

Jersey Employment and Discrimination Tribunal



Annual Report 2016

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This is the twelfth Annual Report of the Tribunal and covers the period 1st January 2016 to 31st December 2016.

Overview

The Jersey Employment and Discrimination Tribunal (the 'Tribunal' or 'JEDT') is an independent judicial body set up to hear and resolve certain complaints and matters of dispute arising under the Employment (Jersey) Law 2003 (the 'Employment Law'), the Employment Relations (Jersey) Law 2007 (the 'Employment Relations Law') and the Discrimination (Jersey) Law 2013 (the 'Discrimination Law').

The Employment and Discrimination Tribunal is one of several tribunals managed by the Judicial Greffe, the administrative arm of the Jersey Courts, through the Tribunal Service. The Judicial Greffe maintains budgetary control of the Tribunal's day to day resources and the Minister for Social Security oversees the appointment of new panel members and also the introduction of employment and discrimination legislation and policy. The other tribunals in the Tribunal Service are:-

- The Planning Tribunal
- The Health and Safety Tribunal
- Three separate Social Security Tribunals – which deal with medical appeals, Social Security appeals and Income Support medical appeals
- The Mental Health Review Tribunal

The JEDT is like a court but is less formal. The Tribunal's hearings are generally held in public and anyone can observe a Tribunal hearing (although there are certain circumstances when hearings are held in private). The JEDT strives to provide a user friendly service ensuring that the documentation and terminology used in its proceedings is easily accessible to all parties. The services of an interpreter will be provided at all hearings at no charge to a party whenever required. Where possible the Tribunal will provide assistance to parties experiencing difficulties due to a disability or a particular need such as dyslexia.

All of the JEDT's application and response forms, as well as User's Guides and other explanatory information, are available on the Tribunal's website: www.jerseyemploymenttribunal.org

The Tribunal has produced guidance to parties in relation to Case Management Meetings, the preparation of Bundles for hearings and the grounds for applying for a Strike Out Order. These guides are available free of charge from the Registrar and are available in English, Portuguese and Polish.

The JEDT's decisions are published on the Jersey Law website: www.jerseylaw.je/Judgments/JET

Comments from the Chairman

It is apparent from the Report that 2016 has seen an increase in the total number of employment and discrimination complaints made to the Tribunal from 178 complaints in 2015 to 206 complaints in 2016. The number of employment law complaints remains fairly constant at 171 (166 in 2015) but the number of discrimination complaints received increased to 35 from 12 in 2015. Each complaint received may contain a number of issues and the employment law complaints received concerned 399 issues in 2016. This year the Tribunal introduced a 3 week 'cooling off' period between the date of receiving the response to a complaint and that of setting a date for case management in order to allow the parties to a case the time to conciliate the claims. This practical step has greatly assisted the administration of cases with only the most persistent claims and responses proceeding further into the process. The Tribunal chairmen continue to actively case manage the remaining the complaints by identifying the issues and the work required by the parties in order to prepare the case for hearing and this intervention also assists further attempts by the parties to conciliate the claims. The effects of this approach can be seen by the decrease in the number of case management meetings held in 2016 but an increase in the number of Full hearings held compared to 2015. This approach saves costs for the Tribunal service. The number of Interim Hearings held in 2016, to determine points of law, remained steady.

With regard to the particular types of employment claims made to the Tribunal in 2016 most complaints were received from the construction sector (21%) and most employees had been employed for more than 5 years when making their complaints. Unfair dismissal remained a consistent complaint by employees in 2016 but breach of contract issues were also prominent with 233 complaints received by the Tribunal over the year. It is noted that a number of complaints are still being received from employees that they have not been issued with a statement of the terms of their employment by their employer or have not been issued with wage slips on the payment of their wages; when these complaints go before the Tribunal 90% of them are found in favour of the employee. From the 1st April 2017 an employer who fails to provide these essential, basic, items of information to an employee will be liable to a fine under the provisions of the Employment law.

In 2016 the Tribunal received 35 complaints of discrimination from claimants. Notwithstanding the introduction of age discrimination in September 2016 28 of the discrimination complaints concerned sex discrimination and most concerned allegations of direct discrimination (52%) and harassment (20%). Over half of the discrimination allegations involved complaints made in a work related context.

On the 1st April 2016 the Employment and Discrimination Tribunal (Procedure) Order 2016 came into force which set out the Tribunal's procedures clearly. Most parties continued to

represent themselves at the Tribunal but the Procedures Order contains a process whereby the Tribunal can hear a complaint in circumstances where the respondent has failed to file a response to the complaint and thereby not engaged with the process. The Tribunal used that procedure in 7% of the complaints received since the introduction of the Order thereby ensuring resolution of those issues. The Tribunal also used video conferencing in 3 of its hearings in order to ensure the full participation of witnesses in the cases. However the use of interpreters in the Tribunal's hearings dropped significantly which is most likely due to the number of cases being settled before a full hearing is convened; again this saves costs for the Tribunal Service.

The Tribunal saw a significant rise in the number of employment complaints made against insolvent employers during 2016, where 19 such complaints were received comprising 70 issues, and the Tribunal has worked with the parties and agencies involved in order to assist in the management of complaints received against insolvent employers in the most appropriate manner.

The Tribunal Service administers 7 tribunals from its premises which results in a heavy workload for the staff. The access to a second hearing room was invaluable in 2016 and meant that there was no discernible delay in scheduling cases for hearing due to the lack of a hearing room. The loss of waiting rooms for witnesses and break out rooms for the parties is keenly felt but the Registrars have used their knowledge of the cases before the Tribunal to timetable the hearings so that the facilities available are used in a practical and sensitive manner appropriate to a case.

This is my last Report as I retire at the end of April. I have been privileged to have been involved with the Employment and Discrimination Tribunal since its creation in 2005, firstly as the sole Deputy Chairman and latterly as the Chairman. It has been a pleasure to work with each of the chairmen and panel members involved in the Tribunal over that time - all of whom believed in the essential work of the Tribunal.

I believe that I leave the Tribunal as an established court service which is confident in the role that it plays in the administration of the employment and discrimination laws in Jersey; laws which govern, bind and direct a modern, outward looking and pluralistic society.

Nicola Santos-Costa

Chairman

April 2017

Statistics Relating to Employment Law

In any given reporting period, the Tribunal deals with *complaints received* and *hearings held*. These may overlap, meaning that a complaint received has come to hearing within the same period. However, complaints received in the latter part of a reporting period tend to be heard in the following period. Conversely, cases that are heard within the reporting period may relate to complaints received in a previous period and carried forward. For the sake of clarity, this report will look at *complaints received* and *hearings held* separately.

Quick facts:

171 complaints were received relating to employment law claims, comprising 400 Issues.

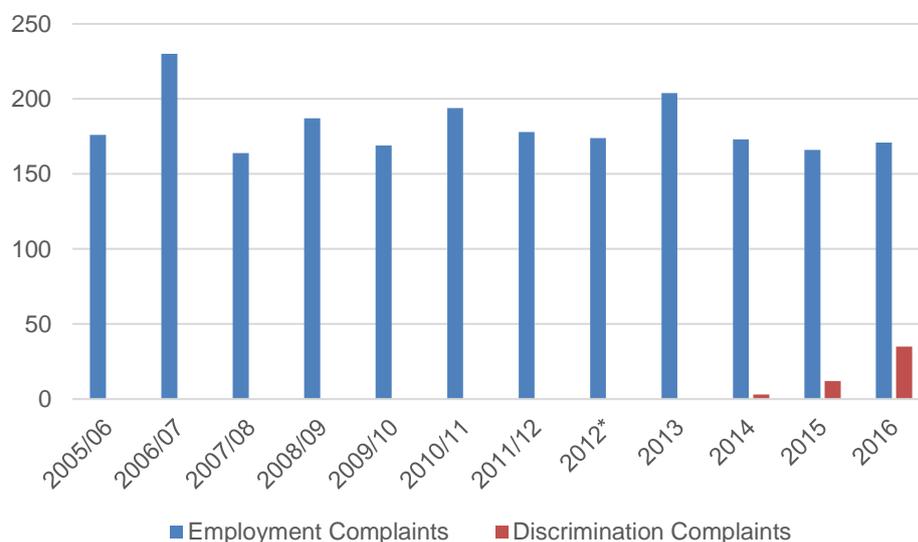
35 complaints were received relating to discrimination claims.

39 judgments were issued by the Tribunal in 2016.

Age became a protected characteristic within the Discrimination Law in May 2016. The Tribunal received 1 complaint regarding age discrimination but this was lodged before May 2016 so could not be accepted.

Four complaints relating to ‘family friendly’ concerns were received during 2016; the Employment Forum is currently reviewing family friendly policies in Jersey.

Number of complaints received by the Employment and Discrimination Tribunal from 2005 – 2016



* (1) From 2012 the Tribunal published its Annual Report based on a calendar year.

(2) Discrimination complaints were only able to be made to the Tribunal from September 2014.

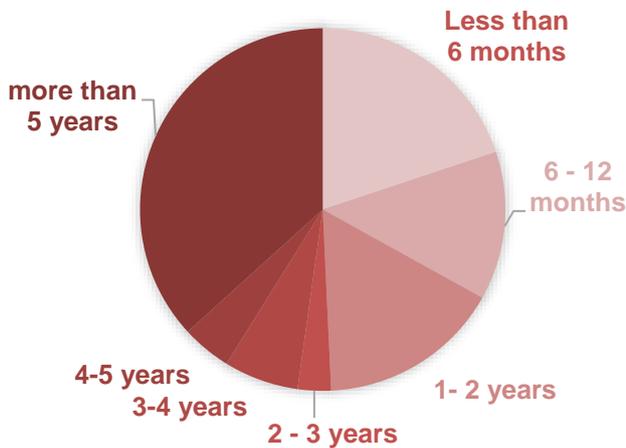
Who brings a case to the Employment and Discrimination Tribunal?



In Employment claims, 95% of claims are brought by an employee against an employer.

There is no average 'claimant' they can be from all walks of life, of working age, and from any sector of the workforce.

Period of employment

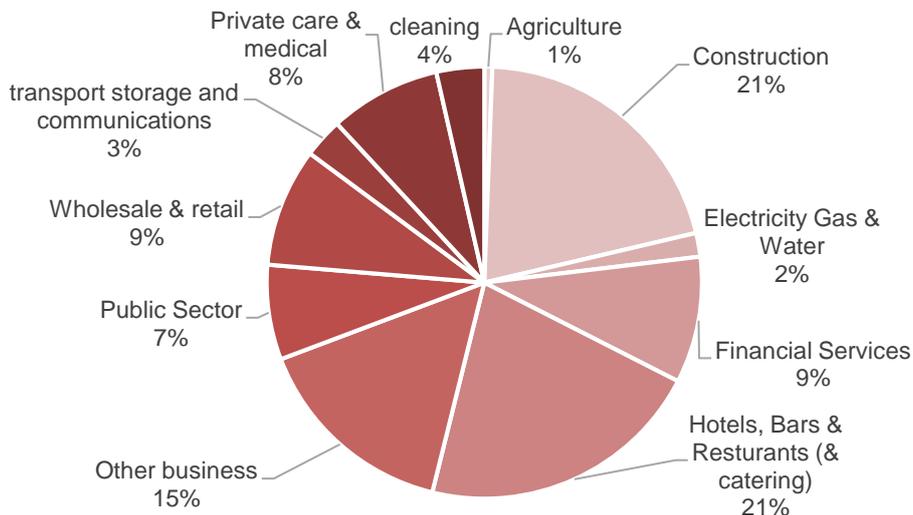


6 months
2 weeks
1 year

Over 70% of applicants had worked for over 1 year for the employer and therefore would be eligible for unfair dismissal claims (if appropriate).

Cases may be brought by both an employee and an employer. However, in 2016 less than 5% of cases involved an employer bringing a case against an employee.

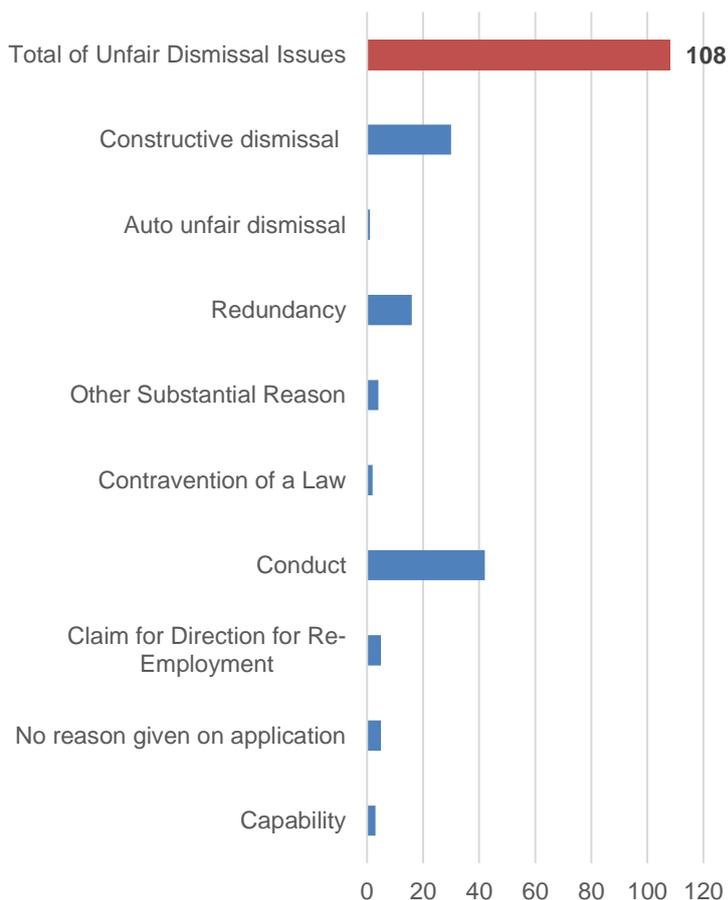
Sector of employment



Issues dealt with in 2016 by the Employment Tribunal

The complaints received by the Tribunal often comprise different types of Issues. The Tribunal has broken down the types of issues into ‘all unfair dismissal claims, all breach of contract claims, all statutory redundancy right claims and all other issues’. Unfair dismissal can be defined as a termination of employment which is seen by the employee as ‘unfair’.

Unfair Dismissal Issues



Capability – where the employee’s capability or the qualifications to do the job were the reason for the dismissal

Conduct – where misconduct by the employee is the reason for the dismissal

Redundancy – where the employee is dismissed wholly or mainly because he is redundant as defined by the Employment Law

Contravention of a Law – where the employee is dismissed because he could not continue in that position without contravening a duty or restriction imposed by a law

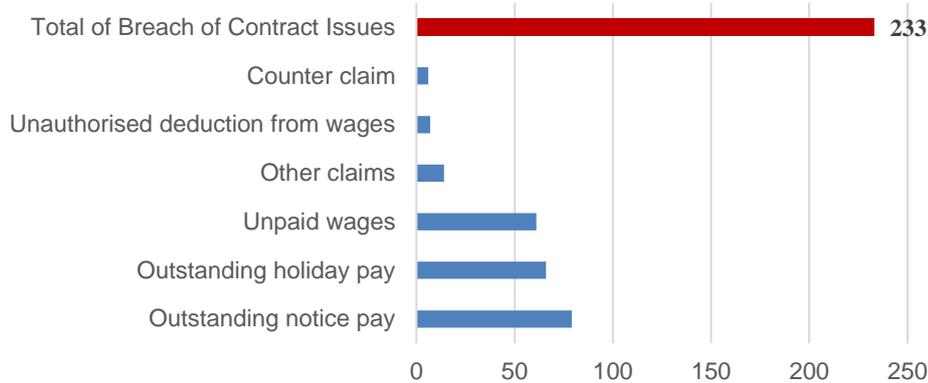
Some other Substantial Reason - where an employee is dismissed because of a substantial reason of a kind which justifies the dismissal of that particular employee

Constructive Dismissal – where an employee resigns because of the way the employer treats them.

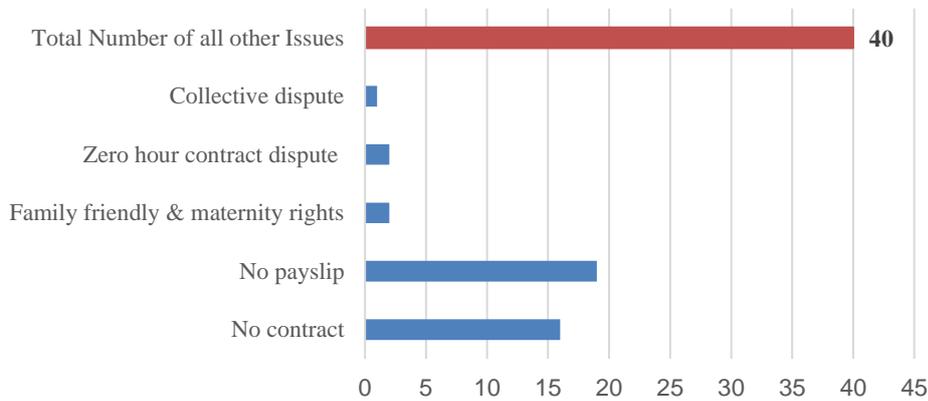
Auto unfair – it is automatically unfair if you are dismissed because you are pregnant or on maternity leave, you have asked for your legal rights (i.e minimum wage), whistle blown, are part of a trade union or due to an act of discrimination.

On application the breach of contract complaints (233 issues in total) concerned the following specific issues:

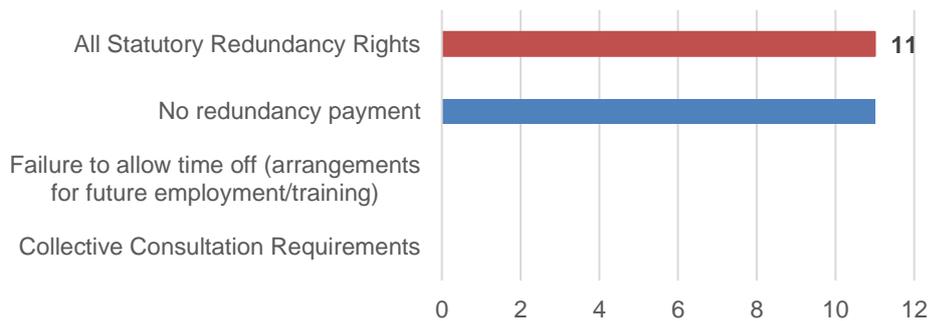
Breach of Contract Issues



Other Issues Raised



Statutory Redundancy Rights

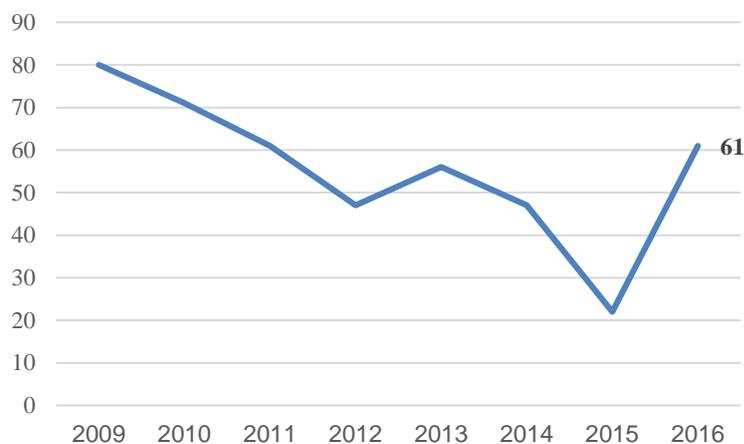


Statutory Redundancy Rights account for 11 issues raised, these were all concerning non-payment of redundancy money.

Trends in issues claimed for

Outstanding Wage Claims

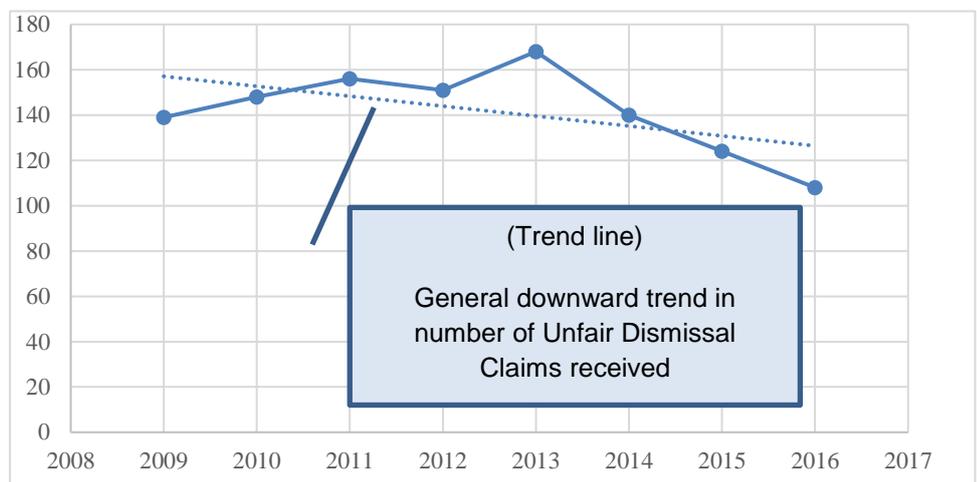
In 2016 there was a sharp increase in the amount of outstanding wage claims.



In final hearings, 18 claims concerning outstanding wages were heard – almost 90% of these claims were found in favour of the applicant (the employee).

Unfair Dismissal

The decrease in the number of unfair dismissal complaints received by the Tribunal continued in 2016



Failure to provide Employment Particulars or a Wage Slip

In 2016 there were 35 complaints to the Tribunal concerning the failure by employers to provide a written statement of the terms of employment or a payslip to the Tribunal. Of these complaints 70% were dealt with by mediation or withdrawn by the applicant and 90% of those complaints that proceeded to a Full hearing were found in favour of the applicant (the employee).

From the 1st April 2017 the Tribunal will be able to award compensation to an employee of up to 4 weeks' pay if their employer fails to provide them with any of their employment particulars, wage slips or rest days in accordance with the provisions of the Employment Law. The Minister for Social Security recognised in her 2015 Report that some employers were failing to comply with these 'three fundamental provisions... [and]... hoped that [this] additional protection will encourage employers to meet these basic entitlements'.

Working with other Organisations

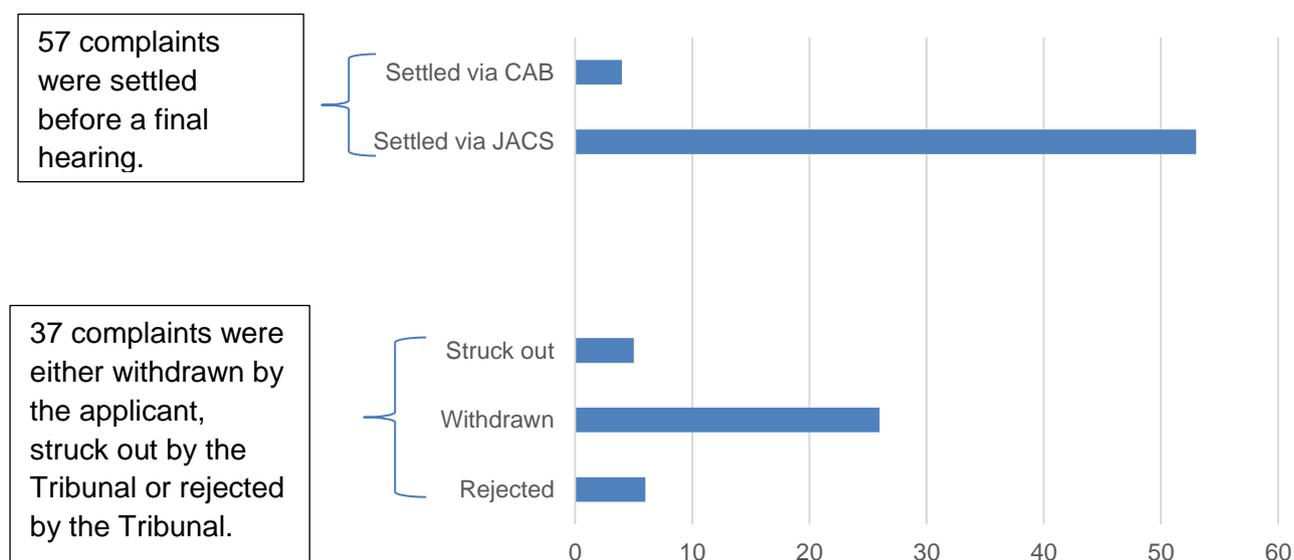
The Tribunal is a forum for the adjudication of employment and discrimination disputes. However, the Tribunal also encourages the settlement of disputes without the need for a hearing.

Following feedback from clients and other organisations the Tribunal Service has changed its timetabling of cases in order to encourage conciliation between parties by providing a longer timeframe between the submission of complaints and the issue of Directions by the Tribunal.

Mid 2016 saw the Tribunal introduce a timeframe of 3 weeks from the submission of a response to complaint before a case management meeting was held, in order to give time to the parties for conciliation to begin to take place.

Complaints involving employment matters (including discrimination in the workplace) are referred to JACS, and non-work based discrimination complaints are referred to CAB, for conciliation.

Outcome of cases which did not go to full hearings



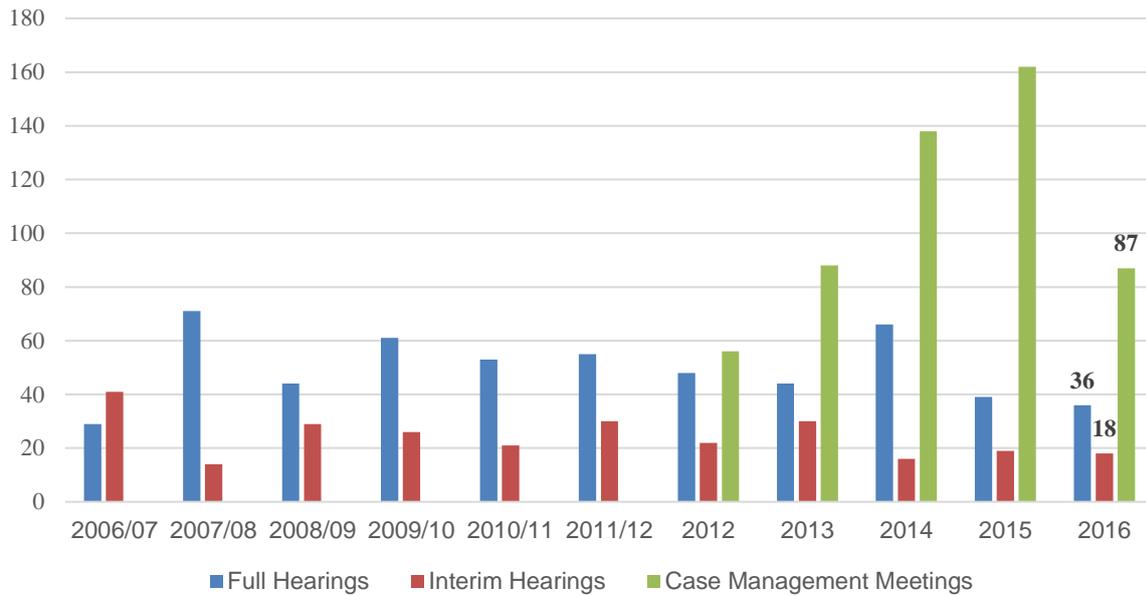
Total number of Hearings before the Tribunal

If a complaint is not settled, withdrawn or rejected at an earlier stage, it proceeds to a *hearing*. A hearing is attended by the Applicant and Respondent or their representative, many parties many of whom choose to put their own case to the Tribunal whilst others are represented by a lawyer, trade union official, professional organisation, friend or relative.

A hearing is normally conducted by a Chairman and two panel members. The purpose of a Full hearing is to decide whether on the evidence the complaint or complaints succeed or fail and to make the appropriate award of compensation.

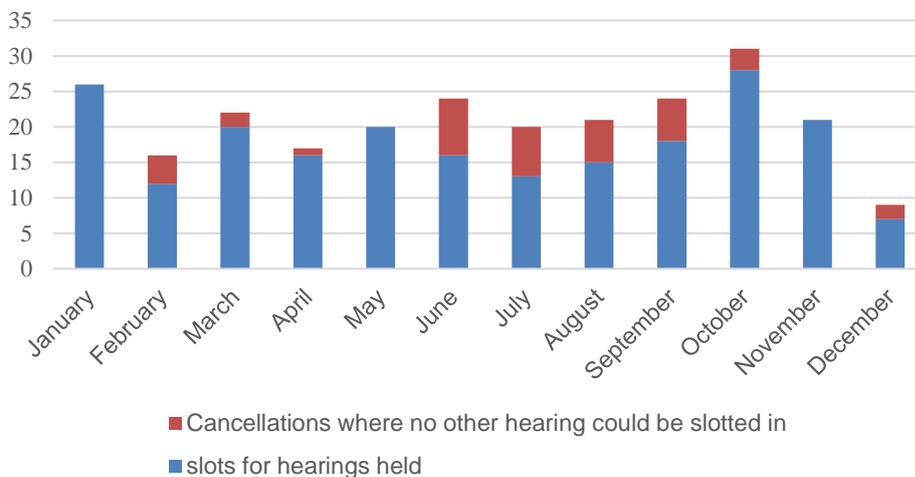
Prior to a Full hearing, there may also be an Interim hearing. These take place in order to determine an initial point of law, for example, whether or not the Applicant was an employee.

Number of Hearings per Year (by Type of Case)



The Tribunal's diary is filled with different types of hearing: a case may have many types of hearings before it is finally resolved. If a hearing is cancelled with notice, the Tribunal will endeavour to hear another case which is waiting to have another date.

Availability of Tribunal to hear cases



Why do cancellations occur?

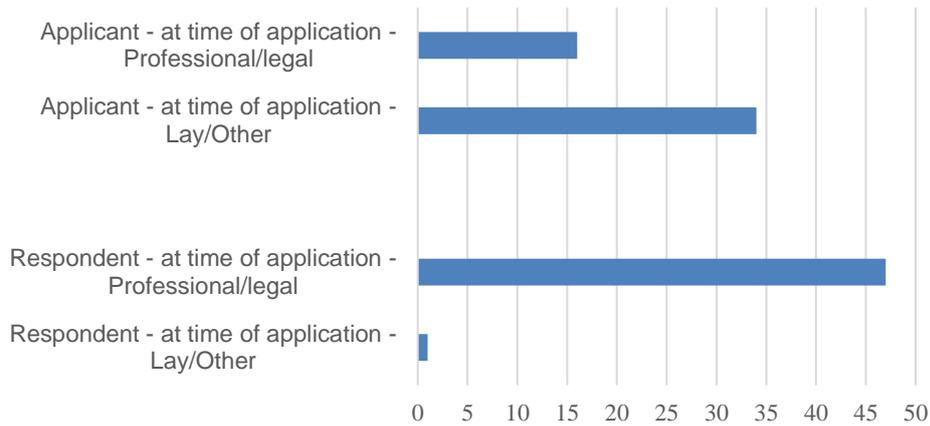
The party may have still been mediating (hopeful that they could avoid a court date).

Parties may request an alternative day (i.e. due to illness) or the case may be adjourned and not held if parties have not complied with written directions or not turned up on the day of the hearing.

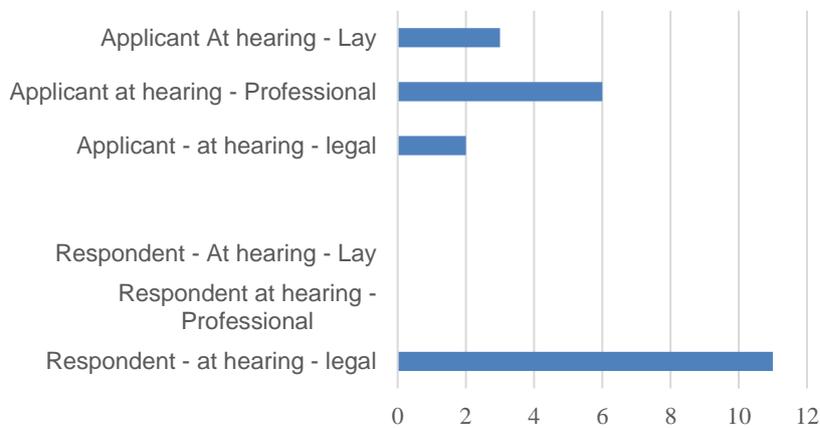
Representation of Parties

Either party can elect to be represented at any point in their case. This may either be by a legal representative, a professional representative (such as a Union Official or a trained professional who has experience of EDT proceedings), a political representative (a member of the States of Jersey) or a lay representative (such as a friend or family member).

Representation at Initial stage of Proceedings



Representation at Interim and Final hearings



Use of Interpreters

The services of an Interpreter are provided by the Tribunal Service at all hearings at no charge to the parties whenever required.

Number of times an Interpreter was required at the EDT for Hearings:

2014 – 41 occasions where an interpreter was required.

2015 – 52 occasions where an interpreter was required.

2016 – 29 occasions where an interpreter was required

In 2016 the Tribunal required the assistance of translators in Portuguese, Polish, Russian and Romanian. 90% of those requiring translators at final hearings were applicants.

Use of technology to facilitate hearings

Three occasions in 2016 required use of video conferencing facilities to enable parties outside the Island to take part in the Tribunal proceedings.

New Tribunal Procedures Order

The Employment and Discrimination Tribunal (Procedure) Order 2016 came into force on 1st April, 2016, which has formalised the manner in which the Tribunal administers cases.

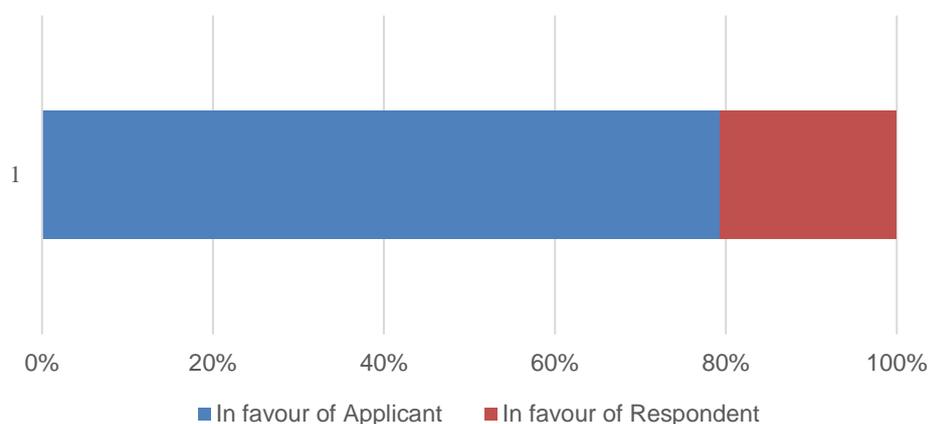
50 cases in 2016 were administered before the Procedure Order came into force.

Non-participation in Tribunal Proceedings

One way in which the Procedures Order has affected the management of the Tribunal's cases is in respect of Article 12 of that Order. Article 12 governs the situation where an employer has either not filed a response to a complaint made against it within the prescribed time limit, its response has been rejected by the Tribunal (and the employer has not asked for a reconsideration of its response) or the employer has indicated that it does not intend to contest the complaints made against it. In these situations the employee's complaints can be heard without the participation of the employer. Even though this provision only came into force on the 1st April 2016 it has been used in 7% of the complaints received by the Tribunal since that date which indicates what a useful provision this for the Tribunal in the resolution of complaints received.

29 issues were raised before the Tribunal in 2016 in which the respondent (the employer) did not take part in the Tribunal proceedings.

Outcome of Issues decided in Regulation 12 cases in 2016



Désastre/bankruptcy/administration of companies / ceasing to trade

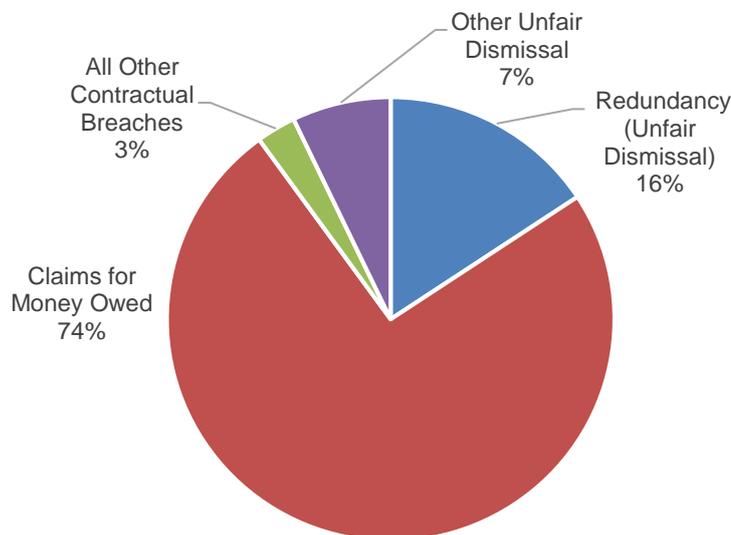
In 2016 the Tribunal saw a significant rise in the number of complaints received where an employer was in financial difficulty, resulting in them being declared insolvent and no longer trading in Jersey.

Companies in Jersey can do this by several means. Companies can go into liquidation or administration, whereby an accountant or specialised firm will arrange the wind up of the company, or via the Viscount, (for employers declared en Désastre).

Where companies are received into liquidation or administration, the Tribunal can continue to hear the case so that a Judgment may be issued with awards of any monies owed. This can then be presented to the administrators, and the applicant can become one of the creditors, claiming money in the matter.

Where a matter is being dealt with by the Viscounts, the Tribunal will 'stay' the case, and the Viscount's Department will assist the employees through the process and keep them apprised of the situation, including whether there are funds available to pay claims and liaise with the Social Security Department in applying for Insolvency Benefit.

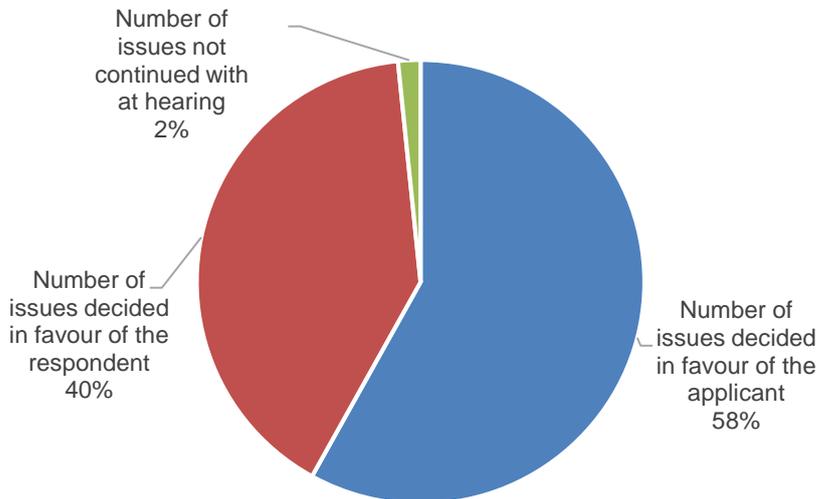
19 Complaints were received by the Tribunal in situations where a company ceased to trade in 2016. These complaints were comprised of 70 Issues:



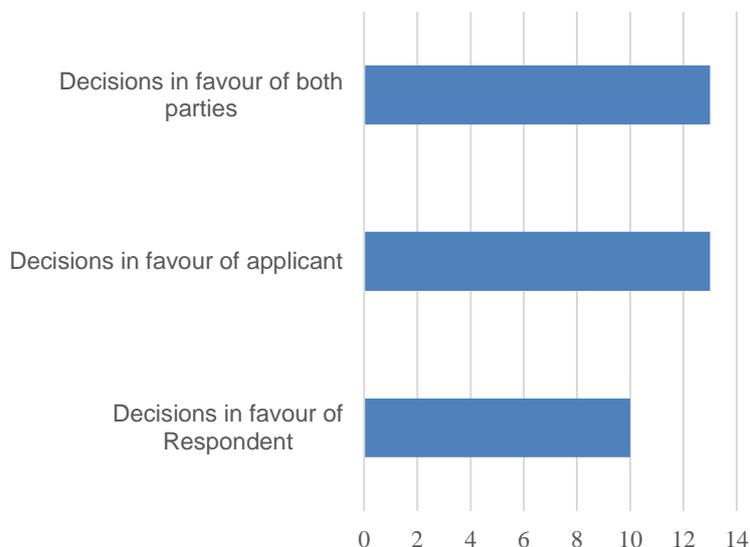
Outcomes of full hearings in 2016

Over the last few years the complexity of complaints received by the Tribunal has increased due to a rise in the number of issues in each complaint and it is now no longer possible simply to state the percentage of who won which complaints (employee or employer) as the cases are too complex to show this accurately:

36 cases, concerning 124 issues were decided at full hearings in 2016.



Here is a breakdown of results of the 36 cases heard in 2016 showing whether the Tribunal found in favour of the applicant, respondent or both parties:-



Decisions in favour of both parties refer to decisions on multiple issues of which some were found in favour of the applicant and some in favour of the respondent.

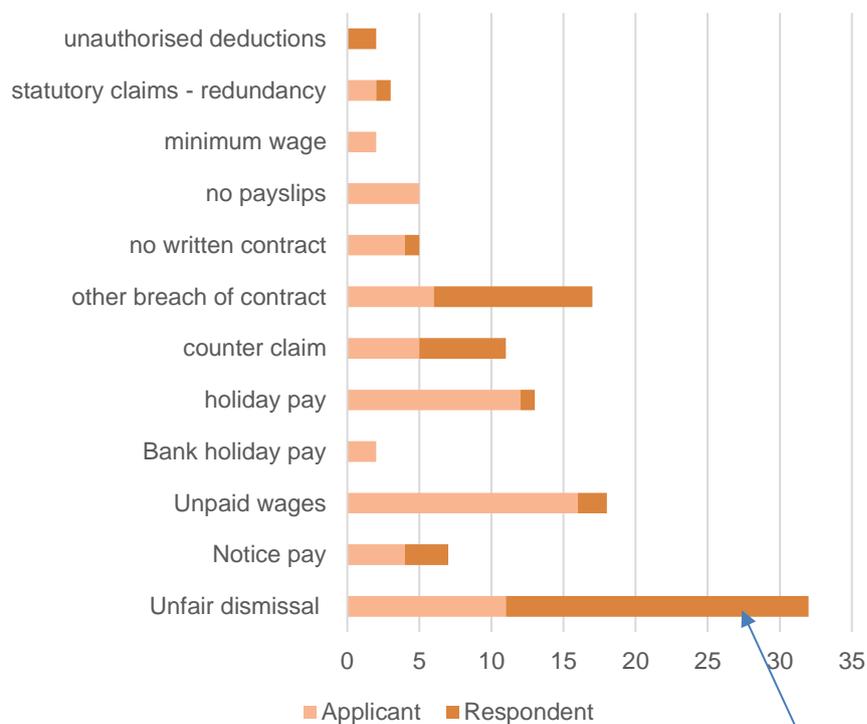
For example:-

A case where it was found that the employee had not been unfairly dismissed, but was found to be owed outstanding wages and holiday pay by the employer.

Outcome of Issues at Hearing

For the first year the Tribunal has recording the outcome of hearings by issue. Not all issues require resolving at full hearing. The issues of unpaid wages, other breaches of contract and unfair dismissal complaints dominated the issues determined at final hearings.

Outcome of hearings - 2016 - by Issue



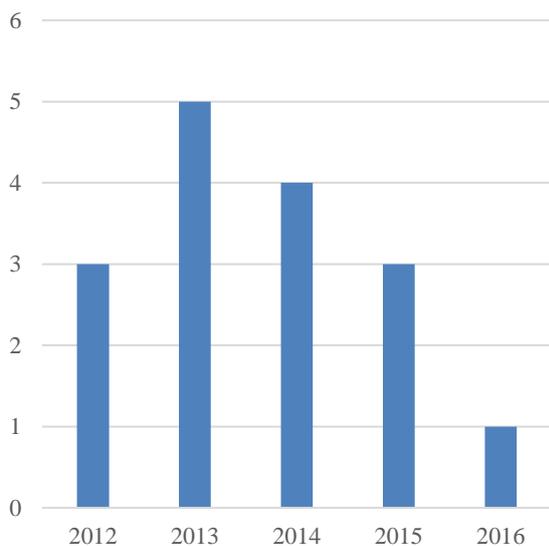
Over 60% of unfair dismissal claims were found in favour of the Respondent, which means that the Tribunal found that the applicant was not unfairly dismissed.

Awards of Compensation in 2016

A total of £75,656.38 was awarded to applicants who had their cases heard in 2016.

A total of £923.41 was awarded to Respondents (Employers) during 2016 following successful counterclaims.

Trends in number of reductions of awards by year



The Tribunal may reduce an award of compensation by such amount as it considers just and equitable having regard to any of these circumstances:

(The statutory reasons for a reduction are found in part 77(F) of the Employment Law.)

That the employee unreasonably refused an offer by the employer which would have them return to employment;

That the employee's conduct before dismissal contributed directly to the dismissal;

That the employee had agreed to receive a settlement payment;

That the employee has been awarded a redundancy payment or is entitled to receive one;

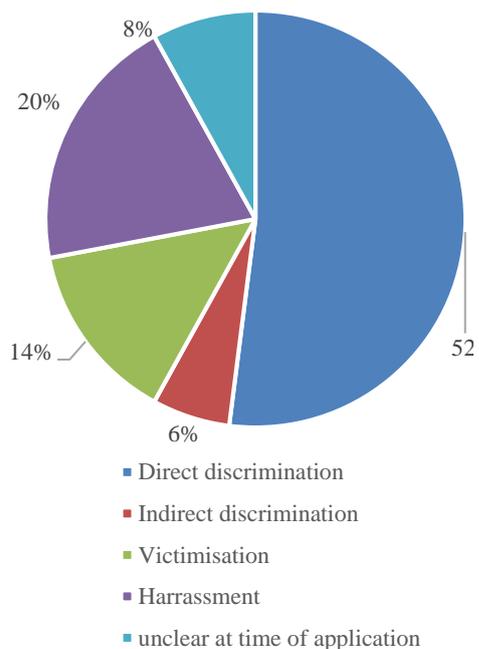
That the employee has refused a reasonable offer of compensation by the employer before the Tribunal proceedings, which was equal to the maximum award the Tribunal can provide;

That there are circumstances in the case that the Tribunal considers would be just and equitable to take into account.

Statistics relating to Discrimination Law

The Discrimination (Jersey) Law 2013, came into force on 1st September, 2014. The EDT has jurisdiction to hear complaints under this law. Currently the protected characteristics under the Discrimination Law are race, sex (sexual orientation, gender reassignment, pregnancy and maternity) and age.

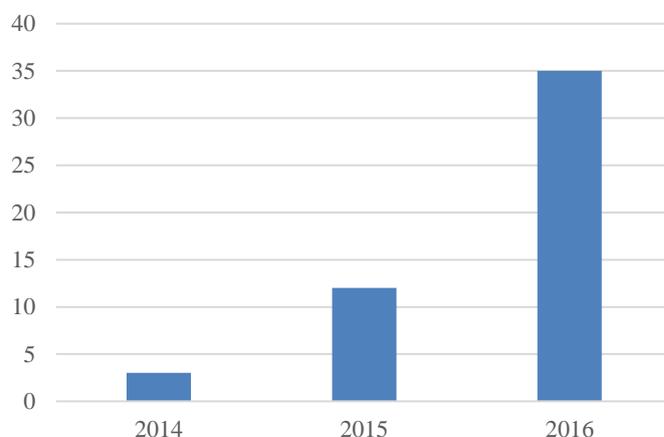
Types of discrimination Complaint Received by the Tribunal



- A person **directly** discriminates against another person if he or she treats that person less favourably than another person because of a particular characteristic.
- A person **indirectly** discriminates against another person where they apply a provision, criterion or practice, which the person cannot show to be a proportionate means of achieving a legitimate aim, that disadvantages (or would, if applied, disadvantage) people with a particular characteristic.
- **Victimisation** – protects those who raise a complaint of discrimination (or assist others in doing so) from suffering less favourable treatment as a result.
- **Harassment** involves unwanted conduct which relates to a protected characteristic that violates the dignity of the victim or creates, for example, an intimidating or offensive environment, e.g. sexual harassment.

Discrimination Complaints are submitted to the Tribunal by way of a Form JEDT1 or JDT1. The Tribunal received 35 complaints of discrimination in 2016.

Number of Discrimination Complaints Received by the Tribunal since the Discrimination laws were introduced



Discrimination laws are being introduced to Jersey in a phased development over several years, which may account for the rising trend in applications.

In September 2014 Race was introduced as a protected characteristic

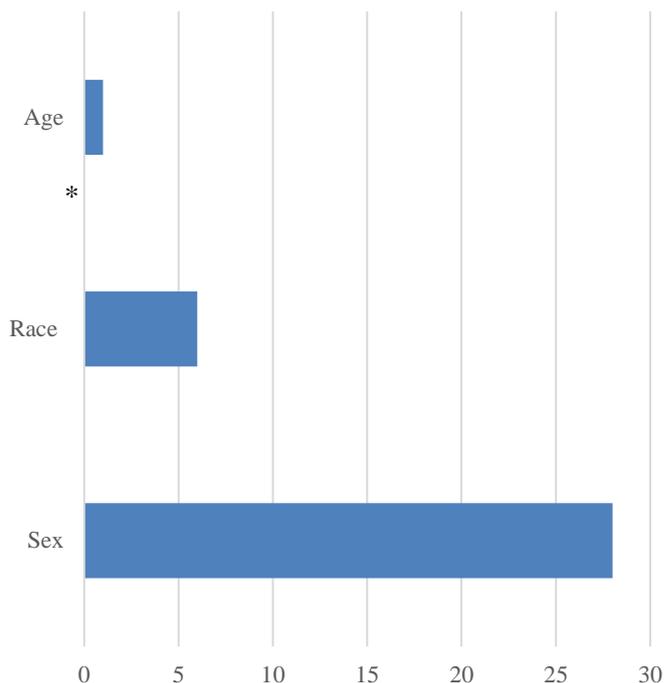
In September 2015 Sex and related characteristics were introduced as protected characteristics.

September 2016, saw the introduction of Age as a protected characteristic.

(2 complaints were rejected in 2016)

“Approximately 17% of cases of discrimination in 2016 involved race”

Applications by protected characteristic in 2016



Sex and related characteristics – this includes (but is not limited to) sex/gender, sexual orientation, gender reassignment, pregnancy and maternity.

Race – this includes colour, nationality, national origins and ethnic origins.

Age – this includes a person who is of a particular age group or to a range of ages. Including young people, older people, middle aged people.

“Approximately 10% of discrimination cases in 2016 included ‘family friendly’ concerns such as maternity and pregnancy.”

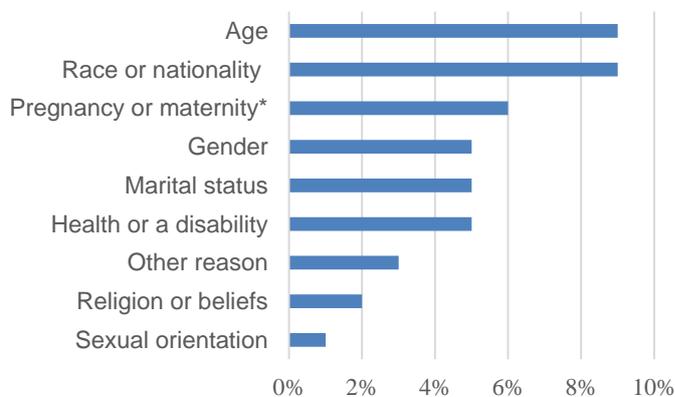
(* the 1 Age related complaint was rejected as the complaint was brought in before May 2016 when the law came into effect)

Perception of Discrimination in Jersey

In the Jersey Annual Social Survey (JASS) of 2012 respondents were asked if they felt they had been discriminated against in Jersey over the past 12 months on a range of grounds such as age, marital status or religion. A quarter (25%) of Islanders reported at least one occasion of discrimination over the previous 12 months.

Figure 25: (JASS 2012 Survey results)

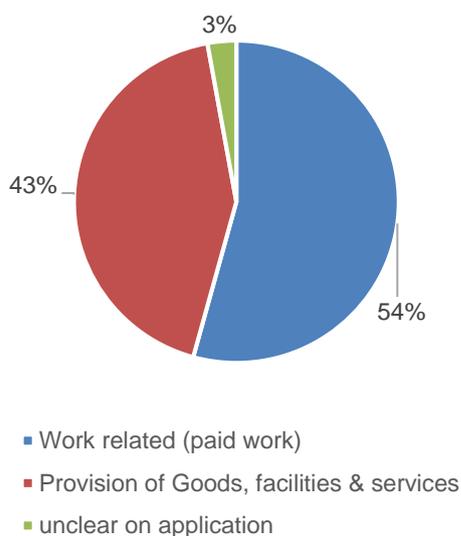
Do you consider that you have been discriminated against in Jersey on any of the following grounds within the past 12 months? (Percentage ‘Yes’ responses for each grounds)



* NB of females aged between 16 and 49 years

Data supplied by SOJ Statistics Unit, 2012 JASS, page 21.

Application by area of Law



A Complaint can be made in respect of the following areas:

- Work Related (paid work)
- Work related (voluntary work)
- Education
- Provisions of goods, facilities and services
- Access to and use of public premises
- Disposal or management of premises
- Access and membership of clubs
- Requests for information

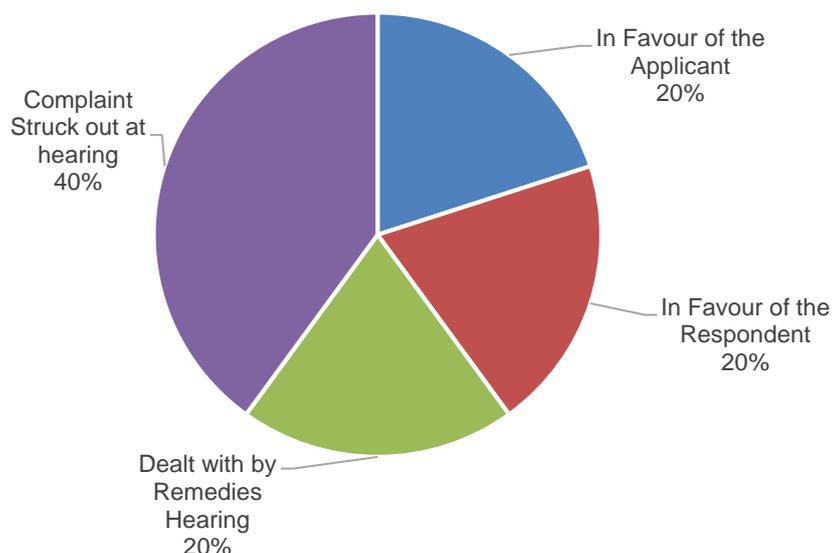
Conclusion of Discrimination complaints

If the nature of the complaint is work related, it falls under the remit of the employment and discrimination panel members; in 2016 over 55% of discrimination claims fell into this bracket. These claims are mediated by JACS.

Discrimination complaints not concerning employment are heard by the discrimination panel and are mediated by the Citizen's Advice Bureau.

Discrimination complaints often involve a number of Respondents. For this reason and the fact that they involve very personal recollections of a situation, they can take longer to administer and to hear than an employment claim.

Outcome of Discrimination Complaints at Hearings



Membership of the Tribunal

The Tribunal consists of a legally qualified Chairman, up to five legally qualified Deputy Chairmen and three pools of side members. One pool of side members comprises up to eight persons with knowledge or experience of, or an interest in, trade unions or matters relating to employees generally. The second pool comprises a group of up to eight persons with knowledge or experience of, or an interest in, employers' associations or matters relating to employers generally. When the Tribunal hears a complaint under the Employment Law, or a work related complaint under the Discrimination Law, a Chairman will sit with a lay member from each of these pools. However when the Tribunal sits to hear a non-work related complaint under the Discrimination Law a Chairman will sit with two lay members drawn from the third pool of lay members which comprises a group of up to eight persons with knowledge or experience of, or an interest in matters relating to equality and discrimination generally. All appointments to the Tribunal are made following an open recruitment process overseen by the Jersey Appointments Commission in accordance with its published guidelines.

Once appointed, lay members remain totally independent of their background; they do not represent any organisation that they are associated with or indeed even the employee/employer perspectives of a work related complaint. In cases that do not include a discrimination complaint, the Chairman and Deputy Chairmen may be able to sit alone to hear disputes but generally, whenever the Tribunal sits to consider issues at an Interim hearing or a Full hearing, it will consist of a panel of three persons being the Chairman or a Deputy Chairman, together with two lay members from the appropriate pools of side members.

Membership of the Jersey Employment and Discrimination Tribunal

As of 31st December, 2016, the members of the Tribunal were:

Chairman

Nicola Santos-Costa

Deputy Chairmen

Advocate Claire Davies

Hilary Griffin

Advocate Michael Preston

Panel members appointed to hear complaints under the Employment Law and also work related complaints of discrimination

Members with experience as representatives of employers

Ian Carr

Louise Cram

Sue Cuming

Emma Harper

Louise James

Gerry Larkins

Mark Therin

Marilyn Wetherall

Members with experience as representatives of employees

Mike Baudains

Simon Cross

Clive Holloway

Zannah Le Moignan

Vincent Manning *(Stepped down in 2016)*

John Noel

Anne Southern

VACANT

Panel members appointed to hear non-work related complaints of discrimination

Elizabeth Adams

Janet Brotherton

Melanie Cavey

Claire Follain-Metcalf

Thomas Gales

Mandlenkosi Mlambo

Tamburi Muoni

Daria Sawicka

Contact details of the Tribunal Service

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