TUC
Changing the world of work for good

Panel composition in the employment tribunals and the employment appeal tribunal

Response to consultation by the Senior President for Tribunals

Introduction

The Trades Union Congress (TUC) exists to make the working world a better place for everyone. We bring together the 5.5 million working people who make up our 48 member unions.

We support unions to grow and thrive, and we stand up for everyone who works for a living.

The TUC and our affiliated unions believe that, wherever possible, it is preferable to resolve employment disputes at work, using internal workplace procedures. Unions are experienced in using their collective bargaining influence and the right to accompany individuals in grievance and disciplinary hearings to find early and amicable solutions to disputes. Where this is not possible, unions will also support union members to take merited claims to the courts or tribunals.

The TUC welcomes the opportunity to respond to the consultation on the proposed reforms of the employment tribunal (ET) and employment appeals tribunal (EAT) systems. We also welcome the Senior President of Tribunals' (SPT) commitment to delivering a judicial system which is fair, accessible and takes into account equality, diversity and inclusion.

Originally known as 'industrial' tribunals, ETs and EATs were created 50 years ago so that tripartite adjudication was at the heart of employment disputes. Lay members were considered an essential part of that process. Further reducing the involvement of non-legal members within these proceedings must be assessed in this context.
At their core, ETs and EATs continue to play this key role in hearing workplace disputes: providing a useful grounding in the realities of a workplace.

The TUC opposes the proposed changes because lay members:

- root tribunals in the realities of working life
- build confidence in the process among claimants and respondents and
- contribute to the diversity and inclusiveness of the tribunal system.

The government should commit to resourcing the tribunal system properly rather than lose these valuable contribution that lay members bring.

Trade unions believe that the involvement of lay members is one of the key strengths of the ET system. They bolster the confidence of both sides of industry and business in the employment tribunal system. And, by drawing on their knowledge of workplace issues, lay members help to ensure that ET decisions are workable and reflect the latest developments in good HR and employment relations practice.

The TUC believes that lay members should sit in all employment related cases, including fast track, unfair dismissal, whistleblowing and discrimination cases.

Employment judges should only have discretion to sit alone, where a case involves complex issues of law, and all issues of fact are uncontested.

We oppose proposals that reduce the role of lay members even further.

The importance of lay members in employment tribunals

ETs play a key role in ensuring that employment issues are resolved swiftly and effectively and do not escalate into wider disputes. It is therefore important that employers, unions and working people all retain confidence in the ET system.

However, the SPT gives little weight to the suggestion that a full panel is required to give parties the assurance of a fair hearing:

> *It cannot be maintained that there is inherent unfairness in a hearing before a judge alone. Facilitating the participation of all parties in all proceedings and in all hearings, including litigants in person, is a basic part of the work of a judge*[1]

The TUC believes that there is increased assurance of a fair hearing with the inclusion of lay members on ET and EAT panels. Having experience of how workplaces operate means lay members can assess and weigh evidence in a manner that provides necessary support to a judge sitting alone. Also, lay members ensure the decision-making process is based on the facts and practicalities of a workplace as well as the nuances of employment law. No matter how skilled a judge is, the career path that most will have taken means many have little direct experience of a typical workplace and the respective roles of employers and workers.

Indeed, the tribunals judiciary's own guide for non-legal members of employment tribunals notes:

> *The balance of perspectives that non-legal members provide helps to ensure that the Employment Tribunals' judgments take proper account of workplace realities. That balance enhances the credibility of the Tribunals' decisions in the eyes of employers and employees alike, as well as managers and business owners, trade unions and the public.*[2]

This, the view that lay members enhance credibility and ground decisions in workplace realities, is also borne out by research.

In 2011, research by Corby for the University of Greenwich found that the main contribution of lay members at ET came from their knowledge of workplace

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[1] The Courts and Tribunals Judiciary (2023) *Senior President of Tribunals' Consultation on Panel Composition in the Employment Tribunals and the Employment Appeal Tribunal* [online] available at https://www.judiciary.uk/guidance-and-resources/senior-president-of-tribunals-consultation-on-panel-composition-in-the-employment-tribunals-and-the-employment-appeal-tribunal-2/ paragraph 14.

[2] The Courts and Tribunals Judiciary (2019) *Candidate Information Pack Non-legal members of the employment tribunals* [online] available at https://www.judiciary.uk/wp-content/uploads/2019/05/ET-Non-Legal-Members-Candidate-Information-Pack.pdf.

experience, which the professional judges did not have, and their injection of a practitioner perspective which helped to balance the judges' legal perspectives.

The presence of lay members can also be an important reassuring presence for unrepresented parties.

In Corby's research, respondents broadly agreed that a three-person employment tribunal was likely to have greater legitimacy for the parties than a judge sitting alone.

Unrepresented parties in particular benefit from having other non-legal members present at tribunals as it may help to make the process less alienating, and it assures members that people with real life experience of workplaces have been involved in the decision-making process.

Equally as compelling is the fact that judges themselves think lay members are an important addition to ET.

When asked about the need for lay members' inclusion in unfair dismissal cases, 80 per cent of those interviewed by Corby noted unfair dismissal as a jurisdiction where lay members added value to decision making.[3] Sadly, this type of case is now also being heard by a judge sitting alone.

The current proposals would mean claimants in two further types of cases will now have their access to hearings by panels including lay members in the first instance removed: whistleblowing and discrimination.

These types of cases are often rooted in complex workplace realities, with the finer legal issues are often considered during case management before the final hearing.

Also, some of these cases can include a constellation of issues, with instances of discrimination, whistleblowing and unfair dismissal all present at the same time. As such they merit being heard by a full panel by default.

Reasons for the change and the meaning and use of 'consistent'.

The consultation paper says that "The SPT's view is that it would be right to aim for a more efficient and consistent pattern of panel composition". It goes on "This would involve pursuing reductions in panel size where that is justifiable in itself, and having in place a system where like cases are treated alike in this way."[4]

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[3] Corby, S (2011). *The Role of Lay Members/Non-legal Members as Judges in Employment Rights Cases* [online] available at https://impact.ref.ac.uk/casestudies/CaseStudy.aspx?Id=3929.
[4] Ibid, paragraph 14

Yet the SPT has not shown what is meant by 'consistent', why the current system is not 'consistent', provided evidence as to the need for a more 'consistent' pattern of panel composition, nor set out why increasing 'consistency' should mean removing panels including lay members from the ET and EAT process.

There have been a number of consultations in the last 20 years on panel composition in the ET and EAT.

The consistent view from employers, HR professionals, employment lawyers and trade unions is that non legal members are of vital importance (see for example, a previous submission from the CIPD[5])

Originally, ETs and EATs were made up of a legally qualified chair, a non-legal member nominated by the TUC, and another non-legal member nominated by the CBI. In 2013 that changed, with all EAT cases being heard by a judge sitting alone by default.

More recently, cases of unfair dismissal, unlawful deductions from wages and preliminary hearings were made 'short track', effectively removing panels including lay members from these types of ET and EAT proceedings unless a judge decides a case should be heard by a panel instead.

The proposed changes would add discrimination and whistleblowing cases to that short track and make two judges sitting alone the default for complex cases, effectively removing lay members from the ET and EAT process completely, unless a judge decides a case should be heard by a panel instead.

This is despite the previous consultation responses and research which has clarified that non-legal members:

- bring a knowledge and understanding of the workplace and employment practice which judges often do not possess, and
- that when facts are in dispute, the quality of decision-making is higher, and the appearance of justice being done is greater, when NLMs are present.

It is not clear why 'consistency' across ET and EAT structure has been deemed of greater importance than the facts above.

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[5] CIPD (2017). *Reforming the Employment Tribunal System Submission to the Department for Business, Energy and Industrial Strategy & the Ministry of Justice* [online] available at: https://www.cipd.co.uk/Images/cipd-response-reforming-the-employment-tribunal-system_tcm18-20648.pdf

It should be noted that due to the Covid-19 pandemic, the ET and EAT system is under increased pressure. Cases are now being listed for 2025, while and the backlog of cases is in excess of 475,000, including multiple cases.[6]

We share the SPT's desire to reduce the backlog as a matter of priority but do not believe this is how to do it.

Quick fixes for cost and speed should not outweigh fairness, diversity and inclusion concerns and wider access to justice.

A central element of the tribunal system is being lost because government is not prepared to properly resource the system.

Equality, diversity and inclusion

The consultation paper states:

> *The promotion of diversity in the judiciary is one of the SPT's main strategic objectives. However, it would not be appropriate to pursue that objective by deploying judicial office holders to hear cases in which their expertise is not required. In circumstances where resources are constantly under pressure, an equally fundamental consideration must be the efficient and proportionate delivery of justice, and the provision of access to justice*[7].

It is encouraging that 'the promotion of diversity in the judiciary is one of the SPT's main strategic objectives'. The statistics cited in the paper clearly show that the proportion of people from ethnic minorities, women, and disabled people is higher among lay members than judges – in some cases almost double.[8]

This consultation response has already shown that the research indicates that 'efficient and proportionate delivery of justice', and 'the provision of access to justice' is increased by including lay members in ETs and EATs.

It cannot be argued that, when considering equality and diversity, the efficiency and proportionality associated with ending claimants' access to panels including lay members by default for whistleblowing and discrimination cases is more central to the delivery of

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[6] (2023) *Tribunal Statistics Quarterly: October to December 2022* [online] available at https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2022/tribunal-statistics-quarterly-october-to-december-2022

[7] Ibid, paragraph 5.

[8] Ibid.

justice, and to access to justice, than continuing to have these cases heard by more diverse and inclusive panels.

Further to this, for discrimination cases, ending claimants' access to hearings by panels including lay members in the first instance, which the judiciary's own data shows are the most diverse and inclusive type of panel, would be profoundly damaging to marginalised workers.

Claimants in discrimination cases already believe they have experienced discrimination as a result of their protected characteristics. Having their case heard by a diverse panel of workplace experts is a by far the safest and most effective way for that case to be resolved.

Consultation 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?

No. Lay members are a valuable part of the ET process. They bring important insight and in-depth knowledge of the workplace from both sides of industry that builds a crucial perception of fairness and credibility for both claimants and respondents.

It is vital that there continues to be confidence in the justice process for all, and panel composition and the involvement of non-legal members can be particularly important for claimants in cases involving discrimination and whistleblowing.

The context of the career pathway of a judge - becoming legal counsel, a barrister, practicing in chambers and then applying to the Judicial Appointments Commission - is not typical of the most common employment relationships. Lay members bring valuable knowledge to tribunals that a judge sitting alone would most likely not have.

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

We share the SPT's desire to reduce the backlog as a matter of priority but do not believe this is how to do it. The government should resource the tribunal system properly. We are not aware of any evidence of the impact in terms of cost, speed or effect on the backlog of tribunal cases of previously removing the automatic hearing by full panel by default from other kinds of claims such as unfair dismissal. The SPT should publish data on whether these previous changes have been successful in these areas before proposing to extend these changes.

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?

No. The removal of lay member panels by default and unless a judge decides a case should be heard by a panel has not been proven to be effective. Lay members are a valuable part of the ET process, providing a useful grounding in the realities of a workplace.

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

No. Lay members are a valuable part of the EAT process too, providing a useful grounding in the realities of a workplace.

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?

No, the choice to direct to a panel should remain. The possibility of a full panel and benefits of one to the claimant must be made clear. Complex cases could benefit from the valuable knowledge about the realities of a workplace that lay members currently provide. The SPT should also investigate whether the judicial resource exists for this change.

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

No, lay members are valuable to the process and must continue to be part of it.

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

If changes are made, claimants should be able to request this without limitations or a burden of proof. Especially members of equalities groups and claimants in discrimination and whistleblowing cases.

8. Do you have any other comments?

The TUC believes that lay members should sit in all employment-related cases, including fast track, unfair dismissal, whistleblowing and discrimination cases.

Employment judges should only have discretion to sit alone, where a case involves only complex issues of law, and all issues of fact are uncontested. It cannot be argued that lay members do not bring valuable knowledge to tribunals that a judge sitting alone might not have.

Lay members maintain the confidence of both sides of industry and business in the employment tribunal system. And, by drawing on their knowledge of workplace issues, lay members help to ensure that ET and EAT decisions are workable and reflect the latest developments in good HR and employment relations practice.

Lay members were originally considered an essential part of a tripartite adjudication process vital to the ET and EAT systems. The TUC believes this is still the case, and we oppose proposals that reduce their role even further because lay members:

- help root tribunals in the realities of working life
- Build confidence in the process among claimants and respondents and
- increase the representation that is diverse and inclusive.

The loss of these factors is too high a price to pay when the alternative is the government resourcing the tribunal system properly.