

**The Employment Lawyers Group (Northern Ireland)
The Bar Library
91 Chichester Street
BELFAST
BT1 3JQ
Tel. 028 9056 2593
e-mail: rachel.best@barlibrary.com**

**Future Administration and Structure of Tribunals in Northern
Ireland**

**Response of the Employment Lawyers Group (Northern Ireland) to
the Consultative Document**

This Response is submitted on behalf of the Employment Lawyers Group (Northern Ireland) "(ELG)". The ELG which has been in existence for 16 years, is an association of approximately 75 members of both branches of the legal profession encompassing specialist employment lawyers and those with a more occasional engagement in the area of employment law. Our membership includes those whose client bases are both employee (or 'Claimant') and employer (or 'Respondent') oriented and we attempt to provide an open and helpful network for the exchange of information and views and training through seminars pertinent to law and practice in the Industrial and Fair Employment Tribunals (OITFET).

The ELG presently has a committee of 17 members. The three current office bearers are John O'Neill (Thompsons McClure), Chair, Rachel Best BL, Secretary and Orlagh O'Neill (Carson McDowell), Treasurer. The Ordinary Members include Anna Beggan (Tughans), Adam Brett (McGrigors), Sarah Cochrane (Carson McDowell), Alison Collins (Jones Cassidy Jones), Rosemary Connolly (Rosemary Connolly Solicitors), Beverley Jones (Jones Cassidy Jones), Conor Hamill BL, Carol McClean (Directorate of Legal Services (BSO)), Mark McEvoy BL, Brian McKee BL, Anne McKernan (Equality Commission), Neasa Murnaghan BL, Michael Potter BL, Lisa Sturgeon (Napier & Sons).

The ELG is concerned to note that the Consultative Document proposes that the OITFET should be included within the proposed arrangements for the future administration and structure of Tribunals in Northern Ireland. In its view whilst improvements in the OITFET system may be required, there are compelling reasons why the current arrangements for dealing with employment and discrimination cases should not be included in the proposed "single integrated structure to be known as the Appeal Tribunal.

The ELG would highlight the following key points:-

1. The OITFET (sponsoring Department DEL) adjudicates at first instance on disputes between private individuals on employment matters. Employment disputes arise in both the private and public sectors. Where such disputes arise in the public sector they concern the employee suing the government entity as an employer not as a citizen challenging State action. The OITFET adjudication panel comprises a legally qualified chair, a representative of the trade unions and a representative of employers' organisations. This panel is important in ensuring that the adjudication of employment disputes is informed by an understanding of the operation of the workplace and labour market. Employers have diverse policies, procedures and practices applicable to different industrial sectors and influenced by the size of the enterprise as well as their location in the private or public sector.

The jurisdictions covered by the OITFET are extensive, including complex discrimination and equal pay issues, unfair dismissal, redundancy, working time, and TUPE. Many of the jurisdictions raise issues under both national and EU law. The OITFET dealt with more than 7885 complaints in over 2600 claims in 2011/2012. The

outcome of tribunal complaints based on the OITFET annual report 2011/2012 is set out below:

Tribunal	Outcome After hearing Allow/Dismiss		Other dismissal	W/drawn	LRA Conc	Other settled	Stay	Total
IT	643	476	571	1334	2412	2268	2	7706
FET	1	26	1	85	38	28	0	179
Total	644	502	572	1419	2450	2296	2	7885

A well-established and effective service is operated by the Labour Relations Agency (LRA) providing conciliation to the parties involved in OITFET claims. Many of the claims to OITFET will be resolved (31%) using this service without recourse to a full hearing. More recently the LRA has developed a workplace mediation service which aims to resolve disputes before they are lodged with the OITFET. As recently as September 2012, legislation was passed to extend the OITFET jurisdictions susceptible to LRA arbitration as an alternative to formal tribunal procedures and hearings.

Many claims are resolved between the parties without LRA intervention and without a full hearing (29%). A significant proportion of all complaints are withdrawn (17.9%). Others were dismissed following pre hearing/preliminary action (7.2%). Hence in 2011/2012 over 85% of all tribunal complaints were resolved without a full tribunal hearing.

It is rare in employment cases that a point of law arises in isolation from the facts. Hence the opportunity for points of law to be heard by legally qualified chairmen sitting alone is rare. Case Management and Pre Hearing Reviews are dealt with by legally qualified chairmen sitting alone.

Appeals from interim decisions of the OITFET are to the High Court by way of judicial review.

An Industrial Tribunal or The Fair Employment Tribunal may review its decision, and confirm, vary or revoke it where:

- the decision was wrongly made as a result of an administrative error;
- a party did not receive notice of the proceedings leading to the decision;
- the decision was made in the absence of a party;
- new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time; or
- the interests of justice require such a review.

Parties currently have the right of appeal to the Northern Ireland Court of Appeal against a decision of an Industrial Tribunal or The Fair Employment Tribunal on a point of law. The opportunity for appeal is limited in Northern Ireland due to the lack of an EAT unlike the equivalent system in GB and the ELG has expressed its concerns about this matter on a number of occasions.

A revised Appeals Procedure on a point of law was introduced by The Rules of the Court of Judicature (Northern Ireland) (Amendment) 2010 which came into operation on 1st April 2010. This provides for 2 forms of Appeal:

Direct Appeal to the Court of Appeal

Appeal by way of Case Stated to the Court of Appeal.

Thereafter appeals follow the usual route to the Supreme Court. In certain circumstances references can be made directly from the OITFET to the CJEU on a point of EU law.

The OITFET system does not overlap or duplicate any other tribunal in Northern Ireland.

2. The ELG notes the Department of Justice refers to the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) which introduced an integrated tribunal structure in GB is overseen by the judicial Senior President of Tribunals. However paragraphs 21 to 23 of the Explanatory Notes accompanying the 2007 Act set out below (with ELG underlining) recognised that not all tribunals are suitable for such an integrated structure:

"21. It is intended that the new tribunals will exercise the jurisdictions currently exercised by the tribunals, which constitute most of the tribunal jurisdictions administered by central government. The Government's policy is that in the future, when a new tribunal jurisdiction is required to deal with a right of review or appeal, that right of appeal or review will be to these new tribunals.

22. Some tribunals have been excluded from the new structures because of their specialist nature. Tribunals run by local government have for now been excluded, as their funding and sponsorship arrangements are sufficiently different to merit a separate review.

23. There are also tribunals that will share a common administration, and the leadership of the Senior President of Tribunals, but whose jurisdictions will not be transferred to the new tribunals. They are the AIT, the employment tribunals and the Employment Appeal Tribunal. The AIT has a unique single-

tier structure (as prescribed by the Nationality, Immigration and Asylum Act 2002, as amended by the Asylum and Immigration (Treatment of Claimants etc) Act 2004) which would not fit into the new structure established by the Act. The employment tribunals and the Employment Appeal Tribunal are excluded because of the nature of the cases that come before them, which involve one party against another, unlike most other tribunals which hear appeals from citizens against decisions of the State.

The ELG commends these explanatory paragraphs, in particular, paragraph 23 as the rationale for excluding the OITFET from the proposed integrated tribunal structure for Northern Ireland. It also considers that the OITFET is of a specialist nature sufficient to warrant separate review. The President, the Chairmen and panel members have extensive expertise in the specialist employment and labour market field. Given the considerable workload of the OITFET, the ELG contends it should retain its separate arrangements.

The name for the proposed new tribunal structure; Appeal Tribunal, would cause confusion in circumstances where disputes between employers and employees are the subject of a first instance decision rather than any review of appeal. This contrasts with the situation of the citizen challenging or reviewing a decision of the State. (Consultative Document: paragraph 3.5-3.8)

3. The ELG makes the following general comments/observations on a number of proposals in the Consultative Document. However, these should not be read as agreement to the inclusion of the OITFET in a proposed integrated Appeal Tribunal.

- a. **Sponsoring Department:** The ELG would welcome transfer of the statutory responsibility to the Department of Justice as an appropriate sponsoring department.
- b. **Judicial Leadership:** The ELG welcomes efforts to improve independence of the tribunal system generally. It would welcome the Lord Chief Justice of Northern Ireland's judicial leadership for OITFET. However the ELG would emphasise that any office of Presiding Tribunal Judge will not obviate the need to retain the Office of the President of the OITFET.
- c. **Resources:** The ELG recognises there may be benefit in shared services and approaches.
- d. The ELG is of the view that were the OITFET to transfer to the Appeal Tribunal system, a lack of **specialist chambers** to deal with specific employment disputes would be harmful to the retention of expertise necessary to deal efficiently with employment complaints within the current OITFET. On the basis of the figures identified in the Consultative Document at the foot of page 10, approximately 25% of all tribunal cases in Northern Ireland relate to the employment field. Each jurisdiction within the employment law field involves specific areas of expertise, built up over the years so that the current OITFET panels have extensive expertise. In the ELG's view it is essential that the current arrangements for dealing with workplace disputes are not disrupted by reforms which may not be suitable to ensure delivery of an effective service to the public.

- e. **Judicial Deployment:** It is currently the position that in certain circumstances cases can be decided by one Tribunal member sitting alone.
- f. **Judicial Support:** Complex issues can arise at interlocutory stages and the ELG would be concerned that the use of administrative staff would merely be a cost saving exercise rather than ensuring appropriate legal expertise addresses issues of importance in interlocutory stages of employment claims.
- g. **Prehearing advice and representative:** ELG would welcome any additional assistance available to users of the OITFET to ensure delivery of a good service to the public which might include case preparation and representation where appropriate. In the complex area of employment law many claimants and small employers cannot afford legal representation and such cases often take up disproportionate OITFET time.
- h. **Hearings:** Whilst the ELG considers that there may be scope for flexibility in the format for the hearing of OITFET cases, it emphasises that it is important that both parties have an opportunity to explain their case to an independent tribunal panel.
- i. **Encouraging earlier dispute resolution:** In the view of ELG this section underlines a lack of understanding of the operation of the OITFET system and the inappropriateness of the proposals in the Consultative Document to the current arrangements for dealing with employment disputes. It refers (ELG underlining) the proposal as providing the opportunity

"to bring about improvements in decision making by Government Departments in order to reduce the need for appeals". The OITFET does not fulfil such a function. Employment disputes concern the resolution of disputes between private individuals some of which may involve government departments or agencies acting as employers. Further OITFET does not operate as an appeal providing "mechanisms for reporting feedback to departments".

It is important that government ensures it meet its obligations to citizens and deal with their appeals against state action but this should not be confused with the distinct work of the OITFET.

Further as identified above there is a well-established and sophisticated ADR process in use in OITFET cases which contributes to the fact that only 15% of all employment complaints result in a full hearing.

- j. **Fees:** Currently, the OITFET system provides an opportunity for a party to seek a deposit before their opponent can continue with their case where there are concerns that pursuit of the matter has little prospect of success.

- k. **Review and Appeal:** The circumstances in which there may be a review or appeal in the OITFET context are set out above. The ELG also refers below to its response of 10 December 2010 to the Access to Justice Review dealing with limitations of the current appeal procedure in employment cases:

"It has for some time now been the view of the ELG that it is not appropriate that employment law cases go straight from the first

instance 'entry-point' of the legal pyramid to the very top. There is no intermediate level of appeal. We submit that it is neither appropriate nor cost effective, to have three Lords Justice of Appeal sitting in the Court of Appeal as the direct forum for appeal from Tribunal. The recent modification to appeals procedures introduced by way of Order 60B RSC is in this context, and in real terms only a technical "tidy-up" which does not address what ELG perceives to be the underlying and more important gap in justice delivery.

The existing procedure presents a very real Access to Justice issue, since it is the experience of ELG members that the costs risk of proceedings in the Court of Appeal is typically prohibitive for both sides but in particular for Claimants.

As against this, there is only an exceptional costs risk in the Tribunals.

Parties involved in tribunal claims in Northern Ireland are at a disadvantage as against comparators in Great Britain, where the Employment Appeal Tribunal exists as an intermediate tier of appeal with similar exceptional costs provisions and where matters on appeal are dealt with quickly and effectively by those experienced in the specialist field of employment law. The risk of a clogging of the system by vexatious or spurious appeals is mitigated by a scrupulous sift procedure.

We believe the creation of an Employment Appeal Tribunal (EAT) for Northern Ireland warrants serious consideration in the context of your Review.

As it stands, parties in employment appeal cases who do not qualify for civil legal aid (and this is the vast majority in our experience) or who are not members of Trades Unions are effectively shut out of the Court of Appeal and cases are abandoned when usually (though not typically) better resourced employers either appeal or threaten to appeal.

For many small employers and for many Trades Unions, the costs risk is too great to appeal or participate in appeal. In an era of straitened public expenditure, public sector employers will also be constrained from protecting the integrity of their employment practices if they are obstructed on resource grounds from participating in appeals before the Court of Appeal.

The continuing absence of an EAT in Northern Ireland hinders development of local employment law jurisprudence and clarity about employment and discrimination law. This is becoming even more important as differences in employment law provision between Northern Ireland and Great Britain continue to develop, particularly

with the differing approaches in dispute resolution procedures (now repealed in GB, whereas a commitment to their partial retention has been made locally) and with the recent commencement in Great Britain of the Equality Act 2010. This will mean that there is likely to be a much greater need for access to an expeditious method of appeal to clarify the law, which employees and small employers will not be able to afford if their only avenue of appeal continues to lead to the Court of Appeal alone, and the consequential inefficiency that more of the Court of Appeal's time and resources will be taken up with employment matters.

We acknowledge that the creation of a new tier of appeal immediately gives rise to issues about modelling within the Review Team's requirement to address proposals against VfM considerations. On that score, we foresee that an EAT could be created and maintained using largely existing resources and personnel and the long term savings and improvements in the delivery and quality of justice to parties involved in employment disputes could be tangibly and measurably improved even in the short term."

- i. **Procedural Rules:** The ELG agrees that ensuring rules of procedure are simple and easily accessible is important. Such a review of GB employment tribunal rules is currently underway under the auspices of the President of the EAT (the Underhill Review). This issue is also under active consideration locally by the OITFET Rules Committee
- m. **Appointments:** ELG considers it sensible to make appointments through the Northern Ireland Judicial Appointments Commission
- n. **Appointment Criteria:** Standardisation of eligibility criteria for appointments is considered sensible provided there is recognition that specialist expertise/experience in employment and discrimination law is an essential criterion.
- o. **Conditions of employment:** It would seem sensible that conditions of appointment are standardised and harmonised.

- p. **Removal:** It would seem sensible that the removal of tribunal Office holders should be a matter for the Lord Chief Justice on the recommendation of an Independent Removals Tribunal.

- q. **Oversight:** ELG considers it sensible to establish an independent non statutory advisory body to keep any new Appeal Tribunal system under review. It considers that this advisory body might review in due course whether OITFET should be included in any integrated tribunal structure at some future stage.