Commission on Justice in Wales

Written statement about the Employment Tribunal in Wales

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The Employment Tribunal

The Employment Tribunal in England and Wales is a statutory tribunal with responsibility for the determination of causes of action over which Parliament has given us (mostly exclusive) jurisdiction. Those causes of action are, by and large, statutory complaints that arise from disputes at work, such as unfair dismissal, unlawful discrimination, equal pay, unpaid wages, unpaid holiday pay and the detrimental treatment of certain classes of worker such as those who qualify as “whistleblowers”.

In some areas our powers to award compensation are unlimited; the consequences of our judgments can lead to compensatory awards of six-figure or occasionally seven-figure sums. Depending on the case, our hearings may last several hours or several days; many hearings take between five and ten days. Some causes of action are determined by an Employment Judge sitting alone and others come before an Employment Judge sitting with two non-legal members, appointed due to their industrial experience of the respective interests of employees and employers. We have separate rules of procedure, in the form of the Employment Tribunals Rules of Procedure 2013, which can be found at Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. They include significant case management powers and, notably, an overriding objective (Rule 2) and a duty to promote alternative dispute resolution (Rule 3).

Unlike many other reserved tribunals, the Employment Tribunal (with certain exceptions) does not adjudicate upon appeals by citizens or companies against decisions of the state. The state’s involvement as a party before the Employment Tribunal arises principally in its private law capacity as an employer. The Employment Tribunal is best viewed as a party-party adjudicative body whose work more closely resembles the civil courts, rather than as part of the system of administrative justice. The exceptions come from our limited appellate jurisdictions, such as appeals against improvement and prohibition notices issued by health and safety officers, appeals against notices of underpayment of the national minimum wage and appeals against refusals by

the Secretary of State to award certain payments arising from the insolvency of employers; but these appeals comprise a very small portion of our caseload.

The ET's place within the structure of reserved tribunals

The Employment Tribunal and the Employment Appeal Tribunal operate as a "separate pillar" of the reserved tribunals system, outside of the First-tier Tribunal and the Upper Tribunal structure. The President of the Employment Tribunal in England and Wales is Judge Brian Doyle. The President of the Employment Appeal Tribunal is Mr Justice Choudhury. The senior leadership judge for all reserved tribunals, including the Employment Tribunal and the Employment Appeal Tribunal, is the Senior President of Tribunals.

The ET's administrative structure

The Employment Tribunal in England and Wales is divided into ten regions, each supported by HMCTS: NE England, NW England, East Midlands, West Midlands, SE England, SW England, London (Central), London (East), London (South) and Wales. In Wales, both the ET region and HMCTS are coterminous with the country of Wales.

Each ET region has a leadership judge in the person of the Regional Employment Judge. This is a statutory leadership role with certain additional powers of case management and assignment.

My own role

I am the Regional Employment Judge for Wales, responsible for the administration of justice in Wales Employment Tribunal. The Employment Tribunal's judicial team in Wales comprises five salaried Employment Judges (shortly to increase to eight), 11 fee paid Employment Judges and over 40 non-legal members.

I am also the lead training judge for the Employment Tribunal in England and Wales, responsible for the training of about 300 salaried and fee paid Employment Judges and about 750 non-legal members.

I am a member of the Wales Committee of the Judicial College, chaired by Mr Justice Picken.

In the context of the HMCTS reform programme, I have two positions. I am the judicial member of the Equalities and Inclusion Engagement Group and I have recently taken over from my colleague RTJ Anne Curran as the Regional Tribunal Liaison Judge for Wales. In the latter role, I act as the single point of contact for all reserved tribunals on HMCTS reform issues that affect Wales.

Hearing venues

The regional office of Wales Employment Tribunal is in Cardiff. Until the end of 2016, we were based at Caradog House, close to Park Place (and had been for about 40 years). At the start of 2017, we moved to the top floor of **Cardiff and Vale Magistrates' Court**, where we have priority use of three hearing rooms on the top floor. Our judges sit regularly at numerous venues outside Cardiff. We sit for two weeks every month at **Mold Law Courts**. We sit frequently at **Swansea Magistrates' Court** and **Pontypridd Family and County Court**.

Subject to demand and availability, hearings also take place regularly at these further venues:

- Wrexham Law Courts
- Abergele Town Hall (non-HMCTS)
- Caernarfon Justice Centre
- Llandudno Magistrates' Court
- Prestatyn Justice Centre
- Welshpool Law Courts
- Cardiff Civil Justice Centre
- Carmarthen County Court and Family Court
- Llanelli Law Courts
- Port Talbot Justice Centre
- Aberystwyth Justice Centre
- Carmarthen Civil and Family Court
- Haverfordwest Law Courts

It is quite common for us, on any one day, to be using eight courtrooms across five venues in Wales. There are 148 courtrooms across the entire HMCTS estate in Wales.

The place of Wales ET within a devolved Wales

The Employment Tribunal in England and Wales is a separate jurisdiction to the Employment Tribunal in Scotland. There are separate provisions concerning devolution of tribunals in Scotland. In Northern Ireland, while some causes of action are the same, it is again a different jurisdiction, with similar judicial powers exercised by the Industrial Tribunal and Fair Employment Tribunal. I can only comment on the Employment Tribunal in England and Wales.

The Employment Tribunal in Wales, and employment law more generally, occupies an interesting position within the Welsh devolved legal environment. Although employment law was not formerly a conferred power under the previous model, and is a reserved power under the new model, areas of clear divergence are emerging that impact upon our work in important ways.

The first mechanism by which devolution has affected employment law arises in respect of the employment rights of those working in areas that have been devolved to Wales. The best-known example comes from one of the Supreme Court cases that tested the legislative boundaries between Westminster and Cardiff. In 2013, the UK Government abolished the Agricultural Wages Board for England and Wales. This body had existed since 1917 to set a minimum wage for agricultural workers; the bottom level grade was set at the same level as the national minimum wage for adults but more senior workers at higher grades were entitled to higher wages. Before 2013, the Employment Tribunal could be asked to decide whether a person worked in the agricultural sector (and was therefore covered by the agricultural minimum wage) and, if so, whether he or she had received the agricultural minimum wage for their appropriate grade.

In July 2013, the National Assembly passed a Bill that retained the agricultural minimum wage in Wales. The Supreme Court heard a reference about whether this Bill was within the legislative competence of the Assembly (*Re Agricultural Sector (Wales) Bill* [2014] UKSC 43). The crucial question for the Supreme Court was whether the regulation of agricultural wages fell within the devolved subject areas dealing with "*agriculture, fisheries, forestry and rural development*" or within a silent area that was not devolved (namely employment law and industrial relations). The Supreme Court accepted that the Bill was capable of relating to both areas but, ultimately, held that it did "fairly and realistically" relate to agriculture. Consequently, the passing of regulations stipulating a minimum agricultural wage in Wales was within the Assembly's competence.

In 2017, the Employment Tribunal in Wales received its first case alleging an underpayment of wages contrary to the Agricultural Wages (Wales) Order 2016. The case has since settled, so the tribunal's first judgment on a uniquely Welsh piece of employment law is still awaited.

The question to which the Supreme Court judgment has given prominence is this: to what extent does the Assembly have competence to create a framework for workers' rights in Wales that is different to England, but for the benefit of those individuals working for employers operating in devolved areas. This applies to those working in public administration, education and training, health, aspects of social care, the fire service, public housing, transport, water and so on – what might loosely be termed the "devolved public sector".

A further example of this approach is the Trade Union (Wales) Act 2017, which came into force on 13 September 2017. By way of background, the Trade Union Act 2016 was passed by Westminster and curbed some trade union powers. The most newsworthy aspect of this legislation was the additional support in a ballot that was required for industrial action in important public services. In

short, the law requires a ballot of employees before industrial action is called for or endorsed. Until Westminster passed the 2016 Act, such industrial action would only be lawful where (a) a ballot produced a majority in favour of industrial action and (b) at least 50% of those eligible to vote did vote (regardless of whether they voted in favour or against industrial action). The 2016 Act introduced a third requirement in the case of important public services: (c) at least 40% of those eligible to vote must have voted in favour of industrial action. Subsequent regulations identified the following as "important public services" for this purpose: health, transport, education, fire and border security. There are sub-divisions in each area; for example, where health is concerned, ambulance services and emergency obstetric and midwifery services are covered, whereas doctors and nurses working in non-emergency areas are not.

The Trade Union (Wales) Act 2017, which came into force on 13 September 2017, excludes this third requirement from applying in Wales. It follows that it is easier in principle for a firefighter, a teacher, an A&E nurse etc to go on strike in Wales than it is for them to go on strike in England.

A more recent example is the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017, which came into force on 2 April 2018. By way of background, in 2011 the Welsh Government published the white paper "*Sustainable Social Services: A Framework for Action*". It proposed "*an ambitious plan to create a new integrated and person-centred approach to social services provision in Wales*". It resulted in two pieces of primary legislation: the Social Services and Well-being (Wales) Act 2014 and the Regulation and Inspection of Social Care (Wales) Act 2016. The second of these reformed the regulation and inspection regime for social care in Wales and provided a statutory framework for the regulation and inspection of social care services and the social care workforce. It enabled the Welsh Ministers to issue subordinate legislation on various related areas. One of the results is the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017.

The explanatory memorandum to the 2017 Regulations states that they ensure that providers of social care services achieve the required standard of care and support so that people's well-being and safety is maintained. In the present context, however, the most notable aspect of the 2017 Regulations is that they do this by enhancing the rights of those who work in domiciliary care (i.e. by giving care in an individual's own home). From an employment law perspective, the 2017 Regulations are noteworthy because they seek to delineate travel time and care time in a way that will likely help a domiciliary care worker in Wales establish their entitlement to the national minimum wage. In addition, they set out the minimum provisions required in a disciplinary procedure and specify the information to be given to staff whether they are employees, workers or volunteers. Regulation 42 provides that, in certain specified circumstances, a domiciliary care worker on a zero-hours contract must, after three months, be

offered a contract of employment. This right is unique to Wales. It means that zero-hours workers have more protection in Wales than in any other corner of the UK.

The second mechanism by which devolution has affected employment law arises in respect of the promotion of equality – which includes equal rights at work. Section 149 of the Equality Act 2010 provides that, in the exercise of its functions, a public authority must have due regard to the need to "*eliminate discrimination, harassment [etc] … prohibited by or under this Act*", "*advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it*" and "*foster good relations between persons who share a relevant protected characteristic and persons who do not share it*". The duty is additional to the duty on these bodies not to discriminate against people such as those they employ. These duties are not justiciable in the Employment Tribunal as such, but they are relevant background information and a failure to comply with them might feasibly be the basis for drawing an adverse inference of discrimination.

The Welsh Government has power to prescribe specific equality duties for public bodies in Wales; see the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011. The so-called "*Welsh Specific Equality Duties*" place responsibilities on the devolved public sector covering engagement, equality impact assessments, pay differences, procurement, equality and employment information, review and reporting arrangements. They require more than the equivalent duties on GB-wide and English public bodies.

In addition, in Wales there is a uniquely Welsh equality duty. Under Section 77 of the Government of Wales Act 2006, the Welsh Ministers must exercise their powers with due regard for equality of opportunity for all people – not just in respect of the various protected characteristics covered by the Equality Act 2010. Each year, the Welsh Government produces an annual report on equality, which encompasses its reporting duties under both Section 77 of the 2006 Act and Regulation 16 of the 2011 Regulations.

Finally, there are areas where devolution touches on the operation of employment law in more peripheral ways. The judges of the Employment Tribunal in Wales make efforts to keep up with developments about the separate Welsh regime for the Protection of Vulnerable Adults, the different organisational structure of the NHS in Wales as well as different rules on public sector exit payments and the relationship between schools and governing bodies. All these matters have featured recently in Employment Tribunal judgments.