Consultation on Panel Composition in the Employment Tribunals and the Employment Appeal Tribunal

Submission by Prospect to the Senior President for Tribunals

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www.prospect.org.uk

Introduction and Summary

Prospect is an independent trade union representing over 150,000 members. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, broadcasting, entertainment and media, defence, education, energy, environment, heritage, industry, scientific research and telecommunications.

Prospect welcomes the opportunity to respond to the consultation on the proposed changes to the composition of the Employment Tribunal and Employment Appeal Tribunal.

Before addressing the specific questions in the consultation document, we would like to make a number of general points in this introductory section of our response. We have had the benefit of seeing the TUC's response to this consultation and can confirm that Prospect is in full agreement with the points made by the TUC.

Valuable insight provided by non-legal members

The Employment Tribunal and Employment Appeal Tribunal is different to most other tribunals in that they are dealing with disputes between parties rather than administrative tribunals which deal with disputes between the party and the state. This makes their role and procedures very different and we consider that this distinction should be recognised. We consider therefore that judges and non-legal members of the panel bring particular specialist expertise and knowledge and that this must be maintained.

We are pleased that the consultation document recognises (paragraph 18) that many of the questions that an ET or the EAT may have to decide 'are questions in which workplace decisions may have a real bearing on a just outcome.' Those working in industry are best placed to bring a 'real-life', 'up-to-date' experience of how workplaces operate and therefore their input is extremely valuable. The world of work is always changing, with the emergence of the 'gig-economy' to the expectations and obligations on employers and employees alike. Without having input from people working across the economy, there is a danger that judicial decisions will fail to reflect the actualities of the workplace.

Should it be decided that more cases are heard by a judge alone by default, this would mean that there would be a significant number of cases that have no input from panel members. We do not consider that changes to panel composition in unfair dismissal cases has been helpful and would be concerned that further changes would lead to a loss of the very real added value of non-legal members in other cases.

Non-legal panel members in unfair dismissal cases

In the consultation paper, it is recognised that questions of 'reasonableness' for example where an individual has requested reasonable adjustments will require a

consideration of workplace experience and therefore decisions on these kinds of issues, if made by a panel, might be stronger than the decision a judge might make when sitting alone. We consider that this is also the case in relation to cases of unfair dismissal where the key test relates to the reasonableness of an employer's decision i.e. was it one that no reasonable employer would have taken. Consequently, we consider that the input of panel members is also necessary in dismissal cases.

Equality, Diversity and Inclusion

It is noted within the consultation document that the proportion of people from ethnic minority backgrounds is higher among non-judge members of the tribunal (18%) than it is among judge members (12%). There is also a higher proportion of women non-judge members, 56%, compared to 52% of judges in the tribunals and a significantly higher number of non-judge disabled members, 11%, compared to 6% of judges.

The promotion of diversity in the judiciary is one of the SPT's main aims. We consider that reducing the number of cases where a full panel sits will significantly impact the SPT's ability to meet this aim. Moreover however, having greater diversity within the judiciary enables better decision making which is more reflective of different experiences. Particularly in discrimination cases, where tribunals may be asked to draw inferences in respect of whether discrimination has occurred, having a diverse and representative panel allows for a greater breadth of experience and understanding.

Efficiency and Consistency

We recognise the SPT's aim is to ensure efficiency and consistency in decision making. We support this aim but do not think that limiting the types of cases where a full panel sits will achieve this.

In particular, since 2012, when the default position in unfair dismissal cases was changed to a judge sitting alone, there has not been a significant change in the length of time it takes to dispose of a case. Tribunal statistics show that in 2011/12 the median age of a case at the time of clearance in the employment tribunal was just over 30 weeks. This dropped in 2015/16 but this was largely due to 'backlog-clearing' during the period fees were payable but in 2020/21 it was back up to over 30 weeks.[1] Therefore, we do not believe that further changes to the composition of tribunal panels will have a considerable impact on the 'efficiency' of dealing with cases.

In addition, although we do not oppose the SPT allowing for the possibility of a two-judge panel to deal with particularly complex cases or for the purposes of development, we do not believe that this means that the panel cannot also include non-legal members.

If such a system were to be adopted, further consideration would need to be given as to how having two judges would work in practice, particularly in relation to the 'status' of the 2nd judge in overall decision making and the potential for split judgments.

[1] 'Court statistics for England and Wales' – published 31 January 2023 CBP-8372.pdf (parliament.uk)

We also recognise that there are already issues with judicial resources and have some concerns that the introduction of a two-judge panel for some cases could lead to further delays in cases being listed. Furthermore, we are concerned that by reducing the types of cases on which non-legal panel members sit, this will dilute the skills of those currently sitting and make it harder for new panel members to develop their skills.

We note that in the EAT the discretion to sit with a panel has only been exercised in about 15% of cases since 2013. We believe that the existing power for judges to determine that lay members should hear a case must be retained and should be used more frequently. We would support the use of Practice Directions in this area to ensure a greater level of consistency is achieved across employment tribunals in respect of the management of cases.

We believe that other avenues should be explored in order to deal with cases more efficiently. In our experience, respondents are often not inclined to take part in mediation. Although we recognise that in order for mediation to be successful, both parties must be willing to engage, we consider that greater encouragement for parties to explore ADR, particularly where the claimant is still in the respondent's employ, would lead to more efficient resolution and also better outcomes for the parties.

We also consider that many of the problems this consultation seeks to address could be better resolved by proper resourcing of the tribunal system, including not just sufficient judges and panel members, but also an increase in the numbers of legal officers and administrative staff to ease delays in tribunal procedures.

CONSULTATION QUESTIONS

Specific 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, we do not agree. We strongly believe that non-legal members of the panel bring particular specialist expertise and knowledge and that this must be maintained.

Prospect considers that the matters that come before Employment Tribunals are often extremely complex, both legally and factually. Many cases involve multi-day hearings, and legal representation is much more prevalent in Employment Tribunals than in other tribunals (largely due to this complexity).

Those with direct experience of the workplace are best placed to bring 'real-life', 'up-to-date' experience of how workplaces operate and therefore their input is extremely valuable. The world of work is always changing. Without having input from people working across the economy, there is a danger that judicial decisions will fail to reflect the reality of the workplace. Non-legal members with a good experience of the issues that arise in the workplace are well placed to determine many issues in respect of employment law, where the test is often reasonableness and fairness.

We therefore consider that there should be no further increase in the number or type of cases heard by a judge alone in employment tribunals and similarly in the EAT.

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

No. The key test in unfair dismissal cases relates to the reasonableness of an employer's decision i.e. was it one that no reasonable employer would have taken. Consequently, we consider that the input of panel members is extremely valuable in dismissal cases.

We note in the consultation that the SPT refers to there being a present distinction in that in a case of automatic unfair dismissal under section 103A of the Employment Rights Act 1996, the tribunal would be made up of a judge sitting alone but in a detriment case relating to making a protected disclosure under section 47B, this would require a full panel and that there appears to be no good reason for this distinction. We agree that there is no good reason for this distinction and that there should be consistency in respect of when a full panel is required, but moreover, we believe that a full panel should sit in most cases and that there should certainly be no increase in the number or types of cases heard by a judge sitting alone.

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. See response to question 1 above. We believe that the involvement of panel members is beneficial in nearly all types of cases, for example claims for unlawful deduction of wages or breach of contract may appear at first to be entirely a matter of legal interpretation, but often in our experience these cases require an assessment of workplace agreements or implied terms, which would benefit from the broader experience of panel members.

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

No. See above responses.

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?

In principle, we do not object to the SPT allowing for the possibility of having two judges on a panel to deal with particularly complex cases or for the purposes of development. However, we do not believe that this means that the panel cannot also include non-legal members.

We appreciate and recognise the desire to assist the development of judges by sitting in a panel with a more experienced judge, however there is similarly a real risk that by reducing further the number of cases on which non-legal members sit, members currently sitting in tribunals may have their existing skills diluted by sitting less frequently and new non-legal members do not develop their skills. Having regular opportunities to sit on panels provides crucial experience to enable members to deal with the complexities of cases coming before tribunals.

Further, the aim of the SPT is to have a more efficient and consistent pattern of panel composition, however no explanation of what is considered to be a 'complex case' or the 'other circumstances' that might justify having two judges is set out in the consultation. We also believe that consideration needs to be given to the 'status' of the second judge and who's decision will take precedence.

In addition, we recognise that there are already limited judicial resources (with the number of judges and non-legal members in all tribunals (not just employment tribunals) having fallen by 9% between 2012/13 and 2021/22[2]). We therefore have some concerns that the introduction of a two-judge panel for some cases could lead to further delays in cases being listed.

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

No. We consider that the current discretion to have a full panel should be maintained and used more frequently. In some cases, issues considered at preliminary hearings are fundamental to the case for example, the claimant's employment status, whether the claimant is disabled under the Equality Act 2010, or what constitutes 'like work' in equal pay claims. These are often very fact specific and rely on having a good comprehension of the actual reality of the nature of the work being done. Therefore, we do not consider that such decisions should be made by a judge alone in all cases.

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

We consider that the position should not be that a judge sits alone by default, rather that there should be a panel by default and then discretion to depart from this if the parties agree.

Should such changes to the panel composition be made, there must be a transparent criteria for determining whether non-legal members should be called upon.

[2] 'Court statistics for England and Wales' – published 31 January 2023 CBP-8372.pdf (parliament.uk)

We would support the use of Practice Directions in this area to ensure a greater level of consistency is achieved across employment tribunals in respect of the management of cases.

We also believe that Claimants should be able to request a hearing by a full panel, particularly in discrimination and whistleblowing cases.

8. Do you have any other comments?

We believe that many of the problems this consultation is seeking to resolve could be addressed by proper resourcing and investment in the tribunal system.

We do not consider that time for panel members to ask questions and to contribute to the preparation of the decision or judgement is likely to be significant or is time 'wasted'. We believe that this can only ensure that judgements are well-considered and based on the reality of the working environment.

Overall therefore, we do not believe that these proposals support, and indeed they are likely to hinder, the need for:

(a) Tribunals to be accessible
(b) Proceedings before tribunals to be fair and to be handled efficiently
(c) Members of tribunals to have appropriate expertise in the subject-matter of, or the law to be applied in, the cases they decide
(d) Developing innovative methods of resolving disputes brought before tribunals; and
(e) Equality, diversity and inclusion.