EMPLOYMENT TRIBUNALS
England & Wales

36th MEETING OF NATIONAL USER GROUP

Minutes of the National User Group meeting held at Victory House on 26th September 2018

In attendance:

Judge Brian Doyle	President, Employment Tribunals E&W
Nigel Edgington	HMCTS
Marie Mannering	HMCTS
Sukvinder Phillips	HMCTS
John Sprack	Law Works
Leo Cotterell	BEIS
Omar Khalil	EEF
Michael Reed	Free Representation Unit
Matthew Bradbury	Citizens Advice
Andrew Willis	Croner Group Limited
James Potts	Peninsula Business Services
Hannah Reed	TUC
Noel Lambert	Acas
James Brown	Thomson Reuters
Matthew Smith	Equality & Human Rights Commission
Philip Thornton	Lexis Nexis
Paul McFarlane	Employment Lawyers Association
Andrew Lingard	Pro Bono Unit
Liz Gardner	Protect (formerly Public Concern at Work)
Simon Carr	Senior President of Tribunals Office
Jackie Hunsley-Wilson	HMCTS (minutes)

Apologies:

Shona Simon	President, Employment Tribunals (Scotland)
Michael Newman	Discrimination Law Association
Richard Boyd	BEIS
Tony Lowe	Acas
Alan Philp	Mentor Services
Juliet Carp	ELA
Rosemary Lloyd	EHRC
Emma Wilkinson	Citizens Advice
Max Winthrop	Law Society Employment Committee

Item 1 Welcome & introductions

The President welcomed members to the 36th meeting of the Employment Tribunals National User Group (England & Wales).

Item 2 Agree minutes of the meeting of 22nd May 2018

The minutes of the previous meeting were approved and accepted.

Item 3 Action points and matters arising

Any matters arising and action points are dealt with in the President's report below.

Item 4 Employment Tribunals – President's report

The President notified members that Hannah Reed was leaving her post at the TUC to take up a position at the Royal College of Nursing. The President paid tribute to Hannah Reed as a long-serving member of the NUG and he thanked her for her considerable contribution to its work over a number of years. Matthew Creagh would be the TUC representative at future NUG meetings.

Members were notified that the Parental Bereavement (Leave and Pay) Act 2018 had received Royal Assent on 13 September 2018. The Act is a short statute of two sections and a schedule. It will come into force on dates to be appointed. It creates a statutory entitlement to parental bereavement leave and parental bereavement pay. It makes a number of legislative amendments as a consequence. Secondary legislation will be necessary to supplement the Act, which may be found here:
http://www.legislation.gov.uk/ukpga/2018/24/pdfs/ukpga_20180024_en.pdf.

The President reported that four Regional Employment Judges would be retiring within the next 18 months. A business case for replacing them was in the process of being approved.

The President informed members of the name change of the Employment Tribunal building for the London East region from "Anchorage House" to "Import Building".

The President summarised the latest performance figures for the ET which had been published by the Ministry of Justice on 13th September 2018 covering the period April to June 2018 (Q2 2018 or Q1 2018/19). See: https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2018.

There had been a 165% increase in single claims (the most reliable measure of the ET's workload) compared to the preceding year. Disposals had increased by 56% at an average time of 28 weeks. The outstanding caseload had increased by 130%.

A user asked whether the President could break these figures down further by short track, standard track and open track cases. The President undertook to

see whether he could do so in preparing the minutes. **See the italicised section that follows.**

The quarterly statistics published by the Ministry of Justice contain a breakdown of receipts and disposals categorised by the 21 main ET jurisdictions and "other". See Tribunal Statistics CSV (Zip File) at the web page above. At that web page can also be found Annex C: ET Receipts Tables, which break down receipts by single and multiple cases; by jurisdiction; by region; and by jurisdiction and region. The Main Tables analyse the annual trends going back 10 years in terms of receipts by jurisdiction; disposals by jurisdiction; and the percentage of disposals by outcome and jurisdiction.

Although the statistics are not presented by track, it is possible to get a sense by jurisdiction of how many short track cases there are in comparison with standard track and open track.

There is also very interesting information available there on representation, compensation awards and costs awards. See the ET and EAT Annual Tables. See also the ET Fees Refund Tables.

Multiple claims (which are inherently volatile and variable from month to month) had increased by 344%, with a decrease in disposals of 13% and an increase in outstanding caseload of 34%. The average time for disposal of multiple claims had decreased from 138 weeks to 133 weeks. The President reminded the meeting that multiples frequently involve claims that are stayed, usually with the parties' agreement, awaiting other proceedings or other developments. A large and recurrent airline multiple continued to distort the data picture.

The President observed that the above position reflected the return of ET claims following the Supreme Court's decision in *Unison* that had resulted in ET fees being abolished. He explained that there would have had to be a 200% increase in single claims to return to a pre-fees position. The trend appeared to be a gently upward-sloping increase curve. The 56% disposal rate for single claims was in large part influenced by the return in volume of short track cases (e.g. for unpaid wages), which were typically one hour hearings listed within 8 weeks and which were particularly susceptible to settlement or withdrawal with Acas intervention. The increase in the outstanding caseload was in large part due to standard track (e.g. unfair dismissal) and open track (e.g. discrimination) cases.

The President updated the meeting as to Employment Tribunal fees refunds. To the end of June 2018 there had been 14,500 applications for refunds, resulting in 12,400 actual refunds, totalling £10.6 million.

The President explained that it was taking 12-18 months (measured from the ET1) to list open track cases for a final hearing in some regions. These hearings are usually of 5+ days duration. Although there was no present budgetary restriction on sitting days, the difficulty was one of judicial resource: that is, due to the reduced number of salaried judges and the uncertain availability of fee-paid judges and members who were able to commit to multi-

day hearings. In London, for example, it could be quite difficult to find members who could sit on, say, a 20 days case.

The President reported that a Judicial Appointments Commission (JAC) exercise to recruit 54 full-time equivalent (FTE) salaried Employment Judges had launched on 18 June 2018 and closed on 2 July 2018. See: https://www.judicialappointments.gov.uk/vacancies/122. These appointments were also open to salaried part-time working of between 50 and 90 per cent of a full-time judge's working time. That meant that the ET expected that the final number of judges recruited might be as many as 60-70 judges, subject to the total being no more than 54 FTE.

For the first time, the recruitment of new salaried Employment Judges was open to candidates without previous judicial experience. This approach had been used with apparent success in a recent exercise to recruit generic salaried judges to the First-tier Tribunal. In the ET exercise it was necessary to open the field more widely to reflect the large number of judges being recruited at one go, the probability that those numbers could not be satisfied from within the ranks of interested fee-paid EJs alone and the continuing need to encourage diversity. As a counter-balance, the competition had an extra-statutory requirement that candidates should have substantial employment law experience and this would be tested in the selection process. The President also anticipated that there would be applications from those with judicial experience in other jurisdictions.

The vacancies arose as follows: Midlands East (5 vacancies); Midlands West (5 vacancies); London Central (7 vacancies); London East (5 vacancies); London South (7 vacancies); North East (2 vacancies); North West (5 vacancies); South East (10 vacancies); South West (4 vacancies); and Wales (4 vacancies). The ET was also particularly keen to recruit at least one Welsh-speaking judge within those numbers.

The President gave the meeting a general impression of the numbers of applications and the intention to shortlist for selection days. This data is for the JAC to publish in due course. An online qualifying test (17 July 2018) had been used to reduce the field to a shortlist for selection days. A feedback report on the online test can be found at: https://www.judicialappointments.gov.uk/sites/default/files/sync/selection_exercises_2018/122-salaried-employment-judge-qualifying-test-feedback-report-v5.pdf.

The selection days were due to take place on 10-18 October 2018. The JAC would make recommendations to the Lord Chancellor in December 2018, with offers of appointment being made in January 2019. The ET had planned three fixed start dates for the new judges in April, July and September 2019. The first week of appointment would be taken up with a programme of regional induction and national training devised and to be delivered by the ET National Training Committee, supported by mentoring, coaching and e-training materials.

It was anticipated that the next JAC recruitment campaign for fee-paid Employment Judges would start in early 2019, subject to confirmation. The

President had made a business case for 50 fee-paid EJs, which had been accepted in principle.

There had also been agreement in principle to recruit 300 non-legal members for the ET (England & Wales). This exercise would be run in-house by HMCTS or by a specialist external recruitment agency.

Hannah Reed suggested that there should be consultation with the TUC and CBI re the member recruitment. She was concerned to ensure balanced panels and that the selection criteria were appropriate. Her recollection was that on the last occasion that members were recruited, at the sifting stage some union representatives had been told their experience was not relevant.

The President acknowledged the provisions of regulation 8 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which provides for the appointment of members. There are two panels: a panel of persons appointed by the Lord Chancellor after consultation with organisations or associations representative of employers and a panel of persons appointed by the Lord Chancellor after consultation with organisations or associations representative of employees. The President recalled that in a previous recruitment exercise members were allocated to panels after the event. In his view it was better that applicants should signal to which panel they were applying at the application stage. He confirmed his expectation that the TUC and CBI should be consulted in preparation for the 2019 exercise.

In future the President anticipated that judicial recruitment would follow a three year cycle. That might involve, say, salaried EJs being recruited at the beginning of the cycle, with fee-paid EJs being recruited 18 months later, and so on. There was likely to be more flexibility in recruiting members as the need arose.

The President reported that the new Regional Employment Judge for the ET South West region was Judge Rohan Pirani with effect from 1 August 2018. See: https://www.judiciary.uk/announcements/appointment-of-a-regional-employment-judge-pirani/.

Item 5 HMCTS Update

Nigel Edgington reported on the ET fees refund scheme. The online procedure had speeded up the process by 75%. Between April and July 2018 there had been 43,000 potential re-claimants. HMCTS had exhausted all avenues of notification of the refund scheme, either by internet, post and telephone.

A discussion took place concerning the resources for administrative staff. **Nigel Edgington** reported that staff with the necessary ET experience were returning to roles within ET administration. He said that it was up to each region to deal with the recruitment of additional administrative staff.

The President noted a need to improve lines of communication between the higher appellate courts (beyond the EAT) and the ET to ensure that cases which were returning to the ET after a second or third appeal did not do so in

circumstances where the case file had been destroyed (otherwise quite properly) in accordance with HMCTS destruction policy.

Michael Reed raised a question about REJs being canvassed for indications of how far into the future cases were being listed. It had been noted that, for example, Croydon was listing into 2020. The President acknowledged this and he hoped that the allocation of new judicial resources in 2019 would ease this problem.

A discussion took place concerning access to WiFi within ET buildings. The President informed members that WiFi was available in all ET buildings. Users could check that availability in their WiFi settings on a smartphone, tablet or laptop. If "PCU WiFi" showed as available, then professional users could register for access. Once registered, the same username and password gave access to PCU WiFi in all HMCTS buildings.

A question arose concerning the page limit on document bundles and word limits in witness statements. The President was aware that this case management practice was adopted by some ET judges and in some ET regions. For example, it had been the practice for some time in the South West region. The President had no objection to it provided it represented an appropriate exercise of judicial discretion with the procedural rules. He did not have plans to make this a national standard practice. It was a matter for a judge in the individual case or for the REJ and judges in a particular region to adopt as a preferred local practice, if seen fit. In his experience, the practice worked well.

A discussion took place concerning the uploading of judgments onto the Government website. **Hannah Reed** felt that this was detrimental. The President explained the procedural basis of this. See https://www.gov.uk/employment-tribunal-decisions. Attention was drawn to rule 50.

Item 6 BEIS report

Leo Cotterell reported on the Parental Bereavement (Leave and Pay) Act 2018, referred to above. The Act will give all employed parents a day-one right to 2 weeks' leave if they lose a child under the age of 18 or suffer a stillbirth from 24 weeks of pregnancy. Eligible parents will be able to claim statutory pay for this leave. There is no qualifying period of service. See also: https://www.gov.uk/government/news/new-law-supports-all-families-who-suffer-the-loss-of-a-child.

He also reported on the outcome of the Taylor Review of Modern Working Practices. There had been a compilation of four consultations: Enforcement; Agency Workers; Transparency; and Employment Status. The Government's response to the consultation was awaited. See generally: https://www.gov.uk/government/publications/government-response-to-the-taylor-review-of-modern-working-practices.

Also relevant is the current work of the House of Commons Select Committee on Women and Equalities. There are two relevant inquiries: one on the use of non-disclosure agreements in discrimination cases and the other on sexual

harassment in the workplace. A Government response to the latter inquiry is due in late Autumn 2018. If anyone had anything to add they were encouraged to send correspondence to **Leo Cotterell**. See generally: https://www.parliament.uk/womenandequalities.

There was no further update concerning Scottish Devolution. It was a big project involving not just the Employment Tribunal (Scotland), but also Tax, Social Security and Child Support.

Item 7 Acas report

Noel Lambert reported on the Q1 2018/19 statistics. Acas had received 33,171 early conciliation notifications, of which 849 were employer led, and this represented a total of circa 46,000 individuals. This equated to 2,500 notifications per week, of which over 1,180 were group notifications, which covered over 14,000 individuals. In the quarter in question 31,049 cases were cleared, including outstanding cases. Of these numbers 3,755 were Acas settlements; 20,208 did not progress to the ET; 7,086 progressed to the ET. 23% of early conciliation notifications settled, while 65% did not progress, leaving 23% that did progress to ET proceedings. The notifications received had gone from 92,000 to 130,000-140,000 per annum. See generally: http://www.acas.org.uk/index.aspx?articleid=6598.

Item 8 Overview of Acas Conciliation Notifications Process Project

Noel Lambert went on to report on the progress of the digital project. The aim was to improve the notification process, install a new case management system and have Employment Tribunal information being fed back in.

Noel said that the group notification process was becoming more complicated in aligning with the Tribunal's process. **Hannah Reed** noted that putting in the correct employer's name on the prescribed form was still a big problem. It was pointed out that the Employment Bill would encourage a review of the early conciliation process.

Item 9 Any other business

Alan Philp had put forward questions to be asked in his absence. His organisation (Mentor Services) found that some unfair dismissal, discrimination or equal pay cases in some regions were being incorrectly listed as short track cases and listed for a full merits hearing of one hour. This created additional work in applying for postponements or conversion into a case management hearing. The President will ask HMCTS to note this issue for possible action.

Alan Philp also noted that most Tribunal offices were taking several weeks to respond to applications. It also seemed difficult to make contact with the London Tribunal offices by telephone. These problems refer back to **Nigel Edgington's** comments on the recruitment of additional administrative staff. In some cases staff would be recruited and trained, but then would leave for better paid positions elsewhere.

The President referred to a question which had been put forward by a claimant for consideration in the agenda: “The purpose of Section 12 ‘Disability’ on the ET1 form – what happens to information submitted by users”.

The President felt this was a good question for an actual user of the ET system to ask. He was aware of two or three instances of correspondence with which he was dealing that concerned disabled persons seeking to engage with the ET’s administrative and judicial processes. He was actively considering Presidential Guidance in this area. He had also had some preliminary exchanges with the Equality & Human Rights Commission and he would meet with the Commission to discuss this issue further.

The President indicated that he would include in the minutes greater detail of what is of concern, what the present position is and what might be done to improve the position. **What follows in italics is a record of those matters post-meeting.**

The issue is one with which the President has considerable empathy. He has a keen desire to ensure that – by way of example only – parties and witnesses who are on the autistic spectrum, or who have other mental health issues, receive the best possible access to justice in the Employment Tribunal system, commensurate with providing a fair hearing for both parties. Where there are ongoing proceedings, it would be difficult and inappropriate for the President to provide advice, directly or indirectly, to one party or to be seen to be intervening in or interfering with case management decisions being taken by independent members of the Employment Tribunal judiciary.

The senior Employment Tribunal judiciary (the President and the Regional Employment Judges) have given recent and continued attention to the question of how best to assist vulnerable persons engaging with Employment Tribunal proceedings. There is a growing body of case law in the First-tier Tribunal, the Employment Tribunal, the ordinary courts and in the appellate system about how best to make reasonable adjustments to legal procedure and judicial practice, commensurate with the overriding objective, equality of arms and a level playing field. In the individual case, it can sometimes be quite difficult to find a workable solution to assist a vulnerable person in their engagement with Employment Tribunal procedure in the absence of publicly available resources to that purpose or an independent organisation that might have the power and the resources to provide the necessary degree of assistance. In so many of these cases, the vulnerable person is also a litigant in person and faces a double disadvantage, not of their making or the Tribunal’s making.

Section 12 of the ET1 claim form asks a claimant whether they have a disability. If they answer “yes” to that question, then a free text box invites them to say what that disability is and to tell the Tribunal what assistance, if any, they will need as the claim progresses through the system, including for any hearings that may be held at Tribunal premises. Ideally this should be picked up by a caseworker vetting the claim form at initial presentation, but in practice that may well depend upon what level of detail the claimant provides in answer to section 12.

As the claim progresses through the system, the chances of a party's need for reasonable adjustments being raised for the first time (or in greater detail) increase. The President would expect that to be picked up from the case correspondence at the various points at which a caseworker refers the file to an Employment Judge for instructions. Cases involving disability discrimination (among other discrimination cases) are almost invariably listed for an early case management hearing and, if the need for a "ground rules hearing" has not been picked up at the earliest stage, it certainly should be picked up by the time of the first case management hearing. In other, non-disability or non-discrimination cases an early request for a case management hearing should and can be made.

Employment Judges are generally good at picking up the need for reasonable adjustments to be made for a disabled person engaging with the Tribunal system, but how to resource or to provide those adjustments is often the most difficult question, particularly if the claimant is a litigant in person or does not enjoy the support of a relevant group or organisation. Even if they do have the support of a relevant group or organisation, that support might not extend beyond providing support and assistance up to the door of the Tribunal, but not during any hearing itself.

This is an area where the Employment Tribunal judiciary recognises that it would like to do more. It may be that Presidential Guidance is the way ahead. The existing conventions and the possible solutions are too many to encapsulate in the National User Group minutes, but a flavour of what might be possible can be gleaned from a recent speech by the Senior President of Tribunals at https://www.judiciary.uk/wp-content/uploads/2018/11/speech-by-spt-mpi-ejtn-wiesbaden-12112018.pdf.

Item 10 Date of next meeting

The President suggested the next meeting be in February 2019 on a date to be arranged.