Bar Council response to the Senior President of Tribunals' Consultation on Panel Composition in the Employment Tribunals and the Employment Appeal Tribunal

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Senior President of Tribunals' Consultation on Panel Composition in the Employment Tribunals and the Employment Appeal Tribunal.[1]

2. The Bar Council represents over 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Question 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?

4. No, we do not agree.

5. In cases in which industrial experience is a valuable factor in decision-making there remains a strong case for lay members of the Employment Tribunal to continue to constitute part of the tribunal determining the claim(s). To facilitate the efficient listing of hearings before a full tribunal (a judge plus two lay members drawn from the employer and employee panels) the default should be that they will constitute the tribunal.

6. However, there ought to be a mechanism by which, a sufficient time before the case is listed, the necessity and / or desirability of a full tribunal sitting is reviewed i.e., the default

[1] 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/

position is actively considered and changed if appropriate. Under the current system where the parties agree in writing, a hearing can be conducted before a judge alone. This is not something as to which parties are proactively invited to consider their respective positions and this may be a useful administrative step to add to case management processes so that cases in which the parties are content to proceed by way of judge alone are not automatically listed with lay members.

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

7. Yes, this should remain the default as it has been working well in practice for over a decade now, and there already exists a legislative basis upon which parties and / or a judge can ask for lay members to join the tribunal.

Question 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?

8. Yes, for the same reasons as given above in (2). These are cases in which the industrial experience of lay members is not considered to be of great importance. We do not consider that s.4(3) Employment Tribunals Act 1996 requires amendment save that we agree that there is a need to review the position in respect of s.103A Employment Rights Act 1996 claims (whistleblowing dismissal) where a judge can sit alone and s.47B detriment claims where a full panel is convened even though the law has moved on and that s.47B claims may be dismissal claims in another guise. There is little rationale basis for a judge hearing one type of case alone and another with lay members.

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

9. Yes, as there is no evidence that the current system is causing injustice or inefficiency. Given the powers of the EAT to consider points of law only (including where the error of law alleged is perversity) it is a rare case in which lay members are required to join the bench at the EAT. The percentage stated in the consultation (15%) for when lay members join the bench seems about right given the type of case in which they are required. The EAT has disposal powers which mean that it may effectively determine a matter rather than remit it to the tribunal below and we can see there will be a minor category of cases in which the industrial experience of lay members remains valuable.

Question 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?

10. No, we do not agree.

11. It would be highly unusual in any civil jurisdiction (if not unprecedented) for there to be two judicial office holders to determine a dispute. An employment judge is qualified to hear a wide range of disputes whether they are complex in fact or law. New employment judges cannot hear what are deemed to be more complex cases, which is a system that has

been in place for some time and works to generally good effect and ensures that a new judge has time to hone their judge-craft and experience before sitting on more complex matters.

12. Further, there may be a substantial level of satellite disputes around whether the complexity of a matter is such to justify two judges rather than one, and what is to be done where obtaining two judges creates greater delay in listing and / or promulgating judgment. It creates the obvious problem where two judges cannot agree on the outcome and reach a "deadlock". This is overall a highly undesirable suggestion and is likely to run counter to the overriding objective of Employment Tribunals and to the principle of access to justice. It is also likely to add to the administrative and cost burdens of an already stretched system.

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

13. Yes, we agree. This works well in practice and increases efficient listing and disposal of preliminary matters and case management issues. There is little scope for the industrial experience of law members being required for the types of matter which are capable of being determined at a preliminary stage.

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

14. The current position is that a panel should generally be convened where there is a "likelihood of a dispute arising on the facts which makes it desirable for the proceedings to be heard" by a panel. The language is imprecise. Clearly the mere presence of a factual dispute does not justify a full tribunal with lay members and a judge is more than capable of resolving factual disputes. The question is what sort of factual dispute might reasonably require industrial knowledge and experience bearing in mind that the use of expert reports is not extensive in tribunals and there is a limit to the matters as to which a judge is entitled to take judicial notice. The industrial experience of the lay members essentially bridges this gap.

15. We consider that a judge should have discretion to require lay members to constitute the tribunal in any case where, having considered the issues in the case, the extent to which facts are in dispute, and the extent to which industrial experience will assist in focusing the issues and / or resolving the factual disputes he or she considers that it would further the overriding objective to do so. In each case where a judge is considering departing from the norm and requiring a full tribunal including lay members, the parties should be given reasonable opportunity to make written representations before a decision is made save in exceptional circumstances.

Question 8: Do you have any other comments?

16. The consultation notes that the number of lay members from minority ethnic backgrounds and with disabilities is higher than the cohort of employment judges. Thus, reducing the number of occasions on which lay members sit on tribunal cases will influence equality, diversity, and inclusivity, and we would also suggest have some impact in terms of social mobility. The Bar Council considers that in-depth analysis is required to understand the equality, inclusivity, and diversity impact of removing the need for lay members of the

Employment Tribunal to hear cases. Both the Law Reform Committee and Equality & Diversity Committee of the Bar Council consider that an Equality Impact Assessment is of fundamental importance before any changes are implemented.

17. While judges and practitioners alike have reported that the current system (which requires lay members to comprise the tribunal which determines cases such as unlawful discrimination and whistleblowing) is one that generally works well, the Bar Council also understands that the label assigned to a case and causes of actions do not always dictate how complex they are, either in law or in fact, and the factors which may lead to preferring a full tribunal panel of three (a judge and two lay members drawn from the "employee" and "employer" panels) can be finely balanced.

18. The Bar Council would endorse a system in which a substantive analysis of the need and desirability for lay members is considered before a case is listed. The Bar Council also notes that many judges recruited to the Employment Tribunal are not, as they once were, employment practitioners with many years of experience in the field of labour law and in tribunals. In those circumstances, it may be said that the lay members of the tribunal add value given their industrial experience. As ever, the Bar Council recognises that the overall interests of justice which includes the speed which with cases can be listed and determined is also an important contextual factor to consider. At present, it is not clear from any robust data sets whether any proposed change to the current system with judges sitting alone in some types of case and not in others will yield any substantial benefits in this regard save in respect of the budget saving of lay members' sitting fees.

Bar Council[2]
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[2] Prepared by the Law Reform Committee