EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT TRIBUNALS AND EMPLOYMENT APPEAL TRIBUNAL (COMPOSITION OF TRIBUNAL) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 These regulations exercise powers conferred on the Lord Chancellor by the Employment Tribunals Act 1996 ("the ETA 1996").

2.2 These regulations delegate to the Senior President of Tribunals the power to make provisions, in relation to every matter that may be decided by an employment tribunal and employment appeal tribunal, for determining the composition of the tribunal.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England, Wales and Scotland.

4.2 The territorial application of this instrument is England, Wales and Scotland.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State Lord Bellamy QC at the Ministry of Justice has made the following statement regarding Human Rights:

"In my view the provisions of The Employment Tribunals and Employment Appeal Tribunals (Composition of Tribunal) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 Section 4 of the ETA 1996 sets out how the composition of an employment tribunal should be determined and specifies the types of cases that can be heard by an Employment Judge sitting alone. Section 28 of the ETA 1996 sets out how the composition of the employment appeal tribunal should be determined and the types of cases that should be heard by a judge alone.

6.2 Section 4 and 28 of the ETA 1996 were amended by Section 35 of the Judicial Review and Courts Act 2022 ("the JR&C Act 2022") to introduce a new framework for determining the composition of an employment tribunal and employment appeal tribunal.

6.3 This new framework provides for the Lord Chancellor to determine the number of members who are to compose the tribunal and the matters that may be heard by a judge sitting alone.

6.4 The framework also provides for this determination to be delegated by regulation to the Senior President of Tribunals.

6.5 This new framework was commenced by The Judicial Review and Courts Act 2022 (Commencement No. 4) Regulations 2023. This instrument is to effect that delegation to the Senior President of Tribunals.

7. Policy background

What is being done and why?

7.1 Industrial tribunals were established in 1964, with the intention that cases before them would be heard by a panel of members. This would consist of one judicial member and two lay members, one representing employers and the other employees.

7.2 Following the ETA 1996, industrial tribunals became employment tribunals but retained the principle that cases should be heard by panels. However, it was recognised in the ETA 1996 that it was not necessary for all cases to be heard by a panel. Consequently, the ETA 1996 set outs that cases should be heard by a panel but also provides a list of types of case that can be heard by a judge sitting alone.

7.3 This list of case types can be amended through joint regulations made by the Lord Chancellor and the Secretary of State for the Department of Business and Trade. The list has been since been amended to reflect desired changes in the types of case that can be heard by a judge alone.

7.4 However, requiring joint regulations to change the specified case types is an inflexible approach that requires a substantial amount of time, work and resources.

7.5 In addition, the current approach means that decisions on panel composition are made by the Lord Chancellor and Secretary of State for the Department of Business and Trade. This is out of step with the wider Unified Tribunal System, where all decisions on panel composition are made by the Senior President of Tribunals.

7.6 Section 35 of the JR&C Act 2022 contained measures to address these concerns. The new approach set out by the JR&C 2022 will provide the Lord Chancellor with the power to determine panel composition. This power can be delegated to either the Senior President of Tribunals or the President of Employment Tribunals. At the time of the passage of the JR&C Act 2022, it was the policy intention for this power to be delegated to the Senior President of Tribunals to be exercised as a judicial function. Once delegated, the Senior President of Tribunals can issue Practice Directions specifying the types of cases that can be heard by a judge alone.

7.7 This will provide a more flexible route to make changes to panel composition to reflect changing needs. It will also align the employment tribunals with the wider Unified Tribunal System.

Explanations

What did any law do before the changes to be made by this instrument?

7.8 Following commencement of Section 35 of the JR&C Act, Sections 4 and 28 of the ETA 1996 provides that the power to determine the composition of employment tribunals and of the employment appeal tribunal rests with the Lord Chancellor.

Why is it being changed?

7.9 The policy intention at the time of the passage of the JR&C was to delegate this power to the Senior President of Tribunals so that this decision would rest with the senior judiciary rather than ministers.

What will it now do?

7.10 The Senior President of Tribunals will be able to exercise this delegated power by practice direction to determine the composition of employment tribunals and of the employment appeal tribunal.

7.11 This instrument imposes conditions on the Senior President of Tribunal when exercising these powers. He can determine whether the tribunal consists of one, two or three members in relation to any particular matter. He must have regard to the nature of the matter being decided and the means by which it is to be decided. He must also have regard to the need for tribunal members to have particular expertise, sills or knowledge.

7.12 It also sets out that the appeal tribunal should consist of one member unless the Senior President of Tribunals determines that it should be heard by two or three members.

7.13 It sets out that where a matter is to be determined by a single member, this must be a judge. Where there is more than more than one member, at least one must be a judge.

7.14 The Senior President of Tribunals may also determine the necessary qualifications for non-legal members.

7.15 This existing framework will be retained until the Senior President of Tribunals makes the necessary practice direction to ensure that there is no gap between the previous and new framework.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union

9. Consolidation

9.1 No consolidation is taking place.

10. Consultation outcome

10.1 In accordance with Section 4 (11) of the ETA 1996, the Ministry of Justice has consulted the Senior President of Tribunals in order to make this instrument.

10.2 In 2016, the Ministry of Justice and the then Department of Business, Energy and Industrial Strategy carried out a public consultation[1] on reforms to the employment tribunal system. This ran for seven weeks and the response was published in 2017.

[1] https://www.gov.uk/government/consultations/reforming-the-employment-tribunal-system

10.3 The consultation paper set out proposals for decisions on panel composition to be delegated by the Lord Chancellor to the Senior President of Tribunals. 72 responses were received to this question. The largest group of respondents was legal representatives, followed by judicial, individual and trade union respondents.

10.4 A number of respondents expressed support for the proposals, with some considering they could provide a greater opportunity to bring in more specialism. Many respondents described the important functions that non-legal members bring to the employment tribunal system, with some also considering the need for balanced panels.

10.5 Some respondents expressed concerns that there would be a reduction in the use of non-legal members, with others being of the view that all determinative hearings should be heard by a panel. The majority of respondents thought it was appropriate for panel composition to be determined on a case-by-case basis or according to case type. Many held the view that the current arrangements are already appropriate.

10.6 Respondents felt that the existing approach to Appeal Tribunal panel composition should be retained.

10.7 In anticipation of the delegation of powers, the Senior President of Tribunals has conducted a public consultation[2] to seek views on his proposals for employment tribunal panel composition.

10.8 This launched in February 2023 and ran for two months. The Senior President of Tribunals will consider the responses and publish his proposals following the formal delegation of powers. The Senior President of Tribunals must consult the Lord Chancellor before making the final Practice Direction.

11. Guidance

11.1 This Order does not attract the need for guidance but general information about tribunals can be found on the Ministry of Justice website[3].

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the impact is expected to be minimal and well below the threshold of £5 million per annum at which an assessment must be prepared.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 These regulations are being made to provide the Senior President of Tribunals with the power to determine employment tribunal and employment appeal tribunal panel

[2] https://www.judiciary.uk/guidance-and-resources/senior-president-of-tribunals-consultation-on-panel-composition-in-the-employment-tribunals-and-the-employment-appeal-tribunal-2/.
[3] https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about

composition. Monitoring and review of the approach taken to panel composition will then be a judicial function.

15. Contact

15.1 Robin Rimmer at the Ministry of Justice Telephone: 07866 146 449 or email: robin.rimmer@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Cathryn Hannah, Deputy Director for Legal Support, Tribunals and Fees, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Parliamentary Under Secretary of State Lord Bellamy QC at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.