



**MINUTES OF THE EMPLOYMENT TRIBUNALS (SCOTLAND)
NATIONAL USER GROUP**

DATE OF MEETING: Tuesday 3rd October 2023

<u>ATTENDEES</u>	
<u>Name</u>	<u>Organisation</u>
Nicola Bronsky	Brodies Solicitors
Katie Buchanan	Thomson Reuters
Rhidian Davies	NHS Scotland
Kevin Duffy	Scottish Engineering
Raymond Farrell	Glasgow City Council
Greg Fletcher	NHS Scotland
Ross Gale	Burness Paull, Solicitors
Lesley Grant	BTO, Solicitors
Tracy Gray	HMCTS, Jurisdictional support
Kirsty MacKay	DLA, Piper
Callum MacNeill KC	Westwater Advocates
Laura MacDonald	Jackson Boyd
Marie MacDonald	Miller Samuel, Solicitors
Anne McFarlane	Glasgow City Council
Laura McKenna	McKee Campbell Morrison
Simon Mayberry	Balfour Mansons
Lindsey Miller	Scottish Engineering
Stephen Miller	Clyde & Co, Solicitors
Ross Milvenan	Just Employment Law
Graham Mitchell	Clyde & Co
Laura Morrison	Denton's Solicitors
Alice Perry	Pinsent Masons
Alan Philp	NatWest Mentor
Becky Robertson	Glasgow City Council
Sarah Shiels	Balfour Mansons, Solicitors
Paman Singh	Weightmans, solicitors
Katie Sloan	Valla
Amie Trainor	Scottish Engineering
Mark Wallace	Glasgow City Council
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)
Mark Lewis,
Richard Boyd, Senior Policy Advisor, BEIS
Robin Rimmer, Employment Tribunal Policy lead for MOJ.
Helen Nolan, HMCTS
Alan Hope, ACAS
Scott MacKell, ACAS

Welcome and Introductions

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

Judge Walker advised that, after seeking user group views on the format of future meetings, it has been decided that one meeting each year will be via Microsoft Teams and the other will be in person with an option to join on Teams.

Agenda Item 1 – President’s Update

Reform

The President reminded users that currently the Reformed case management system only affects discrimination claims brought by a litigant in person and where the respondent is represented.

Judge Walker said that she and the President of Employment Tribunals in England and Wales, Judge Clarke, have been working with the project team to encourage professional users to sign up to MyHMCTS but there has still not been enough activity going through the reformed system from the ET3 onwards to allow the functionality to be tested robustly.

Internally, ET Scotland has moved almost entirely to digital working over the last year. Nearly all our files are now digital with only a few “legacy files” remaining on paper. Judges and staff work digitally, whether that is by email or using the Reform system. There will be further internal changes which will change ways of working and will pose challenges for judges and staff but should not affect users.

Performance

The President thanked Sandra Martin, Senior Operations Manager, and her colleagues for the fantastic support they have been giving to the judges under difficult circumstances. The administration team has lost many experienced members of staff but continue to process work within reasonable time periods.

The President noted that much of the statistical data for employment tribunals is still not available due to migration to a new case management system and this makes it difficult to make meaningful comparisons between the old and new systems. However, official statistics indicate that across Great Britain case receipts have increased from last year and have returned to close to pre-pandemic levels. Despite that, disposals have increased at a higher rate than the rate of increase in receipts and so the outstanding caseload has reduced.

Official data about timeliness is still not available. However, as users were advised in April, there is no backlog in Scotland. Hearings that are listed automatically on receipt of a claim are being listed for around 9 weeks after receipt of the claim. Those are final hearings for simple money claims and the first case management hearing in a case involving discrimination or whistleblowing) This is comparable to or slightly better than pre-pandemic listing periods for such hearings in Scotland.

For other hearings, we continue to offer a listing period for about 2-3 months ahead although there is space in the lists if a hearing is required earlier. This is comparable to the position pre-pandemic.

Users are aware that, we significantly over list the number of cases we could hear. We increased that over listing level back to pre-pandemic level, at the start of the year. We also have video hearings, so listing capacity is greater than pre-pandemic. The President said that although busy it is very rare a hearing has to be put off.

The President noted that judgments are generally being issued promptly.

Case management

The President confirmed that, in the last year, a significant focus for employment judges in ET(Scotland) has been on ensuring that cases are

dealt with in a way that is proportionate. Judges are encouraged to have careful regard for the individual factors when managing any case and to consider carefully whether any intervention is going to be effective to an extent that outweighs the delay that may be caused and to list additional case management hearings only where it is considered they will add real value. The emphasis is on achieving real progress while the parties are present rather than issuing directions to be complied with in writing. It is recognised that complying with such directions may be challenging for many litigants in person.

Use of video.

In Scotland, the majority of substantive hearings have returned to being held in person. However, video is still utilised where appropriate. At the last user group meeting the President indicated we planned to introduce an informal default of video where a hearing is listed for a day or less. Otherwise, a hearing would be listed in person. This is ultimately a judicial decision, though taking account of any relevant factors and the views of the parties. We have been applying that default since then.

All Scottish ET offices have equipment which allow a witness to give evidence by video and so, many in person hearings are, in fact, “hybrid”, with one or more witnesses giving evidence remotely.

At the last user group meeting the President flagged the possibility of using video for case management hearings instead of telephone conference call. Users may recall that part of the reason was that most judges believed that a litigant in person would be able to participate more effectively in complex procedural hearings when they can be seen as well as heard. We hope this will reduce the need for further case management hearings in most cases. We thought it would also be a better platform if there were a number of people joining.

This has been successfully trialled in some cases and will now be rolled out to all case management hearings. It is not intended to run tests in advance of these hearings as we do for substantive video hearings. However, we have extended the length of the hearing to 2 hours to allow for some time spent connecting. There is also the option of joining CVP by telephone and this has worked satisfactorily on at least one occasion.

An additional practical benefit is that if a party drops out of a telephone conference call, they have to be dialled back in by the clerks and this can take bit of time as the judge has to contact the clerk and tell them someone has dropped out. On CVP, the participant can simply rejoin, and the judge can let them in.

The President would be interested to know if users have any comments or concerns about this.

Recording & transcription

The President confirmed that the joint Practice Direction on Recording and transcription and the accompanying Presidential guidance are expected to be issued very shortly. It is expected those will say that HMCTS will record hearings where that is practicable. (Post meeting note: the Practice Direction and Presidential Guidance were issued on 6th November and took effect from 20th November 2023)

In Scotland we are now quite used to this. Since the pandemic, all remote hearings have been recorded in ET (Scotland) and many in person hearings in Glasgow have also been recorded by utilising the video equipment that is installed in most hearing rooms. The Practice Direction and Presidential Guidance will put recording of hearings on a more formal footing and set out the mechanism by which parties (or non-parties) can obtain a transcript, usually at cost.

Recording of in person hearings will start in the other offices in the next month or so and there are TASCAM devices that can be used to record hearings where there is no CVP equipment, including where we use sheriff court rooms.

It is expected that by the end of the year all hearings, in Scotland, whether in person or on CVP, will be recorded. The President advised that recording is not a legal requirement so she would not expect a hearing to be stopped because there was a technical issue with the recording.

The President will review other existing Guidance and Practice directions on remote hearings to see if these need to be updated in light of these new documents and also the passage of time.

Witnesses from abroad

The Foreign and Commonwealth Development Office (FCDO) have now published the list of countries where permission has been granted to take evidence from a witness in that country. The President said there are some concerns about that list. It does not entirely correlate with some information we have been given and does not seem to include countries where consent has been given on a conditional basis. She confirmed that engagement continues with the FCDO about that.

While the list is helpful, the President urged users not just rely on that. She advised that users should continue to contact HMCTS as set out in the presidential guidance. The latest version can be found on the judiciary.uk website. Staff will make the necessary checks and confirm the position.

Employment Judge Recruitment

The President confirmed that recruitment is currently underway for a new salaried judge to be based in Glasgow and for a reserve list for any vacancies that arise in the next 18 months. There are no plans at present to recruit fee paid judges in the near future. However, if there was an influx of claims for any reason that would be reviewed.

Members – Panel Composition

Section 35 of the Judicial Review and Courts Act 2022 provides that powers over panel composition in the employment tribunal may be passed to the Senior President of Tribunals. The Senior President of Tribunals (SPT) carried out a consultation seeking views on how he should exercise these powers but he has decided to defer consideration of the responses until the powers have been delegated to him.

The statutory instrument that would achieve that delegation is expected to be laid before Parliament on 16 October 2023. It is an affirmative process expected to conclude mid-December and we expect that the SPT will publish his response shortly after that. So, we should know more about what is to happen with panel composition and specifically the role of non-legal members at the start of next year. Depending on what his decision is, further work may be required to produce guidance for judges.

Devolution of Functions

As mentioned at the last meeting, the Scottish government has indicated that it does not intend to take this matter forward in the current parliamentary

term. That means that we can assume that the devolution of functions of the employment tribunal will not take place before May 2026.

Legal officers

The President said that our legal officers continue to provide significant support to employment judges in Scotland and invited the Vice-President of Employment Tribunals (Scotland), Judge Eccles, to provide an update about some developments with their work.

Judge Eccles stated that the role of legal officer is now an integral part of the Employment Tribunal system in Scotland. Over the past six months the legal officers have continued to work closely with the judges, particularly on claims that require detailed case management. The Vice-President also confirmed that judges receive very few applications from users to consider afresh, decisions made by legal officers.

Judge Eccles confirmed that the legal officers now deal with over half the correspondence received from parties. They are also very involved in reform and, in particular, testing of reform products.

Legal officers are now responsible for dealing with agreed amendments and the dismissal of many of the claims that have been withdrawn. This is saving considerable judicial time.

The Vice-President expressed gratitude to tribunal users who have cooperated with the tribunals to involve the legal officers in this area of our work.

The most significant development over the past six months has been the start of a pilot, in August, involving defended money claims, for example, wages, holiday pay, notice pay, redundancy pay. Legal officers have already built up a great deal of experience in dealing with these types of claims through their work in drafting Rule 21 judgments, for undefended claims, to be approved and signed by the judges. The pilot involves intervention in defended money claims. Judge Eccles stressed that this does not involve any change in procedure for tribunal users in terms of lodging a claim or response and the final hearing will still be listed when the claim is accepted. Users involved in a defended money claim, which is considered suitable for the pilot, will be contacted by a legal officer to clarify areas of dispute in the hope that either the claim can resolve without a hearing or intervention will assist the

employment judge to determine the claim effectively. For example, this might involve parties agreeing rates of pay, or amounts claimed to be outstanding. The aim is that legal officer intervention will reduce the length of any hearing and the need for adjournments.

Participation in the pilot is voluntary, it is hoped that users will see the benefit of legal officer involvement, whether or not it brings about settlement of a claim.

In conclusion, the President said that despite many challenges, ET (Scotland) continues to deal with its caseload effectively. There are ongoing challenges, especially as the scope of HMCTS Reform expands. However, she has every confidence that the constructive working relationships that have been established with the project team will support the jurisdiction to continue to provide a good service to our users and we will continue to monitor the way that we manage cases to ensure that these are dealt with effectively and promptly. The President reminded users that they should not hesitate to contact the President's office if they have any concerns.

Agenda Item 2 – ET (Scotland) update

Sandra Martin, Senior Operations Manager

Performance

Sandra confirmed that:

There has been an increase in the volume of correspondence received across all Scottish offices. That then generates an increase in the number of referrals to judges and legal officers. This increase appears to be as a result of, predominantly unrepresented parties, sending several e mails about one case. Sandra requested that user group members making several requests should do so, where possible, in one piece of correspondence. This avoids the need for multiple referrals to a judge or legal officer and will speed up the response time.

There has been no significant change to the numbers of hearings taking place in person or via Cloud Video platform in the last 6 months.

There has been a significant decrease in the number of withdrawals and settlements being received each month.

Around 50% of postponement requests come in cases where hearings have been fixed without consulting parties. However, 50% continue to come in for final hearings in which parties have been asked to provide their availability.

There has been no significant change to the number of telephone calls received.

Successful judicial mediations continue to save time spent in hearings.

Administrative Update

Sandra advised that recruitment campaigns for team leaders and fixed term staff announced at the last meeting in April had been completed, and those staff are now in place. In addition, a number of agency administrative staff have joined. Sandra explained that over the last 12 months approximately 30% of experienced staff have left the department, which has presented significant challenge which will continue for a number of weeks. However, she confirmed that robust training plans are in place and the focus will remain on building experience and knowledge. In addition, staff have been becoming more familiar with the reform processes, are more comfortable using them and can see the benefit of working more digitally.

Sandra confirmed that workloads remain stable, administrative targets such as the 10 day correspondence target continue to be met in most cases.

To date, approximately 700 claims have been progressed via the reformed service.

Sandra confirmed that the Webchat facility went live in June 2023 but has had very little uptake.

Looking Forward

Plans are in place to prepare for the roll out of further reformed process and the additional training this will require.

Plans are also in place to deal with the impending receipt of settlement notifications for local authority Equal pay claims.

Agenda Item 4 – HMCTS Reform Update

Mark Lewis

Mark confirmed that legal professionals can now register on MyHMCTS which allows them to upload ET3 response forms, make digital applications and monitor the status of the case online. At present, this only applies to discrimination cases presented by litigant in person claimants and represented respondents. The next step is to expand the type of cases and roll out the reform process to other offices. However, further testing needs to take place before that can happen. Mark confirmed that his team had approached the Employment Lawyers Association to seek volunteers to assist with that. They have also created YouTube videos on how to register and use the service. Letters were also sent to users in the early adopter sites.

There have been a number of internal upgrades to improve the system for staff and judiciary. There is still work to be done on multiple claims and how they progress through the system, how to include represented claimants and litigant in person respondents, employer contract claims and work on common components.

In advance of the meeting a question was asked about whether non-legal representatives would be able to register to use MyHMCTS. Mark explained that his project team are not responsible for that. This is part of the common components so, the team dealing with the MyHMCTS product are responsible for that update and it is hoped that function will be added by early 2024.

Agenda item 5

Update from Department for Business and Trade

Richard Boyd, Senior Policy Advisor

Richard provided an update on the ongoing work on retained EU law. Richard reminded users that a consultation had been launched in May on areas the government believe could benefit from reform including record keeping, working time, simplifying annual leave and holiday pay calculations, and consultation requirement under the transfer of undertakings. The consultation also made clear that there are some areas where government are not intending to make changes. These include maternity, paternity and adoption leave.

The consultation closed in July and a government response will be published in due course.

Richard confirmed that The Workers (Predictable Terms and Conditions) Act received Royal Assent in September 2023

Agenda item 6

Ministry of Justice, Policy update

Robin Rimmer, *Policy Advisor*

Robin acknowledged that the Practice Direction on Recording and Transcriptions had taken some time to agree but anticipated that it would be issued within 2 weeks.

On Devolution, he confirmed that progress remains slow, but MOJ is committed to working with the Scottish Government to finalize the order in council that will give the Scottish Parliament the legislative competence to legislate for tribunal devolution. MOJ are currently working to respond to questions raised by the Scottish Judicial Working Group. However, whilst MOJ is coordinating this work they are dependent on other government departments to progress it. Robin agreed with the President's view that the devolution of functions of the employment tribunal will not take place before 2026.

Robin then talked about the Judicial Review and Courts Act, this act will create a new framework for determining Employment Tribunal panel composition and will delegate power to determine that to the Senior President of Tribunals (SPT). Robin anticipated that a statutory instrument would be laid in the next few weeks and would come into force by December. He anticipated that SPT's proposals would be announced shortly after that.

Robin said that the other main aspect of the act is the transfer of Employment Tribunal and Employment Appeal Tribunal rule making powers from the Department of Business and Trade to the TPC (Tribunal Procedure Committee). He confirmed that announcements on the exact date of the transfer and confirmation of two new appointments to the TPC would be made in due course.

Finally, Robin thanked user group members who had contributed to the call for evidence looking at themes of open justice, access to information and transparency across courts and tribunals. He confirmed that the MOJ open justice team anticipated publishing a report in Spring 2024.

Agenda item 7

ACAS update – Alan Hope, Conciliation Manager.

Case receipts

Alan noted reduced numbers of early conciliation cases in the first 6 months of the operational year. In the same period there has been a small increase in the number of ET1 cases. Alan observed that overall, numbers are fairly stable.

Case outcomes

The early conciliation resolution rate was 36% in 2122 and 37% in 2023. This has been surpassed in first 6 months of the operational year 2024 and currently stands at 39%. At 77%, the Employment Tribunal claims resolution rate remains the same.

In summary, of cases dealt with by conciliators in the operational year to date, 39% are known to be resolved, 77% of ET1 cases were positively resolved and 23% proceeded to a full hearing.

Other Developments

Alan confirmed that work is underway to provide users with “track your case information” which will enable people to check the progress of their conciliated case online. Work is also underway on an interface with Employment Tribunals, looking at the automatic processing of ET1s, ET3s and case correspondence. Alan stated the importance of fast receipt of ET correspondence as this acts as prompt for conciliators to take certain actions.

Alan confirmed that electronic case allocation is increasingly automated. Approximately half of all cases are allocated upon receipt and the aim is to increase this to 70%. Alan did acknowledge that there had been some delays because, where cases are not being automatically allocated on receipt, manual allocation can take up to two weeks. Alan apologised to users who had experienced this type of delay, and hopes that, within a short period of time, any such delay will be no more than one week.

Alan confirmed that ACAS have recruited 60 new members of staff who will soon be fully deployed and will bring to full complement the number of staff required to operate early conciliation and ET1 conciliation. Alan also

confirmed that Scott MacKell had been appointed as a new conciliation manager in Scotland.

The next meeting of the Scottish National User Group will be at 11am on 26th March 2024 at the Glasgow Tribunal Centre