Senior President of Tribunals

Panel composition in the Employment Tribunals and Employment Appeal Tribunal

Introduction

1. Section 35 of the Judicial Review and Courts Act 2022 substituted new sections 4 and 28 into the Employment Tribunals Act 1996. Those new provisions give the Lord Chancellor the responsibility to make regulations determining the number of members who are to compose the Employment Tribunals and Employment Appeal Tribunal in a particular case. The Lord Chancellor can discharge that responsibility by delegating it to the Senior President of Tribunals.

2. Under that power, the Employment Tribunals and Employment Appeal Tribunal (Composition of Tribunal) Regulations 2024 have been made. The Regulations provide that:

    - The SPT must issue a practice direction determining – in relation to any matter that may fall to be decided by an Employment Tribunal – whether the tribunal should be composed of one, two, or three people. In making that determination, the SPT must have regard to the nature of the matters to be decided and the means by which they are to be decided, and the need for members of tribunals to have particular expertise, skills or knowledge.

    - The Employment Appeal Tribunal will be composed of one person unless the SPT determines in a practice direction that it should consist of two or three people.

    - In both the ETs and EAT:

        - If a matter is to be decided by one person, the person must be a judge.
        - If a matter is to be decided by more than one person, at least one of them must be a judge, and the SPT must determine whether the others will be judges or not.
        - The SPT must select one member to chair the tribunal ("the presiding member"). If the decision of the tribunal is not

unanimous, the decision of the majority is the decision of the tribunal, and the presiding member has a casting vote if the votes are equally divided.

3. After an early draft of those Regulations had been shared with the Judicial Office, the SPT published a consultation paper on 30 January 2023, setting out proposals for the exercise of these powers, and seeking views on those proposals. The consultation was published on the judiciary website and circulated to the national user groups of the relevant tribunals. The Secretary of the Council of Tribunal Members Associations ("CoTMA"), which is the judicial association for non-legal members of the Employment Tribunals in England and Wales, had been notified a week in advance that the consultation was to be published. The consultation was initially stated to be for a period of eight weeks, but in response to a request from CoTMA it was later extended to 12 weeks and eventually closed on 27 April 2023.

4. A total of 120 responses to the consultation were received. The majority were from individual non-legal members ("NLMs") (64) and groups or associations of them (eight), there being some duplication within those. There were also responses from 20 individual judges, and a range of other people and stakeholders, including unions and legal organisations. The SPT is grateful for the many thoughtful and helpful responses received.

5. The SPT has carefully taken into account all the responses to the consultation before reaching his decisions.

6. This document will set out the number and proportion of consultees who agreed or disagreed with each proposal, and of those who did not express a clear view either way. There was some degree of impression involved in categorising some responses into those categories. The SPT has not placed undue reliance on the number of responses for or against a particular proposal. He is conscious that a consultation is not a poll, and that a single response might embody the views of many people. His main focus has been on the quality of the arguments raised by consultees, rather than their quantity.

7. Many consultees' arguments on the specific proposals were inseparable from general arguments about the value of NLMs in Employment Tribunal cases. It is appropriate, therefore, to consider some of those general arguments before moving on to the specific proposals.

8. The fact that the large majority of responses were from NLMs themselves prompts some special consideration of how to treat those responses. It is, of course, plain that the consultation proposals would have reduced the

involvement of NLMs in some major categories of cases. At the outset, therefore, the SPT would like to emphasise his gratitude for the valuable contribution to tribunals justice that is made by NLMs, and for the contribution they will continue to make in the future. Their appropriate involvement in the work of the Employment Tribunals and of the EAT is, and will remain, an indispensable part of the style and culture of tribunals justice. The SPT does not underestimate the benefit of this resource, and intends to ensure that it is used to the best possible effect.

9. In making his decisions, the SPT has had regard to several important needs. These include:

    - the need for tribunals to be accessible,
    - the need for proceedings before tribunals to be fair and to be handled quickly and efficiently,
    - the need for members of tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters, and
    - the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals.

10. Although, under paragraph 3 of Schedule 18 to the Equality Act 2010, the "public sector equality duty" does not apply to judicial functions, the SPT has been conscious of the interests of equality, diversity and inclusion when taking his decisions. The consultation paper acknowledged the possibility that since the proposals would be likely to result in more cases being heard by panels with fewer non-legal members than before, and the proportion of people from under-represented groups is higher among non-judge members of the tribunals than it is among judges in the tribunals and in the courts, implementation of the proposals might reduce the diversity of the judiciary.

11. A number of consultees raised concerns about this impact, and some called for an Equality Impact Assessment to quantify what it would be. The SPT does not believe that this is necessary or appropriate. An assessment would be largely based on speculation. It is difficult to estimate how often the discretion to sit with a full panel will be exercised, and what the effect on sitting patterns, recruitment and retirement might be.

12. Furthermore, although the promotion of diversity in the judiciary is one of the SPT's main strategic objectives, his view remains that it would not be appropriate to pursue that objective by deploying judicial office holders to hear cases in which their expertise is not required. In circumstances where resources are constantly under pressure, the fundamental consideration must be the efficient, effective and proportionate delivery of justice, and the provision of access to justice. The SPT would therefore not be assisted by an attempt to quantify the possible impact. There would be no level at which the

impact on the diversity of the judiciary could justify changing the assessment of what is required in the interests of justice.

13. Arguments were made by some consultees about the impact that any reduced diversity in the composition of panels might have on tribunal users, both in terms of their perception of the proceedings and the actual quality of justice that they receive.

14. On this issue, having carefully considered the points made, the SPT has not departed from the views he expressed in the consultation paper. Perception alone cannot justify the involvement of NLMs in proceedings and hearings where their presence is not required in the interests of justice in the case in hand. In principle, the approach to determining the appropriate composition of panels to hear cases in the Employment Tribunals should not be governed by the general objective of increasing diversity in the tribunals.

15. Some consultees have observed that when a case is heard by a panel a user with a particular protected characteristic has a greater chance of having their case decided by someone who shares that characteristic. This is true, but the SPT does not find it to be a persuasive argument in favour of having more cases heard by panels than is warranted by the efficient and effective delivery of justice. It is widely accepted that the judiciary as a whole ought to be more representative of the society that it serves. But the concept that the composition of a tribunal should resemble the characteristics of the parties in an individual case is not sound. For example, a black claimant in any proceedings, including cases in the Employment Tribunals, is not entitled to have their case heard by a racially diverse panel. Accepting a general principle that it is desirable for the panel in such a case to be racially diverse would be mistaken. It is not necessary or warranted in the interests of justice, nor in the interests of the promotion of diversity, inclusion and equality in the justice system as a whole or in the tribunals – an endeavour to which the tribunals judiciary is firmly committed.

16. An understandable argument on diversity and the quality of justice in the Employment Tribunals is that NLMs' own diversity and the range of their experience may make them better able to facilitate the participation of litigants from all walks of life. However, as is so with many of the arguments put forward by consultees, the ability or attribute relied on here is a core part of the work of a judge and is achieved by judges in most jurisdictions, in both courts and tribunals, without the assistance of NLMs.

17. Many consultees pointed to the practical assistance that NLMs provide in conducting hearings: acting as the "eyes and ears" of the tribunal, and taking their own notes, which supplement the judge's. The Council of Employment

Judges noted the widespread belief that a panel helps the judge to control the hearing. Even some judges who supported the consultation proposals acknowledged the value of this kind of assistance. In agreement with those judges, however, the SPT does not believe that this in itself can be seen as a justification for the proposition that in the Employment Tribunal judges ought normally to sit with a panel. In his view it is not a factor that should be given significant weight. It is worth noting that the consultation predated the joint Practice Direction and Presidential Guidance issued in November 2023 on the recording of hearings and arrangements for the transcription of those recordings. The introduction of routine recording means that, in most cases, the judges' notes are no longer the *de facto* record of proceedings.

18. General arguments made by a number of consultees about perception were not persuasive. If the delivery of justice in a particular case in the Employment Tribunal does not require the presence of NLMs in the constitution to hear that case, the perceptions of the parties in that case, or of the public in general, will not themselves require the involvement of NLMs. Many consultees cited a statement that appeared in the recruitment pack for the last NLM recruitment exercise: "The balance of perspectives that non-legal members provide […] furthers the appearance of impartiality". That may well be so, perhaps in many cases in the Employment Tribunals. But it does not mean that any judge sitting alone, as in many other jurisdictions in the courts and tribunals, is not sufficiently impartial, or does not appear to be so.

19. The SPT's view has, however, been influenced by factors relating to perception in rejecting the suggestion made by a number of consultees that judges should sit with a single NLM in some cases. Since NLMs are divided between 'employer' and 'employee' panels, the possible appearance of partiality or unfairness is a significant consideration here, even though that perception would of course be false.

20. Many consultees expressed the view that the contribution of NLMs is more important in cases where there is a dispute as to the facts. This concept is reflected in the previous version of section 4 of the Employment Tribunals Act 1996, which referred to the "likelihood of a dispute arising on the facts which makes it desirable for the proceedings to be heard" by a panel. The SPT's view is that it does not follow that factual disputes are necessarily better resolved by a panel than by a judge alone. One should not forget that judges in many parts of the justice system, in both courts and tribunals, are routinely required to resolve factual disputes alone. It is one of the essential parts of the work of a judge.

21. It is not clear why a panel would necessarily be better able than a judge sitting alone to resolve issues of primary fact. An illustrative example would

be a case where the claimant employee alleges that their manager made a comment to them that constituted harassment related to a protected characteristic, and the respondent employer denies the manager made the comment, but also denies that the comment would have constituted harassment if it was in fact made. It is arguable that in some cases of that kind a panel might be better able than a judge sitting alone to decide whether the comment had the effect of creating, for example, a humiliating work environment. It is more difficult, however, to see why a panel would be better able than a judge to decide whether the comment was in fact made. The comparison made by some consultees with the jury in a criminal trial does not seem apposite here.

22. Inferences of fact may be different. Making inferences about the reason for a person's actions is often crucial in employment cases. For example, was the claimant employee demoted solely as a result of sincere and well-founded concerns about their performance, or was it materially influenced by a protected characteristic of the claimant's, or the fact that they were a whistleblower? It is arguable that a panel might be better able than a judge sitting alone to draw inferences in some situations of this kind. The panel could use their experience to decide whether the account given by the respondent employer makes sense and is to be believed, or whether it is so much at odds with what generally happens in the workplace that their actions are more likely to have been motivated by an unlawful reason and the stated reason is only a pretext – bearing in mind, however, that relevant case law cautions against drawing inappropriate inferences from bad employment practices alone.

23. Much value can undoubtedly be added by the presence of NLMs in Employment Tribunal hearings in cases where the application of the relevant law to the facts requires an assessment of standards of reasonableness drawn from industrial experience. Some examples of these were given in the consultation paper: whether an adjustment that an employee requested for their disability was reasonable, or whether an employer's decision to dismiss an employee was reasonable. These are questions where workplace experience may have a real bearing on a just outcome. The best value in the interests of justice in the Employment Tribunals seems to lie in deploying NLMs in cases where they are likely to spend a higher proportion of their time making decisions in cases of that nature.

24. Many consultees were of the view that the involvement of NLMs is more important in more complex cases. The SPT does not agree that this is always so. One can see how a judge may be assisted by the presence of NLMs on a panel in a relatively complex case where there is a large volume of evidence. However, a competent judge should be able to do that when sitting alone.

Short-track cases such as wage claims are usually suitable to be heard by a judge alone not because they are more straightforward, but because they do not usually involve issues that the experience and expertise of NLMs will be particularly valuable in deciding. A point made by some judges consulted was that greater complexity in a case may not be a factor weighing in favour of the involvement of NLMs, or may even be a factor weighing against, and that there can be more value in NLMs contributing their expertise in helping to apply the law to facts in the employment context, rather than participating in lengthy fact-finding.

25. The specific proposals in the consultation are dealt with below. It is appropriate, in the light of the conclusions the SPT has reached on Questions 1 to 3, to deal with those conclusions together after setting out the arguments raised by consultees.

Question 1: "Do you agree that cases in the ETs which are currently heard by a panel should instead be heard by a judge alone by default?"

26. On this question, 16 consultees agreed with the proposal; 95 disagreed; and nine expressed no clear opinion either way.

27. Not all of those who disagreed with the proposal supported the retention of the current position. Several options were suggested as an alternative to it. Arguments for retaining the current position drew on the general benefits of the participation of NLMs discussed above, and the likelihood that the cases in question would be those in which such benefits were most likely to arise. As has been explained, the SPT has considered the arguments put forward and disagrees with some of them, or would give less weight to them than has been urged by some consultees. He does not agree that cases involving alleged discrimination or whistle-blowing are necessarily those in which NLMs will always add value, or the greatest value, in the interests of justice in the Employment Tribunals.

28. Two main kinds of alternative options were suggested. One was to reverse the presumption in the proposal, by adhering to the principle of using a panel as a default, with active consideration at a preliminary stage of departing from that default position and having the case heard by a judge sitting alone. The other was to carve out some categories of cases from the proposal, and in those categories to use a panel as a default. A variation of the latter was to mandate cases being heard by a panel when a certain issue, usually the reasonableness of somebody's actions, fell to be decided.

29. The Employment Lawyers' Association suggested a category-by-category consideration to be carried out by the Tribunal Procedure Committee. Having considered that option, the SPT does not believe it is necessary or appropriate to delegate consideration of this issue, and intends not to do so.

30. Many consultees argued that panels should be retained for discrimination cases. It was contended that those cases involve the kinds of issue – for example, turning on the making of inferences of fact or involving the application of the law to the facts – that make best use of NLMs' involvement. Direct discrimination cases were often referred to in this context, it being suggested, for example, that the strength of a panel's conclusion would add credibility to an adverse finding against an employer. Such arguments seem generally less cogent for cases where the allegation is of indirect discrimination, which do not require the same process of drawing inferences as to a person's thinking. The kind of proportionality analysis that is central in cases of indirect discrimination is a familiar aspect of other areas of the law where judges sit alone.

31. Similar arguments were made in respect of whistleblowing cases, which may also involve the drawing of inferences.

32. The consultation paper pointed to an anomaly in the use of panels for whistleblowing cases. A case in which a whistleblower had allegedly been subjected to detriment short of dismissal would normally be heard by a panel, whereas a case in which the whistleblower had been dismissed would not be. No consultee who addressed this anomaly sought to defend it as being justified, and most argued for resolving it.

33. Many consultees drew comparisons with discrimination proceedings in the County Court under the Equality Act 2010, where the court will usually sit with an assessor drawn from the corps of NLMs who sit in the Employment Tribunals. Some have asserted that a change of practice in the Employment Tribunals would bring about inconsistency in the way that cases under the same Act are dealt with, and that reduced sittings for NLMs in the tribunals might result in the total number of NLMs being depleted and knock-on difficulties being caused for the listing of County Court cases. These are not persuasive arguments. The two kinds of proceedings are already dealt with differently. In the County Court the judge sits with one assessor, not two, and the role of an assessor is different from that of an NLM; it involves advising rather than deciding. The prospect of sittings for NLMs becoming so reduced that there would be insufficient members to sit on County Court cases seems highly unlikely.

34. Some consultees opposed the proposal, fearing that not enough consideration would be given to exercising the discretion to use a panel, that the default would become the norm, and that the contribution of NLMs to justice in the Employment Tribunals would be eroded.

Question 2: "Do you agree that unfair dismissal claims in the ETs should continue to be heard by a judge alone by default?"

35. On this question, 36 consultees agreed with the proposal; 62 disagreed; and 22 did not express a clear opinion either way.

36. It is clear from the responses that many consultees consider that the decision requiring unfair dismissal claims to be heard by a judge alone by default was mistaken. Their main argument is that the principal issue in many "ordinary" unfair dismissal claims is whether the decision to dismiss fell within the range of reasonable responses available to the employer, which is a good example of the kind of issue that NLMs can assist in deciding.

37. The consultation paper noted that before this change was introduced in 2012, some were concerned that the removal of NLMs might reduce the confidence of those contemplating a claim for unfair dismissal to engage in the process, especially if they were unrepresented. It pointed out that those concerns do not seem to be borne out by the data, because there were 49,036 unfair dismissal claims presented in 2012/13, which is comparable to the numbers in previous years (47,884 in 2010/11, and 46,326 in 2011/12). Some consultees criticised that passage in the consultation paper on the basis that many factors, including the general strength of the economy, can affect the number of claims, which is of course true. It is to be noted, however, that if there was some fall in confidence arising from the change in panel composition, it either did not deter people from issuing claims or any such deterrence was more than outweighed by other factors. As CoTMA put it in their response, even though they were opposing the proposals, "claimants do not decide to lodge claims based on panel compositions; they lodge claims to get justice". Some have pointed to the fact that the volume of unfair dismissal claims is significantly lower now as a cause for concern, but that overlooks other likely causes, such as the increase in the qualifying period for bringing an unfair dismissal claim from one to two years (which also occurred in 2012) and the impact of Acas early conciliation (introduced in 2014).

38. Some consultees expressed concern that – of the unfair dismissal cases that are decided at a final hearing – the proportion that succeed has been lower in recent years than it was before unfair dismissal cases came to be heard by a judge alone by default. That success rate has fluctuated over the past 15 years, but there is no reason to conclude that the change to the arrangements for hearings was the cause of those fluctuations. There is no

reason why the change would prima facie be thought to have favoured respondents. A number of consultees pointed to the possibility that a judge might be more prone to a "substitution" mindset and fail to allow employers the appropriate leeway in deciding whether and how to dismiss an employee. The EAT's decision in *McCafferty v Royal Mail* UKEATS/0002/12/BI is a notable example of this. There are other possible causes which more readily explain the fluctuations. The higher rates of success between 2007 and 2010 were probably due to the impact of the statutory dispute resolution procedures, which created a new species of automatically unfair dismissal (and were abolished in April 2009), while the lower success rates between 2014 and 2018 were more likely to be due to the impact of ET fees (which disproportionately removed from the system those modestly valued claims which are often more likely to succeed).

Question 3: "Do you agree that claims in the ETs other than unfair dismissal which are currently heard by a judge alone by default should continue to be?"

39. On this question, 72 consultees agreed with the proposal; 25 disagreed; and 23 did not express a clear opinion either way.

40. In opposition to the proposal it was suggested that tribunals justice is always better served by a full panel hearing. In the SPT's view this suggestion is not correct. It does not represent the reality throughout the tribunals system that the interests of justice and access to justice are in many cases well served by judges sitting alone, rather than in panels, whether or not including NLMs. Nor does it confront the need to make the most efficient use of judicial resources to ensure that justice is done in the tribunals as efficiently as it can be. Other opponents of the proposal, including the ELA, called for an exhaustive category-by-category consideration rather than the broadly framed proposal in the consultation.

Conclusions on Questions 1 to 3

41. The SPT remains of the view that the current requirements for cases to be heard by panels are too broad and too rigid.

42. The SPT does not believe that a category-by-category approach is appropriate. Cases within a category are not all alike, and even if there might be many cases within a particular category that would be suitable for hearing by a panel, it does not follow that the rule, or default, should be for all cases in that category to be heard by such a constitution. There is no category of cases in the Employment Tribunals in which the desirability of involving NLMs is such that the correct approach is automatically to list all cases before a panel unless it is determined that the involvement of NLMs is not appropriate. There are many cases in the Employment Tribunals in which justice can and

should be delivered by a judge sitting alone. Given the need to provide access to justice for all users of the tribunal, in all categories of case, in an environment of hard-pressed resources, it is important to ensure that NLMs are deployed in cases where their presence in the constitution is truly necessary. A proportionate and realistic approach is required in every category of case.

43. With those principles in mind, and having considered all the representations made by consultees, the SPT has concluded that it is neither necessary nor desirable to introduce a general rule or default providing for those cases that are currently heard by panels to be heard by judges sitting alone. After careful reflection in the light of the concerns that have been expressed, including the apprehension that a default would become the norm, the SPT has decided that such cases should instead become subject to an entirely neutral approach, whereby in each individual case a decision will be made by a judge on the question of whether the case will be heard by a panel or a judge sitting alone. This will enable appropriate arrangements to be made in each case, having regard to the particularities of that case, including matters such as the issues raised, the likely nature and scope of the evidence, the parties and their circumstances, as well as any other relevant considerations. It should be emphasised that this is not to prescribe or limit the factors that ought to be taken into account in any particular case. The discretion will be a broad one, exercised in the interests of justice and in accordance with the overriding objective. The relevant factors will always depend on the circumstances. Crucially, there will be no presumption that the case will be heard by a panel, and no presumption that it will be heard by a judge sitting alone. The interests of justice and the overriding objective will thus be served in every case (see paragraph 62 below).

44. If that decision were made only on the proposal in Question 1 it would effectively create a two-tier system for substantive hearings in the Employment Tribunals. Some cases would then be subject to the new neutral discretion, while others would be subject to the principle that they would be heard by a judge alone as a default. The SPT's view is that such disparity would not be appropriate in principle, and would also be unjustified in practice. Accordingly, he has decided to extend the same neutral discretion to all substantive hearings in the Employment Tribunals.

45. The only exception to the above will be in undefended cases (which includes cases where a respondent has ceased to defend a case, which may arise in consequence of its insolvency). In those cases, which are already heard by a judge alone by default regardless of the subject matter, the desirability of a consistent approach is outweighed by practical considerations. Such cases do not proceed to initial consideration or (generally) to a case management hearing, which – depending on the type of case – are the points at which it is envisaged most judicial decisions about panel composition will be prompted.

Adding a new step in the process would be a disproportionate effort compared to what would be gained by making the cases subject to the neutral discretion. The interests of justice will be protected by the judge retaining the discretion to direct that a case be heard by a panel, although that seems likely to be particularly rare in undefended cases.

Question 4: "Do you agree that cases in the EAT should continue to be heard by a judge alone by default?"

46. On this question 62 consultees agreed with the proposal; 10 disagreed; and 48 did not express a clear opinion either way.

47. The main opposition to this proposal was on the basis that all cases in the EAT should be heard by a panel of three.

48. The SPT's view is that to return to a general system of using panels for hearings in the EAT would be a failure to make the most efficient use of judicial resources. The current system works well, and should continue in operation.

49. The SPT has decided to implement the proposal to maintain the status quo, as proposed in the consultation.

Question 5: "Do you agree that there should be a power to direct that a case be heard by a panel of two judges, to deal with particularly complex cases or where other circumstances justify it?"

50. On this question, 23 consultees agreed with this proposal; 73 disagreed; and 24 did not express a clear opinion either way.

51. Much of the opposition to this proposal appears to have been based on the premise that it had been put forward as if it were a substitute for a judge sitting with NLMs. That was not the SPT's intention. As many consultees pointed out, the involvement of an additional judge in a constitution does not generally provide the same possible benefit as does the involvement of NLMs.

52. Some consultees pointed to the possibility of disagreement or deadlock between two judges. This situation is dealt with by regulation 6(4) and (5) of the Regulations: the person choosing the judges for the panel has to nominate one of them as the "presiding member", and the "presiding member" has a casting vote in the event of a disagreement.

53. Several consultees welcomed the proposal for the Employment Tribunals to have this additional form of constitution at their disposal, as some other tribunal jurisdictions do. The SPT agrees. However, to address concerns

stated by some consultees and to confine this new power to an appropriate level of use, it will be expressly limited to the purposes of training and development, as is so elsewhere in the tribunals, and only a leadership judge will be able to direct that a case should be heard by two judges.

Question 6: "Do you agree that decisions other than at substantive hearings should be made by a judge alone in all cases?"

54. On this question, 54 consultees agreed with the proposal; 44 disagreed; and 22 did not express a clear opinion either way.

55. Some supporters of the proposal did not appear to understand that it included some change from the current position, by the removal of the discretion provided by rule 55 of the current rules to convene a panel for a preliminary hearing in the Employment Tribunals. Other consultees raised arguments against removing that discretion, which the SPT has found persuasive. There are cases in which it is opportune and appropriate for significant issues to be decided at preliminary hearings. A decision on a preliminary issue can effectively resolve a claim. The discretion to have a full panel on preliminary hearings is not very often used. Removing the discretion would, however, come at the cost of sacrificing some desirable flexibility.

56. The current discretion to sit with members on a preliminary hearing is only available when a party requests it. The SPT's view is that this is inappropriate. The views of the parties can of course be relevant, but they should not be automatically determinative on this matter. If a judge is satisfied that it would be in the interests of justice for a particular preliminary hearing to be undertaken by a panel, the parties' agreement to that course should not generally be required.

57. The SPT has therefore decided not to implement the proposal in the consultation. Instead, preliminary hearings in the ETs will be undertaken by a judge alone by default, with the judge having the discretion in an appropriate case to sit with a panel, and decisions made otherwise than at hearings will continue to be made by a judge alone.

Question 7: "In cases which are judge alone by default, how should the discretion to sit with a panel be guided and exercised?"

58. Many of the responses received on this question were weighted by the consultee's opposition to the proposed expansion of the scope of judge-alone decisions by default. Some expressed concern that the discretion to sit with members would not be exercised in practice, and that the default would become the rule. Others called for guidance from the ET Presidents. Others still asked for decisions in England and Wales to be made or supervised by Regional Employment Judges.

59. The decisions made on the proposals in Questions 1 to 3 above will have narrowed some of those concerns, but for both the remaining judge-alone by default jurisdictions and those subject to the new neutral discretion this issue still needs to be decided.

60. The SPT's view is that it would be undesirable for decisions to be made by leadership judges in every case, as this would impose undue burdens on them. Furthermore, a leadership judge might not have the same feel for a case as a judge at a preliminary hearing would likely have, and might not be as well-placed to make the decision.

61. Some consultees suggested that the wishes of the parties should be determinative. As has been explained above, the SPT believes that this would be wrong in principle. It is ultimately for the tribunal, not the parties, to decide what the interests of justice require.

62. The SPT has decided that the decision whether to sit with a panel will be made in every case having regard to the interests of justice and the overriding objective. He has decided against specifying any factors that must be taken into account beyond those two essential principles (see paragraph 43 above). The SPT's view is that it is appropriate to confer a broad discretion and trust to the good sense of individual judges acting under the leadership of the Presidents. He expects the Presidents now to issue guidance to their judges to assist them in deciding whether a case should be heard by a panel, and to encourage the application of consistent principles across Great Britain, which should include matters to be taken into consideration when having regard to the interests of justice and the overriding objective.

63. The Judicial Office will explore with His Majesty's Courts and Tribunals Service what can be done to monitor the proportion of cases in which the discretion to sit with a panel is being exercised. The SPT has no preconceived view of what proportion of cases should be heard by a panel, either in general or for any particular category of cases. And there will not be any targets against which to measure either the number of cases heard by panels or the number heard by judges sitting alone. The collection of appropriate data should nonetheless assist in providing assurance that the option of judges sitting with a panel is – and is seen to be – exercised in practice and in accordance with the Senior President's Practice Direction, used when the circumstances of the particular case justify that being done.