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The Roles, Resources And Competencies Of Worker Lay Judges

Pete Burgess, Sue Corby, Armin Höland, Hélène Michel, Laurent Willemez,
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THE ROLES, RESOURCES AND COMPETENCIES OF WORKER LAY JUDGES

A cross-national study of Germany, France and Great Britain

A research project funded by the Hans-Böckler-Stiftung, Düsseldorf, Germany

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Project summary

This research project analysed and compared the roles, resources and competencies of lay judges in Germany, France and Great Britain, where lay judges take up their role through nationally distinctive routes: nomination by trade unions and employer associations in Germany; election in France; and self-nomination in Great Britain. The primary research consisted of qualitative data collected through interviews. Contextual information on national institutional arrangements, industrial relations, and court procedures was obtained through desk research and expert interviews.

The research had three aims: to compare the resources available to lay judges in terms of time-off, financial compensation, administrative support, and training; to consider influences on lay judges' perception of their role, with a particular focus on the circumstances of employee lay judges; and to ascertain the contribution of lay judges to the judicial process.

One of the central questions explored was how the routes by which employee lay judges come to occupy their role influence their perception of it. In particular, we focused on how lay judges perceived the relationship between their partisan origins (as employees and the employers) and the need for judicial impartiality.

The key findings are as follows:

- The dominant influence on lay judge's reported perception of their role is the prevailing industrial relations system in each country, mediated by the labour court structure and with some impact of the route to nomination. Routes to nomination not only reflect national systems but might possibly reinforce them in some respects. One area where there was a link with the route to nomination and appointment was in the sense of organisational allegiance expressed by some employee lay judges. This appears strongest in France, where lay judges have been elected on trade union lists and, in the future, will be nominated by them.
- Lay judges' perception of their role is also influenced by the part that labour courts play within national systems of employment regulation. This a function both of national histories of employment regulation and the current role of labour courts.
- While acknowledging distinct employer and employee perspectives, there was an aspiration to be impartial and a commitment to fairness, above and beyond any partisan considerations. This was most unambiguously expressed in Germany and Great Britain. In France, the deliberative process was sometimes reported as resembling a negotiation between employee and employer lay judges, but one that had to culminate in a 'well-deliberated' judgment that was legally correct. Very few employee lay judge interviewees reported that they experienced *enduring* dissonance between their self-perception as being on the employee side in the court and their role as a lay judge, although this was noted by several at the outset.
- Our interview findings from lay *and* professional judges indicated that lay judges bring distinctive skills and knowledge. Some of this knowledge is explicit and often specific. But lay skills and knowledge are often tacit and acquired through long exposure to workplace events. Such knowledge was valued by many professional judge interviewees as adding an extra dimension to the decision-making process. Crucially tacit knowledge is a form of understanding that needs to be elicited in the discursive process of deliberations, rather than evidence provided by an expert witness. As well as bringing knowledge to the court, lay judges also reported that they were able to enhance their representational and personal-professional skills

by transferring knowledge and experience acquired in court to the workplace, as employee or as a manager, or to their trade union.

- Gender played some role in the motivation to become a lay judge in Great Britain and in how lay judges assessed their contribution in Germany. Female interviewees in Britain reported about how workplace problems they had personally experienced had contributed to their motivation to become a lay judge. In Germany, men and women appeared to have different ideas about the nature of their contribution. Whereas men tended to emphasise the specialist knowledge they could bring to bear in deliberations, women highlighted a 'social perspective'.
- Our findings suggest that lay judges make an important, but not always visible, contribution to labour court hearings in Great Britain and Germany (in France, the hearing is managed and heard by lay judges alone). Their involvement in deliberations in all three countries is an active one, and, as validated by professional judges, contributes to the effective performance and hence legitimacy of labour courts in Great Britain and Germany. In France, lay judges aspired to resolve cases without resort to professional judge and succeeded in this in four-fifths of cases heard.

Zusammenfassung

Das Forschungsprojekt analysierte und verglich die Rollen, die Mittel und die Fähigkeiten von ehrenamtlichen Richtern in Deutschland, Frankreich und Großbritannien, drei Länder, in denen die ehrenamtlichen Richter auf unterschiedlichen Wegen in ihre Funktionen gelangen: durch Vorschläge von Gewerkschaften und Arbeitgebervereinigungen und anschließende Berufung durch den Staat in Deutschland, durch Wahl in Frankreich, und durch Selbstvorschlag in Großbritannien. Vorrangiges Ziel des Forschungsprojektes war die Sammlung qualitativer Daten mit Hilfe von Interviews. Hinzu kamen Kontextinformationen über die nationalen Rechts- und Gerichtsordnungen, die Arbeitsbeziehungen und die arbeitsgerichtlichen Verfahren, die durch Literatur- und Forschungsrecherchen sowie Expertengespräche gewonnen wurden.

Das Forschungsprojekt hatte drei Ziele: den Vergleich der Mittel, die den ehrenamtlichen Richtern in Gestalt von Arbeitsbefreiung, finanzieller Entschädigung, Unterstützung durch die Verwaltung und Schulung zur Verfügung stehen; die Untersuchung von Einflüssen auf die Wahrnehmungen der ehrenamtlichen Richter hinsichtlich ihrer Rolle, hier vornehmlich derjenige der ehrenamtlichen Richter der Arbeitnehmerseite; die genauere Bestimmung des Beitrages, den ehrenamtliche Richter zum Gerichtsverfahren leisten können.

Eine der zentralen Forschungsaufgaben bestand in der Untersuchung, wie die unterschiedlichen Pfade, auf denen ehrenamtliche Richter der Arbeitnehmerseite in ihre Rolle gelangen, die Wahrnehmung ihrer Rolle beeinflussen. Dabei richteten wir das Augenmerk insbesondere darauf, wie ehrenamtliche Richter das Verhältnis zwischen Interessenbindung (als Arbeitnehmer und Arbeitgeber) und der Notwendigkeit richterlicher Unparteilichkeit wahrnahmen.

Folgende Hauptergebnisse lassen sich festhalten:

- Den wichtigsten Einfluss auf die Wahrnehmung ihrer Rolle als ehrenamtliche Richter bildet das vorherrschende System der industriellen Beziehungen in jedem Land, vermittelt durch die institutionelle Ordnung der Arbeitsgerichte und die Art und Weise ihrer Berufung. Die Zugangswege zum Amt spiegeln nationale Arbeitsweltkulturen nicht nur, sondern verstärken sie möglicherweise auch. Anhaltspunkte für die Verbindung mit Auswahl- und Berufungspfaden bildet das Gefühl für organisatorischen Zugehörigkeit, das von einigen Arbeitnehmer-Richtern zum Ausdruck gebracht wurde. Am stärksten war dieser Eindruck in Frankreich, wo die Arbeitnehmer-Richter bislang von den Gewerkschaften ausgewählt wurden und in Zukunft vorgeschlagen werden.
- Die Wahrnehmung der ehrenamtliche Richter von ihrer Funktion wird auch davon beeinflusst, welche Rolle Arbeitsgerichte innerhalb der nationalen Beschäftigungsregulierung spielen. Zum Tragen kommen hier sowohl die Geschichte der rechtlichen Regulierung abhängiger Arbeit in den beteiligten Ländern als auch die gegenwärtige Rolle der Arbeitsgerichte.
- Auch wenn sich die ehrenamtlichen Richterinnen und Richter aus Kreisen der Arbeitnehmer und der Arbeitgeber ihre unterschiedlichen Sichtweisen bewusst sind, herrschte allgemein das Bemühen um Unparteilichkeit und Fairness jenseits aller parteilichen Erwägungen vor. Am deutlichsten kam das in Deutschland und in Großbritannien zum Ausdruck. Berichte aus Frankreich deuten darauf hin, dass der Entscheidungsprozess gelegentlich den Charakter von Verhandlungen zwischen Arbeitnehmer- und Arbeitgeber-Richtern annimmt. Dennoch

sollten diese Prozesse mit einem wohl begründeten und juristisch korrekten Urteil enden. Nur wenige interviewte Richterinnen und Richter der Arbeitnehmerseite berichteten von Erfahrungen anhaltender Dissonanz zwischen ihrer Selbstwahrnehmung als Mitglied der Arbeitnehmerseite im Gericht und ihrer Rolle als ehrenamtlicher Richter, auch wenn das zu Beginn ihrer Tätigkeit gelegentlich vorhanden gewesen sein mag.

- Unsere Interviews sowohl mit ehrenamtlichen Richtern als auch mit Berufsrichtern weisen darauf hin, dass ehrenamtliche Richterinnen und Richter bestimmte Fähigkeiten und Kenntnisse in die Verfahren einbringen. Einige dieser Kenntnisse sind offen ausdrückbar und oft fachlich spezifisch. Viele Fähigkeiten und Kenntnisse der Laienrichter sind aber auch still und implizit und beruhen auf langjähriger Erfahrung mit Arbeits- und Betriebsverhältnissen. Dieses Arbeits- und Betriebswissen wurde von den interviewten Berufsrichtern durchweg als Gewinn für den gerichtlichen Entscheidungsprozess gewürdigt. Das stille und implizite Wissen bildet eine Form von Verständnis, das im diskursiven Prozess der richterlichen Entscheidungsbildung ans Licht gebracht werden muss und sich damit vom Wissen eines Sachverständigen unterscheidet. Ebenso wie sie ihr Wissen von Arbeits- und Betriebsverhältnissen in das gerichtliche Verfahren einbringen konnten, berichteten ehrenamtliche Richter, dass sie ihre Fähigkeiten zur Interessenvertretung und ihre persönlichen und beruflichen Fähigkeiten dadurch ausbauen konnten, dass sie am Gericht erworbenes Wissen und die Erfahrung aus den Verfahren an ihren Betrieb – sei es als Arbeitnehmervertreter oder als Manager - oder in ihre Gewerkschaft zurück vermitteln konnten.
- Das Geschlecht spielte eine gewisse Rolle in der Motivation, ehrenamtliche Richterin oder Richter zu werden und in der Art und Weise, wie ehrenamtliche Richterinnen und Richter ihren Beitrag zum Verfahren sahen. In Großbritannien interviewte Richterinnen berichteten darüber, wie persönlich erfahrene Arbeitsplatzprobleme zu ihrer Motivation beitrugen, ehrenamtliche Richterin zu werden. In Deutschland schienen Männer und Frauen gelegentlich unterschiedliche Vorstellungen von der Art ihrer Beiträge zu haben. Während Männer dazu neigten, das Fachwissen zu betonen, das sie in die Beratung einbringen können, hoben Frauen ihre Fähigkeit zur Einnahme einer sozialen Perspektive hervor.
- Unsere Forschungsergebnisse legen nahe, dass ehrenamtliche Richterinnen und Richter einen wichtigen, wenn auch nicht stets sichtbaren Beitrag zu den Verfahren vor Arbeitsgerichten in Großbritannien und Deutschland leisten (in Frankreich werden die Verfahren ausschließlich von Laienrichtern durchgeführt). Sie beteiligen sich in allen drei Ländern aktiv an den Beratungen und Entscheidungen und tragen auch nach der Aussage der Berufsrichter zur Leistungsfähigkeit und Legitimität der Arbeitsgerichte in Großbritannien und Deutschland bei. In Frankreich bemühten sich die Laienrichter, nach Möglichkeit die Streitfälle selbst zu entscheiden, ohne einen Berufsrichter zur Auflösung einer Patt-Situation in der Abstimmung herbeiholen zu müssen, was ihnen in vier von fünf Fällen auch gelang.

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List of abbreviations

Acas	Advisory, Conciliation and Arbitration Service
ADR	Alternative Dispute Resolution
BDA	Bundesvereinigung der deutschen Arbeitgeberverbände. German Confederation of Employer Associations
BDI	Bundesverband der deutschen Industrie. Federation of German Industries
CAC	Central Arbitration Committee
CBI	Confederation of British Industry
CFDT	Confederation française démocratique du travail. French Democratic Confederation of Labour.
CFTC	Confederation française des travailleurs. French Confederation of Christian Workers.
CGC	Confederation générale des cadres. General Confederation of Managers.
CGT	Confederation générale du travail. General Confederation of Labour.
CME	Coordinated market economy
CPME	Confédération des petites et moyennes entreprises (French SME employer association)
COTMA	Council of Tribunal Members
DBB	Deutscher Beamtenbund. German Civil Servants Federation
DGB	Deutscher Gewerkschaftsbund. Confederation of German Trade Unions
DJV	Deutsche Journalisten-Verband. German Journalists Federation.
EAT	Employment Appeals Tribunal
EHRC	Equality and Human Rights Commission
ENM	Ecole Nationale de la Magistrature (French National College for the Judiciary)
ET	Employment Tribunal (=labour court in Great Britain)
EWC	European Works Council
FO	Force Ouvrière
HMCTS	Her Majesty's Courts & Tribunals Service
IAB	Institut für Arbeitsmarkt- und Berufsforschung (research institute of the German Federal Labour Agency, Bundesagentur für Arbeit)
IdW	Institut der deutschen Wirtschaft
LCA	English abbreviation of Federal German 'Labour Courts Act' (Arbeitsgerichtsgesetz)
LME	Liberal market economy
Medef	Mouvement des entreprises de France
TUC	Trades Union Congress
U2P/UPA	Union professionnelle des artisans

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PART I

INTRODUCTION, LITERATURE REVIEW, METHODOLOGY

1. INTRODUCTION

This report presents empirical findings and theoretical reflections from the research project ‘the roles, resources and competencies of employee lay judges in Germany, France and Great Britain’. The project was motivated by a desire to fill a research gap in respect of this important group of actors who have not previously been the focus of comparative primary research in Europe.

Lay judges’ presence in labour courts constitutes a significant area of civil society activity. Moreover, trade unions are and have been closely involved in the nomination and support of employee lay judges, drawing them into this social and judicial process.

France, Germany and Great Britain were chosen for comparison because individual employment rights disputes in these three countries are adjudicated in labour courts in which evidence is assessed and judgments made by mixed panels composed of professional and lay judges, and in which lay judges at first-instance in the respective jurisdictions are drawn from the wider labour force and are not required to demonstrate specialist or legal skills (See Table 4.1).

Lay judges in all three countries are faced with similar challenges and dilemmas:

- how to reconcile their knowledge and understandings of the world of work, based principally on experience, with legal norms and values;
- how to reconcile their partisan origins with the requirement to remain non-partisan in the formally neutral judicial process.

Lay judges arrive at their positions by differing routes. They are nominated by trade unions (and for employer lay judges by employer associations) in Germany, have been elected by employees in France, and in Great Britain nominate themselves and are appointed after a panel interview that includes a professional judge. Given the similarities in role, but also contextual differences in the route to becoming a lay judge, meaningful comparisons can be made that might facilitate cross-national learning. Moreover, the position of lay judges in all three countries has been subject to reform proposals and, in some cases, radical change, explained in our national context chapters (Chapters 5-7) and often evident in interviewee responses.

The project has a number of objectives, detailed in the project application and also summarised in Chapter 3 on methodology. The four main objectives outlined here are as follows:

- to ascertain and compare the resources available to lay judges in the three countries in terms of time-off, financial compensation, administrative assistance, and training, enabling ‘good practice’ standards to be identified.
- to analyse what factors influence, in particular, employee lay judges’ perception of their role and to establish whether these perceptions vary as between countries. The empirical research focused on the key research question for the study: how does the route by which a lay judge come to occupy their role influence their perception, and is there any significant variation between these perceptions that might be attributed to individual characteristics.
- to consider whether diversity issues play a role in the procedures through which worker lay judges are nominated/appointed or other aspects of lay judges’ experience. The prime focus in this area will be on gender, for which there are statutory provisions in all three countries.

- to detail lay judges' skills, competencies and activities, in particular those of employee lay judges, in labour courts. This is intended not only to fill a research gap into this area of judicial activity, but also to ascertain the practical contributions that are valued by other stakeholders.

This research was primarily concerned to provide a rich qualitative insight into lay judge activity rather than analyse the basis of the legitimacy of lay judges within wider debates about the composition and role of the judiciary and the representation of trade unions and employer organisations within labour courts. However, the issue of legitimacy is a central one and this research does touch on it in various respects.

The concepts of performance legitimacy, regime legitimacy and polity legitimacy have been adapted to explore the rationales for lay judgment participation in labour courts.¹ 'Performance legitimacy' relates to the capacity of an institution to deliver the goals it is entrusted with, and focuses primarily on effectiveness and efficiency; 'regime legitimacy' refers to the constitution of an institution and the representative capacity and accountability of its participants; 'polity legitimacy' was considered in the judicial context to refer to the extent to which labour courts that include lay judges echo the wider social and constitutional arrangements of a country. While representational issues belong principally in the fields of regime and polity legitimacy, these two sources of legitimacy cannot be divorced from performance considerations. This study also throws some light on the issue of accountability in terms of the relationships between lay judges and their nominating organisations, whether selection processes operate appropriately, and how lay judges from the employee and employer side engage with each other in labour court proceedings. Lay judges themselves, when defending the institution of the labour court, also address the issue of regime legitimacy.

None the less, most of the empirical work in this study is relevant to the issue of performance legitimacy. Performance legitimacy can also raise regime legitimacy by confirming the value of existing arrangements and practices in the eyes of participants.

This study will therefore consider the following aspects related to performance legitimacy.

Firstly, by researching lay judges' activity not only in hearings but also in deliberations, we can establish the full range of their contributions to judicial decision-making, much of the richness of which is not accessible to the observation of court proceedings. Interviews not only with lay judges themselves but also with professional judges enable the research to offer a wider perspective.

Secondly, and related to this, we explore whether the knowledge and the skills that lay judges bring to the judicial process are both indispensable and unavailable except through lay judges' involvement as *decision-makers*. If this is case, this will constitute a fundamental source of legitimacy for lay judges based on their contribution to the performance of labour courts, and hence also the justice they provide.

Thirdly, lay judges not only add knowledge and understanding to labour court deliberations, but also allow cases to be viewed from multiple perspectives. Research suggests that multiple perspectives can facilitate better decisions (see Chapter 2). This adds both to performance but also regime legitimacy, where the presence of lay judges is seen by the parties as adding to the procedural legitimacy ('fair process') of the court.

¹ This has been explored by two of the present authors elsewhere: see Burgess, Corby and Latreille (2014).

And *finally*, the participation of lay judges from the world of work in labour courts can create further positive outcomes through transferring legal knowledge and judicial skills back to workplaces and other contexts, improving the quality of workplace representation and possibly helping to bolster ‘civil society’ in a wider sense.

The plan of the report is as follows:

Part I continues with a review of relevant theoretical literature and the state of research in this specific area of lay judge activity in labour courts. The research will draw on a range of theoretical perspectives and will be interdisciplinary, including the sociology of law, the sociology of interaction, socialisation theory, concepts of ‘career’, and comparative institutional and cultural analysis. Chapter 3 outlines the methodology that guided that study and also includes details of the samples in each of three countries.

Part II deals with the national context for lay judge activity in each of the three countries. Context is significant, not only for comparative purposes, but also because it details the routes through which lay judges take up their roles and establishes the framework, at macro-, meso-, and micro-levels, for the interactions between judicial actors (lay judges, professional judges, other parties). This part concludes with a comparative analysis of the institutional situation of lay judges in each of the countries and the resources available to them in terms of training, payment, and other support.

Part III analyses and compares the empirical findings gathered during the fieldwork, during which interviews were conducted with some 192 respondents across the three countries. This section consists of five chapters, each dealing with a discrete area of lay judge activity: motivations, nomination, selection and initial experiences; training, knowledge and skills; lay judge activity in hearings and deliberations; relationships between lay judges and between them and professional judges; and outcomes of and reflections on lay judge activity, as captured by our interviews.

Part IV offers a range of research and practical conclusions from the study, including consideration of how these findings fit with, complement or challenge some theoretical positions relevant to this area.

A note on terminology

We have adopted certain standard terms for court actors throughout this study, but it should be noted that in the languages of origin of these social roles, the words used often have wider meanings. For example, ‘lay’ in English is associated with ‘laity’ as distinct from the priesthood. In Germany, the term for ‘lay’ as an adjective is ‘ehrenamtlich’, derived from *Ehre* (honour), indicating a post held honorifically. In France, labour courts are ‘conseils de prud’hommes’, a term rich in connotations of being judicious, prudent, trustworthy and having pragmatic wisdom.

In this study, we use the term ‘employee lay judge’, ‘employer lay judge’ and ‘professional judge’ to refer to the three judicial actors. These serve in ‘labour courts’, the generic term to cover courts and tribunals that deal with individual employment rights cases. In France, where the first merits hearing in the labour court is heard by lay judges only, we use the term ‘*conseillers*’ to identify these, as there is no need in this forum to differentiate lay and professional.

In the quotes from interviewees, countries are denoted by GB (Great Britain), F (France) and G (Germany). In France and Germany, locations have been indicated.

EE refers to any employee lay judge; ER to an employer lay judge; and PJ to a professional judge.

2. LITERATURE REVIEW

This chapter considers some of the streams of theoretical literature that have either raised research questions of relevance to this study or might throw light on the evidence collected. As an inductive and exploratory study, this research does not aim to test the theories discussed, although the evidence examined in the comparative and analytical chapters does highlight the strengths and weaknesses of some of the approaches considered. Rather, the theoretical literature offers starting points for conceptualising lay judges' behaviour and perceptions, and the contexts they operate in. By applying, adapting or challenging some of these conceptual schemes, it enables the evidence to be located in a broader frame.

The review draws on complementary streams of research, either in terms of theoretical relevance (sociology of interaction, identity theory, theories of knowledge) or contextual significance (industrial relations). In this respect, the research might be characterised as comparative micro-sociology (interaction) set in a context of comparative macro-sociology (national models).

While there has been considerable research into court hearings and lay juries (cf. Kaplan and Martin, 2006), there has been little research into the unique process in (European) labour courts in which members who are not required to be legally-qualified either participate on a formally equal basis in decision-making with professional judges (Germany and Great Britain) or decide on cases without the presence of a professional judge (France).

The review is structured into three main sections:

- Context, origins, identity and affiliation of employee judges. This includes national industrial relations, the relationship between employee lay judges and trade unions, motivations for becoming lay judges, and approaches to employee lay judges' perceptions of the experience and consequences of their role in labour courts, such as their sense of affiliation and identity.
- Hearings and deliberations. This section looks at the operation and experience of hearings and deliberations, with particular reference to interpersonal interactions in mixed tribunals.
- Capacity and contribution of employee lay judges. This section focuses on issues of tacit knowledge and expertise as means for exploring the contribution to decision-making.

The overall logic of this arrangement is to move from the macro-world of national contexts in Section 2.1 to the micro-sociology of interactions in Section 2.2, with Section 2.3 synthesising how the world of workplace experience is translated into lay expertise.

2.1 Context, origins, identity and affiliation

National comparisons

Employee lay judges inhabit and are socialised into distinctive systems of industrial relations. The industrial relations system is the one of the key contexts that shape the values and perspectives of lay and professional judges.

The main aim of the national comparisons in this study is to outline the context for interviewees' attitudes and perceptions and help elucidate differences and similarities, in particular between the three countries in the study, France, Germany and Great Britain (that is, England, Scotland and Wales). In turn, these perceptions might offer insight into the 'inner world' of national models that are frequently constructed at a high level of abstraction. In this respect, interview data might also throw light on the issue of legal cultures.

This project does not attempt to trace relationships of determination between macro-structures, meso-arrangements (industrial relations, judicial system), and micro-behaviour. It does aim, however, to make some systematic comparisons of the contexts in which labour rights adjudication takes place, given the institutional differences between the three countries in the study.

National differences and typologies

Different national institutional arrangements can be expected to reflect and shape distinct paths of socialisation into roles within the industrial relations system more generally and specifically into the role of employee lay judge. For example, do they favour consensus or conflict between actors from the employee and employer side within the labour court? Is it possible at all to trace linkages between the macro-context and the micro-context of the labour court? The three countries included in the study are characterised by institutional differences in the field of employment relations and in the adjudication of employment rights. In turn, these reflect and are shaped by broader *national* social models, but also number among the criteria for defining these models (see Table 2.1).

Table 2.1: Industrial relations and legal models in France, Germany and Great Britain

	FRANCE	GERMANY	GREAT BRITAIN
Overall economic model (Hall and Soskice, 2001; Ebbinghaus and Visser, 1997)	'Mediterranean' Statist market economy 'Hybrid'	Coordinated market economy 'Social market economy'	Liberal market economy 'Free market economy'
Legal system	Civil law	Civil law	Common law
Trade union structure	Pluralist – political (with competition)	Unitary (non-political), industrial with some (competing) sectional unions	Pluralist: some political/some non-aligned; regulated competition
Union density*	8%	18%	25%
Employee workplace representation	Trade unions and works committees	Work councils	Trade unions
Main collective bargaining (level) and trend	National and industry (Statutory obligation to negotiate at company level)	Industry. Company-level options for implementation and deviation from industry.	Single employer
Extension mechanisms	Yes	Yes	No
Bargaining coverage*	98%	58%	30%
Collective bargaining 'style'	Adversarial	Integrative	Formally adversarial – in practice often integrative or concessional
Industrial conflict incidence (2000-2009)**	120	10	30
Employment protection for indefinite contracts (OECD)	High	High	Low
Industrial relations type (Ebbinghaus and Visser, 1997)	'Latin polarised'	'Social partnership'	'Anglo-Saxon pluralist'

Notes:

* Visser (2016). Collective bargaining coverage by per cent of employees. Some figures for earlier years.

** Average number of days lost annually per 1,000 employees. ETUI (<https://www.etui.org/Topics/Trade-union-renewal-and-mobilisation/Strikes-in-Europe-version-2.1-January-2015#sources>). Data for France = 1990-2008

The UK and Germany are seen as being assignable to relatively clearly delineated models, with the potential scope for constructing a 'read through' from broader structures to local actors' perceptions, subject to qualifications about representativeness and the internal differentiation of national models. There is less agreement in the literature about how France might be categorised.² As the contextual chapter and the evidence shows, how labour courts operate in France is unique. Is there a discernible link between French industrial relations arrangements, and in particular its union structures, and how actors' perceive the role in labour courts?

Connolly (2008: 35) notes the small number of empirical studies that have looked inside the 'black box' of (French) trade unions. Rather, macro-empirical studies have emphasized:

- 1) inter-union competition and high ideological influence;
- 2) activism and mobilization, sometimes only over the short term ('movement' v. 'organisation');
- 3) low trust industrial relations (and strong union member loyalty to their union);
- 4) emphasis on the *trade union* as the sole legitimate representative of employees.

The reality of French labour courts, however, suggests a more nuanced response by actors. In earlier research, Michel and Willemez (2008) found a complex set of relationships in French labour courts, where relationships between employers and employees were found to be not as conflictual as might be imputed and actors' strategies had to balance several competing exigencies, *illustrating the situational nature of interactions that this study aims to explore*. The French example highlights a need for caution about whether there are any 'ideal type' national behaviours or perceptions from which 'real' actors are deemed to diverge or with which they conform.

Legal cultures

The term 'legal culture' has been contested since its development by Friedman in the 1960s with controversies around whether 'legal culture' serves to explain other phenomena (such as litigation rates), whether 'culture' is what needs to be explained, or whether it is a condensate of actions in the legal field within a national setting. Difficulties with answering these questions have led to proposals to abandon or restrict the term, to be replaced by no less problematic constructs as 'legal consciousness' (Merry, 1990) or 'legal ideology' (Cotterell, 2006: 88ff). Despite these problems, 'legal culture' might offer some conceptual help in addressing the process of the making of law. This review adopts, as a working definition, the proposal made by Nelken (cited in Nelken, 2007: 113).

Legal culture, in its most general sense, should be seen as one way of describing relatively stable patterns of legally-oriented social behaviour and attitudes.

This definition is *not* read as implying that each society has only one legal culture. There might be a *plurality* of legal cultures within a given national setting, with complex interrelationships that depend on some shared understandings but also embrace contested values and meanings. Indeed, the unit of the 'nation' is likely to attract contrasting interpretations of what that nation's 'official' legal culture represents (such as whether certain purported values are realised). In this respect, it might be more appropriate to refer to 'adaptation' to a dominant legal culture rather than 'socialisation', a question to be explored through the empirical work in this study, in particular when (employee) lay judges join and act within labour courts as state institutions.

² Such categorisation has usually been used to examine the 'fit' between institutions and practices within models, in part to establish whether model have feedback mechanisms that sustain a distinctive path.

Although this study is not ethnographic in the sense of participant-observation, it does aspire to 'thick description' of 'webs of significance' (Geertz, 1973: 3-30) through the choice of open-ended questions and face-to-face interviews. 'Legal culture' here might serve as a construct embracing a set of expressed views on a range of issues related to the operation of the law and interviewees' role in legal processes, elicited implicitly and without imposing a prior set of categories. These questions touch on socialisation into legal practices (crossing the border from external to internal), views on the nature of legal reasoning, and the mutual perceptions of legal professionals and lay people.

Interests in the legal field

In addition to the parties, the judicial system is also the focus of other individual interests, some complementary, others contending. How these are generated and perceived might also depend on national contextual and cultural factors. The position of lay judges does not appear to have received consideration in the literature, which typically draws a distinction between 'internal' legal cultures, that is the views of legal practitioners, and 'external legal cultures', made up of the public and their demands on the legal field (Nelken, 2007: 112). By definition, lay judges straddle any such boundary.

This issue highlights the relationship between lay and professional legal perspectives, discussed by Bourdieu (1987), who defines the 'juridical field' as a 'social universe.... which is in practice relatively independent of external determinations and pressures' (ibid. 816). Nonetheless, this field exists 'within a broader field of power' (ibid. 823). For Bourdieu, the juridical field is characterised by 'a social division between lay people and professionals' fostered by 'competition for control of access to legal resources' expressed in a 'continuing process of rationalisation' (ibid. 817). This promotes a growing gulf between 'judgments based upon the law and naïve intuitions of fairness' (op. cit.) and, on occasions 'the disqualification of the non-specialists' sense of fairness' (ibid. 828). Entering the juridical field implies a 'redefinition' of ordinary experience and of the issues at stake in the case at hand. The court's creation of 'juridical facts' corresponds with the power of professional judges to determine the law under which a case will be heard (Blankenburg and Schönholz, 1979).

Bourdieu sees legal professionals as a hierarchical body with established procedures for resolving conflicts of law and linguistic repertoires that stress neutrality and impersonality. Dominance is reserved 'for those with legal qualifications' (Bourdieu, 1987: 834). Moreover, increasing juridification creates 'new juridical needs'. Bourdieu here addresses the issue of employment law and the shift in the boundary between lay people and legal professionals, in particular in France as a result of courts displacing negotiating bodies (and their associated arbitration bodies) as the locus of resolution. As well as 'profiting' from juridification, 'professionals have been driven by the logic of competition within the field to increase the technical complexity of their practice in order to keep control of the monopoly of legitimate interpretation' (ibid. 836 fn 52). Initially, union officials sought to match this complexity. However, the more legally adept they became, the more pronounced the move towards judicialisation, partly driven by complainants and respondents who have increasingly resorted to lawyers to make and respond to complaints.

Bourdieu outlines a contested boundary between the juridical and the lay worlds, whose border tensions lay people will directly experience. While lay judges have the legitimacy (in France) of being elected and confidence in their workplace knowledge, professional judges have formal legal knowledge and arguably see their professional identity, and Bourdieu's 'juridical space', as disrupted by the role of lay members, where the line of demarcation between the 'vulgar vision' (ibid.) of individuals about to come under the jurisdiction of the court and 'juridical actors' is blurred.

European labour identities

Given the focus of this study on *employee* lay judges, and in particular their relationship with trade unions, concern with identity connects with current literature on European ‘labour identity’ – or, more appropriately, *identities* – and differing notions of trade unionism in Europe.

Several recent studies have addressed the subjective aspect of international employee cooperation within European Works Councils (EWC).³ Research in this area has focused on issues such as activist identities to explain why outcomes might diverge from those predicted by ‘objective’ structural factors. In this literature, national ‘labour identities’ figure mainly as *obstacles* to resolving collective action problems, but with little express analysis of how such identities are formed. What features of national models might influence employee lay judges’ perceptions of labour court cases before them and the stance they take in judicial decision-making? Two are highlighted here.

Firstly, attitudes to job security, how the courts should treat dismissals, and how employee lay judges perceive this issue. The regulation of job security differs as between countries (see Emmenegger, 2014). Do these different forms of regulation shape perceptions of job security, and do these influence positions taken in deliberations in labour courts (for example, affecting the scope for unanimity)? Such attitudes have a normative dimension, are subjectively experienced as moral issues (and of solidarity), and also constitute an element in the conceptions of ‘moral economy’ (Thompson, 1991: 188) subscribed to by social actors.

Emmenegger (2014: 48ff.) contends that fragmented union movements, as in France, that are typically politicised and that emerged in a hostile political environment, have been less able to achieve employment regulation through collective bargaining and are therefore more inclined to ‘focus on the statutory regulation of job security’ (ibid. 51). In the case of France too, trade union presence in labour courts has been seen as a significant labour movement achievement (Corby and Burgess, 2014: 48). This is unlikely to be without effects on the perception of this institution, especially by employee lay judges, and might condition their attitude to reform proposals.

Secondly, do industrial relations models rooted in workplace institutional arrangements that require or promote consensus, such as German codetermination, influence how lay judges anchored in this system engage with and perceive lay judges from the ‘other’ side in labour courts in such systems.

Relations with nominating bodies

Much of the present study will aim to ascertain the views of employee lay judges towards the (purported) neutral judicial space of the labour court. One of the other aims of this study is explore the relationship between trade unions and employee lay judges, and in particular to ask:

- How do trade unions nominate potential members? Do they employ any criteria in terms of social diversity, experience, and (known) proximity to a union’s positions on relevant issues?
- Do trade unions attempt to convey their priorities to acting employee lay judges? If so, is this through training or other means of communicating with and supporting employee lay judges?
- Has the activity of being a lay judge affected individuals’ attitudes towards and perceptions of their nominating trade union?

³ This includes, Greer and Hauptmeier (2012); Whittall (2010); Whittall et al. (2007); Kotthoff and Whittall (2014); Hauser-Ditz et al. (2016). Much of this research has been supported by the Hans-Böckler-Stiftung.

Willemez (2013) explored this issue for France, and noted that in many instances the link with a trade union was an organic one, as many employee lay judges also held positions as elected or appointed employee representatives and officials (full-time or lay), often specialising in providing legal advice to members. At the same time, employee lay judges (and their employer counterparts) were subject to criticism from their nominating organisations because of their potential uncontrollability: 'they are led to judge not only in the name of their organisations but in the name of the French people; and also because the law is always a powerful instrument for freeing representatives from a strict obedience to their organisations' (ibid. 377). Willemez noted the aspiration of union legal departments 'to control [lay judges] and make them reflect upon the tactical and strategic applications of the law' (ibid. e78). The price for this is criticism from the legal professionals they encounter, calling for 'intellectual gymnastics' to manage the dual logic of their position.

Motivation, social identity and affiliation

Motivation

Hollstein (2015) drew on a number of standard theories of action to explore why individuals took up lay office, defined in her study essentially as voluntary work rather than the unique circumstances of law-making as judges, and focused in particular on theories of the 'modernisation of lay office', in which individuals are motivated to engage in voluntary activities on an instrumental basis rather than on the basis of altruism. These approaches do not fit entirely well with the research approach in this study, but do offer some initial means to consider the issue of motivation.

The two theoretical approaches considered by Hollstein to begin were:

- Instrumental (including rational choice);
- 'Normative' motivations (sometimes associated with a 'traditional' rather than a 'modern' notion of lay engagement). This would include not only 'altruism' but also a 'sense of community' or civic responsibility.

There would appear to be a major difference between instrumental activity (either to benefit the individual directly or to acquire capacities that might help meet other goals) and 'rational choice' is a narrow theory based on a rigorous means-ends relationship. We explored the instrumental aspect by asking lay judges about the range of their motivations and about the benefits that being a lay judge offered other areas of their lives, in particular as employee representatives.

We did not explore lay judge activity in the narrow sense of altruism, 'devotion to the welfare of others', as this did not seem to capture the fact that lay judges consider themselves to share *interests* with those they represent, as well as acting on their behalf. None the less, the issue of the pursuit of justice in the abstract is a normative one, as was the element of civic engagement.

Hollstein seeks to integrate both instrumental and normative elements by drawing on the concept of social capital. From this perspective, engaging in lay activity can be seen as the manifestation of a desire to build social capital (Putnam, 2000), which rests both on a system of values but also, simultaneously, serves individual interests within the context of collective social life. Hollstein has suggested an integrative approach based on the neo-pragmatic theory of Hans Joas.⁴ This stresses

⁴ 'Neo-pragmatism' in Joas, H. and Knöbl, W. (2009), *Social Theory*.

the 'creativity of action', arguing that actors' motives and aims are not unchanging but become transformed and made more concrete in the course of their action. The dimension of the meaning of lay office is experienced in lay activity in and through its associated emotional and social qualities. It may also be subject to development and transformation over the 'career' of the lay judge in their capacity as a judge.

Experience of the judicial role

Labour courts in France, Germany and Great Britain face the issue of how valuable and distinctive understandings of the world of work can be directly brought to bear on the decision-making of a formally neutral judicial process that has also been characterised as a means of 'individualising, technicising and neutralising' workplace disputes' (Bonafé-Schmitt, 1982: 91). Does this pose a problem for employee lay judges?

For lay judges themselves, this can present itself in a number of (differing) respects:

- Collision between their perception of their role as an employee representative and as a judicial decision-maker – referred to by Willemez (2013: e77f.) as the 'double-bind' of 'judging as jurists and belonging to a trade union at the same time';
- Gulf between experience as an employee representative and the judicial setting;
- The processes through which these differences are resolved by (and for) lay judges.

For *Germany*, Höland et al. (2007: 224) asked professional judges at first and second instance whether they had they noticed any signs of group affiliation in the positions advanced by lay judges in dismissal cases. Of the respondents, 44 per cent had 'seldom or never' noticed such an affiliation; around the same proportion answered 'sometimes'; and 10 per cent responded 'frequently or always'. Höland et al. concluded: 'Overall this suggests the interpretation found in other sociological research into judges, according to which, when coming to a view, it is less the social (or political) origin of lay judges that prevails but rather their institutional and role integration into the neutrality and objectivity to which they are obliged in their capacity as judges' (ibid. 224) [*our translation*].

The results of research by Falke et al. (1981), based on information provided by 851 lay judges, did not support the supposition of a 'class identity' on the part of lay judges and suggested 'successful socialisation into the role of judge'. On the question of whether the positions taken in deliberations revealed a partisan affiliation, around a third considered this was either often (27.1 per cent) or always (4 per cent) the case. Such affiliation was 'sometimes' evident in 37.2 per cent of responses, 'seldom' in 27.3 per cent, and 'never' in 3.6 per cent. On the issue of the voting on judgments, 73 per cent did not think that decisions were influenced by the institutional affiliation of the lay judge, and only 9 per cent thought this always or often.

These findings, albeit some 35 years old, suggest that *at that time* there was some degree of partisan affiliation, as this was noted in 68 per cent of responses. This was supported by the findings reported in Höland et al. (2007: 224) when presiding judges were asked about the saliency of the origins of lay judges in deliberations. Some 44 per cent of presiding judges stated that they 'never' or 'seldom' noticed the affiliation of lay judges. And while 46 per cent noted this 'sometimes', 10 per cent of the sample of 302 presiding judges noted this 'often or always'. Overall therefore, 56 per cent of presiding judges registered a discernible affiliation.

This suggests several questions for the present study:

- There is an implication that lay judges *ought* to be socialised into a role as neutral participants in the judicial process. Is this implication valid for all three countries? At what stage in the career of lay judge or the stage of a case is a partisan affiliation acceptable and to be expected? And how does socialisation/adaptation take place?
- If there is a partisan affiliation at the start of a case, do lay judges *change* their positions in deliberations from a partisan to a non-partisan stance, and how do they report this process?

In this respect, the French situation has an extra dimension of interest as the fairly modest incidence of tie-break hearings with a professional judge suggests that lay judges, who hear cases alone, are able to reach agreement (see Chap 5). This might suggest that, despite a nominally high degree of partisanship, the institutional arrangement of the court promotes a move to either a) 'neutrality' as a form of social integration and/or b) 'communicative reason' between the parties and/or c) active commitment to the law as legitimate authority. This offers some advance on a simple partisanship-neutrality antinomy, reflecting what lay judges report (cf. Michel and Willemez, 2008).

There are a number of potential approaches to conceptualising and researching this issue, some of which represent alternative and others complementary accounts.

Cognitive dissonance

Cognitive dissonance is a motivation theory that sees action as driven by how individuals resolve subjective conflicts of attitudes or perceptions. For Festinger (1957), cognitive dissonance theory was based on the notion of 'cognition', a coverall term for 'psychological representations', such as knowledge and beliefs and individuals' reflective knowledge of these. While some accounts deem these to be 'conscious', others regard them as mental processes 'of which we are dimly aware' (Cooper and Goren, 2007: 150), illustrating some of the problems with this approach.

Cognitive dissonance occurs when people experience inconsistency between 'incompatible' psychological representations. This is experienced as an unpleasant emotion that will motivate individuals to achieve 'cognitive consistency' between their attitudes and beliefs. And when forced to choose between two equally valid items, individuals will rationalise to rate the item they chose more highly to avoid the dissonance produced by remorse over their choice (Brehm, 1956).

In a labour court context, employee lay judges might experience cognitive dissonance because their role as an employee representative differs from their role as a judge. If so, how is consonance achieved and is dissonance only experienced when first appointed? Festinger suggested several strategies for reducing dissonance: we have added judicial examples in brackets.

1. Change behaviour. (Always vote for the employee, no matter what. Venerate the court and its rituals. Identify with the law as a legitimate power).
2. Change cognitions by adding new cognitions as rationalisations ('someone has to do this, or it'll be run by judges') or introducing qualifying cognitions ('some employees behave badly').

It is usually argued that changing attitude is easier than changing behaviour to alleviate dissonance. However, *cognitions* can also change and this might be relevant for the self-perception of lay judges moving between two roles. A change in cognitions implies less need for a deliberate shift in attitude (such as rationalisation).

Cognitive dissonance theory has been the object of a number of fundamental criticisms.

1. The existence of dissonance is *inferred* from reports and behaviour of test subjects, presupposing that dissonance exists. If no mitigation behaviour is found, the theory implies that dissonance is insufficiently strong, making the claim hard to operationalize, test or refute.
2. Brehm (2007: 383) noted that the experiments used to establish the theory were remote from and hard to apply to real-world conditions.

'Self-consistency'

'Self-consistency' marked a development of the original theory by Aronson (1992) who sought to address difficulties with cognitive dissonance by arguing that 'most individuals strive to preserve a consistent, stable, predictable sense of self; ... to preserve a morally good sense of self' (Aronson, 1992: 305). For employee lay judges, self-consistency of this type might be challenged by a self-concept based on an identity of 'defending colleagues at the workplace' which then had to manage the process of making decisions (with employer judges) to uphold dismissals. Aronson's concept of self-consistency and self-concept (1992) offers a link between dissonance theory, and its offshoots, and broader theories of self-identity, roles (and their conflicts) and 'careers', many of which derive from the body of ideas broadly grouped as symbolic interactionism.

Social [symbolic] interactionism and (moral) careers

Social interactionists (Goffman, 1961; Becker, 1960) construed a 'career' as a series of stages characterised by experiences, learning, institutional memberships and 'labels'. Goffman (1961: 119) emphasised the 'two-sidedness' of careers: on the one hand, an 'image of felt identity' and on the other an 'official position' and 'style of life'. Goffman (1961). Harré et al. (1985) also developed the concept of 'moral' or 'expressive' careers (in contrast to 'practical' careers). For Harré et al. (1985: 147), a 'moral career' comprises 'the stages of acquisition or loss of honour and the respect due from other people' as individuals move through the 'hazards' experienced in different social worlds.

In the context of the present study, the need to balance partisan affiliation and neutrality poses the issue of how lay judges might manage movement between contrasting value frameworks. For example, defending the idea of law as a transcendent value, and acceptance that decisions can on occasion run contrary to a judge's wider sense of social justice or interests, might offer a personal strategy for resolving tensions created by discordant social evaluations. Such a strategy might also chime with cognitive dissonance theory, according to which dissonance can be mitigated by attributing a high value to a chosen entity. Höland, for instance, found that the 'professionalism, mode of operation and dignity of the court prevails over the political or other provenance of the judge' (Höland, 2010).

Within the wider moral career of the individual, the *practical* career as a lay judge is characterised by several significant stages (appointment, first judgment etc.). Some of these might also constitute stages in an evolving commitment to the role and be part of wider sense of structuring of a life, including professional life, around complementary roles (employee representative, lay judge, civil society, gaining legal experience that has value in other settings). Lay judges' reports of transitions between key stages, such as hearing the first case, might throw some light on how careers in this sense have been structured and/or consciously shaped. A career may accordingly be considered as a succession of social roles that shape individuals and lead them to act in a given manner. Here, this approach can be used to investigate how lay judges comply with the social roles that they are expected or obligated to play, as judges, as 'laity', and as trade unionists (specifically in France and Germany, where there is a direct tie).

Considering lay judges in terms of this plurality of roles offers an alternative – or perhaps complementary – approach to a simple application of cognitive dissonance theory. Like the interactionists, the social psychologists who elaborated the cognitive dissonance concept posit that individuals strive for ‘consistency’ and seek to minimise dissonance. However, the cognitive dissonance approach is generally silent on the forms of socialisation that might generate experiences of dissonance or the practical ways in which individuals manage these contradictions.

‘Salience’ and ‘commitment’

Employee lay judges’ perceptions of their role, and how it interacts with other aspects of life, might depend on the frequency with which they sit and the responsibilities they exercise within the judicial process (which are higher in France than in Great Britain and Germany). This aspect will be explored in the interviews and is dealt with in the literature with the concept of ‘salience’. Stryker (2001) suggests a *salience hierarchy* of identities, with identities higher in the hierarchy more likely to be drawn on and presented than those lower in the hierarchy. In determining this, Stryker also draws on Becker’s concept of commitment. Where there is a high level of commitment to an identity, this will raise its salience and foster an inclination to demonstrate this identity in other settings.

Becker explores the concept of ‘commitment’ (Becker, 1960) and ‘career’ (idem., 1963) in which lines of action within individual lives are construed as series of steps. Although individuals’ activities can be diverse, and even opposed at face value, unity is provided by the subjective notion of commitment to a greater goal. Becker rejects social sanctions and the internalisation of rules as explanations as these beg the question as to which rules should be internalised. For Becker, ‘commitment’ needs to be defined independently of the behaviour it aims to explain and should, in principle, be observable. Drawing on the idea of the ‘side bet’ as an activity that creates a set of interests to reinforce a course of action, Becker argues that individuals adopt consistent lines of action in accordance with sets of constraints and interests. Such mechanisms include:

- ‘Generalized cultural expectations’ about behaviour appropriate to that individual.
- ‘Impersonal bureaucratic arrangements’ that create forms of lock-in.
- ‘Individual adjustment to social position’ that creates costs if another course of action is chosen.
- ‘Face-to-face’ interaction in which individuals try to sustain a ‘front’ congruent with previous presentations.

As Becker concedes, this theory does not explore what happens when commitments ‘collide’.

Application to the project

Cognitive dissonance or role conflicts might have more purchase where trade unions elect/nominate employee lay judges as in France and Germany, creating a more direct link between the union and the employee lay judge. As already noted, in France members of unions’ legal departments talked about their desire to ‘control’ employee lay judges (Willemez, 2013: e78). In Great Britain, where individuals self-nominate, the tension between roles might be lessened as employee lay judges do not owe their position to a trade union, do not have to be union officials or workplace representatives, and, at least in theory, may not even be union members as they only are required to have experience as an employee.

However, no rigorous test of these approaches can be conducted within the present study. The theoretical frame that proves most useful might emerge from the interview transcripts and, in particular, the language used and how incidents have been described and reflected upon.

2.2 Hearings and deliberations

Legal systems are not only structures recognisable objectively... They are made up of the myriad everyday interactions of lawyer and officials... and with citizens who experience (and contribute to shape the character) of the legal system. To understand law is to understand the processes of interaction associated with the idea of 'law'.⁵

Mixed composition tribunals

The operation of labour courts in Germany, Britain and, in some circumstances, in France meets the criteria for mixed composition tribunals. The term 'mixed' is understood as the presence of lay and professional judges as joint decision-makers.

The main issues for exploration are:

- the reported high degree of unanimity in decisions in a context where there might be underlying differences of interest that might suggest partisanship in decision making;⁶
- interactions between lay and professional judges in the court setting and in deliberations;
- the dominance of the professional judge.

Some of the approaches and issues under this heading include:

- *Interaction theory* based on status differences. This might also include the issue of professional judge dominance or lay judge subordination to a *dominant context* (the judicial, rather than the workplace)⁷ or a mixture of the two (the professional judge has access to more (power) resources through their formal control of process).
- Forms of social influence that foster conformity (such as pressure for unanimity).
- The scope for discourse among 'equals' with a shared commitment 'to apply the law'. Such an interaction could be accommodated in interaction theories if lay judges applied *different* status criteria, seeing themselves as distinct but equivalent to professional judges.

Previous findings

Blankenburg and Schönholz (1979: 150ff) noted the dominance of the professional judge over the hearing and the 'theatrical quality' of proceedings in German labour courts, in which *each* party sought to 'dominate the conduct of the discussion' (ibid. 152). In particular, this study noted the advantage accrued through being a repeat player, especially legal representatives (see Chapter 6). The professional judge's dominance rests initially on their formal power, based on court procedures. 'Although lay judges possess superior strength in formal terms and can outvote the presiding judge in deliberations, their influence in the courtroom is meagre' (ibid. 154). In labour court proceedings, interventions by lay judges were legitimated by reference to their *expert role*. Professional judges also, arguably, have considerable informational power, based on their access to case papers and, in the German context, presiding over the preceding mandatory conciliation hearing. Comparative research allows for some investigation as to whether this applies generally, or is specific to particular phases of the judicial process and/or particular countries. This also raises the question as to whether

⁵ Cotterell (1992: 145-6).

⁶ See Höland, 2010.

⁷ The issue of judicial dominance has been raised by Blankenburg and Schönholz (1979: 152) and Falke (1981) for Germany; and by Wikely and Young (1992) in Britain.

the dominance of the presiding judge in the 'theatre' of the courtroom transfers to deliberations, where the rituals and formalities of the court setting are no longer directly in evidence.

For *Great Britain*, Dickens *et al.* (1985) noted that lay members tended to be marginalised in employment tribunals as a consequence of the greater formalisation of proceedings, in particular greater increase legal representation of the parties. This was also observed in a study of British social security tribunals, where Wikely and Young (1992) noted the marginalisation of lay members by the judge following changes that provided for greater 'legalisation' of the procedure.

One issue for *France* might be that the empowerment of lay judges through their management and exclusive decision-making role leads to a different constellation in the mixed tribunal of the 'tie-break' hearing (*audience de départage*).

Self perception and perception by others

Status characteristics theory

Status characteristics theory is one of several interaction theories that sees inequality as multi-dimensional (Ridgeway, 2014). Status characteristics theory essentially contends that interactions are shaped by status and that 'status characteristics' are anchored in 'status-organising processes' (Wagner and Berger, 1993: 23). The theory was developed to explain interactions in small, task-oriented groups and in particular 'the formation and maintenance of hierarchies of power and prestige' (ibid: 24). The core proposition is that expectations of group members about the performance and power of other members, and hence their interaction, are based on perceptions of prior status characteristics and that 'initial status differences become the basis for expectations in the immediate situation' (ibid: 27).

Occupational prestige and educational attainment have been the traditional foci of status theories. However, alternative status dimensions might be explored: for instance, status based on contrasting values or legitimacy based on other status systems. Wagner and Berger (1993: 26) hold that external status differences transfer into internal group differences, irrespective of the immediate relevance of such distinctions, reinforcing those with high status. Those enjoying high status also tend to be biased against those lacking status and rank their achievements lower than their own.

Two classes of status characteristics are distinguished:

- specific characteristics are those of potential direct relevance to the task;
- diffuse characteristics (gender, age, ethnicity, educational attainment, social class), defined as two or more states that are differentially valued, must be 'activated' to influence expectations.

Where status characteristics are seen to be inconsistent (low status crystallisation), such inconsistencies can either be a) eliminated to retain consonance or b), as Wagner and Berger argue (ibid: 32) combined into an 'aggregated status expectation': empirical evidence for any one of these options appears inconclusive.

'Source theory' (Webster *et al.*, 1972) complements this by arguing that an actor's self-evaluations depend on characteristics found desirable by evaluators (the 'source'), where the evaluator possesses attributes regarded positively by the actor. This is a reinforcement mechanism, provided there are shared underlying values. Where professional judges function as the 'evaluators' this process might represent a mechanism for socialisation into the judicial setting.

In a series of papers, Kutnjak Ivković (1997, 2000, 2003, 2007) examined Croatian criminal courts, which are mixed decision-making tribunals. Kutnjak Ivković (1997) argued that professional judges' legal background constitutes a specific characteristic. Although lay and professional judges had equal voting rights, legal training was held to confer higher status on professional judges; hence any differences are likely to be 'resolved in their favour' (Kutnjak *ibid*: 410). Moreover, lay judges might be seen as 'less competent', 'participate less frequently... have fewer opportunities to make contributions', and 'receive less favourable reactions from others' (*ibid*: 409, 410).

Fujita and Hotta (2010) examined the *saiban-in* system in Japan where three professional and six lay judges sit together on criminal cases. They found that if the presiding person already had social influence, their social power would be increased through the deliberative process. The presiding judge's power was also enhanced by informational differences as they led the pre-trial conference.

The national contexts, outlined in Chapters 5-7, offer different settings for examining potential status differences between professional and lay judges (such as, in Germany, differential access to case papers or prior familiarity with a case due to the professional judge presiding alone at conciliation). Such an information differential might be different in French labour courts where lay judges sit alone from the start of a claim, first conciliating and if that fails attempting to reach a decision. Only if they cannot reach a decision is a professional judge involved. For Willemez (2013: e73), status positions in French labour courts are based on an alternative set of status characteristics, given the absence of professional judges at first-instance hearings. The main dimension was seniority, based on in-depth know-how ('specific capital') about the operation of the court and case management.

Social influence theories

Social influence theories look at influencing processes, including mechanisms to secure conformity.

Two possible relevant considerations might be:

- Conformity as an explanation of unanimity. This situation might arise where two judges agree in deliberations, and the third concludes they 'must be right', especially if confronted by the expertise and status of the presiding judge.
- 'Institutionalised dissent' in mixed tribunals. Research by Nemeth (1995, cited in Kaplan et al., 2006) highlights the value of dissent for improving group cognitive performance, especially when it enables an issue to be considered from multiple perspectives.

2.3 Capacities and contribution of employee lay judges

If those who are not experts can have expertise, what special reference does expertise have? ... We say that those referred to by some other analysts as 'lay experts' are just plain 'experts' – albeit their expertise has not been recognized by certification (Collins and Evans, 2002: 238).

The project will explore the competencies that employee lay judges bring to the judicial process by ascertaining how their contribution is seen by themselves and other participants. The scope for drawing on such expertise presupposes, firstly, the existence of specialised courts, in which expertise is present in decision-making, not simply as witnesses or assessors; and secondly, mechanisms to select such individuals (rather than selection by lot). The formal requirements for lay judges to demonstrate knowledge before appointment vary by country and by level of court.

Previous empirical research into the lay judges' contribution (Corby and Latreille, 2011; Höland et al, 2007) suggests their main contribution is the provision of 'workplace experience' and the addition of

a 'balance' between a legal perspective and an employee/employer perspective. There were some differences of opinion between professional and lay judges in this respect. In France, Michel and Willemez (2008, 2009) identified the 'socio-professional space' from which lay judges originated as the basis of their understanding of the disputes that they adjudicated, implying an admixture of both societal background and professional position (that is, workplace plus occupational status).

'Workplace experience' is an unspecific term, essentially denoting an *input* for knowledge and judgement rather than an *output*. The fact that this learning takes place mainly at the workplace also underpins the argument for retaining and developing the role of lay judges as it represents a form of privileged access to experience that is not accessible *in principle* to professional judges.

In terms of lay judge competencies, possible theoretical approaches might include:

- tacit knowledge, in which knowledge of and about workplaces underpins a competency for, a) understanding workplace disputes⁸ and, b) in some settings eliciting information from participants at hearings. In turn, the court is a context for eliciting lay judges' tacit knowledge.
- competency also embraces training in law (codified knowledge) and judgecraft (technique), as a criterion for effective performance. This covers both the training and resources provided in each country, as well as the competencies that lay judges bring as a result of their prior histories.
- lay judges also bring scope for multiple perspectives to deliberations, constituting a potential reservoir of constructive 'institutionalised dissent'.

Knowledge

The type of knowledge that lay judges might bring to their activity in labour courts might be divided into two types: explicit knowledge and tacit knowledge. Most lay members might be expected to contribute both. It is argued here that tacit knowledge might be a fruitful area to explore as it embraces forms of knowledge *in principle* inaccessible to professional judges.

Explicit knowledge covers knowledge that can be fairly easily articulated and accessed, and which can be codified or reported verbally to the court ('knowing that'). The role of the lay judge as potential expert in this area is that they are acquainted with a *separate* realm of relevant *facts* (such as technical facts about work processes that a professional judge is unlikely to be familiar with). It could cover knowledge of collective agreements. Lay judges' knowledge of this sort could arguably be obtained through witness statements in response to questions, but having it 'on tap' through permanent membership of the court might lower the transaction costs of accessing it, especially if it is not possible to specify in advance what information might be relevant as a case unfolds.

In contrast, the *tacit knowledge* of lay judges ('knowing how' and 'knowing that') is knowledge acquired experientially mainly at the workplace. This is distinct from formal learning and implies largely incidental acquisition through participation in workplace processes, including exposure to less tangible aspects such as norms and values, as well as 'hanging around' with relevant others (Collins, 2010: 87). This type of knowledge has a special character since it cannot be made accessible

⁸ The type of case encountered might be relevant. In dismissal cases, relevant experience might include what is a reasonable at a particular type of workplace. In discrimination cases, the main claim heard by lay judges in Great Britain, social and personal experience might be especially relevant.

in a codified form to those who lack these experiences. Even if it were written down, 'full understanding' would require more knowledge, particularly of context – itself 'tacit' in nature.

This section briefly explores the origins of the concept of 'tacit knowledge' and attempts to operationalise it through concepts such as 'expertise' and 'practical intelligence'. Some possible questions are suggested as indicating how this issue might be captured.

Tacit knowledge: origins and development

The concept of tacit knowledge is customarily held to have originated with Polanyi: 'we can know more than we can tell' (1966: 4). Polanyi viewed tacit knowledge not as a specific category of knowledge but as the basis for *all* valid forms of knowledge, arguing that rules of method cannot be fully articulated. Polanyi's account of tacit knowledge is not entirely coherent, however, and can be seen as rendering knowledge and science mysterious rather than accessible.

Problems with Polanyi's approach led to efforts to operationalise the concept of tacit knowledge and deploy it for practical organisational use in the form of 'knowledge management' (Nonaka and Takeuchi, 1995; Baumard, 1999). This also marked the shift from 'tacit knowledge' as knowledge that *cannot* be related to a third person to 'tacit' as denoting that which is not *explicit* (Collins, 2010: 4), allowing some operationalisation. Some of the attempts to operationalise tacit knowledge might have relevance in a judicial context. For example, does a professional judge function as a (process) 'manager' and elicit 'tacit knowledge' from lay members in deliberations. This would require both that professional judges valued the knowledge of lay judges and had the competence to elicit it.

Nonaka and Takeuchi also suggested two organisational features that might promote knowledge sharing: 'redundancy' and 'rotation'. 'Redundancy' requires organisations not to adopt the most streamlined organisation: overlapping responsibilities can foster the elicitation of knowledge. 'Rotation' enables individuals to share knowledge through involvement in many social practices. Both could be applied to judicial settings; 'redundancy', because the presence of lay members adds to the discursive capacity of the court; and 'rotation' because lay members operate in overlapping contexts (work and court), with scope to transfer knowledge between them.

The consensus within this approach (Ambrosini and Bowman, 2001: 812ff.) is that tacit knowledge is:

- hard to formalize, with degrees of tacitness ranging from explicit skills to deeply ingrained (and less accessible) capacities such as judgement that are hard to articulate, or skills that have been learned explicitly but which have become incorporated (and tacit) over time.
- personal (and internalised to an extent that it is a 'mental model' or part of an individual's identity),
- can be practical and is context specific.

'Practical intelligence' and expertise

The concept of 'practical intelligence' seeks to avoid some of the difficulties of 'tacitness', although the term 'tacit' is still used in this approach. Sternberg et al. (1995, 2000) see tacit knowledge as 'informal knowledge' acquired through practical experience but not in principle inaccessible to being articulated. It is a type of 'common sense' and an ability to address 'real world problems'. 'Tacitness' is defined as a 'natural' rather than a 'formal' concept, suggesting a spectrum of qualities between explicit and tacit. Two features are relevant in this context (Sternberg et al., 2000: 107ff).

- It is acquired by individuals without formal support or instruction.

- It is ‘procedural’ and related to ‘particular uses in particular situations’ and typically ‘guides behaviour’ through application of sets of implicit ‘complex procedural rules’.

Expertise

The concept of ‘expertise’ (Collins and Evans, 2007) builds on the idea of tacit knowledge to explore the boundaries between professional expert knowledge and ‘non-certified’ and ‘experience-based expertise’. Although developed mainly to analyse relationships in science and technology, the approach was also intended to have wider application and implies a reevaluation of non-specialist expertise that might have relevance for the knowledge that lay judges bring to labour court activity.

Two types of expertise are suggested. Firstly, ‘full-blown specialist tacit-knowledge-laden expertise which enables those who embody it to contribute to the domain in which it pertains’ (ibid. 69). This is dubbed ‘contributory expertise’. This is held by acknowledged experts (professionals). And secondly, ‘interactional expertise’: this is the knowledge of ‘non-experts’, and is also based on deep tacit knowledge, acquired through enculturation in the language of the relevant domain. In the case of judicial processes, it is not the same as the expertise of the professional judge, who is ‘fully immersed’ in the judicial life. Individuals can be contributory experts in different domains.

Lay judges represent a hybrid between these two types, possibly possessing ‘contributory expertise’ as workplace representatives and developing ‘interactional expertise’ through participating in hearings and deliberations. The position for professional judges would be reversed.

The ‘education function’

Machura (2016), in a review of the arguments for lay participation principally in criminal proceedings, noted that lay participation has an ‘education function’ both for the lay judge (or jury member) directly and, in the form of ‘multiplication function’ for those exposed to their influence. Looked at the narrower context of lay skills and knowledge, this represents a form of knowledge transfer via the lay judge back to their usual milieu. We explore this aspect both in terms of motivation (the desire to engender a two-way flow of knowledge) and the consequences of lay judge activity.

Competencies – judgecraft

‘Judgecraft is the art of judging’ (Judicial College, 2013) and encompasses a range of competencies and behaviours regarded as indispensable in court, but which ‘you will not find in a book on law, evidence or procedure’ (ibid). The *Equal Treatment Benchbook*, published as guidance by the British Judicial College, includes a four-page section on ‘Judgecraft’. The main areas identified are ‘Good communication’ and ‘Demonstrating fairness’.

‘Good communication’ embraces:

- dealing with witnesses and parties, especially ensuring unrepresented parties are fairly heard;
- being aware of the ‘background, culture and special needs’ of participants;
- as a judge trying to ‘put yourself in the position of those appearing before you’;
- ensuring that legal language is kept as simple as possible.

‘Demonstrating fairness’ includes:

- Providing for ‘substantive equality’ in the treatment of parties (‘fair treatment does not mean treating everyone in the same way’);

- Ensuring that any social disadvantage ‘should not be reinforced by the legal system’.
- ‘Recognising and eliminating prejudices’, including unconscious prejudice and stereotyping.

While the main responsibility for ensuring that the principles are complied with in the court rests with the professional judge in Germany and Great Britain, there are a number of aspects for which employee lay judges have both obligations and scope to enable good principles to be realised.

2.4 Conclusions

We point to the three main conclusions from this literature review:

- There is little or no contemporary and comparative empirical work in the field of labour courts; nor do many of the theoretical approaches to juries consider the effects of differing institutional contexts on actors. A glance at the existing literature raises many questions and reservations about the generalisability of some of approaches considered. Roles encountered are dealt with a-historically and in isolation from contexts.
- There is a need to explore socialisation/adaptation into the judicial role. The review notes a variety of mechanisms that might throw light on such processes. Although cognitive dissonance is the object of numerous criticisms, it might offer perspectives on what could be termed ‘final stage’ socialisation, once employee lay judges have joined the court. However, it is important not to isolate this from employee lay judges’ prior experience. In this respect, cognitive dissonance fails as a theory of motivation or leads to a kind of infinite regress. Moreover, how much ‘socialisation’ into a wholly judicialised view of employee workplace rights is desirable? One contribution of lay members, as Sanders (2006: 304) notes, is to ‘leave the law with community norms’ – an issue on which our interviews throw some light.
- Deliberations are the crucial locus. One key area for this study is to examine where lay judge influence can most effectively be brought to bear (in the form of as expertise, as ‘institutionalised dissent’, ‘multiple perspectives; etc.). In particular, the privileged access of lay judges to ‘tacit knowledge’, however defined, could mean the lay contribution is especially valuable.

3. METHODOLOGY

3.1 Research strategy and design

The project's research strategy and methods followed from the agreed central research question and objectives: these primarily focused on the *perceptions and reported experiences* of employee lay judges and other judicial actors (employer lay judges and professional judges) in labour courts in three countries: France, Germany and Great Britain. The rationale for this choice of countries was, firstly, that lay judges, whether appointed or elected from the wider working population, play a key role in the adjudication of individual employment rights disputes in these countries. That is, lay judges at first instance are not certified legal experts. Despite similarities in their roles, employee lay judges have arrived at their positions by differing routes in each country (nominated by trade unions in Germany, elected by employees in France, and, since 1999, self-nominated in Great Britain). This allows for some comparisons to be made about the outcomes and actors' perceptions in each case. However, in view of the diversity of routes, institutional differences, and the heterogeneity of interviewees in other respects, contextualising the research findings will play a major role in the analysis. In this respect, the choice of *countries*, and the scope for comparative inferences that might be drawn from the data, reflects a purposive (small-N) country sample.

The decision to adopt the selected research questions⁹ was based on an assessment of previous research in the field, as set out in the literature review, and the identification of a 'research gap': *aside from France, no qualitative research has been conducted on the attitudes and perceptions of lay judges in labour courts in Western Europe in recent years.*

The chosen method to collect data was that of qualitative research using semi-structured interview guides as the objective was to pursue in-depth and discursive exploration with interview subjects. It was decided not to employ a large-scale survey with questionnaires, amenable to quantitative analysis for two main reasons.

- Firstly, it was not possible to compile a probabilistic sample of interviewees, so that any quantitative results would not be generalisable.
- Secondly, the study aimed to ascertain and analyse the reported experiences, observations and, on some issues, the feelings of interviewees in their own language. In particular, the study set out to investigate the process of the 'making of law' by actors in labour courts as an 'act of meaning' (Bruner, 1990) and an expression of a social, political, employment, and legal culture.

Following Ritchie and Lewis (2003: 32f.), the 'deeply rooted' and 'complex' nature of the expected evidence also strongly suggests a qualitative approach.

⁹Those aspects of the research proposal requiring a qualitative approach included: exploring influences on lay judges' perception of their role; other stakeholders' evaluation of the skills and competencies of lay judges; relationship between the route by which worker lay judges assume their role, their individual characteristics, and their perceptions of the role; whether worker lay judges experience conflicts of loyalty when acting as judges; worker lay judges' perceptions of, and relationships with, employer lay judges and vice versa; worker lay judges' perceptions of, and relationships with, professional judges; professional judges' perceptions of, and relationships with, worker lay judges; worker lay judges' views of their role in decision making; forms of interaction in the judicial forum and in decision-making.

Although the study is guided by and seeks to explore a number of theoretical areas, and aims to establish links between the perceptions and language of interviewees and theoretical frameworks, the research also has an inductive element that might generate hypotheses for future study.

Some previous research into judicial processes in mixed-composition labour and civil courts has relied on direct observation of hearings as the prime research method (cf. Blanckenburg and Schönholz, 1979; Gruner, 1984). In our view, this approach does not offer scope to capture the full range of interactions between the parties and the lay judges generally and/or between the lay judges themselves and/or the professional judge during adjournments or deliberations. We did not receive judicial permission to observe deliberations, however, and in any event our presence as observers might have altered the deliberative process. Accordingly, our exploration of these interactions is based on interviewees' statements. Given the lack of consideration of this aspect in previous research, and the conclusions drawn from this about the nature of the relationship between lay and professionals in the legal field,¹⁰ we consider this strategy to be warranted. Inevitably, this means our approach is more inferential.

Nonetheless, court layout, dress requirements and visible interactions between court actors might be relevant as a means of exploring contextual aspects and as points of contrast. Accordingly, some members of the research team observed labour court proceedings, employing non-participant observation,¹¹ in all three countries.

The qualitative research, which provides the primary data for the study, was complemented by desk research and expert interviews to collect information on the operation of labour courts, the appointment and selection of lay judges, and the approaches of relevant organisations (trade unions, employer associations). Additional contextual information drew on academic research and other public domain sources, such as reports from official bodies and statistical sources.

The research design entailed collecting primary data via interview, using semi-structured guides, in each of the three countries, with the sample in each case distributed across cities and conurbations in each country (see 'Sampling' below).

In addition, expert interviews were conducted in some countries with office-holders in:

- Organisations responsible for nominating lay judges (unions and employer associations);
- Bodies with the legal responsibility for appointing lay members;
- Authorities with responsibility for the management and supervision of labour courts.

3.2 Sampling

Sampling method and sample size

Sampling was guided by *convenience* in terms of interview locations and through *self-selection* by participating individuals. The researchers applied *quota sampling*, in that once the pre-agreed

¹⁰ Such as Bourdieu (1987).

¹¹ Gobo (2008: 105ff.)

number of interviewees in each category had been met,¹² no further interviewees were chosen from this category at a specific location. However, quotas did not apply to any other characteristics of the sample aside from their membership of one or other of the chosen categories.

The choice of locations for the interviews was influenced by the desire for a regional spread within each country (including the three constituent countries of Great Britain).

- In Great Britain, interviews were conducted in Central London, Birmingham, Manchester, Glasgow, and Cardiff.
- In France, interviews were held in Nantes, Strasbourg, Bobigny, Versailles, and Boulogne-Billancourt.
- In Germany, interviews were held in Halle, Berlin, Dortmund and Mannheim.

We outline the main features of each national sample below: it is not possible to assess the representativeness of this sample in terms of the individual characteristics of interviewees as comparable data for the population is either not readily available or only for some dimensions.

The sample size was influenced, firstly, by funding considerations and the research and analytical capacities of the partner institutions, and secondly, by the qualitative nature of the research. In some locations, problems of access emerged over the course of the research.

In *Germany*, 53 interviews were conducted with lay judges (41 employee/12 employer) and 13 with professional judges at first instance labour courts. Four interviews were conducted with officials responsible for appointing lay judges, and with other professional judges (sitting at second instance or in one case a former President of a *Land* labour court) for information only. Two further expert interviews were conducted on the issue of the organisational nomination of candidates for lay judge roles with representatives of a trade union and of an employer association who were members of the lay judge committee at the Berlin labour court.

Key characteristics of the German sample were:

- Gender. Of the lay judges, 55 per cent were male and 45 per cent female. Of the professional judges, 57 per cent were male and 43 per cent female.
- Age. 11 per cent of the lay judges were under 45, 77 per cent between 45 and 64, and 9 per cent over 65.
- Union membership. Of the 41 employee lay judges interviewed, 38 (93 per cent) were currently members of a trade union and 31 (76 per cent) were current or previous elected workplace employee representatives (works council or, in the public sector staff representatives).
- Sector. Of the lay judges, 26 per cent worked in the public sector (compared with 7 per cent of the overall workforce in Germany).
- Eleven of the lay judges served as lay members in other courts, for the most social courts.

¹² Reflecting the focus on employee lay judges, the aim in each country was to conduct 40 interviews with employees, 12 with employers and 12 with professional judges, together with expert interviews. On occasions, more than the precise number of interviews was undertaken if interview subjects were immediately on hand.

In *Great Britain*, 54 interviews were conducted with lay judges (41 employee/13 employer) and 12 with professional judges. Expert interviews were conducted with a full-time trade official at the Trades Union Congress and with the President of the Employment Tribunals (England and Wales).

Key characteristics of the British sample were:

- Gender. Of the lay judges, 28 were female (52 per cent) and 26 male (48 per cent). Of the professional judges, 6 were male and 6 female.
- Age and length of office. Of the lay judges, no interviewees were under 45, 31 (57 per cent) were aged 45-64, and 23 (43 per cent) were over 65. Forty-one (76 per cent) had served as a lay judge for 11 years or more.
- Union membership. Of the 41 employee lay judges interviewed, 27 (66 per cent) were currently a member of a trade union. Two employer lay judges (with backgrounds in higher education) were also trade union members.
- Sector and status. Of the lay judges, 23 were retired (43 per cent) and 18 were self-employed or business owners (33 per cent), including 10 of the 41 employee lay judges (24 per cent). Of the employee lay judges, 11 were employees (27 per cent). Of the employee lay members 25 (61 per cent) were either currently or had previously worked in the public sector (including education), 2 in manufacturing industry, 4 in private services, and 10 in a trade union. Of the employer lay members, 6 worked or had worked in private services, 5 in industry, and 2 in the public sector (higher education).¹³

In *France*, 40 interviews were conducted with lay judges (see 'Gaining access' below). Of these 30 were employee lay judges and 10 were employer lay judges. Five professional judges were interviewed (as outlined in Chapter 5, professional judges only sit with lay judges in particular circumstances).

Key characteristics of the French sample were:

- Gender. Of the employee lay judges, 11 were female (36 per cent) and 19 male (64 per cent). All the professional judges were female.
- Union membership. All the employee lay judges were trade union members, with a spread across the main union confederations (CFDT, CGT, FO, CGC). For the employers, interviews were conducted with judges from MEDEF, CGPME and ESS.
- Length of office: it was difficult to interview new lay judges because the most recent round of elections and new appointment was held in 2008 (see Chapter 5).

Aside from the aim of meeting the quota for each type of interview, no further effort was made to shape the sample in terms of individual characteristics.

These characteristics were then used in conjunction with the coding system to look at responses across the samples by characteristic, where appropriate.

¹³ Information was collected on ethnicity for the British sample, a common practice in the UK and seen as contributing to equal opportunities policies. However, we do not detail the results here as no comparable data was collected in France and Germany (see below in this chapter). As we discuss in Chapter 9, ethnicity played a part in the motives of some British lay judge interviewees in seeking a role as a lay judge.

Gaining access

Within each country, samples were determined by methods that differed, depending on national institutional arrangements and requirements set by the judicial authorities. Samples were not randomly chosen by the researchers from the whole population as researchers did not have access to databases for the relevant national populations. A standard information sheet on the project was prepared and potential interviewees had access to a three-language website for the project, hosted by the University of Greenwich (<https://www.gre.ac.uk/business/research/centres/weru/research-projects/the-roles,-resources-and-competencies-of-worker-lay-judges-a-cross-national-study>).

In Great Britain, all potential lay interviewees at each location were contacted by the offices of the local labour courts chosen for the fieldwork by the researcher, following the granting of judicial approval for the research. Those willing to be interviewed then contacted the research team to arrange interview times. Professional judges were asked direct by their local courts. In Germany, lay judges were contacted by labour courts and times were arranged and then communicated to the local researchers. In France, access had to be secured directly by the research team. This was achieved by interviewing the (lay) president and/or vice-president of the labour courts chosen, and names of potentially willing interviewees were obtained, with further contacts reached via a snowball process. This was a difficult exercise at times, and in some locations the restructuring and rationalisation of the courts made access difficult.

Selection-bias

Self-selection by interviewees creates scope for bias, especially where it is not possible for the causes and effects of self-selection to be anticipated or modelled. For example, individuals might opt to be interviewed either because they have very *negative* or very *positive* views of the process about which they will be asked. Evidence from the fieldwork indicates that both negative and positive perceptions were encountered between individuals and within the same interview (that is, possible self-selection based on *strong* opinions). At a minimum, this might suggest that such interviewees were strongly engaged with their role, which might differentiate interviewees from other non-interviewee lay and professional judges.

One approach to counteract the risks of bias is, therefore, to regard interviewees' reports as interpretative schemes constructed by interviewees as well as evidence for the processes being researched. In some instances, reports in interviews can be triangulated with the reports of other interviewees to establish veracity.

Ethics and data protection

All interviewees gave their explicit consent to being interviewed and to being audio-recorded. Before confirming interviews, interviewees were informed of the context of the study (including the funding body etc.)¹⁴ and the use that would be made of their data. In Germany and Great Britain, the formal consent of the judicial authorities was required and obtaining this might have encouraged lay and professional judges to participate.¹⁵

¹⁴ The contextual information included in the 'Invitation to participate' clarified that the research was funded by a foundation with trade union associations but was being conducted independently by academic institutions, and that such research had to be academically rigorous and in the wider public interest.

¹⁵ In Great Britain, lay judges were encouraged by a senior professional judge to participate at a meeting of the lay judges' association.

Interview data were anonymised. As a result, neither the respondents themselves nor other people they might refer to are identifiable. Transcripts are securely held both physically and electronically.

3.3 Interview guides and the interview process

Interview guides were designed in the light of the literature review and the agreed research questions. The process, which was conducted jointly by all the project partners, extended over several weeks with several iterations and extensive face-to-face discussion. The views of the project's advisory board were taken into account following the circulation of the draft guides in February 2016 and a face-to-face meeting with the Advisory Board later that month.

Interview guides were initially developed as structured outlines, with a consideration that the main questions should be the same in each country. Scope for further elaboration and exploration to follow up the main questions led to a semi-structured set of guides for each interviewee category, with localisation by country. Guides reflected accepted good practice. For example, interviews began with earlier events and asked about simpler topics. There was a mixture of general questions but interviewees were also asked to recall specific events. Interviewees were asked about the overall assessments of their role towards the end of the interviews. Efforts were made to ensure that theoretical constructs were converted into experiential terms (Fowler and Cosenza, 2008: 159).

Comparability

The issue of comparability was seen as a central consideration in conceiving, drafting and translating the interview guides (see, for example, Harkness, 2008: 56ff). This has both cross-national dimensions (national institutional features) and cross-cultural aspects (principally as between interviewees by nationality). Other aspects of cultural differences within national settings were not explored in the design stage of the questionnaire.

Given that the working language of the project team was English, interview guides were discussed and drafted first in English and this became the source interview guide, consisting of a core set of questions that would be put to all interviewees ('Ask-the-Same-Question' approach: Harkness, 2008: 65-67). Issues related to the source guide and the creation of the two 'target' interview guides (French and German) were addressed in project meetings and, iteratively, in the various draft translations. These covered:

- agreement on technical and legal terms to ensure both direct and functional equivalence, where possible. Interview guides were localised to allow for differences in local institutions and practices;
- translations of 'terms of art'; these mainly concerned expressions in employment relations (not always technical in the narrow sense, but customary to practitioners);
- the emotional resonance of questions and terms to be used to explore interviewees' feelings, perceptions and experiences.

Although it was decided to ask the same questions, aside from localisation issues, it was expected that some terms would have different local meanings not only because of differences in institutional settings but also because of differing political and cultural understandings of roles (such as 'employee representative'). One aspect of the research was, indeed, to explore whether there were such differing interpretations of these terms and what form these took.

The source interview guide was translated by local research partners and drafts were reviewed by other member of the research team. The translation process involved several stages of clarification and led to adjustments in both the source and target guides. As well as cross-checking on technical terms (industrial relations, law) there was also discussion around the translatability and meaning of other key words in the guides (for example, those with a potential emotional resonance). One consequence of this process was the development of additional questions ('prompts') to follow up on the principal questions.

There was also extensive discussion within the group about the sensitivity of certain areas and how 'personal' questions, such as those about individual motivations or feelings, could be addressed, and whether there might be national sensitivities or formal constraints on addressing specific issues.

One notable such area was that of ethnicity. Whereas there are standard questions for ascertaining self-identified ethnicity in Great Britain (with varying degrees of detail),¹⁶ and such questions are required to be used by public authorities to ensure that they do not discriminate in terms of policies and procedures, in France such questions are generally disapproved of and would not be customarily be asked. In Germany, while not legally prohibited, ethnic monitoring is virtually never used and is generally regarded as highly sensitive.

Information on personal characteristics, length of time as a worker lay judge, trade union affiliation, other trade union or civil society roles, educational attainment etc. was collected at the interview. Some of this data has been summarised using the 'document variables' function in MaxQDA.

Testing

The interview guides were piloted with a small number (2-3 interviewees) in each country, with the aim of both cognitively testing the guides (for interviewee understanding and responses) and assessing typical interview duration.

In practice, interviews tended to last from between 45 minutes to 1.5 hours, depending mainly on the length of respondents' replies and the scope for elaboration. There were some outliers, with interviews in France lasting up to two hours in some cases.

All interviews were recorded and transcribed.

Reliability and validity

Qualitative research encounters problems of reliability and validity, given the difficulties in using numerical values to confirm the robustness and relevance of the methods used. Flick (2014: 48) also notes the particular problems associated with selective quotation as establishing the credibility of the analysis and conclusions in view of the scope for selectivity on the part of researchers.

'Reliability' refers to the extent to which a research instrument (here an interview guide) will yield similar results in different circumstances, assuming all else remains constant. For qualitative research, reliability is grounded in establishing procedures to ensure that, in theory, the results obtained in interviews should not vary depending on the interviewer and that analysis should yield results that are as close as possible to each other, irrespective of the individual researcher.

¹⁶ National Statistics (2003).

The reliability of interviews was assessed by means of the pilots, with transcripts shared and in researchers sitting in on other interviews (both within a country and cross-nationally).¹⁷ All interviews were recorded and transcribed. The agreed coding system also provided a procedural basis for reliability in adopting a common approach to analysing transcripts. Inter-coder reliability was checked by swapping transcripts locally and subsequent exchange between researchers about any differences in approach (termed 'dialogic exchange' by Saldaña: 2016). Coded transcripts for each country were made available to the whole project group.

'Validity' in qualitative research refers to whether the research instruments used accurately capture the construct to be ascertained and the robustness of 'the lines of inference running between the data and concepts' (Hammersley and Atkinson, 1983: 184). Flick (2014: 483) summarises this as: 'whether the researchers in fact see what they think they see'. Errors in validity can include: identifying relationships inaccurately or asserting relationships where none exist; rejecting the existence of relations (or not noting them), where such relationships do exist; and asking inappropriate questions. There leads to an emphasis on establishing the plausibility and credibility of the knowledge produced by a research project, assessed post hoc rather than prior to field work. For example, is the interpretation put on a quotation plausibly supported by the words used in that quotation (interpretive validity) and are the theoretical conclusions derived from this credible?

Finally, Lewis and Ritchie (2003: 274) propose the following checklist for assessing as procedural approaches to validity. This is set out below, with a note of the approach used in the present study. Some of the issues raised are addressed in the section on 'Data analysis'.

Table 3.1: Checklist for validity

Category	Explanation	Approach in current study
Capture of the phenomena	Was the environment and the quality of questioning sufficiently effective for participants to fully express/explore their views?	Interview surroundings (court or in some cases interviewees' home or work) were deemed conducive to obtaining interview data. Interview guides included specific questions and open questions.
Identification or labelling:	Have the phenomena been identified, categorised and 'named' in ways that reflect the meanings assigned by study participants	Interview guides designed to capture interviewees' experiences and allow their words to constitute evidence, including through coding.
Interpretation	Is there sufficient internal evidence for the explanatory accounts that have been developed?	See analysis below.
Display	Have findings been portrayed in a way that remains 'true' to the original data and allows others to see the analytic constructions that have occurred?	See analysis below.

Source: Ritchie and Lewis (2003: 274)

¹⁷ It was noted that having two researchers in the interview session might alter the dynamics of such interviews.

3.4 Analysis of findings

Analysis of primary data was based on the approach of qualitative content analysis in three stages:

- Initial identification of themes by the research group following data collection and coding. Four thematic areas were selected, corresponding with the themes considered in Chapters 9-13. This stage was dependent on researchers' interpretation of the data, primarily by coded response across the range of interviewees. As required by the overall research question, MaxQDA was also used to explore associations between the individual characteristics of interviewees and the route by they entered the role and their responses.
- Refinement of themes and interpretations following first stage of primary analysis.
- Additional exploration of the primary data through reading transcripts, in particular to develop interpretations within individual transcripts (exploration of apparently contradictory responses by the same individual).¹⁸

Transcripts were coded using MaxQDA using a common set of codes arrived at through extensive group discussion following initial rounds of interviews. The final code system and codebook were drafted by the Greenwich researchers and issued to other research teams. Local research teams had scope to add codes or use *in vivo* coding to respond to words used in interviewees' responses and explore fresh issues.

Where appropriate, data was quantized¹⁹ to emphasise the frequency of particular responses within the sample(s) and to highlight notable comparative differences between the country data sets. This was done in several ways:

1. The frequency of particular comments and observations was noted and reflected in the analysis, using such terms as 'many', 'most' and 'few'. Such terms have a common-sense value in indicating the main features of the sample, without any claim to generalisability.
2. The incidence of codes (how many times a code was used) was noted. However, this is typically seen as having only indicative value.

Although the analysis does offer some descriptive quantification of interviewees' responses, it is also accepted that a single report of a particular perception or experience may still have analytical relevance, possibly as a significant deviant case.

¹⁸ This is especially relevant to cognitive dissonance theory.

¹⁹ See Driscoll et al. (2007) for an overview. The term 'quantize', to mean using coded qualitative data to obtain quantitative evidence, originates with Tashakori and Teddlie (1998), cited in Driscoll (2007).

PART II

NATIONAL CONTEXTS

4. COMPARATIVE OVERVIEW

The following three chapters (5-7) outline the national contexts in which lay judges exercise their judicial role, encompassing the macro-institutional features of the industrial relations and legal systems and extending to the detailed context of the courtroom and its procedures. The aim is to provide a background against which the detail of the analytical chapters (Chapters 9-13) can be understood, and in particular the direct quotations drawn from interviews with lay and professional judges.

Table 4.1 provides an introductory comparative overview to the main institutional differences that characterise lay judges at first instance in the three countries investigated in this study.

Table 4:1 Institutional differences: lay judges at first instance

	Germany	Great Britain	France
Name of lay judge	ehrenamtliche Richter	Lay member/non-legal member/ 'wing member'	<i>Conseillers</i>
Nomination, selection and appointment of employee lay judge	For employee lay judges, union nomination and nomination by independent associations of employees. For employer lay judges, nomination by employer associations. Appointment by the Land or by the presidents of the regional labour courts	Self-nomination Selection by application form sifting/interviews and recommendation for appointment by private sector company to Judicial Appointments Commission	For employee lay judges, election by employees usually from competing lists organised by trade unions (although employees can nominate themselves). Employer associations usually cooperate to produce a single list for employer lay judges. Appointment by the Ministry of Justice.
Mandatory conciliation	Professional judge alone	Separate government agency	2 lay judges
Composition of labour court	Professional judge + 2 lay judges	Professional judge + 2 lay judges only in certain types of complaint, mainly where discrimination is involved. Otherwise, professional judge alone.	4 lay judges Professional judge only if a tie at first merits hearing

Guide to interview data

In the following chapters in the quotes from interviewees, countries are denoted by GB (Great Britain), F (France) and G (Germany). In France and Germany, locations have been indicated. The German abbreviations are DO = Dortmund; MA= Mannheim; HAL = Halle; and B = Berlin.

EE refers to an employee lay judge; ER to an employer lay judge; and PJ to a professional judge.

5. FRANCE

French labour courts, known as *conseils de prud'hommes*, were created in the nineteenth century. Their main distinguishing characteristic is that the first instance merits hearing consists solely of lay judges; professional judges are only called in to adjudicate where the lay judges, whom we term '*conseillers*', are unable to reach agreement. This distinction has many consequences. In particular, it is reflected in the links maintained by the *conseillers*, on the one hand, with the legal field and the judicial system, and, on the other, with trade unions and the industrial relations system.²⁰ To understand their distinctive nature, we need to examine the history of the institution, how this type of court and the work of its judges is organised, the trade union framework in which labour courts operate, and finally the *conseillers* themselves, their status, social background and composition.

5.1. History and reforms of industrial tribunals (1806-2016)

Labour courts, as distinctive bodies based on the presence and involvement of lay judges, have a long history in France. The *conseils de prud'hommes* were created in 1806, some years after the French Revolution, which had abolished all intermediary bodies, and notably the *corporations* ['guilds']. Under the Ancien Régime, guilds were tasked with organising both the market for the products produced by guild members as well as labour relations within particular groups (Koepp and Kaplan, 1986). In 1806, under the Napoleonic *régime*, steps were taken to partially restore this guild-based approach by establishing the *conseils de prud'hommes* to act as a forum bringing employers and workers together to settle disputes in their professional field, with no involvement on the part of professional judges. The central idea was that conflicts originating in the workplace could be settled internally via discussions between the parties and above all without any intervention by the state. This is the conception of 'workplace justice' that developed over the course of the nineteenth and twentieth centuries, and which, in various ways, has persisted into the present day.

The question then was to decide how the judges sitting on these bodies should be appointed. During the nineteenth century, the idea took hold that they should represent (in the sense of political representation) both employees and employers. From the outset, therefore, French labour courts were characterised by the principle of having equal representation for each side ('*paritaire*' in French). This division between employer and employee members came to define how these tribunals were organised and undertook all their judicial work. The idea quickly emerged that the best method of representation would be via election. Numerous reforms were introduced on this issue between 1848 and the early twentieth century, with varying approaches in line with changes of *régime*. In 1907, however, the principle of election for both sides through a system of 'colleges' became firmly established. The same 1907 reform also granted the vote to women.²¹

The way in which these courts were organised remained broadly the same over the course of the twentieth century. In 1979, there was a major reform of the *conseils* that established the organisational arrangements of the court that broadly still stand today. As far as elections are concerned, the 1979 reform provided for a single ballot once every five years, using a system of list-

²⁰ On these questions, see Michel and Willemez (2008).

²¹ It should be borne in mind that in France, although universal suffrage was introduced in 1848 for political elections, at the time the Second Republic was founded, this universality only applied to men. It was not until 1944 that women were granted the right to vote in political elections.

based proportional voting. In terms of the court's activity, the reform divided each local court into five divisions [*sections*], with each adjudicating cases for particular trades and professions (see below). Before this, there had been a very high degree of diversity in how the *conseils* were organised, with the existence of divisions depending on the predominant activities within the labour market areas in which each local court was located.

The central feature of the reform was that the non-professional nature of the labour court system was reaffirmed, despite calls from some right-wing parliamentarians to professionalise labour courts in which professional judges would have been assisted by non-presiding judges (*assesseurs*), known in France as *échevins* ('aldermen').²² By contrast, the 1979 reform created the status of a labour court judge (the *conseiller*), with their own code of professional ethics and the option of undergoing training, to be organised, for employees, by the trade unions. Ultimately, the 1979 reform officially acknowledged the two-fold change that had taken place at grassroots level over the course of the twentieth century. Firstly, that the legal framework was playing an increasingly prominent role via the involvement of lawyers in cases and the fact that the Labour Code was becoming more and more detailed. And secondly, that trade unions and employer associations were playing an increasingly important role: *conseillers'* ties to these organisations, in which they were often members and even activists, were becoming ever closer and the organisations themselves tried ever harder to control the *conseillers*. The introduction of list-based voting in 1979 meant that trade unions acquired influence over these elections and the preparation of electoral lists, even though the law allows non-union lists to be put forward.

The *conseils de prud'hommes* therefore constitute an institution that is not only a key part of the traditional labour relations landscape in France, but also of the whole world of employment. For example, elections have long played a role in measuring the extent to which individual trade unions are representative, attracting a range of public commentary centred on the questions as to which union has obtained the best result and what is the balance of power between the unions and employer organisations. In public debate, therefore, attention is only directed at the role and status of *conseillers* at election times in an analysis of what American election sociologists have dubbed 'horse-race journalism'. This focus on elections has meant that the work of the *conseils* has a low profile in the media in terms of its adjudicative role, and then only in terms of its relationship with the industrial relations landscape rather than on matters of law and justice. This representation of *conseillers* is all the more problematic in that there has been a high and rising rate of abstention in elections since the mid-1980s. This reached 75 per cent in the 2008 elections in the employees' college (and almost 70% in the employers' college).

In addition to this high abstention rate, pressures were exerted on the *conseils* over the course of the 2000s and 2010s by the efforts of successive governments to relax the so-called constraints that employers claimed were a burden on their relationships with employees, in particular in terms of dismissal procedures. These prompted the implementation of an in-depth reform of the institution. Firstly, a law passed in August 2015 to promote 'growth and business' introduced some fairly substantial reforms to the industrial tribunal system, strengthening the *conseillers'* code of ethics, making the training courses offered at the French National School for the Judiciary (*École nationale*

²² Along the lines for example of commercial courts, children's courts or even courts of assizes, at which lay judges sit alongside professional judges who preside over these formations of the court.

de la magistrature' or ENM) compulsory, and assigning a more important role to professional judges (Willemez, 2015). The trade unions and the tribunal judges themselves were strongly opposed to this reform, insofar as it seemed to indicate a mistrust of the institution, was seen as being aimed at weakening the trade union influence on the labour court system, and also complicated the work of the *conseillers*. In interviews conducted for this study, the latter were invariably very critical of these reforms, some of which are, moreover, very difficult to implement for budget-related reasons.²³ Secondly, a decree passed in March 2016 replaced the election of tribunal judges by a system of organisational nomination, in which the number of judges to be nominated by each organisation would depend on an assessment of their relative importance (see below).

5.2 The court and how it is organised

The distinguishing characteristic of workplace justice in France is that it is dispensed by lay judges at the first merits hearing, with the exception of one specific moment: this is when the lay *conseillers* are unable to reach agreement and the case moves to a fresh hearing (*audience de départage*) at which a professional judge exercises a casting vote. For simplicity, we refer to the hearing as a 'tie-break hearing' and to the judge who has the casting vote (the *juge départiteur*) as the 'tie break judge'.²⁴ As a consequence, the notion of parity between the employer and employee colleges is intrinsic to the procedure and is evident at all stages of proceedings at French labour courts.

In France, labour courts hear only individual employment rights disputes. Collective disputes, on such issues as industrial action, union rights, or disagreements over a redundancy scheme, are heard by the court of first instance ('*tribunal de grande instance*') which is staffed by professional judges alone. The *conseils de prud'hommes* therefore hear disputes linked to working hours, holiday pay, disciplinary sanctions and, centrally, termination of employment. More than 90 per cent of cases heard by labour courts involve contested dismissals.²⁵ In the event of workplace discrimination, regardless of the ground, the employee can choose either to refer the matter to a labour court or initiate proceedings under criminal law by submitting a complaint to the public prosecutor or the police prosecutor,²⁶ whereupon the case will be heard by the criminal court ('*tribunal correctionnel*'), which is staffed by professional judges. Opting for a labour court is an irreversible decision and the case cannot be subsequently transferred to the criminal courts.²⁷

In total, the labour courts hear approximately 200,000 cases each year, with a slight decline since the 1990s. An interesting disconnect should be noted since 2008 between the trend in

²³ This is particularly the case as regards training at the ENM, which requires organising and delivering training for more than 14,000 people.

²⁴ At this juncture, we refer only to the proceedings as they existed prior to the 2016 law. This measure has put in place a procedure that in some cases allows an immediate transition to a tie-break hearing, and hence the introduction of a professional judge, and does not require waiting until the disagreement has been formally established. However, at the time interviews were conducted, this procedure had not yet been implemented.

²⁵ This is the case despite the scope for termination by mutual agreement, which has existed for some years and has reduced the prevalence of this type of dispute. On the statistics, see Guillonau and Serverin (2015).

²⁶ In France, discrimination in the workplace constitutes a breach of criminal law.

²⁷ Unfortunately, it is not possible to provide figures on discrimination, as this particular offence is not one of the statistical categories which the Ministry of Justice uses to monitor the activity of labour courts in France.

unemployment figures and the number of cases heard by the labour courts. This corresponds exactly to the introduction of termination by mutual agreement (*'rupture conventionnelle'*). This agreement is mainly financial in nature but it also normally includes an undertaking on the part of the employee not to contest the termination at a labour court. It should also be added that referring a case to a labour court is free of charge: in contrast to Great Britain, the issue of affordability does not therefore filter out some potential claims.

France is divided into 210 judicial districts, each of which has a labour court. The map of these courts does not entirely correspond to the judicial map, as the location of courts was historically based on labour market areas. This explains why, for example, there has always been a large number of labour courts in the industrial regions of northern France. Between 2008 and 2012, a rationalisation process was implemented that led to the abolition of labour courts deemed to be too small, and to mergers between others. Nevertheless, certain inequalities remain. While some are very large (such as Nanterre, with 240 *conseillers*, which manages disputes arising at La Défense, the largest concentration of businesses in France and with the most company head offices, others are quite small (such as Compiègne, in Picardy, with 20 *conseillers*). The largest is Paris, with 832 *conseillers*.

In a striking contrast to Great Britain and Germany, each of these labour courts is headed by a two-person team of lay judges, the president and the vice-president, who are either an employee or an employer. This is a revolving presidency, held in alternate years by an employee and an employer. This two-person team often remains the same for several years (the president in one year becoming vice-president the year after and *vice versa*). Their duties are substantial. Firstly, they represent the court *vis-à-vis* other institutions, be they judicial or otherwise; consequently, in small towns, these individuals become well-known 'notables'. Their internal status and position is also significant, however. The presidents engage in dialogue with the judicial authorities, provide feedback to the latter regarding needs and are the main interlocutors of the court registrars. Above all, they organise the court's work, appoint presiding judges and oversee the smooth functioning of the court. They have a strong physical presence at the court, which is far from being the case with all *conseillers*, and exercise general oversight and authority at the court.

Over and above this general system of organisation, the tribunal is structured into five divisions, most of which represent particular branches of employment: industry, commerce, miscellaneous activities,²⁸ agriculture, and supervision and management (*cadres*). The latter division does not cover any particular activities but rather corresponds to a social and occupational group. Its establishment was the outcome of lobbying by the main managerial trade union (the CGC). With the exception of this latter division, the arrangement of the court into different divisions is linked to one aspect of the legitimacy of the *conseillers*: their familiarity with the specific employment and occupational characteristics of that area and the nature of its employment relations, which enables them to deploy this knowledge to better understand the case.

5.3 Procedures and practices

In France, the process of dispute resolution unfolds in a number of stages, in which professional judges have very little involvement, with the exception of 'tie-break' hearings at which they deliver a

²⁸ Overall, this category brings together service industry activities that do not come under the heading of commerce.

casting vote if the *conseillers* have previously failed to reach agreement. Incidentally, as is the case throughout the French legal system, a party whose case is being heard can appeal. The case then moves to the Court of Appeal within the Social Chamber, composed solely of professional judges. In the event of a further disagreement, the Court of Appeal's judgement will be referred to the Supreme Court (*Cour de Cassation*), which constitutes the highest court in the French judicial system. This is organised into 'chambers' and it is therefore the Social Chamber of the Supreme Court that will hear the case in the last instance. As this research project is devoted only to courts of first instance, we shall limit ourselves to analysing the activity of the *conseillers*, supplemented by some information on the tie-break hearings and the professional judges that hear them.

Conciliation

When any complaint is submitted to a labour court, the first step is a mandatory conciliation hearing, at which a single *conseiller* will meet the two parties and endeavour to induce them engage in discussions and reach an agreement, so that the legal proceedings can be dropped. In reality, the conciliation process is usually extremely formal in nature, and does not involve negotiations: in 2013, the success rate of conciliation proceedings (the ratio of agreements reached to the number of cases submitted to labour courts) was 5.5 per cent. It should be noted that the laws reforming the court system have attempted to reassert the value of this aspect of the procedure. As yet, however, it is too soon to gauge the effects of this change.

There is a marked disparity, however, between this reality and the prevailing discourse in favour of greater use of conciliation, which is also to be found throughout the judicial system in France (for example, to resolve divorces or commercial disputes). This approach is based on an idealised model of the non-judicial settlement of employment rights conflicts, which, it is claimed, will save time and money not only for the parties concerned but also for the state. In France, the motivation for the non-judicial resolution of employment rights disputes, advocated in the early 1980s by socio-legal academics under the title of Alternative Dispute Resolution (ADR), is not, as in the USA, to cut the cost of access to dispute resolution for ordinary workers when compared with the judicial system. On the contrary, the aim has been to bypass the judicial system of the *conseils de prud'hommes*, which is often regarded by employers and free-market proponents as being too favourable to employees.²⁹

The hearing

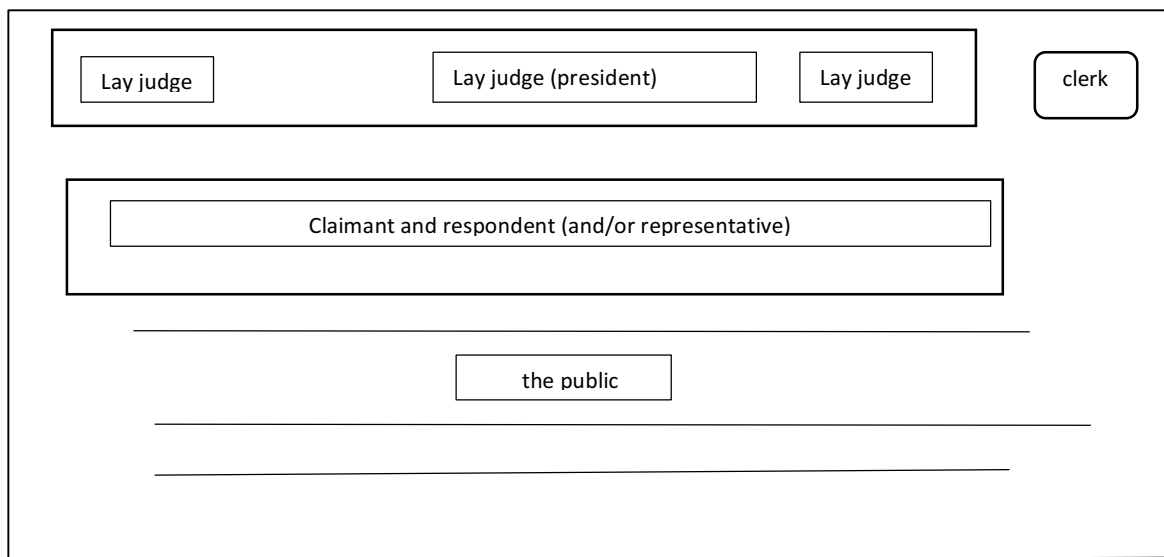
Once this first stage has been passed, and assuming there is no resolution, the dispute moves on to the hearing. As with all courts in France, such hearings are held in public. The adjudication panel (*bureau de jugement*), to use the term describing the body that will rule on the dispute, is made up of four *conseillers*, two employees and two employers: the principle of equal representation of both sides is thus retained throughout. One of the *conseillers* is the president. In addition to the adjudication panel, there is a court clerk (*greffier*), who is often a woman, and whose role is to assist the president in ensuring that the hearing proceeds smoothly. The president will call the cases on the roll, chair the sitting and be responsible for the 'proper conduct' of the hearing. During the hearing, the president is the most active of the *conseillers* and will put questions to the parties and manage the length of time each person may speak. This judge therefore plays an extremely important role and heavily influences the proceedings and potentially the opinions of the other

²⁹ The success rate for employees is c. 70 per cent.

conseillers. The latter may speak when the president gives them permission to do so: they also put questions to the parties. For their part, the parties are either present themselves or represented by either a barrister, an activist from the trade union or representative of an employer association, or by a family member. In recent decades, there has been a significant rise in the level of legal representation: this is particularly for employers, who seldom attend themselves. The principle is very different, however, for employees, who always attend, although they too are increasingly represented by a barrister. For some barristers who specialise in labour law, attendance at a labour court to defend employees is an almost daily task. Typically, lawyers who specialise in representing parties at labour courts are young and female. This question of the presence of lawyers is an important one because, as we show in Chapter 12 (on relations between professional judges and lay judges), these are often the only genuine law professionals that *conseillers* will encounter in the course of their work.

Sittings last for half a day (approximately 3 to 4 hours) and several cases (often around five) will be heard over this period. Each case lasts for between 30 minutes and an hour. A case starts with the employees' statements of claim being set out, then continues with questions put by the *conseiller* to the legal representatives and parties, if they are in attendance, and ends with the oral arguments put forward in turn by each party's lawyer, who submits their pleadings to the judges. The public gallery will include anyone with an interest in any of the cases being heard. The courtroom is often full at the start, but the numbers tend to dwindle as the hearings proceed.

Figure 5.1: Lay out of a hearing room in a conseils de prud'hommes



Urgent applications: an exception to the rule

'Urgent applications' are a special type of procedure unique to France. In situations of an urgent nature, where decisions need to be taken very quickly (for example, where a woman is being made redundant during maternity leave or if a dismissed employee has not been given a certificate of employment), the parties can refer the matter to a labour court in the form of an urgent application: in this case, there is no conciliation hearing, and the adjudication panel consists solely of two judges: one employee and one employer. The ruling must then be enforced very rapidly. It should be noted that some trade unions, such as the CGT, have advocated increased use of this procedure, which

shortens the proceedings and in many cases can quickly deliver a positive outcome for employees. However, few of our interviewees referred to this procedure in the field work for this research.

Deliberations

The four judges then meet to deliberate the matter. This deliberation does not usually take place immediately after the hearing due to a lack of time (it often ends late, either at lunch-time or in the evening), but fairly soon afterwards so that the case remains fresh in the judges' memory. The debates are led by the presiding judge who summarises the parties' questions and their statements of claim, and then consults each *conseiller* individually. The ways of working that then follow are very different but, as we shall show, often resemble forms of negotiation between employers and employees, within the framework of the necessary respect for the law. In reality, a tacit alliance is often evident between the representatives of each side, even if they do not belong to the same organisation. At times, these negotiations can be quite heated and adversarial: this is particularly the case where the court's recent history has been characterised by serious internal conflicts or when, on either side, there is intransigence or personal conflicts. One *conseiller* told us, for example:

The trade union debates are not always about ideas, and in fact you can form the impression that they are about personalities rather than ideas. So things get out of hand.... But it happens. And when they go beyond the bounds of the cases being heard, I try to focus people's attention back to the matter at hand... For example, I've heard many things said, because we're only a small community... *conseillers* can't be criticised on the basis of their family, their appearance or their trade union affiliations. You can criticise them for always defending the employee, but that's all (F10-Nantes-EE).

At such moments, the role played by the presiding judge is vital. They have to remind people not only to show respect for what is known as the 'proper conduct of the hearing', but also for the law, insofar as the decisions reached must be based on legal arguments. In contrast to the deliberations reported on in Great Britain and Germany, the process of deliberation in France is subject to very little formal supervision or regulation. As one industrial tribunal judge succinctly put it:

Deliberations are about applying the rules of law but including an element of discussion and negotiation, in order to arrive at a ruling that is consistent with the law but at the same time still incorporates an element of fairness (F21-Vers-Er).

In our interviews, *conseillers* often portrayed the representatives of the other side as troublemakers and the ones who prevented judgments being pronounced according to the law. Needless to say, the reality is much more complex. Furthermore, some cases do not give rise to any conflict (especially when they are quite clear in legal terms). And sometimes, depending on the local configurations and trade union alliances, some employees will opt to side with the employers.

Even so, one of the challenges involved in deliberations is to move beyond the bounds of these conflicts and negotiations to secure a ruling that will convince a majority of the judges, thus transcending the rivalries between the two sides, while at the same time adhering to the requirements of the law. If this is not achieved, the alternative is extremely harmful to the *conseillers*: a failure to agree will lead to the case being referred to a 'tie-break' hearing. And if the legal representatives or internal legal departments of the employers concerned believe that the law has not been complied with, the decision will be referred to the Court of Appeal, and the *conseillers* face the risk of being disavowed.

Drafting the judgement

Once the deliberations have been concluded, the decision has to be formalised in a judgment that will need to be drafted for publication. The judgment is drafted by the presiding judge, who is sometimes, though not often, accompanied by another *conseiller* (from the same side, or possibly even the same trade union should this situation arise).³⁰ And as we show further below, drafting the judgment is an important moment, encapsulating all of the challenges involved in rendering workplace justice in France: that is, the fact that justice, including the drafting of the judgment, is delivered by lay judges, not only in compliance with the spirit and letter of the law, but also reflecting the unique characteristics of the *conseils de prud'hommes* as a judicial system. First and foremost, the deliberations have to be translated into a text that is legally valid. Moreover, the judgment often serves an educational purpose: those drafting it frequently set themselves the goal of ensuring that the parties involved can understand the legal arguments being used. As one interviewee noted:

These are court rulings, not satirical tracts. We aren't going to work ourselves into a frenzy and start calling the bosses swines... and we need to show respect for the spirit of the deliberations too: we aren't going to introduce a different line of argument to reach the same result (F22Stras-Ee).

All interviewees emphasised how the judgement needed to combine the reality of the case facts with their legal interpretation. In French legalese this is known as '*motiver*' (motivating the arguments) and it lies at the heart of the legal syllogism, the bedrock on which French legal practice is built. This link between the law and the case facts, on which the judgment issued by the *conseillers* must be based, constitutes the principle underlying the very legitimacy and existence of the *conseils de prud'hommes* as an institution. All our interviewees emphasised this issue, which was manifested in the work of drafting the judgment.

As far as I'm concerned, drafting isn't a very complicated task, in fact it's the most interesting phase of the proceedings. If a judgement is well drafted, then it must have been successfully deliberated. If you've deliberated a matter properly, if you've clearly identified the arguments, if you've written them down... A good deliberation rests on the arguments that each person puts forward. Because each person argues a case from their own position. It's the individual arguments put forward that are interesting. We then have to square them with the law, and with the facts (F11Nant-Ee).

And it is on the basis of this judgment that the parties, or their lawyers, decide whether or not to appeal. Incidentally, it is important to note that rulings are often contested by the losing parties: over 60 per cent of cases heard by *conseils de prud'hommes* were referred to the Court of Appeal in 2013, compared to 19.2 per cent for rulings issued by the courts of first instance.³¹

³⁰ The court clerk (*greffier*) might help in correcting any errors of syntax and will proofread the judgment before it is issued. They may offer more assistance in the smaller labour courts. In general, however, *conseillers* do not ask for help and develop a pride in developing the ability to write judgments on their own, based on the training they receive from their nominating organisation.

³¹ Several explanations may be given for this, and in particular the fact that the employers who, as we shall see, often lose the case, see this as a way of extending the length of time involved (if only for financial reasons). The fact remains that this situation seriously undermines the legitimacy of French industrial tribunals.

The 'tie-break' hearing: a special case

As we have seen, one of the distinguishing characteristics of the *conseils de prud'hommes* relates to the absence of professional judges from the process, with the exception of one particular moment, which is important but essentially exceptional in nature: the need for a casting vote by a *juge départiteur* when the four *conseillers* conclude that it is impossible for them to reach agreement either on all or some aspects of the judgment. This happens in approximately 20 per cent of judgments. Professional judges are, therefore, absent from the court when four out of five judgments are pronounced, a fact that complicates comparisons with Germany and Great Britain.

These professional judges are usually district judges from the judicial district in which the labour court is located, often in courts of first instance specialising in other areas of law rather than employment. They will have followed the usual career paths for the judiciary in France: they embark on a career as a judge after passing the competitive entrance examination to attend the French National School for the Judiciary (ENM); they are then appointed to a position, and change jobs periodically (usually once every three or four years), with career mobility being understood in terms of geography (i.e. they change the place where they practise) or vocational specialisation (they change job, transfer from one type of dispute to another, one speciality to another, etc.). They therefore have a general competence to judge cases but do not necessarily know in advance what type of case and area of the law that they will be judging. Consequently, these judges are never experts in labour law when they take on the role of *juge départiteur*, which is not their 'core activity'. This lack of expertise is exacerbated by the fact that there is a declining incidence of labour law instruction at law faculties in France. According to all the interviews conducted with *juges départiteurs*, no training in labour law is provided at the ENM.

As we understand it, the duties of a *juge départiteur* take up little time during the working week: at Nantes, for example, the two *juges départiteurs* share one hearing per week, which means on average less than two hours per week spent at hearings for each of them.

At Nantes, there's one hearing per week, yet it's the largest labour court in the judicial district (...)
Also, it's a court that works very well, so only a tiny proportion of cases require a casting vote.
Firstly, half of the 2,300 new cases will not result in a judgment. And of the other half of these, we only see a very small proportion... in 2015, only 84 cases were referred to us for a decision. So that's only 84 times when the *conseillers* decided they couldn't reach agreement. That's not very many...
We issue three to four judgments per month (F0-6Nant-PJ).

This applies more or less at all *conseils de prud'hommes*. For example, in Strasbourg there are two judges who sit one afternoon per week, sometimes to deal with one case.

5.4 The *conseils de prud'hommes* in the field of industrial relations

Labour courts in France are heavily influenced by the industrial relations systems, insofar as this type of court appears to be an 'employment' rather than a judicial institution. In some of the literature, it has even been described as an institution that facilitates 'the institutionalisation of class conflict' (Couton, 2004: 329). Things are more complicated in reality, but it is impossible to understand the *conseils* as an institution without considering them against the background of two notable characteristics of the French industrial relations system: firstly trade union pluralism and inter-union competition; and secondly the complexity of the relationship between employers and employees, which is caught between a tradition of class struggle and the reality of dialogue with equal representation of both sides, the principle known at the *conseils* as *paritarisme*.

Pluralism and competition among unions in a context of a crisis of representation

The trade unions

Historically, in contrast to what has occurred in many other European countries, trade unionism in France has been built on a basis of diversity and competition. Due to a series of separations and splits, the French trade union landscape is highly fragmented, with the identities of the individual trade unions becoming increasingly entrenched, making mergers between these different organisations extremely difficult. Without rehearsing all of these splits, which constitute a significant chapter of the social history of France, throughout the first part of the twentieth century the *Confederation générale du travail* (CGT), which was the trade union close to the Communist Party from the 1920s onwards, was the only trade union of any real importance. While the 1930s saw the rise of Christian trade unionism (*Confederation française des travailleurs chrétiens* or CFTC), many of whose members and activists left in 1964 to set up the *Confederation française démocratique du travail* or CFDT, the CGT remained predominant. In 1948, the CGT suffered a split and part of it became *Force Ouvrière* (FO), made up of activists who believed that the CGT was too close to the Communist Party. Although FO is an extremely diverse trade union, it has found it hard to expand and remains strong only in certain professional circles. The CFDT managed to sustain itself in the 1970s by defending a position that was initially based on the principle of workers' self-management and subsequently tilted towards being more favourable to negotiations and social dialogue than the CGT. These three trade union confederations now dominate the union landscape: the CGT tends to challenge current labour policies and retains the position of being the largest trade union; in second place, the CFDT defends social dialogue and the possibility of forging agreements; both are well ahead of the FO, which, in the private sector, represents a small minority.

As far as managerial staff are concerned, several unions have been created, based on a corporative logic of defending their distinctive status: the main trade union for this group continues to be the *Confederation générale des cadres* (CGC), created in 1944. Both the CGT and the CFDT have also created managerial staff federations that endeavour to compete with the CGC.

This union landscape represents the site of an inter-organisational power struggle that is both ideological and institutional in nature. These trade unions adopt approaches that are often at odds with company-level industrial relations, especially around questions of employment flexibility and possible negotiations with the state and employer associations (Howell, 2009). At the same time, they also compete for the range of posts as employee representatives,³² including as *conseillers* in labour courts. As already noted, until 2008 employee-side *conseillers* were elected by all employees, and the election results provided an indication of the state of inter-union competition. In 2008, the CGT obtained 33 per cent of the votes, the CFDT 22 per cent, FO 16 per cent and the CFTC 8.9 per cent. Overall, this hierarchy and the gaps between the proportion of votes are found in all elections for representative posts. It should be noted, however, that the influence of the trade union that appears to take the most anti-establishment stance does not necessarily lead to conflictual approaches. There is sometimes a genuine paradox, whereby within companies and institutions the trade unions will join forces at local level to challenge or resist an employer, yet at the same time

³² There are numerous representative bodies at workplace level in France based on statutory rights, including works councils, staff representatives, and workplace trade union sections.

also embark on negotiations. The *conseils de prud'hommes* – especially during deliberations – constitute perfect illustrations of these multiple paradoxes.

The strength of the trade unions' presence in representative roles co-exists with a very low rate of unionisation: this stands at less than 10 overall, and is even lower in the private sector. This is one of the reasons behind the low turnout at elections and also explains the trade unions' inability to successfully contest the most recent reforms of the *conseils*, even though they saw these as an attack on the institution and hence too on trade unions themselves.

The employer associations

In the face of this diversity among the trade unions, employer associations like to highlight their unity, usually evidenced in the existence of a single list at elections to the *conseils*. The reality, however, is more complicated, given that these organisations do not have individual members. Their members are companies, and several organisations compete for their affiliation. The largest and most prominent employer organisation is the *Mouvement des entreprises de France* (Medef). However, there is also the *Confédération générale des petites et moyennes entreprises* (CGPME) and the *Union professionnelle des artisans* (UPA, which became U2P in 2014). However, while the presidents and vice-presidents of labour courts are usually 'activist' employers, this is less the case with the other employer *conseillers*, who are often managerial staff and are more keen to promote the interests of *management* than of Medef or the employers. In contrast to Germany, where there is a distinction between employer associations and trade associations, French employer organisations do not distinguish between these two functions.

New organisations have emerged since the start of the 2000s, structured around defending the 'social and solidarity economy', such cooperatives. These present themselves as harbingers of alternative methods of managing relationships with employees in the health, social and voluntary sectors or in cooperatives. They were all well supported at the latest *conseils* elections in 2002 and 2008, especially in the Miscellaneous Activities division. This has given rise to competition between employer organisations, especially in terms of defining what it means to be an employer. Moreover, employers operating in the social and solidarity economy are themselves caught up in complicated internal contradictions linked to their role as employers – a paradox that becomes apparent when they appear as *conseillers* at labour courts and are more willing to take the side of the employee *conseillers* when hearing cases.

Trials of strength and the principle of equal employer/employee representation

Industrial relations in France were seldom characterised by our interviewees in terms of a class struggle. Rather, relationships were presented more in the form of negotiation between 'social partners' who may have opposing interests but are also engaged in continuous, and never-ending, discussion. In France, workplace institutions, as with all the country's social institutions, are organised around the principle of equal representation for both sides, with the state acting as arbiter and organiser. On many national or occupational bodies, representatives of employers and the employees meet and need to reach agreement to regulate social and employment issues at the political level that are outside the scope of their interaction as 'capital' and 'labour' in workplace industrial relations or collective bargaining (for example on levels of unemployment benefit). Sometimes, disagreements occur, forcing the state to intervene. The *conseils de prud'hommes* may be regarded as one such parity-based institution, although the state is much less actively involved in organising and structuring the debates and negotiations between the two sides.

This is our understanding of the essence of the relationship between the representatives of employees and employers overlaying the specific to-and-fro of the conflicts and negotiations, discussions and disagreements between the two sides (see Chapter 12). Moreover, a further constraint complicates the situation: respect for the law.

Trade union activity in the legal field

The activity of the *conseils de prud'hommes* is also one element in a significant body of legal and judicial activity undertaken by the trade unions (slightly less in the case of employer associations). Since the late-nineteenth century, the trade unions have provided legal advice to employees, firstly within the framework of 'labour exchanges' (*Bourses du travail*), and subsequently in the context of legal advice centres organised by the local trade unions. In the 1920s, the CGT established its own legal journal, *Le droit ouvrier*, followed by another journal after the Second World War, which was less academic in nature and more focused on providing legal aid to activists, the *Revue pratique de droit sociale*. The CFDT and *Force Ouvrière* also now have their own legal journals, which are sent out to those activists with an interest in the law, be they *conseillers*, members of legal advice centres or those exercising the new role of 'organisational representative' (*'defenseur syndical'*) who may represent parties at *conseils de prud'hommes*. These journals play an important educational role and are also widely used as teaching aids in labour court training programmes (see below). The union confederations also have legal departments at national level responsible for producing these journals, monitoring legislation and case law, providing support with local legal and judicial action, and for maintaining relations with law professionals, especially the lawyers and professors of law who are sometimes ideologically close to their organisations.³³

Trade unions have many dealings with lawyers, including those who help run training events for *conseillers* but also as legal representatives for unions find themselves involved in legal action in other courts, especially the courts of first instance in cases where redundancy schemes have been challenged or in the event of industrial action. Some lawyers work only for trade unions, whether in connection with disputes at courts of first instance, labour courts or delivering trade union training.

This explains why employee-side *conseillers* often receive substantial support from their organisations and, although not law professionals, they enjoy the benefit of highly informed and competent legal assistance.

5.5 Status and sociology of lay labour court judges

There are 14,500 lay labour court judges France. Aside from studies into legal aspects linked to their status, there has been only little sociological research into their status and social characteristics, which we now review below. This is also intended to enable a better understanding of how they set about their judicial activity and how they view their role.

Status, code of ethics and indemnification

Although they are lay people, *conseillers* are regarded in French law as judges like any others, or almost so: they pass judgment 'in the name of the French people' and wear a distinctive token of their activity as judges – not a judge's robes but a medal that must be displayed, or at least on hand, when they are attending a hearing. Another distinctive feature compared to other members of the public is the fact that they take an oath as part of a ceremony held in the presence of the local

³³ See Willemez (2003).

judicial authorities. Wearing the medal and taking the oath both constitute rituals that establish them as judges and immediately turn them into actors in the judicial arena.

Even so, they cannot be described as judges like any others, given that, until a decree was passed in December 2016, they did not have their own code of professional ethics. This decree set up a commission responsible for ethics and discipline, tasked with compiling a code of ethics for *conseillers*. Up to that time, one of the only elements characterising their status (other than elements linked to jurisprudence) was protection against redundancy: *conseillers* are a protected category of employees, as are all workplace employee representatives.

As they are not professionals, *conseillers* do not receive a salary but are compensated. The form of compensation varies depending on the individual's employment status: if they are an employee and attend the labour court during working hours, they are paid by their employer, who is reimbursed by the state. If they are retired, or are an employer, or if they attend the court outside working hours, they receive a fee of €7.10 per hour. There is a scale showing the various activities, and the length of time involved: preparation for a case prior to the hearing should last no more than one hour, and writing up the judgement five hours. *Conseillers* receive payment based on time spent via self-declaration. These figures do not take account of the length of the hearing, which is added to the number of hours spent. Overall, this level of compensation does not provide much of an incentive to become a *conseiller*. Such incentives have to be looked for elsewhere (see Chapter 9).³⁴

Training for activity in labour courts is one element in a long history of trade union training. Trade union training, originally named 'workers' educational leave', was created in 1957 for the benefit of all union activists, not just *conseillers*. At the same time, labour institutes were set up within universities with the involvement of academics and the trade union movement (Tanguy, 2006). Trade union training outside these institutes is managed by union training bodies, which receive finance from the state for this. Training for *conseillers* is provided within this framework, at least up until a law passed in 2016 that introduced radical changes to the training regime.³⁵ Under the pre-2016 system, employees were eligible for six weeks' training during their term of office (previously five years). Part of this would take place at the beginning of the term of office and both unions and employer associations offered training syllabi, ranging from the basics (explaining the procedure, initial studies of the laws on dismissal, etc.) through to more detailed training on specific procedures (such as urgent applications) or more complex issues. These courses were delivered by activists from the *conseillers'* own organisation specialised in law, by lawyers, or by academics. Some interviewees mentioned the existence of training courses organised at level local by judges from other parts of the judicial system. These brought together both employee and employer *conseillers*. However, this situation is very rare, and differences exist not only between the training courses provided by the two sides, but even more so between the various trade unions themselves. In point of fact, training is not merely about passing on legal or judicial knowledge and know-how: its purpose is also to train trade unionists in how to be a *conseiller* and thus provides learners with a sense of the values and organisational culture that the union represents and defends (Ethuin and Yon, 2014).

³⁴ It should be noted that in France, since 1 January 2017, the minimum wage (SMIC) has been €9.76 per hour.

³⁵ This reform has not yet been implemented, and given the likely costs to the public purse, there are some reasons to question whether it will be implemented.

Industrial tribunal judges: a wide range of profiles

Conseillers come from a variety of social, educational and vocational backgrounds, although some general points can be noted from research carried out in 2006 (Michel and Willemez, 2008). It would be reasonable to assume that *conseillers'* social characteristics will not have changed substantially since that time, particularly given that the most recent elections were held in 2008.

Firstly, there is a very high degree of gender inequality among *conseillers*. Investigations show that almost 80 per cent of these judges are men, with a lower rate of female participation for employers than for employees. The explanation for this male dominance lies mainly in the fact that trade unionism and activity in employer associations are heavily dominated by men more generally. A law on equal representation passed in 2002 made it compulsory for equal numbers of men and women to appear on electoral lists at all elections, including those for the *conseils de prud'hommes*. Given that no studies have been conducted since 2008, it is difficult to be specific about the effects of this law. However, it is clear that this measure has not succeeded in eliminating the disparity between the numbers of men and women *conseillers*, even though it may have reduced it.

While *conseillers* are formally equal, there are some significant differences. In previous research (Michel and Willemez, 2008), it was found that more than 41 per cent of *conseillers* had either a first degree or post-graduate degree, with a significant difference between the two sides. Some 56 per cent of employer *conseillers* had a degree but only 27 per cent on the employee side. Some, both on the employer and employee side (in the management section) had degrees in labour law or worked with labour law in their day job, mainly in human resource departments. However, these are few in number. Many *conseillers* are, therefore, self-taught in matters of the law and come to the court with little legal knowledge and know-how. They acquire these skills via training and on an ongoing basis through their involvement in hearings, deliberations and drafting judgments.

A second basis for drawing a distinction between different *conseillers* is the volume and intensity of their presence at court. While many attend the institution relatively infrequently, others are there on a daily basis and keep the institution going (for example, by deputising for absent colleagues at hearings, and arranging cover). This latter category of *conseillers* has very specific characteristics: they are much more likely to be employee than employer *conseillers*, and consequently have time-off rights linked to their trade union activity that enable them to devote a great deal of time and effort to their work at the court. They may also be unemployed or retired. Nevertheless, whatever their employment status, they may be regarded as quasi-professional labour court judges, who are both highly skilled activists and legal experts and who, on account of their long experience on the *conseils*, have an in-depth knowledge of labour law, or at least those aspects of it most relevant to the work of the court, and in particular the law on termination of employment. These lay judges have no difficulty in managing their activities associated with the various organisations to which they belong, and seem able to juggle them with great virtuosity.

6. GERMANY

The social, employment, and legal order in Germany, and their interrelationships, is grounded in a number of institutional features that differentiate it, in some respects, from the other two countries in this study. One of the key differences is that freedom of occupation, freedom of association, judicial independence and the participation of lay judges, and the principle of free collective bargaining are all either directly constitutionally established or constitute positive rights derived from constitutional provisions. Two underlying constitutional principles are especially significant: firstly, the principle that Germany is a 'social state' (*Sozialstaatsprinzip*), and secondly that it is a state subject to the rule of law (*Rechtsstaatsprinzip*).

The Federal German constitution also provides for other rights that underpin the employment order and are fundamental in establishing a functioning labour market, namely freedom of contract and the freedom to establish and operate an undertaking. These principles in turn flow into aspects of the employment protection regime that have a direct bearing on the cases that come before the labour courts: these are, that employees should enjoy a high degree of protection from dismissal; that small firms can enjoy some exemption from these provisions; and that some categories of employee should be protected in all circumstances, irrespective of the size of their employer.

Three contextual conditions shape how conflicts arising out of the employment relationship emerge and are resolved in Germany: the overarching economic and social system, including its nature as a 'work-based society' (*Arbeitsgesellschaft*), industrial relations arrangements, and legal arrangements, including labour courts, established for resolving employment disputes. Despite concerns about growing employment precarity, Germany remains a society anchored in employment: in 2015, the employment rate in Germany was some 78 per cent, compared with an EU average of 70 per cent (Eurostat, 2016). Of the some 45 million economically active persons in Germany, 92 per cent are dependent employees, of whom four-fifths are covered by the social insurance system. Set against this, in 2017 just over 2.6 million individuals were registered as unemployed, a rate of 4.3 per cent, with a steady decline in the rate in recent years. Of those in employment, one in five are employed on so-called 'mini-jobs' that do not offer entitlement to many social security benefits.³⁶ This suggests a degree of dualism in the labour market between employment relationships that offer a reasonable basis for economic and social participation and more precarious forms of employment that threaten those affected with a range of difficulties over the longer term.

6.1 Key institutional features

A number of institutions serve to stabilise the German social and employment model.

Firstly, the social security system, including unemployment benefit, which continues to offer a comprehensive structure of social support both through the various stages of life but also the vicissitudes of the labour market; secondly, the system of industrial relations, including the right to free collective bargaining and statutory forms of company-level and workplace codetermination, underpinned since the beginning of 2015 by a national statutory minimum wage; and thirdly, the

³⁶ For example, they have no right to unemployment benefit. Although they claim sick pay from the employer, access to medical care, entitlement to which in Germany is via the employment relationship or through an eligible family member, is not available as of right but may be available if the employee is in another employment relationship that does confer such a right.

‘dual’ system of vocational training, which has played a significant role in maintaining a comparatively low rate of youth unemployment and in which employers play a central role.³⁷

There are a number of means for resolving legal disputes, both within workplaces, using statutory and voluntary options, as well as through the judicial system. However, there is no official conciliation or arbitration service.

Labour jurisdiction is one of five jurisdictions. Its role is to resolve individual and collective legal disputes arising out of the world of work using the resources and methods of the law. In this respect, labour courts are located at the interface between two major social systems – the law and work. They are part of the official administration of justice and are staffed by two groups of judges: professional judges, who must be formally qualified and entitled to adjudicate in German courts;³⁸ and lay judges (*ehrenamtliche Richter*) appointed from the ranks of employers and employees. ‘Ehrenamtlich’ denotes an office held ‘in honour’ – that is, not in return for an emolument. These judges, sitting together, adjudicate disputes brought before them under German and EU law, guided by the case law of the Federal Labour Court, the highest court in the jurisdiction. The object of their decision-making is supplied by the world of work. In this sense, the activity of the labour courts reflects, with the delays customary in systems of law, the conflicts between the actors in the employment system. In turn, court decisions feed back into these actors’ understanding of the law and the actions of workplace and organisational actors (trade unions and employer associations) generating a mutual interaction between the systems of law and work. There is also an institutional relationship between the industrial relations system and labour courts, which we outline below and explore in further detail in subsequent sections.

Over the past 25 years, industrial relations in Germany have undergone a transition from an order characterised by social partnership, stable and free collective bargaining with extensive coverage by industry-level agreements, workplace and company-level codetermination, and a low level of strike activity to an increasingly flexible and deregulated set of arrangements exhibiting some of the features of a post-Fordist and post-Keynesian model (Streeck, 2008). Under the unique circumstances of German unification together with the wider effects of globalisation on employers and labour markets, dependent employment in Germany has lost coherence and continuity. Despite high employment and much reduced unemployment rates, many individuals have been excluded from the prospect of long-term employment offering a reasonable and secure standard of life. None the less, the fact that the labour market has continued to perform well is one possible explanation for the fact that the number of complaints registered at labour courts has declined since 2003.

³⁷ Under the Federal Labour Courts Act (*Arbeitsgerichtsgesetz*), disputes between trainees and training employers can be dealt with by special committees of equal numbers of employer and employee representatives. If the dispute cannot be resolved by this body, a complaint can be lodged at a labour court.

³⁸ This requires a four-year period of study in law at recognised law faculty, unless the requirement can be met in a shorter period; as well as modules in various areas of the law, candidates must also study a foreign language. After four to five years, students will conclude their university studies with a first in exam in law (*erste juristische Prüfung*). In order to gain access to the regulated legal professions of judges, lawyers, notaries and prosecutors they have to pass through a subsequent period of two years in courts and administrations (*“Vorbereitungsdienst”* or *“Referendariat”*), preparing them for the second exam, the *‘Zweite Staatsprüfung’*, which entitles them to sit as judges, and ultimately, together with very good or good marks, opens the way to a judge position. Thus, total study and training time is at least six years and normally seven.

German labour courts as specialist forums for resolving individual and collective employment disputes have existed in their current form since the Weimar Republic (1919-1933) but date back further to the late-nineteenth century. They operate with a clearly-stated mission to resolve disputes amicably through voluntary settlement wherever possible. Their composition, with professional judges and lay judges from the ranks of employers and employees, reflects both a desire that they should function in close proximity to the world of work and a recognition that capital and labour have differing interests. The aspiration to promote conciliated settlements is reflected in the obligation on professional judges, often in conjunction with lay judges, to arrive at an amicable resolution preferably before but also during the course of a full hearing. The mandatory conciliation hearing held before the main hearing involves the professional judge only. Our interviews with labour court judges, which in some respects offer insights into the inner world of the court, suggest a collegial decision-making forum that seeks to take account both of life as lived and workplace experience as well as the requirements of the law.

6.2 Employment developments, industrial relations and labour law in Germany

Work-related conflicts are subject to three systemic contextual conditions: industrial relations, economic and social institutions, and the legal system. While the state of industrial relations and economic and social institutions can temper or intensify conflicts, the courts serve to resolve them. The most significant of the three, in terms of direct and quantitative significance, is the industrial relations system. Active conflict is not a major feature of employment relationships, however, and even when these do experience conflict, only a small share end up before the courts.

Employment developments

Labour courts in Germany deal with virtually all conflicts, individual and collective, arising out of employment relationships. The vast bulk of these are individual legal disputes between employers and employees, with a much smaller proportion accounted for by collective disputes related to the rights and status of works councils, board-level codetermination, and collective bargaining.

Some impression of the potential volume and type of employment disputes can be gleaned from the statistics for dependent employment. Following several years of modest but positive economic growth, the total number of economically active persons in Germany rose from 41.5 million in spring 2012 to 43.7 million by the third quarter of 2016, an employment rate of 78 per cent. Of these, some 90 per cent were dependent employees. The number of self-employed people and family workers also rose over the past decade from 4 million to 4.3 million. This generally positive picture needs to be set against several problematic developments that might influence how actors engage in or deal with conflicts, and which therefore constitute a significant contextual factor for the present study. One such factor is that the number of fully insurable posts is around a fifth lower than the total number of employees.³⁹ In June 2016, some 32 million employees were in such insurable employment. The gap is accounted for by some 7.5 million employees working in low-paid non-insurable part-time posts, known as 'mini-jobs'. Of these, 4.9 million people work solely in such roles and 2.6 million in low-paid second jobs alongside other employment. Associated with this is the emergence of a low-wage sector, which has created problems in the short term for ensuring adequate incomes for workers and in the longer terms for sustaining the social security system

³⁹ As a 'conservative' welfare model, the German social security system is largely financed by employer and employee deductions from pay. Eligibility therefore depends on whether an individual is in, or has been in, insurable employment. This contrasts with systems in which benefits are financed from general taxation.

(Kalina and Weinkopf, 2012). The introduction of a national statutory minimum wage from 1 January 2015, currently €8.84 (2017), has mitigated but not resolved this problem.

The prevailing quality of employment relationships is also an important factor in employment-related disputes. As elsewhere, Germany has experienced major changes in what in the 1970s and 1980s were seen as 'normal' employment relationships. Although indefinite employment contracts continue to account for most dependent employment, internal and external flexibilisation and the 'debordering' of work have grown in importance (Eichhorst, 2015). This has manifested itself in three major forms in which employment relationships have departed from the standard of indefinite and full-time contracts: fixed-term contracts, part-time work, and, in some branches, outsourcing to either genuine or bogus self-employed workers, sometimes dubbed 'freelance associates'. As far as fixed-term contracts are concerned, official statistics do not, at first glance, reveal the real extent of such contracts. In 2015, official statistics indicated that these accounted for 8.4 per cent of total employment. However, this relates to the number of employees (as a percentage of the whole), not the number of employment contracts and therefore fails to take account of the fact that the same person might frequently switch contracts. Secondly, official statistics only include employees aged over 25, excluding the many trainees who transfer into employment initially on fixed-term contracts. Thirdly, the proportion of employees aged between 25 and 34 on fixed-term contracts is 18 per cent, more than double the share for the workforce as a whole. This suggests that the significance of fixed-term contracts is much greater for current fresh recruitment. Currently, 44 per cent of new hires are on fixed-term contracts, with considerable differences between branches. For example, the proportion of new hires on fixed-term contracts stood at almost four-fifths (78 per cent) in education, 60 per cent in public administration, and 54 per cent in health and social care.

The distinction between full-time and part-time work is also of relevance for the incidence of disputes and complaints registered at labour courts. Part-time work has risen steadily in Germany in recent years, accounting for 27 per cent of all employees in 2014 and unevenly divided between women (47 per cent of all female employees) and men (9 per cent). Whether part-time work is freely chosen is a major factor. In 2014, 13 per cent of female part-time workers and 24 per cent of male indicated that they had not freely chosen part-time work.

For the third problem area, the status of 'freelance associates' engaged in project work, some indication of the perceived scale of the problem can be gleaned from the fact that the government has drafted legislation to curb the abuse of contracts portrayed as 'contracts for service' – that is, free-lance work – but which, in fact, are really employment contracts or agency work. This phenomenon has also become associated with new forms of work in the digital economy and the associated problems for employees' status and rights (Matiaske and Czaya, 2016).

6.3 Industrial relations – 'conflictual partnership'

Free collective bargaining and codetermination at workplace and company level constitute core institutional achievements that were reflected in the constitution of the Weimar Republic and, since 1949, of the Federal Republic. In the 'classic' form of German industrial relations, employee interests are represented through a 'dual' system of works councils in workplaces and collective bargaining between trade unions and employer associations at industry level. Distributional conflicts are channelled into and regulated by collective agreements, of which there are several thousand, at a variety of levels (industry, company). However, this framework has been subject to a steady process of erosion in recent years.

Directly elected works councils represent the whole workforce in an 'establishment' (*Betrieb*), except senior managers. An establishment is defined as an economic entity, and a large company might embrace many such workplaces. Each has its own works council, and there is a tiered system in which works councils within large firms appoint higher level representatives, broadly matching managerial levels. Works councils are not mandatory, but once constituted they are entitled to be informed and consulted by management and, on some issues, to engage in joint decision-making ('codetermination'). Labour courts are often called on to adjudicate disputes between works councils and management over the exercise of these rights. Works councils may conclude 'workplace agreements' on specified issues, such as 'social plans' to mitigate the impact of organisational and business changes and other issues subject to codetermination (social facilities, arranging working hours, health and safety). However, they may not strike. And unless permitted by collective agreement, or where a collective agreement has not definitively regulated an issue, works councils may not bargain on pay or other basic terms. Most works council members are trade unionists (64 per cent), and this certainly applies to works council chairs, 74 per cent of whom are members of a DGB-affiliated union. Some 75 per cent are men (Stettes, 2015).

There are statutory rights to time off, based on a formula linking time off to establishment size (an establishment with 1,000 employees will have three full-time works councillors, for instance). As well as representing their own workplace colleagues, such individuals will typically be integrated into trade union structures, often sitting on the wage bargaining committees that negotiate at industry level. There is, therefore, a cadre of employee representatives in Germany who both exercise statutory representative functions, with a strong orientation to the law, and are also engaged in collective bargaining in a relationship with employers classically dubbed a 'conflictual partnership' (Müller-Jentsch, 1993). As we note further below, this group appears to constitute the background for many employee lay judges and represents a distinctly German version of the 'career' profile of an employee representative.

Trade unions in Germany do not have a statutory right to bargain but do enjoy a legal monopoly of the right to conclude collective agreements. Negotiations are conducted between industry level unions and employer associations but also increasingly with individual employers. Although most union members are in trade unions affiliated to the main union centre, the DGB, recent years have seen the emergence of independent unions for occupations such as airline pilots or train drivers. These organisations must be taken into account when lay judges are appointed.

One of the most significant changes in terms of the overall arrangements for dealing with conflicts and disputes has been the weakening of these collective organisations in recent years. Three factors are particularly noteworthy: falling trade union and employer organisational density; the associated reduction in collective bargaining coverage; and the declining importance of workplace codetermination via works councils.

Since German unification in 1989/1990, which briefly boosted trade union density to just under 40 per cent, the level of union membership has halved and now accounts for some 20 per cent of the workforce (Groll, 2014). The main union centre, the DGB, recorded a fall in membership from 6.78 million members in 2005 to 6.1 million by 2015, some 10 per cent. However, since a low point in 2006, this downward trend has been partly reversed. According to the employer-affiliated economic research institute IdW, trade union density had recovered to 21 per cent by 2015 (Anders et al., 2015: 23). The proportion of employees covered by an industry-level or company collective

agreement has fallen from 76 per cent in 1998 to 60 per cent by 2015. In 2015, collective agreements covered 33 per cent of establishments. There are substantial differences in coverage between West and East Germany, where the corresponding figures were 47 per cent and 20 per cent in late-2013.

There has also been a steady decline in the number of workplaces with a works council. In 2015, 41 per cent of all private sector employees were employed in establishments with a works council (Ellguth and Kohaut, 2016), again with a gulf between West and East Germany. While just 33 per cent of employees in the East work in establishments with a works council (a fall from 43 per cent in 1996), the proportion in West Germany is 42 per cent (down from 51 per cent in 1996) (ibid: 288).

6.4 The court system and the administration of justice

Judicial power in Germany is exercised by professional and lay judges. Lay judges sit as decision-makers in all five branches of the judiciary: that is, 'ordinary jurisdiction' (civil, family and criminal), and the administrative, financial, labour and social jurisdictions. Lay judges may only sit where this is expressly stipulated by statute and subject to certain preconditions. Provided this is the case, lay judges are entitled to sit in court proceedings as fully competent decision-makers. Acting alongside legally-qualified professional judges, lay judges continue to be viewed as an indispensable element in the administration of justice by virtue of their proximity to everyday life, the range of their social positions and origins, and the fact that they are held to contribute to the fairness and legitimacy of court proceedings. They are also an institutionalised expression of the continued commitment of trade unions and employer associations to social partnership.

As far as judicial independence and decision-making power are concerned, lay judges enjoy the same status as professional judges and are protected by a number of statutory provisions. For example, lay judges may not be obstructed or suffer a detriment in taking up and exercising their role. During their period of office, they must be released as required by their employer. Any termination of employment on grounds of assuming or exercising their office is unlawful.

In January 2014, there were some 100,000 lay judges in Germany. The largest single group, 37,000, were 'senior magistrates' (*Hauptschöffen*) who sit with professional judges in first and second instance criminal courts. The second largest group, 24,269 in all, are lay judges in labour courts constituted at *Land* (regional) level, that is first and second instance.

6.5 Labour courts

The labour jurisdiction, one of the five jurisdictions expressly provided for in the constitution, is responsible for both individual and collective disputes instigated by or against employees, and in theory, therefore, theoretically encompasses some 39 million individuals. 'Established civil servants', known as *Beamte*, are expressly excluded from the jurisdiction of the labour courts.⁴⁰

⁴⁰ The status of 'Beamte' includes civil servants working in state administrations at Federal, *Land* and local authority level, and in other areas of public administration, such as the social security system. It can include categories such as teachers, firefighters and formerly some train drivers, although the status is increased confined to public administration. There are some 1.7 million *Beamte* in all. Their terms and conditions are set by statute and, in the event of a dispute, they must submit a complaint to an administrative court.

General

There are three instances within the German labour jurisdiction. Labour courts (*Arbeitsgerichte*), of which there were 110 in 2015, represent the first instance; *Land* labour courts (*Landesarbeitsgerichte*), of which there are 18, are the second instance and the first court of appeal; the Federal Labour Court (*Bundesarbeitsgericht*), located in Erfurt, is the final court of appeal within this jurisdiction.⁴¹ All labour courts except the Federal Labour Court are the responsibility of the 16 constituent *Länder* of the Federal Republic. In 2015, there were 1,011 professional judges in the labour court system, with women accounting for some 35 per cent. Although the labour jurisdiction is much closer in terms of procedural guidelines and operations to the civil courts than to the other three public law branches (finance, social and administrative), it is wholly independent of these. There are two types of procedure. By far the most common is the 'judgment procedure' (*Urteilsverfahren*), which deals primarily with individual rights disputes between employees and employers (termination of contract, the validity of time limits on fixed-term contracts, payments and like). The 'decision procedure' (*Beschlussverfahren*) deals with collective legal disputes (mainly related to the legislation on works councils, codetermination, collective bargaining and collective agreements). In 2015, there were 374,095 judgment procedures and 12,324 decision procedures, with the latter accounting for just 3 per cent of all procedures before the labour courts.

Lay judges sit at all three levels of the labour court system. Each chamber of a first-instance labour court or *Land* labour court comprises a chair (the professional judge) and two lay judges, one from the employer side and one from the employee side. In theory – and on occasions too in practice – the two lay judges can outvote the professional judge. Lay judges are a minority only in the chambers (*Senate*) of the Federal Labour Court, where three professional judges sit alongside two lay judges.

Lay judges do not participate in the mandatory conciliation proceedings held before a full hearing and that are intended to promote an amicable settlement. These are chaired by a professional judge.

Taking a case to a labour court costs less than bringing proceedings before a civil court. As well as lower court fees, there is no requirement on the parties to pay money into the court in advance. Legal aid is also available, subject to income thresholds. One of the notable features of labour courts is accessibility, the relative informality of the proceedings, lower costs when compared with other civil courts, and the absence of a requirement to pay costs into court in advance. One aspect of easier accessibility is the fact the parties can represent themselves but can also choose to be represented by a lawyer or someone else they mandate, such as a legally qualified employee of the trade union legal protection service or a similar individual from an employer association.

One aspect of the lower costs associated with labour courts is that, in contrast to the usual civil court procedure, the winning party is not entitled to have their legal costs reimbursed.

While an appeal (*Berufung*) to the *Land* labour court entails rehearing the case on both fact and law, the Federal Labour Court hears appeals from *Land* labour courts on matters of law only. The precondition for such an appeal (*Revision*) is that it has been allowed in the judgment of a *Land*

⁴¹ The Federal Constitutional Court has, on occasions, examined whether a statute is consistent with the Basic Law, most significantly the Codetermination Act 1976.

labour court or – very infrequently – that permission has been granted by the Federal Labour Court following a successful application to it against a refusal by a *Land* labour court.

Lay judges are involved in organising the business of the labour courts, although not to the same degree as in France. This takes the form of a lay judge committee, with equal numbers of employer and employee members, to be established at all labour courts with more than one chamber. The committee must have at least three members from each side and is elected by the lay members, with separate elections for employer and employee representatives.⁴² The committee must be consulted over the organisation of the hearing schedule, and the allocation of lay judges to chambers and cases. It can also transmit any wishes expressed by lay judges to the president of the court, a professional judge, or its senior administrators. Meetings are occasionally attended by ‘supervisory judges’,⁴³ for example in connection with training events for lay judges. The president of the court will also provide information on court statistics and quality assurance issues.

The actors

Court proceedings create space for action and communication by several actors, each of which exercises differing roles depending on their assigned function under the law. Common to all German court proceedings is the leading role of the presiding judge, who must always be a professional judge. Appointment to this status follows a prescribed route of formalised assessment. There are no courts that are wholly lay in composition, in contrast to British magistrates’ courts or French *conseils de prud’hommes*. The only opportunity for lay individuals to sit alone in a quasi-judicial setting is in arbitration and conciliation procedures under civil law that offer opportunities to resolve disputes between individuals, often in an immediate locality, before a dispute reaches the courts.

The leading role of the professional judge also applies in mixed tribunals such as labour courts, in which lay members share in decision-making with the same powers as the presiding judge. Proceedings are managed by the professional judge in line with the Code of Civil Procedure. Judgments are written by the presiding judge and the formal record of the judgment is signed by them and the lay members.

The parties in a ‘judgment procedure’ will typically be employees and employers. As a rule, employees lodge complaints and employer are respondents. Trade unions and employer associations may also appear as parties. The right to appear as a litigant in person is confined to the first instance. Parties must be legally represented before a *Land* labour court or the Federal Labour Court. In addition to the parties to the case and witnesses proposed by the parties and formally invited by the court, in the ‘decision procedure’ the presiding judge may also call witnesses and experts.

Notable features of German labour courts

German labour courts share some features with the institutions for resolving legal disputes in France and Great Britain but also exhibit differences. What all three have in common is the involvement of lay people as non-professional judges in labour court proceedings. One of the notable differences with Great Britain and France is that labour courts are competent to hear all disputes arising out of the employment relationship outside of the public sector, both individual and collective.

⁴² The committee in Berlin, where we conducted interviews, is a large one with six members on each side.

⁴³ These are judges who are assigned administrative and training roles.

As far as procedural requirements and the allocation of judicial roles are concerned, the ‘judgment procedure’ within a labour court is, in essence, a civil procedure in which the proceedings are governed by the requirement that it is the *parties* who are required to adduce arguments and facts. The course of the proceedings is subject to the will of the parties, who are at liberty to terminate the procedure either by withdrawing the complaint, acceding to it, or reaching a settlement. Although the court provides indications as to how applications should be expressed or what forms of evidence might be required, the court does not conduct an examination of the issue. The presiding judge dominates the procedure but has no authority over the facts, which are submitted by the parties. Aside from efforts to secure an amicable agreement, the court’s role is confined to that of coming to a legal appreciation of the matter put before it. As in the civil courts, the procedure is adversarial with claim and counter-claim, drawing on evidence where appropriate. There is no cross-examination in the form experienced in British courts. Evidence is taken from witnesses by the presiding judge, with the parties having a right to pose questions but only via the presiding judge.

6.6 Nominations, selecting and appointing lay judges in German labour courts

The question as *who* becomes a lay judge in a German labour court and *how* has two aspects: one concerned with the law in abstract and the other the law as practised in terms of the operation of selection mechanisms. This latter aspect was investigated for the current research project by means of expert interviews with officials responsible for appointing lay judges in the corresponding agencies in Berlin, Düsseldorf, Halle an der Saale, and Stuttgart. In addition, interviews were conducted with members of the lay judges’ committee at the Berlin labour court.

The legal and personal prerequisites for appointment as a lay judge.

The Labour Courts Act (*Arbeitsgerichtsgesetz, ArbGG*) sets out only the basic requirements for nominating, selecting and appointing individuals to the role of lay judge, with some scope for official discretion on how it is applied in practice. As might be expected in a federal structure such as Germany, practice can be quite diverse. From a sociology of law perspective, one interesting facet is what takes place in the local level micro-spaces where the law is applied. Interviews with the actors involved enabled us to ascertain a number of features of the interactions between administrators, trade unions and employer associations, and judges as far as the selection of lay judges is concerned.

Unlike the lists prepared by local authorities for appointing magistrates (*Schöffen*) in the German sense in the criminal justice system, which are required to reflect all groups in the population in terms of sex, age, occupation, and social position, appointment as a lay judge to a labour court is based on the principle that these should represent the world of work.

Employees and employers may be appointed as lay judges provided they have reached the age of 25 and live or work in the administrative district (*Bezirk*) covered by the labour court. Moving out the district is a fairly common reason for losing office as a lay judge. Individuals who have been convicted of offences carrying a custodial sentence of more than six months or facing trial on such offences may not be appointed. Only those who enjoy the right to vote in elections to the Lower House of the German Parliament, the *Bundestag*, may be appointed. The criteria for such entitlement is being a German citizen and at least 18 years of age, being resident in Germany for at least three months, and not being excluded from the right to vote. One effect of these limitations is to exclude some 7.5 million economically active individuals born overseas from serving as lay judges in labour courts.

Reaching usual retirement age does not automatically entail loss of office as a lay judge. Should a lay judge lose their status as an employee or employer as a result of retirement, release from office can only take place if the individual concerned makes such an application. If an individual opts not to do this, they may continue to sit until their five-year period of office expires. In theory, this would currently allow someone aged 65 who had recently taken up or renewed the office of lay judge to continue in office until they were just over 70. In the future, this would rise in line with rises in retirement age (for example, 67 from 2031, and hence up to the age of 72).

In contrast to employee lay judges, under certain circumstances those from the employer side can continue in office without any age limitation. The precondition is that they have not been part of the social security system and are not, as a consequence, subject to the constraint of reaching 'pensionable age', provided they continue to retain the status of 'employer'. Our interviews indicated that some employer lay judges continued in office into their seventh or eighth decades. Employer lay judges are rarely 'entrepreneurs' in the conventional understanding of the term – that is, independent businesspeople with employees. Rather, the overwhelming majority work in establishments and exercise employer responsibilities, such as chief executives, operations managers, and senior human resource professionals. Just as unemployment is not an obstacle to being appointed as a lay judge for employees, so the fact that an employer does not have employees either temporarily or at certain times of the year does not preclude appointment for an employer.

From a sociological standpoint, one consideration will be how these abstract statutory criteria and characteristics are translated into social reality through the appointment process. Previous research and our own expert interviews with officials responsible for the selection and appointment of lay judges suggest that selection does not mirror the composition of the local workforce. This can be seen in the gender balance, for example, although the imbalance favouring men is less marked than 40 years ago. Similarly, the above-average age profile of lay judges noted in research conducted in 1978 may have been partly reversed, but certainly not removed. Interviews conducted for the current research project also indicated that public sector employees were over-represented.

Lay judges are appointed for five years, with possibility of renewal. It is possible to refuse re-appointment or resign from the office for various reasons, subject to judicial approval, such as reaching normal retirement age, on health grounds, that the exercise of the office might impose an unreasonable burden or make it difficult for them to care for their family or any other important reason, where the individual has held office as a lay judge for 10 years preceding their further appointment. Our interviews suggested that many lay judges continued to hold office for three or four successive five-year periods.

How are lay judges appointed: preliminaries, nominations, checks

The appointment of lay judges to German lay courts is the culmination of processes involving a range of actors. Appointment itself is carried out by the official department assigned this responsibility at *Land* level. This competent body can be the *Land* government itself, a *Land* ministry or a body empowered through a statutory instrument, such as the *Land* labour court. Practice varies. In Baden-Württemberg, for example, appointments to local labour courts and the *Land* labour court are the responsibility of the President of the *Land* labour court. A similar delegation of authority to the *Land* labour court also applies in Saxony-Anhalt. In North Rhine Westphalia, lay judges for all local labour courts and the three *Land* labour courts in the state are appointed and supported by a department based at the Düsseldorf *Land* labour court. Berlin and Bavaria are now the only *Länder*

in which lay judges are appointed by ministries with social responsibilities: in Bavaria, this is the *Land* Labour and Social Ministry and in Berlin the Department for Employment, Integration and Women. In Berlin, the relevant department is led by a former presiding judge at a labour court.

a) *The right to submit proposals: trade unions, employer associations and public authorities.*

The selection of lay judges begins with the submission of nominations by organisations represented in the respective *Land*: organisations entitled to present nominations are trade unions, other independent employee organisations with social or professional aims, employer associations, and certain public bodies (as employers) or their associations. Entitlement to submit nominations is not in the gift of any organisation of employers or employees, or a public body. This would breach the principle of the 'lawful judge' (*der gesetzliche Richter*), as derived from Art. 101 (1:2) of the Basic Law. This specifies that 'No one may be removed from the jurisdiction of their lawful judge', a principle that is interpreted as meaning that every citizen is entitled to be heard by judges that are appointed for their case in advance and independently of the executive. Only organisations of the type noted above that have been checked and authorised by the judicial or labour authorities or the body responsible for appointing lay judges at *Land* level may lawfully submit nominations. Submitting nominations is, therefore, an important preliminary process, but one which is not specified in the Labour Courts Act and remains veiled behind a number of somewhat ambiguous legal concepts. The law requires that lay judges are to be 'drawn from lists of nominations in an appropriate proportion that reflects fair regard for minorities'. In fact, this somewhat anodyne instruction is the trigger for an extensive and rigorous programme in which the appointing authority examines the standing of potential nominating organisations in line with two criteria. 'Minorities' here is not understood as 'social minorities', such as minority ethnic groups, but rather small organisations.

In qualitative terms, the authority needs to establish whether trade unions, employer associations and relevant public bodies and their associations meet the legal requirements for their claimed status. This is usually unproblematic for established unions. However, trade unions can be and are regularly asked to submit membership numbers to establish their relative strength within the broader population of eligible organisations. The position is different for new employee or employer organisations or those that have undergone change. In such cases, the authorities will examine the constitutions or other relevant documentation to ensure that the organisations are what they claim to be. For trade unions, this will involve a minimum capacity to embark on collective bargaining and, if necessary, exert pressure on an employer. Although such checks might not adhere to the precise letter of the requirements set down in the relevant judgments of the Federal Labour Court, which specify when an organisation can be regarded as a legitimate trade union with the capacity to conclude collective agreements (*Tariffähigkeit*), 'they must demonstrate some clout', as one of our expert interviewees commented. In the large *Länder*, such as Bavaria or North Rhine Westphalia, this examination will also consider any spatial limitations to an organisation's reach based on its location and constitution. In checking whether organisations meet the requirements, appointing authorities in ministries or *Land* labour courts will exchange information with administrative bodies in other jurisdictions or *Länder* engaged in similar work.

Potentially eligible organisation will run to several dozen in each *Land*, displaying a high degree of institutional pluralism that extends beyond the usual parties involved in collective bargaining. As well as the regional branches of trade unions affiliated to the DGB, the main union centre, registered employer organisations include the German Civil Servants Federation (Deutscher Beamtenbund,

DBB), regional branches of the German Journalists Union (DJV), the Marburger Bund (a trade union for physicians), the German Surveyors' Union, and the pilots' union, Vereinigung Cockpit. For the employers, in addition to branch-level employer associations, eligible organisations also include local authority federations, social security bodies, regional sickness fund associations, ministries, occupational chambers (small firms and handicrafts, dentists), guilds, churches, welfare associations, hospitals, and charitable foundations.

The second criterion is *quantitative*. The statute requires that lay judges are to be 'drawn from lists of nominations in an appropriate proportion that reflects fair regard for minorities'. 'Appropriate' is based on consideration of the relative numerical strength of each organisation within the totality of employer and employee organisations in each *Land*. This can entail an assessment of the importance of any particular organisation within the district covered by that labour court. The usual benchmark is the number of members in a trade union or association. In sheer quantitative terms, the DGB and, some way behind, the DBB account for by far the largest number of nominations. For the employers, a few large associations encompass together many large firms. Without a requirement to have regard for 'minorities', the right to submit nominations would de facto be the exclusive prerogative of a few large organisations.

b) Requesting nominations

Once the eligibility of organisations has been checked, including membership numbers and hence proportional entitlement to lay judges seats, the appointing authority can carry out a fairly simple calculation to allocate places to organisations in relation to the demand for lay judges. This is regularly ascertained by consulting the courts. The number of lay judges required at each court is based on the number of chambers, each of which might need 18, 15 or 12 lay judges from each side.

The law does not prescribe any schedule for the phase prior to appointment (confirming eligible organisations, checking the number of judges required, requesting nominations). In practice, a variety of approaches has emerged. In the four regions in the present study, we found a) appointments made annually on a specific day, b) a six-monthly rhythm c) a number of appointments each month. In each case, the authority had a well-rehearsed procedure and all parties knew what was expected of them, 'all well-established over time' (expert interview, appointing official).

The number of vacancies for lay judges is distributed across eligible nominating organisations in proportion to their memberships. However, this is not carried out with mathematical precision: the law requires not only an 'appropriate proportion' for 'minorities' but also a 'fair' one. If the principle were applied with algebraic stringency, a comparatively small organisation, such as the 'German Stage Association' (Deutscher Bühnenverein) on the employer side, with only a few members in each constituent *Land*, would stand little chance of fair representation when set against very large employer associations with thousands of member firms. This requires not the application of a 'rigid formula but what, in our judgement, makes sense for this area' (expert interview, appointing official).

The process of soliciting nominations can be simplified by sending standard questionnaires to eligible organisations, the aim of which is to collect data on potential nominees and whether they meet the requirements for being appointed (place of work, occupation, prior experience as a lay judge and related information). One problem with establishing the status of nominees for the employee side is where applicants are not employers but company officers who exercise 'employer

functions', such as being entitled to hire and dismiss staff. For employers, one issue cited by our official interviewee was whether they have transferred all social security contributions due to the appropriate agencies.

c) Who chooses the nominees?

The issue of who chooses candidates for appointment as lay judges is of particular interest, both in sociological terms but also in the context of the constitutional proprieties. One unspoken assumption is that lay judges should represent the major actors in the employment sphere. But who is responsible for this? Our research confirms that this role is not one exercised by the authorities entrusted with appointing lay judges. Even if they wanted to perform this task, there would be little for them to choose from as the number of requests they make for nominees from trade unions and employer associations is based on the expected demand for lay judges by the courts, with a small reserve to cover unanticipated and short-term events, such as lay judge stepping down at short notice.

In practice, responsibility not only for nominees but de facto for the selection of appointees lies entirely with the nominating organisations. As yet, no systematic research has been conducted on their internal search and selection procedures. In the course of this research, we conducted localised expert interviews in with employer and employee members of the lay committee at a local labour court and asked about this issue.⁴⁴ There are two main channels through which nominating organisations generate nominations for appointment by the authorities. Either individuals signal their interest to a nominating organisation, of which they are a member, or the organisation approaches potential nominees. Our expert interviewees reported that both processes were in operation, not only for locating nominees for the position of lay judge but also joining the lay judges' committee, once in office. Both interviewees also noted that one key prerequisite for successfully recruiting prospective lay judges was the existence of a supportive atmosphere within workplaces and organisations. This was especially the case for employee lay judges. If any employee felt or suspected that their management was likely to have concerns, objections or reservations about the absences required of a lay judge, they would be less likely to agree to be put on a nomination list – despite the formal security offered by the statutory proscription of any detriment to lay judges as a result of their activity.⁴⁵

Once a nominating organisation has begun to look out for willing and able candidates for nomination, the visibility of prospective individuals and their practical activity within their union or association becomes a key consideration. 'If the association notices that someone is already actively engaged in their area, it's easier to ask them whether they might be interested in becoming involved in the labour court' (expert interview, employer association).

Within trade unions too, it appears to be more common for the organisation to approach individuals than for members to put themselves forward. Any member of the NGG in Berlin who expressed an interest would be put on a list of prospective nominees. The union also asked its members, with the

⁴⁴ We interviewed a representative of the German Construction Industry Employer Association (HDB) and of the food and hospitality trade union NGG, both members of the Berlin labour court lay judges' committee.

⁴⁵ Under the German Judges Law (Par. 45:1) no one may be impeded in the exercise of their duty nor suffer a detriment for exercising it. Lay judges must be given appropriate paid time-off to attend hearing and may not be dismissed during the time of their office on account of assuming or exercising the role.

approaches to individuals guided by the salience of their activity within the union. 'What experience do they have? How and how much are they active trade unionists?' (expert interview, trade union). Workplace and professional experience also plays a role. 'Being unattached is not enough. It has to be people who are immersed in working life' (expert interview, trade union).

Our interviewees also referred to the social prestige attached to the role of lay judge and how this governed the criteria they used to look for nominees and led them to conduct their search with particular care. 'The position of lay judges enjoys high esteem and is associated with a degree of social reputation' (expert interview, trade union). Nominating organisations were also aware that the quality and conduct of lay judges they nominated would always be associated with the organisation that nominated them. 'I always look closely beforehand at whether they can express themselves well. Can they exercise a particular role properly?' (expert interview, trade union). Within complex unions with many sections, such as NGG,⁴⁶ officials also have to ensure that individual branches are represented, which in the case of Berlin fits well with the fact there this is one of the labour courts with specialist branch-based chambers. Ver.di, the services union, is also a complex multi-branch organisation, created in 2001 by a merger of five preceding unions across the service spectrum and including printing and publishing.

In looking for lay judge nominees, NGG tends to focus on larger workplaces, and this probably also applies in other trade unions. This is closely linked with the fact that the incidence of workplace representation in the form of works councils and a trade union presence is very much a function of establishment size. (Trade unions do not have statutory workplace representative rights, in contrast to France). As our lay judge interviews indicated, prospective employee lay judge nominees, at least in the study sample, are predominantly drawn from, and become visible through, their activity as works councillors, former or present

Our interviews with lay judges also provide some further indirect confirmation of the criteria cited by our expert interviewees. Lay judges mentioned the importance of acquiring an internal profile within the organisation. On the employee side, this can be achieved by participation in the many available committees and sub-organisations within trade unions or through activity as a works councillor or, in the public sector, in staff councils. For the employer side, the corresponding activity would be contributing to the organisational life of the association or occupying a prominent HRM role in a company or public body. This activity also serves to signal interest in serving as a lay judge in either a labour or social court.

One likely difficulty for the future emerges from comparing the German approach with the procedures for recruiting lay judges to British employment tribunals. In Germany, it is not possible for individuals to apply to become lay judges independently of an organisational nomination. According to the expert interviews we conducted with the official responsible for lay judge appointment in Berlin, it is not uncommon for there to be expressions of such interest by individuals.

d) Appointment and taking the oath

The official departments responsible for appointing lay judges – either *Land* ministries or labour courts – will make the required number of appointments to fill vacancies after ensuring that the nominations meet the formal requirements. As a rule, and in line with the established cooperation

⁴⁶ NGG has members in ten branches, with eight covering the food sector, a branch for hospitality and one for tobacco, and a section for 'miscellaneous branches', such as homeworking, animal feeds and others).

with trade unions and employer associations, there is usually a broad balance between the number of vacancies to be filled and the quantity of nominations. If there is a surplus number of nominations, these will be used to build waiting lists as a buffer from which any short-term vacancies can be filled. Appointment as a lay judge is an administrative act and is concluded once the letter of appointment has been delivered to the intended recipient. This is usually accompanied by a formal certificate of appointment used to highlight and underline the importance of the process.

Lay judges must take the judicial oath, administered by the presiding judge in a public hearing, before sitting.

6.7 Lay judge training

Lay judges in first-instance labour courts have not typically had formal legal training or professionally exercised a judicial role. There is no requirement for lay judges to receive training before sitting. Their first day in court as a lay judge places them in a situation in which communication and decision-making will be expected, but whose context, rites and regulations will be unknown. The legal material that they will need to engage with will also not be familiar, or probably only on very specific aspects (such as issues experienced in practical activity as works councillors or HR managers). Our interviewees expressed a desire for (more) training (see Chapter 15). Whether introductory or subsequent training takes place seems to depend on the personal initiative of the Director or President of the labour court or whether there is a sustained tradition of providing such training. In Berlin, an introductory training event for new lay judges was established following an initiative by the Berlin labour court lay judges' committee (see below).

The Labour Courts Act does not regulate the provision of training, although such training is provided to varying levels by the appointing authorities and the labour courts themselves, often drawing on the services of professional judges who volunteer their time. The appointing authorities can instigate training in various ways. This includes offering basic introductions to court procedures, case-law and employment legislation, where appropriate backed up by information material or guides and supported by professional judges who are willing to serve as speakers. Continuing training can also be organised by the labour courts themselves, for example in the form of half-day events with speakers on new case law. Although there is no financial support for this, lay judges can log such training events as a sitting day and be compensated accordingly.

Some trade union organisations provide training for lay judge members. The food and hospitality union, NGG, for example, offers a weekend's training once each year. In the Berlin region, the national trade union confederation, the DGB, provides training on employment law for lay judges. This has two stages. In the first, there is a three-day introductory seminar for newly-appointed and existing employee lay judges, with scope for exchanging experiences as well as formal sessions on labour court procedure and practice, the roles and duties of lay judges, behavioural and discussion norms, decision making, and relevant statutes, especially on employment protection. The second stage, that builds on the first, is intended for lay judges in office and covers such issues as: preparation or a hearing; taking and assessing evidence; labour law issues and recent case law; special aspects of different labour court procedures (such as appeals, 'decision procedure' and urgent hearings).

6.8 Termination of office

In most cases, lay judges will conclude their activity on expiry of a five-year period of office. It is very rare for a lay judge to terminate their role for one of the other options provided for in law. Being removed from office for a serious breach of duty is extremely rare. While several interviewees were aware of just one of the few examples where this has had taken place, they had no direct experience of it. One reason for the infrequency of such events might well be that individuals interested in exercising the role of lay judge can only do so via the intermediate institution of nomination by a trade union or employer association. This places at least some, if only symbolic, shared responsibility on these institutions to ensure the reliability and competence of individuals they propose for office. Given the tiny number of instances in which doubts are raised as to whether an individual should continue to exercise office, this informal method of quality assurance through shared responsibility would seem to function successfully.

It is much more common for a lay judge to request release from office, usually on the ground that they are moving from the district in which the court is located. On occasions, release can be granted 'for an important reason', one of which referred to in the statute is a need 'to care for their family'.

6.9 The course of a hearing

Proceedings at German labour courts, of which there are 110 in all, are characterised by both uniformity and diversity. Uniformity is a consequence of the standard regulations on the conduct of court procedure that apply nationally; diversity a product of the fact that there are divergences in local court practice in a federal state with 16 constituent regions (*Länder*) that differ considerably from each other in terms of size, political orientation, economic strength, and mentality.

The Federal Labour Court Act (LCA), which applies throughout Germany, structures the course both of proceedings for the 'judgment procedure' (*Urteilsverfahren*), which applies to individual legal disputes between employees and employers, and the 'decision procedure' (*Beschlussverfahren*), which deals with collective legal disputes. Both are virtually identical in their core features.

The oral hearing at a labour court begins some four to six weeks after a complaint has been lodged with a hearing before a presiding judge intended to bring about an amicable resolution between the parties, the 'conciliation hearing' (Para. 54: 1, LCA). These proceedings are heard by the presiding judge alone, without lay judges, and aim to review the entire dispute with the parties 'through free consideration of all the circumstances' and to establish whether the parties might be induced to come to an amicable settlement. As the notice of the hearing appended to the door of the courtroom indicates, conciliation hearings, heard by the judge, a minute taker,⁴⁷ the parties' legal representatives, and, on occasions, the parties themselves, are normally allotted some 20 minutes, which can be extended to 30-40 minutes in more demanding cases. Once they have entered the courtroom, the parties will seat themselves opposite the judge in accordance with their status as either complainant or respondent. Witnesses are not invited to conciliation hearings; the public might be in attendance, in varying numbers. It is quite frequent for no one to be present, aside from those directly involved in the hearing. Robes are only worn on occasions by legal representatives. By contrast, the judge and the minute taker, if in attendance, will wear black robes.

⁴⁷ Formally, the records clerk (*Urkundsbeamtin*).

During the conciliation hearing, the judge will first conduct some brief formalities (identity of the parties and their representatives, check that any summons to appear are in order, exchange of documents) and introduce the main aspects of the dispute, the claim, and the response. This stage is largely informal in style, and the precise course will depend on the approach of the individual judge. The parties are then invited to speak. If the parties are represented, which is not legally required but is the norm, after a very short time a highly technical exchange will ensue that is conducted in what is both for an outsider, and no doubt the parties too, assuming they are present, a potentially incomprehensible legal register. This difficulty is compounded by the fact that, in addition to specialist legal terminology, the legal representatives will communicate with each other and with the judge in a style that is marked both by professional jargon and a rapid-fire exchange of references to statutes, based mainly on the relevant paragraph numbers. However, there is limited scope for outlining the full facts of the case. Even the most accommodating of judges will keep a constant eye on the clock and the limited time scheduled for the hearing. The judges will also be aware of the aim of the conciliation hearing – securing an amicable resolution of the dispute – as well as doing their utmost in their own interest to manage their workload to induce the parties to conclude such a ‘settlement’ (*Vergleich*), that is an agreement under Para. 779:1 of the Civil Code that ends the dispute through concessions offered by each side. This process of ‘inducing’ consists in the exercise of judgecraft of various kinds aimed at making the parties alive to what the ultimate legal position might be and, by outlining the risks and opportunities entailed in pursuing the case, highlighting the benefits of a compromise, but without exercising any impermissible pressure on them. Negotiations over a settlement, encouraged by the court, could often be seen to be taking place outside the courtroom door. These also needed some time and possible assistance from the court. If the parties agree, this will be recorded by the chair as a formal settlement and the dispute will be noted as having been resolved.

In practice, it is not uncommon for settlements to be concluded with the proviso that this may be retracted, especially in cases in which the parties have not attended the conciliation hearing. The settlement will only be definitive once the statutory waiting period has expired. If no resolution of the dispute is possible at the conciliation stage, the judge and the parties (and their representatives) will seek to arrange a date to continue the case in a full hearing, including the participation of lay judges.

The daily schedule for full hearings, that can be held several weeks or even months after conciliation, will typically provide for four or five cases to be heard in a morning (from 9 a.m. to 1 p.m.), leaving somewhat more time for each. Between a third and a quarter of cases go onto a full hearing following conciliation, a figure that depends on the nature of the claim and the effectiveness of judges’ conciliation skills. As noted above, the full hearing comprises a professional judge and two lay judges, one from the employer side and one from the employee side. The parties will be the same as in the conciliation hearing. Although parties are not required to have legal representation, unrepresented litigants would be likely to find the procedures and the legal aspects even more of a challenge than at conciliation, unless they are experienced and might be counted as repeat players.

The proceedings are managed by the professional judge, and lay judges only rarely intervene during the oral hearing. As our interviews indicated, lay judges’ main contribution is made away from the public gaze in pre-hearing discussions, adjournments, and interim and final deliberations. A hearing can markedly grow in complexity when evidence is presented, usually by a witness. This requires more time, the management of the hearing becomes more demanding, and lay judges’ capacity to observe proceedings and, if necessary intervene, becomes more important. Similarly, more time and

greater awareness is needed if the parties or witnesses require an interpreter. During the hearing, the judge will also be alive to any opportunities for securing an amicable settlement and may occasionally sound out this option. The judge is enjoined to do this under the Code of Civil Procedure (Para. 278:1) and the opportunity to conclude a case without the time and effort required to produce a written judgment serves as an additional incentive.

Any judgment is issued 'in the name of the people' and is promulgated through reading the tenor of the judgment. Under the Labour Courts Act, this should normally take place at the end of the sitting⁴⁸ and must be in public.⁴⁹ The reality of labour court procedures means that, in practice, and following deliberations with the lay judges, the presiding judge will read the judgment in the early afternoon of the sitting day, often in an empty courtroom.⁵⁰ The lay judges are not usually in attendance by the time the judgment is read at the end of that day's sitting.⁵¹ The parties' legal representatives, who will have long since left for their offices or will be at other hearings, and the parties themselves can ascertain the outcome by phoning the court administrative office.

Summary

Lay judges have been partners in decision-making in labour courts in Germany in a practice of the cooperative administration of justice that extends back over many decades and involves several hundred thousand proceedings each year, in the vast bulk of cases without any major difficulties. This process can be termed 'cooperative' as the joint decision-making powers of lay judges has led to the development of practices in which legal knowledge has been combined with workplace knowledge in dealing with and deciding on legal disputes.

The process through which lay judges are appointed to labour courts is also characterised by a cooperative relationship between the official agencies responsible (ministries or *Land* labour courts) and those organisations entitled to submit nominations (trade unions, independent employee associations, and employer associations). These relationships have evolved over many years, with some regional variations in practices and routines. These bodies are invited by the relevant official agency to supply nominations for consideration to appointment for a five-year term of office as a lay judge. In effect, the real process of selection is conducted by the nominating organisations. Given the match between the requested number of nominations and actual nominations, the official agencies have little further scope. Any surplus nominations will be placed on a waiting list, either to fill in for any early leavers or held back for the next period of office. The statutory requirement to give fair consideration to 'minorities', understood as small nominating organisations or economic groups (large and small firms, white-collar and blue-collar employees) rather than ethnic minorities or other aspects of social diversity, means that available lay judge positions cannot be assigned to trade unions and employer associations using a purely numerical formula based on their respective memberships. The officials responsible for appointments will reserve a number of places for organisations that would not have had any lay judges on numerical criteria alone, using their discretion based on an appreciation of such organisations' role, status and significance.

⁴⁸ Para. 60, Section 1:1, Labour Courts Act.

⁴⁹ Para 173, Section 1, Court Constitution Act (Gerichtsverfassungsgesetz).

⁵⁰ If neither party is present for the reading of the judgment, the judge may simply refer to the signed tenor. If they are present, the judge will communicate the reasons for the decision. (Para. 60:2 Labour Courts Act).

⁵¹ They are not required to be present for the promulgation of the judgment (Para. 60, 3:1, Labour Courts Act).

7. GREAT BRITAIN

This chapter reports on the industrial relations and legal context for our findings from interviews with professional and lay judges in labour courts (employment tribunals - ETs) in Great Britain. Great Britain comprises three countries: England, Wales and Scotland. As will be seen below, procedures and practices in Scottish labour courts sometimes differ from those in England and Wales.⁵² Courts and tribunals in Great Britain are currently administered by Her Majesty's Courts & Tribunals Service (HMCTS).

The plan of this chapter is as follows: after reviewing the industrial relations and legal context, we briefly trace the development of the tribunal system and then turn to the constitution and composition of the labour court, before looking at the actors, the professional and lay judges, and labour court practice and procedures before and after the main hearing.

7.1 The industrial relations context

Great Britain has been categorised as a liberal market economy (Hall and Soskice, 2001) with little current state support for collective bargaining and worker participation. Just over a quarter of UK employees (28 per cent) had their pay determined in some way by a collective agreement in 2015, a decline of 8 percentage points since 1995 (Department for Business Innovation and Skills, 2016: 42), with a marked difference between the public and private sectors. Indeed, in 2011 only 7 per cent of British private sector workplaces engaged in collective bargaining with at least some of their employees, although these tended to be larger workplaces (van Woonroy et al, 2013: 82). Furthermore, private sector collective agreements are mainly negotiated at company level, with multi-employer collective agreements found 'in all but a very small number of industrial enclaves' (Amossé et al, 2016: 13; see too Burgess, 2016: 55-60), mainly in the public sector.

Trade union membership peaked in 1979 with over 13 million members, but is now below 7 million. Similarly, trade union density in Great Britain fell from 34 per cent in 1989 to 22 per cent in 2015 with a marked contrast between the public sector, where 55 per cent of the workforce are union members, and the private sector, with 14 per cent (Department for Business Innovation and Skills, 2016:3). Looking at union structure, 13 unions have over 100,000 members with some large 'general' unions representing diverse categories of employees (manual, administrative and professional) across both the public and private sectors, and occupational unions that confine themselves to a specific group of workers, such as nurses; these also often function as professional associations (Certification Officer, 2016).⁵³ The majority of British trade unions are affiliated to the main union centre, the Trades Union Congress (TUC). The TUC has no formal political affiliation and there are no rival politically-affiliated union centres. Some trade unions are affiliated to the Labour Party, and these account for around 4 million union members.

⁵² The United Kingdom (UK) covers Northern Ireland, as well as the three countries in Great Britain (GB). Many employment statistics are reported on a UK wide basis only. Nevertheless, Northern Ireland is excluded here because it differs in certain important respects in its employment legislation and court structure.

⁵³ The employee lay judges whom we interviewed came from different types of unions.

The main employers' organisation, the Confederation of British Industry (CBI), has no role in bargaining, although it lobbies government on employment regulation. There are also almost 100 industry-level employers' associations. These advise members on industrial relations matters but generally do not have a collective bargaining role.

Tripartite structures were once prevalent in the 1970s and labour courts were, in part, an outgrowth of this corporatist period that have managed to survive. The change in their composition and operation, which began in 1999, is consistent with the weakening of corporatist institutions characteristic of LMEs. Indeed, tripartite bodies are 'relatively uncommon' now (Amossé et al, 2016: 13), although they remain in respect of the bodies focussing on the minimum wage, health and safety and the conciliation of individual and collective disputes.

7.2 The legal context

This decline in trade union membership and collective bargaining over recent decades has been paralleled by an increase in employment legislation and thus individual justiciable rights. This has contributed to a long-term rise in individual employment-related cases brought to courts and tribunals.⁵⁴ Added to this, employment cases at first instance are becoming more intricate because of the 'increasingly impenetrable state of much of our legislation' (Wallington, 2016:iv)

Employment legislation initially developed in the context of the British common law legal system, where law is made by professional judges through judgments rather than being predominantly rooted in legal texts (statutes or codes). As a result of an increase in the volume of legislation, British employment law now has both common law aspects, for instance where it relates to the contract of employment, and statutory/text based aspects, for instance on discrimination on the grounds of a protected characteristic, or a mixture of the two, as with dismissal.

Other key features of the British legal system are the role of precedent, the adversarial nature of court proceedings and litigation through the presentation of oral argument. Under the doctrine of precedent, once a higher court makes a ruling on a legal issue it is binding on the lower courts. Most courts⁵⁵ are not bound by precedents made at the same level in the court hierarchy: these are persuasive only. So an ET need not follow a precedent set by another employment tribunal, but must follow a relevant precedent set by an appellate court.⁵⁶ This contrasts with the civil law tradition where the judge is 'not obliged to follow previous court decisions, but instead uses the previous decisions to understand how the law has been interpreted'. Indeed the judge can introduce an alternative interpretation of a legal text, justifying that approach (Taal, 2016: 60)

Under an adversarial system, it is for the parties, not the ET to choose the issues on which they want the ET's decision and to produce the supporting evidence with the judge becoming a neutral, and in some respects passive, arbiter. (Moorhead, 2006). The ET, however, as far as practicable, should ensure that the parties are on an equal footing; and, as it has greater freedom than the civil courts in its procedure, it can help an unrepresented party. Nevertheless, any judicial help is inhibited by two factors: firstly, it can lead to the appearance of bias in favour of an unrepresented party where the

⁵⁴ Burgess et al. (2001) found an association between falling union density and increased litigation in Great Britain during 1972-1997. The imposition of fees in 2013 has led to a significant fall in claims; see TUC (2014).

⁵⁵ The Court of Appeal, unlike other courts, cannot overturn its own precedents.

⁵⁶ If a case can be distinguished on its facts, the precedent need not be followed.

other party is legally represented,⁵⁷ and secondly the ET usually has ‘inadequate information on which to base its enquiries and to question witnesses’ (Hepple, 1987: 11).

Third, under Britain’s common law system, there is an emphasis on cross-examination oral argument, with evidence being provided by witnesses who are cross-examined by the other side, often at some length, with the judge(s) listening to the evidence, rather than actively probing. Thus, although the ET may (and often does) receive numerous documents, it normally only takes cognizance of a document if it is referred to in oral evidence.

7.3 The role of lay individuals in the British legal system

Non-legally qualified individuals play a role in the criminal court system, as randomly selected jurors in certain types of cases and as appointed magistrates, as well as in some civil cases, and as expert decision-makers in a range of administrative tribunals. Jury trials and magistrates have their origins in the Middle Ages. Administrative tribunals are more recent, as noted below.

Criminal and civil courts

In criminal cases the presiding judge is responsible for matters of law and sentencing, and directs and advises the jury before they deliberate and decide on the verdict. In practice ‘the jury’s decision is based on a consideration of a mixture of fact and law’ (Slapper and Kelly, 2014: 557), with verdicts that, albeit on rare occasions, may depart from judicial advice and can represent a popular understanding of justice, for example by acquittal of defendants.

Unpaid lay part-time magistrates, of which there are some 21,000,⁵⁸ adjudicate a large number of less serious criminal cases together with certain types of civil proceedings. More serious cases are also initially heard by magistrates before referral to the Crown Court. Panels in the Magistrates’ Court have one magistrate approved to sit as chair, who typically speaks in open court. Two other accompanying magistrates hear the evidence and engage in deliberations. All three have equal weight in decision making. Any eligible individual can apply to become a magistrate. They are appointed after a selection procedure and are required to undergo initial and ongoing training.

Tribunals

In the past, administrative tribunals were regarded sceptically by constitutional lawyers as potentially ‘subverting’ the rule of law via established courts (Drewry, 2009: 46). Their reputations remained low, in part as they ‘were perceived as poor persons’ courts, operating informally and inexpensively’ and not an arena for ‘high-profile legal argument’ (ibid.). Tribunals proliferated after 1945, principally as a means of resolving disputes between the state, whose functions were expanding rapidly because of the growth of the welfare state, and individual citizens. One enduring concern was that tribunal members were appointed by the executive to serve on bodies in which the executive was a party. This, amongst other things, led to evaluation of the tribunal system by the Franks Committee (1957). The Franks Report⁵⁹ upheld the role of tribunals as ‘machinery provided by Parliament for adjudication’ independent of the ministry to which they related; stressed their

⁵⁷ In contrast under an inquisitorial approach the court can initiate inquiries, clarify the issues and participate actively in the hearing.

⁵⁸ <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/magistrates/>

⁵⁹ Report of the Committee on Administrative Tribunals and Enquiries, 1957, Cmnd. 218.

informality and cheapness and the role of expert knowledge; and recommended principles for their operation. By emphasising their independence from government, the report placed tribunals closer to the courts; for example, chairs should be legally qualified, hearings should be public, and members appointed by the judicial authorities. This clash between informality and judicialisation can be seen to have been played out, arguably to the disadvantage of informality, in the evolution of the Employment Tribunal.

In 2008, following a further review, (Leggatt, 2001), the tribunal system, viewed as being characterised by 'wide variations of practice and approach, and almost no coherence' (Leggatt Review, cited in Drewry, 2009: 53) was brought under a single system of administration within the Courts and Tribunal Service, with a two-tier structure. The 'First Tier Tribunal' is subdivided into chambers (social entitlement, tax, immigration and asylum, general regulatory matters, such as information rights, health, education & social care, and war pensions and armed forces compensation). Each chamber has several individual tribunals to hear claims relating to specific statutory entitlements. The 'Upper Tribunal' is a court of record that hears appeals from lower level tribunals. Tribunal members are broadly grouped into professionals, for which an accredited qualification is required, and lay members with other forms of 'substantial experience' or, in some tribunals, a specific characteristic, such as a disability. Employment Tribunals (first tier) and the Employment Appeal Tribunal (the appellate body) currently form a 'separate pillar' within the Tribunal system.

Developments

During autumn 2016, an official consultation was held on proposed reforms to the justice system, including specific recommendations on the operation of tribunals. One of the proposals was that non-legal members should not sit routinely on all tribunal sittings but only 'where their presence is relevant to the case' (Ministry of Justice, 2016: 18). Decisions as to when this applied would be devolved to the Senior President of Tribunals, irrespective of the historic arrangements in place.

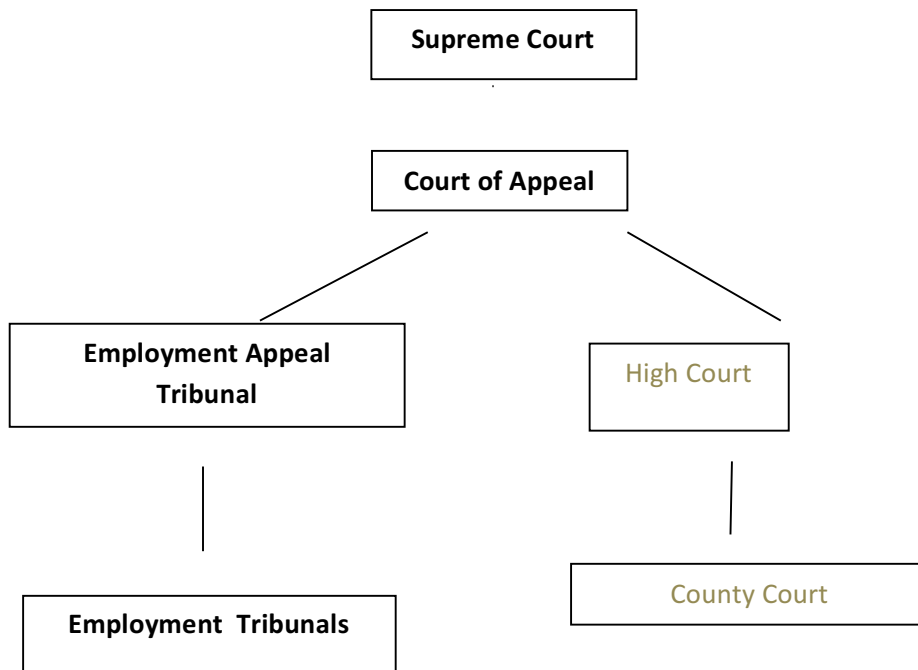
A further development relates to the devolution of functions of Employment Tribunals in Scotland to the Scottish government which is set to take place in a few years.

7.4 The labour jurisdiction

The vast majority of statutory employment rights, and notably provisions on unfair (unlawful) dismissal, are only enforceable in ETs. Nevertheless, the civil courts also have a role in some employment related adjudication such as personal injury, the law on industrial action and some contractual matters such as the enforcement of restrictive covenants.

Appeals from ETs go to the Employment Appeal Tribunal but are only accepted on a point of law (not fact). Further appeals, also on a point of law, go to the 'ordinary' civil courts. See Figure 1.

Figure 7.1: Great Britain's court structure



NB:

1. In Scotland, the Court of Session replaces the Court of Appeal. The Sheriff Court replaces the High Court/County Court, but England, Wales and Scotland all have employment tribunals and are covered by the Employment Appeal Tribunal, while the Supreme Court cover England, Wales, Scotland and Northern Ireland in respect of civil cases.
2. The bulk of employment rights cases go to the courts shown in black type.
3. The Supreme Court was previously known as the House of Lords.

7.5 Origins and composition of the labour courts

ETs were established under the Industrial Training Act 1964, not at the request of employers or unions, but as the 'children of civil servants' in a process that has remained 'shrouded in mystery' (Wedderburn, 1986: 264). As noted above, however, this was a time, however, when tribunals were being established more generally to cater for party v state disputes and ETs, then known as industrial tribunals, reflected this.⁶⁰ Their role was essentially as administrative tribunals, for instance to adjudicate on appeals by employers over the imposition of training levies, on the regulation of dock work, and on disputes arising out of the Redundancy Payments Act 1965. Although the latter disputes were between employee and employer, there was an official interest as, at that time, any redundancy (severance) payment made by the employer that complied with the Act was refunded by the State (Dickens et al, 1985; Meeran, 2006).

⁶⁰ Under the Employment Rights (Dispute Resolution) Act 1998, industrial tribunals were renamed employment tribunals.

From the 1970s, however, the nature of the ETs' jurisdiction changed to party versus party when they acquired a new jurisdiction, unfair dismissal. Other party versus party jurisdictions followed, including time off rights, maternity and paternity rights, working time provisions, unfair deductions from pay, whistleblowing and discrimination including on the grounds of sex, race and disability. Although ETs have to deal with cases 'justly' and 'avoid unnecessary formality and seek flexibility in the proceedings',⁶¹ the longer serving lay judges interviewed (and several had been appointed as much as 25 years ago) commented that ETs had become more formal and legalistic.

ETs were tripartite from the start with a legally qualified chairman (*sic*) and two lay members, one drawn from a panel nominated by the Confederation of British Industry and one from a panel nominated by the Trades Union Congress⁶², with both panels appointed by the minister. Their presence was intended to help overcome the mistrust by labour and the unions of traditional courts, important at a time when trade unions were more powerful than today, especially at workplace level. Also, a tribunal comprising a professional judge and lay judges would, it was thought, engender public confidence as the latter's awareness of the wider industrial relations context would be reflected in their decision making (Wedderburn, 1986).

Since 1994 successive governments of different political complexions have incrementally empowered the professional judge to sit alone on specified complaints. These currently include most preliminary hearings, certain claims for breach of contract, unauthorised deductions from wages, redundancy payments, certain complaints under the National Minimum Wage Act, holiday pay and, since 2012, unfair dismissal (although not when allied with a claim where a tripartite tribunal is required). Unfair dismissal claims comprised nearly a quarter of all claims in 2010-2011 (Ministry of Justice, 2011), so this change in 2012 significantly expanded the scope for professional judges to sit alone. Nevertheless, even where professional judges are empowered to sit alone, they have the discretion to sit with lay judges in certain circumstances, principally where the parties say they would prefer a three-person tribunal or where the case is deemed to be 'fact heavy'. The professional judges we interviewed, however, had exercised this discretion only rarely, although exceptionally one said that he had done so fifteen times since 2012.

Following this last change, British lay judges now predominantly sit on discrimination cases⁶³ and this has had several unintended consequences. First, it has resulted in fewer sittings for lay judges with the result that there has not been a recruitment exercise since 2009 and those lay judges who are in post have far less opportunity than before to maintain their skills. This has been exacerbated by a major drop in the number of cases following the introduction of fees in July 2013.⁶⁴ For instance a fee of £1,200 (€1,385) is now payable to bring an unfair dismissal complaint.

⁶¹ Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

⁶² Other nominating bodies were later added including the Union of Democratic Mineworkers, the Council of Managerial and Professional Staffs, the Institute of Directors and the Federation of Small Businesses (Department of Trade & Industry, 1998).

⁶³ The French labour court, *conseil de prud'hommes*, rarely hears discrimination cases as most are resolved by Défenseur des Droits, after investigation and a recommendation.

⁶⁴ 42 per cent comparing 2013-14 with 2014-15 in England and Wales (Senior President of Tribunals, 2016)

Second, prior to 2012, when lay judges normally sat on unfair dismissal cases, their specific skill – workplace experience – was often central to deciding the issue where it hinged on whether the employer’s response fell within a ‘band of reasonableness’. In contrast, discrimination complaints involve complex *legal* tests. All the professional judges interviewed commented that if a decision had to be made to remove lay judges from certain types of complaints, it should not have been unfair dismissal, for which their workplace knowledge was most useful. Furthermore some professional judges commented that some lay judges were uncomfortable dealing with the complexities of discrimination law.

Third, the enlarged scope for professional judges to sit alone has led to lay judges being required for mainly only for longer sittings. This is because adjudicating an unfair dismissal case typically takes a day or two, but discrimination cases take longer, often 5 – 10 days. Indeed, some lay judges we interviewed reported cases of 20 days or more. This has made it difficult for lay judges who have full-time jobs to sit, resulting in lay judges who have retired sitting more often than those still working. Indeed, 41 per cent of our 52 lay judges were retired. Moreover, a few interviewees said that they knew of lay judges who had left when the 2012 changes were made because they considered that combining sitting as a lay judge with their full-time job would be impossible. This skewing towards retirees, however, means that their experience of the world of work is not current.

The two lay judges assigned to a case with a professional judge are not selected for their sectoral knowledge, despite the substantial variation in the industrial relations context between the public sector, private services, manufacturing and the privatised sector (Arrowsmith, 2010). Indeed, the Employment Appeal Tribunal has ruled that it is on the whole undesirable to select lay judges on the basis of any specialised knowledge they may have, as their decision might be informed more by their own knowledge than by the facts and evidence presented at the hearing (see also below).⁶⁵

Where lay judges and a professional judge sit together, all three have an equal vote. The vast majority of decisions, however are unanimous. As to the relationship between lay and professional judges, longer serving lay judges considered that the more recently appointed professional judges were more inclusive than their predecessors.

7.6 Professional judges

A professional judge in the ETs in Great Britain was formerly called a chairman (*sic*), perhaps to emphasise that ETs were distinct from courts presided over by a Judge. In 2007, however, these ‘chairmen’ were renamed ‘Employment Judges’.

It is not necessary to study law at undergraduate level at university and a legal qualification can be obtained subsequently, but a person can only become an Employment Judge, that is a professional judge, normally if he/she has practised as a lawyer for many years.⁶⁶ In other words, a judicial career is not embarked on immediately after obtaining a legal qualification, because there are no initial rungs as a trainee judge on the judicial career ladder. Most of the professional judges we interviewed had previously been in private practice as either a solicitor or barrister, acting either

⁶⁵ Halford v Sharples & Ors [1992] ICR 146.

⁶⁶ The rules require five years, but this requirement is commonly exceeded.

mainly for claimants or for respondents. Others had worked for a law centre, in local government, or for a government agency.

There are two types of professional judge: fee paid and salaried. Fee paid judges are recruited through open competition and appointed for a renewable five-year term. They are required to sit for at least 30 days a year, but otherwise may continue other work, including representing a party at a hearing, provided it is not in the region where they sit as a judge.⁶⁷ Both salaried and fee paid professional judges are appointed by the Lord Chancellor (England and Wales) or Lord President (Court of Session, Scotland) and may serve until the age of 70. Normally an appointment as a salaried employment judge only follows after an employment judge has served on a fee-paid basis (IDS, 2014). In England and Wales in 2015 there were 123 salaried professional judges (109.8 full-time equivalent) and 208 fee-paid professional judges (Senior President, 2016). In Scotland, 16 professional judges were listed in 2016.⁶⁸

The most senior professional judges in ETs are the Presidents: the President (England and Wales) and the President (Scotland). Under the President England and Wales there are 11 regions, each headed by a regional judge. Both Presidents can issue Practice Directions and Presidential Guidance. Their main constraint is a requirement to meet performance targets, set ultimately by the Ministry of Justice: for instance, there is a 26-week target for the disposal of a case and a target on the age of case at clearance.⁶⁹

One of the Presidents' duties is to investigate complaints, which can be lodged by a party on the grounds of the behaviour, language or conduct of a tribunal member. Such complaints have risen significantly and a senior official we interviewed conjectured that this might be because, following the introduction of fees, cases have involved higher value and more complex claims that are often emotionally charged. Should a complaint against a professional or lay judge be upheld, the offending judge, and the reasons for the notification, are named on a list published by the Judicial Conduct Investigations Office.⁷⁰

Another of the President's duties is to co-ordinate certain cases and direct them to a specialist centre. For instance, the Newcastle employment tribunal was appointed to hear the very many, often lengthy cases on equal pay in the National Health Service, irrespective of the region where the litigation originated. The President also chairs the National Users Group for the Employment Tribunal Service, which meets quarterly and on which the social partners are represented.

Every ET is chaired by either a fee paid or salaried professional judge. Although practice varies, the professional judge who manages a case in advance of a hearing, for instance dealing with orders requiring production of documents or setting a timetable, will not normally adjudicate at the main (merits) hearing. In certain discrimination cases there can be judicial mediation, that is mediation by

⁶⁷ There are 11 regions in England and Wales. All the professional judges whom we interviewed were salaried.

⁶⁸ <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/list-of-members-of-the-tribunals-judiciary/employment-tribunal-scotland-judges/>

⁶⁹ Following the introduction of fees, which deterred simpler low-value claims, the more complex nature of discrimination claims, and the length of hearings, has made it more difficult to meet these targets. <http://www.tayloremmet.co.uk/blogsite/two-years-on-the-impact-of-tribunal-fees/>

⁷⁰ <http://judicialconduct.judiciary.gov.uk/disciplinary-statements/2016/>

a professional judge, but if a mediated case is not resolved and progresses to a hearing, the case is heard by a *different* professional judge who will have no knowledge of anything said at mediation. The President (England and Wales) has also recently introduced a process called judicial assessment, under which a professional judge's indicative view of an outcome can be obtained if the parties wish. Again a *different* professional judge would hear the matter if the case progressed to a full hearing.

Our professional judge interviewees said they normally reviewed the case file an hour or two before the hearing, or perhaps the day before, while our lay interviewees said that they typically saw the case file an hour or less before the hearing. The file typically contains the complaint ('ET1'), the employer's response ('ET3') and any orders made by the professional judge. The bulk of the documents supporting the case, known as the bundle, (for instance witness statements, written particulars of employment, company procedures) are not delivered to the ET until just before the hearing and in complex cases can comprise several lever arch files.⁷¹ Accordingly, it seems that the British professional judge does not enjoy a marked informational advantage compared to the lay judges.

Regional professional judges are responsible for allocating cases to the judges in their region and, although not under any statutory compulsion, seek to ensure that in a sex discrimination case a lay or a professional judge is of the same sex as the claimant and in a race discrimination case a lay or a professional judge has some special knowledge of race relations. This convention, however, is perhaps paradoxical given that lay members are deliberately NOT selected on the basis of any specialised knowledge they may have; see above.

Second, where the regional judge finds that hearing days have to be reduced because of budgetary constraints, he/she can decide which cases should be postponed, which should be kept in the list and which should be accelerated, for instance because the Employment Appeal Tribunal has returned a case for a rehearing.

The budget for the ETs is set annually by HMCTS and prescribes the detail, not just the overall contour of operations; for instance, the number of hearing days, and the number of hearings days by a professional judge with lay judges.⁷²

7.7 Lay judges

Selection and appointment

Lay judges in Great Britain are known as lay members, wing members (suggesting appendages) or non-legal members (emphasising what they do not possess). Such nomenclature is not without symbolic implications: some lay member interviewees expressed displeasure at being referred to as 'wing members'. Moreover, when employment tribunal chairmen were renamed Employment

⁷¹ One of the hallmarks of ETs compared to the *conseils de prud'hommes* is the large volume of case papers ('bundles').

⁷² The President (England and Wales) interviewed for this project said that for 2016-17, he had managed to persuade HMCTS that there should be some provision for fee paid professional judges to have sitting days to keep up their skills as this was important if/when they were to fill salaried judge vacancies. This had to be balanced, however, by cutting some lay judge days to leave the overall contours of the budget intact.

Judges in 2007, lay members' nomenclature was not changed, although they were required to swear the judicial oath.

There were 839 lay judges on 1.3.2017 in England and Wales: 405 on the employee panel and 431 on the employer panel. The equivalent figure for Scotland is 148 lay judges overall; 67 on the employee panel and 81 on the employer panel.

Formally, lay judges in ETs are appointed by the Lord Chancellor 'after consultation with such organisations or associations of organisations representative of employees or of employees' as she sees fit⁷³ for five years, normally renewable until age 70 and they have to commit to being available for at least 15 days a year. According to a TUC spokesperson, the level of engagement with the social partners has declined over the years from genuine dialogue to a formality.

As noted above, up to 1999 appointment was on the basis of nomination by employee organisations, principally the Trades Union Congress (TUC), and employer organisations, principally the Confederation of British Industry (CBI)⁷⁴. Typically the TUC called for nominations from its affiliated unions and the CBI from, for instance, the Engineering Employers' Federation and Chartered Institute of Personnel and Development.

In 1999, as part of a wider political decision to obviate nepotism in public appointments, a new system for recruiting lay judges to ETs was introduced: this involved open competition with an application form, interviews and recommendation for appointment. This was overseen by the Judicial Appointments Commission, with the process subcontracted to a private sector company. Although candidates could still be recommended by the nominating bodies, the then minister said that they would be treated equally alongside applications from other candidates. In the wake of the decision to opt for open competition, advertisements were placed in the local, national and specialist press. The TUC held a briefing session for potential trade union applicants at which a representative from the Employment Tribunal Service explained the process. Those interested were asked to complete an in-depth application form inviting applicants to demonstrate how they met certain essential qualities. Under the most recent recruitment round in 2009 such qualities included 'being fair and open minded bringing their own experience to bear on issues before the Tribunal' and 'an understanding and experience of handling contentious issues in the employment sphere'. Those on the employee panel were expected to demonstrate 'a record of achievement as a trade union official or representative' while those on the employer panel were expected 'to demonstrate experience of employment norms and practices from the perspective of the employer'.⁷⁵ After sifting, based on an online test successful candidates⁷⁶ were asked to attend an interview conducted by a professional judge and two lay judges, after which recommendations for appointment were made.

⁷³ Employment Tribunals Constitution & Rules of Procedure Regs 2004 reg.8

⁷⁴ Other nominating bodies included the Institute of Directors for employer lay judges and the Council of Managerial and Professional Staffs for employee lay judges.

⁷⁵ Appointment of Employment Tribunal, non-legal members: person specification; undated.

⁷⁶ 13 percent of applicants were granted an interview in 2002. See DTI Evaluation of 2002 Recruitment Exercise.

Most lay judge interviewees were happy with the interview process, perhaps not surprising as we did not interview anyone who had not succeeded. Many complained, however, that there was a long delay before they were told the result. A TUC spokesperson, however, was sceptical about the effectiveness of the selection process, noting that there was anecdotal evidence that the sifters did not regard experience in collective bargaining as relevant, in contrast to experience representing individuals. The TUC also had concerns that the online application process discriminated against those who were not computer literate. The effectiveness of the selection process was also questioned by a professional judge interviewed for this project who chaired selection interviews. She was of the view that the interview schedule she was required to follow resulted in her rejecting some applicants whom she considered would have made good lay judges.

Open competition has resulted in more women becoming lay judges;⁷⁷ indeed a few female interviewees said that they would never have become a lay judge under the union nomination process. Nevertheless, open competition has attenuated tripartism. This is because under open competition, an applicant can opt for either the employee or the employer panel. Although some applicants had a clear class or occupational affiliation and opted unambiguously for a particular panel, others had not. Moreover, some applicants who worked in HR opted for the employee panel because, as one put it 'my heart, I guess if I'm honest, lies with the employee' (GB-Employee lay judge-16). This practice was also critically noted by a TUC spokesperson, who expressed 'real concern' that several HR professionals had been appointed to the employee side.

Occasionally the selectors, anxious to fill their quotas in each region, appear to have directed a successful applicant to a panel with a shortfall, especially where an applicant had been both a lay trade union official for a short time early on in their career and had later moved to a human resources role. Also, as our interviews indicated, some of those appointed to the employee panel lacked any recent experience as employees, let alone recent trade union activity or even membership: 14 of the 40 employee lay judges interviewed were not in a trade union at the time of the interview.

Many more people have applied to be lay judges than have been appointed. In the latest recruitment exercise (2009-10) of the 3,998 people who applied, 341 were appointed (Tribunal Service, 2011). So what is their motivation or to be more exact motivations, as many indicated multiple reasons? In our interviews, a common reply was a desire to broaden expertise; some elaborated saying they already knew about ETs but were interested in finding out how they really operated. A number of interviewees said that other lay judges were motivated by money, although they themselves were not; some of those still at work said that their motivation was to gain status/esteem from their employer and/or colleagues; and some said they were driven by values of justice and fairness. These aspects are explored in the thematic section.

The fact that there has not been a recruitment exercise since 2009 means that lay judges are becoming a dying breed. Indeed, just over half of the lay members in England and Wales are over 60.⁷⁸ This is for two reasons. First, as outlined above, the professional judge can sit alone on certain cases and second, there has been a stark reduction in the number of cases, largely attributed to the

⁷⁷ An evaluation of the recruitment exercise in 2002 shows women comprised 44 per cent of the 240 lay judges appointed and ethnic minorities comprised 6 per cent. See DTI Evaluation of 2002 Recruitment Exercise.

⁷⁸ Judicial Diversity statistics 1.4.2016.

introduction of fees in July 2013; see above. The lack of recent recruitment, and the slim prospects for future recruitment, also means that judges are an aging cohort: 22 out of our 52 lay judge interviewees (41 per cent) were aged 65 or over.

Lay judges: induction and training

All training of lay judges is financed by the Judicial College,⁷⁹ which also vets training plans, monitors expenditure and influences how training materials are assessed. It does not, however, prescribe the detail. Once appointed, British lay judges have to undertake a minimum training of one day of observation of a hearing plus deliberations and three days of 'classroom' training over 18 months which covers tribunal procedure and deliberations and is provided by professional judges. This minimum is frequently exceeded and some more recent recruits, when interviewed, said that they had spent five days observing before they took up their role as a lay judge. All our interviewees valued the opportunity to observe hearings and deliberations, but there were mixed views on the effectiveness of 'classroom' training.

Since 2007 new lay judges and those previously appointed have had to swear a judicial oath and this underlines the fact that they are adjudicators in a court of law. Taking the oath was seen as a significant rite by some lay judges interviewed.

In terms of continuing training, lay judges in England and Wales are obliged to attend a one-day training session each year (two days per year in Scotland), delivered at a regional/ local level by professional judges. The syllabus and supporting material for this is specified by the two national training committees (one for England and Wales and one for Scotland), but with an option in England and Wales for a slot to be taken up by an issue determined locally.

As well as the formal training outlined above, lay judges receive regular materials to keep them up to date with any statutory changes and key decisions by the appellate courts. This is financed by the Ministry of Justice, through HMCTS. These materials take the form of a twice monthly online publication and occasional hard copy handbooks by a legal publisher.

Most of our interviewees found both the online and hard copy material useful. They also said that the 'classroom' training had improved, with more emphasis on judgecraft, such as questioning skills, as opposed to an exclusive focus on legal changes. Many interviewees regretted that financial cutbacks had led to the ending of inter-regional training, where they had learnt about good practice in other regions.

Lay judges – status and rights

Lay judges have the statutory right to unpaid time off from work and it is automatically unfair for an employer to dismiss a lay judge for exercising this right. Financial compensation for being a lay judge is provided by the Ministry of Justice. In 2016-17, British lay judges received £182 (€202) per day for attendance at a hearing, but are not recompensed for any other time spent in pursuance of the role, such as travelling time or time for reading before the hearing. Where a hearing lasts a half day, they receive a half fee. They also receive a half fee for a training day. They are paid travel expenses and any necessary subsistence expenses.

⁷⁹ The Judicial College is part of the Judicial Office which supports the judiciary in discharging its responsibilities under the Constitutional Reform Act 2005.

British lay judges normally send a calendar indicating their availability for the following three months to the regional employment tribunal administrator, who then 'books' lay judges according to the demands of the caseload. Since some cases are withdrawn (24 per cent) or settle (39 per cent) (Acas 2016: 41), a lay judge, although booked, is often not required. Our interviewees said that because of recent developments (professional judges sitting alone on unfair dismissal cases and fees), their sitting days had decreased markedly. When asked about the preceding three months, some said they had not sat at all. This was followed up by asking if this was typical. Some said the pattern of sittings varied so much it was hard to say; a lay judge could sit on a 10-day case at the beginning of the year and then nothing until almost the end of the year.

British lay judges, unlike their French counterparts, do not get verbal legal support from court officials, only from the professional judge with whom they sit. Nor do British lay judges obtain specific support from their trade union or employers' association. They have a bespoke association, the Council of Tribunal Members (COTMA), to which they can, but not must, belong. This is organised on a voluntary basis principally by its elected chair and executive secretary. Association members at each regional centre meet at least annually and the executive, to which each region sends a representative, meets four times a year. The researchers were told that the level of activity and the density of COTMA membership varied across the country.

7.8 Labour court practice and procedure

Pre-hearing

A worker/employee cannot submit a claim to the ET unless they have a certificate from another government body, the Advisory, Conciliation and Arbitration Service (Acas), specifying that it had been notified of the claim, but had been unable to resolve the dispute by conciliation. Acas observes that only 19 per cent of the disputes notified to it culminated in a claim to the ET.⁸⁰ Moreover, Acas can continue to conciliate even after a claim has been submitted, with the result that 35 per cent of all claims submitted do not progress to a hearing; they are either settled or withdrawn.

Once a claim is submitted, ET asks the other party (normally the employer) for a response. Claims are 'sifted' (i.e. examined) by a professional judge. This is to ensure that a claim which has no reasonable prospect of success, such as being outside the tribunal's jurisdiction, is halted at an early stage. If on the other hand, the professional judge considers that there is an arguable case, he/she makes what is known as a case management order setting out the date for a preliminary hearing, a final hearing, judicial mediation or judicial assessment (see above).

Preliminary hearings are normally conducted by a professional judge sitting alone and vary widely in scope. In some instances, they are solely concerned with case management, such as clarifying the issues in dispute, ordering the disclosure of documents, or requiring witness statements to be exchanged by a certain date. They can, however, also deal with preliminary issues of law, such as whether a claim has been brought in time or whether the claimant had the requisite service. Increasingly preliminary hearings take the form of teleconferences (Taylor and Amir, 2015:592).

⁸⁰ Acas maintains that 30 per cent of claims are settled formally or informally, but 50 per cent disappear. Speech by Gill McCarthy (ACAS) 20.10.16.

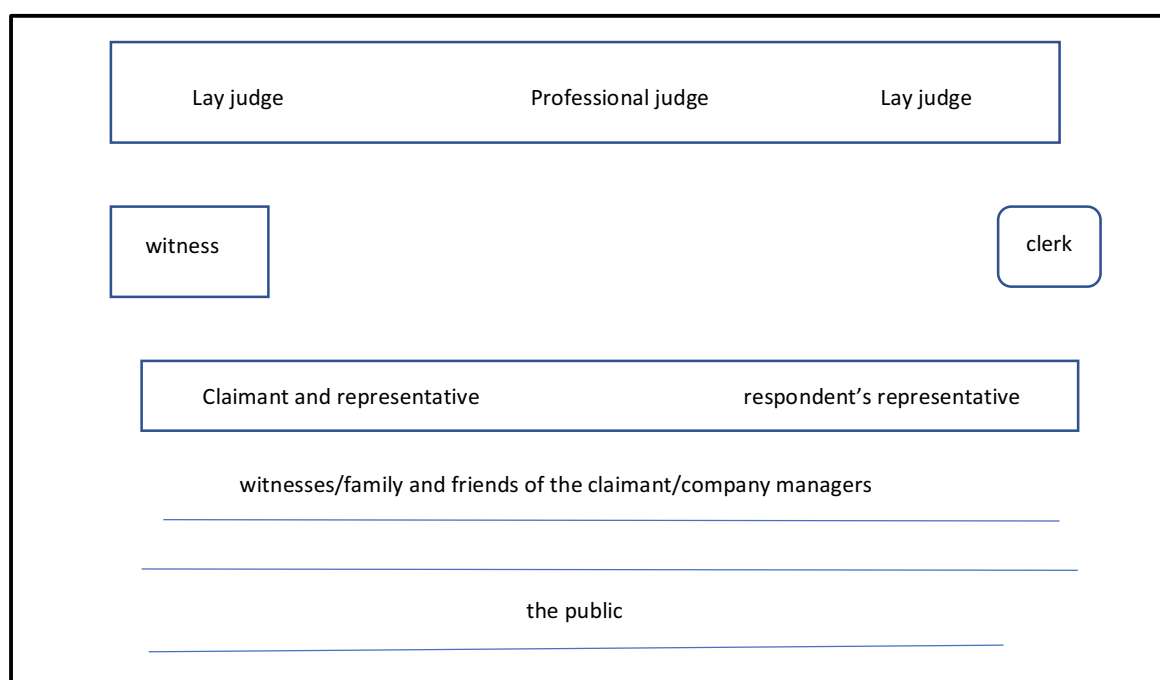
The main hearing

This section focuses on those hearings adjudicated by a full tribunal: a professional judge and two lay judges to determine the merits of the case. As noted above, such hearings now normally relate to the more complex and longer discrimination cases. Unfair dismissal can be included if it has a discriminatory element. Some whistleblowing claims (protected disclosure) are also heard by a full tribunal. Sitting hours are generally from 10 am to 4.30 pm with an hour for lunch.

The three-person tribunal sits on a raised dais,⁸¹ but symbolically it is not as high as that in the Employment Appeal Tribunal. The two lay judges sit on either side of the professional judge, with no indication as to which panel, employer or employee, the lay judges belong to. None of the three are robed and they wear 'ordinary' smart clothes. Legal representatives, like the tribunal, are in 'ordinary' smart clothes as well and do not wear gowns.

Next to the dais but at opposite sides of the room are two small tables and chairs facing inwards, one for the clerk and one for the witness. Facing the tribunal are chairs and a long table for the claimant and respondent and behind that rows of chairs for others including the public.

Figure 7.2: An employment tribunal room



There is no legal aid for representation at ETs in England and Wales⁸² although there is pre-hearing advice for discrimination claims, subject to a savings and income test. Trade unions and some civil society organisations⁸³ and the Equality and Human Rights Commission may offer advice, case

⁸¹ There is no dais in Britain's tripartite Central Arbitration Committee, which adjudicates on certain trade union and other collective matters.

⁸² There are some discretionary provisions in Scotland.

⁸³ For example, the Free Representation Unit, Citizens Advice Bureaux

preparation and representation⁸⁴ or there can be a 'no win/no fee' arrangement. Where a party is unrepresented, however, the professional judge may, but not must, provide advice for instance on the procedure, on the importance of challenging opponents' witnesses through cross-examination, and on the necessity of witnesses expressly referring to documents as otherwise they are not considered by the ET, even though they are in the bundle.

The professional judge, who is in the chair, normally opens the hearing with introductions, asking for agreement on the issues that need to be decided, putting forward a timetable and, if there is large bundle of documents, asking the parties, or their representatives, to identify the important documents that the tribunal will need to read before the hearing gets underway properly. Then, if necessary, the tribunal adjourns for a stated time period for reading; this varies from an hour or two to a day, depending on the number and length of the documents to be read. There is a long-standing convention that the professional judge and the two lay judges read together in the same room, underlining the collegiate nature of adjudication.

After any adjournment for reading, the tribunal returns and the party opening the case (the claimant in discrimination cases) calls a witness who goes to the witness chair/table and swears an oath on the appropriate Holy Book or affirms, promising to tell the truth. Given that the witness statement will already have been read by the tribunal, the witness can be cross-examined straightaway by the opposing party⁸⁵ and in so doing can refer to documents before the tribunal (for instance notes of a meeting, sales figures and relevant emails).

After cross-examination, the tribunal are likely to put their own questions, generally to clarify a matter or to ask the witness to elaborate. The professional judge sometimes starts the questioning with the lay judges then putting their questions, or vice versa. Also, occasionally the professional judge (and sometimes a lay judge) will ask a question during cross-examination. After the tribunal has finished asking questions, the party who first called that witness can 're-examine', that is put further questions to the witness, but only on matters that the witness has already aired. The same party continues this process (cross-examination, questions by the tribunal, re-examination) with all its witnesses and then the opposing party calls its witnesses, following the same process. In England and Wales⁸⁶ all witnesses stay in the tribunal room and hear each other's evidence. At the close, the parties make closing statements, summarising their case and explaining how it complies with the statute and case law.

A key function of the lay judges at the hearing, according to all our interviewees and especially the professional judges, is to be the 'eyes and ears' of the court, observing the demeanour of witnesses and any other court room behaviour, such as a previous witness pulling a face when a subsequent witness is giving evidence. This is because the professional judge has to keep a detailed note of the hearing and thus has his/her head down writing/typing, making it hard to observe events in the room at the same time (No machinery is used to record the proceedings and an appellate court can ask for the professional judge's notes.)

⁸⁴ The EHRC's budget has been drastically cut in the last few years, limiting the legal assistance it provides.

⁸⁵ If the witness statement has not been read the witness first reads out the statement and is examined by his/her representative if represented, after which cross-examination follows.

⁸⁶ In Scotland a witness stays out of the tribunal room until he/she has given evidence.

Normally lay judges remain silent during the hearing, apart from questioning, but several lay judges whom we interviewed reported that they passed a note to the professional judge if they wanted an adjournment. Such adjournments could be used, for instance, to advise a professional judge to be more patient with a litigant or to alert them to a witness's distress.

Another key function of lay judges, according to our interviewees, is note taking. This is particularly useful in two circumstances; first, lay judges' notes can be useful to fill any gaps when the professional judge is asking questions and might find it difficult to write and question at the same time; and second if a party appeals or complains on the grounds of bias by the professional judge, lay judges can draw on their notes for elucidation.

Where a case goes on for many days or is adjourned part heard, lay judges can take certain documents home to refresh their memories, but practice seems to vary by region. In some regions, lay judges are only permitted to take their own personal notes home, but in others they can take home not only their own notes, but any or all of the documents.

Deliberations: the process

Formal deliberations are held at the end of the hearing after all the evidence has been heard. Nevertheless, according to our interviewees, it was not uncommon for the tribunal to have a short recap at the end of a day's session and occasionally prior to the start of a hearing, especially if the hearing was not held continuously and there had been a long interruption. There was, however, awareness on the part of lay judges that they should not attempt to make any assessments in such recaps, as this might lead to overhasty conclusions before all the evidence had been heard.

The deliberations at the close of the hearing are a process of structured decision-making with distinct phases: establishing the facts as presented in documentary material and the outcomes of cross-examination and questioning at the hearing; drawing inferences from these; application of the law; the judgment, including compensation and remedies; and costs. A number of interviewees referred to the 'wheel', a decision-making guide setting out the steps in the deliberation process, although experienced lay judges said they seldom used the wheel as they had internalised the process.

Formal deliberations are steered by the professional judge who has some discretion over how the procedure unfolds. Reported practice varied and seemed to depend on the nature of the case to be decided and/or the preference of the professional judge. Many lay judges reported that the process began with the professional judge inviting an initial round of views from the lay judges before embarking on the findings of fact. Professional judges interviewed also referred to this. As one said:

There are cases where it is very clear from the discussions you have during the course of the hearing what people's views are and where consensus can be reached and where consensus requires further discussion. And a skilled judge will be able to identify those areas with his or her colleagues and focus the discussion on those points (GB-PJ-5).

Alternatively, our interviewees told us that some professional judges preferred to approach a case chronologically or issue by issue. Many of the lay judges interviewed used the term 'collegiate' or working as a 'team' to describe the process of fact finding which involved, for instance, assessing witness credibility and examining the consistency of documentary evidence with oral evidence from cross-examination. Professional judges also referred to the contribution of lay judges in fact finding, noting how their scrutiny of a document or their understanding of a witness's response to a question could, on occasions, persuade them to change their view on an evidential point.

One professional judge recorded in an ET decision that the fact that he, as the Employment Judge, had done most of the talking for the panel at the hearing, did not mean that he had done most of the deciding.⁸⁷ Moreover, this team-working by the whole tribunal was consistent with the comment by many employee lay judges we interviewed that their role was not to champion the claimant's case; likewise, the employer lay judges we interviewed said that their role was not to champion the employer's case. As one employee lay judge said: 'it's not a workplace anymore' (GB-Employee lay judge-17), while another said that he and the employer lay judge thought the same 'many, many times' (GB-Employee lay judge-23). Furthermore, a number of lay judges (from both panels) who had had experience of conflictual industrial relations commented that they were surprised to find that the tribunal deliberated in a consensual manner. Professional judges too remarked that generally one could not distinguish whether the lay judges came from the employee or the employer panel by the stance that they adopted in deliberations.

Deliberations and the lay judges' role

The 2001 Leggatt Review of tribunals noted that one motivation for using tribunals as an adjudicative body was that 'tribunal decisions are often made jointly by a panel of people who pool legal and other expert knowledge, and are the better for that range of skills' (Leggatt, 2001: 1.2). One key resource that lay judges in ETs possess, unlike the professional judges, is workplace experience, but the extent to which this can be drawn on is circumscribed. First, as noted above, lay judges are not matched to the type of industry they come from and the higher courts have held that they should not be selected to sit on an ET because of any specialist knowledge that they possess. Furthermore, if it transpires that by chance they do possess some specialist knowledge this has to be declared at the hearing so that parties can, if they wish, comment.

Second, on the occasions when lay judges sit on an unfair dismissal case (for instance if the unfair dismissal claim is allied to a discrimination claim or a claim of detriment for whistle blowing), this may involve establishing, to quote the statute: 'whether in the circumstances the *employer acted reasonably or unreasonably* [our italics] in treating the reason [for dismissal] as a sufficient reason'. In such a case one of the key roles of the lay judges is to make an assessment as an industrial jury of what would be reasonable, bearing in mind 'the size and administrative resources' of the organisation. In so doing the lay judges' assessment complements the professional judge's legal assessment.

The extent to which lay judges can draw on their workplace experience is further constrained because the Court of Appeal has held that the tribunal, when coming to a view, must not ask what it would have done when faced with the same situation as the employer. Rather, the test is whether the employer's action lies within what is termed a 'range' or 'band' of reasonable responses.⁸⁸ As a result, a tribunal does not decide whether the employer had just cause to dismiss in the light of the interests of both the employer and the employee as in much of continental Europe. Rather the tribunal's intervention is deferential to managerial prerogative and limited to finding a dismissal unfair only where there has been 'a blatant abuse of managerial power'; it is not permitted to act as 'an independent, neutral forum' (Collins, 2004: 35, 39). Indeed, many employment tribunal judgments have been overturned on appeal because the tribunal was deemed to have substituted

⁸⁷ Case no 1601150/2014 Fairbairn v Priory Project Ltd

⁸⁸ British Leyland v Swift [1981] IRLR 91.

its own view, rather than reviewing the employer's actions within the 'band' (see for instance, Wynn-Evans, 2015).

In other respects too, the role of the tribunal, and particularly the lay members whose workplace experience is relevant here, has been circumscribed by precedents set in the higher courts. For instance, the tribunal has been enjoined to allow very considerable latitude to the employer to determine what amounts to gross misconduct warranting summary dismissal, provided the employer has communicated effectively to all their employees what offences equate to gross misconduct. The tribunal's role is also circumscribed in dismissal for misconduct in another respect known as the *Burchell* ruling. This is because although employers are required to carry out an investigation, they do not have to have proof of 'guilt'. All employers need to show is that at the time they took the decision to dismiss, they genuinely and reasonably believed that the employee was guilty of misconduct.⁸⁹ A number of interviewees referred to these limitations in their discussion of how deliberations operated. For instance, one employee laid judge said: 'I've had to accept sometimes that even if it seems harsh to me, it might be within the range of reasonable responses' (GB-Employee lay judge-39).

Furthermore, these limitations mean that lay judges' 'folk norms' of justice and fairness are often not consistent with the law, and in particular precedent. As the interviews conducted with lay members indicate, professional judges frequently had to draw lay judges' attention to the need to comply with precedent, especially to ensure that a judgment was 'appeal-proof'.

Moreover, several lay judges referred to cases where they had felt sympathy for a party, but had not been able to decide in their favour because the legal criteria had not been met. One employee lay judge recounted how a professional judge had said they were not there to be fair but to say what the law was; she agreed that 'he was right really' (GB-Employee lay judge-3). Another said that he struggled with the fact that what the law said overrode his feelings of unfairness. A further lay judge felt 'really sad we had to find against [the claimant] ... but it was legally the right decision' (GB-Employee laid judge-3). Several other lay judge interviewees made similar observations. Thus, even though every member of the tribunal has an equal vote, the professional judge, both as chair of the hearing and exponent of the law in the deliberations, is *primus inter pares*, hence, 'more equal' than the two others.⁹⁰

Workplace experience apart, lay judges considered that they contributed in other ways too, often mentioning analytical skills and common sense, while a professional judge said: 'Where they come in useful more than anything I suppose is that sense of an understanding of human nature' (GB-PJ-10).

Deliberations – dealing with differences

As noted above the three tribunal members all have an equal vote and any minority decision and the reasons for it are included in the judgment. In practice, our interviewees could only recall one or two occasions in 10 or more years, with either one of the lay judges or even more exceptionally, the

⁸⁹ The landmark case here is *British Home Stores v Burchell*. This sets out a three-stage test: did the employer genuinely believe that the claimant was guilty of misconduct; were there reasonable grounds in the employer's mind on which to sustain that belief; at the point when the belief was formed, had the employer carried out as much investigation into the matter as was reasonable in the circumstances?

⁹⁰ To paraphrase George Orwell's well-known words in *Animal Farm* (1945)

professional judge dissenting. Often, as a few interviewees said, having established the facts and applied the law, only one decision was conceivable.

Interestingly the Court of Appeal has frowned on majority decisions, which it held were 'undesirable, on the whole' and 'all efforts' should be made to reach a unanimous decision.⁹¹ Arguably this could be construed as putting pressure on lay judges not to disagree with the professional judge, so undermining the principle of tripartism based on equal votes. By and large, however, our lay judge interviewees did not record any feelings of pressure, but a few commented that there was sometimes a lengthy period of persuasion. As one lay judge said: 'you tend to talk until you get to a decision. I don't think people like decisions that aren't unanimous' (GB-Employee laid judge-35); while another commented: 'I think the [professional] judges work very hard to get a unanimous decision' (GB-Employee lay judge-9). This was echoed by a professional judge who said: 'I think there's more of an effort [now] to reach a consensus' (GB-Employee lay judge-34).

Judgments

Where a tribunal makes a decision on any disputed issue, it must give reasons for its decision. Accordingly, after deliberations have been concluded, the professional judge, in consultation with the lay judges, decides whether the judgement should be given orally at the hearing (in which case the written reasons, if requested, are sent to the parties as soon as practicable) or reserved. In the latter event, parties are sent the judgment and reasons at a later date. In practice the decision as to whether to reserve or not depends on the complexity of the case and the time needed for deliberations. If there is insufficient time for deliberations on the day the hearing ends, the tribunal reconvenes in the professional judge's room. Sometimes, after an adjournment, the tribunal returns and the professional judge announces the judgment and says that the reasons will follow. The reasons must identify the issues, state the findings of facts relevant to those issues, concisely identify the relevant law, state how the law has been applied to those findings in order to decide those issues and, if a financial award is made, how it has been calculated.⁹²

In the rare cases that there is a minority decision, this is announced and the professional judge writes both the minority and majority views. He/she essentially has discretion as to whether or not to send the typed version in draft to the lay judges, but invariably does so where a lay judge has expressed a minority view. British lay judges are not required to sign a judgment; only the professional judge's signature is required. All judgments are archived in hard copy and available for public inspection.

⁹¹ *Anglian Home Improvements Ltd v Kelly* [2004] IRLR 793.

⁹² Tribunal Rules, 2013.

8. LAY JUDGES: TERMS, CONDITIONS AND RESOURCES

This chapter summarises and compares the conditions under which lay judges operate in Germany, France and Great Britain at first instance labour courts.⁹³ It reviews their terms of appointment (Table 8.1); training (Table 8.2); financial compensation (Table 8.3); and support (Table 8.4). Labour court procedures are detailed in the preceding national contextual chapters (Chaps. 5-7).

Table 8.1 summarises how lay judges are appointed, their time off rights, and dismissal protection. There are many *similarities* between lay judges in the three countries:

- They are appointed for five years, renewable.
- They all take a judicial oath.
- In Germany and Great Britain, they are asked to dress 'smartly' but do not wear gowns (unlike professional judges in France and Germany). French lay judges wear a medal when sitting.
- Employee lay judges are protected against dismissal by the employer, although in Great Britain the remedy is normally compensation, not reinstatement, unlike France and Germany.

Nevertheless, there are key *differences*. The most significant is the route by which lay judges come to occupy their position. In Germany, nominations are sent to the appointing bodies (usually Justice Ministries of the *Länder*), principally by trade unions and employers' associations, although some other bodies also have nominating rights. In France, up to now lay judges have been appointed after election; however, in future the French system will resemble that in Germany, with nomination by trade unions and employer associations. In Great Britain, since 1999, there has been open competition with selection after an application form, short-listing and interview (see Chapter 7).

Looking at the four tables together, other key differences are:

- Lay judges in the French labour court are from the private sector only and hear only private sector employment claims, unlike the labour courts in Great Britain and Germany.
- Lay judges in Germany generally sit for 4-6 days a year, less often than in France where they sit once a month on average. In Great Britain, annual sitting days range from nil to over 20.
- There is no compulsory training in Germany, unlike Great Britain. In France, training is provided by unions and employer associations. Although not compulsory, it is recommended and unions receive state financial support. In the past, large unions (in conjunction with universities or with lawyers) aimed to offer training before election, but it mostly occurs later.
- Training in Germany is highly devolved. In Great Britain, training curricula are designed centrally but delivered locally. In France, each union and employer association sets its own curricula. In future, all employer and employee *conseillers* are supposed to receive joint training together under state auspices at the national magistracy school (l'Ecole Nationale de la Magistrature).

⁹³ In Germany lay judges sit at all levels of labour jurisdiction: 1st instance (*Arbeitsgericht*); regional (*Landesarbeitsgericht*) and Federal (*Bundesarbeitsgericht*). In France lay judges sit only at 1st instance. In Great Britain, lay judges sit at 1st instance (employment tribunals) and 2nd instance (Employment Appeal Tribunal, at the discretion of the professional judge). There is no lay participation at the two further levels of appeal.

Table 8.1: Terms of appointment of lay judges

CATEGORY	ITEM	GERMANY	FRANCE	GREAT BRITAIN
Numbers		24,269 lay judges in 1 st and 2 nd instance (<i>Arbeitsgericht</i> and <i>Landesarbeitsgericht</i>)*	14,500 lay judges 7,250 employers 7,250 employees	997 lay judges 512 employers 472 employees
Appointment & withdrawal	Eligibility: Required	Employees/employers 25 years or more, living or working in the court district provided they have the right to vote in Federal elections and are not excluded for certain reasons e.g. have been sentenced, imprisonment of more than 6 months.	Private sector employees or employers, 21 years or more, French citizens, not subject to any statutory ban or loss of core civic rights (e.g. right to vote).	A citizen of the UK, the Commonwealth or the Republic of Ireland at the time of application.**
	How appointed (nomination/election/open competition)	Appointment by Ministries of the <i>Länder</i> or by regional labour courts if authorised by the <i>Länder</i> governments on the basis of lists submitted by trade unions, other independent associations of employees with social-political or professional-political purposes, associations of employers, and public corporations	Up to now <i>conseillers</i> elected by proportional representation on lists. All employees, job seekers & trainees over 16 may vote for employee <i>conseillers</i> . All employers of enterprises of 4+ employees may vote for employer <i>conseillers</i> . The last election was in 2008. In future: nomination by employee and employer organisations. <i>Conseillers</i> appointed by Ministry of Justice.	Open competition (advert/sift/ & interview questions) facilitated by an outsourced company overseen by the Judicial Appointments Commission. Interviews conducted by a panel of professional judge & 2 lay judges. Those recommended appointed by Lord Chancellor*** after consultation with organisations representative of employers/employees.
	Term of office	5 years	5 years (in future 4 years): ordinance of March 2016	5 years
	Renewal	Renewable	Renewable	Renewable
	Removal	<i>Ex post</i> discovery of loss of eligibility. Possibility of removal from office for gross breach of duty.	Not specified.	Only by Lord Chief Justice & Lord Chancellor, or Lord President of the Court of Sessions.
	Retirement provisions	At present, employee lay judges normally retire at age 65½, or just before renewal. No age limit for employer lay judges as long as they have employees, although they may ask for release at age 65½.	No specific age, but lay judges must not serve beyond 10 years after retirement from employment. (Retirement is often at age 60-63).	Age 70

As a lay judge	Initiation	Compulsory oath,	Medal of office & compulsory oath	Compulsory oath
	Dress requirements	No gown for lay judges, but 'smart' clothes informally required.	No gown for <i>conseillers</i> ; no specific dress requirements.	No gown for lay judges, but 'smart' clothes informally required
	Frequency of sitting	Lay judges usually sit for 4-6 days per year.	Lay judges normally sit for 1 or ½ a day per month. Additionally after the hearing (of conciliation and of judgment), the president writes the judgment.	Varies between nil and 20+ days per year, but lay judges required to offer availability of 15 days per year
	Time off rights	Statutory right	Statutory right	Statutory right
	Dismissal protection	Dismissal of a person acting as a lay judge by the employer is illegal, (s. 45 para 1a Law on Judges)	Criminal offence for employer to obstruct a <i>conseiller</i> . Dismissal requires Labour Inspectorate consent; reinstatement if unlawful.	Dismissal of a person acting as a lay judge by the employer is automatically unfair. Remedy normally financial award, not reinstatement.

Notes

* No further statistical breakdown available

** After self-nomination, there is further selection according to specified criteria e.g. experience of dealing with a range of employment relations issues and other qualities e.g. open mindedness; sensitivity.

*** Lord Chief Justice for England and Wales; the Lord President of the Court of Sessions, Scotland.

Table 8.2: Training

CATEGORY	ITEM	GERMANY	FRANCE	GREAT BRITAIN
Initial training	Compulsory training before allowed to sit	No, but some courts, trade unions & employer associations provide training	No, but it is recommended and the overall allowance is 6 weeks during the 5-year period of office. Large unions try to provide it before the election, but mostly it occurs after the election and sometimes even after lay judges' first year.	Yes.
	Who delivers	Trade unions, employer associations, courts	Universities (Instituts du travail), lawyers' association and trade unions or employer associations (some have training centres) which are approved by the State. In future, initial joint training will be provided by the state at l'Ecole Nationale de la Magistrature.	Professional Judges
	Who finances	Financed by provider	The state organises and finances legal training by devolving it to trade unions and employer associations	Judicial College
	Time spent	Varies	Varies	Minimum: 1 day of observation & 1 day lecture.
	Content	Varies	Content specified in Decree 11.12.81 e.g. judgecraft, including writing judgments, labour court procedures relevant law.	Tribunal procedure, the latest relevant law and cases, judgecraft.
On-going training	Compulsory?	No	No	Yes
	Form	Varies	Location depends on provider	In Regional office
	Time spent per year	Not fixed	6 weeks maximum during period of office (normally 5 years)	1 day per year England & Wales. 2 days per year Scotland
	Provider	Trade unions, employer associations, or courts	Various e.g. higher education institutions, certain trade unions, bodies that train state employees.	Professional judges
	Who finances	Special remuneration if training offered by the court	The state supports trade union & employers' association training centres. Employer reimbursed by state for the absence of employees	Judicial College

Table 8.3: Financial compensation provided by the state to employee lay judges and what it covers

ITEM	Amount of financial compensation		
	GERMANY	FRANCE	GREAT BRITAIN
Travelling time	Yes €6 per hour + compensation for income loss	None	None
Expenses of travel	Yes	Yes - if travel over 5 km	Yes- standard class rail Own car: 45p per mile
Reading time before a hearing	None	Compensated on an hourly basis, subject to time limits (see note). <u>Inside working hours:</u> employees compensated on full pay by employer who is reimbursed by state and employers receive €14.20 per hour. <u>Outside working hours</u> employees, job seekers, employers receive €7.10 per hour.	None
Time spent conciliating	Lay judges do not participate in conciliation hearings		Lay judges do not participate in the conciliation hearings
The court hearing & deliberations afterwards	€6 + income compensation during the whole time of the hearing & deliberations		£181.80 (April 2016) per day 10am-4.30pm £90.90 10.00am -1 pm
Time spent drafting the judgment	The judgment is drafted exclusively by the professional judge		Included in rate per day as judgment is drafted in the presence of lay judges.
Training (per diem)	€6 per hour by x hours + compensation for income loss if state provides training	Employer reimbursed by state	£90.90
Loss of earnings	Compensated by Lander if not paid by the employer.	N/A	N/A
Any other matter		Compensation for attendance at meetings – see note below	

Note: In France the compensation detailed above is subject to time limits as follows:

- Reading time before hearing: conciliation hearing = 30 mins; full hearing = 1 hour; ‘rapid procedure’ (see Chapter 5) = 30 minutes
- Study time after hearing: conciliation 45 mins; ‘rapid procedure’ = 15 minutes.
- Drafting record of hearing and decisions: conciliation= 30 minutes; judgement after full hearing = 5 hours.
- Reading and signing judgment by the chair of the hearing = 15 minutes. Drafting an order = 1 hour
- Participation in preparatory sessions for general meetings: 3 meetings a year.

Each year, in January, all the *conseillers* attend the general meeting (*assemblée générale*), chaired by the president of the Cour d’Appel, where they elect the president and the vice-president (one employer and one employee) of the labour court, and the president and vice-president of each section of the court.

Table 8.4: Support for lay judge role

Category	Item	GERMANY	FRANCE	GREAT BRITAIN
Verbal	Court official	None	Yes, but informal	None
	Trade union	None	Yes, but informal	None
Written	Provider	N/A*	Trade unions	Legal Publisher
	Payer	N/A	If material distributed during formal training by accredited body, state pays. Otherwise union, or employers' association pays.	State
	Frequency	N/A	Not specified, but often the legal department of the trade union sends out a newsletter about four times a year to its activists.	Regular summaries of latest cases & developments twice a month (online) + 3 handbooks per year on a specific topic. (hard copy).
Meetings	Who with	Depending on local court practices	Other judges/employee lay judges only	All lay judges
	Who organises	Could be the committee of lay judges, (s. 29 LCA)	Informal, mainly in training sessions	COTMA**
	Frequency	Irregular	Irregular	Quarterly

Notes

* If German employee lay judges are works councillors, they receive legal information in that capacity, paid for by the employer.

**COTMA = Council of Tribunal Members' Association. In each court location COTMA has office holders –normally a chair and secretary. There are annual meetings in each court location for members in that court location. The COTMA executive, on which there is a representative from each court location, meets quarterly normally.

PART III

ANALYSIS AND COMPARISON

9. ENTERING THE COURT AND INITIAL EXPERIENCES

Motivation, nomination, selection and appointment and first steps

This chapter considers how lay judges that we interviewed came to take up their position as a lay judge in the labour court and how they embarked on performing the role of a judicial actor. The chapter begins with what interviewees said had motivated them to either seek this position, make themselves available or accept an invitation to take it up. It then looks at the various formal and informal mechanisms that serve to facilitate this, and then reviews their experience of procedures through which they formally enter the role. It concludes by reporting on lay judges' perceptions of their initial experiences.

9.1 Motivation

Interviewees in all three countries reported a range of motives for becoming a lay judge, often centring on a sense of justice and the view that labour courts, with their distinctive arrangements and composition, offered a means for employees to obtain redress. None the less, as the analysis indicates, the source and nature of motivation varied by country, and in Great Britain, to some extent, between organisational nominees and self-nominees.

Becoming a lay judge was seen as attracting esteem in all three countries, and this was also confirmed by lay judges when subsequently reflecting on their experience. Although this esteem was commented on as an effect of being a lay judge (see Chapter 13), it could also serve to attract individuals to take up the position. The fact that being a lay judge attracted esteem and could be seen as a reward for prior service to an organisation or individuals in that organisation also led to the possibility of conflict over the allocation of such positions within organisations, which some interviewees commented on and alluded to in Great Britain.

In Great Britain, some interviewees noted that this esteem attached not only to the nominee, as a form of recognition, but also, on occasions during the period of organisational nomination, to a nominating individual. One employer lay judge commented 'I was very flattered' (GB ER 3). In two instances in Great Britain, employer lay judges stated that their nominating organisation wanted to increase the number of women members and encouraged them to join, which further improved the standing of the nominating manager. One said, indicating that she was under a degree of organisational pressure to take up the role, 'he thought it was a feather in his cap because at the time I was the first female HR manager they'd ever had and there weren't many females around as lay members. I was told that *I would have* to apply' (GB ER 8) (our emphasis).

'Sense of justice' and problems at work

'I think it was the word "justice" (GB EE 3). 'It all started due to an unfairness' (GB EE 3).

Unsurprisingly, 'justice' and 'fairness' were cited by many individuals' in all three countries as motivating their decision to become (employee) lay judges. For some, lay judge activity appears to have been part of a wider 'moral career', expressed either in terms of 'civic' engagement, union/class affiliation, or a combination of both. In Great Britain, media advertisements in one campaign to recruit lay members asked: 'Do you believe in justice?'

In some cases, interviewees expressed a generalised commitment to justice and fairness. One British employee lay judge said: 'It's about my political beliefs - my moral beliefs... people deserve to be treated fairly, to have justice and that's always motivated me to get involved really' (GB EE 38).⁹⁴

Similarly, German lay judges indicated a desire to contribute to fairness in life and wanted to make use of their scope for social participation 'to make sure that judgments are correct, that they're fair. That's why I do this' (G EE DO 31). 'A very well-developed sense of justice' (G EE HAL 21) was reported as both being a personal characteristic as well as a motive for joining the labour court, and interviewees wanted society to benefit from this: 'the interest I've always had in justice, and arguing for it' (G EE MA 60).

For some interviewees, justice was mainly seen in workplace terms and the motivation to become a lay judge flowed from this. This characterised some British lay judges and was also especially highlighted in France, where many of the *conseillers* interviewed became interested in the legal aspects of employment following conflicts at the workplace in which they were personally involved. This prompted some to begin to read the Labour Code and to learn how to defend themselves. This was particularly the case for employee lay judges who had experienced discrimination on the grounds of their trade union membership.

In two instances in Great Britain, two female *employee* lay judges had experienced problems as *managers*, such as a lack of support during difficult periods. These events often generated some of the strongest emotional language used by interviewees. For example: 'I thought I was about to be hung out to dry. ... It was a terrifying experience but I was really angry and it made me think about people who don't have a voice, who need to have a voice' (GB EE 40). The other commented: 'I thought I want to give back... because in a sense the [experience] nearly destroyed me because when I went past [the workplace] I would shake' (GB EE 37).

A number of interviewees, both employee and employer, reported strong family traditions of a commitment to social justice that had influenced them. This was expressed in both general terms and, for employee lay judges, in terms of a specific commitment to trade unionism.

Two *British* interviewees (one employee and one employer) talked about a 'fairness' or 'rescue gene' in their family or individual make-up. 'My daughter thinks that there's a strong rescue gene in all our family and we can't help meddling' (GB EE 28). A non-political but highly developed sense of community also played a formative role for some employee and employer lay judges. 'My mother and father were the sort that everybody came to for help, not political – it was just day-to-day help. My mother was like the hub of the community' (GB EE 9).

In *France*, there were also some references to 'family traditions' but these were in relation to a commitment to trade unionism as a means for defending and protecting workers from injustice. Several British interviewees also cited a family background in trade unionism:⁹⁵ 'My grandfather was

⁹⁴ In Britain, a sense of injustice about the selective aspects of the education system, especially before the 1970s, and a lack of educational opportunities, in particular to higher education, affected and was reported by several interviewees, both employer and employee.

⁹⁵ During the 1970s, trade union membership was c. 40-50% of the workforce, so a high incidence of exposure to unionism is not surprising.

the secretary of his trade union and so it's quite a, sort of, strong tradition within the family' (GB EE 28). 'My mother was a waitress but she always belonged to the T&G. My dad worked in a factory and he was a shop steward' (GB EE 39).

In Germany, there were also a few instances in which activity as a lay judge or engagement in trade union work grew out of a family tradition.

I also believe in the system. My mother was a lay judge in the administrative court in [...] right up to her death. It's part of our legal system, and the right people should make themselves available. Somehow, I thought I was one of those (G EE MA 66).

Another noted:

Because of my wife, who is a lawyer at [a German trade union] and has also been a lay judge for many years, I've often attended hearings and thought that might be interesting. I then went quite spontaneously to the trade union (G EE MA 62).

Yes, I can exactly, my father has always been a works council member and, as far as I can remember, in the trade union (...). So I sort of grew up into it. He was never at home and I then also discretely joined and never made much of it, but then outsourcing arrived (...) and it was clear we needed our own works council (G EE B 34).

And finally:

First of all, I was employed in production at the company, but should say, about my parents, that my father was already a works councillor, and so were uncles, cousins. I was very caught up in this and new members had to be found when the works council elections came around and I was lucky, I was elected to deputy chair at my first election (...) Two years later, I became chair, it was total man's world and I've been in this office for 22 years now (G EE MA 60).

Gender and race

In some cases, perceived unfairness at the workplace followed from observing and experiencing discrimination at the workplace, either on grounds of gender or race. This appears to have been reported much more frequently by the British lay judges than in France or Germany. One British employee lay judge, whose family were of Caribbean origin, said: 'I applied because I believed that I could bring a sense of fairness, justice, equity. I applied because I had a long experience in seeing discrimination take place in the workplace' (GB EE 22).

One female lay judge in Britain who did not come from a trade union background noted that her father 'could never imagine how he had two daughters that ended up being quite active' (GB EE 32). This individual became involved through a developing sense of *gender discrimination*, an aspect cited by most female employee lay judges. This generated strong emotions. One interviewee noted that she was told that 'because I was married I was likely not to be mobile, therefore they didn't have to give me a permanent job. And I was so angry that I decided I would show them' (GB EE 6).

Defending employees – being a 'good' employee representative

Employee lay judges in all three countries subscribed to the notion of being a 'good' employee representative – in Britain and France expressed in terms of trade union affiliation and in Germany with a greater focus in our sample on activity as a works councillor or staff representative.

Some employee lay judges in France who did not report personal problems at work were motivated to join the labour court because of their having observed workplace injustices. French employee lay judges reported wanting to defend their colleagues, support them and make sure that they did not suffer a detriment at the hands of their employer. In this respect, the role of *conseiller* can tie in with

other workplace representative roles (such as staff representatives or workplace union representatives). A CFDT member who worked at a law firm dealing with insurance noted:

At first it was very well regarded. I was even congratulated by my management. It's also due to the fact that because of the job I was doing, the people we had, because we had very large contracts with clients that were trade unions. It was quite a good selling point to say that there was someone inside who was familiar with the unions and their activities at the labour court from within (F12-Nant-Ee).

I think that having been a staff representative is a help, to have been sensitised, but it goes in both directions. To be a *conseiller* really helps carrying out the positions I hold at my workplace. Suddenly you have a logic, a way of reasoning you didn't have before. And most of all, when we carry out an action we think about what it can lead to afterwards. It is the idea of finding a situation of fact and then finding a situation of law to solve it and putting this to the employer. This helps in drawing up demands as a staff representative. It allows the works council to take certain actions. It will be well documented and if one day there's a problem we can get out that document (F01-Nant-Ee).

Similarly, most union nominees and many employee-side self-nominees in *Britain*, were also motivated by the expectation that becoming a lay judge would enhance their ability to represent their members. 'My motivation was always to protect and promote the interests of people that you represent... continuation to an employment tribunal is a natural step' (GB EE 31). This was expressed in some cases as wanting to continue to defend employee interests through gaining knowledge to help in their workplace role.

I suspect I probably wanted to know more about employment rights, and I thought I would find out a fair amount by being here. But I also thought it would give me a bit more clout in talking to the employers. I felt that if I got the experience here people were less likely to give me problems at work, and that proved to be true actually (GB EE 13).

On occasions, self-protection was also a motivation. 'You are treated better because they know that you know what they know' (GB EE 37).

This link with workplace representation was at its clearest in the case of individuals with trade union 'careers' as senior elected lay officials. One British lay judge and elected senior lay union official said: 'I was just into it! It was, it was part of my life: I was a trade union activist. I like fighting for people, supporting people;. I like getting involved' (GB EE 9). Although some British employee lay judges had trade union careers, typically as lay officials, this was not the dominant trajectory for most of the sample.

In *Germany*, some employee lay judges also stated that they saw their task as supporting employees in having their rights vindicated. For some interviewees, this followed directly from their existing activity as workplace employee representatives, either as works councillors, staff representatives or trade union members:

My motivation actually grew out of activity as a trade unionist, as I was already representing my colleagues by being on the collective bargaining committee and trying to get as much as possible for them and that they were properly represented at the company, and that was also the motive to become a works councillor and, as I said, to get full time-off for this, and try to ensure that they not only have their rights but also that I can get something when negotiating workplace agreements (G EE B 43).

Building knowledge and expertise

Interviewees in all three countries were motivated by the fact that being a lay judge would allow them to develop their knowledge and expertise. For some, mainly employee lay judges, this was

primarily about their role as employee representatives; for others it was the impact on their professional lives. In many cases, this purposive and instrumental aim was closely entwined with other normative considerations and also changed over the course of lay judges' experience in the labour court.

One *British* employee lay judge commented, for example: 'It would help me to develop myself but also better able to assist our members as well' (GB EE 18). An employer lay judge noted: 'I did think I saw it as being very useful for my career' (GB ER 10).

In *Germany*, the most frequently cited motivation for becoming a lay judge was a desire to acquire knowledge that would benefit the individual's professional life and activity as an employee representative, either through gaining experience by dealing with disputes from a judicial perspective or having the opportunity to deepen knowledge of employment law. 'Learning. I thought there can't be a better school. The chance actually to sit with a professional full-time judge and go through cases, hear both sides from the lawyers, with lawyers' (G EE MA 66). Serving as a lay judge was seen as a type of continuing education. 'It's like a form of training. I really like it' (G EE HAL 11).

Lay judges also saw benefit in the fact that they could transfer the knowledge and experience they gained at the labour court into their professional lives. 'From that perspective, on the one hand, it's been a successful learning exercise and that was also my aspiration' (G EE DO 26). These motives for becoming a lay judge in Germany reflect a means-end form of reasoning that follows from a prior decision to become an employee representative rather than a directly instrumental form of reasoning aimed at improving one's career. On the other hand, the proximate motivating factor was not simply to help secure justice but as part of a broader trajectory as an employee representative.

French *conseillers* referred to the prospect of acquiring considerable legal expertise during their period of office, which would enable them to become a reference point on legal matters within their trade union and through this gaining a significant role at their workplaces.

We can talk more easily. I have good relationships, I've never had any problems. If I've had something to say, I'd go to see the regional HR director, I'll knock on his door and he'll open it. I've not needed to make an appointment. They accepted me. They take more notice of you, obviously (F23-Stras-Ee).

In some instances, being lay member was seen as directly being able to enhance a trade union career. One British lay judge commented: 'I wanted experience, I knew I was going to be in-house so the only way to see how other people do their job is to be a lay member, so I see lots of different parties, lots of different advocates, lots of different styles, I have experience in sections of the law that I wouldn't ordinarily see. It was about broadening my horizons' (GB EE 25).

Civic commitment

'I thought I had something to offer' was a frequent observation by interviewees in Britain and Germany. In some instances, this was a reflection on their acquired skills, either as employee representatives, HR specialists or experienced managers, or with a particular insight due to an individual characteristic (ethnicity, a disability). 'I thought the chance of the tribunal just sort of brought all my background together' (GB ER 13). For others, the 'offer' was part of a continuing civic engagement.

Social engagement also played a major role in the interviews conducted in Germany, together with the wish 'to help' and do something for the wider social and legal order. In particular, German

interviewees highlighted the notion of *responsibility*. 'I think that I like taking on responsibility, that I like to get involved and make a contribution, and I hope that I do this well. I have a need to get involved in things, just to participate' (G EE HAL 9). This emotional engagement with the wider civic order seemed more marked in Germany than in Britain. For example, German interviews said they wanted to 'contribute to the system' (G ER MA 64); or to 'get involved in these positions' (G EE MA 59); '...perhaps you can do something good...' (G EE DO 30); 'I feel responsible for my colleagues' (G EE DO 27); 'I wanted to help' (G EE HAL 22). Finally, 'I like doing this because it's a little something that I can give back to society. It sounds rather simplistic, but for me it's a way of just getting a bit involved socially' (G EE HAL 10).

In Germany, this feeling was also coupled with an interest in making not only specific knowledge available to the court but also their broader workplace and life experience. 'One consideration for me was to be able to bring in my experience from active professional life because we repeatedly come across issues ... How did the employee behave? How should the employer behave? This is a constant challenge and that was one motive for me' (G EE MA 69). Another noted: '...on the one hand, widening and using knowledge, bringing my life experience and of course my everyday experience at a staff representative, and I think that's all been the case' (G EE HAL 22). Interviewees also noted a desire to bring a view from the outside, or the standpoint and opinion of a lay person, all of which were seen as important for decision-making at the labour court. 'For me as a somewhat older contemporary, a desire to pass on my life experience a little better' (G EE DO 51).

Our interviewees reported engagement in other social areas, such as the church and political, social and cultural activities. 'From a trade union perspective or other aspects relevant to this, lay positions in IG BAU, on the executive board, ... but also in the district branch, the company's workplace branch, that also exist through the union. ... Also lay positions, social ones, that are not to do with the union – I'm the parents' representative at a large school with 1,300 pupils, but also for all 65 schools in the whole district [...], I'm deputy chair [of the parents' council], and I've done this for eight years at the school and I think three or four years for the whole district' (G EE B 34).

It was not infrequent to encounter labour court lay judges in Germany who served in another jurisdiction.⁹⁶ One interviewee, who also sat in a social court, noted: 'I took up the role of a labour court lay judge, and have also now become a lay judge in a social court. These are all things I find very interesting, they can widen your horizons – yes, that's my career development' (G EE MA 6).

Defending employer interests

Ensuring that the employer perspective was represented in tribunals was also a motivation for some employer lay judges. One British judge commented: 'I do not think there are enough people on employment tribunals who run payrolls; a lot of people there are either self-employed or come from large organisations' (GB ER 12).

Personal fulfilment and interest in the law

Some interviewees in all three countries expressed interest and pleasure in engaging with the law and the specific activity of serving as a judicial decision maker ahead of their joining the court. This is unsurprising and possibly an aspect of self-selection for interview. In some cases, interest was

⁹⁶ This was not the case in Great Britain, for example, where only one lay judge interviewed served on another tribunal, although one British interviewee sat on a panel professionally that made legally-binding decisions in the social work field.

prompted by curiosity at to what happened to workplace disputes once they entered the judicial realm. One British employee lay judge noted: 'There was always this thinking at the back of my mind, what happens when you get there?' (GB EE 4). In this respect, being a judicial actor engaged both the intellect and emotions of many interviewees, with use of the 'fascinate' in some cases (as also noted above), even 'excitement', encompassing both elements. This dimension could have consequences for the relationships between lay judges and professional judges (see Chapter 12) and the situation of subordination in this relationship that is both recognised but also denied by many interviewees.

I thought it would be very interesting, and it is very interesting; and I think it's, you know, I still find it fascinating, that you sit and you hear one side of the case, and you go, 'Oh my God, it's a slam-dunk!' and then you hear the other side, and you go, 'Oh no, it's not!' (GB EE 9).

An interest in following case law was also a motivation for German interviewees to take on this role and participate in shaping the making of law: 'An interest in employment law, in case law, because, as I've experienced at work, this a very fascinating field and can vary a great deal. And being a lay judge of course gives you an opportunity to take part in employment law proceedings' (G ER DO 28). Some interviewees in Germany noted their 'curiosity' and that being a lay judge was an 'intriguing' [or 'exciting'] task: 'I find, and have always found, it fascinating to look out beyond my own horizon. As a business person one can develop blinkers, you only see your own area, and that's eventually boring. The cases that I've been involved in deciding here, and continue to be, they're always intriguing, you're confronted by quite different sets of issues' (G ER DO 45).

Financial reasons – and life changes

'Of course, it's nice to get paid for a few day's work but no one lives off being a tribunal member' (GB ER 13).

The daily fee for sitting as a lay judge in Britain in 2016 was £182, paid directly to the individual. For interviewees, this was both an incentive but could also be a source of grievance. The language used about payment arguably fosters and reflects the perception that it is a form of remuneration for a service provided, in common with other professional service providers. Lay judges used terms such as 'being paid', 'getting some remuneration'. This contrasts with the situation in France and Germany, where lay judges receive continued payment of their regular pay.

The overwhelming response by interviewees in Britain was, however, that they – themselves – were not motivated by money ('I'm not bothered really, I mean whether it's 180 or 50 or 200 I think I'd do it anyway'). 'It's nice to have the money to be paid to go and do that, but I went on there to sit as a Tribunal member, because I felt I could contribute' (GB EE 6). Only one interviewee candidly said that earning money was the main reason for taking up the role ('I wouldn't have done it if it was voluntary', GB EE 27). In this case, lay judge activity was part of a portfolio of such roles in 'semi-retirement'. Some interviewees did consider that financial incentives played a role in *other* lay judges' participation. 'The one thing that worries me is that some colleagues seem to be looking at how much money they're going to have' (GB EE 20).

The source of grievance lay not so much in the fee itself but in the fact that opportunities to sit had become much reduced in recent years (see Chapter 7) and the discrimination cases that did involve lay judges were much longer. This led to perceived inequities about how cases were assigned to individuals, but also recognition that local tribunals tried to respond to this when drawing up listings.

In *France*, holding office as *conseiller* does not give an entitlement to remuneration. Lay judges continue to be paid by their employer while serving, and the employer is, in turn, reimbursed by the state. They expressly noted that this system did not represent an incentive. Employers receive an allowance (see Chapter 5).

In this respect, money cannot be said to function as a motive. On the other hand, the scope for getting out of the workplace and 'doing something different' is an aspect that could have an impact on willingness to take on the role of *conseiller*. Activity as a *conseiller* also offer some opportunities for retraining, although few seem to take this up.

For some self-nominated lay judges in Great Britain, becoming a lay judge appears to have followed from or been in parallel to major life changes, such as redundancy or retirement. 'Like most things in life, it's a strange coincidence of where I was in my life at that particular time' (GB ER 5) The link to a possibly unwanted life change was not always cited as an explicit motivation and the changes were sometimes expressed euphemistically, possibly as a means of maintaining self-esteem.⁹⁷ 'I had an opportunity to do something else'.

Some employee interviewees reported reaching a plateau, including in union engagement. 'I decided I was not going further forward in terms of the hierarchy..., so I looked sideways for things I wanted to do' (GB EE 2). Another self-nominated employee judge commented: 'To be honest I was getting a bit bored at work and I thought it would be quite interesting' (GB EE 35).

One employer lay judge, who had made a number of life changes, noted about sitting on a very long case (20 days): 'That was a wonderful experience, it was *almost like you were back in full time work* at a firm: that focus and mindset' [*our emphasis*] (GB ER 13).

In *France*, there was reference to how becoming a lay judge might offer a 'way out' for employees who might have been marginalised or lost status at the workplace (such as returning from maternity leave) or who had had difficulty in regaining their position at their employer after being involved in significant trade union activity.

I've been a member of the Occupational Health and Safety Committee since 1975 (CHSCT), I've sat on internal bodies, such as the works council, and then in 1987 I was seconded 100% to the trade union for five years. In 1992, I stepped down from this as I wanted to resume my career and I then took up office as a *conseiller* in the labour court. (...) This wasn't bad at all, as I'd been able to get some return from all the years where I was involved within the trade unions and those five years were not wasted as I was going back the same company and the same place. The first proposal was to go back to the post I had before. But it was complicated because the technology had moved on and the work was not the same anymore, and I wasn't at the same level (F5-Nant-Ee).

Motivation: summary

Many lay employee lay judges in Germany said that their main motive was to gain a better knowledge of the law in order to be a more effective employee representative. Becoming a lay judge, therefore, might be seen as a rational-purposive act, but not one necessarily shaped by individual interests. Rather, it is the consequence of a prior decision to serve as an *interest representative*, a decision that in itself might have been motivated by normative considerations or direct experiences of workplace problems. In Great Britain, the range of motivations appears to be

⁹⁷ One conjecture here is that the British practice of 'managing out' senior staff who have no further promotions ahead of them, especially pronounced in the 1990s, often led individuals to have to find fresh opportunities in their late-50s, some way before normal retirement age.

more mixed, with differences between organisational nominees and self-nominees, some of whom made creative adaptations to changing life situations.

In some cases in the British sample, strong emotions were expressed, in particular by women and also ethnic minority lay judges, about their treatment in general and also problems experienced at work. There were some discernible differences between men and women in the British sample on this issue. Whereas 12 of the 20 female British lay judge interviewees expressly referred to 'justice', 'fairness' and 'equity' when asked about their motivation for becoming a lay judge, these terms were used by only four out of the 21 male lay judge interviewees.

In Germany, there were some references to 'responsibility' and similar terms, suggesting a 'constitutional' or 'civic' understanding of the role. Similar expressions were used later in the interviews when some German interviewees spoke about the need to 'uphold the system'. In Great Britain, the language was less formalised, and used expressions such as 'giving something back' (reciprocity rather than duty). In France, workplace issues seemed to be the main driver.

9.2 Nomination and selection

There are currently three distinctive methods for nominating individuals for the role of lay judge in labour courts in France, Germany and Great Britain: election, organisational nomination, and self-nomination. One of the objectives of this chapter is to begin to examine whether interviewees' perception of their judicial role had been shaped by their route into lay judge activity.

In *France*, up to the present, lay judges have been elected by their respective constituencies – employees and employers – following nomination and the compilation of candidate lists by trade unions and employer associations (see Chapter 5: France). The current cohort of *conseillers* in office will be the last to be appointed using this method as under recent reforms, in the future *conseillers* will be appointed to office following nomination by trade unions and employers' associations without election.

Employee lay judges in France must first, therefore, be identified within their trade union. In the past, they will have become candidates on a union list, drawn up by one of several competing unions. At the time that *conseillers'* terms of office expire, trade unions also come under some pressure to deliver a sufficient number of candidates (in the past for elections). There is a statutory obligation on nominating organisations to strive for a balanced representation between occupational sectors and an equal representation of men and women on their lists. As a rule, therefore, it is trade unions and the officials within them that are actively engaged in looking for candidates with the 'right profile'. This includes a significant prior commitment to union activity but also typically some familiarity with and skills in the law. 'Spontaneous applications' by individuals to nominating organisations are, therefore, rare, but do occur and can fit with unions' need to put forward candidates with legal skills.

I have been a member of the CFDT since 1992, since I started working. I was soon appointed as a staff delegate, a member of the works council, and a union representative, but I no longer hold all these offices. I am a lawyer by training and by profession. I am responsible for the legal protection service at an insurance company. So why did I get interested in this activity? Well, because of professional training and my activism. Over the course of 2002, I made myself familiar with this area of law. I knew that there would be elections for a fresh term of office and made myself known to the CFDT in Nantes. I put in an application on my own account. This is not very common because most of the time, when we're looking for activists, we have difficulties (F12-Nant-Ee).

Such individual applications are more frequent for the employer side, as membership of an employer association is different in character to membership of a trade union. As a rule, it is firms that are members of employer associations and individuals do not have a subjective link to these bodies. And the decision to become a lay judge for an employer is not related to the length of their membership or individual involvement.

For the employers, the decision to stand as a candidate usually depends on being approached as an individual, possibly by managers who will ask their HRM staff to extend their reach by engaging with employment law and industrial relations issues as a *conseiller*: some one-third of employer-side *conseillers* are, in fact, employees (Michel and Willemez, 2007). A further source of approaches might come from other employers who used to be *conseillers* and are looking to recruit new members. This might take place at social events, where potential candidates are assessed to see whether they have the 'right attitude'.

Compiling the lists of candidates has always been an important organizational activity for trade unions in France, above and beyond the immediate aim of filling *conseiller* vacancies. Locating potential candidates mobilises and helps identify activists and volunteers, who often represent a small core within the membership, enables unions to gauge their strength and legal knowledge, and draws together members from a variety of occupations and departments. For the individuals nominated, being placed on a list constitutes recognition of their contribution to union activity. At the same time, union activists interested in developing a 'trade union career'⁹⁸ can signal their interest in the *conseiller* role, either expressly or implicitly. The proposed change in the method of appointing lay members will not have a major impact on unions internally, and hence on this other organisational aspects, as in future this task will still be carried out by unions locally.

In *Germany*, lay judges are appointed by the authorities following nomination by a range of organisations representing employees and employers. For employee lay judges, this is predominantly trade unions (see Chapter 6, Germany). One of the most common characteristics of employee labour judges in our sample was that, in addition to being trade union members, they had experience as members of works councils in the private sector or staff councils in the public sector (referred to here as 'works councillors' or 'staff representatives'). Activity as a works councillor was usually preceded by a long period of employment and long service with an individual employer. In terms of gender, within our sample of the 41 employee lay judges interviewed, 31 were actual or former works councillors or staff representatives, of which, in turn, 13 were women. There was also a high level of other forms of lay engagement. For example:

I was then elected to the works council because I was well-liked, became chair of the works council and since August 2002 I've had full time-off for this role, been re-elected several times, which, for me, is confirmation that I've carried this out fairly well and that also led me to expand my activity. I'm very involved in the trade union in a number of roles at national level (G EE MA 67).

While many employee lay judges exercised (or had exercised) a trade union function, others were ordinary union members.

⁹⁸ That is, a structured trajectory as a union activist, not necessarily in pursuit of a post as a full-time official.

On the employer side, several lay judges were independent employers. In addition, the employer side also included human resource managers in the private and public sector and representatives of employer associations.

For the most part, employee candidates for the position of lay judge are proposed either by their trade union or are prompted to do so by union members. Independent employee organisations with social or occupational objectives (such as the Kolpingwerk⁹⁹ or a diocesan association affiliated with the Catholic Employee Association) may also nominate candidates for the employee side. For the employers, candidates are proposed by employer associations or public administrative bodies and agencies or their employer association. Lists of nominations are submitted to the responsible ministries of justice or labour or to the regional labour courts. 'I was told I would be put on a list of nominees, and four weeks later got the letter saying I had been selected' (G ER MA 70).

As a rule, lay judges were prompted by others to take on the role, typically by their trade union or employer/employee association. There were, however, some instances in the German sample in which individuals took the initiative and applied to the trade union or another nominating organisation. 'I have been a lay judge since 2012 and took the initiative myself. The background was an article in our regional newspaper, the *Wochenblatt*. It said that Berlin had far too few lay judges and I thought "that would be something for you"' (G EE B 5).

It went like this... my wife had already been doing this for some years. (...) I was there when she took the oath. I took a look at what went on, and said I would also be interested. I researched how this was done on the Internet and also at my trade union. That is, I took the initiative. At that time, ver.di had a list and I got on the list. (G EE MA 62).

In *Great Britain*, there is a line of demarcation within the currently active cohort between lay judges who were nominated by organisations before 1999 and those who applied independently (self-nomination) after this date (see Chapter 7, Great Britain).¹⁰⁰ Those nominated by unions pre-1999 reported high levels of engagement in union work, often as workplace or local representatives. Some self-nominees were also active union members, often alerted through trade union circulars. Given the lapse of 18 years since union nomination ended, nominees were, on average, older than self-nominees and retired or very close to retirement at the time of the interviews.

One major distinction between the two groups is that union nominees (that is, pre-1999) did not necessarily go through any judicially authorised selection process, although some unions had internal selection arrangements, as did the TUC. One union nominated employee lay judge passed through three union interviews. Another noted that 'there was a selection process of sorts in that each trade union would nominate somebody and then there'd be a sifting process. It wasn't a formal interview it was a "why are you doing this, what's your background, how long have you been an official?"' (GB EE 11).

In some unions, however, nomination seems not to have been formalised and often took place through personal recommendation based on recognition of union activity. One employee lay judge (GB EE 22) noted: 'the General Secretary of the union phoned me and said he was putting my name forward because that's how it worked (...) we'd worked together on several different policies... and I

⁹⁹ A Catholic social association.

¹⁰⁰ Of the 41 employee interviewees, 13 were nominated by unions and 28 nominated themselves: see Chapter 3, Methodology.

worked on his election campaign'. Several union nominees reported that 'somebody' had put their name forward.

The union nomination system was seen negatively by some self-nominees. One view was that full-time officials were favoured. Some interviewees also perceived it as an 'insider' system that could be stacked against women. One female lay union activist noted (GB EE 22):

There is a hierarchy within the unions about who gets on the tribunals and who doesn't... but part time women, they are not in the pecking order, are they? ... I didn't actually believe the open application was for real... I kept getting the phone call, 'you are through to the next stage', lovely! I was expecting that last call, to say 'thank you very much but you know we were only joking!'

A female union official (GB EE 15), commented:

There used to be a TUC nomination ... it was almost like a gift. [My boss] was on in the tribunals [and] he always spoke about it, he loved it. But he didn't love it enough so that any of the staff got on it! ... But meanwhile people were getting appointed, men, from up and down the country and I said what about me? 'If you're not busy I'll give you more work to do'.

This individual then applied at the first opportunity for open applications and was appointed in 2001. 'I do want to go on that, so I'm not asking you this time, I'm telling you I'm applying'. Some self-nominated employee judges contrasted their initiative with organisational routine. 'CBI or TUC was kind of buggins turn and a lot of very weary practice going on' (GB EE 33). Conversely, union nominees were sometimes critical of the lack of industrial experience of self-nominees: 'If I'm sitting with an old member, I've got no problem but some of the newer members are a problem' (GB EE 11).

A couple of female employee lay judges had secured their union's nomination after being active in the TUC women's conference. Although some union nominees reported that their unions had attempted to be more diverse, this had not always succeeded: 'The main problem with my intake was they were hoping to get more of a mix of females and ethnic minorities. But they ended up with the usual stereotype white middle-aged male' (GB EE 8).

One of the notable differences between Great Britain and the other two countries researched is the weaker sense of affiliation with 'one side' reported by British interviewees. Unsurprisingly, this view is a notable characteristic of some of the self-nominated employee lay judges and indicates a clear association between the route to becoming a lay judge and behaviour and perceptions in the role. One noted: 'I applied as a member of the public basically'. One self-nominated employee lay judge felt that a record of union activity no longer seemed to be a criterion for joining the employee panel.

Quite a few people on the employee panel haven't really got any history of activism... They're often people with an HR background who perhaps are just more sympathetic to the employee and thought that they would put in for that, maybe thinking they might have a better chance of getting through (GB EE 24).

Similarly, another interviewee commented that 'some of the younger people [i.e. post-1999], think they could sit on either side' (GB EE 5). Moreover, several interviewees in managerial roles in the public sector opted to sit on the employee side.¹⁰¹ One employee lay judge, noted: 'Our regional judge asked me which side I wanted to sit on, so I said "well, my heart I guess if I'm honest, lies with the employee, but I could sit on either" (GB EE 16). Another public sector employee noted: 'I know

¹⁰¹ No interviewee in the private sector with a managerial role opted for the employee panel.

my experience would suggest that I could do the employer role, but the panel I want to be on is the employee role' (GB EE 21).

Diversity

On diversity, there are differences between the three countries. In France, there is a statutory obligation on nominating organisations to strive for a balanced representation between occupational categories as there are separate sections for different sectors, and between men and women, and to secure an equal representation of men and women on their lists. In Great Britain, self-nomination has produced greater gender diversity. Moreover, the achievement of greater diversity in the sense of a greater representation of women and black and minority ethnic candidates has been a long-standing official concern since 2001 when the Judicial Appointments Commission was established as an oversight body and official statistics have been published every year for over a decade covering both professional and lay judges. In Germany appointing authorities are obliged to attempt to achieve an appropriate balance between men and women.

British lay judges also reported levels of civic engagement that appear to be above average.¹⁰²

Nomination and selection: summary

British experience offers an opportunity to compare the motivations and experience of the two types of lay judge, nominated and self-nominated, sitting in British labour courts. This allows some exploration to be made of the impact of the route to becoming a lay judge on perception of the role and, in particular, the intensity of organisational affiliation. Organisational affiliation to a trade union appears a good deal weaker for some self-nominees in Britain than for union nominated *conseillers* in France, where activity as an employee lay judge is wholly dependent on a process of identification and recognition built around a 'good profile' as a union activist.

In Germany, the main background of most of the employee lay judges *in our sample* was serving as an elected workplace employee representative, but for most works councillors this is accompanied by union membership and engagement, and union nomination is a prerequisite for appointment, aside from those nominated by other employee organisations.

Experience in France suggests that the internal search processes within trade unions to find suitable candidates might have additional organisational benefits, such as mobilisation and a type of 'succession planning' for union roles, in which serving as an employee *conseiller* is one step in a 'trade union career'. Evidence for this was not reported directly in Germany or Great Britain, although when talking about their motivation, activity as a lay judge was viewed by interviewees as a complement to union activity. In Britain, the logic of the internal search mechanisms during the period of union nomination was not always apparent to nominees, and in some cases, they were not aware of who had nominated them. Once nominated, the TUC in Britain operated a selection mechanism to gauge capability and interest. Some interviewees did discuss nomination as conveying esteem, both for themselves and, in one or two instances, for the nominating individual.

¹⁰² Based on the proportions reported in surveys on civic engagement compared with the lay judge sample.

9.3 Entering the role – initial experience and socialisation

This section looks at interviewees' reports of their initial experience on entering the role, both formally and the course of their familiarisation with court practice, routines and behavioural expectations. Lay judges' comments on further activities in the court are dealt with in Chapter 11.

Lay judges in *France*, the *conseillers*, receive training from the trade unions, but this is not necessarily provided before they assume office. Large unions, such as the CGT or the CFDT, which have a union training service, will organise training sessions before elections are held and throughout the term of office. These offer initial guidance in employment law and court procedures.

Prudis [training organization] does this for the CGT. People come here to Strasbourg and we also have training courses at our training centre in Courcelles. (...) There's quite a lot of training with lawyers who are close to the CGT (F17-Stras-Ee).

Yes, at the CFDT, we had anticipated the elections. (...) The CFDT had organised a training session for potential *conseillers*. And that was really good. (...) and I remember there was a session with a labour inspector who later became a director in the inspectorate, and this meant that it had a very strong legal content (F16-Stras-Ee).

Lay judges assume office at an official ceremony held at the beginning of the year after the re-election of the *conseillers*. This is a solemn moment for the judicial hierarchy. Although lay judges do not wear formal robes, they do wear the official medal of office during conciliation and adjudication hearings and interviewees expressed pride in this.

Lay judges primarily 'learn on the job' (see too Chapter 10). More experienced members of the court will mentor newcomers who can observe all the stages of the procedure with them. France is unique in two respects when compared with Germany and Great Britain: conciliation and adjudication hearings are led by lay judges, and lay judges write the judgment. The first time these tasks are performed, therefore, represents an important stage in *conseillers'* experience. New lay judges will not initially chair a hearing, and therefore will not have to write a judgment. Some *conseillers* will make their first attempt at this after a few months, helped by other judges. Sometimes, they are also helped informally by the clerks (*greffier*) of the labour courts. Entering the role therefore takes place through an apprenticeship in legal knowledge and judicial skills, but also by integrating the complex aspects of the role, as jurist, trade unionist, and workplace expert (see too Chapter 11).

I did not understand what was at stake during the first few hearings. I was having a hard time getting my head around the logic of the law. Here we never leave a new *conseiller* on their own, we always put an old one in with a new one. Besides, it's funny, as he was not an older member of the same union as me. I sat with him several times a year, and he trained me. It was real practical training (F11-Nant-Ee).

We have enough *conseillers* to have fresh people coming in and others who have more experience. So at the beginning you sit with the one who's got the most experience, you listen and that shows how to do it (F05-Nant-Ee).

In *Germany*, there is no mandatory training or formalised induction for newly-appointed lay judges. The question as to whether and how the start of activity is managed depends on local circumstances and the organisational style of the local director or president of the 110 labour courts. For this reason, practice and the social reality of commencing lay judge activity in Germany is marked by a high degree of diversity. The only standard feature is the requirement for newly-appointed lay judges to take the statutory oath before their first sitting (see Chapter 6). The only court of the four where interviews were conducted at which there was an induction for newly-appointed lay judges

was Mannheim, at which court procedures and the requirements of lay office were explained. 'It was a morning. It wasn't that fascinating for me as I already knew quite a bit because of prior training I'd received. It is always very interesting, of course. Pure theoretical knowledge is one thing, but how you put it into practice and the courts operate – that's quite another' (G EE MA 68).

It was general. First of all your rights and duties,... confidentiality, which was nothing new for me as a local councillor, ... and then the accepted practice for hearing, not to turn up in your working clothes. In particular, respect for the three groups – complainants, respondents, and the professional judge. Cooperation, how it works and, especially, punctuality, postponements, if you're late, telling the court that you are coming, if you're coming. And then I'd say being reliable if you've agreed to attend. If I've said I'm coming that they know I am and not calling up half an hour later "Sorry I haven't got time" and so on. It was a big group... the training, we were around 200. It was really just a lecture (G ER MA 61).

Our research indicates that in general no special induction event is held for newly-appointed lay judges. This did not meet the needs of new judges, according to our interviewees. Several expressed criticism of the lack of, or shortcomings in, preparation for the requirements of the office.

You asked before whether there had been any training at the start – I certainly would have expected that perhaps there would have been an introduction, even if it was just a day, about what lay office is, what they expect of you, how the procedures work here at the court. You're not exactly thrown in at the deep end, but you're appointed, take the oath, and off you go (G EE DO 40).

I found myself really in at the deep end. It was about two years later, there were hearings where someone said 'We're going to have a meeting where professional judges will be speaking' and where we can participate (G EE B 3).

One employee lay judge noted that serving as a works councillor or staff representative provided scope for preparation: 'But I've not had any training... aside from the training I've been to over the years on the works council, that also dealt with legal issues – current case law and the like, whatever was on offer, I went regularly to those, and to that extent I didn't have the feeling that I went into my first hearing entirely clueless' (G EE B 39).

This lack of preparation for the demands of holding lay office was exacerbated by the fact that, as a rule, lay judges in Germany only attend hearings a few times a year. This leaves little opportunity for building up practice in the office.

In *Great Britain*, many interviewees, but by no means all, reported some prior exposure to employment tribunals, either as witnesses, in helping parties prepare, or, in some cases, as claimants or respondents. Mandatory training, including sitting in on deliberations, was an important part of their induction.

The judicial oath, introduced in 1997, was taken for the first time by those who had already been lay judges and made mandatory for new lay judges from that date. For some post 1997 appointees taking the judicial oath marked a rite of passage as they crossed over into the juridical field.

I am not one for formal oaths and all the rest of it. I think it does mean something. In a way, it gives you a bit of credibility, that you're not just somebody in off the street to do it. You've went through a process, you've taken the oath, you're a member of the judiciary (GB EE 9).

There was an emotional element for some lay judges in affirming their commitment to uphold the law: 'It sounds sort of sentimental but when I took my judicial oath I actually find that very moving...I've taken it very seriously right from the beginning (GB EE 33).

The 'law' also enjoyed high esteem for some lay judges:

I was a bit in awe of the law - a working class background, you held judges and the law [in] high esteem... And then suddenly realised I've taken this oath and I'm in these surroundings here making decisions. It was a bit of a culture shock to start with. I got over that over time. But I would say the first twelve months was a bit of a culture shock (GB EE 8).

Familiarisation appears to have taken place quite rapidly for most British lay judges. One senior lay union official noted:

When you first start, then you've obviously been nominated by and put there for your industrial experience based on working people. But you realise after a while that that really isn't your role. You bring the experience, but you've also got to apply the law and the law doesn't allow you to deal with issues which have not been put in evidence (GB EE 31).¹⁰³

Interviewees also reported that their confidence to ask questions in the hearing and express disagreement in deliberations grew after a few cases (see Chapter 11: 'Deliberations').

Several interviewees reflected on the gravity of the role, especially at the outset. 'I've represented members with management but this was different. ... You suddenly realise you have made a decision and that's going to affect somebody's life' (GB EE 8). An employer lay judge, with a senior HRM role in the private sector, noted: 'But when you come out of the back door the first couple of times you do it, you think, "woah". You realise – power's the wrong word – authority – responsibility – responsibility I think's a better word for what I mean' (GB ER 1).¹⁰⁴

Initial experiences: summary

Great Britain is the only country with mandatory pre-sitting training, and in which training programmes are designed centrally by the judicial authorities and delivered locally by professional judges. In Britain, initial training includes observation of deliberations. In France, there was some training in advance for potential lay judges provided by trade unions and employer associations. Because the first merits hearing in France consists of lay *conseillers* only, there is scope for mentoring between more experienced members of the court and the newly-elected. The extensive provision for training works councillors in Germany might offset any lack of preparatory legal training for those with access to this. Learning by doing was reported across the three countries.

Some interviewees' attitudes to taking the oath suggest that this represented a rite of passage into court life (and the juridical field) and led to a sense of becoming differentiated from others, although this was not universal. A number of lay judges in France and Great Britain reported that participating in their first hearing and judgment was a key moment, and for some the first time that they appreciated the gravity of being a judge. Many interviewees in both Great Britain and France reported that it took some time ('a few cases', 'six months' or 'up two years') to adapt to the court. This is dealt in terms of specific lay judge activities and relationships in Chapters 9 and 10.

9.4 Conclusions

Motivations

Interviewees reported a range of motivations for either accepting or pursuing the role of lay judge. Many employee and employer judges reported similar motives: a general commitment to fairness

¹⁰³ See too under 'Impartiality' in Chapter 12.

¹⁰⁴ This interviewee contrasted the many difficult decisions made professionally, possibly affecting hundreds of employees, with judgments affecting individuals: the latter had a differing quality that was hard to express.

and as an element of civic engagement. There were, however, some broad differences as between countries, between employer and employee lay judges, and, in Great Britain, between nominated lay judges and those who nominated themselves after 1999, when the British system changed.

In national comparative terms, employee lay judges in all three countries associated becoming a lay judge with their activity as a workplace employee representative and, in some cases, a full-time or lay union official. The nature of this association varied as between countries, reflecting the wider industrial relations and institutional environment.

In *Germany*, the predominant background in our sample was activity as a works councillor or staff representative (in the public sector), suggesting that these employees – not unsurprisingly – originated in the more organised area of the German economy that has both works councils and union representation. Moreover, given the paucity of works councils in small firms, this also suggests that lay judges probably come from, at the least, medium-sized undertakings: see Chapter 6. The most frequently cited reason for becoming an employee lay judge in Germany was to build knowledge and expertise through exposure to judicial proceedings and their outcomes. It was viewed as a type of high quality continuing training that would enable workplace representatives to be more effective in carrying out these tasks, which at workplace level involve a good deal of legally-based activity.

In *France*, acquiring legal knowledge was also cited, with the added dimension that becoming a *conseiller* also required some prior legal inclination or knowledge, given that judgments at the first merits hearing are made exclusively by lay *conseillers*.

For French and German lay judges, the step to becoming a lay judge is consistent with a move forwards in a 'career' as an employee representative. Such careers can be seen as 'moral' or 'expressive' (Goffman, 1961; Harré, 1985) in that they flow from a trajectory characterised by a sustained moral commitment (Becker, 1960) to a greater goal – defending employees from injustice, securing their rights at work. In other respects, the career involved is a more complex combination of both self-interest, normative commitment and the achievement of status and recognition.

These factors are also discernible in the sample of British lay judges, and in particular those nominated by trade unions prior to 1999. These interviewees, on occasions, seem to have perceived lay judge activity as an extension of employee representation as well as an expression of or useful complement to it.

In all three countries, these relationships raise the question of the consonance between such a perception of the role and adjustment to the demands of judicial impartiality, discussed in Chapter 13.

The sub-sample of British lay judges who nominated themselves provides an interesting comparison with organisational nominees, although there are areas of overlap, both in terms of attitudes towards the position of lay judge and background as an employee representative (or employer). Rather than responding to an invitation from a union official or demonstrating their willingness to be nominated, British self-nominees actively responded to public advertisements for the role. Several individuals in this group reported that they had applied because of their broader life situation, such as career stagnation or a radical and possibly unwanted change in their economic situation. In this respect, becoming a lay judge, with no less a serious commitment to the role, might be seen as

compensation for a loss or part of an individual's active adaptation to change through fashioning a fresh portfolio of roles.

This was reported also in France, where one interviewee reported becoming a *conseiller* after experiencing difficulties on re-establishing their professional life at their employer after a long period of (full-time) employee representation.

Nomination and selection

There are major institutional differences in nomination, selection, and appointment practices and procedures between the three countries. These are set out in the relevant contextual chapters (Chapters 5 to 7), which also draw on interview material that highlights these practices and their perception by lay judges.

The process of nomination in France takes place within trade unions and is based on identifying individuals with appropriate skills, in particular with an interest in and experience with the law. In Germany, too, employee lay judges must be proposed by competent organisations, principally, for employees, by trade unions. These organisations are entrusted with a degree of quality assurance over the nominations, subject to fairly minimal and formal checks by the appointing authorities.

The British situation is different in that organisational nomination ceased in 1999, and since then, individuals have nominated themselves in the recruitment exercises for lay judges conducted in the 2000s. While many employee self-nominees are active in trade unions, typically as workplace representatives (often in the public sector), others have either ceased such activity or are no currently active as employee representatives. This has led to a weaker organisational affiliation in Great Britain, reinforced by the fact that allocation to the employer or employee takes place after appointment and does not always rigorously conform with the individual's occupational status.

In contrast to France and Germany, self-nomination by individuals has been accompanied by the introduction of formalised selection procedures, operated by private service providers on behalf of the judicial authorities. Such a step was consistent with a broader movement in the UK to introduce greater rigour and independence into public and judicial appointments and promote equal opportunity and greater diversity in appointments, principally on grounds of gender and ethnicity.

Overall, internal selection in Germany and France remains in many respects a 'black box' and resembles the British situation prior to 1999, to which a number of British lay judges who were self-nominees had objections. Although the German and French systems offer a transmission belt for activists, as identified by those holding the power to make such nominations in their organisations, British experience suggests that either consciously or unconsciously, such systems run the risk of reflecting broader social prejudices and might become clientelist. On the other hand, passing 'quality assurance' to the nominating body might reinforce an active relationship between nominee and organisation, and encourage existing experienced lay judges to serve as mentors to newcomers, as discussed immediately below. One significant factor is likely to be the extent to which nominators and nominees accept and internalise the overall 'regime legitimacy'¹⁰⁵ of the labour court system and judicial norms.

¹⁰⁵ See the overall Introduction and Conclusions (Chapter 13) to this study.

Initial experiences

As yet, there has been no mandatory pre-hearing training in France, although some unions provide both initial and ongoing training for employee lay judges, emphasizing the close ties between organisational nomination and ongoing activity. As in Germany, nominating organisations bear some responsibility for the quality of their nominees.

In *Germany*, there is no mandatory initial training, perhaps reflecting the guarantor role of trade unions in assuring the quality of nominees and their institutional autonomy. It might also reflect the fact that the federal arrangements for appointing judges at first and second instance has led to diversity of practice. Trade union-provided training for works councillors also serves to offset the lack of formalised lay judge training in some respects, but does not allow for the development of a targeted curriculum.

In *Great Britain*, initial training might be seen to complement the centralisation of the appointment system and constitute an element of ‘good practice’ in public management. The initial training provision in Britain that prevailed in the 2000s was generally viewed positively by interviewees, and there was no expression that it was biased or that a ‘trade union’ form of training was needed.

How did lay judges respond to their initial activity, and is there any discernible strain or dissonance between the role of employee representative and that of judge in this early period? The evidence for this issue also touched directly on the central research question for this study: whether the route through which a worker lay judge comes to occupy their role influences their perception of it. In general, there was fairly rapid adaptation to the requirements and norms of the court but often concern about being thrown in at ‘the deep end’ without sufficient systematic preparation, especially in Germany. This issue is taken up in subsequent chapters.

One factor that appears common across all three countries is that many interviewees expressed respect for the institution of the law. This took different forms. In France, there some pride in wearing the official medallion of office; in Britain, some interviewees – across both employee and employer panels – noted the oath taking as a significant moment, distinguished the outside world from the world of the courtroom, and reflected on the first judgment they were involved in as a moment of great seriousness. This might reflect the selection processes behind the sample, and the fact that these individuals had opted to become lay judges – as opposed to those hostile or sceptical about the role of the law in defending workers’ rights.¹⁰⁶ We did not systematically investigate *why* our lay judges reported support and respect for the law, although there were some clues in the interview data that is dealt with in detail in Chapter 13.

¹⁰⁶ One British lay judge noted that their union branch was hostile to the use of the law and preferred direct forms of action.

10. KNOWLEDGE, SKILLS AND TRAINING

This chapter looks at the knowledge and skills possessed and applied by lay judges to the adjudicative process in first instance labour courts in Germany, Great Britain and France and their training in that knowledge and skills. It does so on the basis of our interviews with lay and professional judges. The question of knowledge transfer from the labour court back to their role at work and/or as a worker/trade union representative is discussed as a consequence of lay judge activity in Chapter 13.

The literature (see Chapter 2) distinguishes between different types of knowledge and skills. Relevant distinctions for lay judge activity include that between tacit and explicit knowledge, and certified expertise as opposed to uncertified expertise. We define tacit knowledge as knowledge that is acquired largely by experience rather than formal instruction, is often context specific, and is counterposed to explicit or codifiable knowledge. In this context, ‘workplace experience’ is seen as a likely source of such knowledge for lay judges in labour courts, but also other forms of civic engagement. Tacit knowledge can also be unrelated to a specific context.

We next consider various skills. We define a skill as a particular and practised ability which may have been mainly, but not only acquired without formal instruction. Then we turn to explicit knowledge; for the purposes of this chapter this is legal knowledge which is codified and primarily learned through formal instruction.

10.1 Tacit knowledge: workplace knowledge and ‘common sense’

In all three countries, our lay judge interviewees highlighted their context specific knowledge, i.e. *workplace knowledge*, including knowledge of work organisation and the individual behaviour at work. This had been obtained experientially and was applied in the decision-making process in deliberations. Such workplace knowledge, according to our lay judge interviewees, was not available to professional judges.

We look first at some quotations from *German* interviewees.

‘The most important thing, I think, is the experience of life that I’ve had in very different sorts of work’ (G EE B 53). Another noted that the issue was ‘to sensitise the [professional] judge to how things really look in the world outside’ (G EE MA 58). Other lay judges commented on the fact that their presence as a lay judge was important because they understood ‘local economic, labour market and social issues and developments and can bring this into [the court]’ (G ER DO 41); because they could bring ‘the employee perspective ... Perhaps also a perspective from practice because it’s not always easy for a [professional] judge if they are only at the court. If you and say how things operate in practice ...’ (G EE HAL 12); because ‘a [professional] judge is, of course, a theoretical person and ought to listen to this’ (G EE HAL 11).

Examples from Germany where lay judges’ workplace knowledge was particularly pertinent to decision making, because of the predominance of dismissal cases, included an example about leasing: ‘I know how leasing works and how it’s accounted for. And that really helped out my colleagues in that case as it’s a very mathematical issue’ (G ER MA 64), while another said: ‘I can be a lot of help to the [professional] judge where the case involves my branch’ (G EE MA 61).

They are mostly minor things, on working time, processes, and operational records and that sort of thing. One time I said that what the professional judge thought bore no relation to reality, was

completely unlike how things actually worked. These are always just aspects [of a case] that I can cite from my workplace experience but which can lead to a judgment going in a different direction to the one that was originally thought (G-ER-DO-45).

A German professional judge commented on the importance of lay judges' workplace knowledge.

It's also just very important for me because it means I can look out beyond my legal horizon and the fact that, of necessity, my experiences of working life are limited and can draw on the experiences of the lay judges and that also means including and valuing them (G-PJ-MA-54).

The vast majority of employee lay judge interviewees in *Great Britain* said that their main contribution was articulating and applying their workplace/industrial relations /employment experience, citing examples of cases where that knowledge had been particularly pertinent to the decision-making process. These included: a case set in a power station (GB EE 17); cases set in National Health Service where knowledge of the regulatory framework was helpful (18/38); cases set in a school (GB EE 2/5); cases set in a care home (GB EE 3/26); a case revolving around grievance processes (GB EE 4/33/34); a case revolving around a remuneration scheme (GB EE 21); trade union detriment cases (GB EE 23/25); and more generally cases concerning disability and capability (GB EE 19/27/34/38); redundancy (GB EE 9/31/34); sex discrimination (GB EE 22/32). Virtually every British employer lay judge similarly said their main contribution in deliberations was workplace/industrial relations knowledge, some also illustrating this with examples.

Some British professional judges interviewed agreed that lay judges' main contribution in deliberations was a knowledge of workplaces and industrial relations practice 'which can add an extra dimension to the decision-making process'; 'they'll understand how things work'; 'day-to-day practice of industry, which the [professional] judge doesn't always have'; 'how does this fit in the workplace'; (GB-PJ-5/9/7/11). Several British professional judges gave examples of how lay judges' articulation of workplace and industrial relations knowledge had been helpful. One (GB-PJ-2) noted how a lay judge, formerly a metalworking apprentice, 'gave us the background and understanding of the industry'; a further (GB-PJ-4) cited a disability case where a lay judge who was familiar with assembly lines was able to give an informed opinion on reasonable adjustment, which was at the heart of the case. Another (GB-PJ-6) noted that if there was a conflict of evidence, a lay judge could give a view on what information would normally be exchanged between a union representative and a head teacher. Exceptionally, one (GB-PJ-3) said that lay judges' workplace knowledge was 'quite low down on the list...increasingly [professional] judges have come from a fairly broad spectrum of backgrounds... they've got experience of the workplace sometimes from their professional practice'. Many lay judges did not have up-to-date knowledge as they were retired.¹⁰⁷

There is a caveat, however, as British lay judges are not selected for their sector specific knowledge (unlike France where the labour court is divided into five chambers (*sections*) for different sectors/occupations). Moreover, if by chance a British lay judge has specific knowledge this should be declared to the parties and lay judges are enjoined to decide only on the evidence before them. Moreover, both the British professional and lay judges we interviewed were unanimous in their view that workplace knowledge/industrial relations practice was most useful in unfair dismissal cases and lamented the fact that normally lay judges no longer sat on discrete unfair dismissal cases, just the

¹⁰⁷ Almost half our sample of British lay judges were retired, compared to three in Germany.

professional judge alone. 'It's getting more and more complex.... So we are having to rely more and more on the professional judge. We feel it downgrades us a bit' (GB EE 6).

In *France*, all the *conseillers* interviewed acknowledged that they drew on their workplace experience to arrive at judgments. As one *conseiller* said:

For example, if you work in warehouses, you know very well that there are frequent scuffles... We're well aware that if someone barges against his boss with his shoulder they're not necessarily going to get a warning unless there are special circumstances. [Also] we will spare some firms that are very small because they didn't breach the law because they meant to, but because of a lack of competence, or because they relied on an accountant who was not a lawyer and they were badly advised. On the other hand, the multinationals have lawyers, solicitors (F03-Nant-Ee).

Another interviewee gave an example of how he used his workplace experience. He said:

As I am an inspector of the URSSAF¹⁰⁸ there are sometimes problems about additional deductions for professional expenses, to know if the person is registered. I know how I can find this information and having worked at URSSAF gives me a real advantage. So I have this specific knowledge of this area. Just as with the people who have a really good knowledge of their industry, metalworking, the collective agreement in metalworking, the collective agreement in chemicals, things like that. Then they will take the file (F16-Stras-Ee).

Turning to other forms of tacit knowledge, one *leitmotiv* in the interviews with German lay judges was 'common sense', which unlike workplace knowledge is not context specific. Rather it denotes the everyday reason (and reasonableness) of lay people that can counterbalance or complement the legal (and legalistic) understandings and actions of the professional judge. 'A good bit of common sense and self-confidence is needed' (G EE DO 26).

German interviewees often linked the notion of 'life experience' and every day and workplace knowledge with 'common sense'. For instance, one German employee lay judge noted that common sense encompassed the fact 'that you're part of life, you look at an issue from different points of view and try to put yourself in both sides' shoes' (G ER HAL 18). Another employee lay judge said: 'I think, it's experience of life and work that you can bring in and less, I believe, legal skills – rather it's more common sense' (G EE MA 69). Yet another interviewee said: 'I think really common sense in the main, as the legislator also intended.... The basic requirement is common sense' (G EE DO 46).

British employee lay judges interviewees only rarely used the word common sense unlike their German counterparts. In France, the *conseillers* interviewed did not mention 'common sense' in an explicit way; rather they emphasised an understanding of the facts.

Knowledge: summary

In all three countries, the lay judges we interviewed said that their workplace knowledge was their main contribution to the adjudicative process; it was knowledge which they possessed, but professional judges normally did not. German lay judges highlighted their application of 'common sense' to the adjudicative process and contrasted it with the often legalistic approach of professional judges. Both British lay judges and many British professional judges regretted the fact that British lay judges do not normally adjudicate in discrete unfair dismissal claims. They were of the view that British lay judges' workplace knowledge is often more useful in unfair dismissal cases, than in those cases where lay judges now normally adjudicate (mainly discrimination cases).

¹⁰⁸ An organisation for collecting employer social insurance contributions.

10.2 Skills

Turning from tacit knowledge to the skills comprising ‘judgecraft’, the skills mentioned and used by lay judges in all three countries were listening, observation, questioning and note-taking; none of these were obtained in or from a specific context. They were mostly obtained experientially but were reinforced by training in Great Britain and France, see below.

First listening skills: a German lay judge said, ‘I think the most important thing that I can contribute is to listen to the circumstances of the case without any prior prejudice and to help come to a fair decision that corresponds as closely as possible to the law’ (G EE HAL 9). German lay judges also talked about sympathetic listening or listening with empathy. As one said:

One also needs empathy, I think. Understanding for people who aren’t able to express themselves well, understanding for people who aren’t certain about the law and need help in the field of employment law, which is relatively complicated’ (G EE B 53).

Interviewees also described this as ‘putting yourself in others’ shoes’. ‘Aside from that I try to behave neutrally and put myself in the situation of the employee and through this process also have empathy for the employee and understand the issue from their perspective’ (G EE B 2).

Similarly, a British lay judge said that she listened carefully ‘to spot inconsistencies’ (GB-EE-35); another said that it was not just about the words ‘it’s about intonation; it’s about emphasis; it’s about tone’ (GB-EE-5). Several British employee lay judges, like their German counterparts, also said that they listened empathetically, but they recognised that their empathy did not sit easily with, and had to be balanced by, their impartial role as a judge.¹⁰⁹ As a British lay judge said: ‘I can empathise, [but]... I need to be dispassionate’, while another said that she had ‘knowledge of how people react in certain situations, but that isn’t what we’re called for’ (GB-EE- 30/37).

In France listening is particularly important for the *conseiller* acting as the president, who needs to listen and concentrate, as opposed to the other three lay judges (sometimes referred to as assessors in this context). ‘We need to listen carefully to the claimant AND the respondent to understand what happened, why they reached this point of conflict’. ‘During the hearing you have to “listen well”’ (F18-Stras-Er). ‘You have to know how to listen too’ (F21-Vers-Ee)

Essentially listening is a skill that is learned experientially. We were unable to discover any formal training on listening in a labour court situation in any of the three countries, although one British employer lay judge (GB ER 2), had been formally trained in listening as a volunteer for the *Samaritans*, a charity providing a telephone helpline to those in acute mental distress.

Another skill that British lay judges said that they possessed and used was the skill of observation. As some British employee and employer lay judges explained, observational skills during the hearing were necessary because for most of the time the professional judge had his/her head down writing or typing a note of the proceedings. Indeed, all the British professional judges interviewed said that they valued the lay judges being an additional pair of eyes, observing the dynamics at the hearing and the conduct of witnesses and observers (see Chapter 11). As to German lay judges, one referred to the silent observation of the proceedings: ‘if there are witnesses, then I do not usually ask any questions. I’d rather observe.’ (G EE DO 27), but otherwise German lay judge interviewees did not make explicit references to observation.

¹⁰⁹ This issue is further explored in Chapter 13.

In all three countries, the lay judges interviewed mentioned questioning skills (see also Chapter 11). This was particularly important in *France* for the *conseiller* acting as president, who presides over the hearing and asks the questions, including interrupting legal representatives to ask a question. ‘A plea is good but in the end you have to ask questions.’ (F21-Vers-Ee). The other three *conseillers* tended to ask only a few questions, usually addressing a specific point or a document provided by the parties. In France questioning skills are often included in union provided training (see below).

In *Great Britain*, there is cross-examination and so the bulk of the questions are asked by the opposing party as opposed to the labour court judges. Nevertheless, both the professional judge and the lay judges ask questions on a specific point or document normally after cross-examination: see Chapter 11 lay judge activity. None of the British professional judges interviewed, however, mentioned lay judges’ questioning as a valuable skill. Indeed one of the professional judge interviewees was of the view that lay judges sometimes asked irrelevant questions and, unlike lawyers, had not been rigorously trained in questioning witnesses (GB-PJ-1). Questioning in the British labour courts has been the subject of a lay judge training session and also part of a training session on dealing with litigants with mental health problems.

In *Germany*, it is the professional judge who is the principal questioner. A German interviewee said: ‘if I do have a question, I prefer to write it down. If there’s a break or we’ll give the judge a sign, we can have a short discussion’ (G EE DO 27). Indeed, German lay judges rarely raise questions at all in the public hearing.

A further skill mentioned was note taking. In Great Britain and Germany, the professional judge is primarily responsible for note-taking. In France, it is the *conseiller* acting as president. A court official will also take notes that can supplement the president’s, as might any notes of the three other *conseillers*. In Germany, the professional judge sums up from time to time by dictating a short note to an audio-recorder and the lay judges do not take notes. In Great Britain, however, in the absence of audio-recording or a court official taking notes, lay judges can supplement the professional judge’s notes. British professional judges valued the note taking of lay judges (GB-PJ-3/4/12/5). As well as providing evidence when a party had alleged bias, they said that lay judge note taking was particularly important when professional judges were asking a witness a question or having a dialogue with a party as they could not easily take a note and talk at the same time. GB-PJ-4 said: ‘We always say... if there’s some sort of exchange...will you please make a very clear and complete note of it and I actually leave a gap in my notes and then I’ll ask them to tell me what is in their notes’. Although note-taking is learned experientially, a few British lay judge interviewees said that note-taking skills had been honed by their experience in higher education.¹¹⁰

Writing judgments is not part of the lay judge’s skill-set in Germany or Great Britain. In marked contrast, in the French labour court, lay judges are required to develop this skill as judgments are the responsibility of lay people, specifically the *conseiller* acting as president. In the preceding chapter, we noted that drafting their first judgment is a rite of passage for French lay judges.

French lay judges interviewed stressed that when writing judgments they want to demonstrate an understanding of the facts of the case that might differ from an assessment that a professional judge would make, yet at the same time ensuring that the judgment is legally correct and ‘appeal proof’.

¹¹⁰ 35 of the British employee lay judges interviewed had received tertiary education and 11 of the 12 employer judges interviewed.

They also want to ensure that claimants can understand the decision of the court, so they try to write it in ordinary language without the Latin terms commonly used in legal language, deemed by one as ‘incomprehensible to the everyday man or woman’.

Skills: summary

In all three countries lay judges said they exercised a number of skills: listening, observation, questioning and note-taking. These skills were learned experientially through workplace and general life activity, but in Great Britain and France these were honed by training.

These skills were exercised to a varying degree in the three countries, depending on the specific configuration of labour court structure and procedure. In the French labour court, the lay judge (*conseiller*) acting as president deployed the skills of questioning and note-taking to a much greater extent than the lay judges in Germany and Great Britain. French lay judges were also required to develop the legal and drafting skills to write the judgment.

10.3 Legal knowledge

In our sample across all three countries we found that all lay judges interviewed agreed that the judgments they made had to be in line with the relevant law; in other words, the law prevailed and the application of legal knowledge in labour court deliberations was paramount. The extent to which legal knowledge is required by lay judges, however, varies between the three countries.

In *France*, it is essential that lay judges have legal knowledge as they sit without a professional judge to guide them unless there is a tie-break (*audience de départage*). They obtain this through training, self-study and experientially.

One commented: ‘When we preside over hearings, we learn how to express ourselves better’ (F23-Stras-Ee). Another said:

I learned to read the law. Reading the law is very complicated, knowing that a comma, if placed before or after the word, can change the meaning. One section will tell you something, but this can be contradicted or possibly interpreted in one way or another... Being involved in the labour court means respecting employment law of which we are the judges in the full sense of the term (F10-Nantes-Ee).

In contrast, in *Germany* and *Great Britain*, applying the law and ensuring that the judgment complies with it is the responsibility of the professional judge, who also has to advise lay judges on the legal considerations. As we note in the section on ‘Deliberations’ in Chapter 11, in Great Britain this is not only a matter of identifying the relevant statute but also ensuring that the discussion and judgment comply with case law, which can be prescriptive in this aspect. Nevertheless, both British and German lay judges considered that knowledge of the law was important as it enabled them to debate more easily and confidently with the professional judge and shaped their decision making.

In Great Britain, five employee lay judges in our sample of 41 had a formal legal qualification. In previous research conducted in 2007 in France, more than 40 per cent of lay judges had at least a master’s degree: no information was noted specifically on legal qualifications. In Germany too, five lay judges had a formal legal qualification. Furthermore, all the British employer lay judges interviewed and three of the British employee lay judges interviewed had a human resources qualification which often includes an employment law dimension.

Irrespective of any formal legal qualification, many employee lay judges had some knowledge of employment law both through experience and through union provided training as a result of their

role in the workplace before joining the labour court. In Great Britain, this could be as a shop steward, and in Germany as a works councillor, which involves fairly detailed legal instruction, including current case law. Moreover, the union nomination system in Germany was thought to provide some means of ensuring that only experienced employees would become lay judges and so their training needs from the labour court would be minimal.

I think the trade union is very careful when it nominates someone as a lay judge in the labour court. They should be experienced works councillors with experience of a number of labour court cases and attendance at several employment law training sessions. I don't think that one can simply let people loose as judges if they have no clue about employment law. There should at least be some prior familiarity (G EE B 34).

In *France*, employee judges will in many cases have gained legal knowledge as works councillors or as a member of the occupational health and safety committee (CHSCT), been a trade union representative, staff representative, or run the legal service of their local union before they became a lay judge. These roles are not mutually exclusive. For instance, one said 'I am a representative in the company: a trade union representative and a staff representative. Other employee lay judges are on the works council and/or the health and safety committee'¹¹¹ (F22-Stras-Ee).

As to French employer lay judges, their knowledge of the law will mainly be as a result of their professional activity (such as being a lawyer in their company or in HR).

I have a legal background because I have a Master's in business law and my husband runs a family business. I was in charge of accounting and when the company secretary left, I took over all the administrative side and especially employee relations. When I think back to what I've done in law, it was social and employment law that I enjoyed. At that time, I'd enrolled to do a diploma in social law. In theory, my first professional step could have been to join the judiciary (F26-Stras-Er).

However, some French employer lay judges undertook the training provided by employers' association and then went on to be recruited as a *conseiller*.

Yes [I pursue training], training organised by MEDEF for the employers. And it exists similarly for the employees, organised by unions. There exists a specialised training institute from MEDEF. And so I would say that all *conseillers* have been well trained, whatever their panel. (F32-Boul-Er)

Like their counterparts in France and Germany, prior to their appointment some British employee lay judges had received employment law training from their union as workplace representatives, while a few had legal roles as trade union officials. Many British employee lay judges who were self-nominated, however, had not such a background as they were not union activists.

British professional judges were asked for their views on lay judges' legal knowledge. One British professional judge (GB-PJ-10) said that lay judges' 'legal knowledge is sufficient, but it's not their best attribute'. Another (GB-PJ-2) said they found it helpful that many lay judges had legal knowledge and could point to a relevant case. However, yet another (GB- PJ-4) said that legal knowledge is 'not altogether helpful because occasionally the person's understanding of the law isn't actually correct and you have to be quite diplomatic pointing [this] out'. In Germany, professional judges noted that some lay judges, more typically on the employer side, were legally qualified.

¹¹¹The *délégué syndical* is nominated by the union to be a representative in the company, whereas the *délégué du personnel* is elected by the employees; but these different roles are often played by the same person.

Legal knowledge: Summary

In France, it is essential that lay judges have legal knowledge as they sit without a professional judge to guide them unless there is a tie break (*audience de départage*). In Germany and Great Britain, lay judges sit with the professional judge whose expertise is in the law: lay judges' knowledge of the law is desirable, but not essential. Employee lay judges in all three countries had often received training from their union in their role as a union official/workplace representative and so had a degree of legal knowledge before they took up their appointment as a lay judge.

10.4 Training

One issue stemming from the participation of lay people in judicial decision-making relates to the gap in knowledge that invariably exists between experts and non-experts. Training offers one organised means of minimising this gap. We do not consider here on the factual aspects of training, as this is dealt with in the contextual chapters (Chapters 5-7). Rather, we focus on lay judges' perception and evaluation of the training they receive, recognising that training is not neutral and plays a part in shaping lay judges' performance of their role.

British lay judges have to undergo training before they can sit and they can only continue to sit if they have on-going training annually and this training is organised and planned centrally by the judicial authorities and delivered locally. This training covers both legal knowledge and the skills used as a judge (judgecraft) and its neutrality is symbolically underlined by the fact that it is delivered by professional judges to employer and employee lay judges jointly.

British lay judges were not always able to give a considered evaluation of their initial training for two main reasons. First, a few had been appointed long ago when there was virtually no initial training and it was certainly not mandatory. Second, many of those who had received initial training often had hazy memories; even those appointed most recently had received their initial training some seven years ago as there have not been any lay judge appointments since 2009. Of those who recollected their initial training, both employee and employer lay judges noted that the most helpful part was sitting in on deliberations. Interestingly a few lay judges suggested that the initial training had played a significant part in their socialisation into their judicial role. 'We were advised to behave in a particular way'; 'things like you have to be careful how you dress and you know the formality'; 'gets you acclimatised' (GB-EE-24/40/39). One British employee lay judge (GB EE 5) said Britain's labour court training compared unfavourably with that provided by the Social Security Tribunals, but another (GB EE 7) said that British labour court training compared favourably with the training he had received as a lay judge (*magistrate*) in a criminal court.

British lay judges' mandatory annual training has been reduced in England and Wales only (not Scotland) from two days a year – one inter-regional day and one regional day – to just one regional day. The axing of the inter-regional day was widely lamented for both social and pedagogical reasons. Several employee lay judges said how they had valued the inter-regional day, not only because of the content of the training, but also because it gave them an opportunity to meet lay judges from other regions and see how practices differed from one region to another.

Some British lay judges questioned the usefulness of the annual training and/or criticised the trainers' delivery. Others took a different view, with several commenting that they found the annual training day more relevant than hitherto. Not only had it become more structured and interactive in their view, but also there was less emphasis on the law and more emphasis on judgecraft. A few

interviewees specifically mentioned that the training on questioning skills had been helpful, while one mentioned dealing with litigants with autism and another mentioned making assumptions and issues of bias. Several interviewees also mentioned the social aspect: the training day allowed them to meet their fellow employer and employee lay judges whom they now rarely saw.¹¹²

Additionally, a few interviewees said how useful they found the online briefing material they received fortnightly. Indeed, one employee lay judge (GB EE 41), who taught a course for union representatives at a further education college, said she 'got more stuff' from the labour court than from the Trades Union Congress.

This contrasts with Germany. The federal nature of the German state, with its decentralised system of court organisation, mean that lay judges have very diverse experiences, reflecting differing local legal cultures. As a result, their involvement in training ranges from nothing to, at a minimum, annual training in current employment law developments. Some trade unions provide training for lay judge members, such as a weekend programme once a year. In the Berlin region, the national trade union confederation, the DGB, provides training on employment law for lay judges. This has two stages. In the first, there is a three-day introductory seminar for newly-appointed and existing employee lay judges, with scope for exchanging experiences as well as formal sessions on labour court procedure and practice, the roles and duties of lay judges, behavioural and discussion norms, decision making, and relevant statutes, especially on employment protection. The second stage, building on the first, is intended for lay judges in office and covers such issues as: preparation for a hearing; taking and assessing evidence; labour law issues and recent case law; special aspects of different labour court procedures (such as appeals, 'decision procedure' and urgent hearings).

German lay judges were generally critical of the lack of a standardised system of training, especially at the outset of their activity.

I'd say straight away I'm critical of this. Because there's no training or anything, you're really thrown in at the deep end. ... Of course, you're initiated into lay office, and you have to swear that you'll act in accordance with certain guidelines and so on. I think that's more of a formality. But training or being told how it all operates, there was nothing. At least that's how I remember it (G EE MA 63).

A German lay judge summed up the overall position: 'We don't have any fantastic training, for example that we have to have attended so many seminars and so on. In theory, a lay judge in the labour court doesn't have to have any formal training' (G-EE-DO-46).

In France, once elected, the *conseillers*, and especially members of the CFTD and the CGT (both of which have their own training facilities), will have initial training provided by their organisation, dealing with the operation of the court and rules of court procedure etc.

There have been training sessions on how the labour court functions, the organisation, the conciliation hearing and how that works and what conciliation means, what can be done in conciliation, the merits hearing, and then after that deliberations, etc. (F05-Nant-Ee).

Conseillers are entitled to one week's training each year during their five-year term of office, a total of five weeks. Training is currently provided primarily by the trade unions. Sessions last two or three days and deal either with court procedure or a specific topic, perhaps linked to current events.

¹¹² In 2012, lay judges were no longer normally required to sit on unfair dismissal cases and this resulted in less sitting day, while the introduction of fees for ET claims in 2013 has resulted in a noticeable reduction in claims.

Of course, there's training, a theoretical part, a practical part, and when we do the practical cases, we deal with real cases and judgments. We'll work on them, write them up, make our decision. There's usually a dozen of us at a training session, and we can have two or three different judgments. And then we compare those with the judgment that was actually handed down, and we also go as far as the Appeal and the Court of Cassation (FO3, Nant-Ee).

Such training events are, at the same time, both trade union training and legal training: that is law is seen from and rooted in a union perspective. Accordingly, unlike British lay judge training, it accentuates the partisan nature of the lay judge role.

We had our own FO training, which we do at our premises ... One of the first training sessions was with a union activist and it was trade union tinted. But we also have training with MP. He is a lawyer. It is not trade union tinted; it is the law ... Of course, there is more of an inclination to defend the interests of employees than those of employers, that's for sure; but that's not really the same as the trade union perspective (F22-Stras-Ee)

Such training, when provided by a union, often includes drafting judgments. Such training by French trade unions also covers other issues as well as judgment writing, such as questioning and how to act and behave in the labour court (*'savoir faire'* and *'savoir être'*).

In addition to training provided by trade unions, Institutes of Labour or lawyers, *conseillers* also acquire legal knowledge through their own personal investment, such as reading specialist journals or keeping up with case law. 'We get the RPDS,¹¹³ it's still a real help, very well done, with the case law of the previous year' (F23-Stras-Ee). 'When you look at the files, you are given cases from the Court of Cassation, so you have to look. There is work you do yourself and it is important to do it to be effective. Today you have the tools, the internet, journals, online dictionary' (F05-Nant-Ee).

As with employee *conseillers*, those from the employer side mainly reported that they undertook the training provided by their organisations and the legal profession.

I always responded to those invitations, including some even from the legal profession. I did a lot of training because it interested me. What was good was that there is always a little bit of updating on recent cases and I've attended all the training sessions. There is a trainer who comes with an assistant. What is very important is when we can exchange opinions, talk about specific issues, judgments, problems we've had. This is where we get a chance to ask questions (F26-Stras-Er).

Two issues should be highlighted in particular on the issue of training in France. Many of the *conseillers* interviewed commented on the lack of training of other *conseillers*, both employers and employees. (In some cases, given the continuing force of inter-union competition, they referred to members of other trade unions.)

The partisan nature of lay judge training in France is soon to be at least partly altered. Under the 2015 labour market reform legislation, all *conseillers* will receive initial and continuing training at the l'Ecole Nationale de la Magistrature. This measure was criticised by employee-side *conseillers*, who said they were opposed to joint training with the employer side, except where this involved learning about the general rules of labour court procedure.

It will depend on what the training is going to be about, who will do it, whether it's an independent body ... On some things, why not, on procedures, that kind of thing. But, afterwards, for understanding the Labour Code, that's another thing. That has to stay a union matter (F23-Stras-Ee).

¹¹³ *Revue Pratique de Droit Social*.

Training: summary

There is no systematic training for German lay judges and the amount of training will depend on practice at the local or regional labour court, with some trade union training, either by individual unions for their members or the main union confederation, the DGB. The lack of systematic training is compensated for to some degree for employee lay judges by training as works councillors.

British lay judges have compulsory joint training initially and annually. Great Britain is exceptional in that new lay judges may sit in on deliberations in cases as part of their initial training. Training is devised by the judicial authorities centrally and delivered by professional judges locally to employer and employee lay judges jointly, underlining the neutrality of the labour court.

French employee lay judges are entitled to paid time off for six weeks' training during their five-year term of office, but such training is permissive, not compulsory. Training is mostly provided for employee lay judges by their union and for employer lay judges by their organisation/association emphasising the partisan nature of the lay judge role in the labour court. The close institutional link between *conseillers* and trade unions in France, which both reflects reinforces the importance of the nomination process for French trade unions, is further reinforced by the fact training for employee lay judges is provided by the trade unions. This situation has become contentious, as under the 2015 labour market reforms, initial mandatory training will pass to the state. While this was accepted for training in basic procedures, some trade union interviewees were eager to retain a distinctive form of union-based training on substantive issues.

10.5 Skills and knowledge: conclusions

The knowledge and skills exercised by lay judges in France, Germany and Great Britain are determined primarily by the role of trade unions within the labour court system, which reflects the wider industrial relations environment and system of employment regulation, and the specificities of the structure and composition of the labour court. Some of these are closely coupled to the industrial relations system, others are more contingent (such as the technology used).

The fact that French lay judges, unlike their British and German counterparts, are required to have legal knowledge and write judgments is determined not by the fact that they were elected to their role, but by the fact that French labour courts decide on a case *without* the presence of a professional judge, unless there is a tie that an *audience de départage*. Similarly, the fact that British lay judges now have a restricted opportunity to apply their workplace knowledge is less because of the way they have entered their role, but rather because they no longer normally sit on discrete unfair dismissal cases.

Moreover, the fact that training is provided to employee and employer lay judges jointly by professional judges in Great Britain, whereas in France it is essentially carried out by trade unions for employee lay judges and by employer's associations for employer lay judges influences the perspectives lay judges adopt and in turn colours how they perform their roles.

11. LAY JUDGE ACTIVITY: PREPARATION, THE HEARING, AND DELIBERATIONS

This chapter focuses on the phases of lay judge involvement before and during hearings and then in deliberations, beginning with the scope for access to papers the day before the hearing, and running through the course of a case to the production, and in France the writing, of the judgment.

11.1 Activity before the hearing

Much of lay judges' experience in the court is shaped by established and often formally prescribed judicial procedures. Some scope for lay activity at the hearing, and differences between countries, is determined by contingent aspects, such as the choice of means for recording/noting proceedings, but also the approach of individual professional judges. Our research involved exploration of whether there was evidence for active lay judge involvement, derived from interview data, that might not be discernible from observation of court proceedings.

Case papers before the hearing day

Based on our interviewees, neither lay judges in Germany nor *conseillers* in France received case papers before the hearing day. Lay judges in *Germany*, however, were entitled to do so, and many interviewees were aware of this right (see Chapter 6). Most interviewees, lay and professional judges, stated that the main reason for not receiving case papers before the hearing day was the additional time required for reading. Some German professional judges interviewed were concerned that this might deter lay judges from taking on or continuing with their role. One further problem, according to some professional judges, was the fact that consideration of case papers at a first-instance hearing would require knowledge and experience.

They would just get a pile of documents without any commentary, be swamped in paperwork and not able to tell what is relevant for the case because they've not been trained for this' (G PJ B 8).¹¹⁴

Not seeing case papers had also become the norm in Germany: 'You get a sense that this would be an exception' (G ER MA 64). Professional judges interviewed also noted that the chair of the court, the professional judge, would typically be working with the case papers until shortly before a hearing began, making it difficult in practice to share them with lay judges. Nonetheless, some lay judges did express a desire to see them and some professional judges felt that it would be helpful for lay judges to be more familiar with case papers.

In *Great Britain*, there were mixed feeling about whether case papers should be sent out before the hearing day; some lay judges were aware of the complications of releasing papers in advance.

It's a big ask to say to people, 'If we send you these papers, are you going to spend three, four, five, six, seven hours reading them, when you might not need to?' So I don't know what the answer to that one is' (GB EE 9).

Case papers at the start of the hearing day

In *Britain*, 'case papers' refer to the documents registering a claim (the 'ET1') and the response to this by the respondent ('ET3') and any correspondence between the judges and the parties on case management matters. In addition, the parties produce what is called a 'bundle', normally jointly agreed between them, which is the documentary evidence including such matters as the written

¹¹⁴ Case papers are provided beforehand at *Land* labour courts, where lay judges are more experienced and, in contrast to the first instance, the relevant material will already have been compiled.

terms of the contract, witness statements and company policies. In complex cases, such bundles can comprise several separate folders of documents. We discuss 'bundles' further below.

Normally only the ET1/3 are made available to the lay judges shortly before the hearing begins. Some lay judges in Britain felt they had insufficient time to study them before the hearing: 'very limited', 'not enough' (GB EE 10/40). Others referred to the 'rush' shortly before a hearing. Yet others noted the principle that evidence should be presented only at the hearing. 'We get very basic case papers half an hour before. I think one of the reasons for that is they don't want any party to be disadvantaged, obviously you don't have all the information' (GB EE 12).

In *Britain*, admiration for the professional judges was sometimes mixed with the feeling that the process was a formality. For example,

However late the judge might have got the papers, which sometimes is that morning, I think, 'How do they get their head around this in that short period of time?' ... they will come in and say, 'Right, this is the case, have you had a chance to read? I have seen the main issues are...' boom, boom, boom, 'What do you think?' And then we can have our say (GB EE 22).

In *Germany*, lay judges generally get access to documents before or during the pre-hearing discussion with the professional judge. One frequent practice is for the professional judge to look through selected documents with the lay judges during this discussion, and at other opportunities during the hearing, or to provide a copy of these to allow some initial access to the papers.

In *France*, the overall procedure begins with the conciliation hearing, at which two lay judges, one from each side, hear the parties without the presence of a professional judge and try to find an agreement. If they fail, the parties go the second stage, the first merits hearing (*bureau de jugement*), heard by four *conseillers*. The lay judges adjudicating at this hearing are not necessarily the same as at conciliation. There is only a little preparation by *conseillers* beforehand. The claimant will have been asked to present their complaint and claim and the respondent should have provided a defence. The parties are supposed to exchange documents and any other relevant evidence to the other party before the hearing. Sometimes they fail to do this in time, preventing the other party from reading it before the hearing, leading them to ask for a postponement. Although this is a common practice, *conseillers* are increasingly reluctant to accept it.

Once the parties get to court, they submit documents as evidence to substantiate the facts and these are placed in the file. The *conseillers* will examine this after the hearing and during deliberations. This means that hearings are rather short. Although they might be allotted an hour, they usually take much less (often just 15 minutes). The presiding judge will quickly familiarise themselves beforehand with the case papers, but this is more for procedural reasons, such as to check if there are scheduled postponements. The president will also need to be familiar with the case to manage the hearing, and will usually take a quick look at the file.

You can look at the files, but that's of little interest because the documents are not there. (...) You could spend as much time as you wanted. (...) all you would get is the conclusions each side has provided, not the evidence. It is these items of evidence that are fundamental (...) I look half-an-hour before, more for the procedural aspects of knowing which party has not offered any conclusions, what's going to be excluded, more about how the hearing will be run. If I notice more, I'll ask a question. The real study begins after the hearing, before deliberations, preparing for deliberations. You have the conclusions and the documents and it's only then that you can see if it's admissible (F22-Stras-Ee).

As the interviews indicated, there are two explanations for the short preparation time.

Firstly, the procedure is largely oral and the case file may be of relatively minor importance during the hearing. Lawyers can send their 'submissions' (financial claims and supporting arguments) in advance but may also submit these at the hearing. The *conseillers* will first absorb the content of the case file during the hearing, while listening to the evidence and arguments of the parties and their representatives. Written statements are submitted but this takes place during the oral hearing and must be included as 'facts' to be considered during deliberations after the oral pleas. The oral nature of the proceedings plays an important role as it serves to distinguish the lay judges who make up the judiciary at the first merits hearing and the professional judge who comes in only if there is a tie-break hearing. The labour court, as a distinctive element of the French judicial order, is notable for the fact that it centres on the hearing with lay judges. Some interviewees regretted such a situation:

In my opinion a written procedure would be better. My husband is an administrative judge and they judge with a written procedure. Everything has been already exchanged between the parties, and each of them has time to respond and analyse the documents (...) In our case we are very limited. At *prud'hommes*, the lawyers don't systematically send in their conclusions. And we often don't have the documents at the start of the hearing. And we can't prepare it. (F27-Stras-Er)

Secondly, under reforms providing for the administrative rationalisation of the labour courts, there is now tight financial control over courts, with no allowance for preparation time before the hearing.

Pre-hearing discussion

In Germany and Great Britain, there was typically a short meeting and a discussion, of varying length, between the lay judges and the professional judge. In France, no such meeting took place before the first merits hearing, as this was heard solely by the (lay) *conseillers*. As at other stages of the process, in the absence of a formal regulation of this phase, professional judges had a good deal of discretion in both Germany and Great Britain. Lay judges' experience was therefore often conditioned by the approach (and personality) of the individual professional judge.

Such meetings were not universal in *Great Britain*. One experienced lay judge (GB EE 38) said he had never attended a 'meeting', only a short conversation to organise the reading. Another said: 'You arrive half an hour before the hearing's due, sometimes the professional judge will say "Oh I'll give you some chance to read the application" or something like that, but then generally speaking you're straight into the hearing' (GB EE 32).

In *Germany*, the professional judge will have been involved in the prior conciliation proceedings and therefore familiar not only with the documents but also the arguments advanced by the parties and their representatives. Professional judges will also be acquainted with the facts and arguments from the exchange of pleadings as they are statutorily obliged to try and conclude a case in one sitting.

Professional judges in Germany organise the pre-hearing discussion. How many cases in the prospective day's schedule will be discussed during this preliminary discussion will depend, among other things, on cases' anticipated complexity. Some professional judges will provide an overview of a case in the form of documents extracted from the case papers or statutes and previous judgments. As well as the circumstances pertaining to the case, the professional judge will also outline the relevant legal issues. Lay judges overwhelmingly valued this introductory session and most felt adequately prepared. However, some interviewees were critical of the short period of time allowed. '[The professional judge] is aware of everything and an outsider [a lay judge] has to get a grasp in a very short period of time' (G EE HAL 22). Another said:

I make use of this opportunity, I turn up, we have some time for preparation and look at the case papers. From my standpoint, this needs more time. You have to read them properly, you can't get through that in five or ten minutes (G EE HAL 15).

Another interviewee pointed to a variation in practice.

One [professional] judge can give you a lot of time and will introduce a case, another will just dump a pile of documents during coffee, a third will do nothing and say "I'm the czar of all the Russians, and you will follow me". Not literally quite as directly as that, but you do get that too (G EE MA 63).

Often lay judges reported using the opportunity of the pre-hearing discussion to ask questions about the case and, on occasions, raising aspects that the professional judge might not have considered.

The [professional] judge is grateful for background questions and says 'I hadn't thought of that'. Sometimes they'll say, 'Aha, I don't know'. ... I think there is a proper exchange (G EE B 1).

Lay judges reported that they felt that professional judges answered their questions meticulously. Many also indicated that they were asked their view of a case at the pre-hearing discussion: 'We can say how we see it' (G EE B 38). 'He opens the discussion and then we have a discussion' (G EE B 34). In Britain, the scope for lay judge questioning beforehand seemed to be more limited.

In both Germany and Britain, most lay judges considered that the professional judge sometimes made use of the pre-hearing discussion to communicate the prospective direction of the case: 'the direction in which they saw the decision as tending' (G EE HAL 11) 'in a type of preliminary opinion based on the documentation' (G EE B 49). Similarly, a British interviewee said:

We have a brief discussion, but he or she will have already seen all the material (...) So yes, very much the direction would be guided by that judge. (...) It's probably become stronger in recent years as they've sat alone now and sometimes you have to pull them back a little bit (...) You might want to say, you know, 'just tell us a little bit more'. (...) Sometimes they seem to have a fairly strong idea and direction where they're going: that may be quite correct but you just want to keep an open mind. The beauty of not having the evidence before the case or having looked at it, you don't have any preformed ideas as a lay member. That's again one of the strengths that you're bringing too but obviously if you're being sent down in this direction and not being able to think about it a bit more broadly, that may minimise your contribution (GB EE 14).

Some professional judges in Germany said they did not indicate a possible legal resolution of the case to allow them to hear the views of the lay judges. Although there might not be prior agreement on a legal solution between the three judges in every case, some mutual understanding at an early stage can be helpful in Germany due to the practice, discussed below, of suggesting terms for an agreed settlement to the parties during proceedings: 'such a suggestion also points to some extent to the legal view of the case and both [lay judges] should be involved in that' (G PJ HAL 16).

The situation in *France* is quite different as there is no professional judge at the first merits hearing and the constellation of professional and lay seen in Germany and Great Britain is therefore absent. The presiding judge, the (lay) president of the court, does take a more active part than the other *conseillers*, but this does not appear to create a comparable relationship to that between lay and professional seen elsewhere. Matters are different at a tie-break hearing (*audience de départage*), at which a professional judge sits with the lay judges. The professional judge will have consulted the file and established why the lay judges were unable to come to agreement at the first hearing. The lay judges attending this hearing will also be familiar with the case file as they will already have heard the case, albeit without agreement. According to the professional judges, there could be discussions on the case before the tie-break hearing, but it is far from being systematic.

Then, when we hear the cases, we don't know what is in the files, in contrast to the professional judges who have the files beforehand and who can ask questions if there was anything missing. We don't discover it until afterwards (F03-Nant-Ee).

Reading documents

In *Great Britain*, there are so-called 'bundles' of evidence, often comprising several files. If these are voluminous, there will be a unique arrangement for reading them compared with France and Germany. Once the hearing has begun, there will be a discussion between the judges and parties about which documents should be read and the time needed. 'You then make a decision with the [professional] judge about reading time and if we need a couple of days. We'll do an assessment with the parties' (GB EE 38). The parties will then be asked to leave for an agreed adjournment.

Reading typically took place with lay and professional judges in the same room, a practice encouraged by the judicial authorities and welcomed by most interviewees as it promoted collegiality. 'The majority are a partnership as you're reading' (GB EE 7). Experience varied. While some interviewees noted only limited interaction, others reported a discussion: 'So before we get onto the cross-examination, we will have (...) discussed the statements and started to form the narrative and know which bits we're not certain about' (GB EE 24). Reading can also open avenues for exploration: 'One of the useful things is that we tend to read it all together. And things come up as you're reading... someone will say, "Gosh," you know, "they use this machine. Well, that's not usual as far as I know." And it'll just flag up something' (GB EE 28). Not all professional judges were seen to value this: 'Most of the judges, yes. Some are less interested in the views of others, we'll put it that way' (GB EE 10).¹¹⁵

As noted above the many documents normally included (in England and Wales) witness statements. Some interviewees felt that their ability to evaluate witness evidence and credibility was diminished because such statements were 'taken as read': that is, witnesses were cross-examined on their evidence but not required to read out their statements or present evidence. 'That doesn't really test the witness.... Whereas when they read their statement (...). It would give the panel the opportunity to understand things about the persons' (GB EE 7). 'You get a feel for how they deliver it, about the truth of what they're saying which you don't get from reading' (GB EE 14).

Before the hearing: summary

In Germany and Great Britain, some lay judges felt that the time available before the hearing was insufficient, as did some professional judges. Access to case papers by lay judges was limited in all three countries on three main grounds: practical,¹¹⁶ legal, and the consideration voiced in Germany that lay judges might not have the skills to interpret case papers.

¹¹⁵ A perception confirmed by one professional judge: 'I want quiet when I'm reading (...) The trouble is, as far as members are concerned, (...) they'll read a bit and they'll announce, "Oh, have you seen this?" And they'll be looking at a statement that they've read. You haven't yet come to it 'cos you're reading another statement. It completely derails your thoughts. That's another good reason for giving the statements to the members in advance on the evening before, because then they can read it in their own time' (GB PJ 7).

¹¹⁶ A few individuals did say they would be willing spend their own time on this. One of these in Britain also indicated that they took selected case papers home to study (GB ER 13).

In Britain and Germany, the pre-hearing discussion was strongly shaped by the professional judge: challenging a judge's view was presented as a rather adversarial act in Great Britain by some lay judges, but also an opportunity to raise questions. Reports from Germany seem more consensual.

In France, the oral character of the hearing also contributes to the legitimacy of the members of the court in their capacity as lay judges, as written documents play a less significant role in this judicial venue than in other procedures. The tie-break hearing more closely resembles a first-instance hearing in Germany and Great Britain, but there is no discussion ahead of the hearing.

In Great Britain, actions taken by government to limit the scope for full hearings with lay judges in the labour court, combined with the fact that there appear to be more complex discrimination cases, has increased the volume of reading required in cases that lay judges now predominantly sit on. The presumption that this reading should be conducted by all lay and professional judges together creates an additional opportunity for behind-the-scenes interactions.

11.2 In the hearing

One of the central debates around the activity of lay judges is the extent to which they are active or passive during judicial proceedings. A good deal of observational research (see Chapter 2) has concluded that lay judges are essentially passive during court hearings, which are steered and in some respects dominated by the professional judge. In Germany and Britain, this might, at first glance, seem to be the case. The French situation is exceptional as all the judges at the first merits hearing are lay, but the tie-break situation offers an interesting point of comparison. Our interview evidence suggests, however, that the active contribution and role of lay judge might have been underestimated by observational research alone and that lay judges play a subtly active and indispensable part during the hearing, as we outline below.

Moreover, irrespective of the specific activities of lay judges, their presence also has a significance for the legitimacy of the court as a whole, as emphasised by professional judges in Germany.

On the one hand, I think it's important for the parties in a case to get the feeling, via the presence of the lay judges, that someone is there who has some experience drawn from real life. That is, not just a professional judge, who decides everything sitting at their desk, but people active in real life involved in making the decision. I think this means that judges are more accepted by the parties concerned' (G PJ MA 54).

In both *Germany* and *Great Britain*, the course of the hearing is determined by the professional judge, acting in line with statutory requirements and, in Great Britain, practice directions issued by the judicial authorities. There are, nonetheless, several points at which lay judges can and do make active contributions and interventions, with practice varying between the two countries.

In *France*, the course of the hearing is determined by the president of the court, also a lay judge. The chair (president of the court) plays the central role in managing the hearing, in which he or she is the dominant figure. He or she will invite parties or representatives to speak, will also invite or instruct them to stop speaking if their intervention is deemed too long, and also asks the other lay judges if they have any questions. The chair also ensures that the hearing is properly run and procedures complies with, in conjunction with the clerk of the court. At a tie-break hearing, the course is determined solely by the professional judge: lay judges' observation of the hearing enables them to note any modifications made by the parties as compared to the first hearing that they had managed previously.

Note-taking

In *France*, the members of the court, and in particular the president, will take notes to allow themselves to refer to the case file during deliberations. They take note of the financial claims raised by complainants (such as severance compensation) in order to calculate the overall sums asked for by complainants. These will not necessarily have been included in the case file, and lawyers or litigants in person can present them during the hearing. Court observations suggest that members do not take prolific notes or register the legal arguments advanced by the parties' representatives. Note-taking in France is therefore arguably limited in terms of its being a record of the proceedings but central in terms of the material collected by the judges for their subsequent deliberations and, crucially, to allow the president to write the judgment (see further below).

One of the notable features of lay judge activity in *Britain* is *systematic* note-taking, occasioned, in part, by the lack of any recording technology in the courtroom. All British lay judges reported taking notes, some very extensive. 'I take a lot of notes ... I could take 60 pages of notes depending on the size of the case. (...) I keep them for about 18 months-two years' (GB EE 38).

'They [professional judges] say that they rely on us, especially when they're asking questions, because when they're asking questions they're looking at the parties and not writing things down. And one or two judges have said that is when they really rely on their members to write things down' (GB EE 6).

Lay judges' notes can be decisive in Britain in the event of a complaint of bias (see Chapter 7), endowing lay judges with some latent power. 'We often say to the judges "Oh you're lucky to have us"' in the event of 'some sort of argy-bargy' (GB EE 38). In one instance, a lay judge reported that the professional judge was worried their questioning had been too forceful: 'the [professional] judge was concerned afterwards that maybe that had gone too far or whatever, but from the notes and the other member we were able to go back over when the interventions had been made' (GB EE 18). Another commented: 'One judge in particular gets quite a few complaints because he's very robust with witnesses and I've been asked to comment, I think, twice on his behaviour – this is where my notes come in' (GB EE 38).

British professional judges will also confirm their notes with lay judges: 'Quite often, if you break for lunch or at the end of the day, the judge will say, "I've got this noted, is that your understanding?"' (GB ER 1). This was seen by some lay judges as active involvement in the judicial team. 'You've got to stay engaged. But we do, we'll just say "Oh gosh, did somebody catch that" and it's feeling more like a team' (GB ER 10).

In *Germany*, by contrast, there was little or no note-taking. Professional judges used handheld devices to record key aspects and decisions, but this was not a running record of the proceedings. In some courts, such as Berlin, there is minute-taker. The issue of complaints and the scope for addressing these through lay judges' notes was not referred to.

'Eyes and ears'

In addition to note-taking, British judges – both lay and professional – also frequently referred to lay judges' serving as 'eyes and ears' during proceedings. 'I think it's important for lay members to watch, because you can pick up an awful lot (GB EE 2). 'Quite a lot of them [i.e. professional judges] say, "Oh, you're my eyes and ears," because they're writing' (GB EE 26).

Lay members (and professional judges) regarded their scope for observing courtroom events as a key activity during the hearing, in part because of the judge's own note-taking. 'There's a tendency

these days for judges to [be] head down and writing almost all the time.... They don't look at the courtroom' (GB EE 5). 'Some of them do recognise that and say "please be my eyes"' (GB ER 6).

In *Germany*, there were references in interviews to the influence that lay judge' perception of the development of the case in the hearing had over the subsequent discussion in deliberations. 'If both parties are there, then of course you gain some extra information from how they put their argument, their body language, that you can also take there' (G EE B 49). One professional judge noted: '[I] often ask them to look at how the parties are reacting during the oral hearing, whether it confirms [my impression] (...), what's the chemistry like between the parties (G PJ HAL 19).¹¹⁷

Questions during the hearing

Questioning in all three countries, albeit under different circumstances, was primarily directed at eliciting or elucidating facts rather than legal aspects.

As a British interviewee commented 'One of the important things that we bring to the party is to be able to ask questions' (GB EE 24). Interviewees in *Great Britain* reported that they felt free to ask questions without having to clear these with the professional judge: 'They do give you free rein. I've never been constrained as far as the questions I want to ask' (GB EE 7). Lay judges also reported that professional judges were careful to allow lay members scope to put questions: 'When the witness is finished, before the judge asks any questions, he will always ask the lay members if they have any questions first... If there is an adjournment he might say, "are either of you going to ask about X, Y or Z"' (GB EE 32). This also reflected occasional 'backroom' cooperation between the judges. 'If I say "well I'm thinking of asking this" and the [professional] judge will say "yes I was thinking of doing that", then you might say "well who might be best to do it"'. See the judges have the advantage - they can ask questions at any time' (GB EE 39).

In *Germany*, lay judges reported that they only rarely put questions to the parties, but were aware of their right to do so. They felt that exercising this right was recognised and supported by professional judges, who would occasionally ask whether lay judges had questions. One obstacle in this area, however, is the principle that the case is determined by the facts and applications made by the parties (*Beibringungsgrundsatz*): 'We may not add facts ourselves' (G ER DO 41). Both professional and lay judges noted that the professional judge would also, on occasions, make express reference to the knowledge and understanding present on the bench during their management of the hearing. 'If there some issues related to works councils, it can be that you're suddenly asked "Yes, how does this work at your place?"' (G EE HAL 13).

In *France*, the questions asked during the hearing are at the core of the proceedings. Through questioning, the judges exercise their role as representatives, typically by asking about the activity of

¹¹⁷ In this instance, the professional suspected that the relationship between the parties had seriously broken down and wanted the lay judges to see whether the parties' behaviour in the hearing also confirmed this. She said: 'It's often quite important whether lay judges share my assessment either from the case papers or based on what I've reported to them, that an employment relationship has simply completely broken down, for example. I'll discuss this with the lay judges beforehand and then I'll often ask them to look out for the reaction of the parties during the hearing, whether that confirms this, or I might be completely wrong, although that's rarely the case... on the issues of the chemistry between the parties'.

the parties and the conditions of employment relevant to the case (dismissals, how the organisation operates, industrial relations arrangements etc.).

We'll analyse the fault committed... But we must never forget the context in which this happens. An employee who does something stupid, how did he get to that? If you argued purely in terms of law, you might say that a fault had been committed, the contract must be broken, finished. But we must never lose sight of the fact that it is always a relationship of subordination (F13-Nant-Ee).

Given that one of the main sources of *conseillers'* knowledge is the world of work, questions are important as they show (and allow them to reveal) that they are knowledgeable about this and able to make informed judgments.

We come from the world of work, we are confronted with employees' problems, so we are in good position to understand the employees' point of view, and the employer is there to understand ... to understand the point of view, not to defend it but to understand it (F12-Nant-Ee).

'Interim deliberations' and adjournments - signs and signals

In *Great Britain*, 'interim deliberations' refer to adjournments at which the professional and lay judges review the course of the hearing. It does not necessarily imply a problem in the hearing and might be necessitated by the fact that in long cases, possibly extending over several days, there is a need to take stock from time to time. It also does not imply, as professional judges made clear, that there is a move towards a decision. How these discussions were organised, if held at all, was largely a matter for the professional judge ('two or three little chats along the way', GB PJ 8). Such discussions were reported by many lay judges, especially as cases on which lay judges now sit tend to be complex and lengthy.

Yes, normally that happens in the lunchbreak (...) we come back for 15 or 20 minutes and then, depending on how the case had gone, there'd be a review of where we are. At the end of the day, on some cases, we spend 10 or 15 minutes thinking about the witnesses for the following day (GB EE 8).

One lay judge referred to an active practice of managing this on the part of the professional judge.

He'll produce a little précis of the evidence and a précis of what's been said and he sends those by email to us both so that when we come in the next morning we can either agree with him or disagree with him. Sometimes we do disagree, 'she didn't really say that, no' (GB EE 10).

The practice was not universal, and not all lay judges agreed with it: 'I'm not too happy having mini deliberations, I think it can be a bit dangerous, it can set you on a certain sort of track' (GB ER 6).

Scheduled breaks (at lunch or at the end of the day) apart, several lay judges commented on their scope for signalling to the professional judge for a short adjournment or to alert the judge to an issue. This might be prompted by the professional judges' behaviour, an event in the court room, or the evidence ('Very occasionally the judge has got it mixed up and I say "excuse me judge it's that page"', GB EE 40). 'We do it by having an adjournment because you can always pass a note and say "well can we have an adjournment"' (GB EE 38). 'On a number of occasions I've said to the judge, "the witness needs a break, he's been in the box for two hours"' (GB EE 34). One lay judge reported how they would exercise a kind of passive authority to stabilise a heated situation, after suggesting a short adjournment. 'And so sometimes you might have said to the judge (...), "Oh do you want to revisit that when we go back in" and if there's been some argy-bargy they will sort of try and lay that to rest' (GB EE 38). Lay judges were aware of allowing the professional judge to maintain face in the hearing. 'Nothing that would either make him – make the panel – look incompetent or anything like that or you usurp the employment judge's position' (GB EE 40).

In *Germany*, ‘interim deliberations’ were referred to as taking place when there is a desire for clarification during the hearing. Lay judges can indicate to the professional judge that they want such a consultation. These can resolve any questions on the part of the lay judges, review how the case is progressing, and also consider proposals for a settlement. ‘If something seems a bit doubtful during the hearing, then we can give a sign and we’ll withdraw with the professional judge and can make a decision’ (G EE B 38). Both professional and lay judges noted that proposals for a settlement were discussed by all three. Lay judges can make a contribution to this through gauging the plausibility of any severance amounts, based on their own experience.

If a readiness to come to a settlement is indicated during the hearing, then it’s an enormous help that the lay judges can offer their opinion or even suggest a sum. As a rule, I would briefly halt the hearing and perhaps suggest what the general rule-of-thumb would be, if there is one, and the base amount we could then vary up or down. There will be an intense discussion by the lay judges, in my experience (G PJ MA 52).

The proposal will be presented as a proposal of the court: ‘It often works well if all three judges make the suggestion. It’s often accepted’ (G EE MA 67). It was also reported that in some (rare) cases, the lay judges would speak to the parties themselves and this was instrumental in the settlement proposals being accepted: ‘If the professional judge is not speaking and I can see the way forward to a settlement, then I’ll just zoom in’ (G ER MA 70). A professional judge reported: ‘Sometimes the lay judges will say something themselves – I’ll encourage this in some situations’ (G PJ B 6). Another noted: ‘As a rule, I’ll run the whole hearing. It can be a positive thing if an employee representative from the lay judges intervenes. This can help break down barriers. It doesn’t happen often, but certainly from time to time’ (G PJ DO 35).

For some professional judges in Great Britain, this provided an opportunity for feedback: ‘I frequently say to them you know, “Did I go too far and how was that, am I being too patient?” and get some feedback’ (GB PJ 4).

In *France*, one distinctive aspect of hearings not seen in Germany and Great Britain¹¹⁸ is that *conseillers* will on occasions challenge parties’ legal representatives. The situation is somewhat paradoxical: lay judges need to demonstrate that they know the law, but, as *lay* judges, their main source of legitimacy does not lie in this area. As a consequence, it is important for lay judges not to be intimidated by lawyers, whose long interventions and occasional evident disdain towards lay judges – as non-professionals – can be an irritant, and to limit representatives to a minimal role.

The employee was telling his story. Simply. Not like a lawyer, but what he experienced is often more credible than what a lawyer says. The lawyer looks at his file two hours before, looks at what happens and tries to embroider it. He’ll then look for some case law (...) judgments from the Court of Appeal. But often they don’t exert themselves too much for the labour court. Sometimes, it’s true, they think that ‘yes that will do’. There are lawyers who have a lot of work and cannot spend their day on a file. But if they go to the Court of Appeal, they have to put a bit more into it (F23-Stras-Ee).

¹¹⁸ In this study, we have generally not explored the relationships between lay and professional judges and legal representatives. This has been researched in some of the German literature on labour court hearings, with an emphasis on the interaction between professional judges and lawyers as ‘repeat players’, to the exclusion of lay judges. It should be noted that in court observations conducted as complementary research in both Germany and Great Britain, interactions between professional judges and lawyers were courteous, that lawyers were mostly careful to defer to professional judges (but might also try to influence them), and that professional judges would firmly, if politely, correct any lawyer who strayed from procedures.

The political world, doesn't matter which side of it, thinks this is an exceptional jurisdiction, that it's just a complete pain. Some judges, like some lawyers, don't think we're legitimate (F03-Nant-Ee)

This again touches on the question of the legitimacy of the lay judges in French labour courts, as the main concern of the hearing is not primarily legal issues but with establishing the facts of the case and the employment relations context at the employing company.

One further element is related to the logic of the interactions between the parties, where the relationship between lay judges and lawyers gives scope to the former to demonstrate that they exercise real authority. This capacity serves both as a form of reassurance and a confirmation of their assigned role in managing the hearing and the conduct of the parties to it.

In the hearing: summary

Note-taking and observation in Great Britain provides an important area for lay judge activity, enhancing their involvement in the procedure and endowing them with some degree of latent power over the professional. Systematic and comprehensive note-taking appears less important in France, but noting and clarifying claims made at the hearing is crucial in writing the judgment. In Germany, judges record a summary of the proceedings from time to time to a dictation machine, and also recorded any decisions made at the hearing. On occasions, a minute taker might be present. Lay judges, therefore, do not take notes as a record, nor do they need to do so 'strategically', as in France.

'Interim deliberations' in Germany and Great Britain offered a behind-the-scenes opportunity for lay involvement – exchanging views, preparing questions and deciding who will ask them, and allowing an opportunity for the professional judge to draw on lay knowledge. In Britain and Germany, lay judges could ask for breaks, and some British lay judges noted that this, on occasions, was prompted by a need to indicate to a professional judge how their behaviour might be perceived by a party.

In both Great Britain and Germany, professional judges were careful to allow lay judges to ask questions. In Britain, no lay judge reported an attempt to require permission, although a professional judge might steer a lay judge away from a question not deemed relevant. In Germany, lay judges reported involvement and sounding out proposals for settlements during interim deliberations: this was not reported in Great Britain.

In France, the questioning of the parties by the *conseillers* is at the heart of the proceedings. When lay judges question the parties, they are looking for some elements to help them interpret the facts and bring them within the scope of the appropriate law. Lay judges stress their workplace expertise, their 'sense of the workplace'. In France too, lay judges' challenges to and confrontations with lawyers (especially employee lay judges and employer lawyers) is the site at which lay judges seek to establish their authority and the status of the institution, vis-à-vis a social stratum that, on occasions, regards itself as being of higher social status.

In Great Britain, some status issues were discernible in interviews, but possibly expressed more subtly and were not evident during the hearing.

11.3 Deliberations and decision making

As we note in the section on methodology, our research into deliberations, where lay judges have the opportunity to make a major but unobservable contribution, was based on interview data with

lay judges. Our interviews with professional judges also offer a means of cross-checking and qualifying the reports of the lay judges, adding further empirical material.

The situation in France is different to Britain and Germany, as deliberations after the first merits hearing involve only lay judges, the *conseillers*. Lay judges will only encounter a professional judge in deliberations after a tie-break hearing, following a failure to conclude the case at the first hearing.

We divide this phase into a number of sub-sections, covering the basic elements of the deliberative process: how deliberations begin, the course of discussions, dealing with differences, making the decision, and the judgment.

Deliberations – starting the discussion

As noted above, in complex cases in *Great Britain*, some preliminary consideration of the evidence might already have been made, so deliberations will follow a build-up of evidence and some preliminary assessment of it (some of which might have led to questions in the hearing). 'It's not as though this all happens in a vacuum and because these cases, they go on for several days these days... and interim discussions go on (GB EE 10).

In Great Britain, the common, but not universal, practice after the hearing was for the professional judge to begin by asking lay judges for their initial views. 'Let's discuss views. Who would like to go first?' (GB PJ 5). 'Once we get to deliberations proper, we'll generally just kick around a few of the big ideas and clarify what we think are going to be the areas we'll need to focus on (GB PJ 1). 'I always make sure I hear their views first before I give my own, so I want to make sure that there's a dialogue going. The contribution is substantial, as well as procedural' (GB PJ 5).

Professional judges in Britain expressed differing views of the early course of deliberations. One noted: 'Sometimes you start deliberations and you have no idea where you're going, you know, really don't have any idea' (GB PJ 8). By contrast, another tended to a more definitive approach, preferring to set out his view and then invite comments.

I think when I first started doing it, I would toss it open and say, 'Well, how do you all feel?' But it's a bit like writing a book and you've got a blank sheet there. It's really hard. So what I've started doing over the last few years is to say, 'My preliminary view is', but I make it clear that they can agree or disagree or shoot me down, whatever they want to do (GB PJ 7).

In *Germany*, concluding deliberations only take place if no settlement has been reached during the hearing. This part of the process can be especially significant in the light of any questioning of witnesses or if the oral hearing took an unexpected turn. Interviewees reported that although differences of opinion were rare at this stage, there would be a discussion. Both the lay and professional judges described the deliberations as a whole as a collective process of discovery. 'It's like being on a path that you travel along together, and which goes in a straight line' (G EE HAL 11). 'For the most part, we agree. It's like fruit falling from the tree' (G PJ 23).

Several British lay judges emphasised the structured nature of deliberations, beginning with 'findings of fact', which included deciding on the credibility of witnesses and drawing inferences. Lay judges played an active part in this process, but the direction was set by the professional: 'Hopefully I don't dominate the discussion, but I certainly give it structure' (GB PJ 6).

Most judges adopt a structured approach to the issues. But as far as the actual weighing of the evidence I found it to be very, very equal. I haven't come across instances where, you know sort of, the judges have dominated that discussion (GB EE 29).

The style of discussion was also reported as being quite sophisticated: 'And putting sort of hypothetical, sort of, counterfactuals, just to see whether we are certain of what we're saying' (GB EE 24).

Professional judges in Great Britain also noted the activity and contribution of lay judges in deliberations, on occasions persuading them to change their mind, usually on an individual aspect of a case rather than the whole case: '...certainly active in the deliberation process' (GB PJ 8).

I can think of probably four occasions in the last year where I've sort of taken a step back and thought 'oh right, yes'. Without a member, I'm not sure I would have done that (GB PJ 10).

A lay judge reported:

We were going through the case and we'd done that and then I suddenly sort of remembered 'Oh hang on a moment (...) it wasn't like that' and so we went back and re-read all of that section and, yes, that led to a review (GB EE 29).

One professional judge referred to a case in which a lay member steered the discussion on an issue:

[Mr X] is an outstandingly good forensic member and he took myself and my other colleague through the facts very clearly, and by the end of it [he] and I were entirely persuaded that this [party to the case] had fabricated those [...] notes (GB PJ 5).

One professional judge adopted a method to ensure balance:

What I will sometimes do in chairing a discussion – members don't necessarily know I'm doing this but I do it consciously – is I will alternate which of them I ask first to avoid any appearance of an in-group or a clique emerging (GB PJ 5).

Professional judges emphasised the need to draw inferences:

Because we've got to reason why we've made a finding, you know. Why do you infer that? (...) The inference is very interesting (...) we are looking into what is in people's hearts and minds, not simply whether they drove over the give way line (...) and it's a difficult process (GB PJ 8).

Several lay judges in Britain reported considerable discussion over this issue.

It's quite easy to call us into account by saying right, finding of fact and that stops any discussion. Well it dampens the discussion. But you might get a member who wants to argue a point even at that stage. And then sometimes we'll have a break, and the [professional] judge might say 'we've been doing this for an hour now, let's go have a coffee'. And you might just need 10 minutes and then you come back and you look at it again and - it's like negotiation sometimes - you get closer and closer' (GB EE 40).

Lay judges in both Great Britain and Germany were seen as providing some support and certainty to the professional judge by acting as a 'sounding board' (GB PJ 1) for the professional judge's view.

It is sometimes useful just to have another person. I certainly had a couple of cases where I have been aware of my own inbuilt potential for perhaps having empathy with a claimant which could have led to bias and it's been useful to have lay members (GB PJ 1).

On some issues, lay input was deemed especially useful: 'Deductions for contributory fault, the members are quite useful about that because that is an opportunity for them to say, "I think he did it' because you have to make a finding"' (GB PJ 7). Issues of compensation would also trigger a good deal of discussion, with, on occasions, lay judges arguing from different ends of the spectrum, within the bands set out in law. 'I think the judge is interested (...) I remember the [professional] judge not setting a figure, waiting to see what we both said before he would come in with his view' (GB EE 8).

In *Germany*, professional judges considered contested dismissals, in particular as cases in which lay judges' assessments, through their knowledge of workplace practice, could play a significant role. 'When it's a matter of a gut feeling' (G PJ B 6).

During discussions about settlements, what would be a fair outcome but also where it's a matter of judgement. I'd ask the lay judge 'How do you see that.... Is that grounds for a summary dismissal, would that be sufficient?' (G PJ B 8).

Another professional judge posed the question in stark terms: 'Is that enough or not enough' (G PJ HAL 23). Agreement between the lay judges was seen as an indicator and benchmark for the professionals as to the correctness of the decision: professional judges referred to it being a 'surety for correctness' (G PJ HAL 16), a 'corrective' (G PJ HAL 19), a 'useful corrective' (G PJ B 32), and 'as a kind of sanity check, when we can't see the wood for the trees any more' (G PJ MA 52).

Lay judge agreement was also seen as offering both support and backing: 'somehow my view feels more anchored' (G PJ B 6). Other professional judges referred to 'backing' (G PJ B 8), and feeling 'much more confident in the solution' (G PJ HAL 16).

I can still remember from my time at the start, you'd suddenly get this intervention from high-powered lawyers 'But Madam Chairwoman, the Federal Labour Court sees the matter quite differently.... That was naturally rather distracting, as I thought I was well-prepared, (...) but it never threw me off if my lay judges said during a break 'we've never heard that' (G PJ MA 52).

In general, in Germany and Great Britain there was recognition and acceptance of the professional judges' primacy over matters of law,¹¹⁹ but this was not unqualified. One British lay judge said: 'Sometimes it's a point of law you know, and then we're in the hands of the [professional] judge because that's their area, but we're entitled to argue the point' (GB EE 38). As noted in the British context chapter, this division of labour also takes place against the background of the limitations on judicial reasoning in the labour court imposed by precedent. This can be a source of tension, as a professional judge reported.

They think of unfairness in a rather more generalised sense. (...) I think the law is quite clear that the employer is given a huge mental latitude and that's what you have to apply. And sometimes it's with a clenched jaw. But it is the law and I have found that I'm having to sort of repeat the mantra of the band of reasonable responses to members (GB PJ 10).

In *France*, deliberations represent a further moment in the proceedings where the differing roles of lay judges – as employee representatives or as employers and managers – become intertwined, and the different aspects of the legitimacy of the lay judges, in particular legal legitimacy, and its sources are highlighted. This is even more the case than during the hearing, where trade union legitimacy and occupational legitimacy tend to take primacy over the key aspect of legal legitimacy.

Negotiation and differences in deliberations

Ah, you talk it out, and you talk it out and you talk it out. And there are very, very few cases that you can't in the end agree, because... you come closer and closer by arguing (GB EE 2).

Most lay judges interviewed in Germany and Great Britain were willing to disagree during deliberations, and felt entitled and able to do so, in particular on matters of the credibility of evidence. 'Absolutely, it goes to the credibility of witnesses, you're always entitled to make a judgement about that' (GB EE 38). Confidence to do this grew with experience:

¹¹⁹ See too Chapter 11 on relationships between the actors.

Initially, obviously you start very nervously (...) but after a while you do actually relax into the role, and you feel much more confident. I mean, if you 'd say that within my first six months I would have challenged a decision, I don't think I would have done (...). But certainly now, I would have no hesitation if I didn't agree (GB EE 4).

The capacity and willingness to differ during deliberations seems to vary. 'One of the unfortunate things is that some lay members just sit there and let it wash over them and they'll agree with a judge as a matter of course. If I'm the lone voice or the dissenting voice, that can be quite difficult' (GB EE 33). Others, possibly with more adversarial workplace experience, were more robust:

I've had fights with two against me and I don't say I've always won, but I've always made sure that I had my say. (...) I don't get emotional, I use arguments to try and influence people; but equally I'll not be swayed, which some people will say is stubbornness. I don't think it is, because if somebody says to me, 'No, look, you're wrong, because of this,' I'll say, 'Well, fine' (GB EE 9).

In *France*, as noted above, deliberations can more closely resemble a negotiation than was generally reported in Germany and Great Britain. Deliberations can include phases of negotiation that take the classic forms of industrial relations *à la française* (parity between the parties, give-and-take). Deliberations also reveal the organisational ethos of the judges, both as trade union representatives or representatives of employer organisations. Deliberations can also feature confrontations between the two sides, reveal the power relations between them, embrace negotiations (and *rapprochements*) between different trade unions, and between some unions and managements. It is within deliberations that the trade union identity of employee lay judges is revealed most emphatically. 'Even in deliberations, there is an employee camp and an employer camp. Afterwards, as it evolves of course, we find solutions based on understanding and agreement' (F13-Nant-Ee).

During deliberations, you sometimes can't agree, but at some point you try to bring the different points of view closer together, you don't stay fixed on something. I was speaking earlier about regrading. You can be firm on the obligation to do this, but be more flexible on difficulties that might crop up. This is how we come to an agreement. Or in relation to that say you might lay more weight on compensation. We come to an agreement (F21-Versailles-Ee).

At the same time, deliberations also reveal the paradox that the judgment must be consistent with the requirements of the Labour Code, must be safe from appeal, and must be not exposed to legal criticism. In this sense, the outcome of any confrontation must ultimately be shaped to comply with the requirements of the law.

In the drafting of judgment, normally, it has to be presented in a particular way. The assessment of the facts that we reached in deliberations... and the application of the law to these facts. This assessment can differ as between the four of us and so then we'll see, through the force of the arguments made, whether we can reach a consensus on assessing the facts and how the law then applies to them (F07-Nant-Ee).

Very often we'll agree. This morning we had questions about a request for changing a part-time contract into a full-time contract (...) we're going to find ourselves in a two-against-two situation, each side trying to introduce factual arguments that will fit with the law. Then, depending on what arguments are made, you might switch to one side or the other. And when you really can't switch, well you'll just say to yourself that the two of us will interpret it in a certain way (F03-Nant-Ee).

Aside from the concern to avoid appeals, there is also a perceived need to sustain the institution of the *conseils*, to demonstrate its vigour and strength to the world beyond, and to assert that it exists as an institution. To this end, one aspect of the work of the labour court in France is to conclude agreements and reach a consensus, above and beyond the immediate perspectives of employees

and employers. This takes place through a process of institutional learning that also transcends differences between trade unions.

We always manage to agree ... because when we are in deliberations, it's the four of us. From time to time, the two employee *conseillers* might take a different view. One might say 'I think we have to stick to that because we have the arguments' and the other might say 'It's not as clear as that'. But we never say 'the employee is always right'. No, it's never that (F05-Nant-Ee).

The chamber of the labour court that deals with legal disputes involving *cadres* (managers) is somewhat different. The fact that the employer-side judges are senior managers and HR professionals who are sitting across from employee-side judges who are also managers serves to weaken the industrial relations logic that characterises other chambers.

There is no confrontation between the classes in our deliberations because the employers we sit across from are often not entrepreneurs but HR directors of big firms... and they're also employees. Like us, an employee *conseiller*, but in the managerial [*cadre*] section. They can be responsible for a service, in HR, so this can be a little easier than in some other sections, where there are head-on confrontations (F12-Nant-Ee).

Unanimity and majority decisions

In *Germany* and *Great Britain*, there are both procedural and discursive forces that tend to lead to a very high proportion of unanimous decisions. On the other hand, these forces gave lay judges both latent power (to vote down the professional) but also made professional judges aware of the need to engage in thorough discussion of the issues in deliberations.

In *France*, the key issue was to secure a consensus between the two sides in deliberations. Once three judges were in agreement, it was reported that the fourth would then concur. As also discussed in Chapter 12 on relationships between the actors, recourse to a professional judge at a tie-break hearing is seen as a failure and often characterized as an exceptional event.

Several British lay judges said they were uncomfortable about being in a minority and were willing to accede provided they had an opportunity to air their views, once they realised they had not persuaded the other two judges. 'As long as you've had your say, as long as you've been able to put your side and your interpretation of the areas that you've discussed, then I'm more than happy', with the reserve option of a minority decision. 'And if I felt that strongly against something that the judge was saying then, you know, it wouldn't be a unanimous decision' (GB EE 7).

To put it at its lowest level perhaps we don't feel strongly enough to keep arguing against you know. So you might have a different view, you might think something was unfair but once everybody's had their say, you think... yes OK, I'm convinced' (GB EE 39).

Although most interviewees did not refer to explicit 'pressure' to agree, being in the minority often led individuals to abandon their objections, a process described as 'tumbling' by one lay judge and 'crumbling' by a professional.

Lay judges in *Germany*, like many of their British counterparts, felt that divergent opinions were also given a sufficient hearing and discussed in deliberations. If they are asked why decisions are so often unanimous, some noted that this was due to how deliberations were organised. 'I think it's really important to talk between ourselves beforehand' (G EE B 3). 'And all three hear the same, all three see the same' (G EE HAL 9). 'It's very structured from the start to the finish. We discuss right to the end, and arrive at a decision together. You always have the feeling that it all fits together when we decide' (G EE B 43). Most noted that the cases were well-prepared and that the professional judge

was able to set out a convincing account of the legal position. 'It's the judge who has the decisive opinion and can then bring about agreement between us all' (G ER B 7). Much depended 'on good preparation and on a good review by the professional judge' (G ER HAL 18) and that differing opinions were fully aired. 'And that, in doubt, when you've got concerns, these can be fully discussed. You don't say let's leave that aside or something, but rather if someone says "I've got something to say" that will get a hearing from the other two' (G EE B 5) and 'that's always resolved through discussion and having it out, through a proper culture of debate' (G EE B 39).

One circumstance cited in Germany in which lay judges might change the outcome of a case was when they offered a specialist opinion that took the discussions in a new direction. 'Specialist issues, such as what particular job descriptions mean, how people work, that's often missing. And I can add something there. I come from the world of work. I've seen a lot of things and done a lot of things. And I can add quite a lot there' (G EE DO 31). Or in circumstances where the employee and employer lay judges were both in agreement vis-à-vis the professional judge: 'Not just me, the lay judge from the employer side too. We both had a different view to the professional judge. After a long discussion, we managed to persuade him' (G EE DO 27).

Much depended on the stance of the presiding judge.

It also depends on how open the chair is. He is very much able to question his own position, and correct it if needed. Of course, in formal legal terms, we could outvote him. On the other hand, he is the expert on the details' (G EE B 49).

There are also judges who are very open. You can see that too. They allow everyone to have a say. They'll listen and you can tell that as well, you know when someone you're talking to – whether it's sunk in or whether they're one step ahead and are about to come up with the objections (G EE HAL 11).

In *Great Britain*, it was rare for a professional judge to be outvoted by the lay judges. Some professional judges said it had never happened, others only one or twice, some a few times. Their reports of this were generally, but not always, phlegmatic. One noted: 'I felt very uncomfortable because I was recording the majority's view, which was totally against mine' (GB PJ 7).

One incentive for the professional judge to secure unanimity was the prospect of appeal. 'Every single one of them was appealed. Two settled before the appeal was heard and on the other two the members were upheld' (GB PJ 10).

Writing the judgment

Judgments in *Great Britain* are written by the professional judge without the formal involvement of the lay judges. After deliberations have concluded the professional judge will outline to the lay judges what the judgment will contain, seeking to embody what was agreed. There are two ways that the professional judge can give a judgment: it can be communicated orally at the end of a hearing, or it can be reserved and given in writing at a later date (see Chapter 7). In practice, because lay judges normally now sit on complex cases, the judgment is normally reserved. Practice varies. Some professional judges nearly always send the final draft to the lay judges for their approval. All professional judges, however, send the draft to the lay judges where there is a split decision. One professional judge noted: 'I have to draft the judgement and show it to the member who's in the minority' (GB PJ 12).

In *Germany* too, the judgment is written by the professional judge, some of whom also noted that they would take lay judges' arguments into account.

Even if it only contributes to my thinking when I'm setting out the argument for the judgment. And in one or another passage, where I wouldn't otherwise write so much, I can put in a couple of sentences supporting the judgment. So there is some influence at that point (G PJ HAL 16).

In *France*, the judgment is drafted by the presiding judge, possibly assisted by other members of the court. It marks a key stage in the experience of a *conseiller*. Interviewees stressed the requirement for a 'well-deliberated' judgement, which both complies with the law and is in accordance with the facts. 'Good judgment writing requires good deliberations. If you have deliberated well, if you've located the arguments, if you have written them up, no problem' (F11-Nant-Ee). Judgment writing represents both an important but also a challenging moment for the members of the labour court. The law has to be respected and complied with, but also the judgment has to be couched in legal terms: *conseillers* must be able to 'write in law'. This strictly judicial activity takes up a lot of time and is often done during *conseillers'* leisure time. The role played by experienced *conseillers* and the training provided by the trade unions is very important in this activity.

On drafting the judgments, I don't do much outside my working time. When I started, I did a lot of work outside of working hours to see if it was possible to balance my job, my duties as a *conseiller*, and my union offices (F12-Nant-Ee).

At the same time, writing the judgment is also seen as an extremely rewarding task, inasmuch as it lies at the heart of the judicial process, requires deploying legal language, and constitutes engagement in a technically demanding type of legal activity. 'It's not so much the writing but rather the reasoning that has to be go into the writing' (F21-Vers-Ee).

As a jurist, it's a pure syllogism, the law, the facts and the application of the law to the facts. That's the theory. In writing judgments, normally, it has to be that way. But it is during the deliberation that you produce an assessment of the facts. (F12-Nant-Ee).

This is not only a legal matter but also has a pedagogical aspect. As lay judges, the members of the *conseils de prud'hommes* feel themselves to have been entrusted with a mission to make the law understandable to the parties, including those without any legal knowledge.

Afterwards, drafting the judgment, it's an individual thing, some people put in 56 articles from the Labour Code ... I've always said, if the litigant reads their judgment, they must be able to understand it. So it's not worth putting in 56 articles. It has to be justified, but it's also got to be readable and understandable (F23-Stras-Ee).

The final extract draws on an interview with a French employee lay judge, in which she explains how she sets about writing judgments. This activity is important for her as it confirms the value of the legal studies she has undertaken and the fact that her activity at the labour court feeds very directly into her professional life.

Then there is a template. I've made use of a lot of the drafts made by tie-break judges and I've read a lot of judgments and, to be quite honest, I've pinched a few things. I'm lucky in that I don't have too many difficulties in writing. My education was in literature, so this is not too complicated for me. I write a lot of reports at work because I work for a judge in a children's court. So the writing is not too complex. This is the most interesting phase (F11-Nant-Ee).

Deliberations: summary

Deliberations in Great Britain and Germany often began with the professional judge inviting the initial impressions of the lay judges before embarking in what was described by many interviewees as a structured decision-making process, beginning with 'finding of fact'. This emphasis on 'the facts' and lay judges' role in clarifying and assessing them is a central moment in lay judge participation in the

proceedings, but can elide the issue of inference from the facts. It is also the fact in France after a tie-break hearing the professional judge will ask the *conseillers* why they disagreed. The judge will listen to these different arguments and then deliver their decision.

In Great Britain and Germany, deliberations provided an arena for active lay judge involvement, often centring on the credibility of witnesses and the plausibility of facts in the light of the experience. Differences were accepted and most were resolved through discussion, again based on 'objective facts'. In Great Britain and Germany, several lay members noted that they had, on occasions, affected the outcome of a case, either wholly or more typically on specific aspects and some were able to recount the episode.

In *France*, deliberations were described as closer to a 'negotiation', in which lay judges might continue to represent their 'side'. However, this was subject to the constraint that defending the institution of the labour court meant, ultimately, crafting a decision that was in conformity with the law and, on occasions, met other criteria of fairness. In Britain and Germany, there was an element of negotiation over compensation issues, but this was not especially marked and not universal.

This dichotomy between the exigencies of the law and more general notions of fairness was commented on by both professional and lay judges in Great Britain, and was one aspect of the division of labour between the two that was accepted by lay judges in Britain and Germany but not in France, where there was such no division in the first merits hearing. The other aspect of the division of labour turned on the specific skills and knowledge that lay judges could offer when compared with the professionals (see Theme B).

Judgment writing was the prerogative of the professional judge in Germany and Great Britain. In France, this activity is a core task for lay judges and requires a highly developed set of competencies.

11.4 Lay judge activity: conclusions

In France, Germany and Great Britain, lay judges' participation in labour court proceedings begins at or shortly before the hearing. Professional judges have access to case papers either substantially before the hearing (as in Germany) or shortly before (as in Great Britain), but can use their judicial knowledge and status to shape the direction of the case by summarising their understanding of the claims and the background to these in a de facto 'monopoly of interpretation'. There is no comparable situation in France, where the functional role of the professional judge is occupied by the lay president, who will conduct the hearing. But the tie-break hearing is quite similar to the situation observed in Germany and Great Britain: the main protagonist is the professional judge who manages the hearing and deliberations. This dominance exercised by the professional judge, however, rests on the failure of the deliberations involving the four *conseillers* to produce a conclusion. During usual hearings, the president might look at the files before the hearing begins, but primarily to establish whether the day's schedule will run as planned. Court observation in France suggests that there is considerable scope for informal exchange during the hearing to clarify claims and engage with the parties.

Our interview findings indicate that the conclusion that lay judges are passive during public proceedings, based on court observations, should be qualified in Germany and Great Britain. Findings in Germany (add reference), also contended that the drama of the hearing was dominated by repeat players – the professional judges and the lawyers. Our interviews suggested that lay

judges were more active at this stage of the labour court procedure than was apparent, in ways that were often either subtle or not visible. Notably, in Great Britain, note-taking and observation by lay judges was a significant support for the professional judges in their conduct of the proceedings and could serve as an element in judicial disciplinary proceedings (see Chapter 7), endowing lay judges with particular responsibilities and some (latent) power. In both Germany and Great Britain, lay judges could ask for short adjournments to resolve issues that cropped up during the hearing. And in Germany, lay judges could help in facilitating a settlement by sounding out the parties.

Experience in labour courts in France suggests that generalised conclusions about the role of lay persons in the legal field only have validity in particular contexts, given that both conciliation hearings and the first merits hearing are organised and decided solely by lay judges. The 'repeat player' effect should also be qualified to the extent that French *conseils de prud'hommes* also saw some struggles over power and status between the lay judges and legal representatives.

Our interviews indicate that, by and large, lay judges in Germany and Great Britain played an active and valued role in deliberations, and at times could make decisive interventions that led to re-appraisals of the course of a case. Many professional judges interviewed appreciated their contribution and some expressly referred to its role in adding to their sense of confidence about decisions. At times, professional judges drew on lay judges' understanding of their respective constituencies when looking financial compensation.

The scope for lay judges to outvote the professional judge in Great Britain and Germany could be seen to have fostered a willingness on the part of professional judges to engage fully in discussions with the lay judges, given the various pressures on the professionals to secure unanimity and avoid appeals. But this drive for consensus also characterised French labour courts, where there are no professionals and where the composition of the court is evenly divided between employers and employees. Despite a more adversarial stance in the hearing, sometimes demonstrated through questioning, the French process appears to track through negotiation to agreement in deliberations, culminating in the writing of the judgment by the presiding lay judge. Failure to agree, culminating in the need to bring a professional judge, was seen as a kind of failure, not only by the individuals on that occasion but also in terms of the standing of the *conseils de prud'hommes* as an institution.

In Germany, many employee lay judges are anchored in activity as works councillors, which provides an institutional link with trade unions through works council training and the close practical association between works councils and trade unions.

In Great Britain, there is barely any reported institutional link between employee lay judges and trade unions, although a number of interviewees are active workplace representatives. The switch from organisational nomination to self-nomination certainly accounts for much of this weakening, as does the fact that many organisational nominees will have retired (or are about to). Training is provided by the judicial authorities.

12. RELATIONSHIPS BETWEEN LAY JUDGES AND BETWEEN LAY AND PROFESSIONAL JUDGES

The chapter first considers the relationship between employee and employer lay judges, and related to that, how employee lay judges view employer lay judges and vice versa. We then consider the relationship between lay and professional judges and perceptions of status.

12.1 Relations between employer and employee lay judges

Is the relationship conflictual?

Despite the supposition that modern economies are ‘post-Marxist’ and that large-scale class struggle in Europe now seems to be a phenomenon of a former epoch differences of interest between ‘capital’ and ‘labour’ continue to characterise how the actors from each of these sides engage with each other in the micro-processes of employment relations – collective bargaining, industrial disputes, workplace industrial relations, and individual disputes over employment rights. Are these divergent interests reproduced in the relationships between employee and employer lay members in the labour court?

The short answer is that our interviews revealed that in both *Germany* and *Great Britain* the relationships between employee and employer lay judges were largely both consensual and largely cordial, something that surprised lay judges themselves, who often embarked on their judicial activity with quite different expectations (see Chapter 9).

In *France*, the extent to which relations between employee and employer lay judges were conflictual depended on a number of factors, explored below: however, all the *conseillers* interviewed in France said that these relationships varied across their term of office, generally becoming less conflictual as time went on.

Considering Germany first, one German employee lay judge said: ‘People might say they have different interests, but you would not be able to tell really’ (G-EE-B-5). This was echoed by a German employer lay judge.

Funnily enough, I must say, we are always extremely close. I used to think that, as an employer, you just had to represent the employer side, no matter what. But the questions that come up can basically be sorted out using common sense. To be frank, there are hardly any differences of opinion with most employee lay judges (G-ER-B 7).

On occasions, a role reversal could be observed, with employer lay judges having more understanding of the employee appearing at the labour court than the employee lay judge and vice versa. As a German employee lay judge said:

That is a bit of mystery; ... it’s quite something. I don’t know if I’m the only one who’s noticed it, but it is remarkable and sometimes I have the same feeling and think ‘OK, the employer side is right here’; that is, the two sides change places, that’s the impression I get (G-EE-MA-67)

German interviews also suggested that not only do the sides change places (i.e. the employer lay judge support the employee claimant’s arguments and the employee lay judge support the employer respondent’s arguments), but that they can change several times during deliberations.

I have often been there when decisions are made, or least in discussions, where either myself or the others have changed their minds. That is, one moment we’re going in one direction, and then head off in another (G-EE-MA-66).

Employer lay judges confirmed that there was frequently agreement in evaluating a question under dispute. 'I see more things in common than divide us. We don't have industrial disputes in here' (G-ER-DO-41). This same employer lay judge, however, qualified this. He said that although he did not represent the interests of the employer *respondent*, he said 'of course, I represent the interests of employers'. Yet at the same time he recognised that employer and employee lay judges had many shared interests.

Firstly, our concern is that we should keep jobs here, but we also have to make sure that people work and are paid appropriately. In that respect, I see more things in common than that divide us. We don't have industrial disputes in here (G-ER- DO-41).

The British employee lay judges interviewed had very similar views to their German counterparts, i.e. it was not conflictual and it was not what they expected. As an interviewee said

[I thought] 'Oh well, it's going to be adversarial'. But it isn't actually, it's very collegiate there, so that can be something which has been quite refreshing for me because I expected having someone there who is totally unreasonable, totally irrational and then arguments you know, and that was really nice to see because you could have a dialogue and talk about it (GB EE 20).

In similar vein, GB- EE-4 said: 'I've had good relationships with employer lay members in terms of an understanding and empathy'. Another (GB-EE-29) commented that 'the general view is that there is not very much difference' between employee and employer lay judges. A further interviewee said:

If you could be a fly on the wall in the conversation, you might be hard pressed to tell who had said they were on the employer side and who had said they were on the employee side (GB-EE-38).

One employee lay judge (GB-EE-19) said that he struggled with a couple of employer lay judges, but that was very much the exception.

British employer lay judges echoed the sentiments of the majority of British employee lay judge interviewees on the whole. Indeed, one (GB- ER- 8) recounted how she had sat on a case 'with the guy that I negotiated with across the table and we had the most horrendous set-to, but [in the employment tribunal] it was totally different'. Similarly, one (GB-EE-2) said 'the other lay member and myself could be opponents in the drama of workplace conflict, but here we're not', while a further employee lay judge (GB-EE-13) commented that he found himself '99 times out of 100 far more likely to be in tune with the views of the employee lay member than often I am with the [professional] judge'.

In *France*, the position was more nuanced. On the one hand, both the employee and employer *conseillers* interviewed said that their relationship was not characterised by conflict. On the other hand, some of the anecdotes that interviewees recounted suggested that there was an element of conflict in their dealings. Interestingly our interviewees said that conflict took place in *other* chambers,¹²⁰ and involved *other conseillers*, rather than themselves.

I haven't seen too much of that. Except once, in the industry chamber. I found an employee *conseiller* up against an employer *conseiller*, both on their feet. It's the only time I've seen that. That does not mean we don't have arguments, and they can be very heated too (F07-Nant-Ee)

Also, the degree of conflict depended at least partly upon how long a lay judge, (particularly an employee lay judge) had held office. In the initial months after becoming a lay judge or even up to their first year, employee lay judges often retained a class-based perspective and tended to oppose

¹²⁰ As explained in Chapter 4, French labour courts are divided into sectoral/occupational chambers.

their counterparts on the other 'side' as a matter of course, especially during deliberations. Once established in their role, and even more so for those who had served for more than one term of office, *conseillers* maintained that a degree of consensus prevailed between them.

The newly elected, they are much more oppositionist. Afterwards, they learn to listen to the *conseillers* (F07-Nant-Ee).

People have a need to assert themselves at the beginning of their term of office, to play up the side they're on, to get on their high horse... But invariably, this abates quite quickly. We become more moderated. (F16-Stras-Ee)

I had this vision, especially in the first year. I had colleagues who had it, and also employers who had it. What's noticeable about the first year is that you have very high rate of non-agreement, of ties, especially as there will have been many new *conseillers*, so everyone has just come in. (F11-Nant-Ee).

A French professional judge commented on the conflictual relationship between employee and employer *conseillers*. He said: '*Conseillers* sometimes lack objectivity. That's what I feel. That is, you get this kind of ideological stance: "We are here to defend the wage-earners" and the opposite "we are here to defend the employers"' (F19Stras-PJ).

The employer *conseillers* interviewed did not report having any conflicts, either at the start of or during their term of office.

Employer lay judges in France drew distinctions not only on the basis of *conseillers'* length of office, but also on the basis of their specific union affiliation, in particular viewing members of the CGT differently from other employee *conseillers*. Indeed, one third of *conseillers* in France are from the CGT (see Chapter 5). According to our employer-side interviewees, CGT members, and especially those sitting in the industry chamber, were in thrall to 'clichés' and were exclusively concerned with confrontation, sometimes at the cost of justice. Employee *conseillers* from other trade unions were seen by their employer counterparts as more consensus-oriented and less conflictual.

We are not in this class struggle, we are not in this confrontation. There is, nevertheless, employer and employee, but if the law, the rule, is clear, then it's applied. Except in some cases, like the one who is a former trade unionist of the CGT at the French National Railway Company, just like the cliché. He'll defend the employee come what may. So, when that happens, I tend to defend the employer (F09-Nant-Er)

Arguably one explanation for the fact that relationships were not conflictual between lay judges in Great Britain was that there were opportunities for social relationships to be developed that mitigated possible discord in deliberations. This is for a number of reasons. First, the compulsory annual training day held at the labour court venue¹²¹ provides an occasion for employee and employer lay judges to intermingle. Second, in virtually every labour court venue lay members have their own room where they can intermingle before a hearing or during an adjournment and, for instance, eat sandwiches at lunchtime. As one employee lay judge (GB- EE-34) said: they often would talk and 'swap anecdotes, so there is a discourse'. Another echoed this, noting that mostly he spent the lunchtime with the employee lay judge with whom he was sitting on the case and there was an 'informal tabling of some thoughts and ideas' (GB-EE-13). Indeed, some lay judges lamented the fact that, as a result of the decline in hearings, there were far fewer in the lay members' room than hitherto and so the scope for socialisation had decreased. Third, as noted in Chapter 7, lay judges tend to sit on long cases, often 5-10 days with some interviewees reporting cases which lasted 20

¹²¹ Two days in Scotland.

days or more. This provides the opportunity for the employee lay judge and the employer lay judge to build a personal relationship. For instance, one employee lay judge said that he had ‘had lunch with some employer members’ (GB-EE-8), while another said that after a case had finished he and the employer lay judge ‘went for coffee... to discuss it all’ (GB-EE-9). Fourth, the Employment Tribunal Members’ Association brings employee and employer lay judges together in its annual general meeting, which lay judges representing their labour court venue attend. Furthermore, in one large labour court venue there have been ad hoc evening meetings and an annual social event with retired members. Another reported: ‘we’ve started to have, sort of, social occasions now where we get together’ (GB-EE-28).

However, scope for socialisation would not explain the predominantly consensual nature of the relationships in *Germany*, given that there was little or no opportunity for intermingling between employer and employee lay judges. Joint training was only rarely provided, lay judges normally sit 4-6 times a year, and sitting normally last 4-6 hours. Nevertheless, personal relationships were sometimes built up over a long period of joint sitting. ‘Yes, it changes, just as you get acquainted with anyone else. The first time you’re sort of feeling your way, and then you begin to refer to each other by surname. You also know that one judge thinks one way, and another differently (...) You do grow closer, you’ll know people’s names and say “Aha, it’s you again, I’d heard...”. And there’s small talk about holidays and such like. You get a bit closer’ (G EE MA 59).

In *France*, as in *Germany*, there was little social intermingling between employer and employee lay judges. In this instance, however, as shown above, there was more conflict between French employee and employer lay judges than their German counterparts. In *France*, employee and employer *conseillers* meet only at the hearing and deliberations, and sometimes at a tie-break hearing. They do not have overlapping social lives outside the context of the labour court. There are exceptions, however. The main exception relates to the president and the vice-president of the tribunal, of whom one has to be an employee and the other has to be an employer: they meet frequently together as they have to manage the tribunal. In addition, there are other very occasional exceptions. At the Nantes labour court, for example, all *conseillers* attended a joint training session, supervised by a professional judge.

As we note further below in the Conclusions (Chapter 14), the underlying factor determining the nature of relationships at the labour court, and the perceptions of these, is the nature of the *industrial relations system*, including inter-union competition, combined with the specific configuration of the labour court. Scope for social contact might smooth the path towards consensus, but as the case of *Germany* suggests, is not a prerequisite for it.

How do employee lay judges view employer lay judges and vice versa?

Related to whether employee and employer lay judges have a conflictual relationship is how they see each other. Do employee lay judges in the three countries view each other as having different interests, or to put it more crudely, as being on opposite sides of the fence or not? Our interviews suggested that this was more likely in Great Britain than in *Germany*, while in *France* how employee lay judges viewed employer lay judges often depended on their union affiliation.

Dealing first with *Germany* and Great Britain, this difference could not on the face of it be ascribed to the difference in the make-up of the employer panels in the two countries. In both countries as a rule, the employer lay judge panel includes not only employers – that is entrepreneurs in the strict sense who directly represent those with divergent interests to organised labour – but senior

managers or officials who exercise employer-like responsibilities in companies and in areas of public administration, such as HR directors or managers.¹²² Furthermore, in both countries employees of public bodies of various kinds and established civil servants (*Beamte* in Germany) sit as *employer* lay judges. As a German interviewee noted:

The employer representatives are not always the heads of firms but rather, let's say, from the personnel department at the Dortmund city council. In the final analysis, they're employees. Or perhaps something in between. [...] I've also had members who owned companies. And it's clear that they also act differently to some extent' (G-EE-DO 51).

Moreover, in Great Britain, as has been noted in Chapter 7, HR directors or other senior employees whether in the public or private sector sometimes under the self-nomination system often chose, or were pointed in the direction of the employee panel. In France, *conseillers* are drawn from the private sector only, in contrast to Germany and Great Britain.

Yet although the composition of the employer side panel was very similar in Germany and Great Britain, German employee lay judges, when asked whether there was a difference in perspective between those in the two panels, replied in the negative (unlike their British counterparts). As some German employee lay judges said:

[Differing perspectives?] Not at all. It's great. They are mostly HR managers. And they've never been so much in agreement with the works council as they are when they're at the labour court. (G-EE-MA-60).

We've never had any sort of differences. We always basically have the same opinion. I think this is because they come from the personnel departments and in some firms they've never had disputes or arguments. They had the same opinion' (G-EE-MA-59).

German employer lay judges essentially agreed with these employee lay judges: 'Not really, because I cooperate quite closely with our works council and other bodies in my everyday life at the workplace' (G-ER-B 4). This shared perspective, deriving from workplace practice, would appear to have a more marked effect than any – theoretically ascribed – opposition between their respective interests and assessments.

In contrast, British employee lay judges, said that they held a different perspective from British employer lay judges. As one said: 'we are work colleagues together...but our perspectives are different' (GB-EE-13). Other comments included: 'they're very nice people but they just have that employer mind-set' (GB-EE-15); some are 'very right wing' (GB-EE-40); 'there's a difference of angle' (GB-EE-1); it's a different attitude and approach (GB-EE-22); 'they've got a different role altogether' (GB-EE-17). These differences in perspective, however, should not be exaggerated. They were not 'huge' or 'significant'; 'don't differ that greatly'; 'although we're nominally employee and employer, it doesn't really feel like that a lot of the time'; 'not many trying to sort of play their part in a deregulated, neo-liberal framework' (GB-EE- 24/23/27/25).

This view that 'there was a different perspective... [but not] too much that separates the employee and employer lay judges' was echoed by the British employer lay judges interviewed (e.g. GB-EE-1/4/9). Interestingly, employer lay judges valued the different perspective that employee lay judges

¹²² In order to meet the German statutory qualifying conditions for becoming an employer lay judge, post holders must exercise typical employer responsibilities, such as entitlement to hire or dismiss employees and act with the full mandate of their employing organisation.

bring: 'The other member is able to bring an aspect or an angle which I would not have thought of (GB-EE-7); 'I think they bring different things to the table and it makes me think' (GB-EE-11); 'I think I would look at it much more from a business perspective' (GB-EE-10).

Further probing revealed that both German and British employee lay judges differentiated *between* employer lay judges. German employee lay judges differentiated between employer lay judges who were senior civil servants (*Beamte*) in local, regional and federal governments and other employer lay judges.

If there is someone there from an official department, it can be rather rigid – I'd say their views are a bit rooted in a civil service way of thinking. And if someone from a normal industrial workplace is there, sometime a personnel director, if you talk with them then somehow you find you've got common ground. The differences aren't that big. Just a bit of a civil service mentality, sometimes there are frictions (G-EE-HAL-13).

This distinction between employer lay judges who were civil servants and those who were not was echoed by a British employee lay judge (GB-EE-41), but in contrast to her German counterpart she found employer lay judges from the public sector more flexible than their private sector counterparts. She said employer lay judges who came from the public sector 'have an employee perspective as well in there'. Additionally, several British employee lay judges also differentiated according to whether employer lay judges were human resource professionals or self-employed/owner-managers of small businesses. They commented that the former were less forgiving than the latter on whether management had followed the correct procedures (GB-EE-3/4/18/29/34).

One explanation for the fact that employer and employee lay judges in Germany did not see each other in opposite 'camps' might lie in the fact that in the main in Germany distributional conflicts over fundamentals, such as pay and working time, are generally fought out between trade unions and employer associations *outside* the individual workplace (or firm) and embodied in industry-level collective agreements. This does not mean that there are no differences of interest at the workplace, although these tend not to concern basic contractual terms. If no agreement can be reached, the parties can put the matter before a tripartite 'conciliation committee' (*Einigungsstelle*), which can issue a decision. In Great Britain, most collective agreements are enterprise based, not at industry level (van Wanrooy et al., 2013). On the other hand, often both employer and employee lay judges, particularly under the self-nomination system in Great Britain may have come from unorganised workplaces, where there is no collective bargaining at all.

German lay judges, although generally sharing a common perspective, sometimes differed in terms of their assessment of specific issues, particularly levels of severance payment.

I sometimes take a quite different view on payments, on severance, to an employee representative, especially as far as the amount is concerned. If I've got an employee whose been decently paid by his employer over many years and has to leave for one reason or another, as an employer I often don't understand why they should get a massive redundancy payment. Employee representatives often see this quite differently' (G ER DO 45).

Although this issue was noted to a much greater extent by German employer lay judges than employee lay judges, nevertheless it was not ignored entirely by German employee lay judges and, for instance, one commented:

...the employer side is always thinking about the financial side, and not the situation as such. Everything's seen from the standpoint of profitability. What is not profitable? How can I get out of these costs? (G-EE-MA 58).

In France, in general, employee *conseillers* regarded their employer counterparts as solely defending employer interests, even viewing them as being ideologically motivated.

Relations between lay judges: summary

Relations at the labour court between employer and employee lay judges were by and large not conflictual in Germany and Great Britain. In France, there was more variation principally based on how long *conseillers* had been in office and their organisational affiliation, with employers from MEDEF viewing employee *conseillers* from the CGT as being more partisan. Even so, such conflict was tempered by the fact that both employee and employer *conseillers* sought to reach agreement.

There was more intermingling socially between employer and employee lay judges in Great Britain than in Germany and France, possibly mitigating how differences were managed in deliberations.

12.2 Relations between lay judges and professional judges

The relationship between lay and professional judges is characterised by a tension, at least theoretically, between superiority and equality. Overall, in both Germany and Great Britain the professional judge sitting with two lay judges chairs the hearing, in essence chairs the deliberations, and writes the judgment, yet the two lay judges and the professional judge have an equal vote. In France, the judgment at the first merits hearing is written by a lay judge yet when lay judges do not agree, the decision is made by the professional judge alone. This raises the question as to how lay judges can be both equal and subordinate.

The topics explored in this section also refer to aspects of lay judge activity introduced in the previous chapter: the focus here is on the relationships between professional and lay judges.

Do professional judges have an informational advantage?

In order to unpick this issue, we first consider whether professional judges in all three countries have an informational advantage. There are two aspects to this: knowledge in general of employment law; and knowledge of the case. In Germany and Great Britain, professional judges have legal knowledge of employment law, both through legal training and in Great Britain through practitioner experience as employment lawyers. Furthermore, many sit virtually full-time and will have already dealt with the types of problems presented in the case over many years. They are aware not only of the law, but also of the leading cases. The position is somewhat different in France as professional judges are generalists and will not necessarily have had specific training in employment law. This is therefore learned 'on the job'. This experience is intermittent, however, as professional judges do not sit at the labour court on a daily basis and most of their time is spent in other civil jurisdictions (*Tribunal de Grande Instance* or *Tribunal d'Instance*).

Another issue is whether professional judges have an informational advantage on a particular case. The short answer is yes in Germany, not in Great Britain, and to some extent in France.

In *Germany*, the professional judges will have been working on the papers for some weeks and will have conducted the conciliation hearing with the parties (and/or the representatives) without the presence of the lay judges in an effort to reach an 'amicable settlement', during which the presiding judge will discuss the dispute as a whole with the parties, looking at all the circumstances. If conciliation is not successful, that same presiding judge will normally chair the merits hearing. For their part, lay judges usually only have access to the case papers for the scheduled hearing on the day of the hearing itself and however much effort the lay judges might invest in reading the files, it is

virtually impossible for them to catch up with the professional judge's familiarity with the case.

Although our interviewees did not offer any general observations on this issue, the overwhelming impression was that the gap between professional and lay judges in terms of prior knowledge of the case was not seen as a problem. If German lay judges wanted more information or advice, the perception was that this was never looked down or seen as a nuisance. 'If we have more questions before the hearing than usual, there's never any pressure, like "We need to start the hearing now". We have a detailed discussion about the matter' (G EE HAL 12).

Also, the impression was that German professional judges did not consciously exploit their informational advantage. As an employee judge said:

When you talk through the case, of course there is the advantage of the conciliation hearing. The professional judge has already met the parties, and knows what is driving them. It's obvious that this extra knowledge gives him an advantage. But I've never found that the professional judge imposes a view of what the judgment should be onto the others – says, for example, 'I'll push this through and then I can get my sitting over with and enjoy the rest of my day'. I've never come across that. There has always been a proper conversation where you could ask questions and discuss (G EE DO 30).

In *Great Britain*, as noted above, British professional judges do not normally have an informational advantage on the whole in relation to the case. This is because conciliation is carried out by a separate body, the Advisory Conciliation and Arbitration Service (Acas), and there is no formal or informal communication between the conciliation officer and the professional judge. Furthermore, if, exceptionally, there is judicial mediation or a judicial assessment any subsequent merits hearing is chaired by a *different* professional judge. Moreover, when a claim is submitted to a British labour court (the Employment Tribunal) a professional judge carries out case management, contacting the parties, often by phone but sometimes in person, for instance to clarify the issues, to determine the days to be allocated for a hearing and perhaps to arrange a preliminary hearing to determine *inter alia* whether a claim has been brought in time. In such cases, mostly a *different* professional judge conducts the main hearing and will not have seen the file until perhaps an hour before the lay judges or perhaps somewhat cursorily in the evening before.

Occasionally, a professional judge who has conducted a previous case management, will reserve the full hearing to him/herself (GB-PJ-1/4), particularly a case where there are multiple claimants as on an equal pay case or a working hours case. Mostly, however, the British professional judge's informational advantage is slight; the main documents of evidence ('the bundle') are not delivered to the professional and lay judges until just before the hearing. If the bundle is large, normally after brief introductions at the commencement of the hearing, the tribunal retire and the lay judges and the professional judge read the documents together, see Chapter 7.

In *France* the position is less clear cut. On the one hand, the *conseillers* who attend the tie break hearing will have heard the case originally. On the other, the French professional judges will have read the case file beforehand and worked up a list of questions, which they often keep to themselves during the hearing.

The case files, I get them before, together with the documents and I study them. So I kind of already do the first part of my judgment (F20 Stras-PJ).

Tie-break judges behave just like any chair of a hearing. But unlike us, they know why they are there. Sometimes there's one point at issue and they can go to that straightaway. But when we arrive for a hearing, we have nothing (F07Nant-Ee).

Are professional judges seen by lay judges as dominating or egalitarian?

Our interviewees were asked to describe their relationship with the professional judge. In the main they described it as a relationship between equals, not one in which the professional judge dominated the lay judges.

Turning first to *German* lay judge interviewees, one said: 'Of course, [the professional judge] knows more about the law... but that's never used to imply that what I pronounce is better or worth more than what you say' (G EE MA 58), while another said: 'I feel a complete equal and I've never had the sense that it could be anything else. No, completely equal' (G EE B 43).

A further employee lay judge said:

There are not that many differences between us, I think. We all want to resolve a conflict. All three of us work together collectively, both the professional judge... the judge from the employer side, and me... If I could say this, we fit with each other (G EE B 5).

An employer lay judge similarly said:

It depends on the judge, of course. But most judges don't push the fact that they are full-time professionals or behave like schoolmasters – it's much more of a partnership. There are naturally exceptions, as always, but most judges treat it like a partnership (G ER DO 45).

Yet another said:

It's not in every case, but in 10 or 20 per cent the professional judge sometimes doesn't know what to do next. If we're all sitting in the room as a trio, we can look for a solution because we all want to conclude the case that day. And sometimes the professional judge doesn't know how' (G ER MA 70).

A minority of *British* employee lay judges whom we interviewed said they were not treated as equals 'Good god, no. That's not even close.... It's not even in the same ballpark' (GB-EE- 19); 'there's a status issue here.... I'm the judge and you two are not' (GB-EE-9); 'they treat us with sufferance mainly' (GB-EE-11).

The majority, however, like their German counterparts were of the view that their relationship with British professional judges was a relationship of equality. 'They treat you as comparable to themselves' (GB-EE-6); 'we work as a collegiate team' (GB-EE-23); 'it's an equal partnership' (GB-EE-7); 'they're very inclusive' (GB-EE-28); 'equal but different' (GB-EE-29); 'we all talk to each other as equals' (GB-EE-39) and one employee lay judge recounted how she and a professional judge together went to a talk at a local university after she had mentioned that she was attending (GB-EE-21). Interestingly, the word 'collegiate' and/or 'team' was used by a significant minority - 18 British lay judge interviewees - to describe their relationship with professional judges.

On probing further, most British employee lay judges interviewed qualified their overall assessments. First a few interviewees distinguished between finding the facts and applying the law. As one British employee lay judge (25): 'when you're like on the law, no, they don't treat you as equals. When you're on the finding of facts, then yes they do'.

Second, many British lay judge interviewees distinguished between the older judges and the newer ones who were seen as more egalitarian: 'More recently the [professional] judges are more willing to engage a bit with members' (GB-EE-18); 'Better now than was the case 20 years ago... We were just there as sort of acolytes... long gone' (GB-EE-5); 'It's much easier to work with the new judges' (GB-EE-34); 'there was a fair bit of macho stuff in the older ones' (GB-EE-15); 'it's improved' (GB-EE-16); 'it

was more authoritarian and now it's much more democratic' (GB-EE-22); 'old school can be a bit condescending' (GB-EE-32).

Third, some British employee lay judges noted that the professional judge's relationship with the lay judges varied according to the character of the former: 'it's a personality thing' (GB-EE-24) 'some [professional judges] see [lay judges] as a necessary evil.... and others are much more inclusive (GB-EE-18); 'there's some I find very good and very inclusive. There are others who aren't' (GB-EE-9); 'some [professional] judges love having lay members there.... And other [professional] judges think we're a complete waste of time' (GB-EE-33); 'some like us more than others' (GB-EE 35); their behaviour is as varied as there are [professional] judges' (GB-EE-13) 'we are treated as an inconvenience by some [professional] judges... [a] significant minority' (GB-EE-11). There were some further qualifications: one British employee lay judge who had sat in two regions, said it varied by region referring to the tone set by the most senior professional judge in the region (GB-EE-4) and another said that the female professional judges were more inclusive than the male professional judges (GB-EE-15).

The employer lay judge interviewees expressed some of the same nuances as the employee lay judges interviewees – a differentiation between the 'old school' [professional] judges and the more recent appointments (GB-ER-13/10) and, particularly variation according to the character of the professional judge: 'they're all individuals so it varies' (GB-ER-9); 'some are very inclusive and some are less so' (GB-ER-7).

In *France*, *conseillers* whom we interviewed had a range of views about the professional judges. Even in the course of the same interview, a *conseiller* might express the view both that professional judges exerted domination over them but also that they were equal.

Some *conseillers* perceived the professional judge as a fellow judge: in other words, both lay and professional of equal status. This applied particularly to those *conseillers* who saw their role as an impartial judge, rather than a defender of employees.

I consider them [professional judges] equals. Professional judges generally treat us very well... We have studied differently but we are all people and equal. You know, for the [professional] judges, being on the labour court is a stage in their lives. They're not going to stay with that. They're going to do criminal law, and they do a lot of other things. They're not specialists like us. On some things, we know more than they do (F03-Nant-Ee).

Many *conseillers*, however, reported that professional judges dominated during tie-break hearings and the ensuing deliberations.

Often what happens is that when they arrive, they've already made the decision. They've studied the file and settle themselves down in the hearing and already have an idea of where they want to go. I don't have the impression that we have much influence in the discussion afterwards (F13Nant-Ee).

Also some *conseillers* (especially those less confident of their legal knowledge) suggested that some professional judges looked down on their legal knowledge and did not acknowledge their legitimacy as judges, creating a complex interaction. For example, one *conseiller* said:

One day, the lawyer used an aspect of the labour code in his plea and I opened the code to verify it. The [professional] judge said: 'Sir, it is not useful to open the code; my interpretation is the correct one'. I didn't answer. But I must say that I found it haughty and offensive (F10 Nant-Ee).

Interestingly, the *conseillers* we interviewed often labelled professional judges as either pro-employee or pro-employer. As one interviewee said: 'One of the [professional] judges, she is more

like the employer, that's what they say. There is certainly some truth in that' F23-Stras-Ee).¹²³ We did not find that in Germany or Great Britain.

The pressure for unanimity

In all three countries, the vast majority of 1st instance labour court decisions are unanimous. In Germany and Great Britain, this unanimity is between the lay judges and the professional judge; in France it is between the lay judges themselves, avoiding the need for a professional judge to break the tie and decide the issue.

In France, *conseillers* generally tried to avoid a case going to the professional judge and failure to achieve unanimity was seen as a mark of failure. Such incidents were, once again, seen as taking place in other chambers involving other *conseillers* and all those we interviewed minimised the extent to which *they* resorted to a tie break hearing and portrayed it as exceptional. Moreover, some *conseillers* were very clear about their dislike of tie-break hearings.

When it is two against two, that's when we have to go to a tie-break judge, and the rate of this varies depending on the section. It's very low in our section, about 2 per cent; that's very low, but it's higher in some other sections (F12 Nant-Ee).

Not reaching agreement in the hearing, a tie, that's not my cup of tea. I'd rather spend two hours in deliberations finding a solution that satisfies everyone than go to a tie-break hearing (F23 Stras-Ee).

Turning to Germany and Great Britain, interviewees gave a number of reasons for the very high proportion of unanimous decisions. First, many lay judges said that having heard the evidence, most of the time the professional and lay judges would have the same view. Typical comments from British interviewees included: 'we've automatically already come to the same conclusion'; 'it's bloody obvious'; 'unless you have differential ears or something you're going to come up with something vaguely similar'; 'we would come to a similar decision'; three people with common sense viewing evidence...it wouldn't be surprising that they reached the same conclusion' (GB-EE-27/24/1/6/10). Similar comments came from German interviewees. For instance, one said: 'I think all the decisions I've been involved with have been unanimous. And these were never reached under any kind of time pressure' (G EE MA 66).

Second, although many lay judges commonly said they worked as a team (see above), they also recognised that they were making a legal decision: that is, one subject to the provisions of the law and precedent in a situation in which the professional judge was the provider of legal knowledge and expertise and was thus *primus inter pares*. Accordingly, employee lay judges in both Germany and Great Britain often agreed with the professional judge's view because they accepted the legal norms, as expounded by the professional judge. One German employee lay judge commented:

This is due to good preparation on the part of the professional judges, and how they set out the legal position, as I have to say, there are laws, and decisions and judgments that I can't know as a lay judge but which are relevant. It was the same again today, when a lot of decisions of higher courts, *Land* labour courts, were referred to that dealt with similar circumstances and finally reached a decision and these, of course, flow into the judgments' (G EE DO 45).

One comment emphasised the self-confidence of employee representatives: 'Lay judges who are also works councillors are more likely to step into the discussion when the professional judge's view

¹²³ In large tribunals like Nantes and Strasbourg, two professional judges come to the labour court for the tie-break once a week, so the *conseillers* get to know them well.

doesn't fit with their own. With them, you notice that they're not just prepared to accept it, possibly because they're used to discussing things at work' (G PJ DO 48). 'If you've got the chair of a works council sitting there, they're just as good at contradicting you as a personnel manager' (G PJ DO 29). 'A personnel manager has perhaps had different experiences to a works council chair' (G PJ B 8).

Occasionally lay judges both in Great Britain and Germany considered that the decision unanimously made in accordance with legal norms, was not fair in relation to workplace norms. Thus one British lay judge recounted how he had sometimes 'gone home with a heavy heart, because we had to find that way' (GB-EE-3) and another said 'it's not how you feel' (GB-EE-26). Similarly, a German employee lay judge said:

All my decisions so far have been unanimous. ... At the end you might have, at most, an emotional problem... in that you say that you're nevertheless sorry about it, .. but that's the law and you can't do any different. But in terms of the legal position, technically, there has never been any disagreement. (G EE MA 64).

Third some British employee lay judges whom we interviewed said that others, but not themselves, did not wish to disagree with the professional judge. 'Some lay members don't want to upset people' (GB-EE-40); I think it's quite hard for people to argue with the professional judge. I don't mind'. (GB-EE-10). One employee lay judge (GB-EE-16) said that an employer lay judge with whom she once sat told her that 'he couldn't be bothered' with a minority decision.

Fourth, some British interviewees intimated that the professional judges spent time persuading a lay judge to agree to their view, perhaps influenced by a higher court saying that minority decisions at the first instance should be avoided. Typical comments included 'a split decision is not encouraged' (GB-EE-6); the professional judges 'work very hard to get a unanimous decision'; 'I don't think any [professional] judge wants minority decisions'; 'I don't think people like decisions that aren't unanimous'; 'you've got to be willing to fight your corner because normally they love you to be unanimous'; some [professional] judges always want a unanimous decision and they work very hard to get it (GB-EE- 9/24/35/37/15). One interviewee (GB-EE-34) suggested that there was more emphasis than hitherto on unanimity¹²⁴, while another (GB-EE-5) said that when he had had a minority view some decades ago he '*was threatened*' with not sitting again. We had no similar reports from Germany and, as noted above, French professional judges make the decision alone and do not have to convince others of their point of view, although they are eager to explain their thinking and to convince the lay judges.

Professional and lay judge relations: summary

Employee lay judges in Germany and Great Britain seemed to accept the dominance of the professional judge as they accepted that the legal norms, of which the professional judge was the purveyor, prevailed. Because of the absence of the professional judge in the majority of decisions reached at the *conseils de prudhommes*, that was not the case in France.

Although the professional judge in Great Britain may have little or no informational advantage vis-à-vis lay judges in respect of the particular case, in all three countries the professional judge, as the fount of legal knowledge, has a general informational advantage. This is often less marked in France

¹²⁴ In *Anglian Home Improvements v Kelly* [2004] a Court of Appeal judge said: 'In my judgment, it is undesirable, on the whole, for Tribunals to reach split decisions. It will, of course, be inevitable in some cases, but it is preferable, if it is possible to do so, for all efforts to be made to reach an unanimous decision'.

where the professional judge will have had no opportunity to study employment law as a speciality and less opportunity to deal with employment law cases.

British lay judges reported various pressures for unanimity in deliberations, but not their German or French counterparts.

12.3 Conclusions

In 'The Force of Law', Bourdieu (1987) proposes how the law can be viewed as being organised as a field, characterised by a distinctive set of stakes and particular forms of struggle for defining these. Lay judges might be conceived of as being located at the edge of the legal field ('the edge of law'), neither wholly in it or outside it. It is their contact with the professional judge that indicates their complex location at the field's frontiers, highlighting those aspects where they are in it, and others where they are not.

An interactionist perspective and study of the concrete practices that occur during encounters between professionals and lay judges illustrate the difficulty of being within the field or, to express this differently, the relationship of domination. This domination is a structural one, although it can be qualified by the personalities of the parties, and the scope for social interaction between them that might be a function of the social and political positions of professional judges and the social ethos of lay judges.

The idea that lay judges are at the 'edge of law' relates principally to Germany and Great Britain. It does not seem to apply to France, where the *conseillers* arrive at judgments without professional judges present. The *audience de départage*, where *conseillers* are indeed 'at the edge of law', constitutes the exception, not the rule.

While the structure of the labour court, rather than the route to appointment, seems to influence lay judge/professional judge relations, the relationships between the lay judges themselves seems to relate to their route to appointment, with French employee lay judges elected from the CGT in particular having a more conflictual approach than other lay judges both in France and in Germany and Great Britain.

13. CONSEQUENCES AND REFLECTIONS ON EXPERIENCE

This chapter reviews how lay judges perceived their activity in overall terms and the consequences of this activity for their professional and personal lives. This chapter also includes an evaluation of their main contribution to the judicial process, both by lay judges themselves and professional judges, together with suggestions for improvement, again including the views of professional judges.

The chapter begins by considering what lay judges had to say about the question of neutrality and impartiality. This issue was raised as one of the key questions to be addressed in the project proposal¹²⁵ and follows up a question put to lay and professional judges in previous research in Germany (Falke et al., 1981). This issue is also connected with how lay judges adapt to the expectations of the role of judge in their initial period of activity, considered in Chapter 9.

13.1 Neutrality and impartiality

Lay judges in all three countries are required to manage the tension between their status as ‘representing’ one side and a, possibly incompatible, understanding of their role as impartial judges appointed to render justice. Lay judges in all three countries indicated, for the most part, that their experience of this tension abated quite quickly once they began to hear cases, without necessarily weakening their underlying allegiance or their capacity to make a contribution from a particular perspective.

A sense of allegiance also appears to be related to the route to nomination and appointment, and to the strength of the current institutional link with nominating organisations. Based on our interviews, this would appear to be strongest in France, where lay judges have been chosen by their organisations to be candidates and have been elected on the trade union list, and in the future will be nominated by them. The training regime might influence this: in the past and currently, it is provided for employee lay judges predominantly by trade unions and for employer lay judges by employer associations, sometimes in connection with lawyers. In the future, it could be provided, as in Britain, by the state. This remains contentious, highlighting the partisanship that characterises France more strongly than Germany and Great Britain, but which French lay judges manage through the discursive and negotiating processes of deliberations.

Overall, lay judges interviewed in Britain felt that they were able to be impartial during labour court proceedings. At the same time, several acknowledged that they might be ‘influenced by a particular perspective’ (GB EE 38), but that the operation of the system and their own commitment to procedural fairness would not affect their objectivity.

Some interviewees noted that it took the experience of a few cases, and in particular participating in deliberations, for them to be able to divide their judicial role from their everyday activity, either as an employee representative or manager. This was generally more marked in those interviewees who had been nominated by their organisations and spent their working lives in a more adversarial environment, in particular in traditionally highly unionised manufacturing in the 1970s and 1980s. One employer judge reported: ‘early on influenced by work environment (HR in a unionised environment) but less so with time’ (GB ER 8). An employee side judge also noted: ‘I think back in the '80s there was still a bit of them and us but then we balanced each other out... within a matter

¹²⁵ Do lay judges ‘see themselves as partisan representatives... or as applying the lay neutrally’?

of six months of sitting you realise actually we've got a commonality as to what is good practice. (GB EE 11).

This was put very clearly by one employee lay judge:

When you first start, then you've obviously been nominated by and put there for your industrial experience, based on working people. But you realise after a while that that really isn't your role. (...) You've also got to apply the law and the law doesn't allow you to deal with issues which have not been put in evidence. (...) Judgments are made based on that evidence. So, yes, you adapt, you adapt to the requirements of the law basically. But that doesn't mean you haven't got your individual industrial experience in the background. (...) Despite the fact at the end you might think 'oh, that's totally unfair' from your industrial experience, nevertheless [the employer] followed the procedure and therefore they're entitled to do what they did (GB EE 31).

German lay judges reported similar experiences. 'Yes, because as works councillor (...) to some extent you see labour law differently. It's law out of a book but based on your understanding; (G EE HAL 13). 'Of course, sometimes you have a standpoint where you say, the employee, he annoyed the firm but it can be the other way around, where I'll say what this employer did was utterly unacceptable' (G ER MA 64). According to lay judge interviewees, any partiality that did occur was ultimately resolved by the legal position ('and then I save myself with the law', G EE HAL 19). Listening to both sides and being aware of one's own partiality also served to help correct this.

Of course, you're inclined to look at things from the employee standpoint. And so you flounder around in the middle and then say 'Okay, now I'll look at this from another perspective, the employer' and you try to find a happy medium. Naturally, my everyday working life is the employee standpoint. But it's not difficult to look at things another way because you know this from your own working life, from your own employer. But you have to be able to switch your perspective, yes. And I can do that (G EE B 53).

Some German lay judges also described how they might change their 'allegiance' over the course of the proceedings.

When you go into the deliberations and the judge explains what's happened, then you can be a bit partial. (...) Perhaps it's a personal issue, your own make up... If you can only read full stops and commas, then that's how it is, but when you also somehow have some fellow feeling, with people (G EE DO 42).

Others added similar comments. 'You're also aware of the thought "I've been selected for the employer side". But after you've heard the evidence, then everything can be quite different' (G ER MA 70). According to most German professional judges interviewed, lay judges would set aside their origins once they joined the court and adopted the role of a neutral and objective judge: 'There's no sort of class struggle in the retiring room' (G PJ B 6).

A few employee lay judges described that their emotional stance gave way to a more 'objective' approach as they grew in experience or realised, after exposure to more disputes, that they could not help everyone: 'As I said, at the start you perhaps look at things more emotionally, but later you get more objective and more structured in how you think about dealing with a case' (G EE MA 59).

At the start, there's a type of helper syndrome (...) but with time, you learn to say that you can't help everyone, because there's also self-responsibility, on the part of individuals for their own actions' (G EE HAL 17). 'Yes, perhaps you can delude yourself into thinking that can help other people, but you can't. You realise this after the first session of training... You can't bend the law (G EE B 34).

In *France*, it is forbidden to subject *conseillers* to an imperative mandate. The *conseillers* we interviewed all insisted that they had never received any such instructions on how to vote on a

particular case. That is, the *conseillers* judge 'on behalf of the French people' and not on the basis of their employer affiliation or trade union membership. The parity principle, with one employer and employee *conseiller* during conciliation and two of each at the hearing, is intended to allow for an equitable decision. However, even without a mandatory mandate, the *conseillers* sit within a college and serve as judges as representatives of that college. For many *conseillers*, this poses a difficulty that they have to confront and resolve.

You have to be neutral. You're not there specifically to represent the employee. That's the difficulty. You can't just posture or simply take a position on principle. (F38-Nante-Ee).

For the employee *conseillers* we interviewed, this difficulty lay mainly in the assessment of the facts and the interpretation of the law. All the *conseillers* insisted that judged in conformity with the law: that is, they applied the law and the Labour Code to the facts presented to them. But they also recognised that facts are not presented in a neutral way. In their view, they had to be careful not to be left with a view of the case that would be detrimental to employees. Employee *conseillers* said, therefore, that they adopted the employee's point of view even at the risk of not being neutral.

Being neutral is very difficult, especially when you already have a union history behind you and you have seen what employers do, some employers at least, not all. So it's impossible to be neutral, if only by virtue of our experience and what we've lived through. Personally, I try to acknowledge if an employee is in the wrong. But if he is in the right, I will fight to get his rights (F35-Nanter-Ee).

For the employee *conseillers* we interviewed, however, being elected by one side and sitting as a representative of this side does not mean defending its members:

You can't go there to defend employees. That's not the right expression. You can't serve as an advocate for employees. We are there to comply with the letter of the law, to apply it and respect it. Of course, in some respects we are mandated by employees because they elected us. We were put forward by a trade union and we also represent it. And this trade unionist aspect tends to mean that we lean towards defending the employees. We have always done that in our career as a representative and also as an employee. So we pay a lot of attention to what someone who comes to court has to say about what happened to them, their story (F34-Nante-Ee).

For many employee *conseillers*, their point of departure is to assess whether the complainant, almost always an employee, had good reasons to bring the matter to the court. They will give him a sympathetic hearing, which does not mean they are biased. As this *conseiller* recalled, complainants do not always present the right arguments to support their claim.

Neutrality is complicated, because there is always a bias ... well not a bias, but you put yourself in the shoes of the employee. And when you have to tell him that the claim has been submitted too late, that's a real pity for him, that if he had put in the claim earlier he might certainly have won (F37-Bobi-Ee).

For the *conseillers* we interviewed, being a member of one side did not mean being partisan or lacking objectivity. Rather, the issue is one of fulfilling the role that has been entrusted to them by striving to see the facts and the law in a way that is also in conformity with the college they represent. A few *conseillers* went further than this by arguing that various interpretations of the law were possible, firstly as between employee and employer organisations, but also between different organisations on the same side.

There is a trade union reading of the law: the CPME's reading is not the same as MEDEF.¹²⁶ Law isn't something handed down by God. It's a balance of power (...) We have different assessments: if not why would there be several unions? (F31-Nante-Ee)

This approach is manifested at the hearing in the way in which questions are asked. But it is also consistent with the role of a *conseiller* representing a particular college.

However, how this role is perceived tends to evolve over the course of a *conseiller's* period of office. While *conseillers* might begin by thinking they have to defend a party, they subsequently realise that they have to take account both of the law and *conseillers* from other college. One employee lay judge noted:

When you start, in your head, you're there to defend employees. It's a bit of a mistake we all make at the start.... But in the end, people calm down relatively quickly. You realise that you're judges, and have to maintain a certain neutrality (F23-Stras-Ee).

Neutrality in the judgment is, therefore, an outcome of the structure of the court and how it operates.

The capacity to be impartial was seen as lying in a number of factors.

Firstly, for many lay judges – both employee and employer – there was a moral commitment to fairness, both as a prior attitude guiding their decision to become a lay judge and also as an aspect of the responsibilities of the judicial role. This was strongly expressed by many interviewees. One British employee judge noted, for example. '...it was all about natural justice and fairness. So to me it would have been totally unfair to have been biased towards one side (...) because I was concerned about equal opportunities, so to me it would have been totally unfair to have been on the side of the employee just because they were an employee' (GB EE 32).

Being impartial entailed some acts of redefinition in the court. One employee lay member expressed as follows: 'I never considered that I was an employee representative. I was just a representative from the employee side, not an employee representative' (GB EE 32). In the case of this individual, other actors had expected her to be more partial. 'But the professional judges sometimes did and they expected me to at times and also the employer representative sometimes say: "Oh, I didn't think you'd think that"' (...) you know, so I did have a bit of that expectation that I would be. It was a surprise that I wasn't more maybe, gung-ho' (GB EE 32).

Secondly, there was a strong belief and commitment to the function of fact finding during deliberations as a check on any partiality or bias. 'It's about objectivity and facts so I try to remind myself it's facts and objectivity' (GB EE 36). 'I've never felt too concerned about issues of partiality or bias. Why do I say that? One I think is just pure knowledge' (GB ER 13). 'You start off with the finding of fact and then you apply the law and the finding of fact is generally straightforward. There may be ambiguity in interpretation sometimes and you might argue your position there but I wouldn't say that I'm partisan' (GB EE 40).

Thirdly, some self-nominated interviewees reported that they could be objective because they could have sat on either side of the court and did not carry a partisan affiliation, an aspect of the British situation noted elsewhere: 'Oh I think I can [be impartial] because I could have been on the other side' (GB EE 14).

¹²⁶ CPME = SME employer association; MEDEF = national employer association.

Several employee lay judges in Great Britain who were active either as full-time trade union officials or workplace representatives engaged full-time on representative activity reported that their capacity to be impartial flowed quite naturally from the need to be objective when assessing grievances brought by their members, including not always being, at least privately, entirely in sympathy with the employee. 'There are people bad at their jobs who need to have capability procedures. So I think I sort of worked through anyway thinking that everybody who comes through the door is an innocent victim of a management jackboot. It's not always as simple as that' (GB EE 39). This interviewee felt that tribunals were less 'stressful' than union casework because 'you have beginning, a middle and an end that are usually quite quick and as a trade union official I've cases that have gone on for seven years, eight years'.

I think initially I was a little bit naïve in taking the employee position but after a few cases ... you then suddenly realise that some of the employee cases are not always what they are. And again, I think that links back to your workplace experience, you know, you're taught, you represent a member and sometimes you think "look hang on, this is a no hoper". All I can do is make sure you get a fair hearing. And I think after a number of cases, you dispel any sort of naivety (GB EE 8).

One employee lay judge who was a full-time lay official highlighted the relationship between the need to make accept difficult decisions at work and being objective at the labour court:

I think I can be impartial. (...) I was a trade union official at a horrible time, and working in the public sector, where we were facing a hundred cuts. (...) I can make hard decisions, you know, and that goes back to, 'I'll represent you, and make sure you're treated fairly' (...) 'But I'll not try and defend what you did, or represent that as a, a legitimate action', so I think I can be [impartial] (GB EE 9).

Industrial experience, focused on a need to find solutions and accept win and losses, was also referred to by employer lay judges:

I mean in industry if you've been through a lot of dispute resolution you've had your wins and you've had your losers and you've had your draws and you've had your compromises. (...) From my perspective, it's not an adversarial thing to be in here. We're here to try and find the answer to the problem and create a resolution (GB ER 9).

Some employer lay judges in Britain also reported their irritation with 'sloppy' or 'bad' employers. 'Some of my employee colleagues say they think that I'm unnecessarily harsh on an employer because I don't like employers who are sloppy. And if I find an employer who if you like, has been silly shall we say, I actually get quite frustrated' (GB ER 13). 'I take a really dim view of employers who do not follow their own procedures and who do not communicate with people' (GB ER 12).

In Germany too, a few professional judges noted that, on occasions, lay judges swapped roles and took a more critical view of their 'own' side. Most professional judges noted it was only rarely that a lay judge favoured their own side. 'In some particular instances I've thought, personally, that a few employee lay judges – and I emphasise a few – will take a more militant stance (G PJ MA 52). 'From time to time there will be employee representatives who want to be very political' (G PJ DO 35). 'It's very rare that lay judges really tilt towards the side they're from' (G PJ B 8).

Professional judges in Germany did notice differences that were related to lay judges' background experience (for example, whether they came from a large or small workplace, were self-employed, or served as works councillors). This was not always linked to whether the individual was on the employee or employer side. However, different backgrounds could lead to differing contributions and perspectives during proceedings. For the employee side, the professional judges highlighted

experience as a works councillor or staff representative, and for the employer side working as a personnel manager:

It varies on the employee side, and you have to say that as works councillors, many have a lot of prior knowledge and it can happen, for example, that I've got a works councillor there who's had a great deal of experience in collective labour law and has a bit more prior knowledge in cases concerned with this. Perhaps a bit less on aspects of individual law, and on the other hand I might have a personnel manager who's got more experience with individual employment law because she works at a workplace where there's no works council (G PJ MA 54).

13.2 Effects on career and work relationships

Stefan Machura (2016) has identified the 'education function' as a potentially important effect of lay activity, both for the individual and their immediate milieu, but also with positive spillover effects on the wider society.

In this section, we consider what lay judges told us about the impact of their activity on their career and identity, their relationship with their trade union (in the case of employee lay judges), and the scope for transferring knowledge and skills to other aspects of their individual and professional lives and their milieu.

Career and personal development

In *France*, election as a lay judge can offer a means of getting involved in legal activity for those who have no other active involvement in their union or have missed out on a legal career. There are several scenarios. Some interviews had dreamt of a legal career after studying law, but had not been able to make this a reality.

It is they who say 'we'll put that one in there' and that's how I started ... I began work in 1988 at the URSSAF¹²⁷ and then as I'd studied a bit of law, I thought to myself that it would be good to join the labour court (F16-Stras-Ee).

Some employee *conseillers* discover the law through their activity at the *conseils de prud'hommes* and the training offered by the trade unions, and then wish to study to obtain a legal qualification.

I'm looking forward to tomorrow because I'm having training in occupational health, and I have another training session next week. It is extraordinary, enriching. I love these courses. And then I'll try to get a law degree at university (F39-Paris-Ee).

Employee *conseillers* might have gradually come to specialise in legal matters, and are interested in this area, either because they perceive it as being of intellectual interest or because it allows them to express their union commitment through other types of activity. In reality, it is the continuation of trade unionism by other means.

And have you really specialised in the legal field, don't you want to do anything else?

No, I really enjoy it. And the law, well it's a vast area. Judicial we say, judicial.

Really, contentious litigation ...

Yes, litigation, the procedure, compiling the case files. And we've had some training, at the trade union, we train people. I'll take people along, I'll train them and they'll discover the work of the labour court. (F21-Stras-Ee).

¹²⁷ An agency in the French social security administration.

This continuation can be also seen in the trajectories of *conseillers* who exercised representative roles at their own workplace or were activists in their trade unions. Holding office as a *conseiller* is one mandate among several, but enables trade unionists to engage in a form of trade union activity outside the immediate workplace. This reinforces the link with the trade union and leads to the employee becoming a point of reference on legal matters.

For the employers, serving as a *conseiller* is an extension of their professional activity, possibly in human resources, as a corporate lawyer, or even as a senior manager. In this instance, HRM serves a means to establish continuity between their work life and the labour court. Serving as a lay judge allows them to participate right up until the conclusion of the HR process, most notably in the event of dismissals.

Being a *conseiller* is linked to my career. I was an employment lawyer to begin with and I now have a human resource consulting and training firm, so I do a lot of training, give some employment law advice, and so I'll give presentations to people coming for training – HR people, managers or staff representatives – about employment law, reforms, statutes, the foundations of employment law (F09-Nant-Er).

Although not mentioned in Germany or Great Britain, in France lay judges said that serving on the labour court allowed them to meet people from a variety of backgrounds – such as lawyers and professionals – and to expand their local social network.

I've always refused medals, honours. But at the start of the year, where there is formal general assembly of the court to mark the new year, this is something that somehow demands respect. I hate this but in a way we are more respected, doors open more easily. It's easier to discuss and often easier to make progress (F17-Stras-Ee).

Conseillers' experience in the labour court thus has direct and concrete consequences for their life at work, with their employer and socially.

In *Great Britain*, involvement as a lay judge gave both status and agency to many interviewees. 'I see it as quite an honour to sit in the tribunals' (GB EE 23). 'I'm taking part in it - an actor!' (GB EE 10), although this view was not universal: 'I don't really publicise that I do this' (GB EE 26).

A number of interviewees (GB EE 9, GB ER 5) referred to the 'credibility' they gained, which helped in the workplace (both as employee representatives and managers). This was acquired both through passing through the selection process (GB EE 9 and others) as well as over the course of sitting, enabling them to engage with the professional judge. 'I think in the early days it was a bit daunting and I was still learning the first two or three years, but I think as I've got more confident and more capable and more experienced probably to be able to challenge' (GB ER 5).

For some interviewees, the tribunal represented an enclave of politeness, in part due to the previous practice of using formal address (Mr. and Mrs). 'I used to think, well this is a very civilised place, compared to my workplace sometimes' (GB EE 8).

The activity also enhanced their perceived power at the workplace: 'Some managers are a bit wary of me (*laughter*) once it was announced I was appointed to tribunal. They tend to avoid me if they could... it gave a lot more confidence in dealing with management (GB EE 8).

German lay judges also reported that the learning opportunities provided by lay judge activity not only raised their level of knowledge but also lead to greater self-confidence and recognition.

Because in the union, there is a different status, whether you're just a simple member or have an office, or are a lay judge... and I've noticed that there is much more acceptance [...] also at work, because when I got appointed I sent a copy to the office and this went round the place like wildfire' (G EE MA 58).

Another German lay judge commented:

This also applies in private life too, if someone has a question then you're there to answer. And the questions do come if people know 'OK, he'll do that, he's a lay judge, you can ask him' (G EE HAL 15).

One German lay judge also noted:

It's not a secret that I'm active here, and people do ask about it from time to time. And at work, absolutely. Just on its own there's a positive side-effect with the certain degree of respect that you get (G EE DO 51)

For many employee *conseillers* in France, experience as a labour court judge has enabled them to gain in self-confidence and to achieve more in their working life.

When you are a *conseiller*, it builds confidence and I was able to make use of this in my last job. It's reassuring and it creates a relationship of trust, a bond of trust with representatives and with employees. All the legal knowledge that I've gained through the *conseil de prud'hommes*, including the procedural and legal aspects, has really been built up. And I think that in life it also brought a concern to find a consensus. And there's an art to that (F38-Nanter-Ee)

Relationship with trade unions and workplace representation

For trade unionists in France, holding office in the labour court represents a continuation of their union engagement, especially if they are involved in defending employee rights at workplace level or as union officials.

When I began to work regularly, that is to have a permanent job with permanent work – because I had started with a lot of odd jobs – being a union activist seemed the logical thing to me. And then at my company, I became a staff representative and then was on the works council, and then became a union delegate. I was young at the time, it fascinated me, especially to be a union officer, to do these legal duties (F12-Nant-Ee).

I work in an SME [small and medium enterprise] which used to have 100 employees, now has 200, and so I was isolated, and I used to approach the local union a great deal for help. There was a regular connection with my union. And in 2008 I was proposed as a candidate for labour court elections as a *conseiller*. It was a kind of continuation of my position on the works council and as a staff representative. And that was probably because ... I had the skills to be a judge and that fitted with the interest on my part. So I was asked if I wanted stand for election, or not (F01-Nant-EE).

In fact, interviews with legal officials in union organisations in France indicated that some are involved in this type of legal defence and specialise in this form of action, which leads onto to other more collective forms of action at workplace level. Such specialization does pose problems for union organisations and is a source of considerable concern for trade union officials who are eager to combat this 'iron law of oligarchy' (Michels), played out here in the form of legal specialisation.

Trade unionists occupying these roles pass through a *cursus honorum*. The first mandates that unionist activists can have are located at the workplace, such as a staff delegate or trade union representative. After a period of probation, activists can move on to other duties outside the workplace, either within the union itself or as a union representative on other bodies on which they are represented. This trajectory ultimately leads to become a '*conseiller prud'hommes*' as a reward for their enduring union commitment.

I actually joined the union in 1969 and had my first appointment as a staff delegate in 1972. I practically held all of the representatives offices at the company, such as health and safety, workplace council, assistant secretary, treasurer, and so on for more than a decade. I was on the works council, still with the health and safety mandate. I got that in 1972 and in 2010. (...) This experience gave me the chance to be put on a list by my union, which allowed me to be elected in 2008. (...) It has allowed me to finish my career and begin a retirement career and have more opportunity and flexibility that allow me to express myself differently in the judicial field and also mainly here in local branch of the union, the CGT, where I'm responsible for legal matters (F34Nante-E).

In France too, the link between trade union organisations and lay judges might be reinforced by the fact that the search for potential candidates within trade unions might serve as a means for identifying future talent for trade union roles.

In *Germany*, the overwhelming majority of employee lay judges interviewed said that nothing had changed in their relationship to their trade union.

In *Great Britain*, the institutional link between employee lay judges and trade union organisations can be characterised as generally weak, although a number of employee judges continue to serve as workplace union representatives. According to our interviewees, some trade unions positively welcomed the fact that their officials had become labour court members under the self-nomination system and were able to transfer the knowledge they had gained at the labour court back to the union (see also immediately below). For instance, according to one self-nominated interviewee, their union saw it as developmental (GB-EE-18), while three employee lay judges said that their trade unions appreciated the fact that they shared online briefing material on cases and their anonymised experience with their trade union colleagues (GB-EE-13/24/32). Two female trade union officials, however, who had been appointed after the system changed to self-nomination system experienced overt hostility from their trade union colleagues. 'There were a couple of the older men who were most upset' (GB-EE-21); while another said that her male boss said: 'you're off on a jolly' (GB-EE-15) and she and yet another female trade union official (GB-EE-35) said that they had to take holiday in order to sit on the labour court.¹²⁸

Furthermore, although not experiencing hostility, some male and female trade unionists appointed after self-nomination reported that their trade union had ignored their labour court role (GB-EE-9/26/35/40). Of course, as noted in Chapter 7, some of those appointed to the employee panel under the self-nomination system were not even union members at the time of their appointment.

In France and Germany, there appears to be a more direct relationship to workplace representative activities than in Great Britain. This would not always have been the case, as pre-1999 British union nominees have similar profiles and interests to those from France and Germany employee lay judges and report similar motivations. This is also not to say that self-nominated employee lay judges in Great Britain are not sometimes trade union reps. Most employee side self-nominees had active union involvement, often as elected local or in some cases national representatives but the link is reported as much weaker and is certainly far less institutionalised than in France. In France, institutional links with unions is a real and ongoing one for employee lay judges, but less for employers and their organisations.

¹²⁸ There is a statutory right to unpaid time off and lay judges receive pay for the time they are sitting – see chapter 8.

Knowledge transfer

The scope to transfer knowledge and skills gained through lay judge activity into other fields was identified by some interviews as one of their motives in taking up the role (see Chapter 9). In a few instances this was related very directly to individuals' own professional development in an instrumental way; in others, it was intended to improve their skills as employee representatives, and served an overarching (normative) purpose and a conception of their interest; in yet others, knowledge transfer was seen as strengthening their individual position vis-à-vis other workplace actors in terms of status and, possibly, power.

Most of the British and French employee lay judge interviewees reported some knowledge transfer from the labour court to their workplace.

Several British employee lay judges commented that management and/or their fellow trade unionists took more notice than before of what they said because their status and/or authority had been enhanced when they became a lay judge (GB-EE-2/6/8/13/17/ 36/37/39). Furthermore, two interviewees (GB-EE-8/23) said their trade unions invited them to have an input into their training for union members, while several interviewees said that it had improved the way they advised and/or represented members at the establishment on discipline and grievance matters.

Comments from British lay judges included: 'very helpful in a lot of cases'; 'my experiences from the tribunal changed my way of representation... it improved it'; 'more pragmatic, more granulated in how I handle things'; 'it helped me... to ask particular questions in a particular way to get behind something which isn't obvious'; 'you pick up tips [from barristers at the tribunal]'; 'it has changed significantly'; 'I'm not simply accepting what I'm told'; 'it taught you that every issue that you're going to rely upon potentially at a later date, it's got to be put to the employer' (GB-EE-9/8/34/ 11/39/36/10/31).

Several British employee lay judges also said that their experience at the labour court made them realise that the organisation where they worked sometimes did not always meet the standards required by the law and/or had the requisite evidence to demonstrate that they met such standards and they voiced their concern to a manager (GB-EE-12/17/27/29).

Interestingly all those appointed to the employer panel in Britain, whether before or after self-nomination, reported knowledge transfer; their experience on the labour court had helped them as HR professionals, consultants, trainers or employers and a few specifically mentioned recounting anonymised examples of cases when training (GB-ER-3/7/10).

Similarly in *France* the knowledge and experience gained in the labour court provided for knowledge transfer back to the workplace. It allows them to carry out their other representative positions at the workplace in a different way and also to change how they deal with their employers. In particular, it enables them to be seen as someone with legal skills, a jurist.

It's the idea that you can say in a specific situation that there is a legal position that will allow it to be resolved. So we can come to a logical conclusion. This helps when drawing up demands for staff representatives. On the works council, it means you can do certain things (F01-Nant-Ee).

I've realised that it's necessary to go step by step and to be able to develop the discussion, the arguments that will lead onto the next point, to be able to draw the conclusions you want to draw. In a relationship with an employer; for example, we have to avoid opposing them too quickly. Despite everything, we're obliged to listen to the arguments that are being made in order to find a

solution. Being on the labour court has helped me a great deal in knowing how to manage a discussion, a negotiation (F03-Nant-Ee).

The strategy is not to play your cards too fast, to go forward one step at a time, (...) to try and find arguments that will be difficult to contradict (F13-Nant-Ee).

Knowledge transfer in France was also reported as taking a variety of forms, including links to families and friends outside the world of work. *Conseillers* developed into legal all-rounders. Although it is not possible to establish how this capacity was created and it is likely that previously existing competencies have been developed in the role in the world of work, which have led onto the role of specialist. Several *conseillers* explained that representatives of other unions at their workplace come to them for advice:

I have colleagues in other unions who I get on very well with. They always come to us if there are points of law or more involved discussions that need to be had to support employees. I'm not sure why, but they certainly do (F37-Bobi-Ee).

Some *conseillers* explained that management would often hold back from a dismissal or starting a disciplinary process simply because of their presence. In this respect, they acted as a kind of safety rail, reminding managers about the boundaries of what could be done legally and what was impossible.

It can be useful in defending employees threatened with dismissal, because when you are a *conseiller*, employers know that you know the law, so if they try anything on, you'll be sure to win. We are a kind of brake. (F35-Nan-Ee).

More generally, the experience of serving as a *conseiller* affects perceptions of employees, employers and the world of work. 'I always defend the same things but in a different way. I see things not just from my perspective' (F 12-Nant-Ee).

Another trade union *conseiller* also noted: 'It gives you another way of looking at things. That is to say, we immediately translate this into judicial terms, and that can be good, but it can also be not so good' (F 16- Stras-Ee). Nevertheless, not everyone changes their mind or their views of employers and the world of work. This is particularly so in the case of *conseillers* who sit in the court primarily with the objective of defending employees.

No, nothing changed. In fact, for me it's highlighted even more that employees are still dependent on employers, that there is a relationship of domination. I see this even more today than before (F 13-Nant-Ee).

In this instance, the main aspect is that the *conseiller* leaves their workplace and acquires other contacts that will allow them to return and be a more effective representative. This dialectic is nevertheless a delicate one as trade unionists in France are often perceived as 'bureaucrats' who are remote from the workplace and employees' daily concerns. The *conseillers* must, therefore, engage in a complex interplay between the internal and external worlds of the workplace.

This builds a trade union approach based on intervention but also on reflection, gaining an overview, being able to interpret [events]. It's not that easy but it's extremely enriching. There is a specific trajectory for trade unionists who are *conseillers* that leads to them leaving their workplaces in order to then judge events that take place at workplaces (F34-Nan-Ee)

Lay judges in *Germany* also saw a benefit in the fact that they could transfer the knowledge and experience they gained at the labour court into their professional lives. 'From that perspective, on the one hand, it's been a successful learning exercise and that was also my aspiration' (G EE DO 26). On the other hand, I also find it interesting to see what I can take back from the court to my

workplace, and perhaps not trouble the lawyer quite so quickly for decisions, and I'm more concerned to resolve issues within the workplace' (G EE DO 26).

Serving as a lay judge also widened interviewees' horizons: 'it will certainly be helpful for my job as a works councillor at work, getting a broader point of view; (G EE MA 63). Lay judges felt that they had gained in knowledge and were better able to deal with and resolve issues at the workplace: 'Because I find it incredibly interesting. Also, as a works councillor I've also been build up my knowledge and know a bit more in case problems crop up there' (G EE DO 37). In some instances, this was a motivation for joining the court and an expectation of their role: 'Yes, my expectation was to build up my experience and use it at the workplace' (G EE MA 67).

Lay judge activity was, therefore, seen, on the hand, as an opportunity to learn and widen knowledge – as a type of continuing education and training. On the other hand, the individual's own experiences and workplace knowledge could be deployed in the role of lay judge. Knowledge acquired through activity as a works councillor or staff representative could be brought to bear in the court, and experiences gained during hearings could be taken back to the workplace, as the following quote illustrates:

I find employment law interesting, because we also have to deal with it at work. Occasionally there's a warning or a dismissal, so you're right in there with the material. And it also helps me with my activity as chair of the staff council (G EE MA 62).

13.3 Expectations and reflections on experience

Whereas the previous section looked at some specific effects of lay judge activity, this section considers lay judges' broader reflections on their role, including whether it had met their expectations, what had been found especially interesting, and whether it had been fulfilling socially, personally and emotionally (cathexis).

Discovery of law – intrinsic pleasure

In line with original expressions of interest in the law, most lay judges interviewed in *Great Britain* expressed feelings of pleasure and enjoyment, often strong, when asked about their overall assessment: 'I love doing the big cases ... because of the complexity of what's going on' (GB EE 33). '...look forward to when I'm doing it and still quite excited by the cases' GB EE 36). 'I must admit over the years I found it absolutely fascinating. I've really found it tremendously satisfying' (GB ER 8). '...the role exceeded my expectations...I always ask who's the nominated judge... if you get one of your favourites, it gives you a little buzz and thinking that will be really good' (GB ER 13). 'I'm very grateful that I've had the opportunity. I enjoy it immensely' (GB EE 18). One aspect of this is the scope for having an effect within the court: 'But I managed – I think I've done over the years many-many cases I've been able to, in the tribunal itself, sort of sway opinion from one side to other, something like that. So I find it quite satisfactory in that sense' (GB EE 12).

In *France* too, most of the lay judges interviewed were very satisfied with their judicial activity. Not only did it allow them to continue defending the interests and rights of employees or employers. It also allowed them to get out of their immediate workplace and pursue a kind of life-long learning. The work of drafting judgments, being involved in discussions with professional judges, and managing hearings involving lawyers allows them to enjoy a kind of social advancement. (See also section on the relationship with professional judges and lawyers).

Law appears to be source of an intrinsic pleasure, a ‘game around the forms’ appropriate to the legal field (cf. Bourdieu). More generally, the law sometimes is reported as an intellectual pleasure, the pleasure of learning new things. Trade union training plays an important role in the production of this pleasure in the law and in learning about the law.

Training was therefore put in place at that time. At the time I was active and I had two training courses a year, sometimes over two days. Now I have stopped my activities at the workplace, I am happy to do this. As soon as I can, I go to a training session because I like it and also because it is essential to keep informed. For me, it's true that it's become a drug, a passion (F36-Nan-Ee).

German lay judges also reported that serving as a lay judge was a type of enrichment that widened individual horizons and perspectives: ‘..at all events, it definitely broadens the mind, that’s beyond question’ (G EE DO 51). ‘Fun, it’s interesting and you learn new things’ (G ER DO 45). They also indicated that they derived considerable benefits for their working lives. That being a lay judge was an interesting and fascinating task was confirmed by several German lay judges. Not only did it prompt their curiosity but was also a pleasure. ‘It’s much more fascinating than I thought it would be’ (G EE HAL 11). ‘It’s fun’ (G ER DO 45).

It’s interesting, it offers me something – something for me personally – and you’re pleased if the parties can talk with one another afterwards. That’s the best, better than when one goes off to the right, and the other to left, never to see each other again. Or if you’ve found a settlement that both parties are happy with (G EE MA 59).

Upholding the system

I can honestly say that I’m not cynical about the process. Having sat there for 17 years, I still think the process is a fair process (GB EE 20).

Virtually all lay judges from *Great Britain* expressed strong support for their continuing role in adjudication. One British employee lay judge noted:

I believe that employee lay members bring a unique perspective to the employment tribunals in that we have experience of supporting employees, understanding their perspectives, actions, behaviours, thought processes, approaches and we can bring that to bear in deliberations which I think are often excluded from the discussions (GB EE 22).

An employer lay judge in Britain commented: ‘I think the lay members brought a reality, and I think they still do. There is an understanding of what it is like to work in a business and what it’s like to be stressed in a business or have poor management or a lack of policies. I think they bring life to it’ (GB ER 1). Another said: ‘I think we play a very vital role in balancing the application of fairness and judicial principles of fairness in practice in a workplace setting’ (GB ER 10). ‘Just to repeat how impressed I am with the opportunities that people are given who come before the employment tribunal to have their say, to present their evidence, you know, the typical day in court (GB EE 7). Finally: ‘In terms of outcomes for individuals, I haven’t participated in any process that I think has been unfair’ (GB EE 28).

In *France*, lay judges invariably defended the institution of the labour court, perhaps reflecting the fact that the existence of labour courts in their current form has been seen as a long-standing political victory for trade unions in winning joint representation with employers (see Chapter 5 on France). In their view, the systems works well and the principle of equal representation for employees and employers on the judicial panel provides a guarantee for a balanced decision. They are unanimously opposed to the recent reforms (see Context).

Participation was seen as very important for interviewees in *Germany* as a contribution to upholding the system of labour law and ensuring it was applied fairly.: ‘...it is very, very important to meet the requirements of labour law in this country’ (G EE DO 31).

Defending the institution of the labour court as a distinctive forum of obtaining redress and fairness was cited by many interviewees.

In *Great Britain*, labour courts have undergone profound changes in recent years and have also been subject to long term processes of formalisation. At the time some lay judges people were nominated or applied to join, these tribunals were viewed as institutions offering a means for securing fair outcomes. ‘I felt the employment tribunal, as it was 20 years ago when I started, was a tribunal where ordinary people could put their cases, represent themselves and be listened to’ (GB EE 28). ‘I believe very strongly in the sort of industrial court where people get a chance to put their case, and it’s not tied up in all the legal technicalities’ (GB EE 9). Tribunals represented ‘another form of justice really for workers, somewhere they could go to get some justice’ (GB EE 41) and ‘a natural step’ (GB EE 31) from workplace-level representation.

This view was mirrored by some British employer lay judge interviewees. One HR manager said: ‘I have this very strong belief that tribunals are there to deliver innate fairness, to make sure people are treated right. It’s a huge driver for me. Where did I get it from? My mum, I think’ (GB ER 1).

There was also strong support for the principle of having three decision-makers. One employer lay judge commented:

I shall be desperately sad if lay members are done away with because I really do believe that we provide – with a team of three – we can provide a much better judgement than just a person on their own (GB ER 8).

Regrets and criticisms

In *Great Britain*, many lay judges expressed regrets about the recent changes that led to more professional judges sitting alone on unfair dismissal cases and the fall in the number of cases due to the introduction of and raising of fees. ‘When they’ve allowed judges to sit alone, I think that has sort of lessened our role’ (GB EE 20). ‘I do worry that people who need access to justice just can’t afford it anymore: they just give up and they’re not going to bother’ (GB EE 33). A British lay judge lamented the fact that their contribution had been lessened. ‘Lately I think one’s contribution is somewhat limited given the way the law’s moved and the way things have moved and the ability to make a difference has gone (GB EE 11). An employer lay judge commented:

I shall be desperately sad if lay members are done away with because I really do believe that we provide - with a team of three - we can provide a much better judgement than just a person on their own (GB ER 8))

Not one interviewee, including the professional judges, considered that vexatious litigation was a problem. ‘In my experience, I have not seen a so-called frivolous case’ (GB EE 29).

Concerns were expressed that the reduced opportunities to sit could erode judicial skills. ‘You can lose your judicial skills, the observation skills, the intense listening, you know, the constant revisiting of evidence to make sure you’ve heard things properly and fairly’ (GB ER 1).

These criticisms were also reflected in an overall feeling that the labour court system in Great Britain had moved too far away from its roots. A British employer lay judge commented: ‘It’s got to be much

more technical and bureaucratic than it ever was and I'm not sure that's good for employment relations or justice to be honest (GB ER 9). An employee lay judge also noted:

It's changed from when I first started whereby you were bringing the industrial experience of working people. Now you're bringing the same but you've got to adapt that to all the laws that have come in to challenge... what was based on the word 'reasonable'. It was all based on the word 'reasonable'. ...Now it's the same words but the definition of 'reasonable' seems to have changed, so that the reasonableness is less reasonable than what it was 30 years ago (GB EE 31).

One employee lay judge, an experienced former full-time trade union official, also regretted the fact that the formal requirements of British labour courts now less scope for admonition and advice to employers (something echoed by other interviewees).

I think the word 'why' is so important and tribunals, when I started on them, quite commonly would, at the end of a case say 'you should pay a bit more attention to your disciplinary procedure or actually say to the employer, your disciplinary procedure's very good, that's why we've found that fair dismissal' ... We're not allowed to do that anymore and I think that's a shame (GB EE 11)

Some British interviewees complained that because lay judges now tended to sit only on longer discrimination cases, this favoured lay judges who were retired as they were more likely to be available for long cases than lay judges who were in full-time employment. This led to some interviewees perceiving inequities about how cases were assigned to individuals, but also recognition that local tribunals tried to respond to this when drawing up listings.

The only express criticism of the system overall in Germany was a fundamental one made by an employer lay judge and based on cost. 'There should be a political discussion about whether this is necessary. It costs a lot of money all told' (G ER HAL 14). On specific suggestions for improvement, see Chapter 15.

Meeting expectations

Most *German* lay judges interviewed noted that their activity as a lay judge had corresponded with their initial expectations. 'The way it functions, and the experiences you can accumulate, they've met my expectations. I wouldn't have wanted to have missed it' (G EE DO 40). 'Yes, ... it's met my expectations and I hope it continues as it has been... entirely meets my expectations' (G EE B 43). 'Yes, I can confirm that. It's fun and I'm very happy to do it' (G EE B 5).

Some of the lay judge interviewees indicated that the experience had surpassed their expectations:

It's much better and much more interesting. I was naïve then. I thought 'Let's just see what happens'. It makes a very nice change from everyday life at work (G EE HAL 11).

In fact, it's more than I expected. I thought, I'd just nod my head or something like that before I really got involved and found out. Our professional judge really includes us and asks, and you feel you're really needed (GB EE B 3).

Not all the lay judges we interviewed had specific expectations. Some had none.

I can't respond to that because I didn't really have any expectations. I just had a vague idea of what it might be, and in that sense I was quite eager to find out what was in store for me (G EE MA 58).

I didn't have any expectations, to be quite frank. It was a bit like a leap in the dark and I thought 'Hmm, just see what happens' (G EE DO 27).

Some interviewees had had prior experiences in other courts before they began their activity at the labour court or had observed labour court hearings. One commented that their expectations had been shaped by experiences in the criminal courts (GB EE B 35). Another noted:

Based on what I had seen from observing labour court hearings I had an idea how it all worked. Of course, at that stage I had no idea what took place behind the scenes (G EE DO 46).

Activity in the court as a lay judge was described as a learning process by several interviewees

Twenty-five years ago, I didn't think about this too much. I thought it was a task, a mandate, I'll do it. I didn't realise then, that you grow with this role, because it's fun, because you can exercise creativity, be innovative, to shape things. ... I can only say that this has been a harmonious and happy process of development (G ER DO 41).

It was evident from interviews with lay judges that they enjoyed performing these activities (the discussions in deliberations, expressing a view, collective decision making and finding solutions) and wanted more sittings. Their expectation was that they would have more opportunities to sit. 'I thought there would be more sittings to be honest, perhaps once a month or so, but that's been by no means how it's turned out' (G EE MA 66). 'I'd be willing to sit more than just once or twice a year... I could certainly manage more, perhaps four *sittings a year*' (G EE HAL 20).

Many *British* lay judges also noted that serving as a lay judge had exceeded their expectations: 'Initially it was more than I expected, I just loved it, I just loved it' (GB EE 17). 'Better than I expected, definitely' (GB EE 3). 'Better than I expected. I have been here ten years, and I have not come across that politics I have found in the other work place' (GB EE 21). As noted above, in some cases this was linked to the pleasure in exercising the role: 'Much better than I expected in the sense of being able to work on big high profile cases fairly quickly' (GB EE 33). 'I think the role was better than I would ever have anticipate - and I found it hugely stimulating. I found it quite rewarding and I was actually quite proud, still am, to be a tribunal member' (GB ER 13)

Not all comments were positive, however. One employee lay judge noted:

I thought there would be more involvement, I thought... depending on who you sit with, and this is probably one of my biggest disappointments, that I don't think they use us enough (GB EE 19).

Another added: 'It hasn't been fulfilled I don't think. I think because the cases have fallen away, I don't feel I'm contributing as much as I could do' (GB EE 36). 'It's become disappointing in the sense that we hardly sit and you feel as if you're losing your skills' (GB EE 37). Another employee lay judge contrasted their hopes for the role with the formal requirements of the legal system: 'My expectations were, I thought I was going to go there to do justice. I found out very soon what I could do was very restricted to what the law was.... I think it's becoming too legalistic' (GB EE 12). 'I thought it would be a kind of multi-working collaborative thing and I was sadly mistaken in the beginning apart from a few exceptions' (GB EE 16)

13.4 Main contribution

The material in this section is presented country-by-country to reflect some distinctive national differences.

Great Britain

Workplace and employment relations experience

The main contribution of lay judge presence identified by both employee and employer lay judges in Great Britain was their 'workplace experience'. This was perceived both in quite specific terms ('knowing that') but also more generically as enabling a form of non-legal appreciation to be brought to a case.

As a lay member, I think workplace experience, without a doubt. ... And I feel that for both sides, I think it's quite clear that very often judges, however good they might be at employment law, they do need to be reminded of actually what would happen in the real world. (GB EE 4)

This understanding of the 'real world' was emphasised by several interviewees. For example:

Your view of the world from a different perspective, as a worker, ... from the reality of industry, a reality check because it's alright having all the legal positions but actually what happens in the real world in your workplaces is something completely different sometimes. So I think over the years I think we've had the most discussions around what actually happens in the workplace you know. Yes, probably most disagreements as well so the most discussion and the most disagreement about this is 'that's not how the real world works' (GB EE 41).

On occasions, this form of knowledge was contrasted with 'a legal view'. One employer lay judge noted: 'It's by bringing a wide range of knowledge of the world of work, and the messiness and the complexity of the challenges of how you reconcile the law with HR practice (GB ER 10).

Several lay members referred to their ability to bring an understanding of workplace industrial relations, and specifically how grievance arise and might be resolved. For employee lay judges, there was also an emphasis on the insights they gained as workplace employee representatives. For example: 'I think my main contribution was in a sense applying my knowledge of the workplace and the skills that I used in representing members and bringing it to the tribunal (GB EE 8). Another noted their experience with different levels of workplace employment relations and their capacity for 'reading' events, a form of tacit knowledge, in the light of their understanding of these.

Understanding industrial relations in the workplace, understanding how grievances happen, how they're resolved in the workplace, understanding discipline procedures in the workplace, pay structures, how different tiers of the employees work in different ways within the workplace because the shop floor works differently to the supervisors, works differently to the middle managers or works differently to the top level of managers. So I understand all of those interfaces because I've worked all of those levels, negotiated at all of those levels and represented all of those levels, so I think that must be the key part that I bring (GB EE 23).

Some lay judges who had, to use legal parlance a 'protected characteristic' (such as ethnicity or disability), cited their capacity to make a contribution to cases where this was relevant. One employee lay judge noted.

My main contribution is being able to explain, clarify the perceptions of individuals in cases, so where there's an alleged case of discrimination, for example, I'm able to look at it from the perspective of the person who's complaining and the person who's being the alleged perpetrator. So I bring that perspective of having myself experienced discrimination directly, as a woman, as a black person in the workplace. ... It's that perspective of, if you like, a kind of meta-analysis and if I'm working with people who've never experienced discrimination or can't understand how it works, I bring a theoretical knowledge of different types of discrimination (GB EE 22).

Another employee lay judge added:

I just think that the fact that I have a disability... gives me a good perspective of what it's like to work with a long term chronic condition. And that helps when I'm dealing with disability cases, gives me sort of an insight into what it's like to have to work with that condition (GB EE 34).

British professional judges broadly confirmed this self-assessment of the lay judges. In terms of workplace experience, one noted: '... as far as the assessment of the evidence is concerned, I think that they do bring what they are meant to bring which is their day-to-day practice of industry, which the employment [professional] judge doesn't always have (GB PJ 7). Another commented: 'They are

there to assess the evidence and to assist the judge to make findings and facts, to assess credibility within a context, I suppose, the working industrial environment (GB PJ 12).

One referred to the general life experience of lay judges as adding to the scope for multiple views in deliberations: 'Where they come in useful more than anything I suppose is that sense of an understanding of human nature and having another thought about an individual because we all have confirmation biases (GB PJ 10).

Legal knowledge

Legal knowledge was rarely mentioned when interviewees were asked about their main contribution. One British employer lay judge, with a professional background in HR and a legal training, was exceptional in this respect: 'My legal knowledge and knowledge of employment law. I think I do use that quite a lot when we come to discussion and decision so that's quite significant I think (GB ER 7). The legal contribution was also mentioned as a significant factor by one professional judge as a benefit of sitting with lay judges: 'I think the advantage is you've got lay people with appropriate training engaging in making a legal as well as a factual decision (GB PJ 8).

Germany

The most common response by German lay judge interviewees when asked about their main contribution was their ability to evaluate cases based on their life and workplace experience.

I think perhaps seeing a relationship to practice or not losing sight of this... Of course, we've got the case law there, but you've still got to analyse the specific instance, the case in front of you. Just in case something's been got up.... there's always the danger of that. And so we'll try and say 'This just doesn't make sense, what's being set out here'. I think that's the main contribution that we can offer as lay judges' (G ER HAL 24).

It turns on actual practice, what you've experienced at the workplace, and what in theory is in the files. It's also good that you've got a colleague from the employer side there, who's seen it from the other side... (G EE DO 26).

Nearly as frequently cited as this was being involved in determining the judgment and coming to a decision representing a just outcome that will be seen as 'fair process' by the parties. 'The most important thing is that justice is done, regardless of which party wins' (G EE DO 46). This was also set in broader terms. 'Making sure justice is done. That's the greatest good that we can offer' (G EE DO 31).

Yes, coming to a good decision in the deliberations with the other two, what either the complainant or the respondent will see as being fair, regardless of whether we've rejected their arguments or not or whether someone wins. To really come to an honest judgment (G EE MA 57).

The ability to bring an employee or employer perspective to the proceedings was noted by lay judges from both sides.

Sometimes the judge has no idea. And I can see things from the perspective of an employer. ...What might convince me, as an employer, to come to a settlement. And the works council chair, usually the lay judge on the employee side, see things from his side' (G ER MA 70).

The viewpoint as an employer is clearly different to that of a professional judge and an employee representative. This three-fold set up means it's possible to explore many aspects of a case from a variety of positions (G ER DO 45).

The ability of lay judges to complement the professional judge received several mentions. An employer judge noted: 'I think it's a good thing that I've often experienced in our chamber – that the

professional judge has us there as a discussion partner and gets some new ideas (G ER B 4). And an employee judge emphasised the capacity to offer a complementary perspective. 'To be able to say or to have to say: "I see that differently". Rather than just applying the law one to one' (G EE DO 51).

Perhaps the fact that the professional judge focuses on the key legal questions right from the start and might overlook something or see things from just one side ...I can bring in fresh aspects (G ER HAL 18).

Other lay judges (in particular men) saw their most important contribution as being able to add specific workplace knowledge. The value of this was that other members of the court could benefit from the lay judges' specialist knowledge: 'and the judge was able to make sense of it' (G EE MA 63). 'I can be a great help to the professional judge when a case is in my area of industry.... I can explain how it all works' (G ER MA 66). 'And if someone is here who can say it works in such and such a way, like time recording, they can gain a lot of information that helps them make a judgment' (G EE B 5).

A further aspect, mentioned principally by female lay judges was that lay judges offered a social perspective on cases. 'As far as the clients are concerned, ... The procedure. It's a sensitiveness, some humanity, and then to know in the background 'What if...?' yes, this decision, this human level...' (G EE HAL 20). 'Well, to offer a different viewpoint... a social point of view' (G EE HAL 11).

Some lay judges saw their main function as making the principle of lay participation a reality within the system of labour jurisdiction in a constitutional sense (three mentions). 'Just to be there. To support this system, which exists for a good reason' (G EE MA 68). 'Well, in my view, you're actually putting an established democratic system into practice' (G EE HAL 17).

In gender terms, men tended to emphasise their specialist knowledge, something which professional judges lacked, and the specific perspectives of an employer or employee. Women tended to stress their ability to add practical workplace and life experience and a social perspective.

Professional judges were also asked to give their assessment of lay judges' main contribution. Overall, they emphasised the ability of lay judges to add professional and workplace experience, drawn from practice, and judge events from the standpoint of workplace norms. 'In general, an exchange with specialists from the world of work, so things aren't too abstract' (G PJ B 6).

The lay judges can immediately bring in very practical considerations. They lay more weight on the fate of the two parties. What would the decision mean for the employer? How will the employer or employee cope with the decision? And you can see that they think about how a case might look if it happened in their own firm. This is a very congenial characteristic in my view. That is, they come with a very practical perspective... (G PJ MA 65).

The lay judges are able to do that, nearly always, sort out how what something means, what an employee has done wrong from the employer's point of view, a breach of duty, the effects of this in workplace practice, that is they can see through how things might look with legal spectacles on, and see how that would really play at their workplace, if someone had done this or that' (G PJ DO 48).

But it's also very important to know how things look in terms of workplace practice. And then from two sides: employee and employer. How would a particular type of behaviour be seen? Then you can decide things on a much broader basis... That's why I think their participation is very important' (G PJ HAL 16).

Some professional judges also felt that specialist knowledge could be helpful:

Secondly, for us involved specifically in labour law, specialist knowledge which, to put it modestly, I sometimes lack: taxation, tax law, social law, collective bargaining, particular aspects of collective bargaining practice. Arguments such as 'in our collective agreement, this is or this is stipulated' when

that's perhaps not so common. These come under the activity of the lay judge, and I find that enormously enriching' (G PJ MA 52).

Other professional judges stressed the value of technical knowledge, either of operational issues or terms and conditions.

Obviously, I'm not familiar with a great many practical things, that you hear about. For example, lay judges from the metalworking industry. They can tell us about technical matters, work preparation, the jobs; and employer representatives often have knowledge about personnel issues' (G PJ DO 35).

If a case turns on calculating piece rates, I can't do that at all. I need to have this specialist knowledge shown to me by the lay judges in order to understand the calculation and the resulting payment. And there are many... details of workplace practice, that the professional judge doesn't have, and that can be made up for by the lay judges' (G PJ HAL 23).

For example, two or three lay judges have a construction firm. And then there are employees who are foremen or just normal construction workers. They'll have something to add if we have a case, especially if it turns on the employee's behaviour: 'Oh yes, that's really very complicated. Mistakes can easily happen there' (G PJ B 36).

In the view of some professional judges, lay judges also help to raise the legitimacy of the procedure in the eyes of the parties. 'In my opinion, the activity of the law judges is a massive boost to the credibility of the chamber in terms of proposals for a settlement as well as coming to a judgment' (G PJ MA 65). 'I think it promotes acceptance of the judgment by the parties' (G PJ MA 54).

Additional areas noted by professional judges were that lay judges could assess the resolution of case from their own life experience and, in this way, help bring about correct judgments. 'They also add what I would call common sense' (G PJ HAL 19).

On the one hand, something you might expect, namely the aspect of common sense, to say, don't put the cart before the horse, and to ask, what is your gut feeling about what would be a nice result, something we would agree with and which would meet our sense of justice... (G PJ MA 52).

I have the feeling that they bring a capacity for good judgement derived from real life to the cases, and the reality of life.... I find it's a very welcome sense of arriving at a good judgment when the three people bring all that that together and when two of these aren't lawyers. This is a really nice thing. It's a useful corrective' (G PJ B 32).

What do they see as important and fair? Does it fit with the legal solution, as I see it. Sometimes there are discrepancies [between these] and then you need take a closer look' (G PJ HAL 16).

France

As in Germany and Great Britain, the main contribution of the *conseillers* was seen as making available their knowledge of the world of work. This capacity is something that they emphasise as giving them an advantage over the professional judge and a source of legitimacy. This is evident in the hearing in the way in which they question the parties. Because *conseillers* are employees and employers, they are closer to the litigants. Interviewees also noted the quality of their listening.

The benefit we bring, I think, is listening. You have to listen... What I do often during a hearing is that I get the employee to talk, because he needs to be listened to. After all, this is a local court, close to the issues. It's not the Tribunal de Grande Instance (F40-Paris Ee).

This proximity leads to an educative approach to the law. Some of the *conseillers* we interviewed, both employee and employer, emphasised their role of informing and explaining the law to litigants. And when drafting judgments, *conseillers* noted that they try to explain their decision by offering an explanation of the law, while remaining straightforward and accessible.

I write in a certain way ... the important thing is that the litigant can understand the decision that has been made. If I were in the court section for ‘miscellaneous activities’¹²⁹ covering people like janitors, nannies, security guards, etc., things would be drafted perhaps less densely as we would be dealing employees who are much more precarious, with less training and who would it harder. There still has to be a decision but it should be accessible (F33-Nantes-Ee).

This benefit is also evident in tie-break deliberations with the professional *juge départiteur*. As the comment below illustrates, these value this quality in the *conseillers*, which allows them to fine tune their judgment.

These people know the workplace and, given that the dispute arises in the reality of the workplace, they are well placed to provide arguments and perspectives that come from that world - better than a lawyer who’s correct in his field but who is not familiar with workplace life and the concrete problems that can come up at a workplace (F19-Stras-PJ).

For the *conseillers*, this one of their most important contributions in the *conseil de prud’hommes*.

Our experience of working life sometimes leads us to see things a little differently ... The *juges départiteurs* have a different perspective based on their own experience. I’ve had judges who told me quite specifically that they do not know about the workplace or the work environment, don’t have a particular knowledge of employment law, and aren’t familiar with the working environment in the companies that we encounter at the labour court. So they ask us. But it depends on the individuals (F31-Nan-Ee).

Because they are elected as representatives of the world of work, *conseillers* are closer to litigants and more aware of the realities of the company. This practical knowledge of the world of work plays an important role in the assessment of the facts and, consequently, in the application of the law.

13.4 Conclusions

In Germany and France, there was a positive defence of the institution of the labour court as a distinctive judicial forum able to help ensure fair treatment. This was also the case in Great Britain, but qualified in two respects: one, it was linked to expressions of regret and anger about recent changes, especially the level of fees, and the impact of judicialisation; and there seemed occasional hints, albeit rare, of background union scepticism about using the law as a means to defend employee rights.¹³⁰

In France, Great Britain and Germany, there were references to ‘fun’, ‘fascination’, ‘intrinsic pleasure’. Also references to the social confidence they gained as well as confidence in dealing with management, as lay judges were seen as acquiring some power. Opportunities for self-actualisation limited elsewhere – reported in France and hinted at in GB.

On the issue of the main contribution, the dominant response in Germany, in France and Great Britain was that lay judges were able to bring workplace experience to bear, sometimes as specific knowledge, sometimes as ‘common sense’ and judgement, and sometimes, as noted in Germany, as a ‘social’ or ‘human’ perspective.

¹²⁹ See Chapter 4 for an explanation of the various sections into which labour courts are sub-divided.

¹³⁰ One British employee judge and workplace representative had not told his local union branch about his role as he felt that this expressly prioritised collective action and was sceptical about resorting to the courts.

Part IV
CONCLUSIONS

14. RESEARCH CONCLUSIONS

We have divided the conclusions to this study into two parts. This chapter deals with the key research findings from our interviews, together with some theoretical reflections. The following chapter ('Suggestions for improvement – and implications for practice') focuses on what lay (and professional) judges said would improve how they exercised their role, the operation of labour courts, and what would redress some of their criticisms.

Many of the conclusions set out below echo those outlined, often in greater detail, in the preceding analytical and comparative chapters.

14.1 The influence of the route to nomination

One of the central research questions of the study was whether and how the route to nomination influenced lay judges' perceptions of their role – given the three options of election (France), organisational nomination (Germany) or currently self-nomination (Great Britain) in the three countries in the research.

Our conclusion is that the dominant influence on lay judge's reported perception and experience of their role is the prevailing industrial relations system in each country, mediated by the labour court structure and the route to nomination. The industrial relations system covers both macro-level institutional arrangements but also, and crucially for this study, how these are experienced by lay judges as actors within this system. By this we mean that lay judges are likely to have had experience of organised and institutionally stable areas of the three national industrial relations systems in question. These areas might not necessarily reflect conditions in the labour market as a whole, given the observable trend towards greater dualism in all three labour markets. For the most part, those appointed as lay judges whom we interviewed in France and Germany had substantial experience as actors within these respective industrial relations systems and have been selected by nominating organisations precisely because of their experience and engagement. In the case of employee lay judges, this is typically at workplace level. As we note below, lay judges in Britain for the most part have extensive workplace experience, but this was not the case across the board and in some instances their experience had been gathered outside the ambit of organised industrial relations.

This experience of relatively organised industrial relations reflects the fact that nomination to the role of lay judge has been via industrial relations institutions (trade unions or employer associations). At a minimum in France and Germany, potential employee lay judges will be trade union members, given the central role of unions in locating and nominating candidates for the role. And in Germany working at a workplace with a works council (or public sector equivalent) also appears to play a large part in being on a route to nomination, at least in our sample.

The situation is different in Great Britain. In the past, nomination was via an organisation, and long serving lay judges in Britain report this background. Since 1999, such institutional links to industrial relations have become weaker, and this is reflected in the motivations and experiences of some of the more recently appointed lay judges. Of the 41 British employee lay judges, 14 were not currently trade union members, for example.

The three routes to nomination not only reflect national systems but also possibly reinforce them (for example, offering scope to an individual-instrumental perspective in GB, exacerbating inter-

union competition in France, and emphasising the link with codetermination in Germany). Our findings indicate that some lay judges in the three countries report related experiences of this.

One area where there was some discernible link with the route to nomination and appointment was in the sense of organisational allegiance expressed by some employee lay judges. Based on our interviews, this would appear to be strongest in France, where lay judges have been elected on trade union lists and, in the future, will be nominated by them. The training regime in France might influence this: in the past and currently, it is provided for employee lay judges predominantly by trade unions. In the future, it could be provided, as in Britain, by the state.

Lay judges' perception of their role is also influenced by the part that labour courts play within national systems of employment regulation, itself closely linked with the industrial relations arena, and the part that lay judges exercise within this. This a function both of national histories of employment regulation and the current role of labour courts, explored in the national contextual chapters (Chapters 5-7).

In France, the perceptions of the labour court system on the part of lay judges offer some support for thesis advanced by Emmenegger (2014) that fragmented and politicised trade union movements have been less able to achieve employment regulation through collective bargaining and are more inclined to turn to the law to protect employee interests. French employee lay judges report a higher degree of adversarialism within court procedures that, eventually, has to be reconciled with the need to deliver a legally sound judgment that must be agreed with the employer judges in the absence of a professional judge. Compared with lay judges in Germany and Great Britain, deliberations in France were viewed, on occasions, as resembling more a negotiation than a process of deliberative discourse.

In Germany, some lay judges expressly referred to how labour courts stood in relation to the wider constitutional system, which they were keen to uphold. Serving as a lay judge implied a form of civic engagement as well as representing an interest.

In Great Britain, labour courts emerged piecemeal and pragmatically, initially to resolve state v party interests and were then transformed into adjudicative bodies and given jurisdiction over an expanding range of statutes. Our interviewees, especially those who had sat on them since the 1980s, expressed regret at how they had developed from informal and readily accessible bodies to become more formalised, with procedures not dissimilar to the civil courts. In addition, lay judges' role in Britain has undergone a major transformation that has made them exceptional in the three countries studied: they now sit on very few dismissal cases (unless the case essentially involves discrimination) but do sit on long and complex discrimination cases, often extending over many days. As we note elsewhere, while reducing the frequency of sitting, the current British situation creates new opportunities for collegiality, between both lay and professional judges (such as prolonged collective reading of case documents).

There was no identifiable association between these perceptions and personal characteristics, aside from some discernible influence of gender: some women reported certain aspects of their experience differently to men. These are explored below.

Although becoming a lay judge was seen as desirable in all three countries, in general our interviewees did not report on competition or conflict to obtain nomination. In France and Germany, by definition, our interviewees were those who had been successful in obtaining the nomination of

the organisations to which they belonged. The picture was somewhat different in Great Britain, as our interviews included some lay judges who had not been nominated by their organisations (in some cases, as reported by interviewees on gender grounds), but had then applied as individuals when the system changed in 1999.

14.2 Motivations

Our lay judge interviewees reported a range of intertwined motivations – instrumental, normative and some cases personal-emotional. For employee lay judges in all three countries, one strong motive was a marked sense of justice both around workplace issues but also more widely, in some cases nourished by strong family traditions of civil engagement and/or trade union activity. Such an aspiration was also expressed by many employer lay judges, complemented in some instances by the prospect of professional enhancement. This is not intended as a criticism here. As we note further below, self-development could be seen as an aspect of the ‘education function’ of lay activity.

There were some discernible national patterns. In Germany, there was a close functional link with employee representation as a works councillor in our sample, and the most common cited motive for becoming an employee lay judge was to improve knowledge of the law and its application in judicial proceedings in order to transfer this back to the workplace, and in particular to the comparatively highly juridified forms of workplace codetermination through works councils. In France, employee lay judges exhibited a close and organic tie to trade unions, perceived within the French system as the legitimate bearer of employee interests (with elected bodies playing a subordinate role). For some, sitting as a lay judge was one component of a wider career in employee representation and their union. And in Great Britain too, there was often a link to workplace representation, but also evidence of individual-instrumental motivations, more marked with employer lay judges than with employee judges.

Some lay judges in Great Britain also took up the role later in their careers or after stable employment had ended, with lay judge activity seen as part of reconfiguring their professional and civic lives.

The multiplicity of motives reported by interviewees lends some support to Hollstein’s (2015) study of voluntary social engagement. Hollstein rejects a single source of motivation and argues that lay engagement is the outcome of a combination of ‘instrumental’ and ‘normative’ considerations, with the latter understood as a form of social altruism. The interviewees in our study reported a range of motivations, and in many cases also demonstrated classic altruism both in their desire to become lay judges but also in the fairly high levels of civic engagement that they were involved in in other fields. Hollstein’s approach, however, is less directly applicable to that form of voluntary engagement of serving as a lay judge. In particular, instrumental and altruistic motivations fit less well with the concept of *interest representation*, and how this is reflected in motives and perceptions. The motivation to act as a representative of a social collectivity of which one is a member is not reducible to either an ‘instrumental’ standpoint or to ‘altruism’, although there were strands of both in interviewees’ responses. The concept of ‘instrumental’ also has different meanings depending on whether it is understood as ‘rational-purposive’ action or action steered by self-interest. For many interviewees, becoming a lay judge was rational-purposive in that lay judge activity was perceived as useful within their overall personal trajectory (understood also as a form of ‘career’) as an employee

representative. This was based on a prior choice to become a representative that reflected a 'normative' commitment but was not generally couched in individual instrumentalist terms.¹³¹

14.3 Adaptation to the labour court role - impartiality

Being a lay judge was generally not perceived by our lay judge interviewees, in particular here employee lay judges, as a form of interest representation carried into the judicial field. Or rather, for many employee lay judges, especially in France, any sense of being a representative becomes inflected through membership of a court, with its distinct responsibilities and social esteem, and through a commitment to participate in the judicial system. There are no imperative mandates, for example. Interestingly, establishing distance from being an interest representative is expressly required in Great Britain in the 'job description' for being a lay judge issued by the judicial authorities for lay judge recruitment. 'A lay member is performing a judicial role and not representing a particular interest'.

Our interviewees' responses also suggest some national differences in how judicialisation takes place. In France, interest representation seems more overt and persists for longer in labour court proceedings, especially those open to public view. Putting it somewhat schematically, the *dénouement* in deliberations begins with a negotiation and ends with an agreement, but an agreement that needs to be consistent with the law. Socialisation into the role was also reported as emerging from lay judges' peers in the court. 'The newly elected, they are much more oppositionist. Afterwards, they learn to listen to the *conseillers*' (F07-Nant-Ee).

In Germany, employee lay judge interviewees also indicated their desire to ensure that employee interests were protected, but also spoke in abstract terms about the importance of upholding the system and supporting wider constitutional arrangements. In Great Britain, this process of adaptation also generally took place quite swiftly, sometimes after just a few cases.

The speed of adaptation might be more determined by the role that an individual played before becoming a lay judge, such as a trade union official or (full-time) lay workplace representative, than the national setting, as suggested by some of the British interviews.

While acknowledging distinct employer and employee perspectives, there was an aspiration to be impartial in Great Britain and Germany and a commitment both to fairness, above and beyond any partisan considerations. In France, the deliberative process more often resembled a negotiation. In all three countries, the first case heard often represented an 'epiphany for many lay judges. For some judges, this was reported as beginning to be 'less emotional' and 'more objective'. Some interviewees reported that coming to a legal judgment had a different quality to decisions made at work, even those with serious consequences for many people.

Very few employee lay judge interviewees reported that they experienced *enduring* dissonance between their self-perception as an employee representative and their role as a lay judge, although this was noted by several at the outset. Cognitive dissonance theory would suggest that actors will attempt to reduce any such dissonance by placing a high value on their choice (i.e. becoming a lay

¹³¹ This issue has also been addressed in political science considerations of the dichotomy of 'civil society' and 'interest organisations', as noted by De Bièvre (2008: 3): 'In which box of the dichotomy would we have to place trade unions? Are they civil society organisations in the "good" sense? Or are they special interest group organisations...?'

judge) and that changing their cognitions (or perception of the situation) might help in this. In the case of our interviewees, examples of this included the realisation that both employers and employees could be culpable, and some interviewees reserved their most vehement criticism for their 'own' side. Dissonance might also be reduced by adopting a positive view of the institution of the court and courtroom culture and procedures, as expressed by several interviewees.

One way in which some British lay judges expressed their impartiality but retained some continuity between the workplace and the court, rather than separating them, was through emphasising their ability to take 'hard decisions', a capacity developed through acting as a workplace representative (or HR manager in some cases) and reaching compromises under challenging circumstances.

As discussed in the next conclusion, part of the process of adaptation to the court is complying with and ultimately internalising the requirements of legal argumentation.

14.4 What does it mean to be a lay judge?

Labour court hearings represent a set of rule-guided interactions between the actors involved (judges, lawyers, parties). The structures and procedures in each national setting determine the *scope* for how active or passive lay judges are at different stages of court proceedings. These contextual conditions are set by the role of labour courts in the overall system of employment regulation, which also determines which sorts of dispute may be brought to labour courts. For instance, a proportion of public sector employment is excluded in France and Germany; and whereas collective disputes are heard by labour courts in a special procedure in Germany, in Great Britain most collective disputes are adjudicated either by the civil courts or a special arbitration body (the CAC) and in France in the civil courts.

Much of the literature on the role of lay judges in labour courts has concluded that lay judges are generally passive during hearings, sometimes with the implication that this reflects a more general passivity. Our findings suggest, firstly, that this perspective on the hearing needs to be qualified. And secondly, we argue that lay judges play an active part in deliberations, and on occasions their interventions will lead to a different outcome than would have been the case had they not been present.

Lay judge activity in these two aspects of judicial proceedings varies profoundly by country. Notably, lay judges in France exercise a role for which there is no direct comparison in the other two countries: they manage the court, hear cases, determine and write the judgments.

In terms of the lay role in *hearings* in Great Britain and Germany, our findings suggest that lay judges play a useful, at time vital, complementary role to the professional judge in Britain, arguably somewhat less so in Germany. This is due to certain, largely contingent, aspects of the management of hearings in British labour courts that require lay members to take written notes of the proceedings. This creates some scope for an active relationship between the professional and lay judges, some elements of which take place away from the public gaze.

Lay judges play a significant part in *deliberations* in Great Britain and Germany, much of which is not evident to an external observer. These are constrained by the various pressures towards unanimity and, in Britain in particular, how precedent, the requirements of which are typically conveyed by the professional judge, governs the latitude for judicial reasoning. Both lay and professional judges in Britain reported on how the requirement to comply with these constraints occasionally led to a

tension between the dictates of the law and a subjective sense of fairness. In this respect, there are major differences in the 'legal culture' of deliberations between Great Britain and France.

14.5 Knowledge and skills

The effectiveness of lay judge activity in the structured environments of the mixed tribunals of labour courts in Germany and Great Britain is a function of lay judges' knowledge, skills and confidence.

Our interview findings from lay and professional judges indicate that lay judges offer the court distinctive skills and knowledge. Some of this knowledge is explicit and often specific (how shift or pay systems operate, for example). Such knowledge could, on occasions, help 'unlock' a case.

Lay skills and knowledge are often tacit, however, and acquired experientially through long exposure to a range of workplace (but also wider life) events. They were often referred to as 'common sense', especially in Germany, and a capacity to assess evidence in the light of workplace norms. Such knowledge or competence is in principle unavailable to professional judges and was valued by many professional judge interviewees as valuable in decision-making, as adding 'an extra dimension to the decision-making process' to quote one British professional judge. This highlights the capacity to 'read' a workplace situation based on extensive experiential exposure. One British professional judge noted the importance of the capacity to look into 'people's hearts and minds' (GB PJ 8) to draw the appropriate inferences and arrive at a judgment. A German professional judge referred to the value of lay judges' knowledge of workplace practice 'When it's a matter of a gut feeling' (G PJ B 6), for example about the gravity of an event warranting a summary dismissal.

Crucially for the role of lay judges in labour court proceedings, by its nature tacit knowledge is a form of understanding that needs to be elicited in the discursive process of deliberations, rather than evidence provided by an expert witness.

One example of such a skill developed tacitly at the workplace might be termed 'perspective switching', in which a lay judge listens to both sides and is aware of their own partiality. One German employee judge noted: 'Naturally, my everyday working life is the employee standpoint. But it's not difficult to look at things another way because you know this from your own working life, from your own employer. But you have to be able to switch your perspective, yes. And I can do that' (G EE B 53). Some employer lay judges valued the different perspective that employee lay judges bring: 'The other member is able to bring an aspect or an angle which I would not have thought of' (GB-EE-7).

In addition, lay judges needed observational and questioning skills in hearings. These were often developed through workplace and professional activity, but were honed through training, in particular in France and Great Britain. This would appear to correspond with the notion of 'rotation' suggested by Nonaka and Takeuchi (1995), where the fact that lay members operate in overlapping contexts offers opportunities to transfer knowledge between them.

Many lay judges had a high level of practical familiarity with the law, based on workplace representative activity or working as an HR manager, and a number had a formal legal qualification. The possession of *legal knowledge* plays a very different role in France when compared with Great Britain and Germany. While most British and German lay judges generally accepted a division of labour with the professional judge, in which the latter was responsible for the applying the law, in France, lay judges have to apply the law and write judgments without professional judges. The legal aspects of the role were emphasised in interviews, with some lay judges who had a legal

qualification regarding activity as a *conseiller* as an expression of their desire for a legal career. Learning to act as a lay judge in France is therefore associated, for the individuals concerned, with passing through key stages of applying the law in the court, the most significant of which is the first time they draft a judgment, involving a good deal of peer support.

As well as bringing knowledge to the court, lay judges also reported that they were able to enhance their representational and personal-professional skills as a result of activity in the court. In this respect, lay participation might serve an 'education function' (Machura, 2016). For employee lay judges, this took the form of transferring knowledge and experience acquired in court to the workplace (or to their trade union) and also led to enhanced authority and confidence vis-à-vis management. In France, this educative role was also extended by some of the lay judges interviewed to include the parties. *Conseillers* attempted to make the law transparent, to explain aspects during the hearing, and to make judgments as understandable and non-technical as they could, while complying with the law.

14.6 Gender

Women accounted for around half of the British sample of employee lay judges and eight of the 13 employer judges.

There is some evidence from interviews that gender issues played a role both in motivation and in nomination in *Great Britain*. Female interviewees in Britain reported about workplace problems they had personally experienced as contributing to their motivation to become a lay judge. Some also reported that they had felt blocked from being nominated by their organisations (before 1999) and that self-nomination had enabled them to apply direct. On the other hand, both employer and employee lay judges in Britain noted that organisations to which they belonged had provided a route to becoming a lay judge.

In *Germany*, men and women appeared to have different ideas about the nature of their contribution. Whereas men tended to emphasise the specialist knowledge they could bring to bear in deliberations, women highlighted a 'social perspective'.

In *Great Britain*, female lay judges welcomed the fact that there were more female professional judges and one said she found them to be 'more inclusive'.

14.7 Relationships and the role of professional judges

Research into mixed tribunals, such as labour courts in the countries studied, has focused on the nature of the interactions between professional and lay judges. In general, and drawing on status theories and complementary notions of 'informational advantage', this has found that professional judges exercise domination and control.

Our findings offer a more nuanced, if not diametrically opposed, perspective on this.

Firstly, although the hearing was steered and controlled by the professional judge in Germany and Great Britain, as noted in previous research, the situation was different in deliberations, where professional judges were seen generally as providing direction and structure but not dominating the discussion. In France, where the professional judges were only brought in if the lay judges failed to agree, they were dominant.

Secondly, in Germany and Great Britain professional judges had a general informational advantage on matters of law and procedure. This was less marked in France, where professional judges do not study employment law in their training and often sit only occasionally in the labour court. On the issue of the specific case being heard, professional judges had a considerable advantage in Germany by virtue of their having conducted the preceding conciliation hearing and exercising a monopoly over case papers. French professional judges, where called on to settle a tie-break, also had some informational advantage, not so much through access to case papers (which lay judges will have already seen) but in not necessarily disclosing their questioning strategy based on these papers. In Great Britain, professional judges had only a limited informational advantage in terms of the particular case, possibly fostering a more collegial approach during the hearing, reinforced by the practice of lay judges and professional judges reading documentary evidence in camera together.

A minority of *British* employee lay judges whom we interviewed said they were not treated as equals. The majority, however, as with their German counterparts expressed the view that their relationship with professional judges was one of equality and, for many, collegiality based on 'working together collectively' (G EE B 5).

14.8 Legitimacy

What conclusions can be drawn from the empirical findings of this study for the issue of the legitimacy of the role of lay judges in adjudicating employment rights disputes? 'Legitimacy' is both a subjective and normative concept. A legitimate power is one that individuals regard as rightfully exercising authority (Beetham, 2013). For labour courts, legitimacy would imply that such institutions exercise rightful authority in the eyes of the parties, industrial relations actors, and the wider society. It is also relevant, but not decisive, whether actors within a specific sub-system, such as labour courts, also consider their actions to be legitimate. Participants, such as lay judges, are not *solely* 'insiders', but also, by definition, span the boundary between the judicial and non-judicial worlds.

In the Introduction to this study, at the beginning of Part I, we referred to three concepts that might be useful in exploring the legitimacy of the role of lay judges: performance legitimacy, regime legitimacy, and polity legitimacy.

Regime legitimacy and polity legitimacy, which concern the normative validity of an authority, are aspects where the views of those subject to that authority and wider society are the most relevant, but about which the views of the actors are also significant. Our interviewees expressed a number of opinions about the regime legitimacy of their respective systems, and in some instances the – wider – polity legitimacy.

In *Great Britain*, our interviewees felt that there had been two main changes in the 'labour court regime' in recent years. 1) judicialisation, intervention of lawyers, more formality; and more recently 2) the effective removal of lay judges from dismissal cases. The latter, in particular, was a source of almost universal regret and criticism by our interviewees, employee and employer. Many, but not all, of our professional judge interviewees also echoed this to varying degrees. On balance, however, interviewees continued to believe strongly in the need for a distinctive labour jurisdiction and offered suggestions for improvement (see Chapter 15).

In *Germany*, some professional judges interviewed noted that the presence of lay judges was significant for the legitimacy of the court: 'On the one hand, I think it's important for the parties in a

case to get the feeling, via the presence of the lay judges, that someone is there who has some experience drawn from real life. That is, not just a professional judge, who decides everything sitting at their desk, but people active in real life... I think this means that judges are more accepted by the parties concerned' (G PJ MA 54).

'Performance legitimacy' links the validity of an authority with whether this authority can offer procedural justice based on its effectiveness in producing decisions that are accepted as fair because decisions are produced through a system seen to be *competent*.¹³² Our findings suggest that the active involvement of lay judges in deliberations in Britain and Germany, as validated by the assessment of professional judges, contributes to the performance legitimacy of labour courts in these two countries. 'The contribution is substantial, as well as procedural' (GB PJ 5).

In *France*, the effective performance of lay judges in terms of resolving a case at the first merits hearing was something noted by interviewees. *Conseillers* generally tried to avoid a case going to the professional judge and failure to achieve unanimity was seen as a mark of failure. Resort to a tie-break occurred in around one-fifth of cases, which might be viewed as an effective performance given the composition of the court.

¹³² Indicators of this might be the extent to which court decisions are rejected by the parties by being appealed. This is not explored here, but was considered in Corby and Burgess (2014), which concluded that it was virtually impossible to make meaningful cross-national comparisons of appeal rates.

15. SUGGESTIONS FOR IMPROVEMENT – AND IMPLICATIONS FOR PRACTICE

The suggestions for improvement offered by lay judges are grouped by country as they frequently address specific features of national systems.

15.1 Great Britain

The main areas identified by lay judges were:

Selection criteria and panel composition

Some lay judges expressed concern about the method of nomination and selection.

I think now it is open to anyone just to apply and we're getting... general lawyers, we're getting entrepreneurs, people who've got no knowledge of these problems at all... I think that's wrong. I think that there should be more detailed criteria (GB EE 6)

The selection of lay judges was also raised by some professional judges, in particular focusing on how best match of industrial or other experience with the type of case.

If we're going to be using lay members for their industrial experience and we're not allowed to pick them for their particular industry then perhaps one thing that could be done is for them to have some means of sharing their experience of their relevant sectors....Perhaps more rigour in the recruitment process or even in terms of the pool that we have, some kind of rigour in relation to the cases that people are allocated, because it ought to be able to be identified at preliminary stage where there are going to be complex legal arguments. I don't mean that we have two tiers of members, but some way of ensuring that the right members sit on the right cases (GB PJ 1)

One professional judge raised the issue of the specialist nature of cases, and whether it was reasonable for non-specialist lay judges to be aware of the complexities of certain cases.

I think that role of lay members is one which perhaps needs to become a bit more specific. Our jurisdiction has broadened so much since the creation of employment tribunals and I think that specifically expertise in areas might be far more useful, called on less frequently, to actually come and sit perhaps, but having the specific expertise. Typical examples, we get a lot of medical cases where doctors are claiming under the specific complicated contracts that they've got and someone with an experience of that area would be so much more helpful in terms of cutting through what is a huge amount of material to the real nub (GB PJ 10).

At the same time, and echoing the views of many lay judges, this professional judge argued for retaining a decision-making role for lay members.

I think as assessors there is a problem of, if you like, paying lip service to what they do. If they're judges as well you cannot do that. I think if someone's going to be involved they've got to be importantly involved (GB PJ 10)

Training

Many British lay judges wanted more training, but of different sorts. While some wanted better initial training, others argued for shorter but regular training (such as quarterly) for half-a-day; one employee lay judge argued that residential training would be most useful.

There should be more of a longer training period for new members... Because for some people I think it's quite a culture shock coming in, particularly if you represent ... shop floor unions. ... I've known union members from the shop floor, you know, who come in thinking they can operate as they do on the shop floor and they suddenly find a different culture altogether (GB EE 8)

I think we could do with a bit more regular training.... I think it would also be useful if some of the training covered these key EAT type decisions...where there are those important decisions it might

be useful to have some sort of analysis and discussion and maybe be more critical of the tribunal's involvement in that, if there was some sort of criticism of the tribunal, rather than it just being on the point of law, because sometimes they can be quite critical (GB EE 18).

Several lay and professional judges argued for more training in judgecraft, including questioning skills and dealing with issues such as unconscious bias and litigants with mental illness, and more mock cases. One lay judge said that appropriate external organisations should provide the training on discrimination.

Appraisal

Some lay judges argued for formal appraisal, for lay and professional judges. 'I think appraisal is long overdue ... appraisal of lay members and of judges' (GB EE 5). A professional judge also thought lay judges should be supported through a mentoring system: 'It would be very useful to have an ongoing system of mentoring for lay members because sometimes they don't come in for months at a time and they're really rusty' (GB PJ 7).

In part, this desire reflected a need for feedback: 'Nobody has told me that I'm a good lay member, I'm a poor lay member, oh, you're adequate or whatever. ...we're not appraised (GB ER 2).

When you've done a case and you've thought 'ooh, I've not done a case like therefore that's been new', ... it would be nice just to be able to say to somebody, the judge, 'could I just talk to you about this because I need to understand what's the important principle here', so just a bit of reflective feedback and enquiry (GB ER 10)

Fees

There was a virtual universal feeling that fees had had a negative impact, often expressed in strong terms. 'Fees should be abolished!' (GB EE 19). 'Get rid of the fee system, which I think is abhorrent, denying the very people who need justice, basically denying them it' (GE EE 4)

Papers in advance

Several lay judges and one professional judge were in favour of changing the system for access to case papers and reading time.

I believe we should have a reading day before anything happens. I believe they should get the papers and the witness statement and everything else in and then have a reading day. We do it and then we call them in. We're not wasting their time and we're not wasting our time (GB EE 10).

Another commented: 'I think lay members could read in advance you know, then more cases could be done and you know that might be a way of dealing with some small cases' (GB EE 29).

There was awareness of the difficulties involved in making case papers available earlier, but both lay and professional judges felt it would be useful for lay judges to have access to basic documents.

It's not practical to send the papers to a tribunal in advance because [of] the cost involved and the fact that the case might be settled by the time you get in. But it would be helpful to have more time I think in the morning of day one of the case, to go through the papers on one's own and also then with the judge as well (GB ER 7)

There shouldn't be any reason why the judge and his or her members shouldn't be able to electronically see the key papers two or three days before. I don't know of a single member who wouldn't be happy to do that. I don't know of a single member who's not at least sufficiently computer literate to be able to read some documentation that's been sent through. It doesn't have to be the whole bundle, just the really key papers, the ET1, the ET3, the key witness statements, schedule of loss, anything specific (GB ER 13)

One professional judge was also in favour of earlier access to case papers.

I think it's really poor that the members don't get the papers in advance. I know the way the system is structured, it makes it exceptionally difficult because so many cases settle and the poor people in the listing department tear their hair out because they don't know, often, at 3:30 the day before what cases are coming up. But with email and so on, I can't really see why the members can't get at least the ET1 and 3 in advance so that they can read it, 'cause they frequently, well, they always turn up now and they're not even given the pack (GB PJ 7).

Before and In the hearing

One lay judge thought that there might be a role for lay judges earlier in the process and also argued for more scope for discussion before the hearing. 'Yes, I think to be involved in mediation cases and a mediation role, judicial mediation. I think to be involved in that in some shape or form would be very helpful. I think maybe having time to discuss the case before we go in to meet the parties would be really good' (GB EE 22). Echoing some lay judges' views about the erosion of the skill in assessing credibility, one lay judge argued that the system should return to letting 'people read their own statements'. One of the reasons was for procedural fairness: 'We forget that these guys have turned up there because they want to tell their story, they want to be there because they feel aggrieved, they want to turn up and say this is what's happened to me. I want to read my statement. They can't do that anymore. You see it in their faces when they turn up' (GB EE 19)

Deliberations and judgments

One employee lay judge had very clear proposals for changing the way deliberations were conducted, in two respects. Firstly, 'there also has to be some protocol on deliberations' which would require the professional judge to ask both lay judges their views before stating their own, 'because in my experience the other member gets influenced' (GB EE 30).¹³³ Secondly, there should be a consistent approach compensation through the use of a 'single person, an assessor, to whom the tribunal can supply, submit the judgement and a remedy report'.

Reinstate lay judges to dismissal cases

There was a strong and virtually unanimous feeling on the part of lay judges that they should sit on all cases. 'I believe that members are more effective and I believe the system would actually be more effective if we went back to the system that members sit on all the cases' (GB ER 13). 'Reinstating us to hear unfair dismissal cases which the judges now hear alone' (GB ER 8).

More technology

Several lay judges drew attention to what they perceived as the low level of technology and use of IT. 'I wish that the tribunal service would get online better. ...we get box after box of stuff that's all paper based. I mean it's ridiculous' (GB ER 11).

The strangest area I find is the lack of technology and the use of technology within the courts. ... On some cases you can have two or three lever arch files... I've got no problem with that prior to the case because obviously you're directed as to what you should read. But then during the hearing to have three people sat on the panel each with three lever arch files, looking for the same document, and invariably there's never enough room on the benches or the tables in front of you. It would be

¹³³ This issue of the ordering of voting is dealt with by statute in Germany (Sect. 197, Gerichtsverfassungsgesetz). The requires that professional judges should vote in order of seniority, and if two or more judges have the same seniority, by age. Lay judges vote by age, with the youngest voting first. The presiding judge votes last.

ideal just simply to put the document... up on a screen and make reference from there. Everybody would be able to see it (GB EE 7).

An employer lay judge also commented:

Certainly, having the whole thing recorded. I mean it's crackers particularly with all this we really are having a lot of complaints coming in which involves the judges, particularly the regional judges, in a huge amount of work and they've got nothing except notes- some scrappy, some better. A record of what went on so that would be useful (GB ER 6)

15.2 Germany

In Germany, we not only asked lay judges for suggestions for improvement but also conducted two interviews with members of the lay judge committee at the Berlin labour court (see Chapter 6 on Germany), one from the employee and one from the employer side, and asked them about what changes would improve the system from their perspective.

The main areas for improvement identified in Germany were as follows.

Induction and training

Training was the most common area noted both by lay and professional judges in Germany and professional judges.

Specific suggestions were for training to be made available to newly-appointed lay judges to cover labour court procedures, and the rights and duties of lay judges. Further regular training should cover employment law and case law.

I was recently nominated and appointed as a lay judge and then had my first hearing. I didn't know how I should behave, where I should report to, what I was permitted to do, and not permitted to do, what they wanted from me, what was required. Eventually, I asked a colleague who had been giving me a bit of help. But there was nothing from the labour court itself, so that even on my first day I was very uncertain, and also the second time I was called in I was also very uncertain about what they wanted. It would be a good idea to have an introduction before the first sitting (G EE DO 25).

Perhaps some training once a year, because a lot of the substance stays the same. The cases just essentially repeat themselves. There's not a great deal that's radically new, so that you have to deal with fundamentally different things. But so you can be kept up-to-date with the most recent cases. What have the higher courts decided? That wouldn't be bad a thing (G EE HAL 9)

In addition to training, some lay judges also expressed a desire for an opportunity to have a regular (annual) exchange about their experiences, to include the professional judges.

Once a year a meeting of lay judges at their local labour court just to have an exchange. ... it would also be useful if the professional judges attended. Just to have some exchange and get to know each other a bit better, and not just these two to three hours when you're called in for a sitting, and that's often too short. I think both sides would benefit from some intensive exchange (G EE MA 69).

The expert interviews with members of the lay judge committee also corroborated the field research in emphasising a need for more training, but also highlighted the desire for a structured introduction to the post of lay judge for all new appointees before they sit on a case. The expert interviews noted that the provision of such an introduction in Berlin was at the initiative of the lay judges' committee.

Preparation for hearings

The second main area for suggestions for change was more intensive preparation for lay judges in terms of dealing with court proceedings. Some lay judges stated they wanted more information ahead of cases, but preferably in the form of short notes, summarising the main issues of the case.

Only in a few cases did lay judges tell us that they would like to get access to the case files prior to the opening of the hearings.

I would like things to be arranged in a similar way to the *Land* labour court, so that you get perhaps a written synopsis of each case. Because time is sometimes short when we're given some information, especially if the preceding case has been delayed for whatever reason, then there is hardly any time for discussion for the next case and sometimes it all does quickly, very quickly (G EE DO 46).

That you get some basic information when you get the invitation to attend. What is this case about? So you know and can prepare. Just knowing which law to take along (G EE HAL 9).

Lay judges also wanted improvements to the pre-hearing discussion.

It would be enough for me if each [professional judge] was obliged to give a clear and understandable introduction – that some already do – and that [professional judges'] ways of working didn't diverge so much (G EE MA 63)

Around half the professional judges interviewed were opposed to providing a preparation for the sittings using documents at first-instance. A few of the professionals, in contrast, were in favour of improving the preparation of lay judges for each case.

Other suggestions made by lay judges included:

- More frequent sittings: this was confirmed by the expert interviews, where this was considered to be more applicable to employee rather than employer lay judges;
- Participation in conciliation hearings or subsequent hearings on a case;
- Better information about the hearing schedule;
- More scope for exchange between lay judges outside of hearings and, in larger courts, their particular chamber.

Eleven lay judges did not see any need for a change.

There were two mentions by professional judges of a need for improvements in time-off and financial provisions for lay judges

15.3 France

In France, the *conseillers* we interviewed were relatively satisfied with the justice provided by the *conseils de prud'hommes*. They considered that they performed their duties well, as was confirmed by the professional judges we interviewed. Although training is not (currently) mandatory, most *conseillers* attend training events and are eager to be trained, either 'on the job' by a more experienced lay judge or through locally organised training.

Conseillers did, however, express complaints about the lack of resources they are provided with by the authorities: they do not always have a desk and computer in court, have to write judgments at home, and do not always have access to a library with the necessary legal documentation, and must subscribe to journals themselves or rely on their trade union. Above all, they complained that the authorities did not allow them more time to examine case files, and for the hearing, deliberations, and drafting judgments. Although they underlined the fact that their commitment to being a *conseiller* was a form of voluntary engagement, they were critical that the state did not fully recognise the time they spent. In particular, compensation arrangements were an obstacle.

Lay judges expressed concern about the reforms decided in 2016 that are now being implemented. These reforms may significantly alter how the institution of the labour court operates. We asked interviewees about the ongoing reforms. All the *conseillers, both employee and employer*, were reluctant to see the introduction of a professional judge accompanied by assessors (*échevinage* system: see Chapter 5). For them, it is the sign of official distrust of lay judges.

This is a matter of our own specificity and I must say that the way in which the judiciary and legal profession look down on us has contributed greatly to a closing of the ranks. There has been a defensive reflex, a common front, between employers and employees, which is quite human and normal (F31-Nanter-EE).

This threat is not really on the agenda, however. Such a reform would be very costly as it would require a substantial increase in the number of professional judges. As noted above, our interviewees were already unhappy about the lack of resources available. The same applies for *conseiller* training, which is intended to be delivered by the National College for the Judiciary rather than the trade unions and employer association but, as yet, without the resources needed to accommodate the 14,500 lay judges this would affect.

The main change that will occur in France is that *conseillers* will be appointed based on a measure of the representativeness of nominating organisations. Our interviewees seemed resigned to this, as if the system was not going to change much. Certainly, at present, for employee *conseillers*, trade unions currently draw up lists of candidates and these candidates are appointed based on the election results (and the number of resignations). The main concern seems to be ensuring parity between men and women, which must be respected by the court as a whole.

The *conseillers*, therefore, have adopted a very defensive stance towards the institution of the *conseils*, which they consider as being under threat. One consequence is that they offer only very few suggestions for improvement. Many are now tired by the length of their mandate¹³⁴ and are anxious about the prospects for the future of workplace justice in France. Their concern is to preserve what exists, and notably the strong link between the *conseillers* and the following three domains: justice, trade union organization, and the workplace. They wish to defend this balance, which is at the heart of their determination to judge in an equitable manner, in accordance with the law, and with respect for the daily realities of the world of work.

Without wishing to defend a return to the status quo, it should be remembered that the institution of the *conseils de prud'hommes* remains very popular with employees, who see it as a means of restoring balance with employers when act contrary to the law. Will the new reforms call into question the meaning this institution still retains for *conseillers* and for trade unionists? Will the labour law reforms promised by the new President of the Republic Emmanuel Macron effect a further transformation? Without knowing the answers to these questions, it not presently possible to recommend changes in the system of French workplace justice.

¹³⁴ One of the consequences of the reform in the system of nomination for *conseillers*, envisaged since 2014 but not yet implemented because of legal difficulties, is that the current cohort has been in office without a break since 2008.

Practical implications - summary

- Training: in Germany particularly, to include an induction for new appointees and regular refresher training. In England and Wales, the reinstatement of 2 days of training per year as is the practice currently in Scotland. Training on judgecraft, e.g. questioning skills, as well as legal updates.
- More frequent sittings for lay judges: currently the norm is 4-6 days a year in Germany and anywhere between 0 to over 20 in Great Britain. (*Problem - Lay judges find it difficult to take time off for the long cases found in Great Britain.*)
- In Great Britain, earlier access to case papers, perhaps using an upgraded IT system, (*although the problems of introducing this were acknowledged*). In Germany, provision of short notes for guidance ahead of the hearing.
- Lay judge involvement in conciliation/mediation: currently the professional judge in Germany conciliates alone and in Great Britain there is judicial mediation in a minority of cases by a professional judge alone, even though some lay members are trained and experienced mediators.
- A formal mentoring system for new lay judges, mentioned in all three countries.
- Assign some cases to lay judges with known expertise in the issue/area (*Informal arrangements to this effect sometimes found in France.*)
- Reinstate lay judges to unfair dismissal cases in Great Britain.
- Reduce/abolish employment tribunal fees in Great Britain

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