



Law Society
of Scotland

Consultation response

Panel composition in the Employment Tribunal and Employment Appeal Tribunal

April 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the Senior President of Tribunals Office consultation: *Panel composition in the Employment Tribunal and Employment Appeal Tribunal*.¹ The sub-committee has the following comments to put forward for consideration.

General Comments

Though outside the scope of the current consultation, it is important to consider the role of access to justice and legal aid for Employment Tribunals (ETs) and Employment Appeal Tribunals (EATs). The consultation paper notes the complexity of particular types of employment dispute, particularly discrimination and whistleblowing claims, which “often succeed or fail on legal points which members’ knowledge may have little bearing upon”. These complexities are more challenging still for unrepresented parties, claimants and sometimes also smaller-scale employers. There are similar difficulties for unrepresented parties in EAT proceedings, where we are aware that many seek to raise points of fact rather than law, finding the appeals process frustrating as a result and also incurring additional judicial time in the management of these appeals.

Legal aid is available to assist with employment advice and representation for employment matters in Scotland, though the latter is subject to an effective participation test.² As a result, the number of ET and EAT cases funded by legal aid is very low. We believe that any changes emerging from this consultation process should be reflected in the availability of legal aid for representation and that the complexity of ET and EAT cases should be recognised in the application process for legal aid. More generally, we have also advocated that future legal aid reforms, such as the anticipated Legal Aid Reform Bill, should ensure that there is practical and effective protection of human rights for people bringing or defending cases through the tribunal system. This is not unique to employment issues, but also seen in other areas involving key rights, such as housing or social security disputes.

¹ <https://www.judiciary.uk/wp-content/uploads/2023/02/ET-EAT-Panel-composition-consultation.pdf>

² [The effective participation test - Scottish Legal Aid Board \(slab.org.uk\)](https://www.slab.org.uk/the-effective-participation-test)

Any changes to panel composition and supporting changes to ET rules should be considered in the context of the wider dispute resolution landscape in relation to employment disputes, including the concurrent jurisdiction between courts and tribunals and the availability of judicial mediation.

Questions

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

We do not believe that the Tribunal should move to a system of operating with a Judge sitting alone as default.

One of the unique and distinct features of the Employment Tribunal is the role played by lay members. They provide an on-the-ground expertise of employment, a source of knowledge which those in the legal profession, including Judges and Solicitors, may not have. They are able to apply their expertise to the interpretation and application of legal principles. Crucially, they also are more relatable to litigants in person, and provide reassurance and relatability to non-legally qualified stakeholders.

Lay members have a key role to play in whistleblowing and discrimination cases, where they help to ensure the application of the law complies with good employment practice and can bring the day-to-day expertise which legally qualified stakeholders may not have.

The comments around a lack of legal knowledge and time spent explaining legal principles is noted. However, the function of the lay member is not to have expert knowledge of the nuances and complexities of areas of law, which even seasoned legal professionals may struggle with. Rather, the role is to ensure procedural fairness, and to lend practical insights. For example, lay members can help with matters such as what may be considered a reasonable adjustment in the workplace, or when analysing workplace culture in discrimination/harassment cases. They can also provide useful input into disclosures and detriments in whistleblowing cases, to take some of the most obvious benefits.

Further, a crucial part of the Panel's role is to consider findings in fact. Having lay members assess evidence and credibility does not hamper the successful conclusion of a matter and they are an important reference and balancing perspective in discrimination and whistleblowing cases, which are significant matters of public policy concern in a democratic society.

We have set out the reasons above why lay members play an important part in the administration of justice in the Employment Tribunal, however it should also be noted that their role is equally important in that it shows the perception of justice being done. It is well accepted that the Employment Tribunal is designed to be more accessible and less formal than the civil courts. This is an inherent founding principle of the

Employment Tribunal system. Having a panel consider cases strengthens the public's perception of this and it allows all stakeholders to maintain confidence in the system, in that it is accessible to all.

We accept that the complexity of the case law and the volume of cases before the Tribunal is expanding rapidly. Rather than advocate this as a reason to move away from panels including lay members, we believe that maintaining the public's perception of accessibility and flexibility rests to a significant extent on the visibility of non-legal members of the decision-making panel.

Little to no evidence, anecdotal or otherwise, has been presented in relation to the suggestion that including non-legal members on a panel significantly expends the resources of the Tribunal. Having members ask questions allows for further exploration of matters, which may not have been in the contemplation of a legally-trained Judge. This is an important safeguard which should be preserved.

It has been suggested by the SPT in the consultation paper at paragraph 13 that the cost to the justice system of deploying members is significant. However, we note that on 13th March 2023, Mike Freer MP, Parliamentary Under-Secretary for the Ministry of Justice, published a breakdown of costs associated with non-legal employment tribunal panel members in the past five financial years.³ Expenditure by HM Courts & Tribunals Service (HMCTS), which includes member fees, associated pension, travel and subsistence costs, totalled the following:

- £3.14 million in 2017-18.
- £2.97 million in 2018-19.
- £3.41 million in 2019-20.
- £2.62 million in 2020-21.
- £4.56 million in 2021-22.

The increase in 2021-2022 is explained by the implementation of a pension scheme for non-legal members.

We do not believe that these are significant costs which place a strain on the justice system or justify the proposed move to cases being heard by a judge alone by default.

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

Whilst there is undoubtedly a benefit arising from having workplace experience to rely upon, we do accept that largely, the removal of panels for unfair dismissal claims has been successful. Given the financial constraints faced by the Tribunals (and the legal system as a whole), we believe that the current default position is proportionate.

³ [Written questions and answers - Written questions, answers and statements - UK Parliament](#)

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?

Yes, wages claims, breach of contract claims and the likes are more legally technical in nature and would not benefit from the input of lay members.

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

Yes. As a matter of procedure, the subject matter considered by the EAT is technical and limited to errors in law or perversity, and lay members may only be able to provide limited input.

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?

We believe that this ought to be an option which is available to the stakeholders in a case, but not the only option. Where a Judge is sitting alone and the question as to the Tribunal's composition may arise, then the option of having the standard two lay members and a Judge panel should also be available.

There may be merit in having a panel of two Judges, for example, in complex financial services or technology-type cases, where the subject matter or the background may be particularly complex.

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

We believe that the current system is adequate, however, we note the benefit of legal officers making decisions on everyday case management matters, with the safeguard of stakeholders being able to request that a matter be reviewed by a Judge if unsatisfied.

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

Should the SPT choose to proceed with the decision to remove panels from the Employment Tribunal system as a starting point, then either the Employment Tribunal Rules of Procedure as set out in Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, or section 9 of the Regulations itself ought to be amended to codify the process of how any discretion ought to be exercised.

Alongside this, training should be implemented and Practice Directions should be issued by the Presidents of the Employment Tribunals in England & Wales and in Scotland.

8. Do you have any other comments?

Such a radical change should be approached with an abundance of caution. Accessibility and public confidence are key features of the Employment Tribunal system. By continuing to strip away the 'everyday' nature of the process, as it inevitably becomes more legalistic with the progress of time, risks adversely impacting on the public's confidence in the system.

Criticism has been levied at the quality and the level of participation of lay members, however, this can be remedied with further training and regular reviews of the employer panel and employee panel from which lay members are selected. Quality control is to be encouraged and is in our view more appropriate than moving away from a panel system. Whilst our members will all have anecdotal evidence of lay members asking what they believe to be irrelevant questions or being uninvolved in proceedings, by and large, they are seen as a positive aspect of the Tribunal process.

There is, however, an overriding concern which the SPT's proposals do not fully address. That is the equality, diversity and inclusion. The judiciary, at present, is unrepresentative of its stakeholders. The statistics⁴ show that there are higher proportions of ethnic minorities, women and disabled persons who sit as lay members than who sit as Judges. As one of the key aims is for the promotion of diversity in the judiciary, the removal of the lay members would have a chilling effect on minority representation, but also minority visibility, which is crucial to increasing diversity and encouraging others to invest in the tribunal system. Removing minority representation and visibility when, for example, there is a significantly higher proportion of people from ethnic minorities among Claimants in the ET than in the workforce as a whole,⁵ could serve to alienate this group and dissuade valid claims from being raised and progressed. Perception of a decision being made, for example, in a race discrimination claim against a white manager, by a white decision maker (as per the statistic likelihood), could undermine the confidence in the ET system. The Tribunal system must allow serious issues such as discrimination and whistleblowing to be properly adjudicated. The SPT's proposals could conceivably have unintended consequences in this respect. If the proposed changes proceed, they must be accompanied by a full Equality Impact Assessment.

⁴ [Diversity of the judiciary: 2022 statistics - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2022-statistics)

⁵ [Employment tribunal claims - GOV.UK Ethnicity facts and figures \(ethnicity-facts-figures.service.gov.uk\)](https://ethnicity-facts-figures.service.gov.uk/)



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