

**Impact case study (REF3b)**

<p><b>Institution:</b> University of Greenwich</p>
<p><b>Unit of Assessment:</b> (UoA 19) - Business and Management Studies</p>
<p><b>Title of case study:</b> The Role of Lay Members/Non-legal Members as Judges in Employment Rights Cases</p>
<p><b>1. Summary of the impact</b></p> <p>Employment Tribunals and the Employment Appeal Tribunal can be constituted by a professional judge sitting alone or by a professional judge with lay members depending primarily on the type of complaint. In 2011 the government proposed to limit dramatically the type of complaint where lay members could sit. This research provided empirical, timely evidence on the positive contribution that lay members make to the adjudicatory process. It provided an evidential basis for a keen public policy debate, was used by stakeholders responding to the government’s proposal and was cited by the Minister and his shadow in the parliamentary debate.</p>
<p><b>2. Underpinning research</b></p> <p>This research, conducted in 2010-2011, investigated the role of lay members in British employment tribunals (ETs) and the Employment Appeal Tribunal (EAT) and whether and how they added value. It was led by <b>Susan Corby</b>, Professor of Employment Relations, University of Greenwich (UoG) and supported by Professor Paul Latreille, Swansea University and Pete Burgess, research fellow (UoG). A mixed methods approach was adopted: questionnaire surveys, interviews, desk research and a statistical analysis of administrative data and judgments. Four questionnaires were sent to ET judges (424), ET lay members (1,783), EAT judges (20) and EAT lay members (53). This was a census, not a sample, and response rates were high, ranging from 45 per cent (ET judges) to 80 per cent (EAT judges). Twenty interviews were held with both legally qualified and lay representatives and with senior people in user organisations. In addition, EAT administrative data on 4,800 appeals was analysed to ascertain if the court’s composition influenced outcome, while desk research was conducted on labour courts outside Britain for comparative purposes.</p> <p>The surveys broadly endorsed the role of lay members and considered that they added value.</p> <p>Specifically they found:</p> <ul style="list-style-type: none"> <li>• Lay members’ main contribution derived from their provision of workplace experience, which the professional judges did not have, and their injection of a practitioner perspective which balanced judges’ legal perspective.</li> <li>• High percentages of both ET lay members and judges (100% and 80% respectively) assessed unfair dismissal as a jurisdiction where lay members added value to decision making, despite a government proposal to enable judges to sit alone in unfair dismissal cases.</li> <li>• Few judges or lay members assessed lay members’ contribution in terms of the lowest score on a 1 to 4 scale; the mean score of ET judges was 2.36 and the mean score of EAT judges 2.64.</li> <li>• Respondents broadly agreed that a three person tribunal was likely to have greater legitimacy for the parties than a judge alone.</li> </ul> <p>Most interviewees said they valued the presence of lay members on ETs because they were able to reassure parties that two out of the three people deciding their case had workplace experience and it would not just be a lawyer who would be making decisions. As to the EAT, interviewees had mixed views. Some considered that lay members were otiose as the EAT only determines points of</p>

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law; others held a contra-view while some interviewees were equivocal.

Controlling for case characteristics, analysis of EAT data indicated that employee appellants have a significantly better chance of success when a decision is made by a judge sitting alone, rather than a judge with lay members.

Comparative research indicated differences between Great Britain (GB) and continental Europe. First, there has been self-nomination of lay judges in GB since 1999, replacing nomination by trade union and employer organisations as occurs in continental European labour courts. Second, in GB self-nominees are assessed by formal selection processes. Elsewhere the social partners informally check nominees' credentials. Third, governments elsewhere, unlike GB's, have not questioned the role of lay members.

### 3. References to the research (REF1 submitted staff in **bold**, \*\*REF2 Output)

- 3.1 Hepple, B. (2013). Back to the Future: Employment Law under the Coalition Government. *Industrial Law Journal*, 42(3), 203–223. <http://dx.doi.org/10.1093/indlaw/dwt009>
- 3.2 Urwin, P., Buscha, F., & Latreille, P. L. (2013). Representation in UK Employment Tribunals: Analysis of the 2003 and 2008 Survey of Employment Tribunal Applications (SETA). *British Journal of Industrial Relations*, 51(2). <http://dx.doi.org/10.1111/j.1467-8543.2012.00914.x>
- 3.3 Morris, G. (2012) The Development of Statutory Employment Rights in Britain and Enforcement Mechanisms. In L. Dickens. *Making Employment Rights Effective: Issues of Enforcement and Compliance* (pp. 7-28). Oxford: Hart Publishing.
- \*\*3.4 **Corby, S.**, & Latreille, P. (2012). Tripartite adjudication—an endangered species. *Industrial Relations Journal*, 43(2), 94–109. <http://dx.doi.org/10.1111/j.1468-2338.2012.00662.x>
- \*\*3.5 **Corby, S.**, & Latreille, P. L. (2012). Employment Tribunals and the Civil Courts: Isomorphism Exemplified. *Industrial Law Journal*, 41(4), 387–406. <http://dx.doi.org/10.1093/indlaw/dws034>
- 3.6 **Corby, S.** & Latreille, P. (2011) 'Balance' that adds value to decision-making. *Tribunals*, Winter, 16-18. Available at [http://www.judiciary.gov.uk/Resources/JCO/Documents/Tribunals/tribunals\\_winter\\_2011\\_final%20proof\\_201211.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Tribunals/tribunals_winter_2011_final%20proof_201211.pdf)

**The grant** was awarded to Susan Corby for research entitled *The role of lay/non-legal members in employment rights cases*, by the Economic and Social Research Council (ESRC), 1 October 2010 to 30 September 2011, RES 000-22-4154. The value (FEC) was £99,000. An impact report was drawn up for the ESRC. The research was graded '**very good**' by the ESRC in a letter issued 14.5.2013.

**Further scholarly work** is to be published soon:

Burgess, P., Corby, S., and Latreille, P. (2014) 'Lay judges and labour courts: a question of legitimacy' *Comparative Labor Law and Policy Journal*.

Corby, S. and Burgess, P. (2014) *Adjudicating Employment Rights a cross national approach*, Basingstoke: Palgrave Macmillan.

### 4. Details of the impact

Employment Tribunals (ETs), originally known as Industrial Tribunals, have been determining disputes between employers and workers for almost 50 years. Cases include unfair dismissal, discrimination, wages and working hours. The Employment Appeal Tribunal (EAT) hears appeals on decisions made by ETs on points of law only. ETs and the EAT were originally tripartite: a

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professional judge with two lay members, one representing employers and the other representing workers. Since 1994, successive governments have been incrementally limiting the types of cases on which lay members are legally required to sit. It was in this context that Susan Corby decided to research whether and how lay members add value. While the project was still at an early stage in 2011, the government announced its proposal for the biggest and most controversial limitation yet – the default exclusion of lay members from adjudicating unfair dismissal cases and from all cases at the EAT. These government proposals were without a basis in empirical evidence.

The research therefore not only generated a fresh understanding of these important labour market institutions in Great Britain, and widespread interest from policy makers, practitioners and the general public; it also provided empirical evidence which informed responses to the government's consultation on its proposals, the surrounding debate, and the government's own understanding.

The impacts are presented by audience:

**Policy makers****Department of Business, Innovation and Skills (BIS)**

The research is acknowledged in the government's document responding to its proposals, *Resolving Workplace Disputes*. Despite the research's findings, the government implemented its proposed reduction in the use of lay members in unfair dismissal cases in April 2012. Nevertheless, it said:

We will use the research to evaluate the findings of the first year of operation, once judges have begun to sit alone in more cases, to see whether a reversal or extension of the policy is necessary. (BIS, 2011:31).

**House of Commons General Committee**

13.3.2012 Debate: There were several references to the research, when Parliament was debating the statutory instrument removing employment tribunal lay members from unfair dismissal cases, by Norman Lamb M.P. (Minister for Employment Relations in 2012), and Ian Murray M.P. (shadow minister). Norman Lamb, who introduced the order, acknowledged the findings: he was aware that they supported the continuation of lay members on unfair dismissal cases, but justified the proposals on the grounds of reducing expenditure.

**Advisory, Conciliation and Arbitration Service (ACAS)**

ACAS in its response to the Government's consultation exercise asked it to stay its hand in order to consider fully the research's findings.

**Practitioners/practitioner organisations**

a) The Employment Lawyers' Association, which has nearly 6,000 members, publishes a regular newsletter. In November 2011, it published a 500-word piece summarising the questionnaires' findings.

b) Incomes Data Services (IDS) publishes a twice monthly journal, *Employment Law Brief*, taken by employers, trade unions, government departments, lawyers and the judiciary. Each issue has an introductory page commenting on a current issue. The December issue page 1, entitled '*The importance – or not – of lay members*', was devoted to describing the context and findings from the surveys which it said provided 'a unique insight'. Beforehand IDS's email alert had drawn attention to the research, reporting it briefly.

c) Michael Rubenstein, editor of *Industrial Relations Law Reports*, publishes a blog, which reported the results of the EAT administrative data analysis, including the finding that the increase in success rates is more pronounced for employee-instigated appeals than for employer-instigated

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appeals.

d) New Law Journal which is read by lawyers and has 48 issues per year reported the survey in its news section: “Lay employment tribunal members add value according to study”.

e) Bond Pearce (commercial law firm), which issues a newsletter electronically, reported the survey’s findings in November 2011. (Bond Pearce merged with Dickinson Dees, adapting the latter’s computer systems so this newsletter no longer exists.)

f) Turbervilles solicitors, which issues a newsletter electronically, reported the survey findings and said they were ‘very timely’.

g) Industrial Law Society London: 21 February 2012 - presentation by Corby and Latreille to judges and legal and lay practitioners of findings from the surveys and interviews.

h) Council of Tribunal Members Association: Birmingham 23 April 2012 – presentation by Corby and Latreille to lay members as above.

i) Seminar: University of Warwick 5 June 2013. Audience included legal and mediation practitioners and a government representative; presentation by Corby and Latreille on analysis of EAT administrative data.

### General public

BBC Radio 4 *World at One* 5.4.2012 included an interview with Susan Corby about the default exclusion of lay members from unfair dismissal complaints.

## 5. Sources to corroborate the impact (10 provided)

### a) Publications/reports (alphabetical order)

1. ACAS, March 2012 – see p.22  
[http://www.acas.org.uk/media/pdf/2/t/Resolving\\_workplace\\_disputes\\_-\\_a\\_consultation\\_response\\_-\\_accessible\\_version.pdf](http://www.acas.org.uk/media/pdf/2/t/Resolving_workplace_disputes_-_a_consultation_response_-_accessible_version.pdf)
2. Department of Business Innovation and Skills (2011) *Resolving Workplace Disputes: Government Response to the Consultation*, London: BIS/HM Courts & Tribunal Service.
3. Employment Law Association newsletter, 11 November 2011
4. House of Commons General Committee debate: Draft Employment Tribunals Act 1996 (Tribunal Composition) Order 2012, Column number 32:  
<http://www.publications.parliament.uk/pa/cm201012/cmgeneral/deleg9/120313/120313s01.htm>
5. IDS Employment Law Brief, 938, December 2011.
6. Michael Rubenstein blog:  
<http://blog.rubensteinpublishing.com/appellants-have-a-better-chance-of-success-at-eat-when-a-decision-is-made-by-a-judge-sitting-alone/>
7. New Law Journal Issue 7492 1/12/2011  
<http://www.newlawjournal.co.uk/nlj/content/lay-research>  
Turbervilles: (2011) HR and Employment Law Newsletter, 90, November p.3  
[http://www.turbervilles.co.uk/assets/Newsletters/Employment%202011/90\\_%20November%202011.pdf](http://www.turbervilles.co.uk/assets/Newsletters/Employment%202011/90_%20November%202011.pdf)

### b) People

8. Employment Relations Advisor, Chartered Institute of Personnel and Development (CIPD)
9. Senior Employment Rights Officer, Trades Union Congress (TUC) - (both letters available).