EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

Proposals for Transforming our Justice System: Panel Composition in Tribunals

Response by the Employment Lawyers Association

21 November 2016

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law. We include those who represent both claimants and respondents/defendants in the courts and employment tribunals. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal and practical standpoint. Our Legislative & Policy Committee is made up of both barristers and solicitors who meet regularly to consider and respond to proposed new legislation.

ELA initially prepared its response to *Transforming our Justice System: Summary of Reforms and Consultation*, in order to deal with the questions on **Assisted Digital** and **Panel Composition in Tribunals**. We subsequently discovered that these issues had formed the subject of two separate papers, namely *Transforming our Justice System: Assisted Digital Strategy, Online Conviction and Statutory Fixed Fines* and *Transforming our Justice System: Panel Composition in Tribunals*. We have therefore separated our responses, and submitted them to each of the two new Consultations.

A list of the members of the working party with responsibility for (what is now) the separate paper on Panel Composition in Tribunals is attached at Appendix 1.

Introduction

Panel composition is an important issue for employment lawyers. As we pointed out in our Response to Proposals for a Single Employment Court (12 April 2016), one of the unique and crucial features of the original industrial tribunal system was the role played by "lay members", known as the "industrial jury". They apply their "employment" expertise to the interpretation and application of legal principles. They also provide a reassurance to the parties that their views are taken into account. They give the Tribunal a different look and feel to that of an ordinary Court.

There has been a steady erosion in the involvement of the industrial jury in the day to day work of the Employment Tribunals. Since 2012 particularly, they have largely disappeared in unfair dismissal cases, to be replaced by an Employment Judge sitting alone.

We understand there are those who take the view that the role of lay members has outlived their usefulness. Over the years there has undoubtedly been a growth of legalism in the Employment Tribunals (as the volume of reported case law bears witness) and the specialist expertise of employment judges, who, when the Tribunals were first established, were quite often former colonial judges, has increased significantly. But some of our members strongly believe that the industrial jury continues to have an important role to play. An obvious example is in ordinary unfair dismissal cases where the experience of those from both sides of industry can be brought to bear in forming a view as to whether the actions of the employer were within the band of reasonable responses, which is one of the issues in such cases. Lay members also have a key role to play in discrimination cases, where they help to ensure the application of discrimination law complies with what we originally called "good industrial practice", and which we now refer to as "good employment practice". As with unfair dismissal cases, this is really important. It ensures procedural fairness and assists with aspects of discrimination law including reasonable adjustments in disability cases. Many observe that the result of the removal of lay members from many cases is that the Tribunal now increasingly resembles an

ordinary common-law court. The reality is that most Employment Judges performing this role have primarily been drawn from legal practice. They therefore may not have the same breath of experience as one expects of lay members. Many of our members do not agree with this course. This is why we have been keen to make further submissions in response to the current consultation.

ELA Response

Transforming our justice system: summary of reforms and consultation

(We refer below to the question numbers set out in the original Consultation Paper: *Transforming our Justice System: Summary of Reforms and Consultation*)

Question 7 – Do you agree that the Senior President of Tribunals (SPT) should be able to determine panel composition based on the changing needs of people using the system?

Please state your reasons.

1. Summary

1.1 We believe the SPT should be able to determine appropriate panel composition in the Employment Tribunals, provided he or she takes account of the specific and unique features of the Employment Tribunal system as considered below.

2. The current system

2.1 An Employment Tribunal full panel consists of:

(a) an Employment Judge (legally qualified); and

(b) two lay members:

(i) one from an employee background (*such as a trade union representative*); and

(ii) one from an employer background (*such as a human resources specialist*).

2.2 Currently, certain Employment Tribunal claims may be heard by an Employment Judge sitting alone. From 2012 these have included unfair dismissal claims and claims in which the parties have agreed in writing that they should be heard by a Judge sitting alone. However, a Judge may consider in his or her discretion that the claim should be heard by a full panel, taking into account certain prescribed circumstances:

(a) whether there is a likelihood of a dispute arising on the facts which makes it desirable for the proceeding to be heard by a full panel;

(b) whether there is a likelihood of an issues of law arising which would make it desirable for the proceeding to be heard by a Judge alone;

(c) the views of the parties; and

(d) the existence of any concurrent proceedings that a Judge does not have jurisdiction to hear alone.

2.3 In the Employment Appeal Tribunal, since 25 June 2013, Judges hear cases sitting alone unless they otherwise direct.

3. Background

3.1 Although much has changed since the introduction of the Employment Tribunal system 50 years ago, the ethos of the system has always been to provide litigants with a different format and experience than the civil courts - less court-like and legalistic. The involvement of lay members, referred to as an "industrial jury" is seen as a defining characteristic.

3.2 Sir Andrew Leggatt when reviewing the Employment Tribunal system in 2001 stated:

> "*what has rendered the [Employment Tribunal system] successful has been the composition of the tribunal, the absence of fees and the proximity of ACAS*".

3.3 He further stated:

> "… *one of the defining characteristics of the Employment Tribunal is that it has wing members who bring experience of both sides of industry. Users argue strongly that having members with that experience participating directly in the decision-making process leads to better decisions and that a panel including both lawyers and non-lawyers is more accessible. We agree and recommend that three-member panels should remain the norm for ET cases*."

3.4 Specialist experts, similar to assessors (who provide advice and reports at the direction of a Judge in the civil court system), are mooted as possible replacements to lay members. Unlike assessors, lay members have a decision-making role (rather than an advisory role) and attend the entirety of the hearing. Lay members bring the whole of their working experience to the decision-making process and contribute to that on an equal footing with a Judge.[1] It is considered that this factor contributes considerably not only to their contribution in seeking to apply good employment practice in the determination of fact and the application of the law to the facts, but also in terms of the acceptability of decisions made, particularly when unrepresented parties and trade unions are involved.

3.5 So whilst it is accepted there are cases where the "expertise" of lay members is less relevant, such as disputes over the interpretation of contract, or the non-payment of wages or holiday pay or the like, the reality is that such issues do not form the majority of the claims that are currently dealt with by the Employment Tribunals. This is particularly the case now, one would think, given that the introduction of Tribunal fees has removed so many of these claims from the system.

3.6 Much of the decision-making process of an Employment Tribunal is factual – e.g. whether conduct is "fair in all the circumstances" or has caused "detriment", whether an employee has sufficiently mitigated his or her loss, how long it is likely for the employee to find another job and how seriously contributory conduct should be rated. It is workplace experience, not legal precedent, which is relevant to these issues. It is considered that lay members' workplace experience here is invaluable to the decision-making process.

[1] See a decision of the EAT in *Kellaway v Thames Valley Police* [2000] IRLR 170 which held, inter alia, that the Chair could be out voted by the lay members.

3.7 It is the Working Party's view that the public's perception of the Employment Tribunal system is that it is generally more accessible, and less formal, than the civil courts. This is in no small part due to the existence of lay members. Removal of such lay members risks a reduction in confidence of potential Claimants to engage the system, especially for those who are unrepresented.

3.8 Generally, where the facts are in dispute in an Employment Tribunal claim, it is considered that the quality of decision-making is higher, and the appearance of justice being done is greater, when lay members are present. Judges may not have practical experience of being employed or engaged in a workplace (although it is accepted that is not always the case given many may, for example, have been solicitors in private practice with management responsibilities, or may have been from an in-house background). Employment Judges may not be familiar with the industrial context and are often 'educated' by their lay colleagues.

3.9 It is recognised, that in an era of austerity, there are cost and administrative convenience arguments in reducing the role of lay members. However in our view, the cost-saving must be carefully scrutinised, and appropriately balanced, against what is likely to be lost as a result.

3.10 In recent years there has been considerable improvement in the quality of lay members, and accordingly, arguments about delay in legal proceedings to accommodate lay members' "keeping up" are generally not considered tenable. One way of dealing with this may be, in our view, better selection, training and appraisals processes for lay members.

3.11 However there are cases where the background or subject matter are particularly complex. Financial Services is one such example; others include technology, life sciences and cases involving the pharmaceutical industry. To some extent this can be addressed by the use of glossaries, particularly where complex terminology and opaque algorithms are in issue. Of course even high value Financial Services cases can still derive from say, whistleblowing and discrimination allegations, where practical experience of workplace cultures may well be at a premium. There may be scope for a judge to sit alone in appropriate cases, and for them to have the aid of a specialist expert to advise on, for example, complicated financial terminology, methodology and algorithms.

3.12 Last-minute postponement of hearings, in our experience, is often due to the unavailability of a Judge, not a lay member.

4. Relevant judicial comment

4.1 In our Response to Proposals for a Single Employment Court (12 April 2016), we referred (at page 8) to the view of Lord Justice Mummery, both a former President of the EAT and a Judge of the Court of Appeal for many years. In *Aylott v Stockton on Tees Borough Council*, he described lay members as being indispensable for the actual experience of industrial relations and of day to day life in the workplace that they bring to [tribunal] decisions.

4.2 In the Employment Appeal Tribunal case of *Mitchell v St Joseph's School UKEAT/0506/12*, the late HHJ McMullen QC, sitting alone in an unfair dismissal appeal, observed that there was a danger for Judges sitting alone to take a subjective

"substitution mind-set" approach (impermissibly substituting their judgment for that of the employer in unfair dismissal cases). He noted (at paragraph 33-35):

> *"This is the first appeal which I have heard, as a judge alone in this court, from a judge alone at the Employment Tribunal on a case of misconduct. This is because the Employment Tribunals Act 1996 was changed in 2012 for this to happen. It seems to me that there is a danger, when a judge sits alone, in failing to recognise the importance of the task as set out by Lewison LJ, and Sir Stephen Sedley which is reviewing the material before the employer. The industrial jury has always seemed to me to be an inapt analogue and now Sir Stephen Sedley has consigned it to history. That is put beyond doubt by the introduction of the judge-alone jurisdiction. A specialist judge is not a jury.*
>
> *Using the first person singular may lead the unwary to develop the substitution mindset. The law is the same, whether the hearing is being conducted by a judge alone or by a three-person Tribunal. The chemistry of the decision-making will obviously be different. Where three people from different experiences of industry and law come together, there is bound to be some give and take and some exchange of views about what falls within the band of reasonable responses of an employer in the circumstances. That is missing when there is a judge alone. The Employment Judge is carrying out a function which is common to single judges in other jurisdictions. Take, for example, judges of the Administrative Court, who are reviewing administrative action rather than making a decision on the substance. Missing out relevant factors in making decisions is a ground for appeal, so is perversity. It is not a misuse of language to describe the hearing of a case of unfair dismissal for misconduct as a judicial review of the employer's procedure and decision.*
>
> *It remains to be seen whether the band of reasonable responses will be widened as a result of single judges deciding without the benefit of lay members' experience in industry."*

4.3 In *Kingston Upon Hull City Council v Schofield and others UKEAT/0616/11*, the Employment Appeal Tribunal commented on the fact that at present it is not possible to order the selection of lay members having particular relevant experience (in this case coming from a public sector or local authority background with experience of job evaluation), noting (paragraph 41):

> *"The Case Management Order indicated that the [Employment Judge] recognised that job evaluation requires specialist knowledge and experience. However counsel were agreed that the [Employment Judge] had no power to make the Order regarding the selection of the non-legal members of the ET. The selection of lay members to sit on an ET panel is made by the President, Vice President or the Regional Employment Judge in accordance with the ET Regulations 8(5) and 9(2)."*

Question 8 – In order to assist the SPT to make sure that appropriate expertise is provided following the proposed reform, which factors do you think should be considered to determine whether multiple specialists are needed to hear individual cases?

Please state your reasons and specify the jurisdictions and/or types of case to which these factors refer.

1. The Working Party considers that a full panel should be retained in discrimination claims where the facts and inferences to be drawn from them benefit considerably from lay members' industrial experience.

2. Despite unfair dismissal claims currently being heard by a Judge alone in most cases, it is the Working Party's view that such claims could better be heard by a full panel except where the parties agree otherwise, as, until recently, it has always done. We believe that the issue of what is reasonable in all the circumstances is most appropriately determined with the assistance of lay members. It is considered that there is an inconsistency in unfair dismissal claims where discrimination on termination is also alleged (generally heard by a full panel) and those where discrimination is not alleged (heard by a Judge alone).

3. If the use of lay members is to be encroached, the Working Party considers that there may be scope to remove lay members in the following cases:

   (a) where the issues are purely legal e.g. contractual claims;

   (b) equal pay claims, where the facts are often both complex and relatively uncontentious, and what is most needed from the Employment Tribunal is an ability to understand and apply very complex legal authority; and

   (c) claims involving particularly complex background or subject matter e.g. those arising from the financial services, technology, life sciences and pharmaceutical sectors, which (particularly in the case of financial services) often involve highly remunerated claimants who are legally represented. In appropriate cases the judge may be aided by a specialist expert to advise on, for example, complicated financial terminology, methodology and algorithms.

4. Specialist experts and assessors (with no decision-making powers) may usefully play some role in the Employment Tribunal system. For example, in whistleblowing cases where they could input their expert knowledge of particular sectors in a way that lay members (even specialist lay members) perhaps could not. They may also have a part to play in assessing the evidence of experts in equal pay and equal value cases where, arguably, lay members are less well suited to make such an assessment and where the issue of good employment practice is less relevant (and, we would observe, that now may be a good time to review their role in this respect). They may also advise the Employment Tribunal in complicated financial services cases, although this may only be relevant where the case turns on specific evidence in relation to practice in such cases. Otherwise assessors cannot be considered as a replacement for lay members (for the reasons outlined in the response to Q.7 above).

5. There may also be scope to provide that an Employment Judge be permitted to order that the lay members selected for a particular claim have specialist knowledge and experience relevant to the claim. In that respect one issue may be to investigate the extent to which there will be a potential body of experienced lay members from both an employer and employee perspective in, for example, the Financial Services sector.

6. **IMPORTANT RIDER:** There is another view on lay members which is, we acknowledge, held by some of our Members, and it is right to report that here. It is that the role of lay members has become so marginalised, and the quality so variable, that they may not be able to continue to play a meaningful part in Employment Tribunals in the future. That is, unless there is significant investment to ensure the quality is universal and/or a new cadre are introduced, who are more familiar with the modern workplace, which has changed so significantly, particularly over recent years. They would add that lay members can slow the process, principally for three reasons. First, listing hearings convenient to three people is more challenging than for one. Secondly, judgments take longer to materialise if they need to be agreed between three people whose availability may be hard to secure. Thirdly, hearings can, they argue, take longer if lay members take time to grasp certain points that may be absorbed more quickly by Employment Judges, who may be more familiar with the process. This view is not taken by the majority of our Working Party Members, but we felt nonetheless that we should make it in this Response, as it is a legitimate contrary view.

7. Finally, we suggest that there should be regular recruitment exercises to replenish the pool of lay members. This would ensure they come from a wide range of backgrounds, including some of the new industries that have developed over time. In that respect, they may also contribute to the Tribunal's understanding of some of the new technical terms and concepts, that may not otherwise be familiar to lay members whose work experience may have been more heavily concentrated in the more traditional industries, rather than with the hi-tech economy that embraces many of our workplaces today.

Appendix 1

Members of Working Party

Richard Fox, Kingsley Napley LLP (Chair)
Emma Burrows, Trowers & Hamlins LLP
Robert Davies, Walbrook Law LLP
Susan Doris-Obando, Freshfields Bruckhaus Deringer LLP
Peter Frost, Herbert Smith Freehills LLP
Anthony Korn, N° 5 Barristers Chambers
Bronwyn McKenna, UNISON