



The Employment Tribunal System Steering Board

Report on consistency

31 March 2010

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Foreword

To: Bridget Prentice MP, Parliamentary Under-Secretary for Justice, and Lord Young of Norwood Green, Parliamentary Under-Secretary of State for Employment Relations

Dear Ministers,

We are pleased to present our report on consistency of employment tribunal procedures and case management. When you commissioned this important work in January last year, the backdrop of Michael Gibbons' 2007 Review was very much in the minds of stakeholders.

To a very significant extent, that remains the case. However, the task that you asked us to undertake was by no means a simple one. Defining what 'consistency' (or, more to the point, 'inconsistency') means in the context of a justice system that needs to treat each case on its individual merits, has in itself provided some challenges. We refer to this in Section 3 of our report.

Over the course of the last 14 months, we have consulted as widely as possible within our resource constraints. Indeed, we have been pleased with the constructive and willing engagement of stakeholders from all quarters – and express our thanks to them now. Our work here reinforces the view that a *perception* of inconsistent practice and procedure exists, at least in the minds of some users.

Of course, further empirical evidence would always be useful. But whether or not a perception is valid is, in a sense, not a first order issue. The justice system – and in our own context the employment tribunal system – must be and must be seen to be fair in the way that it treats cases. Consistency of practice (and so predictability) should, *so far as possible*, be entrenched.

To the extent that a perception exists in the minds of users, therefore, it must be addressed. To the extent that the perceived issues are having a real and negative impact on users' experience of the system, it is yet more important to meet the issues with robust recommendations. But it is of the utmost importance that we recognise from the outset that the overriding objective of the employment tribunal system is "to deal with cases justly" – and in particular to try to ensure just outcomes for all cases. Consistency is but one factor in that endeavour.

The tension between 'active case management' (where Employment Judges have to be afforded discretion to manage cases according to their individual circumstances) and the need for 'consistency' (so as to make the system as predictable as possible, in particular with respect to the overall costs to both parties in time and expenses of the ET process and eventual outcomes) requires a fine balance. That fine balance is not always suited to hard and fast algorithms. But at the very least, communicating more effectively how and why the system works as it does is important.

This report, which is largely the product of a working group set up under the auspices of the ETSSB and which has been endorsed by the ETSSB, outlines the work we have done, including the results of our consultation exercise, and the work that others are doing (so illustrating the measures already in the pipeline which should have a telling and positive effect). The report finishes with a list of the recommendations we make. In summary, those recommendations touch on:

- the need to improve the way in which ‘the system’ communicates to its users, so helping those users better to understand what to expect, and why;
- more generally, the transparency and accountability of the system, and so the extent to which the system can prove itself to be as consistent as possible; and
- the extent to which it is thought possible to improve consistency in respect of case management process and procedure, whilst protecting the essential independence of the judiciary.

Some concerns raised by stakeholders during the course of our review have touched on issues outside the strict confines of consistency of practice. Although consistency issues must remain our core focus, in general members of the ETSSB felt it important to recognise the concerns raised and to address those points where appropriate. In particular, as this report is that last piece of work that the ETSSB will, as a group, produce, we wanted to ensure the views of members on matters of importance to stakeholders were recorded for the benefit of ministers and departments.

We thank you for commissioning this interesting and important work. Now that the ETSSB is disbanding, we look forward as individuals with continued interest, to watching progress in the months ahead. It is probably impossible to achieve a state of affairs where everyone involved in a justice system (particularly one which is being driven by various factors towards an adversarial approach rather than an inquisitorial approach, perhaps a matter for further investigation) will be happy all of the time. Nevertheless, we consider that much more transparent and effective communication about how the employment tribunal system operates can help significantly to improve both the user experience and their understanding.

Ian Barr

For and on behalf of the ETSSB

Executive Summary

1. The employment tribunal (ET) system is, in general, a system of which we should all be proud. It performs a difficult job in trying circumstances and it consistently does it well. But there is no room for complacency.
2. We were asked by ministers to consider the extent to which there were any issues with inconsistent application of practice and procedure across the system; and, if there were, what (if anything) could be done about them.
3. In line with the findings of Michael Gibbons, our work suggests that there is a perception in at least some quarters of inconsistency. By inconsistency we mean different offices, judges or tribunal panels operating what are understood to be 'standard' procedures in different ways, without any clear basis for so doing.
4. After exploring the context of the consistency debate in Chapter 2, tracing the major plots on the civil justice landscape both north and south of the border in respect of the search for consistency in court and tribunal process, we look to define the ambit of the inconsistency issues in Chapter 3. It is in that chapter that we set out the scope of our review and try to explain in more depth what we mean by inconsistency. We also explain the boundaries of our review, and the ground rules we have observed.
5. In chapter 4 we summarise the investigation we carried out in respect of this review. We had limited resources at our disposal, which meant we were unable to undertake any wide ranging public consultation. And we make no claim to have robust empirical research underlying our analysis. However, our focused consultation did reach some ET users with experience of tribunal offices right across Great Britain. We are confident, therefore, that our analysis stands on firm ground.
6. In Chapter 5 we set out that analysis. We cover issues as broad as the communications strategy that we think the Tribunals Service should develop and hone; and issues as focused as whether particular interlocutory hearings should be conducted by telephone conference as a matter of routine or not. We set out many of our conclusions alongside our analysis, and so Chapter 5 represents the central core of our report.
7. In Chapter 6, we then summarise the recommendations made. By way of further summary, and in the hope that it will be useful to give a snapshot of what we suggest, we also set out in summary form our major recommendations below. But we encourage readers not to stop at the executive summary and to read the rest of our report. And we encourage those at whom the recommendations are aimed to consider seriously what we have said and why we have said it. While this report is the final report of the present ETSSB, it is likely to form a basis for the work of any successor body.

And in any event, the constituent parts of the ETSSB, including both sides of industry, will be watching closely for progress on implementation.

8. The recommendations we make include:

Recommendation 1. We recommend that the Tribunals Service reviews its communications strategy in respect of the employment jurisdiction. In particular:

- a) we **recommend** that the flowchart we publish at **Annex C** is used by the Tribunals Service as the basis of written guidance setting out how the system works, and why; and
- b) we **endorse** the work being done by BIS, TS and Acas on a short online video about the end-to-end employment dispute resolution system. This is likely to complement the further written guidance (which should also be available online) that we recommend in this report.

Recommendation 2. The detail of the rules and guidance on which the employment tribunal system operate should be more clearly set out. In particular:

- a) we **recommend** that the rules and regulations reproduced on the employment tribunals website by the Tribunals Service should be in the form of a consolidated version, along the lines of the rules on the Employment Appeal Tribunal website; and
- b) we **recommend** that any practice directions issued by the Presidents to supplement the rules and regulations should not only be published, but should be prominently communicated by the Tribunals Service, online and in local offices.

Recommendation 3. Practices in respect of listing and conducting Case Management Discussions (CMDs) seem to vary, and this apparent inconsistency needs to be addressed. Accordingly:

- a) we **recommend** that, in discrimination cases, there should be a clear aim that cases have a CMD within 6 weeks of the lodging of the ET3 Response, so long as there is a clear understanding (communicated to users) also of the factors which may mean that in certain circumstances the CMD might be held before or after that time, or not at all, and that parties would be advised of the reasons at the time;
- b) we **recommend** that, in non-discrimination cases, no guidance should give an 'expectation' that a CMD will be fixed. However, we think it right that parties should have an explanation if any request for a CMD is refused. We think that explanation should be made available (i.e. communicated by the Secretary) within a reasonable time, say three working days of the judge's decision;
- c) we **recommend** that further clarification is given by the judiciary in respect of when telephone as opposed to in-person CMDs will be fixed. That clarification should make plain that there should be no 'standard' approach of CMDs being held in a particular way. For example, being held by telephone or, on

the other hand, by in-person attendance. The overriding consideration here must be paying sufficient regard to the needs of the parties involved as required by the overriding objective; and

- d) we **recommend** that the results of the pilots in England & Wales, focusing on standard agendas and formats for the hearings, and on the involvement of Acas, are analysed and made public.

Recommendation 4. A balance needs to be struck between safeguarding the importance of judicial independence and ensuring as much procedural certainty as possible for users. Accordingly:

- a) we **recommend** that the judiciary and the Tribunals Service staff make every effort to identify correct templates for orders and judgements (and any associated covering letters sent by ET offices), and then ensure such templates (where they exist) are used;
- b) we **recommend** that guidance is published, by the Tribunals Service after consulting with the judiciary, making it as clear as possible what directions can be made in respect of bundles and productions, and how those might apply to different cases likely to arise in the ET system. However, such guidance should make as clear as possible what kind of matters an Employment Judge might need to take into account when making whatever directions are appropriate in individual cases; and
- c) we **suggest** a review is undertaken, either by the appellate authorities of the guidance that is handed down to employment tribunals in respect of sanctions for non-compliance, or more widely into the rules which govern the use of those sanctions.

Recommendation 5. In terms of listing hearings:

- a) we make a majority – but not unanimous – **recommendation** that tribunal offices should inform parties by no later than 4.30 pm on the previous day if their case is likely to be affected by over-listing. The minority view of the President of Employment Tribunals in England & Wales is set out at paragraph 5.63;
- b) we unanimously **recommend** that, in any circumstances where a case is adjourned by reason of over-listing, that case should be relisted as a priority, with a commitment insofar as is possible to ensure that hearing is a fixture, rather than subject to over-listing arrangements;
- c) we make a majority **recommendation** that the listing stencil should be piloted in some English employment tribunals, with the results of that pilot published. A minority of the Board dissented, considering that the administrative burden on the tribunals would not justify the perceived benefit. The minority view of the President of Employment Tribunals in England & Wales is set out at paragraph 5.71; and

- d) we **recommend** that the Tribunals Service should give greater transparency in respect of listing. In particular, the public should have access to a cause list of hearings in each office, which is currently available to the press for a small fee, if possible 7 days prior to hearings taking place.

Recommendation 6. We **recommend** that guidance should, so far as possible, reiterate and – to the extent necessary, clarify – what criteria parties should be required to meet when seeking to adjourn, postpone or vacate a hearing.

Recommendation 7. We **recommend** that the guidance in England & Wales where witness statements are not ‘taken as read’ should be enforced more consistently.

Recommendation 8. We **recommend**, by a majority, a fully-resourced independent review on the issue of bias, which was the focus of concern for some of our consultees. If such allegations as we have heard through anecdotal evidence can be substantiated, then they should be dealt with robustly and expeditiously. But, equally, if the allegations are unfounded, we should be able to point to hard evidence to prove that, and so accordingly protect the system against the risk of a loss of public confidence.

9. We look forward to monitoring progress and hope that any successor body to the ETSSB, however structured, will look to assure itself that this report has been taken seriously by those concerned.

1. Introduction

- 1.1. On 20 January 2009, Pat McFadden MP, then the minister responsible for employment relations, and Bridget Prentice MP, the minister then (as now) responsible for civil and administrative justice, commissioned the ETSSB to undertake a review of consistency in respect of ET procedures and case management.
- 1.2. Lord Young of Norwood Green has now succeeded Pat McFadden as the minister at the Department for Business, Innovation and Skills with responsibility for employment relations. This report is therefore to Bridget Prentice and Lord Young and it represents the culmination of the ETSSB's work on 'consistency' within the ET system.
- 1.3. The terms of reference for the work, as commissioned by ministers, were:

“to consider [the matter of consistency in employment tribunal procedures and case management], in particular to identify whether there is a consistency issue; if so, whether it is a process issue or a matter of judgement; and whether, and what, scope exists to do something about it”.
- 1.4. In commissioning the work, ministers made explicitly clear that they recognised the clear distinction between judgment and process, and that there will be apparent differences in judgment which reflect the detail of particular cases.
- 1.5. This report will cover:
 - the contextual backdrop to the consistency review, in particular to explain how and why the issue is of importance to stakeholders (**chapter 2**);
 - the scope of our work, in particular explaining how we have drawn boundaries so as to avoid trespassing on the essential independence of the judiciary (**chapter 3**);
 - an outline of the work carried out to identify stakeholders' issues (**chapter 4**);
 - a summary of consultation results, the issues highlighted and our commentary on those issues (**chapter 5**); and
 - the recommendations we are making in light of the foregoing (**chapter 6**).
- 1.6. In addition, annexed to this report are:

- a list of stakeholders consulted as part of our work (**Annex A**);
 - the letter sent to stakeholders to start the consultation process (**Annex B**);
 - a process map, or flowchart, explaining how the employment tribunal system was designed to work, and therefore helping to give users a clearer expectation about what going through the system will tend to entail (**Annex C**).
- 1.7. As well as being sent to ministers, this report will, in due course, be published online¹. If you do not have access to the internet, it may be possible to supply a hard copy of the report.
- 1.8. If you would like to request a hard copy report, or ask any questions about the work we have undertaken, please contact our secretariat in the first instance. Contact details are:

ETSSB Secretariat

c/o Tribunals Service
Alexandra House,
14 to 22 The Parsonage
Manchester, M3 2JA
0161 833 6319
Customer.ServicesET@tribunals.gsi.gov.uk

¹ <http://www.employmenttribunals.gov.uk/AboutUs/stakeholderConsultativeGroups.htm#I0>

2. Context

- 2.1. The civil justice systems in England & Wales and in Scotland are separate but they share many characteristics. In recent years, the concept of 'active case management' has grown steadily in prominence in both jurisdictions. This is true of the employment tribunals system, which straddles the national jurisdictions, albeit with two legally distinct tribunals in place, as well as the wider civil justice systems in each distinct territory.
- 2.2. By taking a firm grip on the direction of cases at an early stage, and in turn helping the parties to narrow the issues in dispute, the chances of earlier settlement are often much improved. If settlement is unachievable, at the very least the effective management of cases will mean they are better readied for final hearing, which may well involve less time and expense than would otherwise be the case. The end-to-end experience of the tribunal process should also prove less daunting for individual parties too since an Employment Judge will have had the opportunity to guide them through it.
- 2.3. Active case management, set against a clear set of procedural rules, practices and protocols, should allow parties to predict with much more certainty, how long their case will take, how much it will cost and the key issues which will be relevant in deciding their case.
- 2.4. This predictability is in and of itself important. Conversely, inconsistency, or misapplication of practice, procedure or protocol, can have significant and negative impacts. For example, an individual's perception (or that of their lawyer) about how long a case will take, or how much it will cost, could be a substantial factor when a party is weighing up whether to proceed with or settle a claim. If a party settles a case through 'fear of the unknown', rather than a genuine acceptance that a claim should be settled, this would be a major issue for access to justice. The real risk here, therefore, is not that the system can be criticised for want of consistency. Rather, it is that individuals are not treated in accordance with the overriding objective of the employment tribunal system: to deal with cases justly.

Recent developments

- 2.5. The consistent application of case management powers by courts and tribunals has been a recurring theme in several high-profile and authoritative reports. Indeed, many experts have criticised the civil justice system in the past, north and south of the border, for being – among other things – far too uncertain. Accordingly, many reforms over the last decade or more have focused on trying to entrench consistency so as to ensure as much procedural fairness and predictability as possible.

- 2.6. To put in context the work the ETSSB has been commissioned to undertake, it is worth summarising some of the major plots on the landscape insofar as the search for procedural consistency is concerned.

Woolf

- 2.7. In England & Wales, a landmark piece of work in respect of practice and procedure generally was the 1995/6 Civil Justice Review² led by the then Master of the Rolls, Lord Woolf of Barnes. The ‘Woolf’ review focused solely on the courts (as opposed to the tribunals) but it has shaped much of what followed and so remains an important part of the context for this work.
- 2.8. The 1995 Interim Woolf report³ included a focus on consistency, in particular in respect of case management decisions made by judges throughout the country at all levels. For example, the Interim Report called for: “enhanced training and guidance for district judges to achieve greater consistency in procedure and in their application of the substantive law”⁴. The Interim Report also foresaw a role for judicial leadership in “promulgating practice guidance and directions, to ensure consistency of practice between different courts at all levels”⁵.
- 2.9. In his Final Report, Lord Woolf said: “In the future, I hope that the [reforms] will make for a greater partnership between all the judges in every court and ensure consistency of approach to the handling of cases and the development of case management”⁶. The report went on to say: “It will be essential for there to be consistency in decision making throughout the country, at each local centre and at every level of the judiciary. This will require judicial training and guidance to ensure that there is consistency of approach both at first instance and appeal”⁷.
- 2.10. Although consistency was important, it was not the overriding objective of the reforms proposed (and later adopted). Of course, the Overriding Objective of the subsequent Civil Procedure Rules – as is the case with the Employment Tribunals Rules – is “to deal with cases justly”. As Lord Woolf said in his Final Report: “The aim is to establish a consistent system of case management in courts throughout the country, but the arrangements required to underpin this will vary in different geographical areas, and sometimes in different courts within each area. It is important, therefore, that the detailed recommendations in the interim report are not

² Access to Justice, Final Report to the Lord Chancellor on the civil justice system in England & Wales. The Rt Hon the Lord Woolf of Barnes, Master of the Rolls, July 1996 (The Stationery Office, London) (<http://www.dca.gov.uk/civil/final/contents.htm>)

³ Access to Justice, Interim Report (<http://www.dca.gov.uk/civil/interim/contents.htm>)

⁴ Chapter 6, para 13

⁵ Chapter 10, para 8

⁶ Section II, Chapter 1, para 4

⁷ Chapter 1, para 33

interpreted too rigidly. Where there are better or more appropriate ways of achieving my objectives, then these should be adopted”⁸.

Scotland

- 2.11. The Civil Procedure Rules do not apply in Scotland. Furthermore, the idea of a judge as a referee between two opposing sides, rather than a procedural master managing cases, is deeply rooted in the Scottish legal tradition. However, as with England & Wales, the Scottish civil justice system has always recognised an inherent power for its judges to regulate the conduct of their own proceedings and to ensure that judicial business is conducted efficiently⁹. Furthermore recent initiatives have been aimed at giving the judges a more interventionist and managerial role¹⁰.
- 2.12. This approach has recently been examined by the Lord Justice Clerk, Lord Gill, in a wide-ranging review of the civil justice system in Scotland¹¹. A key suggestion in that review was that the court, rather than the parties, should manage cases, and in particular decide how best those cases should be handled proportionately.

Leggatt

- 2.13. Sir Andrew Leggatt's 2001 Review of Tribunals report¹² is also a prominent marker on the landscape of reform. Indeed, insofar as tribunals are concerned, it is far more pertinent a marker.
- 2.14. While mainly a report from an England & Wales perspective, it makes strong references to cross-border jurisdictions like that in the employment tribunals field. And in any event, the subsequent work in Scotland, including that led by Lord Philip and the Administrative Justice Steering Group, under the auspices of the Scottish Committee of the AJTC, accepts the central tenets of the Leggatt findings¹³.
- 2.15. Consistency – including in respect of judicial decisions made – was a particular focus for Leggatt. In his final report, Sir Andrew recommended that: “It should be the task of the Presidents to promote, by leadership and

⁸ Section II, Chapter 8, para 5

⁹ See, for example, *Barrie Tonner -v- Reiach and Hall* (12/6/2007), a decision of the Inner House of Session.

¹⁰ Such initiatives have ranged from the introduction of the Options Hearing in ordinary civil procedure in the sheriff court in 1993, the establishment of the commercial court in the Court of Session in 1994, the introduction of the rules for commercial cases in the sheriff court in 2001, and most recently, the new procedure for personal injury cases in the Court of Session.

¹¹ Scottish Civil Courts Review, Lord Gill, September 2009

(<http://www.scotcourts.gov.uk/civilcourtsreview/>)

¹² The Review of Tribunals, Sir Andrew Leggatt: <http://www.tribunals-review.org.uk/>. The final report, *Tribunals for Users – One System, One Service*, was published in March 2001:

<http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>

¹³ See, for example, the first paragraph of the Chairman's Foreword in the Philip Report (http://www.ajtc.gov.uk/docs/Tribunals_in_Scotland.pdf), which affirms a commitment to the Leggatt vision of “coherence and consistency”.

co-ordination, both consistency of decision-making and uniformity of practice and procedure throughout their respective areas of responsibility”¹⁴. Further, the final report envisaged appraising tribunal members and judges so as to ensure appropriate and consistent standards were maintained¹⁵.

- 2.16. Later in the report, Sir Andrew identified the listing and conduct of hearings as a particular case in point. The report identified¹⁶ “wide variation in practice between tribunals” insofar as determining issues through written procedures or hearings (whether face-to-face, or by telephone) was concerned. The report recommended that “active case management” should seek, among other things, to reduce inconsistency.
- 2.17. Of course, Sir Andrew recognised the importance of avoiding a one-size-fits-all mentality. Much emphasis was made throughout the final report on local tribunals servicing the needs of local users. Regional variations, therefore, have always been understood as being justifiable. Indeed, sometimes they should positively be striven for. But where ‘good inconsistency’ is to be found, it is important that it is justified and explained.

Gibbons

- 2.18. Woolf and Leggatt, together with the corresponding work in Scotland, form a large portion of the context provided by recent history. However, the immediate backdrop of our work on reviewing apparent inconsistencies was grounded in Michael Gibbons’ Dispute Resolution Review report¹⁷, published in March 2007. The report made specific comments aimed at ‘consistency’ within the employment tribunal system. It is those comments, perhaps more than anything else, that provide the genesis for this report.
- 2.19. Because of its centrality to the commissioning of our work, it is worth repeating in full the short passage that Gibbons devoted to the subject of consistency:

Claims of inconsistency in case management and judgments

4.20 The perceived problem of inconsistency in relation to case management and decisions has been raised by a number of those consulted who have significant experience of observing tribunal outcomes. It is difficult to identify specific examples but the high level of concern suggests more could be done to promote consistency.

¹⁴ Overview chapter, para 12

¹⁵ See at para 20 of that overview,

¹⁶ At para 8.16,

¹⁷ *Better Dispute Resolution, A review of employment dispute resolution in Great Britain*. Michael Gibbons, published by the Department for Trade and Industry, March 2007. See: <http://www.berr.gov.uk/files/file38516.pdf>

4.21 The Review recognises the importance of judicial independence but takes the view that good, consistent directions are a key factor in the success of the system. The Review has heard that the perceived inconsistency and varying case management may be the consequence of inconsistent individual chair performance. It is not within the scope of this Review to make recommendations on the terms and conditions of judicial appointments and reappointments. However, it is worth noting that the behaviour and judgments of different tribunal chairs appear to many to give employment tribunals a reputation for inconsistency and that reduces the confidence of users in the system.¹⁸

- 2.20. That report itself noted the inherent tension between consistency and flexibility with the system. For example, when focusing on its core recommendations, Gibbons highlighted that his key message was that “inflexible, prescriptive regulation has been unsuccessful in this context and it follows that the measures to be used in future should be much simpler and more flexible – and therefore will offer rather less certainty and predictability in their operation. I trust that those parties who have so strongly opposed the current regulations will as willingly accept the challenges that a different style of regulation will bring about”.

Jackson

- 2.21. Most recently, and again with an exclusive focus on England & Wales, Lord Justice Jackson’s Civil Litigation Costs Review¹⁹ is worthy of mention. Primarily, it is of course a report on costs in the civil courts. The employment tribunals are not subject to the same costs regime as the civil courts, and so do not feature prominently in the final recommendations made. However, the report builds very much on the key messages of the landmark reviews that preceded it, in particular with respect to consistency.
- 2.22. Sir Rupert Jackson’s recommendations included ones which were targeted specifically at case management²⁰. For example, Sir Rupert identified problems which included “standard directions” used individually by judges, which “vary from one district judge to another and from one court centre to another”²¹. The final report recommended that such practices should be abandoned. Instead, “a menu of standard paragraphs for case management directions should be prepared for each type of case of common occurrence and made available to all district judges both in hard copy and online. These standard directions should then be used by district judges as their starting point in formulating initial case

¹⁸ See footnote 17. Gibbons final report, page 47, paragraphs 4.20 and 4.21.

¹⁹ Civil Litigation Costs Review, January 2010. Lord Justice (Sir Rupert) Jackson: http://www.judiciary.gov.uk/about_judiciary/cost-review/index.htm

²⁰ See Chapter 39.

²¹ Chapter 39, page 393, paragraph 5.1 (i).

management directions”²². As Sir Rupert highlighted, this has worked well in other areas of the civil justice system.

- 2.23. Although the Jackson Report related only to civil courts and only in England & Wales, a working party has been set up by the Senior President of Tribunals to consider the report’s potential application to tribunals across the Tribunals Service. That working party is being led by Mr Justice Warren. Clearly, consistency of practice was not a core focus for that report, nor will it be for the tribunals working party. Indeed, mention of consistency in the Jackson report was tangential. But the references made are of interest in this current debate.

Building on the ‘consistency’ message

- 2.24. In conducting our review, we have seen that a number of measures, either in the pipeline or already put in place, will help to improve consistency of approach across the system. It is important to highlight these initiatives to reflect the positives in what is generally a sound and effective system. Such positives might be easy to overlook when our investigation is centred on those areas where there is room for further improvement. It is important that they are not overlooked.
- 2.25. First, the respective Presidents for the Employment Tribunals in England & Wales and Scotland have drawn our attention to the mechanisms in place to help to facilitate effective and consistent practice across the board. These include regular training for Employment Judges and Members, mechanisms for judicial appraisal, mentoring schemes, and judicial guidance on certain matters. In addition, there are safeguards built into the system, as it stands today, which can and should reduce as much as possible inconsistent practice. Parties can for example apply for a review of decisions made, or appeal against them, if they feel they have been wrongly or unfairly treated. Similarly, there are judicial complaints mechanisms which parties and representatives can use. All of these different mechanisms are overseen, managed or monitored by senior judges (Regional Employment Judges in England & Wales, the Vice President in Scotland, and the two Presidents).
- 2.26. More widely, matters for which the Tribunals Service is responsible are likely to help in matters of consistency. For example, the introduction and wider roll-out of the Caseflow system²³ (which is currently being piloted in Nottingham) will assist consistency of approach in a number of areas. Both tribunal jurisdictions in England & Wales and Scotland will have a 'suite' of standard letter templates within Caseflow which will be used in correspondence with the parties. This will ensure that the letters issued

²² Chapter 39, page 393, paragraph 5.3.

²³ Caseflow is the new database case management system being developed for use in employment tribunals. It will replace the existing system, Ethos, but it will also facilitate electronic case file management, replacing the older hard copy paper files used in tribunals currently. The system will be used by tribunals staff and judiciary.

by each of the offices, either in England & Wales or in Scotland, are identical in style and content. Further, the system is designed with paragraph libraries for judicial use to maximise consistency in the production of orders and directions. The system, as the name suggests, is a work flow process and will take staff using it through a prescribed process. This should reduce, and often hopefully eliminate, regional variations in administrative practice.

- 2.27. In addition, most employment tribunal regions have a local user group which meets normally twice a year. There are, additionally, two national user groups (one in England & Wales and the other in Scotland) which meet not less than twice a year. These meetings, which are attended by stakeholders, the ET judiciary and ET administration, provide a forum to discuss and monitor the consistency issue. The minutes from these meetings are published on the ET website at <http://www.employmenttribunals.gov.uk/AboutUs/stakeholderConsultativeGroups.htm>.
- 2.28. It is recognised that the local user groups, which are open to all users of the system, consist primarily of representative bodies - welfare rights organisations, Citizens Advice, solicitors - and that individual parties rarely, if ever, attend. While we support the need to ensure that all users have the opportunity to comment on their experience of the ET System and would welcome greater participation by individual parties, we must also recognise that the vast majority of individual parties only experience the ET System once and are therefore not in a position to contribute to any discussion on the issue of consistency *per se*. The periodic (approximately every five years) Survey of Employment Tribunal Applications (SETA) may provide a vehicle which enables the views of unrepresented claimants to be sought. We recognise though that there are significant limitations to seeking to monitor the user experience only every five years.
- 2.29. We understand that the Employment Lawyers Association (ELA) propose to seek further views from their members on the consistency issue and their findings could provide a valuable source of information to help the system to monitor and address any concerns about consistency which arise. We welcome this initiative and would encourage the ELA to ensure that the findings from its survey are promptly made available publicly; and that others such as the Discrimination Law Association are encouraged to share their findings of any similar research that they may undertake.

3. Scope of review

- 3.1. The work commissioned by ministers required focus on consistency. The review was not established to consider more general issues, whether about performance, service standards or otherwise. However, where wider concerns were expressed, we have not excluded them from our report. Many of us felt that it was not appropriate to interpret our terms of reference so rigidly, particularly as this report marks the final opportunity for the ETSSB to make representations to ministers as a group. Where we think a response to wider issues raised is appropriate, we offer one. But we explain why we do so in each instance, and we reflect the degree of consensus within our group where a range of opinions were held.
- 3.2. Importantly, though, the review was not established to second guess the proper exercise of judicial discretion. Indeed, it would not be at all appropriate to stray into that territory.
- 3.3. That said, consistency as an issue – certainly in the minds of many users – is concerned, at least in part, with the exercise of judicial case management powers. And as we have outlined in previous chapters, the call for consistency in decision-making is not a new phenomenon. In carrying out this review, and in drafting this report, our task is to strike an appropriate balance.

What is 'inconsistency'?

- 3.4. Our first job was to define what it was we meant by 'consistency', or rather, 'inconsistency'. This would be central to the outcome of our work. We started from the premise that, when users refer to matters being inconsistent, they are being critical of the process being used. We believe that they are, in all probability, making a judgement based on their own understanding of what to expect of the system. Their view of inconsistency could arise as a result of expectations which might have been based on past experiences (what users might perceive as common practice) or might be based on a difference in perceived or actual application of published standards and procedures where these exist and have been communicated to users. Perceptions of inconsistency will, therefore, be much more likely where users do not have a full understanding of what to expect from the system, and of why there are differences in the application of standards and procedures.
- 3.5. We accept that actual inconsistency or perceptions of inconsistency are generally regarded in a negative light. We believe that the greater the perception of inconsistency of performance of any organisation, then the less likelihood there is of people having confidence in that organisation. While user surveys indicate a high level of satisfaction with the performance of ETs, we appreciate that if even a small number of users

(be they applicants, respondents or their representatives) believe ETs are inconsistent, then they could lose confidence in and be less supportive of ETs as a means of resolving employment disputes.

- 3.6. There are undoubted dangers though in unthinkingly promoting consistency in a judicial system that requires individual circumstances to be taken into account to ensure effective access to justice for both parties. For example, always taking witness statements as read²⁴, as was reported to be the practice in one of the regions in the research, would be a consistent practice. However, that practice itself, while consistently applied, would not meet the needs of all users and all circumstances; indeed such a practice would be inconsistent with the norm in other regions in England & Wales and completely out of kilter with the approach taken in Scotland, which follows civil court practice there. As we have noted later in our report, if this practice is being consistently applied, the President of Employment Tribunals in England & Wales could reiterate guidance on the expected standard whereby witness statements are not normally taken as read.
- 3.7. As a consequence, in considering how best to ensure users do have confidence in the ET System, we have been very conscious that we must ensure a proper balance between the consistent application of relevant and appropriate standards and the fundamental and appropriate right of Employment Judges to manage cases, taking into account the many different needs of a diverse group of users.

Consideration of 'inconsistency'

- 3.8. Before proceeding, certain 'ground rules' need to be made clear. This review is not:
- based on empirically-tested evidence. However, the network of stakeholders to whom we have access has been useful in obtaining a reasonable snapshot of a cross-section of expert user opinion. Indeed, the national coverage of many of those stakeholders which gave evidence to us means that the relatively small sample should not be mistakenly understood as of little significance. Members of the CBI and TUC, for example, are involved in a considerable number of cases, and so can call upon a lot of relevant experience, including in assessing the practices across different offices and regions. That said, there was a very heavy weighting on the side of respondents' representatives, rather than claimants' representatives;
 - seeking to encourage a one-size-fits-all approach. Rather, it is important to take proper account of user demographics, which can vary between different offices and regions. A typical claim in central London (insofar as that might exist) is likely to be very

²⁴ See *post*, paragraphs 5.79 to 5.82 and footnote 39

different from a typical claim in the North East of England, for example. Further, what might appear to be inconsistent case management might be entirely justified by reason of respective parties being represented (or unrepresented), or by parties' individual preferences as expressed to the Employment Judge in question; or

- blind to the issue of resources. It must be recognised that local offices will be affected by differing volumes and types of work, for example. In particular, variable staff and other resources can impact significantly on the administrative support provided to the system from time to time. While in a perfect world, such factors could be equalised across the board, the current climate is unlikely to facilitate any recommendation from us about the need for more resources. However, where there is scope to utilise resources more effectively, such opportunities should not be missed.

3.9. Most importantly, this review is not about usurping the discretion afforded to the judiciary to manage cases. However, if there is a perception that tribunals are interpreting the same rules in different ways, leading to unequal and/or unfair treatment, or to a lack of predictability more generally, then it is right that this review should address such perceptions.

3.10. Where focusing on such issues, our work will have three main objectives:

- first, we will want to show stakeholders and users that their concerns are being listened to;
- second, we will want to explain why the system needs to operate in the way that it does (if, indeed, that is the case). Effective communication is essential, and this report can be a part of that necessary communication; and
- third, we will want to make the judiciary, and those responsible for administration, aware of the perceptions that exist. While ultimately such matters must be for others to take forward – in the context of a justice system that rightly treats each individual case on its merits – the calls from Woolf, Leggatt, Gibbons and others over recent years need to be kept in mind. For example, if senior judges can work with their colleagues, leading the promulgation of practice guidance and directions (to adopt the terminology of Lord Woolf), consistency could be improved without endangering the independence which must so importantly be preserved.

3.11. We have also recognised that the vast majority of users have not participated in what inevitably has been a limited qualitative review. Most people who experience the process of an Employment Tribunal do so only once and are, therefore, unlikely to be able to offer relevant comment on consistency of approach. Recent, as yet unpublished research, into the

views of users of the ET System does, in fact, show high levels of satisfaction with the experience. While that in itself does not negate the criticisms that have been made about the ET System both during the Gibbons review and this review, we should not ignore that there is much to be proud of in the way that most users view their experience of the system.

- 3.12. Equally though, we must also acknowledge that those who did respond to our survey were, in the main, representatives, (or their nominees), some of whom represented claimants but the majority of whom represented respondents. These representatives, because of the nature of their roles which can involve operating across regions and in some cases in Scotland and in England & Wales are much more able to comment on actual or perceived inconsistencies in the application of administrative and judicial procedures.
- 3.13. Additionally, it was clear from our discussions with CBI member companies with operations across Great Britain that some of these large companies do have a significant number of concerns about what they consider to be inconsistency of approach across ETs.
- 3.14. We know, therefore that the ET System cannot be complacent and must recognise that both perceptions of inconsistency (and actual inconsistencies, where these exist) must be addressed. As already highlighted, if fear of unpredictable costs or outcomes is unduly affecting decisions being taken by parties then – perception or not – there is potentially a real impact on access to justice.

4. Investigation

- 4.1. The Consistency Working Group (WG) was convened as a sub group of the Employment Tribunal System Steering Board (ETSSB) to look at the perceptions of consistency within the Employment Tribunals. The WG was chaired by the Chair of the ETSSB and its membership was made up of representatives of the ETSSB and included representation from:
- Presidents of the Employment Tribunals England & Wales and Scotland;
 - Trade Union Congress (TUC);
 - Confederation of British Industry (CBI);
 - Independent Member of the ETSSB;
 - Tribunals Service/Employment Tribunal Administration; and
 - Department for Business, Innovation and Skills.
- 4.2. The ETSSB recognised that Gibbons found it difficult to provide specific examples of inconsistency; this has remained a challenge. That said the Board did agree, following on from Gibbons, that there is a perception of inconsistency among those we spoke to. Accordingly, we must look to address that perception.
- 4.3. The Consistency Working Group (WG) consulted their representative organisations and identified key stakeholders to engage in the project to provide specific evidence of inconsistent practices within the ET. Details of the stakeholder organisations consulted as part of this project are available at **Annex A**.
- 4.4. It was not considered viable to consult more widely. We had no particular resource to undertake such work. But in any event the network of stakeholders we had access to covered a range of national organisations, with wide experience.
- 4.5. Stakeholders were invited to assist the ETSSB via a letter from the Chair of the board requesting them to provide real, hard evidence of any lack of consistency within ET. The letter we sent is attached at **Annex B**.
- 4.6. Over the course of the exercise, 52 stakeholder organisations responded – and we are immensely grateful to them for doing so. Although a relatively small sample, the users making up that group of 52 had, between them, a wide range of experience of conducting tribunal proceedings. In many cases, that experience included involvement in cases right across the country and in some cases across the border between Scotland and England, in numerous regions and offices – or access to members who did have that experience.

- 4.7. In the following chapter, we set out the major issues raised in submissions to us. We also analyse those issues, before setting out our key recommendations in Chapter 6.

5. Results of consultation

- 5.1. As Michael Gibbons experienced when conducting his review, a large number of the submissions we received provided anecdotal evidence rather than anything empirical or systemic. There were a number of stakeholders who explained their perceptions of the system, based on their (often frequent) use. It was common for respondents to refer to specific cases or offices to illustrate varying practices within the Employment Tribunals at various stages of the 'life of a case'.
- 5.2. Overall, the consultation feedback indicated that, in the minds of stakeholders, there is a perception of varied approaches between offices and regions and between Scotland and England & Wales, although the latter was not much commented upon, possibly because users recognise the tribunals are legally distinct and operating in separate legal jurisdictions which have their own long established traditions in terms of civil and tribunal practice. This varied approach – or inconsistency – was believed by those responding to us to be a product of local office or individual judicial preference, rather than a necessary result of treating cases individually. In other words, they tended to believe that the variation or inconsistency was unnecessary – and as such, it was thought to be a problem.
- 5.3. However, as well as the evidence on these matters, a number of the responses highlighted broader issues about service standards or practices. In order to keep within our terms of reference, and in order to keep the task in hand manageable, we could not concentrate on such matters. Ministers have asked us to review alleged inconsistencies: that will be our central focus.
- 5.4. This chapter summarises the key issues raised by respondents. It goes on to set out our analysis of those issues, paving the way for our recommendations, which are set out in the chapter that follows.

Key themes

- 5.5. There were a number of recurring themes which arose in consultation submissions. For example, several respondents emphasised that any pursuit of consistency should not produce too rigid a system. It was recognised that a fundamentally important feature of the Employment Tribunal process is its flexibility and informality. So it was recognised that the long-standing provision enshrined in Rule 60 of the Employment Tribunals Rules of Procedure (where it provides that a tribunal regulates its own procedure, other than in matters covered expressly in the rules) must not be overridden or endangered.

- 5.6. A view was expressed that inconsistencies appear because employment tribunal decisions are based upon facts to which the law is applied. Although no two cases will ever involve *identical* facts, if *similar* facts are put before a number of people, it was suggested, each would interpret them differently, depending upon their experiences. This might contribute towards apparent inconsistencies. This, it was further suggested, could be seen as an inherent problem with the tribunal system (although it is difficult to see why the same might not be said of the courts); however it was felt that in general the law is applied correctly.
- 5.7. Over and above those more general comments, a number of more specific points were raised. The key issues are categorised below.

Coherent communication: Transparency and accountability

- 5.8. The theme of transparency was prevalent throughout the consultation exercise. Users commented that it was difficult to understand what to expect – and so to measure accurately the extent to which standards are consistently and properly applied – without access to those underlying standards.
- 5.9. In a sense, the issue is a simple one. Standards may be applied properly by judges and tribunals staff. While outcomes (i.e. the result of the standards having been applied in specific circumstances) may appear inconsistent, the decisions made which lead to them could be perfectly valid, based on objective and consistently-applied criteria.
- 5.10. This is a central thread of our work. We have not found sufficient evidence to justify any conclusion that employment tribunals up and down the country are doing anything other than dealing with cases justly. Nor do we believe that such an accusation would be at all valid. Consistently high user satisfaction survey results, for example, lend credence to our position here. However, that is not to say things cannot improve. We have identified a small number of instances where clearly specified guidance appears not to have been properly applied. These have been brought to the attention of the relevant President for consideration.
- 5.11. The provision of information, for example about how the employment tribunal system works, and what users can expect throughout the process, should be an important part of the service which is being delivered. Helping parties and their representatives to understand practice, protocol and procedure is central to this.
- 5.12. We recognise that the Tribunals Service already publishes a range of material, in particular aimed at unrepresented parties who have not experienced the tribunal before. For example, a range of booklets is available at ET offices and online²⁵. They deal with what happens after you make a claim, how the hearing process works and what happens if a

²⁵ See <http://www.employmenttribunals.gov.uk/Publications/guidanceBooklets.htm>

judgment is made. But we think that there is scope to expand and improve on the range of information available.

- 5.13. In respect of practice and procedure, to help us in our review, the Tribunals Service produced a Process Flowchart describing on a step-by-step basis how the system is designed to work. One case is never the same as another, no matter how similar the underlying facts might be. And the overriding objective demands that cases are dealt with on their individual merits. So the process map – reproduced at **Annex C** – is meant as a high-level guide, not as a determinative manual setting out instructions for tribunals in each and every case.
- 5.14. We refer to this Flowchart later in our recommendations as we believe that this could form the basis for much more transparent and comprehensive user information and guidance from the Tribunals Service.
- 5.15. As part of this work, we believe more could be done to help users understand the detail of the rules and guidelines on which the employment tribunal system operates. For example:
- we endorse the proposal being developed by BIS, TS and Acas on a short online video explaining, albeit at a high level, what to expect from the end-to-end employment dispute resolution system. More innovative forms of communication will be important as the system strives to reach more and more of its users. It will be important to review the outcome of this work, perhaps with a view to building on the video in future so that more information can be relayed to users;
 - the rules and regulations reproduced on the employment tribunals website should be in the form of a consolidated version, rather than (as at present) all the different statutory instruments which need to be cross-checked to ensure updates and amendments have been captured. The Employment Appeal Tribunal website includes this facility²⁶, with an ‘as amended’ set of rules published, and we would welcome a similar arrangement for the employment tribunals; and
 - any practice directions issued to supplement the rules and regulations should not only be published, but should be prominently communicated, online and in local offices.
- 5.16. Transparency does, of course, carry benefits and risks. Insofar as the former is concerned, giving users the ability to hold the system to account is a very effective way of safeguarding standards. Insofar as the latter is concerned, giving the impression that a one-size-fits-all approach will be adopted in relation to any given case is misleading. Therefore it is

²⁶ See:

http://www.employmentappeals.gov.uk/Documents/FormsLeafletsGuidance/EAT_Rules.pdf

imperative to communicate effectively that discretion exists. Tribunals must be allowed to use that discretion in each individual case so as to ensure that claims are dealt with on their merits.

- 5.17. This is a complex and sensitive area. While transparency and accountability are generally forces for good, we must not let them inadvertently impact negatively on user experiences. So an effective balance is key. And that balance must itself recognise the resource implications of any recommendations we make. Accordingly, we make recommendations in Chapter 6 about the need for greater transparency, but we caveat those recommendations in light of our foregoing analysis.

Case Management Discussions (CMD)

- 5.18. Case Management Discussions (CMDs) are interim hearings, which must be held in private²⁷. They deal with matters of procedure and the management of the proceedings generally. Determinations affecting the rights of either party are not dealt with at CMDs, so the focus of the hearing is very much 'interlocutory'.
- 5.19. The decision to hold a CMD is judicial and the Employment Judge has discretion to case manage the proceedings as they see appropriate taking into consideration the individual merits of each case and the capacities of the parties before them.
- 5.20. The feedback we received suggested a perception among our sample of users of inconsistent practices in respect of whether (and, if so, when) such hearings are held, what they should or actually do entail and how parties are expected to prepare for them. An often quoted issue was whether CMDs should, as a general rule, be conducted by way of telephone conference, or face to face, or whether there was no 'general rule' at all. We found that users considered this unpredictability to be a problem, in particular when trying to plan ahead for the conduct of their cases.

Analysis

- 5.21. It is inevitable that there will be variation between specific cases, as each case has individual circumstances and therefore a one size fits all approach is not possible – or indeed desirable. In assessing the need for a CMD, or how to conduct one once fixed, the factors considered may include the different volumes of work and level of resources deployed within office; the nature of the claim; whether parties are represented; and also how the Employment Judges applies discretion to fit the needs of the case. This is not necessarily 'inconsistency' but implementation of the ET Rules of Procedure, and the proper exercise of judicial discretion within that framework.

²⁷ Employment Tribunal Rules and Regulations, Rule 17.

- 5.22. Insofar as we have been able to determine, CMDs take place in the vast majority of discrimination cases and, less frequently, in other types of cases should an Employment Judge identify a need. In relation to the former, the majority of cases tend to be listed for CMD within approximately 6 weeks of the filing of a Response – i.e. the CMD will take place within this 6-week period. However a judge may direct otherwise for countless perfectly appropriate reasons.

Timing

- 5.23. While a specific period of time should not be set in stone, therefore, the 6-week guide (if properly understood to be a *guide*) would seem to us to work well as a rule of thumb, at least for those discrimination cases. In order to aid general understanding, therefore, we would like to see this 6-week period become an aim, so long as there is a clear understanding also of the type of factors which mean that the aim cannot always be met.
- 5.24. A number of those who responded to our survey referred to different practices in how Applications for Case Management Discussions were treated. We would suggest that there is some confusion amongst users about Applications for CMDs. Rule 11 explains that, where an Application for a CMD has been made, and where the party is represented legally, there is a requirement on the party or their representative to ensure that, at the same time as the Application is sent to the ET office, they provide all parties with in summary:
- details of the application;
 - notification that an objection must be lodged within 7 days of receipt of the Application; and
 - that any objection must be copied to the ET office and all parties.
- 5.25. Where a party is not legally represented, then the Secretary of the Tribunal is required to inform all parties of the above. However, Rule 11 does not provide for a time-frame for the Secretary to do this, although represented parties are required to notify all parties immediately they lodge the Application. In addition, if a request is refused, the Secretary must write to all parties advising them of the refusal. There is no requirement to state reasons for the refusal and there is no timeframe within which the parties should be notified.
- 5.26. While parties should not generally expect a CMD to be listed, we think it right that parties should have an explanation if that request is refused and that the Secretary should be required to communicate that to all parties within a reasonable time, say, three working days. We also believe that the obligation on the Secretary to inform parties in unrepresented claims that an Application has been made should be undertaken in a timely fashion. Again, a reasonable time may be three working days. Accordingly, we would suggest that these are adopted as standards and communicated effectively to users, judiciary and the Tribunals Service.

Telephone conferences

- 5.27. The results of our survey suggested that certain judges or offices were perceived to have a particular disposition for holding CMDs only by telephone, or only face-to-face. While the judge/office was being consistent, the application of only one means of conducting a CMD is not in itself consistent with the practice generally in England & Wales and in Scotland, and could not be taking into account the specific needs of users and the interests of justice.
- 5.28. Local practice and procedure, when at variance with national protocols, is, we find, generally considered by users to be unhelpful. Of course, an underlying theme of Leggatt and the work which followed it was that 'local' justice was often beneficial, allowing the judiciary to tailor the management of cases to the needs of local users. As we have seen, what qualifies as a 'typical' claim in one part of the country (such as it may be said to exist), may differ markedly from a 'typical' claim in another office.
- 5.29. As ever, a balance must be struck. We must accept – as must users – that cases in a certain office might generally suit a particular type of treatment. But we would find it worrying if decisions were being made on the basis of the personal preference of the judge or office, rather than on the basis of the circumstances of the case and in particular the needs of the parties concerned.
- 5.30. Accordingly, we would welcome clarification in guidance to the judiciary in respect of the conduct of CMD hearings.

Pilots

- 5.31. The Employment Tribunals are currently undertaking a pilot in England & Wales where an agenda format is used for CMDs. The pilot is an attempt to make the content of CMDs more predictable and, so far as possible, regulate procedures and formatting of outcomes. The pilot commenced in December 2009 and will be evaluated in June 2010. In Scotland a structured agenda has been used since 2004, albeit the exact content will vary depending on the nature of the issues to be considered at the hearing.
- 5.32. A pilot was also commissioned in England & Wales to involve Acas at certain CMDs, which could be beneficial in terms of encouraging earlier settlements. We understand that Acas officials are finalising an evaluation report on this pilot just as we are finalising our report for publication.
- 5.33. Alongside the suggestions we think are necessary in respect of CMDs as a result of the work we have done, we also think that it will be important for the results of these pilots to be analysed and made public. It seems to us that the initiatives are potentially of great interest. In particular, the

standard format agendas could be a real boost for consistency. And Acas involvement may well increase the chances of timely and effective settlements. We welcome the action taken by the judiciary, the Tribunals Service and Acas in setting up the pilots and look forward to seeing the results.

Judicial Directions

5.34. Employment Judges have the discretion to case manage the proceedings as they consider appropriate. As part of that work, Employment Judges consider cases on their individual merits and then make case management directions, designed to get the case to a point where it can be effectively disposed of. That may mean disposal by way of settlement, withdrawal, or by way of final hearing.

5.35. Directions issued by an Employment Judge can include²⁸:

- timetabling of future steps necessary or appropriate in the case;
- the provision of additional information by one or more of the parties involved, in particular to clarify the issues between the parties which are actually disputed;
- the consolidation of the proceedings with others, so as to allow common issues to be explored and determined as effectively as possible;
- the joining of other parties to the proceedings where such parties have an interest in the outcome of the case;
- an order for the preparation or exchange of witness statements²⁹;
- directions as to the use of experts or interpreters in the proceedings; or
- directions as to any other conduct at or in advance of future hearings, including preparation for hearings.

5.36. Some stakeholders provided examples of varying practices across ETs, including in relation to the format of orders issued by tribunals and sent to the parties; and in relation to the content of those orders. In respect of the

²⁸ Rule 10 of the Employment Tribunals Rules sets out the “general case management powers” of an Employment Judge in proceedings.

²⁹ In Scotland, because of the approach of the civil justice system in that country, witness statements are not used routinely in cases but may be in individual cases where an Employment Judge considers this appropriate. Scottish users, when asked, consistently reject the idea of witness statements being introduced routinely.

latter, issues were raised about directions for the disclosure³⁰ of documents, for example. A particular concern related to the directions in respect of the preparation of 'bundles' or 'productions' – i.e. the collection of documents relevant to the proceedings which it is necessary to gather together for the purposes of a final hearing. A further concern related to the lack of action in the enforcement of direction orders where there is non-compliance.

Analysis

- 5.37. This area is very wide ranging. As with other areas, a standard algorithm for every case will often be unsuitable. But there are some issues which we can explore.

Format of orders

- 5.38. During the course of our investigation, our attention was drawn to examples of case management orders made in different cases, which were issued by different judges in different offices and produced using a different format or template.
- 5.39. Consistency at its most basic level should see that documents issued by tribunals – and in particular documents as important as judicial orders and the covering letters associated with them – are issued with a standard format. While content might vary, certain core information (the name of the judge, the contact details of the tribunal office and a clear explanation of what is expected of the respective parties, and by when) is, we think, essential.
- 5.40. We understand that provision is already made to standardise formatting or layout of documents like orders and letters. We also understand that Caseflow³¹ will help in this regard, once rolled-out nationally as planned. Although we have no understanding of how widespread inconsistent use of these templates may be, there is clearly an issue with inconsistency of practice. Accordingly, in particular prior to the full introduction of Caseflow, we recommend that Tribunals Service staff make every effort to identify and use the appropriate document format/layout in each case.

Disclosure

- 5.41. Disclosure is a process that is part of conducting a case under which each party discloses documentation to their opponents. We are advised that, at least insofar as England & Wales is concerned, in practice employment tribunals require disclosure of documents that are relevant to the issues involved in the claim, thus controlling and managing not only the expense

³⁰ Disclosure is generally understood as a statement by one party to the opposing party that the document in question exists or used to exist. In England & Wales, the provisions of Part 31 of the Civil Procedure Rules tend to apply. In Scotland, however, the CPR does not apply.

³¹ See above, footnote 23.

to the tribunal and the parties, but the volume of work required by the tribunal. Again in respect to England & Wales, the Civil Procedure Rules apply and *could* in theory require disclosure of *every* document that could relate to *any* of the issues, subject to an Employment Judge directing otherwise³².

- 5.42. In Scotland, a Practice Direction³³ has been issued requiring parties (where both sides are legally represented) to provide the other side with a list of all the documents they intend to rely upon no later than 14 days before the Hearing.
- 5.43. In relation to orders for disclosure, and indeed more widely in relation to case management directions, we highlight the recent findings of Lord Justice Jackson's recently published Civil Litigation Costs Review³⁴. We are aware that the Jackson Review did not consider evidence on tribunals at all; that issues of consistency were tangential at best to the main focus of the review; and that the Review was limited to England & Wales. Of potential relevance to the issues here, however, might be the recommendation in respect of the need for a "menu of standard paragraphs for case management directions", which should be used by "judges as their starting point in formulating initial case management directions".

Bundles/Productions

- 5.44. In employment tribunals, as elsewhere, circumstances such as whether or not the parties are represented will have a significant impact on the directions made as to the preparation of bundles (in England & Wales) and productions (in Scotland). This is very much an area where judicial discretion should pervade so as to ensure that each case is dealt with in the best and fairest way. But, to the extent that it is possible, the exercise of that discretion should be based on clearly understood national parameters.
- 5.45. Issues like the size of bundles/productions; who is responsible for collating them; and when they should be produced are all considerations that need to be determined by the Employment Judge depending on the particular circumstances that pertain to each case. We recognise though that where discretion is applied by individual tribunals and judges in different cases, it can be confusing if the outcomes appear to be, or are, different.
- 5.46. We have no wish to suggest constraining judicial action in the application of their discretion to treat each case on its merits. However, we do believe

³² See CPR, rule 31.

³³ Practice Direction 1, issued on 14 December 2006:
<http://www.employmenttribunals.gov.uk/Documents/RulesLegislation/PracticeDirectionS127Decetsguide.doc>

³⁴ See above, paragraphs 2.21 to 2.23; and footnotes 19 to 22.

that access to justice for both parties would be enhanced if parties and their representatives had a better understanding of what is usually required, and perhaps, even, not required, when producing evidence for hearings; and what a reasonable time-frame might be.

5.47. We would therefore like to see some guidance produced which makes as clear as possible what users might tend to expect. We would also like to see that guidance clarify where and why it might be inappropriate to expect directions conforming to what some might understand as 'normal' or 'usual'.

5.48. We would envisage guidance here covering the type of directions that might be expected in certain types of cases; and then providing examples of the matters an Employment Judge might usually consider when determining the actual order to make in a specific case. So parties would be able to see, by reference to clear examples, orders which may be considered to be 'usual' (insofar as they exist) but also the range of matters which might make a 'usual order' less likely. Such matters might include:

- the extent to which factual issues involved in the case are agreed between the parties;
- the underlying legal complexity in the issues that need to be determined;
- whether one or more of the parties are represented or not; and
- whether any of the parties has a disability.

5.49. It will almost certainly prove impossible to produce an exhaustive list. But producing some examples and outlining how the factors involved might impact on the possible conduct of the case would be useful. Indeed, there is possible wider application here, beyond the narrow issue of bundles/productions.

5.50. We should, however, make it clear that where any guidance is issued – and in particular where any examples are provided to illustrate how guidance might be applied in practical circumstances – those producing the guidance should guard against a perception that the guidance could in some way become absolute. Examples must be understood as being just that: examples. Likewise with guidance. In making our recommendations, we want to be helpful and to enable benefits to accrue. We do not want to see an increase in appeal rates on the basis that judges are quite properly exercising discretion based on the individual circumstances of the case. That said, in providing this guidance, we would hope that this would facilitate the avoidance of some actions that were reported such as apparent unilateral restrictions on bundle size and time-scales that seemed to be over-optimistic if not unrealistic.

Enforcement

- 5.51. Parties may feel that employment tribunals lack teeth in dealing with perennial disregard of directions or orders. However, in a sense, this is an issue that reaches beyond the confines of the employment tribunals and into the wider civil justice systems.
- 5.52. Authorities from the Employment Appeal Tribunal (a unitary court covering England & Wales and Scotland), the Court of Appeal (in England & Wales) and the Inner House (in Scotland) make clear that where a case has a reasonable prospect of success, it should not ordinarily be struck out as a result of a procedural failure. In effect, certain ‘cardinal conditions’ should be evident before a tribunal is allowed to strike out a claim, or a response. There must be unreasonable conduct, and that conduct must either have; (a) shown a deliberate and persistent disregard of procedural steps; and/or (b) made a fair trial impossible³⁵.
- 5.53. The latter condition is a high hurdle indeed. It is not for this review to assess underlying law. However, a review by the appellate authorities of the guidance that is handed down to Employment Tribunals could be useful if it is perceived that they (the ETs) are unable to use powers that are robust enough.
- 5.54. Again, the recommendations made by the Jackson Review seem apposite in our own context. In his final report, Sir Rupert said: “courts at all levels have become too tolerant of delays and non-compliance with orders. In so doing they have lost sight of the damage which the culture of delay and non-compliance is inflicting upon the civil justice system. The balance therefore needs to be redressed”³⁶.
- 5.55. Sir Rupert’s concern was obviously on cost and delay, whereas ours is with avoiding undue inconsistency. But the two issues come together neatly. If tribunals had real sanctions to incentivise compliance, it would assist in the realisation of more effective and consistent case management practice. The system would be more predictable, which is in line with what we seek to achieve.
- 5.56. An alternative approach to reviewing the appellate authorities would be to commission a review of the Employment Tribunal Rules, which could clarify and (if appropriate) extend the grounds on which sanctions were appropriate. This could help to focus the minds of parties when tasked with complying with directions and orders.

³⁵ The concept of ‘relief from sanction’, based on the Civil Procedure Rule concept of the same name (see rule 3.9) is also relevant. This means that, where a party applies to overturn a sanction levied on them for non-compliance with procedure (for example where their claim has been struck out), the tribunal must consider various factors, including – but not limited to – the interests of justice.

³⁶ Jackson, Chapter 39, paragraph 6.6, page 397. See above, footnote 19.

Listing

- 5.57. A clear message from the consultation responses was that there is clear variation in the process adopted in offices for listing cases for hearing. A number of issues were raised, including:
- (a) most, if not all offices ‘over-list’ cases in the anticipation that cases will settle, but certain offices are perceived to be more robust in over-listing than others;
 - (b) the advantages of the pre-listing stencil, which is issued in Scotland (but not in England & Wales) to parties to ascertain their availability prior to listing of certain cases for hearing³⁷; and
 - (c) the practice of using ‘floating’ or ‘block’ lists.

Analysis

Over-listing

- 5.58. The practice of over-listing was clearly an issue for those that we spoke to. However, in order to maximise the use of resources available and deliver an effective and efficient service, and attempt to list cases as speedily as possible, tribunals regularly adopt the practice of over-listing cases for hearing. This is in the anticipation that a large number of cases do not progress to hearing i.e. postponements, settlements and withdrawals. The overriding objective includes consideration as to the expense of dealing with claims, which itself requires focus on efficient use of judicial and tribunal room resource; and ensuring that cases are dealt with expeditiously.
- 5.59. It seems to us that this is not, at least at its core, a matter of inconsistency. Indeed, we have found that tribunals tend consistently to over-list. However, we accept that the issue is an important one for the stakeholders we spoke to. The question about what, if anything, to recommend as a result proved difficult for us as a group.
- 5.60. Rule 14 of the Employment Tribunal (Constitution and Rules) Regulations makes clear that the listing of hearings is a judicial function. Practices in respect of listing in England & Wales and in Scotland are different. This reflects the different civil justice systems north and south of the border. Such differences are not therefore necessarily undue, or unjustified. But the variance was observed by some members of the ETSSB, who considered that the issues should be addressed.

³⁷ In Scotland, the stencil tends to be used only in what used to be ‘standard track’ cases, so those involving mainly unfair dismissal issues. Many cases, even in Scotland, therefore, do not use the stencil approach.

- 5.61. In Scotland, where tribunals over-list, they tend to contact the parties in advance to give notice that their case may not get heard. This means that, on the afternoon before the case is due to be heard, tribunal staff telephone the parties and explain the situation. The parties can therefore make an informed decision about whether to accept the cancellation of the hearing or to attend the ET office in the hope that their case will get called. This is particularly helpful where parties or witnesses are required to travel a long way for the hearing. From the point of view of staff this avoids them having to deal directly with parties and representatives who may be upset about arriving at an office only to discover the case may not be heard at all and also saves staff time since it avoids the need for engagement with such parties throughout the day in terms of keeping them up to date.
- 5.62. In England & Wales, this does not happen. The majority of the ETSSB considered that the Scottish approach – which receives broad support from many users in both jurisdictions – should be rolled out across all employment tribunals, thereby saving parties inconvenience and cost. However, this recommendation could not be agreed unanimously.
- 5.63. It was considered by the President of Employment Tribunals in England & Wales to be both unnecessary and undesirable to introduce the Scottish practice in England & Wales. In the President's view, the very benefits sought (i.e. better customer service) were considered unlikely to result. Principally, the knock-on affect of deploying staff resources on this task would be that other tasks could not be completed as quickly. This in his view would mean that cases would be progressed less quickly. As there is no facility for increased resources, he therefore considered that reallocation in this way would diminish the service provided to the public. Consequently, the President (E&W) could not support the recommendation.
- 5.64. We therefore make a majority – but not unanimous – recommendation that tribunal offices should inform parties by no later than 4.30 pm on the previous day if their case is likely to be affected by over-listing. The standard practice should require tribunal staff to telephone parties, so as to ensure that all concerned are informed of the circumstances. And that parties have the opportunity to have their case re-listed with priority at the earliest opportunity.
- 5.65. However, we make a unanimous recommendation that, in any circumstances where a case is adjourned by reason of over-listing, that case should be relisted as a priority, with a commitment insofar as is possible to ensure that hearing is a fixture, rather than subject to over-listing arrangements. If it is impossible to fix a new date while the parties are at the tribunal, the tribunal should agree to hold a telephone CMD within no more than a few working days, at which time that new date will be agreed.

- 5.66. We also make a recommendation that the Tribunals Service should give far greater transparency in respect of listing. In particular, the public should have access to a cause list of hearings in each office, which is currently available to the press for a small fee, if possible 7 days prior to hearings taking place. Parties will therefore be able to see for themselves the number of panels (or judges) scheduled to hear cases, and the number of cases before them. So the over-listing issues should be more predictable.

Listing stencils

- 5.67. In Scotland parties are invited, in what were previously described as standard track cases (mainly complaints of unfair dismissal) to identify dates within a given period on which they are not available to attend a hearing. Parties are also asked to estimate the time necessary to hear their case. Although the process undeniably represents additional work for tribunal staff at this stage in the process. Scottish users are very supportive of this service, minimising as it does the need to apply for a postponement on the basis of the date fixed being unsuitable for parties or their representatives. However, the practice, although consistent with the Courts in England & Wales³⁸, is not adopted in employment tribunals south of the border.
- 5.68. Again, despite some evidence that users across the country would support rollout of the Scottish practice, we could not secure agreement to a unanimous recommendation to that effect. The President of Employment Tribunals in England & Wales felt strongly that such change would not further the overriding objective. Accordingly, he could not support it, particularly as listing is a judicial function and so the overriding objective is paramount.
- 5.69. It was considered by the President (E&W) that the reform was designed to focus too much on the interests of representatives, rather than necessarily the interests of the parties themselves. Moreover, it was noted that few applications to postpone hearings are made in England & Wales, indicating that parties are generally content with the dates they get. In any event, the facility to apply for a postponement does exist, which can be used where necessary, if the interests of justice so demand.
- 5.70. By way of background, the President (E&W) observed that a system like the Scottish stencil was tried and abandoned south of the border because it was considered not to be the most efficient means of achieving what was sought. The President considered that it is in the interests of all users that cases should be effectively disposed of as quickly as possible. Listing

³⁸ The civil courts in England & Wales issues 'Allocation Questionnaires' and 'Listing Questionnaires', which seek dates of availability for parties and witnesses at the relevant stages of the proceedings. Those responsible for the administrative function of fixing a date for a hearing – while at all times working within the remit of judicial supervision – take account of those dates wherever possible when so listing.

hearings is a significant part of that equation. Adding in administrative steps when fixing those hearings, when the system already caters for those few situations where dates initially allocated are unsuitable, would make the system less effective, not more so. In any event, the President observed that this issue has little if anything to do with 'inconsistency' across the tribunals for which he is responsible. He therefore felt that the recommendation was outside the scope of the Working Group to recommend.

- 5.71. The fact remains, though, that the administrative role undertaken by the Tribunals Service should have as its core focus the interests of users. We accept that there is a balance to be struck. But we see that the call of users across the system is a significant indicator of user interest. Accordingly, we make a majority recommendation that the listing stencil should be piloted in some English employment tribunals, with the results of that pilot published. The President of Employment Tribunals in England & Wales dissented, considering that the administrative burden on the tribunals would not justify the perceived benefit.

Hearing length

- 5.72. A further issue for the users we spoke to centred on the anticipated length of hearings compared to the actual time taken to hear cases. The allegation was that insufficient time was allotted to hearings, leaving parties unable to conduct their respective cases sufficiently.
- 5.73. It is far from clear that this is a matter of inconsistency. Accordingly, it does not feature as a central part of this report. However, we do consider that there is some merit in asking the Tribunals Service to monitor this situation, with a view to assessing whether or not a real problem exists. We would expect any monitoring information to be captured, so that high standards of transparency are upheld.

Postponements

- 5.74. In certain circumstances, sometimes at short notice, one or both parties may want or need to seek a postponement of their hearing. Either party may ask for a postponement of a hearing, but they should provide reasons for doing so. During the course of our investigation, we heard that users perceive different judges in different offices to apply different standards when considering these applications.

Analysis

- 5.75. In terms of process, if a judge refuses the request, the judge's reasons are conveyed to all parties either by telephone if the hearing is imminent or by letter or email or fax. If the judge grants the request, both parties are immediately informed that the case has been postponed. If the postponement request is close to the hearing date, parties are contacted

by phone, which is followed up with a letter. These standards could be better explained.

- 5.76. Ultimately the listing and hearing of claims is a judicial matter and a postponement only ever occurs following a Judge's instruction. This is as true of the Employment Tribunals as it is in other fora.
- 5.77. We understand, however, that Employment Judges require parties to justify, with reasons, why a request for a postponement is necessary. We agree that this should be the case. We consider that the work flowing from this report, which will see advice and guidance set out more clearly, should include reference to the position here.
- 5.78. So far as possible, those within employment tribunals, and those using the services, should be made aware of, by way of example, the type and range of issues that may be taken into account when considering an application to postpone. That should help people to make their applications and to understand why the applications are determined in the way that they are. From a practical point of view, the Presidents highlighted that there are so many circumstances when an adjournment or postponement is sought that it would be very difficult to give guidance on them all. Ill health, for example, might be an area where such guidance might be possible. But beyond that it becomes more difficult to encapsulate what might have to be done. As elsewhere, therefore, those framing guidance should make clear that any examples given are non-exhaustive and for use as a general guide only.

Taking of Witness Statements

- 5.79. Where a party, or a witness, gives evidence in an employment tribunal case, they will usually have to appear before that tribunal. In England & Wales, that evidence is usually collected first in a written witness statement, which is added to the tribunal file. Feedback we received indicates that some offices take witness statements as read at the final hearing (i.e. the witness's evidence is accepted in the form of the written statement, and so there is no need for this to be given again orally³⁹) and others do not.
- 5.80. In England & Wales the usual procedure tends to be that witness statements are not taken as read. Although this is a guide and is subject to judicial discretion in each case, the judiciary generally likes to see a witness give evidence in person, so that they can better assess the veracity of that evidence, rather than accepting what is said in a written document. In Scotland witness statements, as a matter of course, are not used unless so ordered by a Judge.

³⁹ Where a statement is taken as read, it will still be subject to cross examination. So the party will give evidence before the tribunal, but will not take up time by reading that which is already known.

- 5.81. It is clear that this is a matter which touches on judicial independence. The judiciary must be free to decide how best to take evidence. But the balance with consistency is important. If there is guidance or common practice, that should be communicated and met unless there is good reason. That way, parties and their representatives will be better able to prepare for hearings and for the future conduct of their cases.
- 5.82. Insofar as England & Wales is concerned, we would like to see the guidance being applied more consistently. Statements should be read out before the tribunal, unless otherwise is ordered or provided for under specific rules.

Judgements and decisions

- 5.83. No set of issues is more sensitive in the context of the need to safeguard judicial independence than when looking at the decisions made by judges. It is an absolute principle that the ability of judges to make decisions based on an application of the relevant law to the particular facts should be subject to no interference whatsoever.
- 5.84. In the course of our work on this review, we heard of some anecdotal concerns about the treatment by some judges of cases involving mainly though not exclusively discrimination issues.
- 5.85. Some of those who responded to our review believed that certain judges were known for deciding cases one way (e.g. in favour of claimants) and others the other way. This type of allegation is made about courts and tribunals across the entire judicial system so there is nothing unique about employment tribunals in this regard.
- 5.86. In the context of employment tribunals, it is important to highlight that tribunals are made up of an Employment Judge and two Members, one of whom is drawn from a panel from each side of industry (i.e. an employers panel and an employees panel). All three carry an equal vote when it comes to the decisions being made – something which is emphasised strongly in training carried out for Judges and Members. This means that decisions made by tribunals are decisions of the full panel, not just of the judge on that panel. That, we think, provides a degree of protection not available in many other legal fora. But the view of the Employment Judge, particularly in the complex and difficult cases, is perceived to carry significant weight by some of our consultees.
- 5.87. It was pointed out by both Presidents that where either party believes that there has been bias, there is the opportunity to appeal the decision; and that there are very few cases that are appealed successfully on such grounds. There are also robust mechanisms in place to deal with judicial complaints. The Judicial Misconduct Procedures require a proper investigation to be carried out, in accordance with the associated rules, if any complaint is made. If, as a result of those investigations, bias or

anything akin to it is found to have occurred, that is a matter that has to be reported immediately both to the Senior President and the Lord Chief Justice (in England & Wales).

- 5.88. Insofar as Scotland is concerned, complaints about Employment Judges are dealt with by the President of the Employment Tribunal (Scotland) who would notify serious matters to the Lord President, given he is responsible for the appointment of Scottish Employment Judges. In contrast, as things stand, ET members are appointed by the Lord Chancellor and are subject to the Judicial Complaints procedure that applies in England & Wales.
- 5.89. Mechanisms do therefore already exist to deal with the issues identified here. At present, they deal with few cases and still less are ever upheld. If there are more people who think they have a legitimate complaint, they should be encouraged to raise those matters through these existing arrangements.
- 5.90. The potential for serious harm here is obvious. If a particular judge is due to hear a case and one or other of the parties believes (whether rightly or wrongly) that s/he will not get a fair hearing, that party's conduct of the case may be affected. For example, the party may feel under undue pressure to settle the claim before the hearing, so conceding to less favourable terms than they otherwise might.
- 5.91. Inconsistency here is difficult to pin down. However, the criteria against which all cases are judged should be applied consistently, no matter what panel or judge is hearing the case. Neither President considered there was any evidence to suggest that this was not happening and both were seriously concerned about undermining the independence of the judiciary and creating a climate of mistrust.
- 5.92. We recognise in this difficult area that even unsubstantiated allegations of bias, if they become part of the mythology surrounding the system, can cause reputational damage to the whole ET System. Despite the potential difficulty of tackling this sensitive subject area, a majority of us believe that the allegations need to be considered further with a view to establishing if there is any basis for them.
- 5.93. Accordingly, the majority believe that there should be a formal research project commissioned of all discriminations cases (and, if it thought appropriate all other cases) from the point of the acceptance of the ET3 through to the settlement of the case, however that settlement is reached. This review should look for any patterns that might suggest a particular bias towards the claimant or towards the respondent, and/or towards or against a particular type of case such as sex, race, disability, religion and/or sexual orientation discrimination.

- 5.94. Neither ET President considered such a review was warranted. However, they were prepared to cooperate with such a process to enable the issue raised to be assessed objectively and independently but only to the extent they could do so without compromising the independence of the judiciary.
- 5.95. The President of England & Wales, while accepting that any perception that does persist may undermine confidence and create mistrust, was clear that any future research should first of all seek to confirm that a perception actually exists (as distinct from people merely feeling aggrieved that they have not achieved the result they wished).
- 5.96. The remainder of the Group, whilst accepting the fact that a perception existed at face value, agreed that a phased approach to research would be sensible. The majority believed that the first phase of such research should assess the extent and strength of the perceptions that exist. The findings of this research would allow a judgment to be made about whether or not further resource should be invested in investigating the matters involved. If and to the extent that there did appear to be material upon which a perception of bias might reasonably be based, this could be considered in a second phase of research. The President of England & Wales agreed with this phased approach, subject to the additional preliminary phase suggested in the preceding paragraph.
- 5.97. An important issue then focused on was the extent to which such research might legitimately focus on comparing data at regional level, at hearing centre level or even down to the level of individual panels or judges.
- 5.98. There was consensus that, in order to protect and safeguard judicial independence, it would not be right to consider judgments from individual panels or members of the judiciary. The majority considered that the research could be effective if it looked to compare determinations made at hearing centre level. However, the respective Presidents considered that this too could risk damaging judicial independence. Moreover, as Employment Judges and, to a lesser extent Members sit at venues across Regions (or in the case of Scotland in all hearing centres across the county), research looking to compare decisions between individual hearing centres would not get an accurate picture. Therefore, the Presidents suggested that, if research was to go ahead, it should be limited to comparing data at a regional/Scotland wide level so as to ensure optimal effectiveness and ensure risk to independence is minimised.
- 5.99. By way of background to this debate, the President (E&W) emphasised that a National User Group meeting recently considered these issues, which involved a presentation from the Equalities & Human Rights

Commission⁴⁰. That presentation looked at differences in success rates, rather than at comparing outcomes at local centre or regional level. However, broad issues relating to such comparisons were raised and those concerned were invited to provide evidence of the problems. The President (E&W) highlights that no evidence has yet been presented.

- 5.100. As a Group, we understood the views expressed by both Presidents. On balance, we felt that there was sufficient concern expressed by users from both sides of industry over a period of time to warrant the recommendation of a comprehensive review to address these albeit unevicenced allegations. The purpose of such work should be either finally to lay to rest the perceptions as being completely unwarranted, or, if the perception were to be evidenced, to enable it to be dealt with.
- 5.101. This review would need to cover a relatively significant period of time; we would suggest at least the previous five years. We understand that this will require a degree of investment in time and resources which will be challenging in the current climate. However, it is the clear view of the Steering Board that these general allegations of bias, which have not be substantiated by any hard evidence, need to be addressed through properly resourced research in order to ensure confidence in the fairness of the System.

⁴⁰ National User Group (E&W), 8 November 2008. See from paragraph 18: <http://www.employmenttribunals.gov.uk/Documents/AboutUs/ETSNUGMinutesNovember08.pdf>

6. Recommendations

- 6.1. In the previous chapter, we analysed the issues raised by our consultees and expressed our view about what action was required. For the sake of clarity, we set out in this chapter a summary of the key recommendations made.
- 6.2. We would, however, encourage this chapter to be read together with those that precede it in order to provide a fuller understanding: an overview or summary of a complex set of issues is often not sufficient to convey all that is required.

Coherent communication: Transparency and accountability

- 6.3. We believe more could be done to help users understand how the system was designed to work, and what they can expect from the system. This recommendation sits on many levels and will require action from various parts of the system.
- 6.4. First, and most broadly, **we recommend that the Tribunals Service reviews its communications strategy in respect of the employment jurisdiction**. Employment tribunals are different to many of the other tribunals within the TS framework: rather than appeals against administrative decisions of the State, employment tribunals consider cases brought by one party (usually an employee) against another (usually an employer). This means the needs of its users will tend to be different from elsewhere.
- 6.5. The narrative of the system needs to be set out more clearly for those users. While this report has gone some way to explaining standards exist in specific areas raised during our review, there is scope for a much fuller explanation to users of how the ET system operates and what users should be able to expect. And it is for the Tribunals Service to provide that explanation.

Recommendation 1. We recommend that the Tribunals Service reviews its communications strategy in respect of the employment jurisdiction. In particular:

- a) we **recommend** that the flowchart we publish at **Annex C** is used by the Tribunals Service as the basis of written guidance setting out how the system works, and why; and
- b) we **endorse** the work being done by BIS, TS and Acas on a short online video about the end-to-end employment dispute resolution system. This is likely to complement the further written guidance (which should also be available online) that we recommend in this report.

- 6.6. Moreover, the detail of the rules and guidance on which the employment tribunal system operate should be more clearly set out.

Recommendation 2. The detail of the rules and guidance on which the employment tribunal system operate should be more clearly set out. In particular:

- a) we **recommend** that the rules and regulations reproduced on the employment tribunals website by the Tribunals Service should be in the form of a consolidated version, along the lines of the rules on the Employment Appeal Tribunal website; and
- b) we **recommend** that any practice directions issued by the Presidents to supplement the rules and regulations should not only be published, but should be prominently communicated by the Tribunals Service, online and in local offices.

Case Management Discussions

- 6.7. The standards applied when listing and conduction CMDs seem to vary, and this apparent inconsistency needs to be addressed. Accordingly:

Recommendation 3. Practices in respect of listing and conducting Case Management Discussions (CMDs) seem to vary, and this apparent inconsistency needs to be addressed. Accordingly

- a) we **recommend** that, in discrimination cases, there should be a clear aim that cases have a CMD within 6 weeks of the lodging of the ET3 Response, so long as there is a clear understanding (communicated to users) also of the factors which may mean that in certain circumstances the CMD might be held before or after that time, or not at all, and that parties would be advised of the reasons at the time;
- b) we **recommend** that, in non-discrimination cases, no guidance should give an 'expectation' that a CMD will be fixed. However, we think it right that parties should have an explanation if any request for a CMD is refused. We think that explanation should be made available (i.e. communicated by the Secretary) within a reasonable time, say three working days of the judge's decision;
- c) we **recommend** that further clarification is given by the judiciary in respect of when telephone as opposed to in-person CMD s will be fixed. That clarification should make plain that there should be no 'standard' approach of CMDs being held in a particular way. For example, being held by telephone or, on the other hand, by in-person attendance. The overriding consideration here must be paying sufficient regard to the needs of the parties involved as

required by the overriding objective; and

- d) we **recommend** that the results of the pilots in England & Wales, focusing on standard agendas and formats for the hearings, and on the involvement of Acas, are analysed and made public

Judicial directions

- 6.8. As we discussed in earlier chapters, the importance of safeguarding judicial independence is difficult to understate. This must form a backdrop to all recommendations we make, and in particular those in respect of the work of Employment Judges where there is discretion to be exercised.
- 6.9. As ever, a balance needs to be struck. On the basis of our analysis, in particular that which is contained at paragraphs 5.34 to 5.56 in the previous Chapter, we make the following recommendations.

Recommendation 4. A balance needs to be struck between safeguarding the importance of judicial independence and ensuring as much procedural certainty as possible for users. Accordingly:

- a) we **recommend** that the judiciary and the Tribunals Service staff make every effort to identify correct templates for orders and judgements (and any associated covering letters sent by ET offices), and then ensure such templates (where they exist) are used;
- b) we **recommend** that guidance is published, by the Tribunals Service after consulting with the judiciary, making it as clear as possible what directions can be made in respect of bundles and productions, and how those might apply to different cases likely to arise in the ET system. However, such guidance should make as clear as possible what kind of matters an Employment Judge might need to take into account when making whatever directions are appropriate in individual cases; and
- c) we **suggest** a review is undertaken, either by the appellate authorities of the guidance that is handed down to Employment Tribunals in respect of sanctions for non-compliance, or more widely into the rules which govern the use of those sanctions.

Listing

- 6.10. We made several recommendations in respect of the practice and procedure connected with listing cases for hearing. We recognise that many of the recommendations made will have resource implications. We also highlight the fact that some of the recommendations we make were not agreed unanimously by members of the Board. Where we have

included a majority recommendation, the recommendation has always been agreed by the representatives of the CBI, TUC and the independent members of the Board. Therefore, as a Board, we feel it important that these issues are explored.

6.11. Accordingly, we make recommendations.

Recommendation 5. In terms of listing hearings:

- a) we make a majority – but not unanimous – **recommendation** that tribunal offices should inform parties by no later than 4.30 pm on the previous day if their case is likely to be affected by over-listing. The minority view of the President of Employment Tribunals in England & Wales is set out at paragraph 5.63;
- b) we unanimously **recommend** that, in any circumstances where a case is adjourned by reason of over-listing, that case should be relisted as a priority, with a commitment insofar as is possible to ensure that hearing is a fixture, rather than subject to over-listing arrangements;
- c) we make a majority **recommendation** that the listing stencil should be piloted in some English employment tribunals, with the results of that pilot published. A minority of the Board dissented, considering that the administrative burden on the tribunals would not justify the perceived benefit. The minority view of the President of Employment Tribunals in England & Wales was set out at paragraph 5.71; and
- d) we **recommend** that the Tribunals Service should give greater transparency in respect of listing. In particular, the public should have access to a cause list of hearings in each office, which is currently available to the press for a small fee, if possible 7 days prior to hearings taking place.

6.12. The issue of hearing lengths was also raised by consultees. It is far from clear that this is a matter of inconsistency. Accordingly, it does not feature as a central part of this report. However, we do consider that there is some merit in asking the Tribunals Service to monitor this situation, with a view to assessing whether or not a real problem exists. We would expect any monitoring information to be captured, so that high standards of transparency are upheld.

Postponement

6.13. Requests from parties to adjourn or postpone cases are dealt with by Employment Judges who operate within the framework of the discretion afforded to them. We agree that parties making these requests should be required to justify their application – and that judges considering the requests should so consider them against consistent criteria. Again, it will

be important to ensure that such guidance is understood as being non-exhaustive and subject to judicial judgment in each and every case.

Recommendation 6. We **recommend** that guidance should, so far as possible, reiterate and – to the extent necessary, clarify – what criteria parties should be required to meet when seeking to adjourn, postpone or vacate a hearing.

Witness statements

6.14. The practice in respect of witness statements was found to merit further attention.

Recommendation 7. We **recommend** that the guidance in England & Wales where witness statements are not ‘taken as read’ should be enforced more consistently.

Judicial decision-making

6.15. There was no more sensitive issue in our review than when our focus was directed to the decisions of individual judges in individual cases. Although we heard some anecdotal suggestions, we found no hard evidence of bias in any case. Nor do we as a Board believe that such allegations can be made out, at least on any widespread basis. We are, however, concerned about the effect that such accusations could have on the confidence in which this system is held. The views and concerns of the ETSSB members are set out in full from paragraphs 5.83 to 5.93.

Recommendation 8. We **recommend**, by a majority, a fully-resourced independent review on the issue of bias, which was the focus of concern for some of our consultees. If such allegations as we have heard anecdotal evidence of can be substantiated, then they should be dealt with robustly and expeditiously. But, equally, if the allegations are unfounded, we should be able to point to hard evidence to prove that, and so accordingly protect the system against the risk of a loss of public confidence.

Annex A – List of persons and organisations consulted

Alsters Kelley Solicitors
BEERS LLP
Birmingham City Council
Chubb Security Personnel (ELA)
Citizens Advice Bureau (Taunton)
Citizens Advice Bureau (Walden)
Confederation of British Industry (CBI)
Council of Employment Tribunal Judges (CETJ)
Council of Tribunal Members Association (COTMA)
Crossland Employment Solicitors (ELA)
EAD Solicitors LLP
EEF Ltd
Equality and Human Rights Commission (EHRC)
Employment Lawyers Association (Replies from anonymous ELA)
Forum of Private Business (FPB)
Home Office
iLaw
Joint Industry Board
Keelys LLP
Law Cawthra Feather LLP (Member of Yorkshire & Humberside User Group)
Law Society, The
Lemon & Co
Liddell & Company
Mac Roberts
Martin Searle Solicitors
Mincoff Jackson's (Member of Newcastle User Group)
Mischon de Reya
Morton Fraser Solicitors (Member of Scotland National User Group)
Needham & James LLP
Rickerbys Solicitors
Royal College of Nursing (ELA)
Scotland Trade Union Centre
The People Function (Employment Law Operations)
Thring Townsend
Trade Union Congress
Treasury Solicitors Department (TSOL)
Wragge & Co LLP

Annex B – Consultation letter from ETSSB



Tribunals Service
Employment

Employment Tribunal System Steering Board
Tribunals Service
Victory House
30-34 Kingsway
London
WC2B 6EX

Office: 44 (0) 207 224 0771

Mobile: 44 (0) 7884 232421

June 2009

Consistency of Employment Tribunals

Dear Stakeholder

The Employment Tribunal System Steering Board (ETSSB) has been commissioned by Ministers to investigate concerns about a perceived lack of consistency in employment tribunals. Those concerns were expressed during the course of responses to the Gibbons review. Gibbons recognised that this was a perceived problem and had difficulty identifying specific examples.

The Government is committed to addressing the concerns expressed by users in their responses to the Gibbons review. ETSSB recognises that perceptions of inconsistency, whether justified or not, can damage user confidence in the system. We also recognise, however, that we must be able to clearly identify specific evidence of any inconsistency.

In recognition of the Government's acceptance of this perception and in light of the absence of any specific evidence on the problem of inconsistency, as a key stakeholder of the Employment Tribunal System I am writing to invite you to assist the ETSSB in providing specific examples of lack of consistency within employment tribunals. The ETSSB will then consider whether, on the basis of the examples provided, there is evidence of a consistency issue, what the consistency issues are and what steps might be taken to address them.

Organisations that provide evidence of inconsistencies may be contacted to discuss the issue further.

[Flag] A provides details of the organisations that have been invited to participate in this piece of work,

Please forward any evidence available by 17 July 2009 to:

Christopher Hall
Employment Policy

Tribunals Service
Alexandra House
14-22 The Parsonage
Manchester M3 2JA
E:mail: Christopher.hall@tribunals.gsi.gov.uk

Yours sincerely

Ian Barr

Chair
Employment Tribunal System Steering Board

Flag A

Organisations involved in consultation

CBI
Trade Union Congress
Federation of Small Businesses
Forum of Private Businesses
Chambers of Commerce
Government Departments (where to write to)
James Libson, Mischon de Reya
Employment Tribunal System National User Groups
Citizens Advice
Equality & Human Rights Commission
Employment Lawyers Association
Free Representation Unit
Law Centres Federation
The Law Society
Scottish Trade Union Congress
Engineering Employers Federation
Peninsula Business Services
BAR Pro Bono Unit

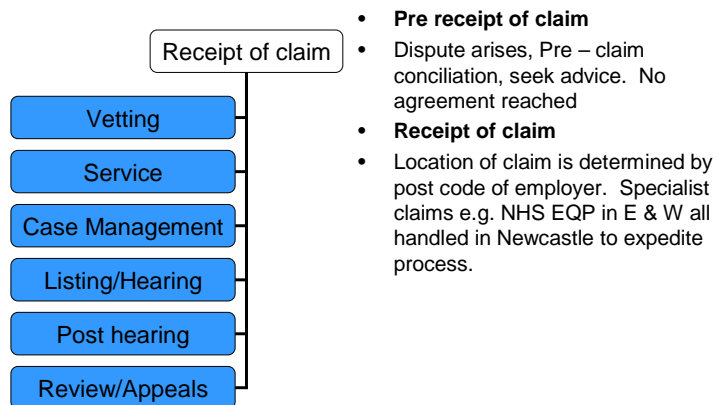
Employment Tribunal Local User Groups (includes representation from various organisations)

Annex C – Process map for ET system

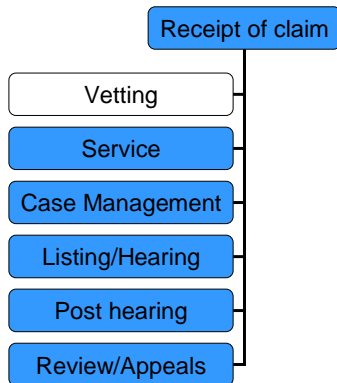
ET Process Flow Chart

Consistency Working Group

Receipt of Claim

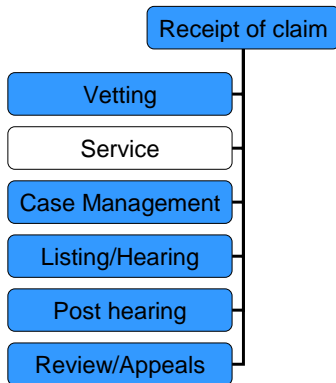


Vetting



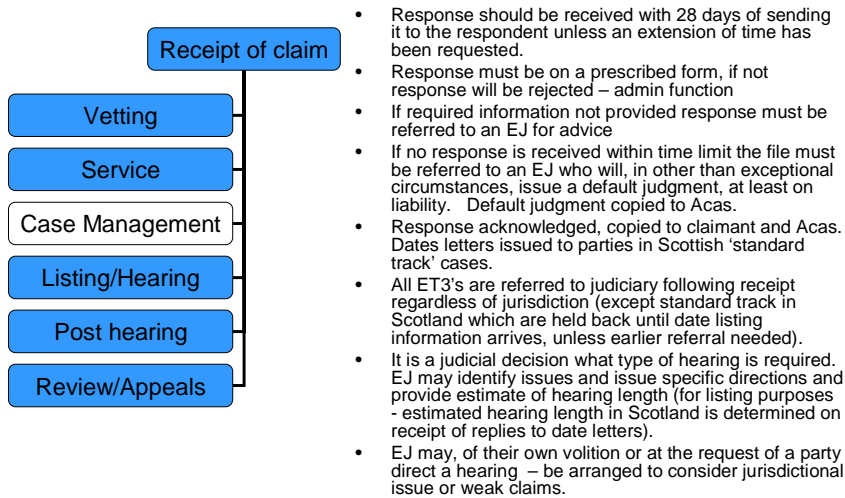
- Claim lodged, pre-acceptance checklist used for all claims - admin.
- Claim rejected if not on prescribed form – admin responsibility. Claimant advised.
- If required information is not provided claim must be referred to an EJ
- Any other issues, i.e. out of time, multiples, claim jurisdiction – judicial instructions sought
- Location of claim is determined by post code of employer. Specialist claims e.g. NHS EQP in E & W all handled in Newcastle to expedite process. Special arrangements apply for transferring claims between offices and jurisdictions.

Service

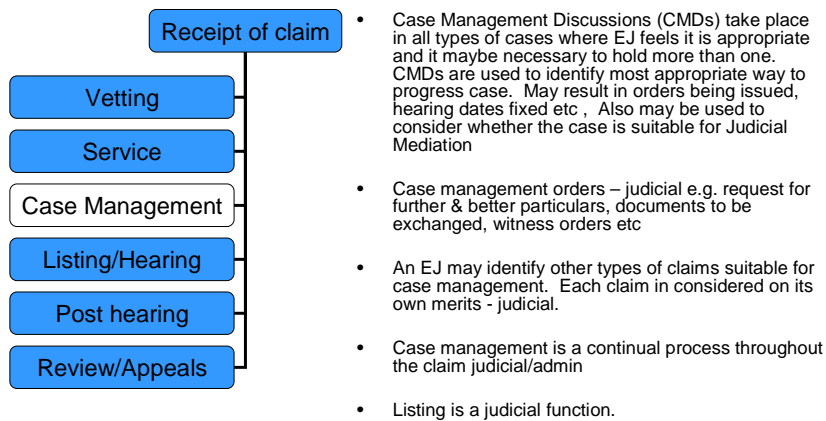


- Prepare case file, upload details on ETHOS – admin function
- Certain jurisdictions i.e. WA, BOC, RPT are normally allocated a hearing date 8-9 weeks ahead – admin function under direction of judiciary.
- All claims should be acknowledged, served and copied to Acas within 5 days of receipt
- Referral to an EJ not required if the claim raises no issues. If Vetter has any concerns claim is referred to EJ for directions.

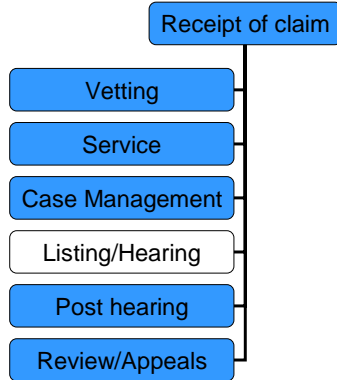
Case management (1)



Case Management (2)

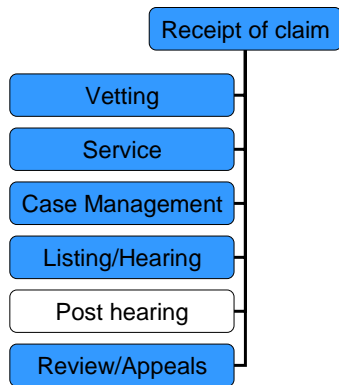


Listing



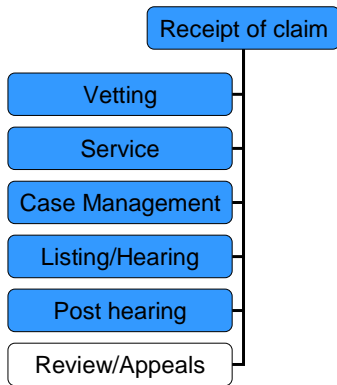
- Cases are over listed in the anticipation that many will settle or withdraw in advance of the hearing. The number of cases or sessions listed per day is determined by the judiciary
- Claim listed by admin and takes account of sit-alone and full tribunal cases
- All postponement requests are considered by EJs
- Listing staff book and where necessary cancel judiciary and members and ensure suitably trained judiciary & members sit on panel
- Day to day arrangements for hearings and clerking of cases undertaken by admin

Post Hearing



- All judgments are issued in written form
- Judgments and reasons may be announced orally at the conclusion of the hearing or reserved.
- Where judgment and reasons issued orally there is no requirement, unless one of the parties requests them at the hearing or within 14 days of receiving the judgment, for written reasons to be given
- The preparation (typing) of the judgment is normally undertaken by the administration
- The final judgment, and when produced the reasons are signed by the EJ, sent to parties and Acas (depending on the nature of the claim it may also be copied on to other Government Departments). In discrimination cases a copy of Judgments and reasons are sent to Equality and Human Rights Commission.
- Admin then undertake post-promulgation work– management of bundles, case file archiving

Review / Appeals



- An application for review of any judicial decision (at any stage in the process) can be made by the parties within 14 days of the decision or judgment being notified to them. All applications for review are dealt with by the judiciary.
- A party can appeal against any judicial decision to the EAT. That appeal must be made to the EAT within 42 days of the decision being intimated to them.

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Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

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