

Response to the Senior President of Tribunals consultation on panel composition in the Employment Tribunals and the Employment Appeal Tribunal

This response is provided by the Free Representation Unit ('FRU').

The Free Representation Unit (FRU) provides free casework and representation for litigants in person at the Employment and Social Security Tribunal. We have the twin aims of alleviating poverty and supporting aspiring solicitors and barristers to develop their experience by running cases.

We are a volunteer-based organisation that offers quality, supervised representation to litigants in person through our volunteer network. We currently have 450 active volunteers who are largely students undertaking BVC (Bar Vocational Course) and LPC (Legal Practice Course) and junior solicitors and barristers. We also train around 600 volunteers a year and so have a robust rolling programme of volunteer training, supervision, and delivery.

We were set up in 1972 by law students who wanted to obtain real life practical experience whilst giving practical legal support to those who could not afford it.

FRU volunteers provide casework support once a notice of hearing is provided and provide advocacy in the Employment Tribunal. As such, we have considerable experience of the experience of Claimant's and litigants in person navigating the Employment Tribunal process including at Preliminary Hearing and Final Hearing stages.

We respond to Question 28 of the consultation for panel composition in the Employment Tribunals and Employment Appeal Tribunal as follows:

28. In each case, please give your reasons for agreeing or disagreeing. If disagreeing, please explain any proposal which you suggest should be adopted instead.

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 recognise that there is a balance to be struck between the need to reduce the waiting times for a matter to be heard in the Employment Tribunal and the delivery of remedy should be efficient and proportionate. However, we would argue that the increased legalisation of Employment Tribunals leads the need for a better understanding of the realities of the workplace and that this is provided through the judicial insight of the panel members.

We would also argue that the marked statistics of the diversity of the panel members in terms of race, sex, and disability in comparison to the Judicial members gives a relevant insight and lived experience that is necessary to ensure access to justice.

We would argue that the benefit of the real-world experience of the panel members is incredibly valuable and insightful, particularly in discrimination cases where they often, in our experience, offer a viewpoint not reflected in either the experience of the parties or their representatives. The relevance of that real time experience is to reflect the nature of work and also the changing nature of work. As FRU provides casework and advocacy support to litigants in person who would otherwise be unable to afford legal representation through volunteers, the effect of last-minute postponements and long lead times to Tribunal makes case management through the use of volunteers exceedingly difficult. Many volunteers are unable to commit to a 2 – 3-year case, particularly where many are students and will inevitably have entered work by the time a postponed hearing is finally heard. However, this also needs to be balanced against the fact that users need to feel engaged with the process and outcome of the hearing and there is a danger, as well as possibly a reality, that Judges do not have the benefit of that engagement capability. Having the benefit of diverse views assists not only the understanding of the decision-making process but also the perception of that understanding and the belief and satisfaction in the judicial process.

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

Yes. With the caveat that either party or the Employment Tribunal can request additional panel members if the complexity of the case or vulnerability of the claimant requires it.

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?

Yes. With the caveat that either party or the Employment Tribunal can request additional panel members if the complexity of the case or vulnerability of the claimant requires it.

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

Yes, we agree that the cases in the ET's that are currently heard by a judge alone by default should continue to be heard by a Judge alone with the caveat that either party or the Employment Tribunal can request additional panel members if the complexity of the case or vulnerability of the claimant requires it.

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?

We agree that there are circumstances where it may be appropriate for a case to be heard by two Judges, for example as part of the training requirements of a more inexperienced Judge. However, we do not agree that the introduction of a panel of two Judges ameliorates the loss of expertise created by the loss of the wing members as the wing members have different industrial and commercial skills and experience which is not reflected in or rectified by the introduction of a second additional member of the Judiciary.

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

We agree that in most preliminary hearings a judge alone panel is appropriate. However, we can envisage some preliminary hearings, such as the determination of whether the Claimant is disabled or the preliminary determination as to whether acts amount to a protected disclosure, where it would be in the interests of justice to commission a tripartite panel. With the caveat that either party or the Employment Tribunal can request additional panel members if the complexity of the case or vulnerability of the claimant requires it.

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

FRU representatives often become involved in cases quite a long way into the claim and the experience of many litigants in person post LASPO is that they are unable to obtain legal advice and the first time they have received any legal assistance is a month or two before the hearing. With this in mind, we would request that the opportunity to request an extension to the panel be given in clear terms, potentially via an addition to the case management agenda.

Factors to be taken into account could be (but not limited to):

- The views of the parties (with the judge acting as proxy where either the Claimant or the Respondent are unrepresented)
- The complexity of the hearing including how many preliminary issues are to be determined
- The length of the hearing (as an indication of complexity)
- Whether the claimant is particularly vulnerable

8. Do you have any other comments?

No

Should you wish to discuss this with us further. Please do not hesitate to contact us.

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