Senior President of Tribunals' Consultation on Panel Composition in the Employment Tribunals and the Employment Appeal Tribunal

Response from the Employment Lawyers Association

24 April 2023

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INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. A Working Party, co-chaired by Arpita Dutt, Elaine McIlroy and Jennifer Sole was set up by the Legislative and Policy Committee of ELA to respond to **Senior President of Tribunals' Consultation on Panel Composition in the Employment Tribunals and the Employment Appeal Tribunal.** Members of the Working Party are listed at the end of this paper.

3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership. The views in this response represent the views of ELA and do not represent the views of any organisation which any working party members are affiliated with.

EXECUTIVE SUMMARY

4. It is not ELA's place to make comments on the policy aspects of the call for evidence, but we do consider the contribution of lay members' workplace knowledge and experience remains extremely valuable in the effective adjudication of claims and the interests of justice. We detail below the nature of the benefits they bring to decision-making and various empirical evidence supporting this from users of the Tribunal service. It is our view that there are alternative, more proportionate measures that could be considered to increase efficiency, speed up listing and reduce costs, rather than further limiting the number or types of claims heard by lay members. All parties and the Employment Tribunal and Employment Appeal Tribunal ("**EAT**") have a duty to further the Overriding Objective: this requires a balancing exercise by dealing 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.

5. We recognise that some claims may not require lay members to be involved in their determination, based on their particular facts and characteristics. Whilst we consider there should be detailed review of each jurisdiction, it is our view that broadly where an evaluative exercise requiring workplace knowledge or discrimination expertise is required in reaching a fair and just determination of the issue, we consider that such claims would be suitable for a full panel regardless of whether the issue is being determined at a preliminary or substantive hearing.

QUESTION 1

DO YOU AGREE THAT CASES IN THE EMPLOYMENT TRIBUNALS WHICH ARE CURRENTLY HEARD BY A PANEL SHOULD INSTEAD BE HEARD BY A JUDGE ALONE BY DEFAULT.

6. We consider that the approach that cases in the Employment Tribunals which are currently heard by a panel should instead be heard by a "Judge alone by default" ("**JABD**") risks undermining the effectiveness and perceived and actual fairness of Employment Tribunal decisions. The role of lay members in many cases lies at the heart of whether a particular claim is justly determined because of the influence of their workplace and sectoral experience on decision-making. Knowledge of current employment practices are often relevant to the determination of the legal and factual issues in many claims.

7. Rather than taking a broad-brush approach, we suggest that a detailed review of the Employment Tribunals' jurisdiction under section 4(3) Employment Tribunals Act 1996 be conducted (see the response to question 3 below).

8. We support the position that there should be presumptions, either in favour of a Judge alone, or for a full panel, depending on the type of claim issued.

9. As we set out in response to question 3, we believe there is a relatively straightforward methodology that can be used to determine whether a case should be JABD or not. That depends, in broad terms, on whether a particular cause of action calls for a determination of an issue of reasonableness, other significant evaluative factors, or where the tribunal stands "in the shoes" of a decision-maker.

10. We note that in this consultation, little is said about the large number of jurisdictions where the Employment Tribunal hears appeals from decision-makers. Those decision-makers are usually non-departmental public bodies with specific statutory duties. For example:

    10.1. Employment Agencies Act 1973, s 3A (1) (application for prohibition order)

    10.2. Health and Safety at Work etc Act 1974 (appeal against prohibition notice)

    10.3. Industrial Training Act 1982 (appeals against training levies)

11. We suggest that where there is a statutory JABD position, it can be reviewed subject to an application made by the parties, as it is currently. We would encourage the Presidents of the Employment Tribunals to amend the current case management agenda to include a question relating to this subject. We would also recommend that it would be beneficial for there to be Presidential Guidance on this question, to which litigants in person or otherwise vulnerable parties can be directed such to place them on an equal footing.

12. In respect of total claims brought in 2020/21 (the last period for which annual data is available), 117,926 Employment Tribunal claim forms were accepted[1]. A claim form can contain a number of grounds, known as jurisdictional complaints. The total number of discrimination claims presented under the Equality Act 2010 was 34,719, unfair dismissal claims was 23,904, whistleblowing claims was 3,128, equal pay claims was 8,509 and part time workers regulations claims were 2,766. The largest category of Employment Tribunal claims were discrimination claims.

13. Given the number of discrimination claims, we acknowledge that it is more costly for such claims to continue to be heard by a full panel, particularly as these are often multi-day hearings. However, we note that the diversity of lay members is proportionately higher than Judges with respect to those from an ethnic heritage, women and disabled people. This suggests there are more lay members who may have direct life experience of the workplace where discrimination might arise, thereby providing a source of explicit and tacit knowledge and insight in these cases, which can have complicated contested facts. Where lay members share a protected characteristic such as gender, race or disability with a party to litigation, this may enhance the credibility of an Employment Tribunal panel and the judgment's findings. Here, the public perception relating to the composition of the panel is important, in addition to supporting the strategic objective of the Senior President of Tribunals ('SPT') in the promotion of diversity in the judiciary in the majority of Employment Tribunal claims. This way, the composition of Employment Tribunals can be seen more fully to reflect the society in which they operate.

14. Furthermore, we consider lay members' workplace experience is particularly valuable in discrimination claims where there is an evaluative element such as reasonable adjustment disability claims, harassment claims and the issue of proportionality in indirect discrimination claims. Supporting evidence of the valuable expertise in discrimination that some lay members have arises in Parliament's express intention in section 114(7) of the Equality Act 2010, supported by Guidance, that lay assessors sit in the County Court for discrimination claims. The assessor must have suitable skills and experience and the appointment may be from any source; however, in ELA's experience, lay members of the Employment Tribunals are invariably appointed as the assessor. This is currently achieved by an approach to the Regional Employment Judge for the local Employment Tribunal who will provide details of lay members along with CVs or supporting statements. Not only does this illustrate the benefit of this pool of expertise in lay members, we are concerned that reducing the use of lay members in the Employment Tribunal will lead to lay members leaving, leading to the depletion of its valuable pool of expertise to the detriment of the fair and just determination of

[1] https://data.justice.gov.uk/courts/tribunals#chart-tab-courts-tribunals-employment

claims, incurring delay and increasing cost to the Employment Tribunal and County Court systems.

15. We note that the SPT's consultation does not appear to have considered this possibility and query whether at present any decision taken would be compliant with the public law duty in section 149 of the Equality Act 2010.

16. We note that there is no evidence provided within the consultation that the availability of lay members delays the listing of hearings (although we acknowledge that in scheduling lengthy hearings or part-heard hearings it is inevitable that scheduling availability for three individuals may impact the date of a hearing). To the extent that it may cause delay, we consider this to be a resource issue (there may be insufficient members recruited, or an inefficiency issue arising from the use of lay members) (see our response to question 8 below). If there is delay, we would expect data to be available to demonstrate the length of that delay and whether it is of such significance to outweigh the valuable contribution of lay members. We would caution against an assumption both (1) that there is delay and (2) that the delay is of such significance to outweigh the benefits as that could potentially give rise to grounds for challenging the SPTs decision.

17. In accordance with research[2] conducted in 2010-2011 by Greenwich and Swansea Universities, which investigated the role of lay members in the Employment Tribunal and EAT, discrimination claims were a jurisdiction where lay members were found to provide significant value.

18. We would therefore be concerned if lay members were removed from sitting on discrimination claims.

QUESTION 2

DO YOU AGREE THAT UNFAIR DISMISSAL CLAIMS IN THE ETS SHOULD CONTINUE TO BE HEARD BY A JUDGE ALONE BY DEFAULT?

19. It is our view that there are certain types of unfair dismissal claim which are suitable for determination by a JABD but there are other types of unfair dismissal claims which would benefit from being determined by a full panel.

20. We consider that those unfair dismissal cases where the only question to be determined is what the reason or principal reason for dismissal is (due to the claim being for 'automatic' unfair dismissal on one of the protected grounds) are potentially suitable to be heard by a JABD for the reasons explained below.

21. However, certain automatic unfair dismissal claims and remedies also involve determination of matters such as reasonableness and/or whether a particular allegation was made in good faith (in addition to the determination of the reason for dismissal). As a result, and for the reasons explained below, we consider that these claims would be better determined by a full panel rather than a JABD:

[2] Corby, S. C. & Latreille P. L, The role of lay members in employment rights cases – survey evidence, University of Greenwich and Swansea University, November 2011. pages 1- 42

s. 99 (by virtue of the Maternity and Parental Leave etc Regulations 1999);
s. 100 (Health and Safety cases);
s.103A (by virtue of the fact that a protected disclosure was made);
s.104 (assertion of a statutory right);
s.104B (tax credits);
s.104D (pension enrolment); and,
s.105 (redundancy on protected grounds).

22. For ordinary unfair dismissal claims which are not automatic unfair dismissal claims, and where the issues to be determined go beyond the reason for dismissal ("**Ordinary Unfair Dismissal Claims"**), we consider that there is a benefit in having a full panel determine those claims. This is because additional matters have to be determined which often involves the Employment Tribunal being required to carry out a different type of analysis in its decision-making. Ordinary Unfair Dismissal Claims also require the Employment Tribunal to undertake an evaluative analysis of the "reasonableness" of the employer's actions in deciding to dismiss. We consider that this evaluative analysis, benefits from the experience of lay members.

23. Our view is that these claims benefit from the contribution of lay panel members because they offer valuable experience of the realities of the workplace from the perspective of both the employer and the employee. That is, lay members can draw on their experience of the workplace to form a view on what is, or is not, within the band of reasonable responses/a reasonable procedure on the part of an employer. We consider that the knowledge and experience of lay members may be relevant in, for example, capability and ill health dismissals and some other substantial reason for dismissal cases, and in variation of contract cases. This experience is one which many Judges may not have due to their employment history and therefore lay members are able to contribute meaningfully to an evaluation of the reasonableness of the employer's actions and provide a balance to the judicial perspective. The contribution of lay members may be less valuable in automatic unfair dismissal claims which do not involve an evaluation of the reasonableness of the employer's conduct.

24. As referred to in the response to question 1, we consider there to be a benefit in terms of the quality of decision-making in having a full panel rather than an Employment Judge when decisions involve consideration of matters of reasonableness and certain other matters that require evaluation. However, we do appreciate that there may be constraints in terms of resources within the Employment Tribunal system and that it may cause challenges if every unfair dismissal claim were to require a full panel to be convened. We also appreciate that this may result in further delay in terms of claims being heard if a full panel needs to be convened on each occasion and we recognise that further delays in terms of hearing dates presents issues in terms of access to justice for both Claimants and Respondents. Whilst our view is that there is a significant benefit in having a full panel in considering Ordinary Unfair Dismissal Claims we also acknowledge that limited resources may make this difficult in practice, in all cases. It would therefore be helpful for an assessment to be carried out to consider the impact on the Employment Tribunal system that it may have in the short-medium-and long-term if all Ordinary Unfair Dismissal Cases were to be heard by a full panel in terms of any increases in delays to a matter progressing to a full hearing for example. We acknowledge that this factor may require to be weighed in the balance in deciding what claims should be heard by a full panel.

25. The consultation paper highlighted an inconsistent approach that is currently taken, in that a worker who is subjected to a detriment by reason of having made a protected disclosure can bring a claim under section 47B (which would be heard by a full panel) whereas a determination of whether someone had been dismissed by reason of having made a protected disclosure would not involve a full panel. In specific response to this issue, this unfair dismissal claim requires an evaluation of several factors including whether there was a reasonable belief, whether the disclosure was in the public interest and whether, in respect of any award of compensation, it was made in good faith. We consider therefore that the involvement of lay members in this evaluation would add to the credibility of the determination of these factors and that it would make sense for such protected disclosure unfair dismissal claims to also be dealt with by a full panel. This would remove the inconsistency.

26. In addition, consideration could be given to appointing lay members with specialist sectoral experience such as those with an NHS background in NHS whistleblowing cases, or financial services experience. This could assist in determining the norms associated with discerning the content of a particular protected disclosure and whether it includes sufficient factual content and specificity contributing to the assessment of reasonable belief.

27. As explained above, we consider the decision regarding the composition of the panel should be determined at a case management preliminary hearing.

28. The views of ELA appear to align with research conducted in 2010-2011 by Greenwich and Swansea Universities[3] which investigated the role of lay members in the Employment Tribunal and EAT and whether and how they added value.

29. Specifically, the research found:

    29.1. Lay members' main contribution derived from their workplace experience, which the professional Judges did not have, and their injection of a practitioner perspective which balanced Judges' legal perspective.

    29.2. High percentages of both Employment Tribunal lay members and Judges (100% and 80% respectively) assessed unfair dismissal as a jurisdiction where lay members added value to decision-making, despite a government proposal (at that time which was subsequently implemented) to enable Judges to sit alone in unfair dismissal cases.

30. Notwithstanding the findings of this research, the Employment Tribunals Act 1996 ("ETA") was amended in 2012 pursuant to the Employment Tribunals Act 1996 (Tribunal Composition) Order 2012 to provide for unfair dismissal cases to be heard by a Judge alone.

31. Subsequent to the change in the ETA which resulted in unfair dismissal claims being heard by a JABD, there was an EAT decision published which we consider illustrates the benefit in having a full panel in unfair dismissal claims and which demonstrates the value which their workplace experience can have in terms of decision-making.

[3] ibid.

32. In the unfair dismissal case of *McCafferty v Royal Mail Group Ltd [2012] UKEAT 0002_12_1206 (12 June 2012)*, the Claimant was a postman with 19 years' service. He was dismissed for gross misconduct by reason of alleged dishonesty for knowingly, without authorisation using the Royal Mail taxi account for all his travel to work. The decision was a majority one (the case was heard before the 2012 rule change). The lay members found the dismissal to be fair. The Employment Judge, in the minority, considered that the dismissal was unfair. The lay members recognised that not all employers might have dismissed, but in the circumstances where the company believed the Claimant guilty of the alleged misconduct and that this conduct had caused a breakdown in the trust and integrity required in the employment relationship, the dismissal fell within the band of reasonable responses. The Employment Judge acknowledged the Claimant's actions could be defined as theft and gross misconduct but considered that his long service, clean disciplinary record and the option of a lesser sanction outweighed the other factors. She considered that the manager's conclusions regarding loss of trust and confidence were based more on their belief that the Claimant had tried to hide his use of the taxi account (a belief she did not consider they were entitled to hold).

33. The employee appealed, arguing that the Employment Judge's position was correct in law and that the dismissal was not within the range of reasonable responses. However, the decision of the majority (lay members) was upheld by the EAT. The conclusions of the Employment Judge were found to clearly result in her substituting her own views, despite prefacing them with a self-denying ordinance to refrain from doing so. Lady Smith at the EAT pointed out that the lay members of the Employment Tribunal had in part drawn on their 'valuable common sense' and articulated her concerns about the effect of the Employment Tribunals Act 1996 (Tribunal Composition) Order 2012 SI 2012/988 which permitted an Employment Judge to hear unfair dismissal cases sitting alone. In this case, the result would evidently have been different had the decision been taken by an Employment Judge sitting alone. This case illustrates that a full panel of the Employment Judge and lay members may be a better check on a "substitution" mindset prevailing in unfair dismissal cases.

34. More recent research[4] conducted in 2017 after the default rule of having certain unfair dismissal claims heard by JABD had bedded in for 6 years), found that most Judges who were involved in the research wanted the reinstatement of lay members[5] to hear unfair dismissal cases. Lay members were also unanimous in their views that they should sit on all cases. The most important contribution to the deliberations and judgment to unfair dismissal cases was said to be their assessment of the reasonableness of the employer's behaviour based on their knowledge of workplace norms and deep knowledge of workplace industrial relations built up over many years. Our experience accords with these findings.

[4] Burgess, Pete et al. (2017) : The roles, resources and competencies of employee lay judges: A cross-national study of Germany, France and Great Britain, Working Paper Forschungsförderung, No. 051, Hans-Böckler-Stiftung, Düsseldorf, https://nbn-resolving.de/urn:nbn:de:101:1-201711153217.

[5] Referred to as 'Lay Judges' in the above research.

QUESTION 3

DO YOU AGREE THAT OTHER KINDS OF CLAIMS IN THE ETs WHICH ARE CURRENTLY HEARD BY A JUDGE ALONE BY DEFAULT SHOULD CONTINUE TO BE?

35. We would have concerns if other kinds of claims currently heard by JABD continued to be so heard. Our suggestion is that the list of jurisdictions should be individually reviewed by the Tribunal Procedures Committee. We attach at Appendix 1 a jurisdiction list for consideration setting out each claim, whether it is presently heard by a Judge alone and whether the determination of the claim is broadly a factual or evaluative one.

36. There are several claims in the list which are presently heard by a full panel, and which could be heard by an Employment Judge alone by default because they only require factual determinations, for example:

s. 24 Health and Safety at Work Act
s. 31 (5) (e) Social Security Pensions Act 1975 recognition of unions and whether consultation properly completed for contracting out
s. 12 Industrial Training Act 1982 appeal against training levies
s. 137 (2) TULRCA 1992 'closed shop' and union membership detriment when employment refused
s. 138 (2) TULRCA 1992 detriment when employment refused by employment agency
s. 145 A (5) TULRCA 1992 inducement payments – membership
s. 145 (B) (5) TULRCA 1992 inducement payments – bargaining
s. 146 (5) TULRCA 1992 trade union detriment
s. 169 (5) TULRCA 1992 pay during time off for union duties
Sch. A1 para 156 (5) TULRCA 1992 detriment in the recognition process
s. 57ZC ERA 1996 time off for ante-natal care
s. 57ZM ERA 1996 time off for adoption appointments
s. 57ZQ ERA 1996 time off for adoption appointments (agency workers)
s. 63I ERA 1996 right to request study or training
s. 177 (1) ERA 1996 claims for a redundancy payment for those not employed under a contract of employment
s. 24 (1) National Minimum Wage Act 1998 right not to be subjected to a detriment
Reg 32 (1) Transnational Information and Consultation of Employees Regulations 1999 right not to be subject to detriment in respect of EWC membership
Reg 22 (1) Merchant Shipping (Hours of Work) Regulations 2002

QUESTION 4

DO YOU AGREE THAT CASES IN THE EAT SHOULD CONTINUE TO BE HEARD BY A JUDGE ALONE BY DEFAULT?

37. Given that the EAT hears appeals on points of law and therefore has a narrower scope than Employment Tribunals in many respects, our view is that the default should continue to be that cases should be heard by a Judge sitting alone, with there continuing to be a discretion to have a full panel where the EAT considers it necessary.

38. Avoiding the need to convene a panel in every case leads to the more efficient hearing of appeals. This is also efficient in terms of the use of resources.

39. We do however think that it is important that the EAT should consider having the ability to convene a panel in some cases. There may be some exceptional cases which are suitable for inclusion of lay panel members. Our experience has been that in a number of cases in which lay members have sat, they have made a valuable contribution.

40. Rather than being determined by jurisdiction, the type of appeal specified in the grounds of appeal would be more relevant to the determination about which cases should be heard by a panel. After the sift stage, the parties could be invited by the Registrar to make submissions on the necessity for lay panel members having regard to specific criteria. For example, a perversity appeal which requires a deeper analysis of the findings of fact and a determination of reasonableness to meet the high threshold applied (as per *Yeboah v Crofton [2002] IRLR 634, CA*) is met, may be a suitable case for a full panel. Alternatively, if an issue arose about whether there was bias in the decision-making at the Employment tribunal stage, that may be a case where there is a benefit to having lay members involved in the consideration of the issues. We would recommend continuing to allow EAT Judges to make the ultimate decision having considered these representations.

41. We note that EAT Judges exercise their discretion to convene a panel in around 15% of cases at present.

42. We note the comments made in the consultation paper that having panels with fewer legal members is likely to mean less diversity as a there are more lay members who are women and there are more lay members from ethnic minority groups. We do therefore consider that it is important that lay members have a role to play in decision-making at the EAT stage where the issues warrant it. The reduction in diversity is a downside to having fewer decisions made by lay members. Ensuring that the appointment process for EAT Judges is as inclusive as possible is therefore important as an ongoing aim.

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?

43. We do not consider there to be any discernible benefit to this approach in terms of cost, efficiency or the interests of justice. The other jurisdictions to which this power applies are not analogous to the types of cases heard by Employment Tribunals.

44. The introduction of two Judges could cause split decisions. With a panel of two, there would need to be some mechanism to overcome a "deadlock" situation with one of the two having the casting vote. It would be better to have a panel of 3, which reverts to the need for one Judge and two panel members.

45. In relation to the suggestion in the consultation that trainee Judges could be involved in determining claims, we understand that shadowing takes place whereby a second Judge may observe a case with another Judge making the decision by themselves. We understand that in such cases the second Judge does not participate in the decision-making. We understand that participating in the actual decision-making may add additional elements to the training and development of the Judge. However, our view is that the same training and development aims be achieved without them participating in the decision itself.

46. If this route is followed, we would suggest that guidance would need to be produced on the principles to be applied when deciding such cases. For example, if the two Judges disagreed on the judgment to be made, would the Judge of greater seniority make the ultimate decision with the junior Judge providing a dissenting judgment? This creates an additional layer of uncertainty and may result in more cost by increasing the number of appeals. We submit that it would not be appropriate in such instances to have a merits hearing determined by that trainee Judge.

QUESTION 6

DO YOU AGREE THAT DECISIONS OTHER THAN AT SUBSTANTIVE HEARINGS SHOULD BE MADE BY A JUDGE ALONE IN ALL CASES?

47. The current position, under Rule 55 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, is that non-substantive hearings (i.e., preliminary hearings) are heard by a Judge alone. However, parties can request that these hearings are heard by a full panel.

48. We recognise that requiring more full panel preliminary hearings may cause delays in listing cases and therefore accessing justice (albeit no evidence has been provided that this is the reason). We consider that maintaining the default position and permitting exceptions would maintain flexibility and fairness in the system.

49. It is not our view that all decisions at other preliminary hearings should be heard by a Judge alone however, it is our view that the default position should be a JABD hearing. There are a number of hearings that are already heard by a full panel, and we believe

it should be open to the parties to apply for a full panel in an appropriate case. Such an application would be made at a case management discussion having regard to the factors set out at paragraphs 50and 51 below. We consider that there should be a presumption in favour of some hearings being heard by a full panel.

50. Examples of preliminary hearings suitable for a full panel may include the following:

Stage 2 equal value decisions

50.1. These are presently heard by a full panel and often comprise complex fact-finding hearings relating to the actual work done at a workplace by sample Claimants and named comparators whereby the workplace experience of lay members remains of substantial value.

Worker status claims

50.2. The determination of issues relating to personal service, control and mutuality of obligation can be nuanced and determined by norms in certain industry sectors.

Whether a Claimant is disabled

50.3. The nuanced consideration of whether the effect of an impairment is 'significant' (i.e., more than minor or trivial) is an area where lay members would assist the evaluative deliberation. Consideration could be given in particular to whether lay members with medical expertise may be useful in this determination.

Whether a particular religion or belief is protected

50.4. The determination of the genuineness of the belief requires an assessment of its cogency, seriousness and whether it is worthy of respect in a democratic[6] society amongst other evaluative factors.

Time limits

50.5. An evaluation of the weight given to certain factors in consideration of whether it is 'just and equitable' to extend time in discrimination cases involves an evaluative rather than purely factual exercise.

QUESTION 7

IN CASES WHICH ARE JUDGE ALONE BY DEFAULT, HOW SHOULD THE DISCRETION TO SIT WITH A PANEL BE GUIDED AND EXERCISED?

51. In the context of the resolution of civil disputes, the governing principle underpinning the Employment Tribunals rules, is to deal with cases fairly and justly and, in relation to the court rules, at proportionate cost (CPR 1.1 and Rule 2, Employment Tribunals Rules of Procedure 2013).

52. These principles, known as the 'Overriding Objective' include, so far as practicable –

51.1 ensuring that the parties are on an equal footing;

[6] Grainger Plc & Ors v. Nicholson [2009] UKEAT 0219_09_0311 (3 November 2009)

51.2 dealing with cases in ways which are proportionate to the complexity and importance of the issues;
51.3 avoiding unnecessary formality and seeking flexibility in the proceedings.
51.4 avoiding delay, so far as compatible with proper consideration of the issues; and
51.5 saving expense.

52 The Overriding Objective also applies to the EAT.

53 Presently, the circumstances to be considered in deciding whether lay members are needed in relation to the Employment Tribunal are set out at Section 4 (4) of the ETA 1996, namely:

53.1 the likelihood of a dispute arising on the facts;
53.2 the likelihood of an issue of law arising;
53.3 the wishes of the parties;
53.4 whether or not there are other proceedings being brought that can best be heard at the same time and for which a full panel is needed (such as discrimination or whistleblowing proceedings).

54 We consider the criteria applied when exercising the discretion should be reviewed by the Tribunal Procedures Committee (see paragraphs 64 and 65 below). Alternatively, in the same way as applies to orders relating to matters such as costs, preparation time and wasted costs awards, the exercise of such discretion by Judges would be set out in the appropriate Employment Tribunal/ EAT rules and their Practice Directions. Such factors may, for example, include the views of the parties, delay on listing that may prejudice either party caused by the administrative arrangements required to constitute a full panel and where lay members would assist in the evaluation of the issues in dispute due to their sectoral or general workplace experience. The primary criterion, however, should be whether the claim involves an issue where the input of lay members would assist in the determination of the claim.

55 The SPT's stated position that the presence of lay members often affects the length of time to hear a case does not represent the experience of members of this Working Party. While there is justified concern (but no evidence is presented) that making arrangements for a full panel may require greater time for a listing window than if the claim had been heard by a single Judge, this may be ameliorated by recruiting more lay members.

56 It is our view that there is no significant difference in time taken for a hearing to complete due to members' questions or delivering a judgment (albeit that there may be some time involved in circulating a draft Judgement to the panel for comment before it is finalised we do not consider that this adds significant additional time). While practices vary, our experience is that often lay members do not always participate in the judgment writing process but do participate in the discussions relating to findings of fact and conclusions. It seems unlikely that this will therefore be of any significant influence as a factor.

57 If the discretion lies with the SPJ, we presume that the SPT will exercise his power under the new section 4 (7) ETA to delegate the actual selection of panels to the

relevant territorial President of the Employment Tribunals, who will themselves delegate to the Regional Employment Judge for the relevant region. Bearing in mind that sub-delegation is created by the current regulation 6 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, and that paragraph 17 of the new Schedule A1 to ETA provides for the Tribunal Procedures Committee ("TPC") to make any ancillary powers as are necessary for the proper discharge of its functions, we would suggest that the SPT provide in regulations that:

"*the President of the Employment Tribunals, or any person to whom their functions are delegated may, in accordance with Procedure Rules (for which see section 37QA of the Employment Tribunals Act 1996) order that in any case where by regulation X a case is to be heard by an Employment Judge alone, be heard in accordance with regulation Y*" Regulation Y will be the relevant regulation made under section 4 (6) designating the panels of members for full Tribunals.

58 In our view this represents a proper exercise of the SPT's functions in two ways. First, the TPC is, in our view, better placed to assess what factors ought to be considered when deciding whether a full tribunal ought to be convened. Its composition better reflects judicial and practitioner experience than the SPT acting alone. Secondly, given the ability of the TPC to make rules that can be dealt with by practice direction, as with the Civil Procedure Committee (see the new paragraph 18 of Schedule A1) it allows greater flexibility to give discretion to the Presidents of the Employment Tribunals if thought proper, who themselves have greater knowledge of what cases or factors may be relevant.

59 We are concerned, given the stated aim of the SPT in the consultation to reduce the deployment of lay members, that the SPT may risk either taking into account an irrelevant factor in making regulations, or otherwise failing to take into account relevant factors that ought properly to be decided by a rule making body. In our view the proposed answer is a proper exercise of the power and would be a lawful one.

60 ELA would be pleased to work with the legislators to provide comments on any proposals and/or drafts which may assist with writing amendments into such rules.

QUESTION 8

DO YOU HAVE ANY OTHER COMMENTS?

61 <u>Utilising Lay Members Effectively and Efficiently</u>
We are concerned that reducing the claims allocated to full panels would result in the skills of lay members atrophying. To assist with expediting the listing process, we believe that there could be more flexibility in the use of lay members by recruiting a general pool of lay members that could sit in different regions and participate in hybrid or fully virtual hearings.

62 <u>Judicial Mediation</u>
Many lay members may be accredited mediators and could become part of the available pool of judicial mediators rather than reserve the process to Judges alone. In

January to March 2021, the success rate for judicial mediations was 75.6%[7]. This could assist with early disposal of claims, reducing the pressures on listing and the backlog within the Employment Tribunal. This could be particularly helpful if in due course mandated mediation is introduced in the Employment Tribunals, as is currently being contemplated in the civil courts.

63 Risk of bias

As demonstrated in two recent decisions of the President of the EAT in *Higgs v Farmor's School [2022] EAT 102*, it is important that both judges and lay members, but more likely lay members, carefully consider any conflict of interest they may have that could make it inappropriate for them to adjudicate in a particular matter. Guidance to that effect was provided by the President. While conflicts of interest will likely be rare, they are more likely to arise in relation to matters where public opinion is sharply divided and people – including lay members – may want to take an active campaigning stance; in *Higgs* the issues concerned the extent to which children's education should include LGBT issues. Both lay members originally chosen by the EAT to sit on the panel were – in separate challenges – rescued from sitting because of the appearance of bias and ultimately the President heard the case alone. This may indicate that in such cases lay members should not participate or, if they do, considerable care needs to be taken to ensure that the panel is free from any taint of bias.

64 Lack of data supporting consultation proposals

There are several broad propositions made in the consultation which are unsubstantiated by data, for example:

64.1 *"Including non-legal members on the panel may often affect the length of time involved in the hearing of a case and delivering a decision or judgment" (para 13);*

64.2 *"Listing hearings convenient for three members of a panel is often more difficult than it is for a judge alone" (para 13);*

64.3 *"The cost to the justice system of deploying members is significant" (para 13);*

64.4 *"It cannot be maintained that there is inherent unfairness in a hearing before a judge alone" (para 14)*

If, as it appears to be, the main reasons for dispensing with lay members is (1) financial cost and (2) delays caused by diary constraints, we consider that details of the savings in money and time that will be achieved by doing so ought to have been provided.

In 2009/2010[8] and in 2010/2011 there were a total of 236,103 and 218,096 receipts of Employment Tribunal claims of which 57,400 and 47,900 were unfair dismissal claims, compared to 117,926 total claims in 2020/21 and 23,904 unfair dismissal claims. Despite dealing with 50% fewer claims and no longer having to constitute full panel hearings for unfair dismissal claims access to justice caused by delay is worse now than it was 10 years ago. We do not consider the answer to this is reducing the quality of the outcome for the parties by removing relevant expertise from tribunal panels

[7] Exclusive: judicial mediation successful in 75% of cases' (Time Johnson/Law) https://www.timjohnson-law.com/single-post/exclusive-judicial-mediation-successful-in-75-of-cases.

[8] Ministry of Justice Employment Tribunal and EAT statistics 2009-10 (GB), 3 September 2010

hearing claims. That appears to us to be striking the wrong balance in dealing with cases fairly and justly. In 2009/2010 the EAT received 1848 appeals.

65 Increasing the pool of Judges by appointing non-legally qualified but experienced Employment Tribunal panel representatives

65.1 As it stands, by regulations 5 (2) and 8 (2) (a) of the 2013 constitution and rules of procedure regulations, the qualifications required to be an Employment Judge require a person to be formally legally qualified as an advocate, barrister or solicitor.

65.2 The Tribunals, Courts and Enforcement Act (2007) widened the eligibility for many judicial posts, making them open to The Chartered Institute of Legal Executives (CILEX), members of the Institute of Trade Mark Attorneys (ITMA) and the Chartered Institute of Patent Attorneys (CIPA). The Judicial Careers Portal also states that 'Applications are also welcomed from non-traditional legal backgrounds, for example legal academics'.

65.3 So far as we are aware, within the Tribunals under the supervision of the SPT, this leaves the Employment Tribunals as the only Tribunals where people who have regularly appeared before the Tribunals themselves can be barred from judicial membership of it. Removing the requirement for legal qualifications could increase the diversity of representation in accordance with the SPT's strategic objective by being able to recruit from a wider pool of candidates, including legal academics, and increase the level of sectoral and workplace skills and experience of the Employment Judge. Section 6 ETA, which is unaffected by the Judicial Review and Courts Act 2022, permits "any...person whom [a party] desires to represent him" to appear at hearing in the Employment Tribunals. Similar provision is made for the EAT by section 29. Although ELA is an organisation composed of qualified lawyers, we regularly appear in the Tribunals alongside "lay" representatives, many of whom are excellent advocates and lawyers.

65.4 Given the SPT seems likely to revoke and replace, or at least amend, the 2013 constitution and procedure regulations, this would seem to be an appropriate time to consider replacing the requirement for formal legal qualifications with the standard form of wording in paragraph 1 of Schedules 1 to the Tribunals, Courts and Enforcement Act 2007:

(1)The Senior President of Tribunals may appoint a person to be an Employment Judge.

(2)A person is eligible for appointment under paragraph (1) only if the person—

a) *satisfies the judicial-appointment eligibility condition on a 5-year basis,*
b) *is an advocate or solicitor in Scotland of at least five years' standing,*
c) is a barrister or solicitor in Northern Ireland of at least five years' standing, or
d) *in the opinion of the Senior President of Tribunals, has gained experience in law which makes the person as suitable for appointment as if the person satisfied any of paragraphs (a) to (c).*

(3) In this regulation, "gained experience in law" has the same meaning as in section 52(2) to (5) Tribunals, Courts and Enforcement Act 2007, but as if section 52(4)(i) referred to the Senior President of Tribunals instead of to the relevant decision-maker.

65.5 We consider that the tested entry requirements for these applicants would be the same as those presently.

65.6 The remainder of any regulations will of course be provided as necessary, and the Lord Chancellor can make any order under section 85 (3) (d) Constitutional Reform Act 2005 as necessary if the regulations are amended or revoked.

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APPENDIX 1

Enactment/Provision	Jurisdiction	Now	Evaluative or factual
Employment Agencies Act 1973, s 3A (1)	Application for Prohibition order	Panel	Evaluative (suitability based on conduct by employer)
Health and Safety at Work etc Act 1974			
Section 24	Appeal against prohibition notice	Panel	Factual
Section 80 and reg 11 Safety Representatives and Safety Committees Regulations 1977	Failure to permit time off or pay for time off	Panel	Factual
Social Security Pensions Act 1975, s31 (5) (e)[9]	Recognition of unions and whether consultation properly completed for contracting out	Panel	Factual
Colleges of Education (Compensation) Regulations 1975, reg 42	Appeals against compensation decisions	Panel	Evaluative (whether authority entitled to make decision)
Industrial Training Act 1982, s 12	Appeals against training reviews	Panel	Factual (mostly – whether levy properly calculated)
Trade Union and Labour Relations (Consolidation) Act 1992			
Section 66	Unjustifiable discipline	Panel	Evaluative
Section 68A	Unauthorised deduction of union subs	Judge	Factual
Section 70C	Union complaints about collective bargaining for training	Panel	Mostly factual – some evaluation of sufficiency of materials for meetings
Section 87 (1)	Wrongful deduction for political funds	Judge	Factual
Section 137 (2)	"Closed shop" and union membership detriment when employment refused	Panel	Factual – what was the reason for non-employment
Section 138 (2)	As 137 but engagement by employment agency	Panel	Factual – what was the reason for non-engagement
Section 145A (5)	Inducement payments – membership	Panel	Factual – what was the reason for offer
Section 145B (5)	Inducement payments – bargaining	Panel	Factual – what was the reason for offer
Section 146 (5)	Trade Union detriment	Panel	Factual – what was the reason for detriment
Sections 152-3	Trade Union dismissal	Judge	Factual – what was the reason for dismissal
Section 161 (1), 165 (1) & 166 (1)	Interim relief	Judge	Factual – what was the reason for dismissal
Section 168 (4)	Time off for union duties	Panel	Evaluative – what is a "reasonable" time off
Section 168A (9)	Time off for union learning reps	Panel	Evaluative – what is a "reasonable" time off

[9] And also the Occupational Pensions Schemes (Contracting-out) Regulations 1996 reg 4(2) and (3), and the Occupational Pensions Schemes (Disclosure of Information) Regulations 2013 reg 10

Section 169 (5)	Pay during time off for union duties	Panel	Factual – what is normal pay
Section 170 (4)	Time off for union activities	Panel	Evaluative – what is a "reasonable" time off
Section 174 (5) & 176 (2)	Union exclusion or expulsion	Panel	Evaluative – what is "fair"
Section 189 (1)	Failure to consult about redundancies	Panel	Factual – claims based on s 188 (1B) relating to who are "appropriate" representatives (they are exhaustively defined) and compliance with procedural steps. Evaluative – Adequacy of consultation under s 188 (2), "special circumstances" defence under section 188 (7).
Section 192 (1)	Claim by individual employees for protective award to be paid to them	Judge	Factual – Has the award been paid
Sch A1 para 156 (5)	Detriment in the recognition process	Panel	Factual – What was the reason for detriment
Pensions Schemes Act 1993, s 126 (1)	Failure of Secretary of State to pay insolvent employer's pension contributions	Judge	Factual – Has SoS paid at all and if so correct amount
Employment Tribunals Extension of Jurisdiction Orders 1994,[10] arts 3 & 4	Employee's claim for breach of contract and employer's counterclaim	Judge	Factual – Due to ***Johnson v Unisys*** and the other restrictions in the orders, this becomes solely about contractual terms and damages
Employment Rights Act 1996			
Section 11 (1) & (2)	References relating to s 1 statements and payslips	Judge	Factual – What terms should be in s 1 statement and what should payslip say
Section 23	Deductions from wages	Judge	Factual – What was properly payable wage
Section 34 (1)	Guarantee payments	Judge	Factual – Was C entitled to guarantee pay[11]
Section 48	Employment detriment	Panel	Factual – What was the reason for detriment
Section 51 (1)	Time off for public duties[12]	Panel	Evaluative – What is reasonable time off
Section 57 (1)	Time off for ante-natal care	Panel	Evaluative – Right to pay under section 56 refers to an "unreasonable" refusal
Section 57ZC	Time off for ante-natal care (agency workers)	Panel	Factual – Simply whether time off given and whether paid correctly.
Section 57ZF	Time off to accompany to ante-natal care	Panel	Evaluative – Whether refusal was "unreasonable"
Section 57ZH	Time off to accompany to ante-natal care (agency workers)	Panel	Evaluative – Whether refusal was "unreasonable"

[10] There are two SIs, the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 and the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 SI 1994/1624

[11] Strictly there may be arguments about whether there are implied terms in particular industries such as construction, but these no longer generally arise

[12] Defined in the act in a number of ways, but generally including sitting as a JP (in England & Wales), on tribunals, local authorities, statutory boards or monitoring organisations. Does not include jury service as that is one of the claims under section 48.

Section 57ZM	Time off for adoption appointments	Panel	Factual – Whether agreed time off was paid correctly (section 57ZM (1) (b)) Evaluative – Whether refusal was "unreasonable"(section 57ZM (1) (a))
Section 57ZQ	Time off for adoption appointments (agency workers)	Panel	Factual – Whether agreed time off was paid correctly (section 57ZQ (1) (b)) Evaluative – Whether refusal was "unreasonable"(section 57ZQ (1) (a))
Section 57B (1)	Time off for dependants	Panel	Evaluative – What is "reasonable" time off and was any refusal "unreasonable"
Section 60 (1)	Time off for trustees of occupational pension schemes	Panel	Factual – was permitted time off correctly paid (section 59) Evaluative – what is a "reasonable" time off (section 58)
Section 63 (1)	Time off for employee representatives[13]	Panel	Evaluative – what is a "reasonable" time off
Section 63C	Time off for young person in England and Wales for study or training[14]	Panel	Factual – was permitted time off correctly paid (section 63C (1) (b)) Evaluative – was refusal unreasonable (section 63C (1) (a))
Section 63I	Right to request study or training	Panel	Factual[15]
Section 70 (1)	Right to remuneration when suspended on medical or maternity grounds	Mixed[16]	Factual – Whether the employee qualifies and rate of pay. Evaluative – Whether employee is excluded from right to remuneration having: "Unreasonably" refused alternative work s 65 (4) (a) (medical), that is "suitable" s 68 (2) (b) (maternity) Not complied with reasonable requirements to try and ensure can work (section 65 (4) (b) – medical) Evaluative – Did employer fail to offer "suitable" alternative work (section 70 (4) – maternity)

[13] Only for collective redundancy and TUPE consultations – section 61 (1)
[14] This probably doesn't raise a specific devolution issue as by section 2 TCEA 2007, the SPJ is president of all the tribunals, even though in practice they are a member of the Court of Appeal of England and Wales. This amendment was also made by the UK Parliament.
[15] This is based on the fact a claim can only be brought for breaches of The Employee Study and Training (Procedural Requirements) Regulations 2010 specified in the Employee Study and Training (Eligibility, Complaints and Remedies) Regulations 2010. Currently the specified breaches all relate to whether something did, or did not, happen.
[16] Complaints about medical suspension are judge alone. Maternity suspension are a panel

Section 70A (1)	Right to alternative work or remuneration when supply ended due to pregnancy (agency workers)	Panel	Factual – Does the agency worker qualify for protection and rate of pay Evaluative – Was alternative work offered "suitable" (section 68B (1) (a))
Section 80 (1)	Right to parental leave	Panel	Factual – Has employer prevented or attempted to prevent taking of leave (section 80 (1) (a)[17] Evaluative – Was a period of leave "unreasonably" postponed
Section 93 (1)	Right to written statement of reasons for dismissal	Panel	Factual – Was a given statement of reasons true Evaluative – Was a refusal to provide "reasonable"
Section 111 (1)	Unfair dismissal	Judge	Factual – Automatically unfair dismissal cases Evaluative – All other cases by section 98 (4)
Section 128, 131, 132	Interim relief	Judge	Factual – Reason for dismissal
Section 163 (1)	Claim for redundancy payment	Judge	Factual – Has employee been dismissed/completed the notice procedure correctly and amount of payment
Section 170 (1)	Claims out of National Insurance Fund for redundancy payment	Judge	Factual – Issues same as for 163 (1) but whether employer insolvent or has otherwise had an Employment Tribunal judgment for the payment
Section 177 (1)	Claims for equivalent of a redundancy payment for those not employed under a contract of employment but specified in regulations as such[18] or otherwise in section 171 (2)	Panel	Factual – Other than qualifying employment which is exhaustively defined, test is same as for redundancy payment
Section 188 (1)	Claims against NIF for payments other than a redundancy payment	Judge	Factual – Other than protective award (which is determined before claim to NIF in practice), and basis award (also already determined) all payments are based on contractual or other paid sums.[19]
Section 206 (4)	Appointment of an appropriate person to continue deceased employee's claim	Judge	Factual – "Appropriate person" is exhaustively defined"

[17] See also MAPLE 1999 for whether the employee qualifies
[18] Redundancy Payments Office Holders Regulations 1965
[19] See section 184 (1). There is a theoretical "reasonableness" provision for a fee or premium paid by an apprentice of articled clerk, but ACs (I think) no longer exist, and most premium payments are now also banned under most apprenticeship schemes.

Employment Tribunals Act 1996, s 37G (2)	Appeal against a penalty notice	Panel	Evaluative – If brought under section 37G (3) (b) issue is whether it was "unreasonable" to have given the notice
Health and Safety (Consultation with Employees) Regulations 1996, sch 2 para 2	Time off for employee safety representatives and candidates	Panel	Unclear – Right is to time off "necessary" to complete certain duties and to be paid. There does not appear to be any case law on the meaning of "necessary".
Working Time Regulations 1998			
Regulation 30 (1)	Complaints in respect of rights or failure to pay for annual leave[20]	Judge	Factual – Calculation of pay
Regulation 30 (1)	All other complaints to an Employment Tribunal except annual leave[21]	Panel	Varies – Most are factual
Sch 3 para 6	Appeal against prohibition or improvement notice	Panel	Evaluative – Requires consideration of working conditions, codes of practice etc.
National Minimum Wage Act 1998			
Section 11 (1)	Failure to permit access to records	Judge	Mostly factual – Requires evaluation of an employee believes on reasonable grounds that being underpaid
Section 19C[22]	Appeal against underpayment notice	Judge	Mostly factual – Employment Tribunal must determine whether worker entitled to a particular level of NWM and whether was paid it. Determination of a penalty is evaluative however.
Section 24 (1)	Right not to be subject to a detriment	Panel	Factual – What was reason for detriment
Employment Relations Act 1999, section 11 (1)	Right to be accompanied	Panel	Technically evaluative – Was a request to be accompanied "reasonable".
Transnational Information and Consultation of Employees Regulations 1999			
Regulation 27 (1)	Right to time off for members of a European Works Council or special negotiating body and for information and consultation representatives and election candidates	Panel	Factual – Was agreed time off properly paid (regulation 27 (1) (b) Evaluative – Was a refusal to permit time off unreasonable (regulation 27 (1) (a)

[20] In practice these are usually brought as deductions claims under ERA.

[21] Reg 10 (Daily Rest), reg 11 (Weekly Rest), reg 12 (rest breaks), reg 24 (compensatory rest where regs 10-12 modified or excluded), reg 24A (mobile workers where regs 10-12 modified or excluded), reg 25 (armed forces), 27 (young workers: force majeure) and 27A (exceptions related to young workers)

[22] The Employment Tribunals Act 1996 refers to this as "proceedings on a complaint under section 19C". This probably reflects incomplete amendments made in 2009, but still appears to be correct

Regulation 32 (1)	Right not to be subject to detriment in respect of membership of EWC etc	Panel	Factual – What was the reason for detriment
Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, reg 8	Right to equal treatment (reg 5) and not to be victimised (reg 7 (2))	Panel	Factual – What was reason for any detriment and were contractual terms less favourable (subject to pro rata principle) Evaluative – Reg 5 claims only, was treatment justified on objective grounds
Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002			
Regulation 7	Right to equal treatment (reg 3) and not to be victimised (reg 6 (2))	Panel	Factual – What was the reason for any detriment. Evaluative – Was any less favourable treatment objectively justified (reg 3 only)
Regulation 9 (5)	Application for declaration as to permanent employee status	Panel	Factual (unless objectively justifiable defence pleaded) – Has the relevant qualifying period passed
Merchant Shipping (Hours of Work) Regulations 2002, reg 22 (1)	Equivalent rights to the WTR for annual leave and rest periods	Panel[23]	Factual – Same as WTR.
Merchant Shipping (Working Time: Inland Waterways) Regulations 2003, reg 18 (1)	Equivalent rights to WTR for annual leave (reg 11)	Judge	Factual – Same as WTR
	Other equivalent WTR rights	Panel	Varies – Generally factual
Civil Aviation (Working Time) Regulations 2004, reg 18 (1)	Equivalent rights to WTR (reg 4)	Judge	Factual – Same as WTR
	Remainder of regs	Panel	Varies – Generally factual
Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004, reg 19 (1)	Equivalent rights to WTR for annual leave (reg 11)	Judge	Factual – Same as WTR
	Other equivalent WTR rights	Panel	Varies – Generally factual
Information and Consultation of Employees Regulations 2004			
Regulation 29 (1)	Time off for negotiating and information & consultation representatives	Panel	Factual – Has agreed time off been properly paid (regulation 29 (1) (b))

[23] This seems to be an oversight as the Inland Waterways, Civil Aviation and Fishing Vessels equivalent are all judge alone under section 4 Employment TribunalA for t

			Evaluative – Was a refusal to permit time off unreasonable (regulation 29 (1) (a))
Regulation 33	Right not to be subject to a detriment	Panel	Factual – What was reason for detriment
Road Transport (Working Time) Regulations 2005, Sch 2 para 6 (2)	Appeals against improvement and prohibition notices	Panel	Evaluative – Requires consideration of working conditions, codes of practice etc.
Transfer of Undertakings (Protection of Employment) Regulations 2006			
Regulation 12 (1)	Failure by transferor to provide employer liability information to transferee	Panel	Mostly factual – Was information provided or not.
Regulation 15 (1)	Failure to inform and consult about a transfer	Panel	Mostly factual – Arguably whether "suitable measures" have been taken for consultation is evaluative, but generally only depends on whether representatives have enough to go on which does not normally depend on industrial practice
Regulation 15 (10)	Failure to pay compensation when after protective award made	Panel	Factual – Was award paid or not
Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006			
Sch para 4(1)	Right to time off for employee representatives	Panel	Factual – Has agreed time off been properly paid (para 4 (1) (b)) Evaluative – Was a refusal to permit time off unreasonable (para 4 (1) (a))
European Cooperative Society (Involvement of Employees) Regulations 2006			
Regulation 30 (1)	Right to time off for members of special negotiating body	Panel	Factual – Has agreed time off been properly paid (regulation 30 (1) (b)) Evaluative – Was a refusal to permit time off unreasonable (regulation 30 (1) (a))
Regulation 34 (1)	Right not to be subject to a detriment	Panel	Factual – What was the reason for detriment

Pensions Act 2008, section 56 (1)	Right not to be subject to a detriment	Panel	Factual – What was the reason for detriment
Cross-border Railway Services (Working Time) Regulations 2008			
Regulation 17 (1)	Rights to daily etc rest breaks	Panel	Factual – Were breaks and/or compensatory rest given
Sch 2 para 6(2)	Appeals against improvement and prohibition notices	Panel	Evaluative – Requires consideration of working conditions, codes of practice etc.
REACH Enforcement Regulations 2008, reg 21(1), Sch 8 Pt 2 paras 1–3	Appeals against improvement and prohibition notices	Panel	Evaluative – Requires consideration of working conditions, codes of practice etc.
Ecclesiastical Offices (Terms of Service) Regulations 2009			
Regulation 9 (1) & (2)	Reference on matters equivalent to section 1 & 8 ERA	Panel	Factual – Same determination as under section 11 ERA
European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009			
Regulation 28 (1)	Right to time off for members of special negotiating body	Panel	Factual – Has agreed time off been properly paid (regulation 28 (1) (b)) Evaluative – Was a refusal to permit time off unreasonable (regulation 28 (1) (a))
Regulation 32 (1)	Right of members of special negotiating body not to be subject to detriment	Panel	Factual – What was the reason for detriment
Agency Workers Regulations 2010, Regulation 18 (2)	Right of agency worker to pay equivalence (reg 5), access to collective facilities (reg 12), access to employment (reg 13) and not to be subject to a detriment for victimisation (reg 17 (2))	Panel	Factual – Was equivalence, given, was access give, what was reason for detriment
Employee Study and Training (Procedural Requirements) Regulations 2010			
Regulation 17 (1)	Right to be accompanied at meeting to discuss training	Panel	Technically evaluative – Request to be accompanied must be “reasonable”

Regulation 18	Applies section 48 ERA (detriment), Part 10 ERA (auto UD) and interim relief provisions in ERA	Panel[24] Judge[25]	Factual – What was the reason for dismissal/detriment
Employment Relations Act 1999 (Blacklists) Regulations 2010[26]			
Regulation 5 (1)	Refusal of employment due to blacklisting	Panel	Factual – What was the reason employment refused
Regulation 6 (1)	Refusal of employment agency services due to blacklisting	Panel	Factual – What was the reason for refusal of the services
Regulation 9 (1)	Right not to be subject to a detriment from employer due to blacklisting	Panel	Factual – What was the reason for detriment
Equality Act 2010			
section 120 (1) – Part 5 (Work) Contravention	Direct discrimination – section 13	Panel	Factual – Reason for less favourable treatment
	Discrimination arising from disability – section 15		Evaluative – Was treatment a proportionate means of achieving a legitimate aim
	Gender reassignment work absence discrimination – section 16		Evaluative – Section 16 (2) (b) requires decision about whether (in a case other thank sickness absence) whether it was reasonable to treat less favourably
	Pregnancy or maternity discrimination – section 18		Factual – What was the reason for detriment
	Indirect discrimination – section 19		Evaluative – Was a particular group at a particular disadvantage, and was the PCP a proportionate means of achieving a legitimate aim
	Failure to make reasonable adjustments – section 21		Evaluative – Had R taken such steps as it is reasonable to have to take
	Harassment – section 26		Evaluative – Was it reasonable for unwanted conduct to have the prohibited effect
	Victimisation – section 27		Factual – What was the reason for detriment
	"Normal" discrimination – section 61 (2)	Panel	As per equivalent section under Part 2

[24] Detriments
[25] Dismissal
[26] A prerequisite for all claims require the existence of a prohibited list, the existence of which is a question of fact

Section 120 (2) – Occupational pension schemes (responsible person)	Declaration as to rights reference brought by responsible person		Evaluative – The Employment Tribunal declares what the rights of an individual are in relation to the non-discrimination rule within a pension scheme
Section 120 (3) – Occupational pension schemes (trustees)	Dispute about effect of ND rule	Panel	Evaluative – Employment Tribunal must consider a ND rule and how it affects the scheme as a whole or for individuals
Section 120 (4)	Matters referred by court	Panel	Depends on issue referred by court
Section 122 (2)	Matters referred by court	Panel	Depends on issue referred by court
Section 127 (1)	Breach of sex equality clause (s 66 – equal pay) or rule (section 67 – pensions)	Panel	Factual – Is there equal work (section 65) and do the existing scheme rules treat women less favourably than men. Evaluative – Is there a genuine material factor other than sex that justifies the rule
Sections 127 (3) to (4)	Applications equivalent to section 120 (2) and 120 (3)	Panel	Evaluative as above
Section 127 (5)	Matters referred by court	Panel	Depends on issue referred by court
Section 146 (1)	Application for declaration that collective agreement term is void	Panel	Factual – If term is directly discriminatory or infringes section 18 Evaluative – If term infringes any other part of EqA
Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015, regulation 3 (1)	Right not to be subject to a detriment for working other than for the Respondent	Panel	Factual – What was the reason for detriment
Posted Workers (Enforcement of Employment Rights) Regulations 2016, regulation 6 (1)	Right not to be paid less than minimum wage	Panel	Factual – Was employee paid less than minimum wage in a pay reference period