RESEARCH AND REPORTS

**Lay Judges at Labour Courts: A Cross-national Study**

A recently published research report[[1]](#footnote-1) sheds new light on the work of lay judges at labour courts. Nine countries of the European Union - Austria, Belgium, Denmark, Finland, France, Germany, Luxembourg, Slovenia and the UK - have lay judges representing employers and employees in their labour courts[[2]](#footnote-2). Here, the state recognises the interests of employers and employees in the application and development of labour law in the courts. The study by Burgess et al. provides detailed information on the labour courts of Germany, France and Great Britain. It covers the recruitment, training and work of the lay judges. The study notes that employee and employer representatives are influenced by the industrial relations culture in their countries and by the traits of their national labour courts.

Demonstrating the advantage of a tri-national research team, the study is based on semi-structured interviews with employee and employer lay judges as well as with professional judges in all three countries. The researchers work with a convenience sample of interviews. The participants self-selected to take part after receiving an information sheet guiding them to a project website. Employee lay judges were purposefully over-sampled. In the German case the study is based on interviews with 41 employee, and 12 employer lay judges, as well as with 13 professional judges coming from four courts. For Great Britain, the equivalent numbers are 41, 13 and 12 at five courts, and for France 30, 10 and 5 at five courts. The study, financed by the Hans-Böckler-Stiftung, abody affiliated to the German Trade Union Confederation (DGB), provides important insights into the functioning of labour courts.

Labour courts are just one example of “mixed courts” (or “mixed tribunals”) in which professional and lay judges cooperate and have equal votes. The professional judge in this context becomes the expert for the law, but also with the function of representing the state while maintaining an oversight on the continuity and comparability of decisions based on labour law, a matter which cannot be left to the appeal courts on their own. The concept of “lay” judges encompasses those individuals whose main profession is not to work in the courts. In all three countries of the study, lay judges may frequently be trained HR staff or employee and employer representatives who also hold a law degree. They may also be “self-taught in matters of the law” (p. 15) and dealing routinely with labour law, e.g. for the works council or union.

The literature on mixed courts most often discusses the relationship between the professional and the lay element. In many legal systems, e.g. at the German administrative courts, the professional judges often dominate the lay members. Where lay judges bring special expertise to their work on the bench, their standing tends to be more equal to that of the professional judges and this study reiterates this point when it comes to relations between professional and lay judges in the labour courts of France, Germany and the UK.

The study also has observed a “knowledge transfer” in the opposite direction: from experiences in court to the workplace; such a transfer being less likely in other branches of the court system. But insight gained as lay judge in the labour courts can quite easily flow into the daily practice of e.g. union representatives or HR managers. It can also be disseminated in training events.

One question often posed in relation to tribunals and labour courts that have a mix of lay and professional judges is the relationship between them and then, between employee and employer representatives. The study reports differences in the three countries covered. But, importantly, does not suggest that the professional and lay judges cannot cooperate meaningfully when it comes to reaching a decision.

The study found that in Germany and Great Britain lay judges from both sides, employees and employers, generally worked well together alongside the professional judge presiding over the trial. The atmosphere in the mixed courts was found to be cooperative rather than confrontational. Typically, decisions were found to be arrived at by way of consensus. German professional judges are career judges in the labour courts, having specialised in this branch of the law, but, according to the study, their experience of labour conflicts is not as broad as that of their British counterparts who have a background as lawyers with a more varied experience of the legal system. Regardless of this, in both countries, according to the study, the lay judges provide unique experiences at the “coal face” of work relations. They were found to possess detailed knowledge of the issues to hand, and had a general cultural understanding of relations in industry that is the result of their personal direct involvement. The labour courts themselves obtain the benefit of this knowledge while at the same time the lay judges themselves gain deeper insights into the law and into conflict situations. Confronted with the individual case, the study found that the affiliation of the lay judge with one or other side often disappears and employee and employer lay judges find common ground. The present study chimes in with other academic work and anecdotal evidence that professional judges value their lay colleagues for the perspectives they contribute. An example of this comes from the study of the British tribunal system where it is suggested that it is the lay judges that can be tasked with minuting the hearing and this in turn enhances their influence on the decisions.

The study finds, however, that in France the system is rather different. Not only is the industrial relations culture much more adversarial, but this is also reflected in tensions between employer and employee lay judges. At the time of the study, the lay judges were then still being trained by their respective organizations (trade unions and employer bodies), but, in the course of the study this method of training had changed to some degree with the introduction of a court-related training.

In initial trials at the French court of first instance, there are two employer representatives and two employee representatives but no professional judge. Lay judges conduct the hearing and they also write the judgment. In about 20% of the cases (according to the study) where the four cannot reach a majority opinion, there is a second stage in which they are joined by a professional judge who will preside over the trial. In contrast to Germany or Great Britain, this French professional judge is not a specialist for labour law. According to the interview evidence for the study, having to go into the tie break stage, is perceived as “failure” by the lay judges. As consequence the lay judges try to find common ground wherever possible.

The study cites statistics that more than 60% of the decisions by French first instance labour courts are appealed against, a much higher appeal rate than for other courts in France.

Apart from the above main findings, the study provides overviews of the industrial relations and labour courts in all three countries and summarizes the main theoretical approaches to explain the behaviour and experiences of lay judges. It also suggests changes to how lay participation is organized in those countries.

When it comes to improvements to lay participation, the authors address the three countries separately. In France, the lay judges were calling for improvements to their work space in the courts and to the need for the allocation of more time to them to deal with individual cases. In Germany, the focus, for both the lay and professional judges, was on the need for better training, with some lay judges saying that they additionally wanted more opportunities to exchange experiences with those who share the bench with them. The lay judges also wanted to be able to better prepare themselves for hearing individual cases, most notably, receiving “short notes, summarising the key issues”. In Great Britain, mixed labour courts have for the most part lost the remit to deal with unfair dismissal cases and the study reports that both lay and professional judges wanted to get back to a situation wherein which they could decide the broad range of cases together. British lay and professional judges also expressed the desire to have earlier access to case papers in advance of the hearing. In relation to how the lay judges are currently appointed, applications from British, Irish and Commonwealth citizens can be made on their own behalf, without need for the support of a trade union or employer body. Among the interviewees, some lay judges wanted “to ensure that those appointed had appropriate workplace knowledge” and some professional judges were “focusing on how best to match workplace or other experience with the type of case.” The study suggests that current links between ‘employee’ lay judges and the trade unions are weak, certainly at least to some degree a consequence of the recruitment pattern. As a proposal for all three countries, the study suggests that there is the need for some form of formal mentoring for all new lay judges.

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1. **The Roles, Resources and Competencies of Employee Lay Judges. A Cross-national Study of Germany, France and Great Britain** by Peter Burgess, Susan Corby, Armin Höland, Hélène Michel, Laurent Willemez, Christina Buchwald, and Elisabeth Krausbeck [Working Paper Forschungsförderung, no. 051, October 2017, Düsseldorf: Hans-Böckler-Stiftung, 92 pp., online, complimentary, available at: https://www.boeckler.de/pdf/p\_fofoe\_WP\_051\_2017.pdf] [↑](#footnote-ref-1)
2. Machura, Stefan, ‛Civil Justice: Lay Judges in the EU Countries’ (2016) Oñati Socio-Legal Series 6(2) <<http://ssrn.com/abstract=2665612>> accessed 24 March 2018. [↑](#footnote-ref-2)