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## **The roles, resources and competencies of employee lay judges**

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

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## 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 Confed- eration of Christian Workers.
CGC	Confederation générale des cadres. General Confed- eration of Managers.
CGT	Confederation générale du travail. General Confederation of Labour.
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)
FO	Force Ouvrière
HMCTS	Her Majesty's Courts & Tribunals Service
IdW	Institut der deutschen Wirtschaft
LCA	German 'Labour Courts Act' (Arbeitsgerichtsgesetz)
Medef	Mouvement des entreprises de France
TUC	Trades Union Congress
U2P/UPA	Union professionnelle des artisans

## 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 essentially by the social partners in Germany, self-nomination in Great Britain and election in France. The primary research consisted of qualitative data collected through interviews, set against contextual information on national institutional arrangements, industrial relations, and court procedures. The key findings are as follows:

- The dominant influence on lay judge's reported perception of their role is their experience of the prevailing industrial relations system in each country, mediated by the labour court structure. Routes to nomination not only reflect national systems but may reinforce them and have a bearing on employee lay judges' sense of organisational allegiance.
- While acknowledging distinct employer and employee perspectives, there was an aspiration to be impartial and a commitment to fairness. This was most unambiguously expressed in Germany and Great Britain. In France, deliberations were sometimes reported as resembling a negotiation between employee and employer lay judges, but one that had to culminate in a legally correct judgment. Very few employee lay judge interviewees reported that they experienced *enduring* dissonance between sitting 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 knowledge. Some of this knowledge is explicit and often specific. Lay knowledge is often tacit, however, and acquired through long exposure to workplace events. Such knowledge was valued by many professional judge interviewees as adding an extra dimension to decision-making and was seen by nearly all our interviewees as the main contribution of lay judges to the judicial process. Crucially tacit knowledge is a form of understanding that needs to be elicited in the process of deliberations, rather than as evidence provided by an expert witness. As well as bringing knowledge to the court, lay judges also reported that they could enhance their representational and personal-professional skills by transferring knowledge and experience acquired in court back to the workplace.
- 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. Some female interviewees in Britain reported that workplace problems they had personally experienced had contributed to their motivation to become a lay judge. In Germany, there were some differences between men and women in their views of 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'.



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# 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 aims to fill a research gap in respect of this important group. France, Germany and Great Britain were chosen for comparison because they exhibit both similarities and differences. In all three countries, individual employment rights disputes are adjudicated in labour courts that include professional and lay judges, and in which lay judges at first-instance are not required to demonstrate legal skills. They differ in that lay judges are nominated by the social partners in Germany, self-nominate in Great Britain and, until recently, have been elected in France. The four main objectives of the project were:

- to ascertain and compare the resources available to lay judges.
- to analyse what factors influence lay judges’ perception of their role.
- to consider the impact of diversity issues. The prime focus in this area will be on gender, for which there are statutory provisions in all three countries
- to detail the skills, competencies and activities of lay judges, and in particular employee lay judges, in labour courts, and hence ascertain their practical contribution to the judicial process.

The research is based on data from interviews conducted with employee lay judges, employer lay judges, and professional judges. The methodology employed and the sampling procedure are set out in the Appendix.

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. However, the issue of legitimacy is a central one and this research does touch on it in various respects.

The plan of the report is as follows:

Chapters 2 and 6 deal with the national context for lay judge activity the three countries. Context is significant not only for comparison but also because it establishes the framework for interactions between lay and professional judges. Chapter 6 offers a comparative analysis of the institutional situation of lay judges in each of the countries and the resources available to them.

Chapter 7 outlines theoretical approaches relevant to the study.

Chapters 8-13 analyse and compare the empirical findings gathered during the fieldwork.

Chapters 14 and 15 draw together the research and practical conclusions from the study.

## 2. Comparative overview

The following three chapters 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 the detailed context of the courtroom and its procedures. The aim is to provide a background against which the analytical chapters can be understood.

Table 2.1 provides an introductory comparative overview of the main institutional differences that characterise lay judges at first instance in the three countries investigated in this study.

*Table 2:1 Institutional differences: lay judges at first instance*

	<b>Germany</b>	<b>Great Britain</b>	<b>France</b>
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 by private sector company, interviews by professional and lay judges and recommendation for appointment to Judicial Appointments Commission	For employee lay judges, election by employees from competing lists or organised by trade unions (employees may also 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

**A note on terminology**

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 used here 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 often use the term ‘*conseillers*’ to identify these, as there is no need in this forum to differentiate lay and professional.

## 3. FRANCE

### 3.1 Industrial relations context

The industrial relations context in France is passing through a period of rapid change, initiated in 2014 with the first 'Loi Macron', and with further reforms in prospect. Some of these changes have directly affected the operation of labour courts. Collective bargaining coverage by industry-level agreements is high at over 90 per cent, albeit often only setting minimum terms, via the extension of agreements to non-signatory employers. This offsets to some extent the low level of trade union density, currently some 11 per cent. In establishments with over 50 employees, union workplace sections co-exist with works committees that are essentially consultative bodies.

The French trade union landscape is highly fragmented. Throughout the first part of the twentieth century the *Confederation Générale du Travail* (CGT), closely aligned with the Communist Party, was the only union of real importance. While the 1930s saw the rise of Christian trade unionism (*Confederation Française des Travailleurs Chrétiens* or CFTC), many of whose members left in 1964 to set up the *Confederation Française Démocratique du Travail* or CFDT, the CGT remained predominant. In 1948, there was a split in the CGT with some of its members leaving to set up *Force Ouvrière* (FO) due to the CGT's closeness to the Communist Party. Although FO is a diverse organisation, it remains strong only in certain occupations. The main union for managers is the *Confederation Générale des Cadres* (CGC): both the CGT and the CFDT have also created managerial unions that compete with the CGC.

The largest and most prominent employers' 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).

### 3.2 The legal context

France has a civil law system. Although there is no strict doctrine of precedent, judgments of superior courts guide the lower courts. Labour courts, the *conseils de prud'hommes*, are one of several specialist civil tribunals. There is not a separate strand of labour jurisdiction from first instance to appeal. Appeals go first to the social division of the Court of Appeal on fact and law and ultimately to the Supreme Court on law only.

Labour courts hear only private sector individual employment rights disputes. Collective disputes are heard by the court of first instance (*tribunal de grande instance*) staffed by professional judges alone. More than 90 per cent of cases heard by labour courts involve contested dismissals. Claims for discrimination are mostly successfully mediated by the *Défenseur des droits*, but may be lodged either with a labour court or progressed through the criminal justice system.

### 3.3 History and reform of French labour courts (1806-2016)

The *conseils de prud'hommes* were created in 1806 to act as a forum to bring employers and workers together to settle disputes without the involvement of professional judges. The core idea was that conflicts originating in the workplace could be settled directly between the parties without intervention by the state. The *conseils* initially consisted exclusively of employers but became bipartite from 1848. The balance shifted to the employers during the Second Empire (1852-1870) but employee representation was subsequently re-established, although not without conflicts over the balance between the two sides. 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 through a system of 'colleges' for both sides became firmly established. This reform also granted the vote in *conseils* elections to women. (Although universal male suffrage was introduced in 1848 for political elections, women did not obtain this right until 1944.) In 1979, there was a major reform of the *conseils*, providing for election every five years using a system of list-based proportional voting based on nominations from trade unions and employer associations. These elections have since played a role in measuring support for individual trade unions. 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.

The rate of abstention in elections has risen in recent years: only some 25 per cent of eligible employees voted in the 2008 elections, adding to pressure for reform. Accordingly, in 2016, a decree replaced election with organisational *nomination*, under which the number of judges nominated by each organisation will depend on their relative strength.

Other recent reforms include the efforts of successive governments to relax dismissal procedures and a law in 2015 strengthening *conseillers'* code of ethics and introducing compulsory training by the official *École nationale de la magistrature*.

### 3.4 Organisation and operation of the *conseils de prud'hommes*

France is unique in this study in that cases are heard by lay judges (*conseillers*) without professional judges: these become involved only if *conseillers* are unable to reach agreement and the case moves to a fresh hearing (*audience de départage*, or 'tie-break') at which a professional judge exercises a casting vote, acting as a *juge départiteur*.

Each of the 210 labour courts is structured into five divisions: industry, commerce, miscellaneous activities, agriculture, and a division for managers (*cadres*). Courts (and each division) are headed by a two-person team of lay judges, a president and vice-president, with positions alternating annually between an employee and an employer. These organise the court's work.

The first step in dealing with a claim is a mandatory conciliation hearing with two lay *conseillers*. This is usually a formal process: in 2013, just 5.5 per cent of cases submitted were resolved through conciliation. If there is no resolution, there is a public hearing with an adjudication panel ('*bureau de jugement*') of four *conseillers*, two employees and two employers. One of the *conseillers* presides. There is also a court clerk (*greffier*), whose role is to assist the president. In recent decades, there has been a significant rise in the level of legal representation, particularly for employers, who seldom attend in person. Employees always attend, although they are also increasingly legally represented.

Sittings last for half a day and several cases will be heard over this period. A case starts with the employee's statement of claim and continues with questions put by the *conseillers* to the parties and/or their legal representatives. It ends with the pleadings by each party's lawyer. The *conseillers* then retire to deliberate. The pattern of this process can vary greatly but often resembles a negotiation with the presiding judge ensuring that outcomes are consistent with the law. If the *conseillers* reach an agreed judgment, this is drafted by the presiding judge, possibly assisted by the *greffier* who will proofread the judgment. *Conseillers* tend not to ask for help and exhibit pride in their ability to write judgments on their own. If no agreement is achieved, which occurs in some 20 per cent of cases, the case will be referred to a 'tie-break' hearing. Professional judges are usually district judges in courts specialising in other areas of law and are, consequently, never experts in labour law.

Judgments are often appealed: over 60 per cent of cases heard by *conseils de prud'hommes* were referred to the Court of Appeal in 2013, compared to 19 per cent for other courts of first instance.

### 3.5 Status and sociology of lay judges

There are 14,500 lay labour court judges. Although lay, *conseillers* are regarded as judges like any others, or almost so: they take an oath, pass judgment 'in the name of the French people' and wear a distinctive token of their status – a medal that must be displayed at a hearing. *Conseillers* do not receive a salary but are compensated, depending on their employment status (see Table 6.3).

Training for employee *conseillers* is one aspect of a longer history of trade union training for union activists. Since the late-nineteenth century, the trade unions have provided legal advice to employees initially in 'labour exchanges' (*Bourses du travail*) and later through local legal advice centres. The main union centres have their own journals and legal departments. There are labour institutes at universities, established with the involvement of academics. Trade union training outside these institutes is managed by union training bodies, which receive finance from the state. Training for *conseillers* is provided within this framework (although this is set to change under a 2016 proposal for joint training by the judicial college. Under the system in force when this study was completed, employees were eligible for six weeks' training during their term of office, some at the start. Both unions and employer associations offer training. Trade union training is seen not merely as passing on legal knowledge but also as imparting the values the union represents.

*Conseillers* come from a variety of social, educational and vocational backgrounds: some general points can be noted from previous research (Michel and Willemez, 2008). There is a very high degree of gender inequality among *conseillers*. Almost 80 per cent are men, with a lower rate of female participation for employers than for employees. Since 2002 it has been mandatory to have equal numbers of men and women on electoral lists at all elections, including the *conseils de prud'hommes*. Although this has reduced gender disparity, it has not eliminated it.

While *conseillers* are formally equal, there are some significant differences. Some 41 per cent of *conseillers* had either a first degree or post-graduate degree, with a significant difference between the two sides (56 per cent of employer *conseillers* but only 27 per cent employees). A few, both on the employer and employee side (in the management section) had degrees in labour law or worked in this area in their 'day job', mainly in human resource management departments. Many *conseillers* are, therefore, self-taught in matters of the law. They also acquire these skills via training and their involvement in hearings, deliberations and drafting judgments.



A second basis for drawing a distinction between *conseillers* is the frequency and intensity of their presence at court. While many attend the institution infrequently, others are there on a daily basis and keep the institution going (for example, by deputising for absent colleagues). These are much more likely to be employee *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.

## 4. Germany

### 4.1 Industrial relations

In the 'classic' pattern of German industrial relations, employee interests are represented through a 'dual' system of elected works council and industry-level collective bargaining. Works councils are entitled to information and consultation and, on some issues, joint decision-making ('codetermination'): they may negotiate on specified issues but may not call a strike. Most works council members are trade union members and often union activists. This cadre of employee appears to constitute the background for many employee lay judges and represents a distinctly German version of the 'career' profile of an employee representative.

One of the most significant recent changes has been the weakening of collective organisations. Three aspects are noteworthy: falling union and employer association density; shrinking collective bargaining coverage; and the declining importance of workplace codetermination. Trade union density is now 21 per cent of the workforce (Anders et al., 2015: 23). The proportion of employees covered by an industry-level or company collective agreement fell from 76 per cent in 1998 to 60 per cent by 2015. There has also been a steady decline in workplaces with a works council.

### 4.2 The court system and the administration of justice

Lay judges sit as decision-makers alongside professional judges in all five branches of the judiciary: civil, family, criminal, administrative, financial, labour and social jurisdictions. They enjoy the same status as professional judges and have statutory protection (they may not be obstructed in exercising their role, are protected against dismissal, and must be given time off as needed).

German labour courts were established in their current form in 1926, during the Weimar Republic (1919-1933). The labour jurisdiction deals with individual and collective legal disputes but excludes 'established civil servants' (*Beamte*). (*Beamte* include civil servants in state administrations at Federal, *Land* and local authority levels, and other areas of public administration. Disputes over their terms and conditions are heard by administrative courts). There are 110 first-instance labour courts (*Arbeitsgerichte*); *Land* labour courts (*Landesarbeitsgerichte*), of which

there are 18, are the second instance and first court of appeal. Both first and second instance are the responsibility of the 16 constituent *Länder*. The Federal Labour Court (*Bundesarbeitsgericht*) is the final court of appeal in this jurisdiction. On occasions, there have been references to the Federal Constitutional Court.

Lay judges, of which there were 24,269 in 2014, sit at all three levels. Each chamber of a first or second instance labour court comprises a chair (professional judge) and two lay judges (employer and employee). In theory, the lay judges can outvote the professional. Lay judges are a minority only at the Federal Labour Court, where three professional judges sit alongside two lay judges.

There are two types of procedure. By far the most common is the 'judgment procedure' (*Urteilsverfahren*), which deals with individual rights disputes between employees and employers (termination, pay). The 'decision procedure' (*Beschlussverfahren*) deals with collective legal disputes (such as codetermination rights). In 2015, there were 374,095 judgment procedures and 12,324 decision procedures (3 per cent of all labour court procedures). The 'judgment procedure' is a civil procedure in which the *parties* must adduce arguments and facts. Aside from efforts to secure a settlement, the court's role is confined to deciding on the matter before it.

### **4.3 Nomination, selection and appointment of lay judges in German labour courts**

Employees and employers may be appointed as lay judges provided they have reached the age of 25, live or work in the administrative district (*Bezirk*) covered by the labour court, and are entitled to vote in Federal elections (that is, are German citizens). One effect of this is to exclude some 7.5 million economically active individuals born overseas from serving as lay judges. Reaching retirement age does not automatically entail loss of office. Should a lay judge lose their status as an employee or employer as a result of retirement, they may continue to sit until their five-year period of office expires. Employer lay judges can continue in office without age limitation provided they continue to be employers and have not been part of the social security system (and therefore not subject to the constraint of reaching 'pensionable age'). Most employer lay judges are senior managers, such as chief executives and HR professionals, who exercise employer responsibilities.

Lay judges are appointed for five years, with scope for renewal. Many hold office for three or four successive periods. Appointment is carried out by the official department assigned this responsibility at *Land* level. The selection process begins with the submission of nominations by eligible organisations, of which there are several dozen in each *Land*. These are trade unions, other independent employee organisations, employer associations, and certain public bodies (as employers) or their associations. The appointing authority needs to establish whether these organisations meet the legal requirements for doing so, which is usually unproblematic for established unions. On occasions, they might be asked to submit membership figures to establish their relative strength. The position is different for new organisations, such as small or occupational unions. In these cases, the authorities will examine their constitutions and their capacity to exercise their role (for trade unions, being able to conduct meaningful collective bargaining).

The law requires that lay judges be ‘drawn from lists of nominations in an appropriate proportion that reflects fair regard for minorities’, meaning here smaller *organisations*, not social minorities. The usual benchmark is the number of members. In quantitative terms, unions affiliated to the main centre, the DGB, account for the largest number of nominations. For the employers, the landscape is dominated by a few large associations. Without a requirement to have regard for ‘minorities’, the right to submit nominations would be the exclusive prerogative of large organisations. Responsibility not only for submitting nominees but de facto for their selection lies with nominating organisations.

There are two main channels through which nominating organisations generate nominations. Either individuals signal their interest to a nominating organisation, of which they are a member, or the organisation approaches potential nominees. Within trade unions, it appears to be more common for the organisation to approach individuals, guided by the salience of their activity within the union and their experience, than for members to put themselves forward. Our expert interviewees also referred to the social prestige attached to the role of lay judge. 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.

Appointment as a lay judge is an administrative act via a letter of appointment. This is usually accompanied by a formal certificate of appointment to underline the importance of the process. Lay judges must take the judicial oath, administered publicly by a professional judge, before sitting.

There is no requirement for lay judges to receive training before sitting. Whether introductory or subsequent training takes place seems to depend on the personal initiative of the president of the labour court or whether there is a sustained tradition of such training. The Labour Courts Act does not regulate the provision of training, although such training is provided to varying levels by the appointing authorities and labour courts, often drawing on the services of professional judges. Continuing training can be organised by the labour courts, for example in the form of half-day events on new case law. Although there is no financial support for this, lay judges can log such events as a sitting day and be compensated. Some trade unions provide training for lay judges who are union members.

Being removed from office for a serious breach of duty is extremely rare. One reason for this might be that individuals interested in exercising the role of lay judge can only do so via nomination from a trade union or employer association. This places at least some, if only symbolic, shared responsibility on these institutions to ensure the reliability of individuals they propose.

## **4.4 The course of a hearing**

The oral hearing at a labour court begins with a conciliation hearing before a professional judge sitting alone, intended to achieve an amicable resolution. Such hearings are normally allotted some 20 minutes, which can be extended in more demanding cases. Witnesses are not invited. The public might be in attendance, in varying numbers; quite often, no one attends aside from those directly involved. Robes are only worn on occasions by legal representatives. By contrast, the judge and the minute taker, if in attendance, will wear black robes. The aim of the conciliation hearing – securing an amicable resolution of the dispute – is reflected in the exercise of judgecraft of various kinds by the professional judge, such as alerting the parties to what the ultimate legal position might be and outlining the risks and opportunities entailed in pursuing the case. If no resolution is possible at conciliation, a date will be fixed to continue the case in a full hearing with the same professional judge and in addition an employer lay judge and an employee lay judge.

Between a third and a quarter of cases go onto a full hearing. Typically, four or five cases are heard in a morning. The procedure is adversarial but there is no cross-examination. Evidence is taken from witnesses by the professional judge who manages the proceedings. Parties may pose questions but only via the professional judge. Lay judges only rare-

ly 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.

During the hearing, the judges will also be alive to any opportunities for an amicable settlement and may occasionally sound out this option. The professional judge is enjoined to do so under the Code of Civil Procedure, with the additional incentive of not having to produce a written judgment.

The judgment is written by the professional judge, who signs it together with the lay judges. It is promulgated through reading out the key points. This should normally take place at the end of the sitting and must be in public. In practice, and following deliberations with the lay judges, the professional judge will read out the judgment in the afternoon of the sitting day, often in an empty courtroom: neither the lay judges nor the parties' legal representatives are usually in attendance by this stage. The parties can ascertain the outcome via the court office.

## 5. Great Britain

### 5.1 The industrial relations and legal context

Great Britain<sup>1</sup> has been categorised as a 'liberal market economy' with little current state support for collective bargaining and employee participation. Some 28 per cent of UK employees had their pay determined by collective agreement in 2015, with a marked gap between the public and private sectors, where collective agreements are overwhelmingly negotiated at company level. Trade union density in 2015 was 22 per cent, again with a gulf between the public and private sectors (55 per cent/14 per cent). Most trade unions are affiliated to the main union centre, the Trades Union Congress (TUC). The TUC has no formal political affiliation, although many larger trade unions directly affiliate to the Labour Party, and there are no rival political union centres. The main employers' organisation, the Confederation of British Industry (CBI), has no role in bargaining, although it lobbies government on employment regulation. There are almost 100 industry-level employer associations. These generally do not engage in collective bargaining.

The British legal system is notable for the role of precedent, the adversarial nature of proceedings, and the cross-examination of witnesses by the opposing party. Most statutory employment rights are only enforceable in labour courts. Nevertheless, the civil courts also have a role in some employment related claims based on contractual rights and a lay body, the Central Arbitration Committee, adjudicates on some collective legal disputes such as trade union recognition claims. Appeals from first instance labour courts go to the Employment Appeal Tribunal on a point of law. Further appeals go to the civil courts.

### 5.2 Origins and composition of British labour courts

Labour courts ('Employment Tribunals') were established in 1964. Their original role was to rule on appeals by employers over official decisions (such as the imposition of training levies). From the 1970s, they began to rule on party versus party disputes when they acquired a new jurisdic-

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<sup>1</sup> Great Britain comprises England, Scotland and Wales. Northern Ireland, which completes the United Kingdom, is excluded here due to some differences in employment law and court structures.

tion, unfair dismissal. Other jurisdictions followed (including maternity and paternity rights, discrimination).

British labour courts were tripartite from the start with a legally qualified chairman and two lay members, an employer and an employee. Beginning in 1994, professional judges have steadily acquired the authority to sit alone on certain cases, most notably, since 2012, unfair dismissal (except when the claim also involves discrimination or whistle blowing). Professional judges may opt to sit with lay judges in certain circumstances even on unfair dismissal cases, principally if the parties say they would prefer a full tribunal or if the case is deemed ‘fact heavy’: this happens rarely. Where lay judges and a professional judge sit together, all have an equal vote. Most decisions are unanimous.

These changes have dramatically reduced the scope for lay judges to sit, a situation exacerbated at the time of our interviews by a large drop in the number of cases following the introduction of hefty fees in 2013: for instance, £1,200 (€1,385) was required for an unfair dismissal hearing. (*Fees were abolished by the Supreme Court in July 2017.*) Moreover, the cases on which lay judges now commonly sit tend to be long, often 5-10 days, and occasions up to 20 or more, for a discrimination case. This has made it difficult for lay judges with full-time jobs to sit. No fresh recruitment of lay judges has occurred since 2009, with 43 per cent of our lay judge interviewees aged 65 or over.

### 5.3 Lay judges

There were 987 lay judges in 2017: 472 employee and 512 employer. They are appointed by the Lord Chancellor for five years, normally renewable until age 70 and must commit to being available for at least 15 days a year.

Up until 1999 appointment was via nomination by employee organisations, principally the TUC, and employer organisations, principally the CBI. In 1999, as part of a wider reform of public appointments, a new system for recruiting lay judges was introduced, based on individual open competition. Applicants were asked to complete an in-depth application form, followed by an interview conducted by a professional judge and two lay judges, and, if successful, recommendation for appointment.

Open competition has resulted in more women becoming lay judges. An evaluation of the 2002 recruitment exercise showed that women accounted for 44 per cent of the 240 lay judges appointed and ethnic minorities 6 per cent (Department of Trade and Industry, 2003). Nevertheless, self-nomination has weakened the principle of tripartism as an ap-



plicant can decide to join either the employee or employer panel. Occasionally the selectors, anxious to fill their quotas, appear to have directed a successful applicant to a panel with a shortfall, irrespective of their background. Our interviews indicated that some of those appointed to the employee panel lacked recent experience not only as trade unionists but also, in some instances, as employees.

Training is financed by the Judicial College, an official body, and is provided by professional judges. Once appointed, lay judges must undertake at least one day of observation of a hearing and deliberations, with three days of 'classroom' training over 18 months. This is frequently exceeded. In terms of continuing training, lay judges in England and Wales must attend a one-day local training session each year (two days in Scotland). Lay judges also receive regular materials to keep them up to date with any statutory changes and case law, paid for by the state.

Lay judges have a right to unpaid time off from work. It is automatically unfair for an employer to dismiss a lay judge for exercising this right. Financial compensation is provided by the Ministry of Justice (see Table 6.3). There is a lay judges' association, the Council of Tribunal Members (COTMA), to which they can, but not must, belong. 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.

## **5.4 Labour court practice and procedure**

A claim may not be submitted unless it has first been taken to the official Advisory, Conciliation and Arbitration Service (Acas) for conciliation. Just 19 per cent of disputes notified to Acas culminated in a claim to a labour court. Acas can continue to conciliate even after a claim has been submitted, with the result that 35 per cent of claims do not progress to a hearing; they are either settled or withdrawn.

Claims are examined by a professional judge to ensure that those with no reasonable prospect of success do not progress. If the professional judge considers there is an arguable case, he or she will set a date for a preliminary hearing, judicial mediation or assessment, or a final hearing. At a final hearing, and assuming the case involves lay judges, the professional judge will usually open proceedings, ask for agreement on the issues to be decided, propose a timetable, and ask the parties or their representatives to identify documents that the court should read. If necessary, the court then adjourns for reading that can vary from an hour or two to a day, depending on the volume of material. Lay and professional judges read together in the same room. After this, the party

opening the case (the claimant in discrimination cases) calls a witness whose written statement will already have been read by the court, enabling immediate cross-examination by the opposing party. After cross-examination, the judges might ask their own questions. At the close, the parties make closing statements, summarising their case and explaining how it complies with the statute and case law.

There is currently no electronic recording of proceedings and professional judges have to take detailed notes. Lay judges also take extensive notes. These can be useful to fill any gaps when the professional judge is asking questions. Moreover, if a party appeals or complains on grounds of bias on the part of the professional judge, lay judges' notes may be required during any investigation.

Lay judges are not matched to cases from the sector or branch they come from and the higher courts have held that they should not be selected to sit because of specialist knowledge they possess as this might lead them to decide based on their own knowledge rather than the evidence. The extent to which lay judges may draw on their workplace experience is further limited as the Court of Appeal has held that in an unfair dismissal case, the court 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 a 'band' of reasonable responses. As a result, the court can find a dismissal unlawful only if 'the employer has acted perversely, arbitrarily or capriciously, or in some other way outside the broad band of discretion left to them' (Collins, 2004: 35). Employers are also granted considerable latitude to determine what amounts to gross misconduct warranting summary dismissal, provided employees have been clearly informed about which offences constitute such misconduct.

All three judges have an equal vote and any minority decision and the reasons for it are included in the judgment. This is a rare occurrence. The Court of Appeal, has noted that 'all efforts' should be made to reach a unanimous decision (*Anglian Home Improvements v Kelly* [2004]).

After deliberations, the professional judge, in consultation with the lay judges, decides whether the judgment should be given orally at the hearing (with the written reasons forwarded to the parties as soon as practicable) or sent to the parties later. The judgment must identify the issues, state the findings of facts, indicate the law and how it has been applied and, if a financial award is made, how it has been calculated. Only the professional judge signs the judgment. In those rare cases where there is a minority decision, this is announced and the professional judge writes both the minority and majority views, always showing the draft to the lay judges, and often also doing so where there is unanimity.

## 6. 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. It reviews their terms of appointment (Table 6.1); training (Table 6.2); financial compensation (Table 6.3); and support (Table 6.4). Table 6.1 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 and all take a judicial oath.
- In Germany and Great Britain, lay judges are asked to dress ‘smartly’ but do not wear gowns (unlike professional judges in France and Germany). French lay judges wear an official medal of 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 (organisational nomination in Germany, self-nomination in Great Britain, and, up to 2008, election in France). 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 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.
- Training in Germany is 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 training together under state auspices at the national magistracy school (l’Ecole Nationale de la Magistrature).

Figure 6.1 (on p. 35) depicts employee lay judges' interactions with institutions and actors. It shows that:

- Employee lay judges in France have a stronger link with their trade union than their counterparts in Germany and Great Britain.
- Employee lay judges in Germany and France have quite a strong link with their workplace, whereas in Great Britain, employee lay judges link with their workplace is often weak.
- Employee lay judges in all three countries *always* sit with employer lay judges. However, French lay judges (unlike their British and German counterparts) only sit infrequently with *professional* judges: that is, where here has been no agreement between the lay judges.

Table 6.1: Terms of appointment of lay judges

		<b>Germany</b>	<b>France</b>	<b>Great Britain</b>
Appointment & withdrawal	Eligibility	Employees/employers 25 years+ living or working in the court district if entitled to vote in Federal elections and not excluded e.g. custodial sentence 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	Appointment by <i>Länder</i> ministries or regional labour courts if authorised by <i>Länder</i> governments on the basis of lists submitted by trade unions, other employee organisations, employer associations and public corporations	<i>Conseillers</i> elected on lists by proportional representation. Employees, job seekers & trainees over 16 may vote for employee <i>conseillers</i> . Employers of enterprises with 4+ employees may vote for employer <i>conseillers</i> . Last election in 2008. In future nomination by organisations. Justice Ministry appoints.	Open competition facilitated by an outsourced company overseen by Judicial Appointments Commission. Interviews conducted by a panel of professional judge & 2 lay judges. Appointed by Lord Chancellor after consultation with organisations representative of employers and employees.
	Term of office	5 years	5 years (in future 4)	5 years
	Renewal	Renewable	Renewable	Renewable

	Removal	<i>Ex post</i> discovery of loss of eligibility. Possibility of removal for gross breach of duty.	For complying with an imperative mandate or breach of required conduct in a hearing. In future, for also breach of duty.	By Lord Chief Justice & Lord Chancellor, or Lord President of the Court of Sessions.
	Retirement provisions	Employee lay judges usually retire at 65½. No age limit for employer lay judges provided they have employees: may request release at 65½.	Retirees may serve: must have worked for at least two years in the field covered by their section or already be a <i>conseiller</i> .	At age 70
As a lay judge	Initiation	Compulsory oath	Medal of office & 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 sit for 1 or ½ a day per month. After hearings, the president writes the judgment.	Varies between 0 and 20+ days per year. Lay judges must be available for 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.	Employer obstruction of a <i>conseiller</i> is a criminal offence. Dismissal requires consent of the Labour Inspectorate.	Dismissal of a lay judge is automatically unfair. Remedy normally financial award, not reinstatement.

Table 6.2: Training

		<b>Germany</b>	<b>France</b>	<b>Great Britain</b>
Initial training	Compulsory training before allowed to sit	No, but some courts, trade unions and employer associations provide training	No, but recommended. Unions may provide training before election, but mostly after (sometimes even after first year of office).	Yes.
	Who delivers	Trade unions, employer associations, courts	Universities (Instituts du travail), lawyers' association and approved trade unions or employer associations. In future, initial joint training to be provided by the state at <i>l'Ecole Nationale de la Magistrature</i> .	Professional Judges
	Who finances	Provider	State	Judicial College
	Time spent	Varies	Varies	Minimum: 1 day of observation & 1 day lecture.
	Content	Varies	Content specified in law. Includes judgecraft, writing judgments, court procedure, 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.	1 day per year in England/Wales; 2 in Scotland

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	Provider	Trade unions, employer associations, or courts	Various (higher education institutions, some trade unions, bodies that train state employees).	Professional judges
	Who finances	Special remuneration if training offered by the court	State supports trade union & employer association training centres. Employer reimbursed by state for employee absence.	Judicial College



Table 6.3: Financial compensation provided by the state to lay judges

	<b>Germany</b>	<b>France</b>	<b>Great Britain</b>
Travelling time	€6 per hour + compensation for income loss. Compensation may be up to €24 an hour from the state unless the employee is entitled to continued payment of wages (usually but not always the case).	<i>Conseillers</i> must indicate travel time as they are absent from work. Journey time is measured at the start of office. <i>Conseillers</i> state at each hearing whether they have travelled from home or work, as entitlement differs.	None
Expenses of travel	Yes	Yes - if travel over 5 km	Standard class rail or 45p per mile for own car.
Reading time before a hearing	None	Compensated on an hourly basis, subject to limits (see note).	None
Time spent conciliating	Lay judges do not participate in conciliation hearings	<u>During working hours</u> : employees receive full pay from employer who is reimbursed by state; employers receive €14.20 per hour.	Lay judges do not participate in conciliation
The court hearing & deliberations afterwards	€6 + income compensation during the whole time of the hearing & deliberations	<u>Outside working hours</u> : employees, job seekers, employers receive €7.10 per hour.	£183.62 (2017) per day (10.00-16.30) £91.81 (10.00-13.00)
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	£91.81 (2017)

Loss of earnings	Compensated by <i>Länder</i> if not paid by the employer.	N/A	N/A
Any other matter		Compensation for attendance – see below	Employer must give reasonable <i>unpaid</i> time off

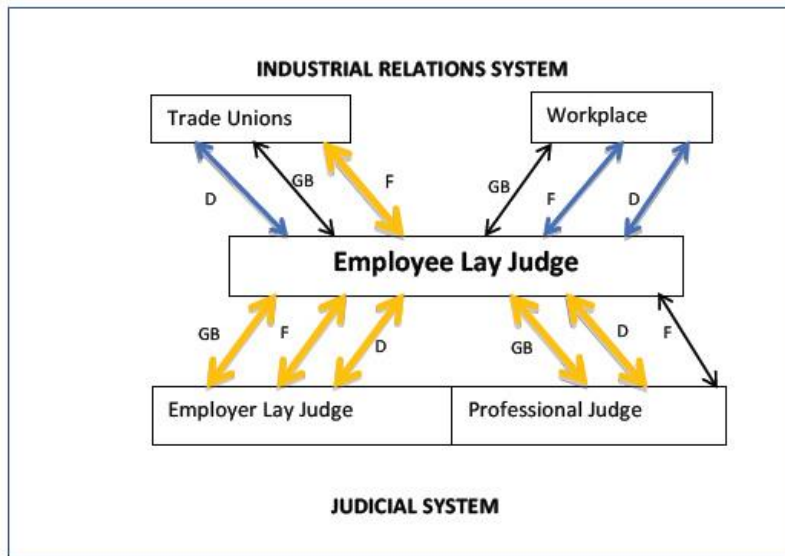
*Note.*




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’ = 30 minutes
- Study time after hearing: conciliation 45 mins; ‘rapid procedure’ = 15 minutes.
- Drafting record of hearing/decisions: conciliation= 30 minutes; judgment 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 *conseillers* attend the general meeting (*assemblée générale*) of their court, 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 court, and the president and vice-president of each section.

Figure 6.1: Employee lay judges' interactions with institutions and actors



**Key:**  
 D = Germany  
 GB = Great Britain  
 F = France  
 Strong link   
 Moderate link   
 Weak link 

## 7. Theoretical approaches

This chapter highlights theoretical approaches that have been used in previous or complementary research and that have informed the present study. We focus here on the following aspects:

- Motivation
- Experience of the judicial role and adjustment to the judicial system.
- Mixed tribunals and issues of dominance and control.
- The contribution of lay judges to the judicial process.

### 7.1 Motivation

Why individuals seek or accept office as a lay *judge* has not been researched directly. Hollstein (2015) drew on standard theories of action to explore why individuals took up lay activity, defined in her research as voluntary work rather than law-making as judges, and focusing on theories of the ‘modernisation of lay office’, in which individuals are motivated to undertake voluntary activity for instrumental rather altruistic reasons. The two theoretical approaches initially considered by Hollstein were:

- Instrumental motivations, including rational choice, aimed at benefiting the individual;
- ‘Normative’ motives, embracing ‘altruism’ and a ‘sense of community’ or civic responsibility.

There would appear to be a difference between instrumental activity intended to benefit the individual directly and purposive activity aimed at acquiring capacities to serve other goals. In the present study, we explored instrumental motivation by asking lay judges about their motives and the benefits they sought for other areas of their lives. We did not explore altruism in the narrow sense, understood as a commitment to the welfare of others, as this did not address the fact that lay judges see themselves as sharing *interests* with those they represent. We did seek to elicit whether lay judges had an abstract sense of justice or were engaged more widely in civic life.

### 7.2 Experience of the judicial role

Labour courts in France, Germany and Great Britain face the issue of how distinctive understandings of the world of work can be brought to bear on a neutral judicial process. Does this pose a problem for lay, and

especially for employee, lay judges? For lay judges themselves, this can present itself in several respects:

- Collision between 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.

There is some evidence from previous research that professional judges noted that lay judges on occasions revealed a partisan affiliation. For example, Höland et al. (2007: 224) asked professional judges in Germany at first and second instance whether they noticed signs of group affiliation in the positions taken 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'. Overall, some 54 per cent of presiding judges registered a discernible affiliation.

This suggests several questions for the present study:

- At what stage in the career of lay judge or the phase of a case is a partisan affiliation and/or distinct perspective acceptable and to be expected?
- How does socialisation/adaptation take place? And how do lay judges report their experiences of this?
- 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?

There are a number of potential approaches to conceptualising and researching this issue.

*Cognitive dissonance* theory argues that individuals are motivated to resolve conflicts of attitudes or perceptions when these are experienced as an unpleasant emotion of 'dissonance'. Brehm (1956) argued that, when forced to choose between two equally valid items, individuals will rate the item they chose more highly to avoid dissonance produced by remorse over their choice. In a labour court context, employee lay judges might experience dissonance because their role as an employee representative conflicts with that of a judge. If so, how is 'consonance' achieved? Festinger (1957) suggested several strategies for reducing dissonance: judicial examples have been added in brackets.

- Change behaviour (always vote for the employee; venerate the court and its rituals; identify with the law as a legitimate power).
- Change cognitions by adding new cognitions as rationalisations ('someone has to do this or it will be run by professional judges') or introducing qualifying cognitions ('some employees behave badly').

Cognitive dissonance theory has been subject to several fundamental criticisms. For instance, the existence of dissonance is *inferred* from the behaviour of test subjects, presupposing that dissonance exists. If no mitigating behaviour is found, the theory implies that dissonance is insufficiently strong, making the claim hard to operationalise, test or refute. 'Self-consistency', developed by Aronson (1992) to address such difficulties, posited that individuals strive for a 'consistent, stable' sense of self (Aronson, 1992: 305). For employee lay judges, 'consistency' might be challenged by a clash between an identity based on defending workers as a representative and that of a lay judge making decisions with employer judges to uphold dismissals. 'Self-consistency' also offers a link between dissonance theory and theories of identity and 'careers'.

Social interactionists (Becker, 1960) construed a 'career' as a series of stages characterised by experiences, learning, institutional memberships and 'labels'. Harré et al. (1985) also proposed the notion of 'moral' (as opposed to practical) careers, comprising 'the stages of acquisition or loss of honour' as individuals navigate the 'hazards' of different social worlds. Within the wider moral career of an individual, the *practical* career as a lay judge is marked by several significant events (appointment, first judgment). Some of these might also constitute stages in an evolving commitment to the role. Lay judges' reports of transitions between stages, such as hearing the first case, might throw some light on how such careers have been shaped. Lay judges' perceptions of their role might also depend on the frequency ('salience') with which they sit and the responsibilities they exercise in the judicial process (Stryker, 2001).

### 7.3 Mixed composition tribunals

Labour courts in Germany, Great Britain and, in some situations, in France represent 'mixed composition tribunals' in which lay and professional judges jointly decide. The main issues for exploration are:

- the reported high degree of unanimity;
- interactions between lay and professional judges in court 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*.
- 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'.

Blankenburg and Schönholz (1979) noted the dominance of the professional judge (and other 'repeat players') over the hearing in German labour courts (ibid. 152). Although lay judges could outvote the presiding judge in deliberations 'their influence in the courtroom is meagre' (ibid. 154). 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. For *Great Britain*, Dickens *et al.* (1985) noted that lay judges tended to be marginalised in employment tribunals as a result of the greater formalisation of proceedings, in particular increased legal representation of the parties.

*Status characteristics theory* contends that group interactions are shaped by status and that 'status characteristics' are anchored in 'status-organising processes' (Wagner and Berger, 1993: 23). Group members' expectations about the standing of other members are based on perceptions of status characteristics, with initial and external status differences shaping expectations about the immediate situation and reinforcing the power of those with high status.

National contexts offer different settings for examining status differences between professional and lay judges. For Willemez (2013: e73), status in French labour courts rests 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 about the operation of the court.

*Social influence theories* look at influencing processes, including mechanisms to secure conformity (see Ross and Nisbett, 2011: 28-46). Pressures to conform might, for instance, explain high rates of unanimity (where two judges agree in deliberations, and the third concludes they 'must be right'). In contrast, good decisions might be promoted by 'institutionalised dissent' in mixed tribunals, especially if two lay judges disagree with the professional. Research by Nemeth (1995, cited in Kaplan *et al.*, 2006) highlights the value of dissent for improving group cognitive performance.

## 7.4 Capacities and contribution of employee lay judges

### Tacit and explicit knowledge

Previous research into lay judges' contribution (Corby and Latreille, 2011; Höland et al, 2007) suggests that one of their prime contributions is the provision of 'workplace experience'. 'Workplace experience' is an unspecific term, denoting an *input* for knowledge rather than an *output*. The fact that this learning takes place mainly at the workplace also underpins the argument for retaining the role of lay judges as it represents a form of privileged access to experience not accessible *in principle* to professional judges. In terms of lay judge competencies, possible theoretical approaches might include:

- tacit knowledge, in which workplace knowledge underpins a competency for understanding workplace disputes and, in some settings, eliciting information from participants at hearings;
- competency also embraces training in law (codified knowledge) and judgecraft (technique);
- lay judges offer multiple perspectives, constituting a potential reservoir of constructive 'institutionalised dissent'.

Lay judges can offer both explicit knowledge and tacit knowledge. *Explicit knowledge* covers knowledge that can be codified or reported verbally to the court ('knowing that'). Lay judges are potential experts in this area in that they are acquainted with a *separate* realm of *facts* (such as technical facts about work processes that a professional judge is unlikely to be familiar with). Lay judges' knowledge of this sort could arguably be obtained through witness statements, but having it 'on tap' through membership of the court might lower the transaction costs of accessing it, especially where what information is relevant might not be specified in advance. However, whether lay judges possess relevant knowledge of a case is both a matter of chance and the labour court structure and/or practice and procedure in each country.

In contrast, the *tacit knowledge* of lay judges ('knowing how') is knowledge acquired experientially mainly at the workplace, including exposure to less tangible aspects, in particular norms and values. This type of knowledge has a special character since it cannot readily be made accessible 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. One means of accessing it is using lay people as decision-makers, as judges.



The concept of tacit knowledge is customarily held to have originated with Polanyi (1966: 4) who viewed it not as a specific category of knowledge but as underpinning *all* valid forms of knowledge, arguing that rules of method cannot be fully articulated. Problems with Polanyi's approach led to efforts to operationalise tacit knowledge for practical organisational use in 'knowledge management' (Nonaka and Takeuchi, 1995). 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). Some 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 judges in deliberations.

### **The 'education function'**

Machura (2016) noted that lay participation has an 'education function' both directly and in the form of a 'multiplication function' for those exposed to their lay judges' influence. Looked at in 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.

## 8. Entering the court and initial experiences

*Note:*

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

### 8.1 Motivation

Interviewees reported a range of motives for becoming a lay judge.

#### **‘Sense of justice’**

‘Justice’ and ‘fairness’ were cited as motivating the decision to become lay judges in all three countries, sometimes as part of a wider ‘moral career’, expressed in terms of ‘civic’ engagement, union/class affiliation, or both. Several interviewees in Germany and Great Britain reported family traditions of commitment to social justice and, for employees, a family background in trade unionism. In some cases, ethnic or gender discrimination had a direct effect. One British lay judge of Caribbean origin, said: ‘I applied because I had a long experience in seeing discrimination take place in the workplace’ (GB EE 22). One British female interviewee who had been denied a permanent post because she was married said: ‘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. Most union nominees and many employee-side self-nominees in *Great Britain* were motivated by the expectation that becoming a lay judge would help them better represent their members. This link was at its clearest for union activists; a British lay judge said: ‘It was part of my life: I was a trade union activist. I like fighting for people’ (GB EE 9). Similarly, a German lay judge said: ‘My motivation actually grew out of activity as a trade unionist’ (G EE B 43).

#### **Building knowledge and expertise**

Developing knowledge and expertise served as an instrumental motive for many interviewees in all three countries, in some cases joined with the motivation to be a more effective representative.

One *British* employee lay judge noted: 'It would help me to develop myself but also be better able to assist our members' (GB EE 18). An employer lay judge noted: 'I saw it as being very useful for my career' (GB ER 10). In *Germany*, the most frequently cited motive was to acquire knowledge to be a more effective employee representative through developing legal expertise. 'There can't be a better school. The chance to sit with a professional full-time judge' (G EE MA 66). Some French *conseillers* wanted legal expertise to enable them to become a reference point specifically on legal matters in their union, with this aspect having a more marked emphasis in France.

### **Civic commitment**

'I thought I had something to offer' was frequently noted by interviewees in Britain and Germany. In some instances, this was a reflection on their acquired skills or an insight due to an individual characteristic (ethnicity, disability). 'The tribunal just brought all my background together' (GB ER 13). Social engagement also played a major role in Germany, where interviewees highlighted *responsibility*. 'I like taking on responsibility... and I hope that I do this well' (G EE HAL 9).

### **Personal fulfilment and interest in the law**

Some interviewees in all three countries expressed interest and pleasure in engaging with the law. In this respect, being a judicial actor engaged both the intellect and emotions of many interviewees. 'I thought it would be very interesting, and it is very interesting; ... I still find it fascinating' (GB EE 9).

An interest in the law was also a motive for some German interviewees: 'This a very fascinating field' (G ER DO 28). Some interviewees reported 'curiosity' and that being a lay judge was an 'intriguing' [or 'exciting'] task.

### **Financial reasons – and life changes**

As shown in Table 6.3, the form of remuneration for lay judges in Great Britain differs from that of their counterparts in France and Germany, and generally exceeds it. Nevertheless, nearly all the British interviewees said that *they* were not motivated by money, although some added that their colleagues might be. In *France*, *conseillers* expressly noted that the compensation system did not represent an incentive.

For some self-nominated lay judges in *Britain*, becoming a lay judge appears to have followed from major life changes, such as redundancy. One such employer lay judge noted that sitting on a very long case: '...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 could offer a 'way out' for employees who might have been marginalised at the workplace (such as after maternity leave) or who had had difficulty in regaining their position after significant involvement in trade union activity.

## 8.2 Nomination and selection

Up to the present, lay judges in France have been elected following nomination by trade unions and employer associations. As a rule, therefore, trade unions and their officials are actively engaged in looking for employee lay judge candidates with the 'right profile', such as a commitment to union activity and familiarity with the law. For employers, the decision to stand for election usually depends on being approached, possibly by managers who may ask HRM staff to extend their scope by engaging with employment law issues as a *conseillers*.

In *Germany*, one of the most common characteristics of employee lay judges in our sample was that they had experience as members of works councils (or staff councils in the public sector).

'I was then elected to the works council ... became chair of the works council and since August 2002 I've had full time-off for this role, been re-elected several times (G EE MA 67).'

In *Great Britain*, there is a distinction between lay judges nominated by organisations before 1999 and those who applied independently after this. Those nominated by unions reported high levels of union engagement; although some self-nominees were also active union members, others were not. In some unions, nomination seems not to have been formalised and was often based on personal recommendation; this was seen negatively by some self-nominees. 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'. One feature in Great Britain is the weaker sense of organisational or social affiliation compared to Germany and France, especially on the part of some self-nominated lay judges, some of whom applied as socially engaged citizens rather than as employers or employees.

Organisational nomination in Germany and France remains a 'black box' in many respects. British experience suggests that such systems can exclude some social groups. On the other hand, delegating 'quality assurance' to nominating bodies can reinforce the tie between nominee and organisation.

### 8.3 Entering the role – initial experience and socialisation

Lay judges in *France* receive training from the trade unions, but not necessarily before they begin office, which they assume at an official ceremony. Lay judges also wear a medal of office in proceedings. Learning is mainly experiential and ‘on the job’, with experienced lay judges mentoring newcomers. France is unique in that conciliation and adjudication are led by lay judges who write the judgment. The first time these tasks are performed represents an important stage in *conseillers*’ experience.

‘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 (F EE 11).’

In *Germany*, there is no mandatory training or induction for new lay judges and socialisation is experiential. Several lay judges were critical of this. ‘I found myself really in at the deep end’ (G EE B 3). One employee lay judge noted that being a works councillor offered some preparation: ‘I’ve not had any training... aside from training I’ve been to over the years on the works council’ (G EE B 39).

In *Great Britain*, mandatory training was an important part of induction. A few lay judges noted that initial training had played a part in their socialisation into the judicial role. ‘We were advised to behave in a particular way’; ‘to be careful how you dress and, you know, the formality’ (GB EE 24/40). The judicial oath marked a rite of passage: ‘You’ve taken the oath, you’re a member of the judiciary (GB EE 9). 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... It was a bit of a culture shock to start with’ (GB EE 8). Familiarisation appears to have quite rapid for most British lay judges:

‘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 (GB EE 31).’

Several interviewees reflected on the gravity of the role. An employer lay judge, in a senior professional role, noted: ‘When you come out of the back door the first couple of times, you think, “woah”. ... power’s the wrong word – authority – responsibility: responsibility, that’s a better word for what I mean’ (GB ER 1).

## 9. Knowledge, skills and training

### 9.1 Tacit knowledge: workplace knowledge and ‘common sense’

In all three countries, lay judges highlighted their context specific *workplace knowledge*, including knowledge of work organisation and individual behaviour at work. This had been obtained experientially and was applied in the decision-making process in deliberations.

In *Germany* an employee lay judge noted that the issue was ‘to sensitise the [professional] judge to how things really look in the world outside’ (G EE MA 58). A German professional judge commented on the importance of lay judges’ workplace knowledge: ‘my experiences of working life are limited and I 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 applying workplace experience. One British professional judge noted that such knowledge ‘can add an extra dimension to the decision-making process’ (GB PJ 5).

In *France*, *conseillers* acknowledged that they drew on their workplace experience when deciding:

‘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... they’re not necessarily going to get a warning (F EE 03).’

Some German lay judges emphasised ‘*common sense*’, understood as the everyday reason of lay people that can counterbalance a legal view.

‘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).’

### 9.2 Skills

The skills noted in all three countries were listening, observation, questioning and note-taking. These were mostly obtained experientially but were reinforced by training in Great Britain and France.

On 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’ (G EE HAL 9). German lay judges also referred to ‘sympathetic listening’. ‘One also needs empathy, I think. Understanding for people who aren’t able to express themselves well’ (G

EE B 53). Several *British* employee lay judges said that they listened empathetically, but recognised that this did not sit always easily with being a judge: ‘I can empathise, [but]... I need to be dispassionate’ (GB EE 30). One British lay judge listened carefully ‘to spot inconsistencies’ (GB EE 35).

In *France* listening is particularly important for the *conseiller* acting as the president of the hearing. ‘We need to listen carefully to the claimant *and* the respondent to understand what happened, why they reached this point of conflict... you have to “listen well”’ (F ER 18).

British lay judges also referred to observational skills. All the British professional judges interviewed said they valued the lay judges being an additional pair of eyes, observing the conduct of witnesses and the dynamics of the hearing (see chapter 10 for more details).

In all three countries, lay judges mentioned questioning skills. This was particularly important in *France* for the *conseiller* who presides in the hearing and asks most questions, including challenging legal representatives. ‘A plea is good, but in the end you have to ask questions’ (F EE 21).

In *Great Britain*, there is cross-examination, with most questions asked by the opposing party. While both the professional judge and the lay judges ask questions on specific points, none of the British professional judges interviewed mentioned lay judges’ questioning as a valuable skill.

In *Germany*, the professional judge 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 [professional] judge a sign; we can have a short discussion’ (G EE DO 27). German lay judges rarely raise questions during the hearing.

A further skill mentioned was note taking. In *France*, notes are taken by the presiding *conseiller*, possibly supplemented by the court clerk or other *conseillers*. In *Germany*, the professional judge sums up periodically by dictating to an audio-recorder; lay judges do not take notes. In *Great Britain*, in the absence of audio-recording, lay judges can supplement the professional judge’s notes (see too Chapter 11). There was no formal training for this, and lay judges used their own methods.

Writing judgments is not required of lay judges in *Germany* or *Great Britain*. In marked contrast, in the French labour court, lay judges are required to develop this skill as writing judgments is a lay judge responsibility, and specifically the *conseiller* chairing the hearing.

French lay judges 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 ensure that the judgment is legally correct. They also want to ensure that claimants can understand the court's decision, so they try to write it in ordinary, rather than legal, language.

### 9.3 Legal knowledge

All lay judges interviewed agreed that judgments had to be in line with the law and that 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*, legal knowledge is vital as lay judges sit without a professional judge. They obtain this through training, self-study and experientially. 'I learned to read the law... Being involved in the labour court means respecting employment law of which *we are the judges in the full sense of the term*' [*our emphasis*] (F EE 10). In *France*, many employee judges gain legal knowledge as employee representatives or through running the local union legal service. French employer lay judges acquire legal knowledge mainly as a result of their professional activity in HRM or as a corporate lawyer. Some French employer lay judges also attended training provided by their employer association. 'Yes, [I pursue training] organised by Medef for employers. And it exists similarly for employees, organised by unions.... I would say that all *conseillers* have been well trained' (F ER 32).

In *Germany* and *Great Britain*, applying the law is the responsibility of the professional judge. Nevertheless, both British and German lay judges considered that knowledge of the law was important as it enabled them to debate more confidently with the professional judge.

In Great Britain, five employee lay judges in our sample of 41 had a formal legal qualification. In Germany, five lay judges had a formal legal qualification.

### 9.4 Training

*British* lay judges must undergo training before they can sit and can only continue if they attend annual training. Sitting in on deliberations during induction was the most helpful part, according to lay judge interviewees. While some lay judges questioned the usefulness of the annual training and/or criticised the form of delivery, others said they found this more relevant than before, especially the reduced emphasis on law and greater focus on judgecraft (such as questioning skills and dealing with bias).



In *Germany*, the decentralised system of court organisation means that lay judges have very diverse experiences, with exposure to training ranging from nothing to some annual training in employment law developments, depending on practice at local courts. Some trade unions provide training for lay judge members. The union nomination system was thought to provide some degree of 'quality control'.

'I think the trade union is very careful when it nominates someone as a lay judge... They should be experienced works councillors with experience of a number of labour court cases and attendance at several employment law training sessions (G EE B 34).'

In *France*, *conseillers* had initial training from their organisation.

'There have been training sessions on how the labour court functions, the organisation, the conciliation hearing, ... the merits hearing, and then after that deliberations, etc. (F EE 05).'

*Conseillers* are entitled to one week's training each year during their five-year term of office. For employee lay judges, training is currently provided primarily by trade unions, especially members of the CFDT and the CGT, both of which have their own training facilities. Sessions last two or three days and deal with court procedure or a specific topic, perhaps linked to current events.

'Of course, there's training, a theoretical part, a practical part, and we do the practical cases, we deal with real cases and judgments. We'll work on them, write them up, make our decision (F EE 03).'

Such training events are both trade union training and legal training: that is law is seen from and rooted in a union perspective, accentuating the partisan nature of the lay judge role.

'One of the first training sessions was with a union activist and it was trade union tinted. But we also have training with a lawyer. It is not trade union tinted; it is the law (F EE 22).'

*Conseillers* also acquire legal knowledge through their own activity.

'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 (F EE 05).'

As with employee *conseillers*, those from the employer side mainly reported that they undertook the training provided by their organisations and legal professionals.

The partisan aspect of lay judge training in France is soon to be altered. Under the 2015 labour market reform, all *conseillers* will receive initial and continuing training at the National College for the Judiciary (ENM). This was criticised by employee *conseillers*, who said they were opposed to joint training with employers, except on the general rules of labour court procedure.

‘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 (F EE 23).’

## 10. Lay judge activity: preparation, the hearing, and deliberations

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, which varies by country, is determined by contingent aspects, such as the choice of means for recording or noting proceedings.

### 10.1 Activity before the hearing

#### **Case papers before and at the start of the hearing day**

Lay judges in *Germany* did not see case papers before the hearing day, although they are entitled to do so. Lay and professional judges said the main reason for this was the additional time needed for reading. Some professional judges also thought that reading papers would require legal knowledge for which training was needed. Nonetheless, some lay judges wanted to see papers and some professionals felt it would be helpful if lay judges were more familiar with case materials. Lay judges generally get access to papers on the hearing day before or during the pre-hearing discussion.

In *Britain*, 'case papers' normally refer to the documents registering a claim and the response plus any case management correspondence and orders. In addition, the parties produce extensive documentary evidence, known as 'bundles'. Normally only the claim and response documents are available to lay judges before a hearing. In *Great Britain*, there were mixed feeling about whether case papers should be sent out *before* the hearing day as cases are often withdrawn at short notice. If 'bundles' of evidence are voluminous, there will be a unique arrangement for reading them in which lay and professional judges read in the same room once it has been decided which documents are relevant. This reading together is encouraged by the judicial authorities and welcomed by most interviewees who found it fostered collegiality.

In *France*, preparation by *conseillers* before a hearing is minimal. The presiding judge will check case papers in advance, both to manage the hearing but also for procedural reasons, such as to see if there have been any postponements and the parties hand over documents at the hearing, which go in the file for examination in deliberations. This means that hearings are short, often just 15 minutes.

### **Pre-hearing discussion**

In Germany and Great Britain, there was typically a short meeting between lay judges and the professional judge. In *Germany*, professional judges, who will be familiar with the case from the conciliation hearing, organise the discussions. Lay judges valued this and most felt adequately prepared. In both Germany and Britain, professional judges sometimes used the pre-hearing discussion to communicate the prospective direction of the case. Although there might not be prior agreement on a legal solution, some mutual understanding at an early stage was seen as helpful in Germany as terms for an agreed settlement might be suggested during proceedings.

In *France*, there is no professional judge at the first merits hearing. The lay presiding judge is more active 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, where a professional judge has the casting vote. The professional judge will have consulted the file and the lay judges will also be familiar with the case as they will already have heard it. There are sometimes discussions between the judges before the hearing, but this is far from routine.

## **10.2 In the hearing**

Our findings suggest that lay judges play a subtly active and often indispensable part in hearings. Although in both *Germany* and *Great Britain*, the hearing is chaired by the professional judge, acting in line with procedural requirements, there are several points at which lay judges can and do make interventions often out of public view. In *France*, the (lay) president of the court plays the central role in managing the hearing and ensures it is properly run in conjunction with the clerk of the court.

### **Note-taking and observation**

In *France*, the members of the court, especially the president, will take notes for reference during deliberations, although these do not seem voluminous. Note-taking in France is limited as a record of proceedings but central for guiding the judges in deliberations and writing the judgment.

One notable feature of lay judge activity in *Britain* is *systematic* note-taking, occasioned, in part, by the lack of recording technology and the professional judge being required to make a note of proceedings. All lay judges reported taking notes. '[Professional judges] say that they rely on us, especially when they're asking questions' [and so cannot easily take

a note simultaneously] (GB EE 6). Lay judges' notes can be decisive in the event of a complaint of bias, endowing lay judges with some latent power. 'We often say to the judges "Oh you're lucky to have us"' (GB EE 38). Lay and professional judges frequently referred to lay judges' role in observing events in court. 'Quite a lot of them [professional judges] say, "Oh, you're my eyes and ears," because they're writing' (GB EE 26).

In *Germany*, there was little or no note-taking. Professional judges used handheld devices to record key moments. Nonetheless, there were references to the influence of lay judges' perceptions of those attending the hearing. A professional judge said: '[I] often ask them to look at how the parties are reacting during the hearing, ...what's the chemistry like between the parties' (G PJ HAL 19).

### **Questions during the hearing**

Lay judges in *Great Britain* reported that they felt free to ask questions without having to clear these with the professional judge. There was also sometimes 'off stage' cooperation between professional and lay 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"' (GB EE 39).

In *Germany*, lay judges rarely put questions, but were aware of their right to do so. One barrier noted was that only the parties may adduce facts. 'We may not add facts ourselves' (G ER DO 41).

In *France*, questioning is central to the process. Through questioning, in particular the employee *conseillers* can exercise their role as representatives, typically by asking about the workplace context. '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?' (F EE 13).

### **'Interim deliberations' and adjournments**

In *Great Britain*, 'interim deliberations', at which the professional and lay judges review the course of the hearing, were reported as common in long cases. Several lay judges commented on signalling to the professional judge for an adjournment, possibly prompted by the professional judge's behaviour or an event in the court. '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).

In *Germany*, 'interim deliberations' take place if there is a desire for clarification or to explore the scope for a settlement: 'it's an enormous help that the lay judges can offer their opinion or even suggest a sum' (G PJ MA 52). A professional judge noted: 'It can be a positive thing if an

employee representative from the lay judges intervenes. This can help break down barriers' (G PJ DO 35).

In *France*, *conseillers* will on occasions challenge legal representatives: lay judges need to show that they know the law, but, as *lay* judges, their main legitimacy does not lie in this. As a consequence, it is important for them not to be intimidated by lawyers. 'Some judges, like some lawyers, don't think we're legitimate' (F EE 03).

## 10.3 Deliberations and decision making

We divide this phase into a number of sub-sections, covering the basic elements of deliberations: how they start, the course of discussions, making the decision, and the judgment.

### **Deliberations – starting and developing the discussion**

In *Great Britain*, it was common for the professional judge to begin by asking lay judges for their views. 'I want to make sure that there's a dialogue going. The contribution is substantial, as well as procedural' (GB PJ 5). Professional judges noted the role of lay judges in deliberations. '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 [lay] member, I'm not sure I would have done that (GB PJ 10).

In *Germany*, both lay and professional judges described deliberations as a process of collective discovery. Professional judges drew on lay judges' workplace experience on dismissal cases. 'I'd ask the lay judge "Is that grounds for a summary dismissal?"' (G PJ B 8). Agreement between the lay judges was viewed as an indication that the decision was correct. One professional judge termed it 'a kind of sanity check' (G PJ MA 52) making the professional 'much more confident in the solution' (G PJ HAL 16).

In Germany and Great Britain there was recognition of professional judges' primacy on matters of law, but this was not unqualified. One British lay judge said: '...we're entitled to argue the point' (GB EE 38). This division of labour also takes place against the background of the stringent limitations on judicial reasoning in unfair dismissal cases in Britain inscribed in case law. This can be a source of tension. '[Lay judges] think of unfairness in a rather more generalised sense. ... I think the law is quite clear ... and that's what you have to apply. And sometimes it's with a clenched jaw' (GB PJ 10).

In *France*, deliberations represent a further moment where the differing roles of lay judges – as representatives and judges – become inter-

twined, and different aspects of their legitimacy are highlighted. While organisational legitimacy (trade union or employer) might take primacy in the hearing, legal legitimacy becomes crucial in deliberations, as reflected in the judgment.

### **Negotiation and differences in deliberations**

Most lay judges in Germany and Great Britain were willing to disagree in deliberations, with confidence growing with experience. Willingness to disagree seemed to vary: 'some lay members... agree with a [professional] judge as a matter of course' (GB EE 33). Others were more robust when in the minority: 'I don't say I've always won, but I've always made sure I had my say' (GB EE 9).

In *France*, deliberations can resemble a negotiation. 'Even in deliberations, there is an employee camp and an employer camp. Afterwards, as it evolves, we find solutions based on agreement' (F EE 13). This might include give-and-take in how the judgment is formulated, provided it complies with the law. Aside from a concern to avoid appeals, there is also a perceived need to uphold the institution of the *conseils de prud'hommes* through demonstrating its capacity to deliver judgments.

### **Unanimity and majority decisions**

In *Germany* and *Great Britain*, there is a very high proportion of unanimous decisions.

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. Being in the minority often led them to abandon their objections, in line with the expectations of social influence theories. It was rare for professional judges to be outvoted by lay judges. Some professional judges said it never happened, others rarely or just a few times. While reports of this were generally phlegmatic, this was not always the case. One said: 'I felt very uncomfortable because I was recording the majority's view, which was totally against mine' (GB PJ 7).

Lay judges in *Germany* also felt that divergent opinions had a hearing. Some noted that unanimity lay in how deliberations were run. 'It's the [professional] judge who has the decisive opinion and can then bring about agreement between us all' (G ER B 7). This might change if a lay judge offered a specialist view that changed the direction of the discussion or if both employee and employer lay judges disagreed with the professional: 'After a long discussion, we managed to persuade him' (G EE DO 27).

In *France*, the key issue was to secure a consensus between the two sides in deliberations. Once three judges were in agreement, the fourth

tended to concur: recourse to a professional judge at a tie-break hearing is seen as a failure and often characterised as an exceptional event.

### **Writing the judgment**

Judgments in *Great Britain* are written by the professional judge with the involvement of the lay judges, although the latter are not required to sign the judgment and may not see a written draft, unless there is a split decision.

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' (G PJ HAL 16).

In *France*, the presiding lay judge drafts the judgment, emphasising that 'good judgment writing requires good deliberations' (F EE 11). *Conseillers* feel entrusted with a mission to make the law accessible: 'It has to be justified, but it's also got to be readable and understandable' (F EE 23).



## 11. Relationships between judges

### 11.1 Relations between employer and employee lay judges

#### Is the relationship conflictual?

In *Germany* and *Great Britain*, relationships between employee and employer lay judges were reported as largely consensual and often cordial. In *France*, the extent to which relations between employee and employer lay judges were conflictual depended on several factors: however, all *conseillers* interviewed said that relationships generally became less adversarial as time went on.

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. ‘To be frank, there are hardly any differences of opinion with most employee lay judges’ (G ER B 7). Employer lay judges confirmed that there was frequently agreement. ‘I see more things in common than divide us’ (G ER DO 41). This same individual qualified this, however. Although he did not represent the interests of the employer *respondent* ‘of course, I represent the interests of employers’.

British employee lay judges had similar views to their German counterparts. ‘[I thought] “Oh well, it’s going to be adversarial”. But it isn’t, it’s very collegiate’ (GB EE 20). A further interviewee said: ‘If you could be a fly on the wall... 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). British employer lay judges generally echoed this. One (GB ER 8) recounted how she had sat on a case ‘with the guy that I negotiated with... and we had the most horrendous set-to, but [in the court] it was totally different’.

In *France*, on the one hand, *conseillers* said that the relationship was not characterised by conflict. On the other hand, some recounted episodes, but these took place elsewhere - not in their chamber. ‘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’ (F EE 07). Employee lay judges initially often opposed their counterparts on the other ‘side’ as a matter of course but once established, but this did not usually persist. ‘People have a need to assert themselves at the beginning ... but invariably, this abates quite quickly’ (F EE 16). Employer *conseillers* interviewed did not report conflicts, either at the start of or during their term of office.

In *Great Britain*, there were opportunities for social contacts that could mitigate possible discord in deliberations. Lay judges jointly attended the annual training day, had a joint meeting room at labour courts, and found themselves sitting on long cases over many days. The Employment Tribunal Members' Association also brings employee and employer lay judges together at its annual meeting.

However, scope for socialisation would not explain the consensual nature of relationships in *Germany*, given the limited scope for intermingling between employer and employee lay judges. Nevertheless, personal relationships were sometimes built up. 'Yes, it changes... You do grow closer, you'll know people's names... And there's small talk about holidays' (G EE MA 59).

In *France*, employee and employer *conseillers* normally meet only at the hearing and do not have overlapping social lives outside. The main exception is the president and the vice-president, who meet frequently to manage the court's business.

The key factor determining relationships is the nature of the *industrial relations system* combined with the specific organisation of the labour court. Social contact might smooth the path to consensus, but is not a prerequisite for it.

### **How do employee lay judges view employer lay judges (and vice versa)?**

Although the composition of the employer side panel was very similar in Germany and Great Britain, German employee lay judges, unlike their British counterparts, did not report major 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 (G EE MA 59).'

German employer lay judges agreed with this: '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 interests and perspectives. 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 distributional conflicts over fundamentals, such as pay, tend to take place *outside* the individual workplace. This does not mean that there are no differences of interest at the workplace, but these can be resolved through established procedures within the works council system.

In contrast, most British employee lay judges said that they had a different perspective to employer: 'we are work colleagues together...but our perspectives are different' (GB EE 13). These differences should not be overstated. They were not 'huge' (GB EE 24). Some employer lay judges valued the perspective of employee lay judges: 'an angle which I would not have thought of (GB ER 7).

In France, in general, employee *conseillers* regarded their employer counterparts as solely defending employer interests, even viewing them as being ideologically motivated. Some employer *conseillers* drew distinctions on the basis of union affiliation, viewing members of the CGT as more oppositionist than other employee *conseillers*.

## 11.2 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. In both Germany and Great Britain the professional judge sitting with two lay judges chairs the hearing, steers deliberations, and writes the judgment, yet all three 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 rests with the professional judge alone. This raises the question as to how lay judges can be both equal and subordinate.

### **Do professional judges have an informational advantage?**

There are two aspects to this issue: knowledge in general of employment law and knowledge of the specific case. In Germany and Great Britain, professional judges have knowledge of employment law through legal training and in Great Britain through practitioner experience. The position is somewhat different in France as professional judges are generalists and will not necessarily have had specific training in employment law. They learn 'on the job', albeit intermittently, as they do not sit at the labour court on a daily basis and spend most of their time 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, 'no' in Great Britain, and 'to some extent' in France.

In *Germany*, professional judges will have been working on the papers for some weeks and will have conducted the conciliation hearing alone. If conciliation is not successful, that same judge will chair the merits hearing. Lay judges usually only have access to case papers on the

day of the hearing. The overwhelming impression was that the gap between professional and lay judges in terms of prior knowledge of the case did not cause concern. If German lay judges wanted more information or advice, this was never seen as problematic and professional judges were not seen as exploiting their informational advantage. An employee judge said: 'I've never found that the professional judge imposes a view of what the judgment should be' (G EE DO 30).

In *Great Britain*, professional judges do not normally have an informational advantage in relation to the immediate case. This is because a separate body, the Advisory Conciliation and Arbitration Service (Acas), conducts conciliation with no communication between Acas and the professional judge. If there is prior judicial mediation or judicial assessment, any subsequent hearing is chaired by a *different* professional judge. Moreover, the professional judge hearing the case will not have seen the file until perhaps an hour before the lay judges or somewhat cursorily in the evening before.

The position is less clear cut in *France*. On the one hand, the *conseillers* who attend the tie-break hearing will have heard the case originally. On the other, French professional judges will have read the case file beforehand. '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' (F PJ 20).

### **Are professional judges seen as dominating or egalitarian by lay judges?**

Lay judge interviewees generally described their relationship as one of equality, but with some qualifications particularly according to country.

One *German* lay judge said: 'I feel a complete equal and I've never had the sense it could be anything else' (G EE B 43). An employer lay judge noted: '...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' (G ER MA 70).

Most, but not all, *British* employee lay judges considered their relationship with British professional judges to be one of equality. 'We work as a collegiate team' (GB EE 23). Many employee lay judges qualified this assessment, distinguishing between finding the facts and applying the law: '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' (GB EE 25). Some British employee lay judges also noted that their relationship with the professional judge varied: 'some [professional] judges love having lay members there.... And other [professional] judges think we're a complete waste of time' (GB EE 33).

In *France*, *conseillers* expressed a range of views about professional judges. Even in the same interview, a *conseiller* might say both that professional judges exercised domination but also that they were equal.

'I consider them [professional judges] equals. Professional judges generally treat us very well... We have studied differently but we are all people and equal... They're not specialists like us. On some things, we know more than they do (F EE 03).'

Many *conseillers*, however, reported that professional judges dominated at tie-break hearings. 'Often what happens is that when they arrive, they've already made the decision. ... I don't have the impression that we have much influence in the discussion' (F EE 13). Some *conseillers* labelled professional judges as partisan: 'One of the [professional] judges, she is more like the employer' (F EE 23). We did not encounter this in Germany or Great Britain.

## 12. Consequences and reflections on experience

This chapter reviews how lay judges perceived their activity and its consequences for their professional and personal lives.

### 12.1 Neutrality and impartiality

Lay judges in all three countries are required to manage the tension between their status as ‘representing’ one side and their role as (impartial) judges. Overall experience of this tension abated quite quickly in all three countries, without necessarily weakening their underlying allegiance.

Although lay judges in *Britain* felt they could be impartial, several acknowledged that they might be ‘influenced by a particular perspective’ (GB EE 38). Some noted that it took the experience of a few cases for them to divide their judicial role from everyday activity, especially if they spent their working lives in an adversarial environment. *German* lay judges reported similar experiences. Any partiality that did occur was resolved by the legal position (‘I save myself with the law’, G EE HAL 19).

‘Naturally, my everyday working life is the employee standpoint. ... But you have to be able to switch your perspective, yes. And I can do that (G EE B 53).’

Some German lay judges described how they might change ‘allegiance’. ‘You’re also aware of the thought “I’ve been selected for the employer side”. But after you’ve heard the evidence, everything can be quite different’ (G ER MA 70). Professional judges said that lay judges set aside their origins in the court: ‘There’s no sort of class struggle in the retiring room’ (G PJ B 6). Some employee lay judges described how an emotional stance gave way to a more ‘objective’ approach with experience.

In *France*, imperative mandates on *conseillers* are forbidden. Nonetheless, *conseillers* serve as representatives of their ‘side’. For many *conseillers*, this poses a difficulty. ‘You have to be neutral. You’re not there specifically to represent the employee. That’s the difficulty’ (F EE 38). All *conseillers* insisted that they judged in conformity with the law. But employee *conseillers* also recognised that facts are not presented in a neutral way.

‘Being neutral is very difficult, especially when you already have a union history behind you and have seen what employers do, some employers at least, not all. So it’s impossible to be neutral (F EE 35).’

For some employee *conseillers*, however, being elected by one side does not mean defending its members: ‘You can’t serve as an advocate for employees. We are there to comply with the letter of the law’ (F EE 34). How this is perceived tends to evolve with experience. One employee lay judge noted:

‘When you start, in your head, you’re there to defend employees. But in the end, people calm down relatively quickly. You realise that you’re judges, and have to maintain a certain neutrality (F EE 23).’

*British* lay judges noted several factors that fostered impartiality. *Firstly*, there was a moral commitment to fairness: ‘...it would have been totally unfair to have been biased towards one side’ (GB EE 32). *Secondly*, fact finding was seen as a check on any bias. ‘It’s about objectivity and facts’ (GB EE 36). And *thirdly*, some self-nominated interviewees reported that they could be objective because they could have sat as an employer or employee lay judge: ‘I think I can [be impartial] because I could have been on the other side’ (GB EE 14). Several British employee lay judges with trade union roles said being impartial flowed from the capacity to be objective when assessing members’ grievances: ‘I think I can be impartial. ... I can make hard decisions’ (GB EE 9).

## 12.2 Effects on career and work relationships

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 (for employee lay judges), and the scope for transferring knowledge and skills to other aspects of their individual and professional lives.

### **Career and personal development**

In *France*, becoming a lay judge can open the door to involvement in legal activity for those who have no other union role or missed out on a legal career. Some employee *conseillers* discover the law through activity at the labour court and trade union training and wish to obtain a legal qualification. ‘I love these courses. And then I’ll try to get a law degree at university’ (F EE 39). The experience also boosted self-confidence. ‘When you are a *conseiller*, it builds confidence and I was able to make use of this in my last job’ (F EE 38). For employers, serving as a *conseiller* is an extension of their professional life. ‘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' (F ER 09).

In *Great Britain*, being a lay judge gave both status and agency. 'I see it as quite an honour' (GB EE 23). 'I'm taking part in it - an actor!' (GB EE 10). Several interviewees referred to 'credibility' and a greater sense of power at the workplace: 'Some managers are a bit wary of me' (GB EE 8).

*German* lay judges reported that the opportunities provided by lay judge activity led to greater 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... I've noticed that there is much more acceptance' (G EE MA 58).

### **Relationship with trade unions and workplace representation**

For trade unionists in *France*, acting as a *conseiller* represents a continuation of union engagement, especially for workplace representatives. Trade unionists in these roles pass through a *cursus honorum*. They begin at the workplace, as a staff delegate or union representative, move on to duties outside the workplace, either within the union or on bodies on which unions are represented, and finally become a *conseiller* as a reward for commitment.

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 link between employee lay judges and trade unions is generally reported as weak, although some employee judges serve as workplace union representatives. Some trade unions welcomed the fact that their officials had become lay judges through self-nomination and could transfer knowledge back to the union. Two female union officials, however, who had been appointed after the system via self-nomination, experienced hostility from trade union colleagues.

### **Knowledge transfer**

The scope to transfer knowledge to other fields was identified as one motive for taking up the role. In some instances, this was related directly to professional development in an instrumental way; in others, the focus was on becoming a better employee representative.

Most British and French employee lay judge interviewees reported some knowledge transfer. Two *British* interviewees said their trade unions invited them to contribute to union training, while several said that it improved how they dealt with grievances. *All* British employer lay judges interviewed reported knowledge transfer: experience at the court had helped them as HR professionals, consultants, or employers.



Similarly in *France*, there was knowledge transfer to the workplace. 'Being on the labour court has helped me a great deal in knowing how to manage a discussion, a negotiation' (F EE 03). Some *conseillers* explained that their sheer presence deterred management from a dismissal: 'when you are a *conseiller*, employers know you know the law, so if they try anything on you'll be sure to win' (F EE 35).

Lay judges in *Germany*, for whom this was a core motive, also appreciated the scope to transfer experience gained at the court to their workplaces. 'It will certainly be helpful for my job as a works councillor at work, getting a broader point of view; (G EE MA 63).

## 12.3 Reflections on experience

### Discovery of law – intrinsic pleasure

Most lay judges interviewed in *Great Britain* expressed feelings of pleasure and enjoyment: 'I love doing the big cases ... because of the complexity of what's going on' (GB EE 33).

In *France*, most lay judges were very satisfied with their activity. Law appears to be source of intrinsic pleasure, including attending trade union training. 'I had two training courses a year. ... I am happy to do this. ... it's become a drug, a passion' (F EE 36).

*German* lay judges also reported that serving as a lay judge was a type of personal enrichment: 'it definitely broadens the mind' (G EE DO 51). 'Fun, interesting and you learn new things' (G ER DO 45).

### Upholding the system

Virtually all lay judges from *Great Britain* expressed strong support for their continuing role in adjudication. One employee lay judge noted: 'I believe that employee lay members bring a unique perspective to the employment tribunals ... and we can bring that to bear in deliberations' (GB EE 22).

In *France*, lay judges invariably defended the institution of the labour court. They are unanimously opposed to the recent reforms, characterised by some as 'regressions'.

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. Defending the institution of the labour court as a distinctive forum of obtaining redress and fairness was cited by many interviewees.

**Regrets and criticisms**

In *Great Britain*, many lay judges criticised recent changes that led to more professional judges sitting alone on unfair dismissal cases and the fall in the number of cases due to fees being charged between 2013 and 2017, which covered the period of our interviews. '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 any more: they just give up... (GB EE 33). Concerns were expressed that the reduced opportunities to sit could erode judicial skills.

## 13. 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.

### 13.1 France

In France, *conseillers* were relatively satisfied with the justice provided by the labour courts. They considered they performed their duties well, as confirmed by the professional judges interviewed. Although training is not (currently) mandatory, most *conseillers* attend training and are eager to be trained, either ‘on the job’ by a more experienced lay judge and/or through locally organised events.

*Conseillers* did, however, have complaints about the lack of resources provided 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, some of which, such as the CGT, provide free access for *conseillers* to legal journals. 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 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 2016 reforms that are now being implemented and which may significantly alter how labour courts operate. Rather than proposing improvements to the existing system, *conseillers* adopted a defensive stance towards the institution of the *conseils*, which they see as under threat. For employee *conseillers*, their prime concern is to preserve what exists, notably the close link and balance between themselves and three domains of justice, trade union, and the workplace.

The reforms pose a number of questions for the institution and for *conseillers* themselves, in particular on the issue of trade union-based training. Without knowing the answers to these, lay judges have found it difficult to make practical recommendations for improving the system.

## 13.2 Germany

The main areas for improvement identified in Germany were as follows.

### 1. Induction and training

Training was the most common area noted both by lay and professional judges. Specific suggestions were for training for new lay judges, with further regular training on statute 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... It would be a good idea to have an introduction before the first sitting (G EE DO 25).'

'Some training once a year ... so you can be kept up-to-date with the most recent cases (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).'

Expert interviews with members of the Berlin lay judge committee emphasised a need for more training, and also the desire for a structured introduction to the post of lay judge for new appointees before they sit on a case, something provided in Berlin at the initiative of the lay judges' committee.

### 2. Preparation for hearings

The second main suggestion was for more intensive preparation ahead of cases, preferably in the form of short notes, summarising the key issues. Only a few lay judges wanted access to case files.

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 (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 wanted to improve the pre-hearing discussion. 'It would be enough for me if each [professional judge] was obliged to give a clear and understandable introduction' (G EE MA 63). Around half the professional judges interviewed did not support providing preparation for first-instance hearings using case documents. Others were in favour of improving the preparation of lay judges for each case.

Other suggestions made by lay judges included:

- More frequent sittings;
- Participation in conciliation hearings or subsequent hearings;
- Better information about the hearing schedule;
- More scope for exchange between lay judges outside of hearings.

## 13.3 Great Britain

The four most frequent suggestions were:

### 1. Reinstate lay judges to dismissal cases

Lay judges said almost unanimously that they should sit on all cases, including unfair dismissal. '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). Most professional judges we interviewed echoed this view, and one emphasised the need for retaining a lay decision-making role as judges rather than as assessors. 'I think if someone's going to be involved, they've got to be importantly involved' (GB PJ 10).

### 2. Selection criteria and panel composition

Some lay judges were concerned about selection and argued for more 'detailed criteria' (GB EE 6) to ensure that those appointed had appropriate workplace knowledge. Lay judge selection was also raised by some professional judges, focusing on how best to match workplace or other experience with the type of case: 'perhaps more rigour in the recruitment process or even in terms of the pool that we have... 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 specific expertise in areas might be far more useful... We get a lot of medical cases where doctors are claiming under [their] complicated contracts... 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).'

### 3. Papers in advance

Several lay judges and one professional were in favour of changing access to case papers and reading. 'I believe we should have a reading day before anything happens... 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 said: 'I think lay members could read in advance; then more cases could be done... that might be a way of dealing with some small cases' (GB EE 29). While aware of the difficulties, both lay and professional judges thought earlier access to basic documents would be useful.

'It's not practical to send the papers in advance because [of] the cost involved and the fact that the case might be settled... 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 (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 (GB ER 13).'

One professional judge also favoured earlier access to case papers.

### 4. More technology

Several lay judges wanted improved use of technology.

'On some cases you can have two or three lever-arch files... to have three people sat on the panel each with three lever-arch files, looking for the same document .... It would be ideal just to put the document... on a screen and make reference from there (GB EE 7).'

An employer lay judge also argued for recording the hearing: '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' (GB ER 6).

Other suggestions:

- *Training*: many English and Welsh lay judges wanted the restoration of two days of annual training as before, and still the practice in Scotland, not the current annual one-day. While some wanted better initial training, others argued for shorter but regular training.
- *Appraisal*: a couple of lay judges wanted a formal appraisal of lay and professional judges.
- *Conciliation*: one lay judge felt there might be a role for lay judges earlier in the process.

**Suggestions for improvement – summary**

- Training: in Germany, induction for new appointees and regular refresher training. In England and Wales, reinstatement of 2 days of training per year as is the practice currently in Scotland.
- A formal mentoring system for new lay judges, mentioned in all three countries.
- More frequent and regular sittings for lay judges
- 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 judges are trained and experienced mediators.
- Where possible, assign cases to lay judges with known expertise in the issue/area.
- Reinstate lay judges to unfair dismissal cases in Great Britain.

## 14. Conclusions

### 14.1 Influence of the route to nomination

The dominant influence on lay judge's reported perception and experience of their role is the prevailing industrial relations system in each country, mediated primarily by the labour court structure and to a lesser extent by the route to nomination. Lay judges are likely to have had experience of organised industrial relations systems in the three countries researched, which might not necessarily reflect the labour market as a whole, given the trend towards dualism in all three countries. This experience of organised industrial relations reflects the fact that nomination to the role of lay judge has been via industrial relations institutions. 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. And in Germany working at a workplace with a works council (or public sector equivalent) also plays a large part in the route to nomination. 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 have become weaker, reflected in the motivations and experiences of some of the more recently appointed lay judges.

Our interviewees in Great Britain and Germany reflected national industrial relations systems in many instances. For example, reported individualism, consistent in some respects with the 'modernisation' theory of lay engagement, appeared higher in Great Britain than in Germany, where many employer and employee lay judges retained institutional links. French interviewees, in many cases, reflected inter-union competition and a commitment to trade unions as the main legitimate channel for defending employee interests, expressed in scepticism about officially-provided training.

The three routes to nomination not only reflect national systems but also reinforce them (for example, offering scope to an individual-instrumental perspective in Great Britain, exacerbating inter-union competition in France, and emphasising the link with codetermination in Germany).

One area where there was some discernible link with the route to nomination was in the 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. The training regime in France influences this: in the past



and currently, it is provided for employee lay judges predominantly by trade unions.

Lay judges' perception of their role is also influenced by the role of labour courts in national systems of employment regulation. In France, lay judges' perceptions of the labour court system offer some support for Emmenegger's (2014) thesis that fragmented and politicised trade union movements are more inclined to turn to the law rather than collective bargaining to protect employee interests. German interviewees' reports were strongly shaped by the culture and experience of workplace codetermination. In Germany, some lay judges also 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.

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.

## 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. Similar motives were also expressed by many employer lay judges, complemented in some instances by the prospect of professional enhancement. There were some discernible national patterns. In Germany, the most common cited motive for becoming an employee lay judge was to improve knowledge of the law in order to transfer this back to the workplace. In France, for some lay judges, the role of *conseiller* was one component of a wider career in employee representation, their union and in the legal field. And in Great Britain too, there was often a link to workplace representation, but also evidence of individual-instrumental motivation, consistent with the 'modernisation' theory of lay engagement (see Chapter 7.1), which was more marked for employer than employee judges.

The multiplicity of motives reported by interviewees lends some support to Hollstein's (2015) study of voluntary social engagement. In some respects, however, serving as a lay judge differs from other fields of voluntary engagement as instrumental and altruistic motivations fit less well with the notion of *interest representation* that is intrinsic to the idea of

employer/employee panels. The motivation to act as a representative of a social collectivity based on shared interests is not reducible to 'instrumentalism' or 'altruism'. 'Instrumental' also has different meanings depending on whether it is understood as 'rational-purposive' (being a 'better representative') or self-interest ('helping my career'). For many interviewees, becoming a lay judge was rational-purposive, but not individualist, in that lay judge activity was perceived as useful for serving as an employee representative. This was based on a prior choice that might reflect a 'normative' commitment but also a notion of interests. Serving as an employee representative, as reported in France, in which the various stages from workplace representative to lay judge are seen in terms of self-fulfilment and esteem, also reflects the notion of 'expressive career' suggested by Harré et al. (1985).

### **14.3 Adaptation to the court – impartiality**

Being a lay judge was generally not perceived by lay judge interviewees as a form of interest representation carried into the judicial field. Or rather, for many employee lay judges, any sense of being a representative is modified through membership of the court, with its distinct responsibilities.

Our interviewees' responses 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 phases open to public view. The maintenance of a consistent identity (Aronson, 1992) for employee lay judges in France was possibly facilitated by the acceptability of a more adversarial environment in which reaching a judgment by employer and employee lay judges could be cast as an 'agreement', with its undertones of remaining an industrial relations institution, rather than requiring lay judges to shed their external identity.

In Germany, employee lay judge interviewees indicated a desire to ensure that employee interests were protected, but also emphasised the importance of upholding the system. The process of adaptation to the labour court mostly took place swiftly, despite the lack of mandatory induction. In Great Britain, adaptation also generally took place swiftly, sometimes after just a few cases. Nevertheless, there were variations between individual lay judges. The speed of adaptation might be more determined by the role that a person played before becoming a lay judge, such as a trade union official or lay workplace representative, than the national setting.

Very few employee lay judge interviewees reported *enduring* dissonance between being an employee representative and a lay judge. Cognitive dissonance theory suggests that actors will reduce dissonance by placing a high value on their choice (here becoming a lay judge) or changing their cognitions or perception of the situation. This was exemplified in the case of some interviewees in a positive view of judicial institutions, an interest in the law, and expressing a realisation that both employers and employees could be culpable. There are alternative explanations for these reported experiences. In France, for example, the social influence of peers through mentoring would appear to play a major part in adaptation to the court, albeit reinforced by 'respect' for the law.

Stryker's notion of a salience hierarchy of identities (2001) would suggest that lay judges' perception of their role will depend on the intensity of their judicial engagement. Where an identity occupies a significant part in an individual's hierarchy of identities, it is more likely to be presented in interactions with others. Only *conseillers* acting as labour court presidents and vice-presidents in France are likely to be sufficiently engaged in judicial activity for this to be a salient identity; sitting opportunities were too infrequent in Great Britain and Germany. In France too, some interviewees spoke of the external validation of being a lay judge ('opening doors', according to F EE 17), implying that this identity was presented in other settings.

## 14.4 Lay judges: active or passive?

Much of the literature on the role of lay judges in labour courts has concluded that lay judges are generally passive during hearings. 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 can change the outcome of a case.

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 times 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.

## 14.5 Knowledge and skills

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 workplace events. They were often referred to as ‘common sense’, especially in Germany, as the capacity to assess evidence in the light of workplace norms (such indicating when an employee’s behaviour might warrant summary dismissal). Such knowledge or competence is in principle unavailable to, and was valued by, professional judge interviewees. This capacity would appear to fit closely with the concept of ‘practical intelligence’ suggested by Sternberg et al. (2000).

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 but can also see events from the standpoint of the ‘other side’ to their own panel. Some employer lay judges also expressly valued the different perspective that employee lay judges bring. These findings suggest that lay judges can inject multiple perspectives into deliberations that some research indicates will improve decision-making (see, for example, Nemeth, 1995). In addition, lay judges needed observational and questioning skills in hearings. These were often developed through workplace and professional activity, and honed

through training, in particular in France and Great Britain. This would appear to fit with the notion of 'rotation' (Nonaka and Takeuchi, 1995), in which operating 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; several were legally qualified. The possession of *legal knowledge* plays a different role in France compared with Great Britain and Germany. While most British and German lay judges accepted a division of labour with the professional judge, in which the latter applied the law, in France, lay judges apply the law without professional judges. Learning to act as a lay judge in France is therefore associated with passing through key stages of applying the law in court, the most significant of which is the first time a judgment is drafted.

As well as bringing knowledge to the court, lay judges also reported that they could 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 acquired in court to the workplace (or trade union) and led to enhanced authority and confidence vis-à-vis management. In France, this educative role was extended to include the parties. *Conseillers* attempted to explain the procedure and make judgments as understandable and non-technical as they could, while complying with the law.

The extent to which lay judges can fulfil this expectation will depend on two factors: the institutional link between lay judges and workplace or nominating organisation; and the 'density' of lay judge presence in the workforce, as a ratio of lay judges to the working population.

Our findings suggest that the 'educative' role is most likely to be fulfilled in France, where the institutional link to trade unions (and to a lesser extent employer organisations) appears the strongest of the three countries. There is also a close link between the practice of workplace representation in Germany and activity as a lay judge: most employee lay judge interviewees had a background as a workplace representative. There is also scope for an educative function in Great Britain, where several employee lay judges were active as employee/trade union representatives. This has become increasingly attenuated, however, as organisational nominees retire and the motivation to become a lay judge becomes more individual. At the same time, some employer lay judges reported a direct benefit to their professional lives from being a lay judge.

The ratio of lay judges to the working population is much higher in Germany and France, with 1 employee lay judge per 3,000 workers in each case. In Great Britain, the ratio is 1 per 52,000.

## 14.6 Gender

There is some evidence from interviews that gender played a role in motivation and in nomination in *Great Britain*. Female interviewees in Britain reported that workplace problems they had personally experienced contributed 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 said that organisations to which belonged had provided routes 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

Previous research into mixed tribunals has focused on the interactions between professional and lay judges. In general, and drawing on status theories and complementary notions of 'informational advantage', this research has found that professional judges exercise domination and control (see Kutnjak Ivković, 1997, 2000, 2003, 2007; Dickens, 1985; and Blankenburg and Schönholz, 1979).

Our findings offer a more nuanced, if not diametrically opposed, perspective on this.

Hearings and deliberations differ as between the three countries in terms of status issues: status characteristics theory requires that external sources of (perceived) status are imported into mixed tribunals and shape discourse within them. Status considerations exist in parallel to and on occasions interact with substantive procedural power.

*Firstly*, although the hearing was steered and controlled by the professional judge in Germany and Great Britain, the situation was different in deliberations, where professional judges were seen generally as providing direction and structure but not dominating. In France, where the professional judges were only brought in if the lay judges failed to agree, they tended to be dominant.

*Secondly*, in Germany and Great Britain professional judges had an informational advantage on matters of law and procedure. This was less marked in France, where professional judges do not study employment law and sit only occasionally in the labour court. On the issue of the case being heard, professional judges had a considerable advantage in Germany as they conducted conciliation and exercised a monopoly over case papers. French professional judges also had some informational advantage, not so much through access to case papers but in not necessarily disclosing their questioning strategy. In Great Britain, professional judges had only a limited informational advantage in terms of the particular case, possibly fostering a more collegial approach in the hearing, reinforced by the practice of lay judges and professional judges reading evidence together.

For Bourdieu (1987), the juridical field was characterised by a stark division between lay people and legal professionals on occasions leading to 'the disqualification of the non-specialists' sense of fairness' (ibid. 828). This tension was evident in many of the reported experiences of lay judges and of professionals. Nevertheless, our findings also suggest that this division is not as impermeable as Bourdieu implies. *Firstly*, some professional judges in Great Britain and Germany welcomed the scope to make law jointly, as the injection of workplace experience enabled them to arrive at judgments in which the exigencies of the law could be made as consistent as possible with 'common sense' fairness. Interventions by lay judges could change the direction of a case. *Secondly*, some professional judges in Germany and Great Britain indicated that they welcomed the presence of lay judges as decision-makers as this gave them greater confidence in the judgment. And *thirdly*, in particular in Great Britain, lay judges had some latent power as professional judges relied them as observers and note-takers in the hearing. Combined with the lower informational advantage of the professional in specific cases in Great Britain and the joint reading of documents, this arguably promotes the collegiality reported by most British lay judges and many professional judges.

The majority of British and German lay judges considered that their relationship with professional judges was one of equality and, for many, collegiality based on working together collectively.

## 14.8 Main contribution of lay participation

This sub-section suggests three main conclusions about the main direct contribution of lay judges.

### **Workplace knowledge and experience**

In all three countries, the contribution mentioned most often by lay and professional judge interviewees was the ability to bring 'workplace experience' to bear in deliberations. This had two dimensions: specific knowledge ('knowing that') and a general non-legal appreciation of workplace norms. 'Knowing that' was highlighted by male lay judge interviewees in Germany, in contrast to some female lay judges, who highlighted a 'social' perspective. This possibly suggests a (gendered) perception of a hierarchy of knowledge in which (some) male lay judges place a high ranking on 'hard facts', which complements a legal perspective: lay judges introducing a specialist opinion was one of the factors cited as likely to change the direction of a case. Professional judges in Germany also highlighted the value of specialist knowledge. In contrast, a 'social' perspective would tend to run counter to legal reasoning. This was not inevitably the case: one German professional judge noted that if the 'legal' solution clashed with what was deemed fair, this would merit a second look.

Possibly located between these two forms of workplace experience is deep knowledge of workplace industrial relations built up over many years by employee and managerial practitioners. This ability to 'read' events represents a form of tacit knowledge obtained through observation and action (such as negotiating or representing employees). This capacity was identified as a key contribution by lay judge interviewees in all three countries and confirmed by professional judges.

In Germany and Great Britain, the usefulness of having a mixed panel of employee and employers was also highlighted. And in Germany, a mixed panel of experienced practitioners was directly referred to as enabling the lay judges to assist the professional judge in exploring the scope for a settlement once a full hearing was under way. And in Great Britain and Germany, professional and lay judges highlighted the advantages of the multiple perspectives offered by mixed panels.

The contribution of lay judges' workplace knowledge is arguably more important in Germany and France than Great Britain. This is because professional judges in Germany are career judges who embark on this track as soon as they qualify. In Great Britain, in contrast, professional judges must first have had a minimum of five years' experience as lawyers (working as solicitors or barristers, in civil society organisations or in



academia). As a result, many know, albeit indirectly through their clients, about a wide range of workplaces and are not as reliant as professional judges in Germany and France on lay judges' workplace experience. Furthermore, the role of workplace experience has been diminished in Great Britain as lay judges no longer sit on discrete unfair dismissal cases, for which an understanding of workplace norms is significant as the key factor is often whether an employer acted reasonably.

### **Life experience**

In Great Britain, direct life experience of discrimination - on grounds of gender, race or disability - was also cited by some interviewees as a further source of knowledge and insight and a particular contribution that they could offer to judicial proceedings. Again, this form of knowledge has both explicit and tacit aspects, with the latter only available to those sharing a characteristic with a party to litigation. This has particular relevance in Great Britain as lay judges now sit predominantly on cases involving discrimination, in contrast to France, where most discrimination cases are resolved by mediation through the Défenseur des Droits.

Broader life experience was also noted as a key contribution in Germany, distilled into the notion of 'common sense' that could correct a narrow legalistic form of reasoning.

### **Procedural fairness**

Procedural fairness was highlighted in Germany by lay and professional judges, both as contributing to a fair process in the court but also meeting a general aspiration to ensure that justice was done. For some German and French lay judges, there is a desire to support the principle of lay participation within the system of labour jurisdiction.

In France, the social proximity of *conseillers*, employer and employee, and parties generated a substantive approach to procedural fairness in that there was a perceived obligation to explain the law to litigants through a non-technical approach to proceedings and drafting of the judgment.

Procedural fairness also leads on to the issue of legitimacy.

## **14.9 Legitimacy**

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.

Three concepts that might be useful in exploring the legitimacy of the role of lay judges: performance legitimacy, regime legitimacy, and polity legitimacy. (This has been explored by two of the present authors elsewhere: see Burgess, Corby and Latreille, 2014). 'Performance legitimacy' relates to the capacity of an institution to deliver the goals it is entrusted with; 'regime legitimacy' refers to its accountability; in the judicial context, 'polity legitimacy' refers to the extent to which labour courts echo wider national social and constitutional arrangements. 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 range of views about the regime and polity legitimacy of their systems.

In *Great Britain*, interviewees felt that there had been two main changes in the 'labour court regime' in recent years. 1) judicialisation (formalisation, legal representation); and more recently 2) the effective removal of lay judges from dismissal cases. The latter was a source of almost universal criticism as noted above. Nevertheless, on balance interviewees continued to believe strongly in the need for a distinctive labour jurisdiction and offered suggestions for improvement (see Chapter 13).

In *Germany*, some professional judges interviewed noted that the presence of lay judges was significant for the legitimacy of the court and raised the acceptance of the process and judgments.

'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*. 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. 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 noted by interviewees. *Con-*

*seillers* generally tried to avoid a case going to the professional judge and not achieving 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.

## 14.10 Further research

This study highlights a number of areas that might be explored through further research.

Given the high profile of *training* in developing judicial skills, as well as in induction and socialisation, that emerged in this study, it might be fruitful to compare training curricula and delivery arrangements for lay judges on a cross-national basis. This could also throw light on differing conceptions of lay judgecraft in the three countries. Further qualitative research might also be relevant in tracing specific forms of knowledge transfer and the 'educative effect' in greater detail.

Lay participation in other bodies fulfilling similar functions could also be compared cross-nationally: examples might include social security tribunals in Germany and Great Britain.

Finally, the qualitative research and the conclusions drawn from it suggest hypotheses that might be tested through quantitative study on issues such as lay skills and knowledge, the lay contribution in judicial decision-making, mutual perceptions of the judicial actors, and relationships in mixed tribunals.

## Appendix: Methodology

### Research strategy and design

The project's research strategy and methods 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 France, Germany and Great Britain. These countries were chosen because lay judges act as decision makers in adjudicating individual employment rights disputes. Moreover, first-instance lay judges, whether appointed or elected, are not required to be certified legal experts.

The chosen method to collect data was qualitative research using semi-structured interview guides. This was complemented by desk research and expert interviews. Some members of the research team observed labour court proceedings, employing non-participant observation.

### Sampling

Within each country, samples were determined by methods that differed, depending on national institutional arrangements and the requirements of the judicial authorities. A standard information sheet was prepared and potential interviewees had access to a three-language project website (<https://www.gre.ac.uk/business/research/centres/weru/research-projects/the-roles,-resources-and-competencies-of-worker-lay-judges-a-cross-national-study>).

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, divided in pre-stated proportions between the agreed locations. On some occasions, more than the precise number of interviews was undertaken locally if potential interview subjects were immediately on hand.

Sampling was guided by *convenience* in terms of interview locations and through *self-selection* by participating individuals. The researchers generally applied *quota sampling*: once the agreed number of interviewees in each category had been met, no further interviewees were chosen from this category at a location. There was no deliberate attempt to obtain a stratified sample.

The choice of locations for the interviews was influenced by the desire for a regional spread in each country (including the three constituent countries of Great Britain). Interviews were held as follows:

- In Great Britain, in Central London, Birmingham, Manchester, Glasgow, and Cardiff.

- In France, in Nantes, Strasbourg, Bobigny, Versailles, and Boulogne-Billancourt.
- In Germany, in Halle, Berlin, Dortmund and Mannheim.

Interviewees gave consent to being interviewed and recorded. They were informed of the context of the study (including the funding body) and the use that would be made of their data. Interview data were anonymised. Transcripts are securely held both physically and electronically. Interview guides were drafted first in English and then translated and localised. 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

### **Achieved sample and interviewee characteristics**

In *Germany*, 53 interviews were conducted with lay judges (41 employee/12 employer) and 13 with professional judges at first instance labour courts. 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. Three of the lay judges (6 per cent) were retired.
- Union membership. Of the 41 employee lay judges, 38 (93 per cent) were currently members of a trade union and 31 (76 per cent) were or had been elected workplace employee 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.
- Five lay judges had a formal legal qualification.

In *Great Britain*, 54 interviews were conducted with lay judges (41 employee/13 employer) and 12 with professional judges. 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. 41 (76 per cent) had been a lay judge for 11 years or more.
- Union membership. Of the 41 employee lay judges, 27 (66 per cent) were currently a member of a trade union. Two employer lay judges (in higher education) were trade union members.

- Sector and status. Of the lay judges, 23 (43 per cent) were retired and 18 were self-employed or business owners (33 per cent), including 10 of the 41 employee judges. Of the employee lay judges, 11 were employees (27 per cent), 25 (61 per cent) were working or had worked in the public sector, 2 in manufacturing, 4 in private services, and 10 for a trade union. Of the employers, 6 worked or had worked in private services, 5 in industry, and 2 in higher education.
- Education. 35 British employee lay judges (85 per cent) had received tertiary education and 11 of the 12 employer judges (92 per cent). Five employee lay judges in our sample of 41 had a formal legal qualification. All the British employer lay judges interviewed and three of the British employee lay judges interviewed had an HRM qualification which often includes an employment law dimension.

In *France*, 40 interviews were conducted with lay judges. This was less than aimed for, and was due to problems of access at one labour court. Of the 40, 30 were employee lay judges and 10 were employer lay judges. Five professional judges were interviewed. Key characteristics were:

- Gender. 11 employee lay judges were female (36 per cent) and 19 male (64 per cent). All professional judges were female.
- Union membership. All the employee lay judges were trade union members, spread across the main confederations. For the employers, interviewees were from MEDEF, CGPME and ESS.
- Length of office: it was difficult to interview new lay judges as the most recent round of elections and appointments was held in 2008.

### **Reliability and validity**

In qualitative research, reliability is grounded in procedures to ensure that results obtained should not vary depending on the interviewer. Reliability was assessed by means of the pilots. The coding system also provided a basis for reliability by offering a common approach to analysing transcripts. Inter-coder reliability was checked by exchanging and cross-checking coded transcripts.

'Validity' in qualitative research refers to whether the research instruments used accurately capture the construct to be ascertained. Lewis and Ritchie (2003: 274) propose the following checklist for assessing approaches to validity. This is set out below, with a note of the approach used in the present study.

*Checklist for validity*

	<b>Explanation</b>	<b>Approach in current study</b>
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 home/work) were deemed conducive to obtaining data. Interview guides included specific 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 evidence for the explanatory accounts offered?	See analysis below.
Display	Have findings been portrayed in a way that remains 'true' to the data and allows others to see the analytic constructions made?	See analysis below.

Source: Ritchie and Lewis (2003: 274)

**Analysis of findings**

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

- Initial identification of themes following data collection and coding.
- Refinement of themes and interpretations following first stage of primary analysis.
- Additional exploration of primary data by reading entire transcripts.

Transcripts were coded using MaxQDA based on a common set of codes. Local research teams had scope to add codes or use *in vivo* coding. Where appropriate, data was quantized to emphasise the frequency of particular responses and highlight differences between the country data sets, using such terms as 'many', 'most' and 'few'. The term 'quantize', to mean using coded qualitative data to obtain quantitative evidence, originates with Tashakori and Teddlie (1998), cited in Driscoll (2007). Such terms have a common-sense value in indicating the main features of the sample, without any claim to generalisability.

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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 essentially by the social partners in Germany, self-nomination in Great Britain and election in France. The primary research consisted of qualitative data collected through interviews, set against contextual information on national institutional arrangements, industrial relations, and court procedures.

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