

**Tribunal Procedure Committee (TPC) Meeting Minutes
Friday 08 December 2023**

Meeting (Hybrid) at 7 Rolls Building, London

Present

- Mrs Justice Joanna Smith (JS)
- Michael Reed (MJR)
- Christine Martin (CM)
- Donald Ferguson (DWF)
- Susan Humble (SH)
- Mark Loveday (ML)
- Gabriella Bettiga (GB)
- Stephen Smith (SS)
- Jeremy Rintoul (JR)
- David Franey (DF)
- Matt Jackson (MJ)
- Gillian Fleming (GF)
- Alasdair Wallace (AW)
- Razana Begum (RB)
- Shane O'Reilly (SOR)
- Vijay Parkash (VP)
- Hannah Polanszky (HP)
- Amir Khandoker (AK)

Guests

- Julian Phillips (JP)
- Mark Blundell (MB)
- Fiona Monk (FM)
- Robin Rimmer (RR)

Apologies

- Philip Brook Smith KC (PBS)

Minutes

1. Introductory matters

- 1.1. JS welcomed GF to her inaugural TPC meeting. GF is a Lord Chief Justice appointment/tribunal member on the TPC. JS also introduced AK to the attendees who has joined the TPC Secretariat team. AK is a fast streamer candidate on the Yorkshire Development Scheme.
- 1.2. An apology was received from PBS. MJ would be joining the meeting at midday.

TPC appointments/membership

- 1.3. The Judicial Office (JO) has launched an expression of interest (EOI) competition to appoint a First-tier Tribunal (FtT) Judge member to the TPC. The EOI campaign was launched on 13 November 2023 and will end on 08 December 2023.
- 1.4. The necessary Commencement Order came into force on 06 November 2023 to confirm MK and DF's appointments on the TPC. Their respective terms on the TPC commenced on 07 November 2023 and will end on 06 November 2026.

Matters Arising

- 1.5. The draft minutes from the 03 November 2023 meeting were agreed by the TPC subject to some minor amendments.

Transfer of responsibility for the making of Procedure Rules in the Employment Tribunal and Employment Appeal Tribunal to the TPC

- 1.7. RR provided an update on the latest developments to progress the exercise for the transfer of responsibility for the making of procedural rules in the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) from the Department for Business and Trade (DBT) and the Lord Chancellor (respectively) to the TPC. The legislative change was originally planned to be introduced in October 2023, but a delay had occurred with the implementation timetable being pushed back to several weeks later than anticipated.
- 1.8. RR provided a contextual summary of the mitigating circumstances contributing to the delay for: i) the transfer of rulemaking responsibility to the TPC and ii) the contingency plan to make urgent ET Rule changes.
- 1.9. RR said the delay was partly due to the legislative approval process confirming the formal appointments of the two new TPC members who would be assisting the TPC to consider the making of new ET Rules. The delay was also due to the shortfall in the DBT's legal resource needed to progress making legislative changes.
- 1.10. RR said the MoJ have agreed a plan/approach with the DBT that will permit the MoJ to make/progress the three most urgent changes to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("2013 Regulations") in March 2024. In order to facilitate this, MoJ legal resources will be used rather than the DBT's legal resource to progress the amendments. DBT were working to a legislative schedule to lay a Statutory Instrument (SI) in March 2024, to come into force in April 2024. DBT have since confirmed that they have made a legislative bid to secure parliamentary time to lay the SI as reported.
- 1.11. The 3 identified urgent rule changes are:
 - a new rule to allow cases using the ET's digital case management system to deem compliance with any requirements to send or deliver

documents under the rules, where this is done in accordance with a practice direction. This is to accommodate delivery through the digital case management system where the digital system automates the task, such as Rule 92, Rule 71 and equivalent rules.

- Rule 16, an amendment to enable the senior judiciary to prescribe that any response forms presented electronically must use the online digital case management system.
- Rule 15, a rule which allows the ET to direct, where a copy of the claim form is sent to a different postal address for the respondent, a new 28-days' time limit for the response to be presented.

- 1.12. RB said that the statutory power that will be transferred to the TPC to make ET rules is not a regulation-making power. Therefore, this statutory power does not permit the TPC to amend, revoke or repeal the Rules as contained in the 2013 Regulations. It is therefore necessary, after the transfer for the TPC to remake the Rules (with any modifications or amendments) under its acquired new powers as a rules SI. To facilitate the transfer exercise, it will be necessary to sequence the making of the new rules with a separate SI made by the Lord Chancellor and the Secretary of State which will revoke the current ET Rules as contained in the Schedules to the 2013 Regulations, together with other consequential amendments to the 2013 Regulations to enable a 'switch' from the old regime to the new.
- 1.13. RB proposed that, in order to aid the sequencing exercise, the TPC may wish to consider undertaking the public consultation exercise ahead of the formal transfer in anticipation of receiving the transfer power.
- 1.14. In respect of any further changes to the 2013 Regulations that would be necessary but would fall outside the statutory powers of the TPC after the transfer had been concluded, RR said that there should be another opportunity to undertake this activity by the DBT in the second half-year of 2024.
- 1.15. MR said that it is appropriate under the circumstances to consult on changes ahead of the formal transfer of ET/EAT powers as the transfer is uncontroversial and this will minimise the complexity of related legal drafting tasks to be undertaken by RB.
- 1.16. With regard to the proposed changes in relation to authorising 'legal officers' to perform additional specified functions, presently, these powers sit within the 2013 Regulations but, once the rule-making powers are transferred, they will sit within the new remade ET Rules. Consequently, any change that is made now to 'legal officer' powers would inevitably have to be revoked and then remade as part of the transfer process. Given the pressures on legal resourcing, RR suggested that the most sensible approach would be for the TPC to consider making this change post-transfer.

- 1.17. In relation to the impending remaking ET Rules work to be undertaken by the ET subgroup, MR provided an overview of the subgroup's proposed plan to commence and progress the forthcoming rules work which includes the remaking rules work being organised into 2 tranches according to importance/priority.
- 1.18. In order to progress the forthcoming rules work, MR proposed a subgroup meeting in January 2024, with a view to producing a draft consultation document to be circulated ahead of the next scheduled TPC meeting on 02 February 2024. The aim would be to seek the TPC's sign-off to the final version of the draft consultation at the March 2024 TPC meeting.
- 1.19. RR expressed great thanks to RB and her MoJ legal colleagues for providing their resources to carry out the drafting work to avoid any further delay.

AP/124/23: To organise an ET subgroup meeting in January 2024 – TPC Secretariat

2. Written Reasons in the First tier Tribunal

- 2.1. JS thanked SS for his hard work in preparing a paper in response to the Judicial Office's (JO) paper '*Proposed Changes to the Tribunal Procedure Rules*'. The paper was circulated to the Tribunal Chamber Presidents on 17 November 2024.
- 2.2. SS summarised the 5 recommendations detailed in the JO's paper:
 - Recommendation 1 – changes to default rule in all FtT jurisdictions so that written reasons need only be provided on request.
 - Recommendation 2 – make a rule to permit a practice direction to specify which types of proceedings require the automatic provision of written reasons.
 - Recommendation 3 – mandatory written reasons in a small number of cases where the swift final disposal of the proceedings is particularly important, such as section 2 mental health cases, asylum support cases etc.
 - Recommendation 4 – reduce the time limits for requesting optional written reasons.
 - Recommendation 5 – written reasons only available to an unsuccessful party.
- 2.3. JS said she had received comprehensive responses to the JO proposals in relation to written reasons. In summary there was very little judicial support for the proposed changes and a considerable amount of opposition to the proposals. In particular it was a generally held view that "one size does not fit all".
- 2.4. The TPC agreed that it would not be sensible to consult on proposals which have not found favour with the majority of Chamber Presidents.
- 2.5. JS asked SOR to inform the Senior President of Tribunals that whilst there is clearly discussion to be had as to changes that might be implemented within individual Chambers to ensure greater efficiency, there is nothing that the

TPC can presently do pursuant to its rule making function to facilitate these discussions. The TPC would be prepared to revisit this matter following further judicial engagement by the JO with the Tribunal Chamber Presidents.

3. Immigration & Asylum Chambers Subgroup (IACSG)

New Plan for Immigration programme: Nationality and Borders Act 2022/Illegal Migration Act 2023

- 3.1. JS said she had met with Jenny Pickrell, the MoJ NPI policy lead, prior to the TPC meeting but has nothing new to report regarding the Home Office (HO) plans for progressing the provisions (delivery or operational timetable) resulting from the Nationality and Borders Act 2022 and the Illegal Migration Act 2023. JS added that it had been suggested to her that the MoJ may potentially return to the TPC in early 2024 to further discuss the making of new Rules in respect to the provisions: wasted and unreasonable costs orders/tribunal costs.
- 3.2. The TPC considered that there is nothing further it can do at this present time.

The Nationality and Borders Act 2022 (Consequential Amendments) Regulations 2023

- 3.3. JS then mentioned the HO paper provided to the TPC shortly in advance of the November 2023 meeting, in which the HO informed the TPC that it had laid a statutory instrument (SI) on 25 October 2023 in respect of Section 46 of the Nationality and Borders Act 2022 (Removals: notice requirements). The SI amends paragraph 41(5) of the Tribunal Procedure Rules to amend the existing 14 days' timeframe to 21 days. JS said that she had written to the MoJ policy lead expressing the TPC's dissatisfaction that its rule making powers and responsibilities have been bypassed in this way and making it clear that this should not be treated as a precedent. JS reported that the TPC's concerns had been acknowledged, and an apology received. JS considers this matter closed.

4. GTCL Subgroup

- 4.1. In PBS's absence, JS reported that there were no urgent issues that required the TPC's immediate attention.

5. HSW Subgroup

Mental Health Tribunal- Rule 35 proposed change

- 5.1. The TPC are preparing to reconsult on the proposed change to Rule 35 Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 having addressed concerns noted by respondents to the initial consultation on 'Rule 35' (which closed on August 29 2023), by amending the scope of the consultation proposal to include additional safeguarding measures designed to accommodate the needs of a vulnerable person. CM circulated the final draft consultation paper which incorporated a response to the original consultation on the proposed change to Rule 35. The draft consultation paper was approved. The consultation will run for a period of 8 weeks.

AP/125/23: To make the necessary arrangements for publication of the TPC consultation on Rule 35- TPC Secretariat

'Open Justice' in Criminal Injuries Compensation cases

5.2. The consultation paper in respect of the proposed change to Rule 30(2) of the Social Entitlement Chamber (SEC) (FtT) Rules for the 'Criminal Injuries Compensation (CIC)' jurisdiction of the SEC, to the effect that Criminal Injuries Compensation cases be heard in public by default, was published on 17 October 2023. The consultation will close on 12 December 2023.

Victim Personal Statements in the (Mental Health jurisdiction- Health, Education and Social Care Chamber)

5.3. The MoJ Victim and Witness Policy and Strategy Team (VWPST) submitted a policy paper for the TPC's consideration. Having noted RB's legal advice, the TPC decided it is not in a position to take any further action on this matter – the TPC does not consider it necessary to make any rules in connection with Victim Personal Statements. RB agreed to advise the VWPST and her MoJ legal counterpart of the TPC's decision following the meeting.

AP/126/23: To advise VWPST and MoJ legal colleagues of the TPC's decision- RB.

6. Costs Subgroup

6.1. ML said he had no urgent issues to report that required the TPC's attention.

7. Tribunal Procedure (Amendment) Rules 2024 Exercise

7.1. RB confirmed the following provisional rule amendments to the Tribunal Procedure Rules that will be included in the forthcoming April 2024 TPC Amendment SI package:

- Electronic Communication Code cases.
An amendment to Rule 13 (orders for costs, reimbursement of fees and interest on costs) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 so that the existing cost regime applies to all Electronic Communication Code cases (including cases under the Part 4ZA of Schedule 3A to the Communications Act 2003, as inserted by the Product Security and Telecommunications Infrastructure Act 2022) heard in the FtT.
- Biodiversity Net Gain cases
An amendment to Rule 22 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 to accommodate appeals to be heard in the FtT with respect to the Biodiversity Gain Site Register. These appeals will be provided for in regulations made under section 100 of the Environment Act 2021 by the Secretary of State.
- Economic Crime Levy cases
An amendment to the definition of "respondent" as contained in Rule 1(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to

include “Gambling Commission”, to allow the existing procedural rules to also apply to these cases.

8. Overview Subgroup

- 8.1. The TPC work programme has been updated and circulated as of 01 December 2023. It was agreed that the TPC work programme should be updated to reflect the latest position for each entry.

9. Review of TPC Subgroups’ membership

- 9.1. The TPC Subgroup chart has been revised to reflect recent TPC membership changes resulting from members joining and leaving and to supplement subgroups that had an apparent resource deficiency. A new ET subgroup has been created comprising of: MR (Chair), MJ, DF, JR and GF.

10. Tribunal Procedure Rules – the power to set aside a decision where there has been a procedural irregularity.

- 10.1. JO had submitted a request that the TPC consider clarifying the circumstances in which the FtT can set aside one of its own decisions where there has been a procedural irregularity. JO had suggested a drafting change.
- 10.2. The TPC discussed the proposal and decided that it was important to seek the views of the FtT Chamber Presidents on this subject as a consequence of the JO’s paper. Their responses will be considered at the TPC meeting in February 2024 or March 2024 and a decision taken as to next steps.

AP/127/23- To write to FtT Chamber Presidents to request their views- JS.

11. AOB

- 11.1. JS confirmed that the next scheduled meeting will take place on Friday 2 February 2024, but that subsequent meetings will thereafter return to their customary slot on the first Thursday of each month, commencing from March 2024.

Next meeting: Friday 02 February 2024