



SENIOR PRESIDENT
OF TRIBUNALS

THE RIGHT HONOURABLE SIR KEITH LINDBLOM

Sir Bob Neill MP
Justice Committee
justicecom@parliament.uk

By email only

10 December 2020

Dear Sir Bob,

Employment Tribunals

When the Justice Select Committee met on 10 November 2020, you asked the Lord Chief Justice a question about the Employment Tribunals. In response, he said that he would invite me to write to you to explain how those tribunals had been performing during the Covid-19 pandemic.

In this letter I shall provide some information that will, I hope, reassure you about the innovative and robust recovery measures that are being taken. I regularly meet the two Presidents of the Employment Tribunals – Judge Barry Clarke, who is President of the Employment Tribunals in England and Wales, and Judge Shona Simon, who is President of the Employment Tribunals in Scotland – and I have been kept fully informed of their progress. At the same time, it is right to acknowledge the considerable challenges faced by the Employment Tribunals, and I shall therefore begin by providing some context.

Context

As you know, the Employment Tribunals comprise two separate jurisdictions, one for England and Wales and one for Scotland, each with its own President. They have been witnessing a steady increase in their caseload since the judgment of the Supreme Court in July 2017 in *R (UNISON) v Lord Chancellor* [2017] UKSC 51, which led to the removal of the fee regime that had operated since April 2013.

The most frequently cited indicator of the demands on the Employment Tribunal system at any time is the number of outstanding “single” claims awaiting determination. A “single” claim is a claim brought by just one claimant. It might be a straightforward complaint about a week’s unpaid wages, capable of being decided on the papers (if it is not defended) or at a short hearing before a judge. It might be a complaint of unfair dismissal, capable of being

decided at a hearing before a judge lasting one or two days. It might, however, be a complex matter involving several discrete complaints about discrimination, or detriments for “blowing the whistle”, which requires a hearing before a full panel of three members (including a judge), sometimes lasting several days despite the appropriate efforts of the tribunal to ensure that the hearing is as short as it realistically can be.

In England, Wales and Scotland, there were about 10,000 single cases awaiting determination in March 2017, about 19,000 in March 2018, and about 27,000 in March 2019. The previous peak had been in the 2009/10 financial year, in the aftermath of the financial crisis, when it stood at about 36,000. This demonstrates how the pressures on the Employment Tribunal system operate countercyclically to the performance of the economy. The “pre-Covid baseline” of outstanding single claims in early March 2020 was about 30,500; it had begun to level off following the recruitment of new judges north and south of the border.

The pandemic has affected the Employment Tribunals in three principal ways this year. First, the need to reduce footfall in buildings, to ensure public safety, has reduced the ability to hold in-person hearings, even after the HMCTS estate began to reopen in the summer. Second, as the labour market has been disrupted, more claims are entering the system. Third, because the Employment Tribunals use a server-based case management system called “Ethos”, it cannot reliably be accessed remotely. Staff must therefore be physically present in the office, and in most venues used by the Employment Tribunals, effective office working is difficult to reconcile with safe “social distancing”. These factors have accelerated the increase in the outstanding caseload of “single” claims. For the week ending on 29 November 2020, the figure had risen to about 43,200. This is a 40% increase since the March 2020 baseline.

The “single” claims caseload of the Employment Tribunals is accompanied by a “multiple” claims caseload. A “multiple” is a case involving more than one claimant. Many such claims involve hundreds of claimants and some involve many thousands. Some “multiples” arise in consequence of the economic cycle (such as collective redundancy cases when businesses become insolvent), but many arise independently of the state of the labour market (such as public sector pension claims and equal pay claims with remedies calculated in very large sums, occasionally in excess of £100 million). The “multiple” caseload is a less reliable barometer of the pressure on the system because the size of the claim does not always correspond with the judicial work required to determine it, and because the flow of work is less dependent on the economic cycle.

In England, Wales and Scotland, there were about 2,800 multiple cases awaiting determination in March 2017. Within this figure were about 260,000 individual claimants. This had increased to about 3,600 cases in March 2018 (about 320,000 individual claimants), and about 4,700 cases in March 2019 (about 380,000 individual claimants). The “pre-Covid baseline” of outstanding multiple cases in early March 2020 was about 5,200 cases (about 410,000 individual claimants). For the week ending on 29 November 2020, the figure stood at about 5,900 (about 440,000 individual claimants).

The credibility of the Employment Tribunals depends upon the fair, just and efficient disposal of these claims. However, the uneven distribution of resources between areas of Great Britain results in short waiting times in some areas and longer waiting times in others (especially London and the South East).

The immediate response

In my view, the response of the Employment Tribunals to the challenges of the pandemic has been exemplary.

When the pandemic struck, the two Presidents of Employment Tribunals set about devising ways in which hearings could continue. By mid-March, they had issued joint guidance on the conduct of hearings during the pandemic, encouraging the tribunals and their users to make the greatest possible use of telephone and video platforms to conduct hearings. They issued a series of “FAQ” documents for users and, by the start of June, had produced a “road map” to support a staged return to full contested hearings by September. They have each issued new Practice Directions and Guidance documents on such matters as the fixing and conducting of remote hearings, the safe operation of in-person hearings and the safeguarding of open justice. Such materials can be accessed [here](#) (for England and Wales) and [here](#) (Scotland).

The Employment Tribunals judiciary has embraced the HMCTS Cloud Video Platform (“CVP”) as a means of conducting hearings. The rapid training of about 1,500 office holders has been undertaken. Contested hearings are now being conducted, in all parts of the country, north and south of the border, using this technology. This includes multi-day hearings before full panels, all sitting remotely, as well as judicial mediations.

Interest in judicial mediation has increased during the pandemic, both by telephone and video methods, with many parties commenting on how suitable CVP has proved when it comes to assisting parties to resolve their disputes in this way. In the first nine months of 2020, the Employment Tribunals in England and Wales made a net saving of 2,374 sitting days through judicial mediation. This is a 15% increase from the same period in 2019, and a 25% increase from the same period in 2018. Between two thirds and three quarters of claims that enter judicial mediation result in settlement. The percentage success rate and the improvement in figures has also been seen in Scotland.

The latest statistics show that the Employment Tribunals are sitting more “CVP hours” than any chamber of the First-tier Tribunal and, indeed, almost as many hours as all chambers combined. By September, the number of sitting days in the Employment Tribunals had returned to their pre-Covid levels, both for judges and non-legal members. For both “single” and “multiple” claims, the numbers disposed of on a weekly basis had also largely returned to their pre-Covid levels. I consider this to be an impressive achievement.

The national and regional leadership judges of the Employment Tribunals have worked tirelessly alongside HMCTS to secure the hardware and software needed to conduct remote hearings and, while there is still some way to go, progress has been significant. However, the leadership judges, and the Employment Tribunals judiciary generally, are well aware

that not all cases are suitable to be heard in this way. Some parties, particularly those who are unrepresented, may not have the equipment they would need to take part in a remote hearing. In other cases, one or more features of the parties or their circumstances may mean that a hearing cannot be conducted fairly and justly on a remote basis. The Practice Directions and Guidance issued by both Presidents focus on the range of factors that Employment Tribunals should take into account when deciding whether a case is suitable to be heard remotely. For those who lack equipment the hope is that in the future HMCTS will be able to provide equipment in Employment Tribunal premises that can be used by parties to take part in CVP hearings. Excellent support has been provided by HMCTS video hearing officers to those who may need assistance when participating in a hearing by video. Since hearing centres reopened HMCTS has been working hard to provide facilities that are safe and 'Covid secure' so that hearings in person can take place. Each month since the early summer the number of such hearings has been increasing across the country, so that where a case is unsuitable for a remote hearing, access to justice can still be provided.

Both Presidents have been keenly aware of the need to communicate effectively with tribunal users, to ensure that they understand what is happening and why. They have engaged in numerous public engagement exercises (virtual meetings, interviews, podcasts and webinars) to explain their strategy to the users of the Employment Tribunals. Users themselves have generally been complimentary about these efforts.

The two Presidents have actively engaged with BEIS and MOJ to secure improvements to the relevant regulations and rules of procedure applying to the Employment Tribunals, designed to improve efficiency, which took effect on 8 October 2020. It should be remembered that BEIS still "owns" the system's rules of procedure. Such changes have facilitated the conduct of remote hearings, the prospects of judicial cross-deployment and the recruitment of caseworkers (called "legal officers").

Plans are also under way in England and Wales to develop a cohort of judges and members able to sit remotely on cases generated by any region – particularly those most in need, in London and the South East – rather than only the one to which they have been assigned. This is mirrored by a new approach, where feasible, of assigning the management of future large "multiple" claims to regions outside London and the South East with greater capacity to handle them swiftly.

I would also like to praise HMCTS for the work it has done alongside the leadership judiciary of the Employment Tribunals. This has included the provision of nearly 330 CVP "rooms", the provision of software and hardware for conducting remote hearings, support for the Employment Tribunals in piloting the next-generation version of CVP; and continuing efforts to prioritise the delivery of a modern, "Cloud"-based case management system to replace Ethos. Staff working in the tribunals have adapted well to new ways of working. This includes the provision of remote clerking services for remote hearings.

Next steps

However, the immediate response, impressive though it is, does not solve the systemic problems faced by the Employment Tribunals. These problems result from there being too

few judges sitting in the Employment Tribunals, too few sitting days, too few staff, premises of variable quality and the effects of the poorly functioning Ethos case management system.

While CVP provides an important new vehicle for tackling the caseload, it is not a panacea. Waiting times for hearings will continue to lengthen – particularly in London and the South East – until more resources are available. There is a continuing and pressing need for the recruitment of judicial office holders, caseworkers and staff, for the effective replacement of Ethos, for an improved online presence for the Employment Tribunals to help the parties in understanding what the system expects of them, further investment in video hearings, and an improved estate than can better support “hybrid” in-person and video hearings. It would also assist the efficiency of the Employment Tribunals if improved support and publicity were provided to Acas –so that Acas can be more effective in helping to resolve employment disputes and can provide information that prevents disputes from arising – and if there is more funding for advice on employment law, which has over several decades become complex and technical.

I hope that this letter has provided an adequate answer to your question, but I shall be glad to assist the Select Committee if there are any matters I have not dealt with fully.

Yours sincerely,

Senior President of Tribunals