Fee refunds and reinstatements –

Refunds – to date 4,000 refund applications have been received in Scotland with none currently outstanding.

Reinstatements – 65 requests have been received YTD.

On-line Judgments

Financial year to date 7,680 judgments have been sent to Leicester for publishing on the on-line judgment register

Looking Forward

Focus to remain on hearings proceeding by CVP where possible.

ETHOS case management system replacement. The rollout of the new Employment Case Management System (ECM) has been delayed until at least mid-March. [Update post meeting – ECM successfully rolled out in Scotland over the weekend of 13/14 March.]

Staffing – Start dates are awaited to backfill those team members who have recently left the organisation. (We have lost a number of experienced staff predominantly on promotion – new staff being recruited but substantial training will be required)

Tribunal rooms - GTC. Work is underway to ensure that 2 further rooms within the 2nd floor are able to safely accommodate full tribunal hearings.

Endeavour House, Dundee. Discussions are ongoing to agree the floor plans/design of the Tribunals facility. We plan to hold in person hearings in Dundee in the Apex Hotel while waiting for the refurbishment of the new premises.

Video Hardware Project. New VC kit is in the process of being installed across all of our sites in Scotland (except Dundee, due to building work). This will increase flexibility in terms of hybrid hearings and will also give greater scope should any party not have access to suitable kit to allow them to participate in a CVP hearing; subject to management of demand levels, access to a remote hearing can be provided to anyone in this position in an ET office using this or other equipment.

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

Richard Boyd confirmed that the Employment Tribunals Rules of Procedure were updated in October 2020. The consolidated version is now available and incorporates changes re postponement in 2015 and the changes made in October 2020.

<https://www.gov.uk/government/publications/employment-tribunal-procedure-rules>

BEIS continues to work with ACAS, MOJ, HMCTS and the judiciary to monitor the impact of Covid and the challenges facing the system, to try to identify ways to alleviate some of those pressures and maximise the efficiency of the system going forward, to help people resolve their disputes as quickly as possible.

Other Areas

Topical issue: “Jab or no Jab”

At present there are no specific statutory provisions which employers can rely on to require that their staff be vaccinated. As part of the roadmap out of lockdown the Government has committed to review whether Covid status certification could play a role in reopening of the economy, reducing restrictions on social contact and improving safety. The Government will set out its conclusions in advance of step 4 of the roadmap.

RB said Michael Gove will be responsible for leading the review into vaccine passports/certification; which will look at the extent to which certification could be effective in reducing risk and enable access to settings or relaxation of Covid secure mitigations.

Fire and rehire

There has been a lot of interest in some employers’ use of “fire and rehire” tactics. To better understand the issues in relation to “fire and rehire” further investigation is being undertaken including talking to business and employee representatives to gather evidence into how “fire and rehire” is being used. We want to consider that evidence before considering any additional action.

Richard Boyd can be contacted at: richard.boyd@beis.gov.uk

Agenda Item 4 – Acas,

Alan Hope (AH), Acas, provided users with a conciliation update which covered changes and case receipts:

Changes

Case Management system

AH explained that the Acas case management system was now approaching two years old. He explained that it was now a much more comprehensive system than when introduced in 2019. Although development is ongoing it has proved stable, generally reliable, as compatible with client systems as we had hoped and is doing most of what we require of it. Current project focus on document management and system speed enhancements.

Standard six-week EC Period

Notifications received after 1 December 2020 automatically have a six-week Early Conciliation period. This avoids the need for conciliators to get consent to extend by two weeks. Removal of this requirement allows conciliators, and the parties, to focus time on discussing settlement.

Ability to make corrections to prescribed information

Conciliators previously spent a great deal of time resolving respondent's name, and other prescribed information, issues. Again, from 1 December conciliators can make corrections quickly where a claimant has made an error on their notification form. This reduces the need for prospective claimants to complete corrective notifications and the subsequent added administrative load. Approx. 100 fewer notifications per week as a result of this.

Similar EC related rule changes in the ET Rules of Procedure came into effect in October; in combination, the changes will hopefully mean less time spent on technical arguments.

Re-prescription of the notification form (coming soon)

Acas are hoping to do some further work with BEIS soon. They want to try and get to a position where we can improve the ability to present large group of EC notifications (multiple claimants) online. At present, the online facility allows up to 50 claimants to be entered in one batch which is time consuming and impractical for very large groups. Most large groups therefore avoid the current online option and send in by hard copy through the post. The ability to upload a large group of claimants is our main ambition.

Acas have already made changes to allow claimants or representatives to request a certificate at the point of submission, where there's no desire to attempt conciliation, and claimants or their representatives want to take the certificate in order to progress the matter to tribunal.

Recruitment

Acas have been able to recruit and train an additional 80 conciliators in the last 12 months. Impact of form changes and the ability to amend errors should enable us to move further Early Conciliation Support Officers across to conciliation roles.

Acas Case receipts. Apr-Dec 2020:

There has been a lull in the level of notifications during the first quarter of this year between (Apr-Jun 2020) which coincided with the rising numbers of coronavirus cases and the 1st lockdown period.

However, receipts have been climbing steadily back. End of employment type cases such as Unfair Dismissal, Redundancy Payment and Breach of Contract predominate.

An interesting development has been a 43% increase in employer led requests for Early Conciliation. Of these 72% relate to Standard track disputes e.g. UDL (w/o discrimination) or Redundancy Payments.

Overall the Track split Year To Date for EC cases is 32% Fast / 26% Standard / 28% Open – the remaining 14% are No Track (mostly where certificates have been requested immediately following submission without disclosure of the type of claim).

Conciliation hasn't been easy. Levels of anxiety have been heightened amongst both claimants and respondents with a higher than normal degree of concern about whether money would be available to fund settlements.

The impact of the furlough scheme must be significant but the impact of its ending won't be felt during the current operational year.

National statistics on case settlements will be available to share soon.

Questions/other issues

Multiple claims – SS urged ET system users to use the multiple online submission process where possible and said that if users are not sure how to do that they should contact the Employment Tribunal office in

Glasgow, where there are a number of members of staff who would be able to provide assistance.

In response to a question SS confirmed that parties can notify the tribunal, if they think witness statements might be useful in a case, even if there has not been a case management hearing at which the matter has been discussed. Ideally if a party think they may be useful they should discuss that first with the other side in the hope that a joint application can be made to the tribunal.

Online judgment Register - Standard Banner for Judgments

It has been agreed that north and south of the border there will be a standard format for showing the name of a case in the judgment register. The new format will be set out as the claimant's initial followed by their surname v Respondent's name e.g. J Brown v XXX.

It is hoped this will make it less likely that tribunal judgments will come up near the top of returns if a google search is done using fuller details of the claimant's name; that is a matter which has been raised by a number of claimants who are concerned about the ease with which potential new employers and others can see that they have made an ET claim in the past.

ECM System – once live it will mean that ET staff will be able to work remotely on case management. SS expressed the hope that this would significantly improve the ability of the administration to deal with case management applications.

Questions for Sandra Martin

Q - Jennifer Skeoch - There have been a few occasions when we have received e mails about CVP tests but we have not yet received notice of the hearing. Is that because there are different teams dealing with listing and the CVP tests.

A – (SM) advised the meeting that she would follow this up and has now provided the following response: *Both the listing and the CVP teams have confirmed in the majority of cases the hearing notice should be issued in advance of the CVP test call being arranged. There were some exceptions to this when the CVP team were in the process of being set up. On occasions when a case has been listed at short notice e.g. a hearing*

date within 14 days has been agreed at a PH, the CVP test call can be arranged prior to the hearing notice being issued.

Q - If listing period passes and we haven't had a Notice of hearing yet should we provide alternative dates for the next quarter?

A – It would be useful if parties did that. SM explained that there was planned overtime to tackle listing backlogs so hopefully there would be fewer occasions when this is an issue.

Useful Contact details

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