Judge Susan Walker
President
Employment Tribunals
(Scotland)

Judge Barry Clarke
President
Employment Tribunals
(England and Wales)

Presidential Guidance

Panel composition

1. Rule 7 of the Employment Tribunals Rules of Procedure allows the Presidents to publish guidance as to matters of practice. Such guidance must be published in an appropriate manner to bring it to the attention of claimants, respondents and their advisers. This guidance, issued jointly, concerns panel composition. Employment Tribunals must have regard to this guidance, but they are not bound by it.

The Senior President's Practice Direction on panel composition

2. The Senior President of Tribunals has issued a Practice Direction on panel composition in the Employment Tribunals and the Employment Appeal Tribunal. This takes effect from 29 October 2024[1] alongside other changes to the Employment Tribunals Act 1996[2] and the Employment Tribunals Rules of Procedure[3]. In respect of the Employment Tribunals, the Practice Direction provides:

> **3. Subject to paragraph 5, in respect of matters that fall to be decided at or following a final hearing, a judge will decide, having regard to the interests of justice and the overriding objective, whether an Employment Tribunal is to consist of:**
> **a. a judge sitting alone; or**
> **b. a judge, an employee member, and an employer member;**
> **unless a leadership judge decides that it should consist of two judges for the purposes of training and development.**
>
> **4. In respect of matters that fall to be decided at a preliminary hearing, an Employment Tribunal is to consist of a judge sitting alone unless:**

[1] https://www.judiciary.uk/guidance-and-resources/practice-direction-from-the-spt-panel-composition-in-the-employment-tribunals-and-employment-appeal-tribunal/.
[2] In accordance with the transitional provision at regulation 3 of the Judicial Review and Courts Act 2022 (Commencement No. 4) Regulations 2023.
[3] In accordance with the transitional provision at regulation 9 of the Employment Tribunals and Employment Appeal Tribunal (Composition of Tribunal) Regulations 2024.

a. a judge decides that, having regard to the interests of justice and the overriding objective, it should consist of a judge, an employee member, and an employer member; or
b. a leadership judge decides that it should consist of two judges for the purposes of training and development.

5. In respect of matters that fall to be decided at a hearing in proceedings in which the person (or, where more than one, each of the persons) against whom the proceedings are brought does not, or has ceased to, contest the case, an Employment Tribunal is to consist of a judge sitting alone unless:
a. a judge decides that, having regard to the interests of justice and the overriding objective, it should consist of a judge, an employee member, and an employer member; or
b. a leadership judge decides that it should consist of two judges for the purposes of training and development.

6. In respect of any other matter an Employment Tribunal is to consist of a judge. This includes consideration of whether a party's application for reconsideration discloses a reasonable prospect of a judgment being varied or revoked.

9. Where a leadership judge exercises the power to have an Employment Tribunal consist of two judges, the leadership judge must choose a judge to be the presiding member of the tribunal. In any other instance where a tribunal consists of more than one person, the judge will be the presiding member.

10. This practice direction applies to any matter that falls to be decided on or after 29 October 2024, save that if that matter was listed for a hearing before that date, and the hearing takes place partly or wholly on or after that date, the tribunal may be constituted in accordance with the law as it stood before this practice direction was made.

Non-legal members in the Employment Tribunals

3. Non-legal members are independently appointed to judicial office after consultation with organisations or associations representative of employers (employer members) or organisations or associations representative of employees (employee members). They bring to the process of adjudication their experience of the workplace (including contemporary workplace norms, practices and challenges) so that, where appropriate, their experience can inform the legal analysis of the judge who chairs the panel. It also ensures that any decisions to which they contribute are made with an understanding of the realities of the modern workplace and current industrial practices.

4. In the words of the Senior President in his response to his consultation paper, their "*appropriate involvement in the work of the Employment Tribunals … is, and will remain, an indispensable part of the style and culture of tribunals justice*"[4]. The Senior President's expectation, as also expressed in his response to his consultation paper, is that we will issue guidance to 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*

[4] Consultation response, paragraph 8. https://www.judiciary.uk/wp-content/uploads/2024/07/ET-and-EAT-panel-composition-consultation-response.pdf.

matters to be taken into consideration when having regard to the interests of justice and the overriding objective"[5]. This document contains that guidance.

The overriding objective

5. The Senior President's Practice Direction refers to the overriding objective. As set out at rule 2 of the Employment Tribunals Rules of Procedure, the overriding objective is to deal with cases fairly and justly. This includes, so far as practicable:

   (a) ensuring that the parties are on an equal footing;
   (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
   (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
   (d) avoiding delay, so far as compatible with proper consideration of the issues; and
   (e) saving expense.

6. Each case will have allotted to it an appropriate share of the resources of the Employment Tribunals, while taking into account the need to allot resources to other cases. This includes judicial resources.

Factors relevant to panel composition

7. A judge's decision on panel composition is a case management order for the purposes of rule 29. The factors that are relevant to panel composition will vary from case to case. They need not lead inevitably to a conclusion one way or the other, but are for the judge to weigh in the balance when deciding the composition which furthers the interests of justice and accords with the overriding objective.

8. They include:

   8.1 The views of the parties (which are not determinative).

   8.2 Whether the issues to be determined at the hearing require an understanding of contemporary workplace norms, practices and challenges, to which the members can contribute their experience. This may be so where the issues require an assessment of the reasonableness of the actions or beliefs of the employer or the employee and the members' experience may add significant value to that assessment.

   8.3 On a practical level, the availability of members to sit on the case (which may correlate with the length of the hearing) and the risk of delay to the case if a full tribunal were to be empanelled.

9. Examples of cases which involve an assessment of reasonableness are: whether an employer acted reasonably or unreasonably in treating its reason for dismissal as a sufficient reason for dismissing the employee[6]; whether, in constructive dismissal cases, an employer had reasonable and proper cause for conduct that would otherwise be likely to destroy or seriously damage the relationship of trust

[5] Consultation response, paragraph 62. https://www.judiciary.uk/wp-content/uploads/2024/07/ET-and-EAT-panel-composition-consultation-response.pdf.
[6] Section 98(4) of the Employment Rights Act 1996 (ERA).

and confidence; whether it was reasonable for an employee to believe that a qualifying disclosure was made in the public interest[7]; whether it was reasonable for an employee to believe that circumstances connected with work were harmful or potentially harmful to health and safety, or posed a danger that was serious and imminent[8]; whether an employer failed to comply with a duty to make a reasonable adjustment for a disabled person[9]; and whether it was reasonable for unwanted conduct to have the effect of violating a person's dignity (or creating for them an intimidating, hostile, degrading, humiliating or offensive environment)[10].

10. The involvement of members is not to be limited to cases that involve an assessment of reasonableness. For example, we anticipate that judges may often consider it appropriate to have members on a panel that is required to consider an appeal against a health and safety prohibition or improvement notice[11]; the lawfulness of inducements relating to trade union membership/activities or collective bargaining[12]; the consultation steps that an employer has undertaken in respect of collective redundancy situations[13]; whether an asserted belief qualifies for protection from discrimination[14]; and, when examining objective justification in those discrimination claims where the defence arises, whether the legitimate aim identified by an employer corresponds to a genuine business need[15].

11. The fact that the case involves an assessment of the sort identified in paragraphs 7 to 10 above does not, in and of itself, mean that a full tribunal should be empanelled. The question for the judge in each case is whether the members' experience is likely to add significant value to the process of adjudication.

12. If there are a number of complaints to be considered together at one hearing, the judge must make an overall assessment of the panel composition that would further the interests of justice and accord with the overriding objective for the hearing as a whole. This may include consideration of whether it is proportionate to list all the complaints before a panel that includes members.

13. Deciding panel composition is not the same as choosing which individual judge and/or members sit on that panel. Deciding panel composition is about whether the panel should comprise a judge sitting alone, a judge sitting with two members or, exceptionally, two judges. Choosing which individual judge and/or members sit on a panel is, by section 4(1) of the Employment Tribunals Act 1996, a matter for the Senior President. The Senior President has delegated that power to leadership judges of the Employment Tribunals (and which may be delegated further to HMCTS staff in listing teams). In practice, it is a deployment decision typically made very shortly before a hearing commences (sometimes the same day). It is influenced by judicial availability and resources, and by late settlements and withdrawals in other cases. The name of the judge and/or members chosen for a panel is published on a "cause list"[16].

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[7] Section 43B(1) ERA.
[8] Sections 44(1) and 100(1) ERA.
[9] Sections 20 and 21 of the Equality Act 2010 (EqA).
[10] Section 26(4) EqA.
[11] Section 24 of the Health and Safety at Work etc Act 1974.
[12] Sections 145A and 145B of the Trade Union and Labour Relations (Consolidation) Act 1992.
[13] Sections 188 and 188A of the Trade Union and Labour Relations (Consolidation) Act 1992.
[14] Section 10 EqA.
[15] Most commonly, sections 13(2), 15(1), 19(2) and 19A(1) EqA.
[16] Available in Employment Tribunal venues and online at https://www.courtserve.net.

Matters arising after a liability hearing

14. Some cases require more than one final hearing, in order to deal (for example) with subsequent decisions in respect of remedy, reconsideration and costs/expenses. A judge should have regard to the guidance at paragraphs 7 to 12 above when deciding, for each such hearing, the composition which furthers the interests of justice and accords with the overriding objective.

15. Save where the Employment Appeal Tribunal has ordered otherwise in respect of a remitted case, it is likely to further the interests of justice and accord with the overriding objective to retain the same panel composition throughout, such that subsequent applications are considered by the tribunal that made the original decision on liability. However, it may be appropriate to dispense with members where the subsequent hearing is limited to matters of case management; to the calculation of complex pension loss; to adjustments for grossing-up for taxation purposes; or where an application for costs is based on behaviour preceding the liability hearing rather than during the hearing itself[17].

16. There are two circumstances where post-hearing matters will always be decided by a judge alone:

    16.1 In respect of applications for reconsideration, when deciding under rule 72(1) if such an application discloses a reasonable prospect of a judgment being varied or revoked and when deciding under rule 72(2) if a hearing in respect of that application is in the interests of justice; and

    16.2 In respect of costs/expenses, when deciding under rule 78(1)(b) the amount to be paid by way of detailed assessment (in England and Wales) or by way of taxation (in Scotland).

17. In hearings covered by paragraphs 4 and 5 of the Senior President's Practice Direction, the tribunal will consist of a judge sitting without members by default, unless a judge has directed otherwise.

18. If a matter is to be decided without a hearing, then paragraph 6 of the Senior President's Practice Direction will apply: the tribunal will consist of a judge sitting without members. There is no discretion for a judge to direct otherwise. This would include judgments issued under rule 21 and interlocutory decisions in respect of applications for case management orders where a judge decides that a hearing is unnecessary.

19. Where the judge reaches a decision on panel composition that is contrary to the position of one or more of the parties, the judge should give reasons for that decision. Such reasons should be proportionate to the significance of the issue and may be very short.

[17] See, on this point, *Ireland v. University College London* [2024] EAT 68 (paragraphs 75-76). This refers to *Riley v Secretary of State for Justice & others* [2016] ICR 172 EAT, a case decided before section 4 of the Employment Tribunals Act 1996 had been amended by section 35 of the Judicial Review and Courts Act 2022.

When the decision on panel composition is made

20. A question on the ET1 claim form and ET3 response form invites the parties to offer their view on how the tribunal panel should be composed. Then:

    20.1 In short track cases (which include money-based claims such as unpaid wages, unpaid notice pay, holiday pay and redundancy pay) and standard track cases (which involve claims of unfair dismissal), the judge will usually decide panel composition when conducting an initial consideration of the case under rule 26.

    20.2 In open track cases (principally claims of discrimination and whistleblowing detriment), the judge will usually decide panel composition when conducting a preliminary consideration of the claim at a hearing held for case management purposes under rule 53(1). A question on the agenda form sent to the parties ahead of a case management hearing provides a further opportunity for them to provide their views on panel composition.

    20.3 If, for any reason, the decision on panel composition for any hearing is not made in accordance with paragraphs 20.1 or 20.2 above, a judge may make the decision at a later point. This may be done with or without a hearing.

21. If a claim is listed for hearing at the same time the tribunal serves the ET1 claim form on the respondent, the notice of hearing will simply refer to the case being heard by a tribunal without reference to the panel's composition.

Keeping panel composition under review

22. A judge should remain alert to the possibility that a material change in circumstances might require the decision on panel composition to be reviewed[18]. Given that many judges may be involved in the management of a case during its life, this will often mean that the matter is reviewed by a different judge to the one who originally directed the composition of the panel.

23. Examples of material changes that may involve empanelling a tribunal with members are: where it has become apparent in the process of managing the case to a hearing that the issues requiring determination will have widespread consequences for industrial practices; and where a subsequent amendment to the claim or response has identified new issues for determination that favour the use of members.

24. Examples of a material change that may favour changing panel composition to a judge sitting alone are: there is no member available to sit on the case at all, or one or both of the members is no longer available for the hearing and it has not proved possible to locate replacement members, and the delay involved in relisting the case on a later date would be contrary to the interests of justice; where the only way a hearing can proceed with its allocated slot is for it to be heard via the virtual region[19]; and the respondent has ceased to contest the claim (or has ceased to contest that part of the claim which had favoured including members on the panel).

[18] *Gladwell v. Secretary of State for Trade & Industry* [2007] ICR 264 EAT.
[19] The virtual region involves judges sitting alone and operates solely in England and Wales.

25. Judges should not change a decision on panel composition simply because they disagree with the decision that was made by a previous judge: a judge should not vary or revoke a previous order of another judge unless this is necessary in the interests of justice[20]. Again, a judge should give reasons for that decision, and such reasons should be proportionate to the significance of the issue and may be very short.

26. Section 4(9) of the Employment Tribunals Act 1996 provides that, where a tribunal is to be composed of more than one member, the tribunal may proceed in the absence of one or more of the members chosen to compose it if (a) the parties to the case agree, and (b) at least one of the members who is present is a judge. This arises where panel composition is provided for by regulations made under section 4(4) of the Employment Tribunals Act 1996. It does not arise where a decision on panel composition is a case management order made under paragraph 7 above; consequently, the consent of all parties is not needed for a decision changing panel composition to a judge sitting alone. Nonetheless, we consider that, once a hearing has commenced, panel composition in respect of that hearing should not be varied except with the consent of all parties.

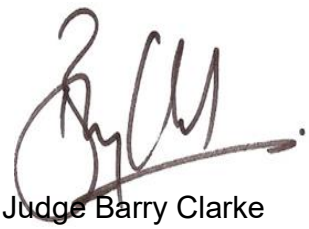
Training and development

27. Only a leadership judge may decide that a tribunal should consist of two judges. It is a power to be used sparingly, and exclusively for the purposes of training and development. Examples include appraisals of judges and support for newly-inducted judges. Paragraph 9 of the Senior President's Practice Direction will apply: there must be a presiding judge.

Transitional arrangements

28. Decisions about panel composition made before 29 October 2024, by reference to the law as it stood at that time, should remain effective whenever after that date the hearing takes place, save where a material change in circumstances permits panel composition to be reviewed. In practical terms, panel composition will remain largely in accordance with the listing arrangements that were made before 29 October 2024, but with flexibility to proceed with a judge alone if the tribunal encounters practical difficulties in finding members.

29. This Presidential Guidance has effect from 29 October 2024.



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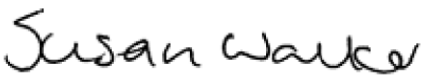
President



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[20] That would include where there has been a material change in circumstances since the decision was made, where law or fact have been misstated or where there has been an omission to state a relevant fact; see *Serco Ltd v. Wells* [2016] ICR 768 EAT.