Courts and Tribunals Judiciary

EMPLOYMENT TRIBUNALS
England & Wales

50th MEETING OF NATIONAL USER GROUP

Minutes of the National User Group meeting held via Microsoft Teams on 6 November 2023

Attendance:

Judge Barry Clarke	President, Employment Tribunals (England & Wales)
Judge Susan Walker	President, Employment Tribunals (Scotland)
Judge Sian Davies	Regional Employment Judge, Wales
Judge George Foxwell	Regional Employment Judge, South East
Judge Benjimin Burgher	Regional Employment Judge, London East
Judge Jenny Jones	Acting Regional Employment Judge, Midlands West
Mark Lewis	HMCTS
Helen Nolan	HMCTS
Robin Rimmer	MoJ
Stewart Gee	Acas
Caspar Glyn KC	Employment Lawyers Association
Catrina Smith	Employment Lawyers Association
Nick Denys	Law Society's Employment Law Committee
Clare Cruise	Law Centres Network
Steve Hall	Disability Law Service
Sarah Watson	Lexis Nexis
Matthew Creagh	TUC
Tracey Moss	Citizens Advice
Molly Charles	Make UK
Richard Boyd	Department for Business and Trade
Shantha David	Head of Legal Services, UNISON
Kiyara Sen	Government Legal Department
Sophie McGuinness	Thomson Reuters
Andrew Willis	Croner Group Limited

Apologies

Simon Pender	Make UK
Tony Lowe	Acas
Mike Smith	Disability Law Service
John Sprack	LawWorks
Paman Singh	Law Society of Scotland's Employment Law Committee
Tracy Parker-Priest	HMCTS

1. Welcome & Introductions

The President welcomed members to the 50th meeting of the Employment Tribunals (England & Wales) National User Group, via Teams.

The President began by paying tribute to Philip Thornton, who had passed away the previous week at the age of 58. Philip had originally qualified as a barrister. He had been head of the Employment, Pensions and Immigration Group at Lexis Nexis, having worked for them for over 17 years. He had recently joined a new organisation called "FromCounsel". He had been an active member of the user group for many years and was a greatly admired figure within the employment law community. He would be much missed. The President expressed condolences to his family, friends and colleagues.

2. Employment Tribunals system update – President

2.1 People and Places

The President announced that Benjimin Burgher had been appointed as the new Regional Employment Judge for the London East region. Judge Burgher had been a barrister at Outer Temple Chambers, becoming a fee-paid Employment Judge in 2005 and a salaried Employment Judge in 2019.

Unfortunately, it had not proved possible to fill the Regional Employment Judge vacancy in London South. This meant that the JAC exercise would need be rerun in December 2023. The President expressed his gratitude to Employment Judges Omar Khalil and Kate Andrews who were filling the vacancy on an acting (and job share) basis.

Judge Lorna Findlay retired as a Regional Employment Judge on 1 November 2023. Judge Findlay had been the leadership judge for the Midlands West region and was an active member of the national training committee. As Regional Employment Judge, she had led for the Employment Tribunals in England & Wales on alternative dispute resolution, and her innovative approaches had attracted interest from the senior judiciary in other jurisdictions. On behalf of the user group, the President wished her a happy and healthy retirement. Permission had been secured for Judge Findlay to sit in retirement on a fee paid basis for a period of two years. Judge Burgher would be taking over from her as lead ADR judge.

2.2 Resources

The President confirmed that several salaried Employment Judges had recently left on promotion. Alison Russell and Nike Balogun had joined the Circuit Bench. He thanked them both for their service and, in particular, for the time that they had spent as Acting REJs in London East and London South respectively. In addition, Holly Stout had now joined the Upper Tribunal (Administrative Appeals Chamber); she had been heavily involved in policy and procedure work for the ET and was the first sitting Employment Judge to be assigned to the EAT. Judge Stout would continue to sit in the EAT as a judge of the Upper Tribunal.

29 new salaried Employment Judges (25.1 full time equivalent) and 40 fee-paid Employment Judges had joined the Employment Tribunals (England and Wales) in 2023. As of November 2023, this jurisdiction now comprised one President; 8 Regional Employment Judges; about 150 salaried Employment Judges (equating to approximately 130 FTE); 365 fee-paid Employment Judges (which now included 30 judges cross-assigned from other tiers of the First-tier Tribunal); and 823 non-legal members.

The President confirmed that a competition was underway to recruit 50 full-time equivalent salaried Employment Judges for London and the South East. It remained the case that all vacancies were in that part of the country.

HMCTS had confirmed that the Employment Tribunals north and south of the border had been allocated 34,000 sitting days for this financial year. This was an increase on the previous year.

2.3 Recording and Transcription

The President confirmed that the Practice Direction on Recording and Transcription had now been sent to the Lord Chancellor for approval. The members were thanked for their feedback on an earlier draft that had been circulated.

Both the Practice Direction and the accompanying Presidential Guidance would take effect from 20 November 2023. The short gap was to allow time for staff and judicial training.

2.4 Alternative Dispute Resolution

New Presidential Guidance on ADR had been published in July 2023. As well as restating the ADR offering in respect of judicial mediation, it described a new form of hearing known as a Dispute Resolution Appointment (DRA). This was being rolled out nationally following a successful pilot in Birmingham under the supervision of Judge Findlay.

A DRA was a confidential process. At this hearing, an Employment Judge would provide the parties with a view on the merits of their case and possible outcomes. To ensure the evaluation was as well informed as possible, the appointment would be held after witness statements had been exchanged.

The President explained that DRAs are mandatory, in that parties are required to attend. There is, however, no mandatory outcome. Evidence suggests that the appointments focus minds at an earlier stage, increasing the number of the cases in which the parties can reach agreement.

2.5 EAT Case: *Phipps v Priory Education Services Ltd* [2023] EWCA Civ 652

The President drew members' attention to the above judgment and Bean LJ's comments at paragraph 43:

> ***I would invite the President of Employment Tribunals for England and Wales to consider a modest change in practice (I do not think it requires a rule change) relating to strike-out applications. Rule 37(2) requires that a claim or response may not be struck out "unless the party in question has been given a reasonable opportunity to make representations either in writing, or, if requested by the party, at a hearing". Where a party is represented, any warning letter under Rule 37(2) should surely be sent to the party personally, at whatever e-mail or postal address has been provided, as well as to the representative. Had that been done when any of the three warning letters were sent to Mr Johnstone but not to the Claimant in 2018, this case would almost certainly have taken a very different course.***

The President said that he had discussed the matter with Judge Walker. They had agreed the following approach and recommended it to judges:

1) Where a judge has concerns about representative inactivity, such as a failure to respond to correspondence, they should consider copying the party personally into a final warning letter. This will require a notification outside of the digital case management system introduced by HMCTS reform.

2) This can be done on a case-by-case basis and is a matter that can properly be left to judicial discretion.

3) If an injustice follows, reconsideration is likely to be the appropriate response – but, again, it would be for the judge to decide.

2.6 Performance

The President reminded members of the national user group that HMCTS published quarterly statistics for the Employment Tribunals. He went through recent reports since the start of the pandemic:

- The quarterly report published on 11 June 2020 covered the January-March 2020 quarter, the last one before the pandemic. It identified **32,000** single claims awaiting determination.
- The quarterly report published on 28 September 2020 covered the April-June 2020 quarter. It identified **37,000** single claims awaiting determination.
- The quarterly report published on 10 December 2020 covered the July-September 2020 quarter. It identified **40,000** single claims awaiting determination.
- The quarterly report published on 11 March 2021 covered the October-December 2020 quarter. This quarter saw the peak of pandemic-related receipts. The report identified **44,000** single claims awaiting determination.
- The quarterly report published on 10 June 2021 covered the January-March 2021 quarter. It identified **44,000** single claims awaiting determination.
- The quarterly report published on 9 September 2021 covered the April-June 2021 period and did not mention Employment Tribunals. The Employment Tribunals had moved from one case management system (Ethos) to another (ECM) between March and May 2021 and this impaired the ability of HMCTS to capture accurate data.
- The quarterly report published on 9 December 2021 covered the July-September 2021 quarter. It did not mention the Employment Tribunals.
- The quarterly report published on 10 March 2022 covered the October-December 2021 quarter. It did not mention the Employment Tribunals.
- The quarterly report published on 9 June 2022 covered the January-March 2022 quarter. For the first time in a year, it mentioned the Employment Tribunals. It identified **42,000** single claims awaiting determination.
- The quarterly report published on 8 September 2022 covered the April-June 2022 quarter. It identified **43,000** single claims awaiting determination.
- The quarterly report published on 8 December 2022 covered the July-September 2022 quarter. It identified **45,000** single claims awaiting determination.
- The quarterly report published on 9 March 2023 covered the October-December 2022 quarter. It identified **45,000** single claims awaiting determination.
- The quarterly report published on 8 June 2023 covered the January-March 2023 quarter. It identified **37,000** single claims awaiting determination.
- Finally, the quarterly report published on 14 September 2023 covered the April-June 2023 quarter. It identified **35,000** single claims awaiting determination.

Thus it could be seen that, according to these reports, the so-called “ET backlog” had shrunk from 45,000 single claims to 35,000 single claims in about six months. On the face of it, this seemed a relative success, even if the singles caseload had not quite returned to pre-pandemic levels.

The President then pointed out that HMCTS also published monthly management information for the Employment Tribunals. This information was set out in a form that allowed users to download a spreadsheet that tracked progress over time. The most recent spreadsheet had been published on 12 October 2023 and covered the period from August 2022 to August 2023. Column V of the spreadsheet was described as "Employment Tribunal Open Caseload". This contained the following figures:

- August 2022: 38,980
- September 2022: 39,120
- October 2022: 38,898
- November 2022: 38,613
- December 2022: 38,664
- January 2023: 39,033
- February 2023: 38,611
- March 2023: 38,168
- April 2023: 38,457
- May 2023: 39,305
- June 2023: 39,201
- July 2023: 39,034
- August 2023: 39,024

Why were these figures different? The President explained that there were two reasons.

The first reason was straightforward. The monthly figures were the entire open caseload, They aggregated (a) all outstanding single claims with (b) all outstanding multiple cases. If the tribunal was dealing with a multiple case involving 100 claimants, this would be one multiple case. If it was dealing with a multiple case involving 10,000 claimants, this would also be one multiple case. In recent years, the Employment Tribunals had been dealing with somewhere between 5,000 and 6,000 multiple cases. These were included in the above monthly figures.

But, if that were so, single claims throughout this period would have consistently been between 32,000 and 35,000. These were very different to the figures appearing in the quarterly published reports. What was going on? This was the second, and less straightforward, reason. The President explained that he had long felt that the so-called "backlog" was overstated. It transpired that, arising from the twin pressures of a new case management system and the pandemic, staff in some locations had not been properly "closing down" cases on the system and marking them as "disposals". This had the effect of artificially inflating the outstanding stock of single claims and making the so-called "backlog" seem greater than it was. He said that he had encouraged HMCTS to engage in a data cleanse. The effects of this cleanse were apparent in the monthly published figures, which had been, in effect, retrospectively amended and now differed from the quarterly figures.

The President said that this was not the whole story: during this time significant numbers of judges had been recruited, inducted and trained. Judges were sitting more days in the Employment Tribunals than ever before. This too had brought down the backlog, and increased the number of cases that could properly be recorded as disposals.

The President said that the true picture may forever be obscured, but the most accurate statement that could probably be made was that the reduction in the so-called ET "backlog" resulted both from increased judicial activity and from the HMCTS data cleanse over recent months. We may never know which was the most impactful, but the important thing was that the figures were better overall.

The President pointed out that, sometimes, reference is made publicly to close to half a million claimants awaiting a hearing in the Employment Tribunals. Where does that figure come from? That figure aggregates the number of claimants in single claims with the number of individual claimants in all multiple cases (some of which, such as the retail supermarket equal pay litigation, number many tens of thousands). Multiples are never an accurate barometer of pressure on the ET system and so such figures should be treated with caution.

The President observed that the statistics published by HMCTS do not presently include the cases now progressing on the reform platform in Glasgow, Leeds, Nottingham and Bristol. There were presently about 1,500 of those. At some point, there may be a data spike as reform cases are reintegrated with legacy cases for statistical purposes.

The President encouraged users and those interested in ET system performance to study the published statistics and the accompanying tables. By way of illustration, he referred to a suggestion sometimes made by campaigners and/or observers that "only 3% of whistleblowing claims succeed", the clear inference being that 97% of whistleblowing claims are successfully resisted by respondents. These figures are drawn from the accompanying tables. That statistic, out of context, is damaging because it gives a false impression of ET justice and could discourage those with meritorious claims from bringing proceedings.

The table accompanying the quarterly report for January-March 2023 confirms that 655 whistleblowing claims were received across Great Britain during this period. That number is in line with historic averages. 2,801 whistleblowing claims were received in the 2020/21 financial year, and 1,961 such claims were disposed of. "Disposal" in this context means brought to an end in some shape or form. The President explained that Main Table ET_3 breaks down the percentage split of disposals by reference to each type of claim. In respect of those 1,961 cases, the statistics do indeed show that only 3% of whistleblowing claims were categorised as being "successful at hearing". But that does not mean that 97% were categorised as being "unsuccessful at hearing". The full figures are:

- Percentage of claims conciliated by ACAS: 33%
- Percentage of claims withdrawn (usually settlement by other means): 28%
- Percentage of claims successful at hearing: 3%
- Percentage of claims unsuccessful at hearing: 10%
- Percentage of claims dismissed at a preliminary hearing: 2%
- Percentage of claims struck out: 10%
- Percentage of claims where default judgment issued in claimant's favour: 1%
- Percentage of claims dismissed under rule 27: 1%
- Percentage of claims dismissed following withdrawal: 11%
- Percentage of claims discontinued in some other way: 1%

Accordingly, it is more accurate to say that nearly three quarters of all whistleblowing claims are conciliated or settled in some way and that, of the small number of whistleblowing claims that reach a final hearing, about one quarter succeed. This approach can be replicated with all other causes of action.

Finally, the President observed that the data published by HMCTS is less rich than it used to be, because it no longer covers a concept known as "timeliness". This concept concerns waiting times. Before the move from Ethos to ECM, the quarterly reports mentioned how long it was taking on average for a case to come to a hearing. For example, the report published on 10 June 2021 (for the January-March 2021 quarter) referred to a "mean age at disposal" of 43 weeks. This meant that it was taking an average of 43 weeks, across all claim types, to "dispose" of claims. A year earlier, in the last quarterly report before the pandemic, the mean age at disposal had been 38 weeks.

The January-March 2021 quarter – nearly three years ago – was the last time there had been any published data on timeliness in the Employment Tribunals. In the absence of this data, the President had to rely on anecdotal information about waiting times from the Regional Employment Judges. In his view, this was an inadequate substitute for rigorous and audited data, but it was the best he had to go on. With that, the President turned to waiting times.

2.7 Waiting Times

The President provided an update on waiting times across the ten Employment Tribunal regions in England and Wales as of the end of October 2023.

- For shorter hearings of 1-2 days' duration, all regions except Midlands West could list them in the first half of 2024. Midlands West could list these hearing in the second half of 2024.

- For medium length hearings of 3-5 days' duration, many regions could hear them in the first half of 2024; these include Wales, the South East, London East, Midlands East and the North East regions. The remainder of the regions except the North West could list them in the second half of 2024. The longest waiting times were in the North West (first half of 2025).

- For longer hearings of 6-10 days' duration, the majority of regions could list these in the second half of 2024. The shortest waiting times were in London Central and the North East (Leeds), who could list these hearings in the first half of 2024. The North West, London East, and London South were listing these claims in the first half of 2025.

- For hearings longer than 10 days, the majority of regions could list these into the second half of 2024. The North East (Leeds) could still list these cases in the first half of 2024, while the North West, London East and Midlands East regions were listing these cases in the first half of 2025. The longest waiting times were in London South, who were listing these cases in the second half of 2025.

Regions were often able to accommodate judicial mediations or DRAs at short notice and often within six weeks. As ever, the President confirmed that this as an overall picture and there were always exceptions, such as cases which required numerous preliminary hearings, had been postponed for a good reason or had been subject to an appeal.

The meeting then turned to regional updates.

3. Regional updates

3.1 Judge George Foxwell – South East

REJ Foxwell explained the ongoing position of the South East region. 2,300 single claims had been received in his region in this financial year and 2,960 had been disposed of, meaning that more cases are being disposed of each month than are being received. Judges were regularly sitting on nearly 500 cases each month.

3.2 Judge Sian Davies – Wales

REJ Davies explained the wide geographic spread of the Wales region and the challenges that presents, including ensuring people and papers are in the correct place. Her judges had begun sitting in locations other than Cardiff and Mold and were now sitting regularly across a variety of locations in South, West and North Wales. She explained that the region continued

to face similar pressures as others, including the loss of staff, but the administrative teams were working hard to provide support. The Wales region would shortly start arranging Dispute Resolution Appointments.

3.3 Judge Benjimin Burgher – London East

REJ Burgher acknowledged that the wait in the London East region for a 5+ day hearing until April 2025 was not acceptable and he was seeking to resolve this point, but acknowledged the ongoing resource issues the region faced. He further explained that the implementation of Dispute Resolution Appointments was a positive step that would present the opportunity to bring cases forward..

3.4 Judge Jenny Jones – Midlands West

Acting REJ Jones confirmed that four new salaried judges had been appointed to Midlands West region, three of which were shared with other regions, but that this resource was helping to ensure cases could be listed in a reasonable time. She explained the main concern was the backlog of correspondence work and she urged parties to include case numbers and relevant information in the subject of their email to help administrative staff process the correspondence.

4. Mark Lewis – HMCTS

Mark Lewis explained that one of the reform products released in July 2023 gave the ability for legal professionals to submit ET3 responses and make digital applications via the new online portal. However, so far there had been a very low uptake. Only 7 ET3s and 2 applications had been received via the MyHMCTS portal across all four early adopter sites. The figures were too low for HMCTS to confidently test the new system and its functionality. Mark encouraged user group members to register for MyHMCTS and use the processes available so that updates and improvements could be made.

Mark explained that the Document Upload Centre continues to be used across regions. While not a reform product, it will remain in use until such time as the ET team has built a reform solution to bundle submission. This is likely to be between January and March 2024.

Mark acknowledged that all ET regions were currently experiencing staff recruitment and retention issues.

5. Richard Boyd – DBT

Richard explained his work as part of the Labour Markets Directorate at the Department for Business and Trade. DBT were no longer classed as the Department for Business, Energy and Industrial Strategy but retained the main levers and legislation relating to employment law policy. Richard explained his role as part of the national user group, which is to act as a bridge between the user community and DBT, and to help identify concerns or questions users may have. He said he was especially grateful for the clarification the President had provided on the interpretation of published statistics.

Richard took the opportunity to demystify the process by which ET1 claim forms and ET3 response forms were “prescribed”. He said that user group members may have seen in August 2023 a new ET1 and ET3, which asked for further information. This was to facilitate smoother case handling. What this meant in practice was that the Secretary of State or Minister was required to sign off the forms. Richard confirmed that there is no process by which old ET1 and ET3 forms are “un-prescribed”.

6. Robin Rimmer – MoJ

Robin provided an update on the implementation of the Judicial Review and Courts Act. This will provide a new framework for determining Employment Tribunal panel composition, and the intention was for these powers to be delegated to and exercised by the Senior President of Tribunals. Ministers had signed the commencement order. The powers would come into force tomorrow (7 November 2023), but a further Statutory Instrument was required in order to delegate the powers to the SPT.

Robin said that it was expected that the SI would be laid on 14 November 2023 and the process concluded by mid-January 2024. The consultation response and the final proposals are a matter for the SPT. The existing arrangements will remain in place until that point.

Robin said that the other key measure in the Act was the provision which transfers the rule-making powers to the Tribunal Procedure Committee. This should result in a smoother process for the creation of tribunal rules and a more harmonised set of rules. The transfer date has yet to be confirmed but Robin anticipated it will take place by the end of 2023.

Robin also provided an update on the Open Justice team's call for evidence which closed in September. Colleagues were working through the responses, and it was expected that the response would be published in Spring 2024.

7. Stewart Gee – ACAS

Stewart reported that, since 1 April 2023, ACAS had received nearly 60,000 requests for early conciliation from employees or their representatives and 3,000 from employers, which is approximately 2,100 per week.

Staffing levels had fallen, but following recruitment it was expected for levels to return to normal by November 2023. Current waiting times for a case to be put before a conciliator had been 9 days but had now reduced to 4 days.

The notification form had recently undergone an update, which has ensured 97% of users now provide a telephone number, allowing their case to be progressed to a conciliator quicker, as most conciliation takes place by telephone.

ACAS have been working with the HMCTS reform team in relation to the electronic transfer of cases from the tribunal system to the ACAS system. It was hoped this would improve timeliness of information transfer and facilitate earlier settlement.

8. Any other business

Emma Wilkinson, on behalf of the ELBA Committee, asked a question about unregulated ET representatives and whether and how they could be subject to better control. The President explained that s.6(1)(c) of the Employment Tribunals Act 1996 states in terms that a party before the ET can be represented by anyone they choose. If the concern was that the representative was habitually and persistently acting in a vexatious manner, the matter could be referred to the Attorney General under s.33 of the Employment Tribunals Act 1996.

The President thanked members for attending. He said that the date of the next meeting, in Spring 2024, would be confirmed in due course.