Employment Tribunal Proceedings Guidance during Covid-19

Although virtual hearings are not something new to the Employment Tribunal, it is, like every other area of law, faced with the inevitable voluminous amounts of virtual hearings for which are now imminent, so that the rule of law can continue during this time of crisis. In that respect, HMCTS have issued various Directions and Guidance over the last few weeks to assist all parties involved in Tribunal proceedings and to ensure as far as is practicable that Tribunals are kept running as efficiently as possible. Chelsea Brooke-Ward consolidates that guidance below.

On 18th March 2020 the first issue of the Presidential Guidance took effect in connection with the conduct of Employment Tribunal proceedings during the COVID-19 pandemic.

This Guidance was issued in accordance with Rule 7 of the Employment Tribunals Rules of Procedure ("the Rules"). The Rules are set out in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, and can be accessed here.

The President of the Employment Tribunal contended that Tribunals must have regard to the guidance, but are not bound by it.

Most practitioners will already be familiar with the Overriding Objective which is set out in Rule 2 which gives Judges are wide discretion in relation to the conduct of proceedings so as to enable Employment Tribunals to deal with cases fairly and justly. As usual Tribunals are required to seek to give effect to the Overriding Objective when interpreting, or exercising any power given by, the Rules and those in relation to the current pandemic are no different. Parties and their representatives are required to assist Tribunals to further the Overriding Objective, and in particular are encouraged to cooperate with each other generally and the Tribunal.

Hearings conducted by electronic communication

"Rule 46 allows a hearing of any kind to be conducted, in whole or in part, by use of electronic communication (including by telephone) provided the Tribunal considers it just and equitable to do so and, where a hearing is to be in public, members of the public can hear what the Tribunal can hear and see any witness as seen by the Tribunal. Electronic communication can include use of video conferencing and skype."

This Rule is not a new concept and has always been available for Employment Tribunal cases, although most commonly used for Preliminary Private Hearing where only the representatives are required. The President of the Employment Tribunal has however advised "that during the pandemic Tribunals, and parties, should have this power at the forefront of their minds when considering how best to further the Overriding Objective in the current circumstances." By enabling electronic hearings to continue "this will reduce the risk to parties and representatives, and related worry and stress. It may also mean that a hearing can take place expeditiously which might otherwise be delayed due to Covid-19 related difficulties.

<u>The Guidance</u>

Employment Tribunals already conduct a significant number of case management preliminary hearings, which are private under Rule 56, by telephone as mentioned above, although a lot of these were also generally conducted in person. It is now accepted that parties should start on the presumption that these hearings will now be conducted by telephone or other electronic means.

Further directions were implemented on 23rd March 2020 which took immediate effect which converted all in-person hearings (hearings where the parties are expected to be in attendance at a tribunal hearing centre) to a case management hearing by telephone or other electronic means which will take place (unless parties are advised otherwise) on the first day allocated for the hearing. This direction applies to all cases listed to commence on or before Friday 26th June 2020. If the case is set down for more than one day then parties should proceed on the basis that the remainder of the days fixed have been cancelled. The parties remain free to make any application to the Tribunal at any time in respect of such direction or any other matter. In-person hearings listed to commence on or after 29th June 2020 will remain listed, for the time

being, and will be subject to further directions in due course. These directions are expected to be kept under review with the next review scheduled to take place on 29th April 2020 and thereafter on 29th May 2020.

Given that the Tribunals are now set to be completely virtual all parties and the Tribunal are urged to ensure that no time is wasted and that matters and issued are dealt with expeditiously and pragmatically. Employment Judges have been advised to issue written orders and directions to gather information about some of the issues which a judge might, in normal circumstances, consider are best discussed with parties at an in-person hearing. It may also be that some of the information judges regularly provide to unrepresented parties at in-person hearings, to assist them in understanding key legal concepts in a case, could be provided in writing before any such hearing takes place, with information also being provided at that stage about sources of further information and advice.

Directions may now be made that parties read the written information, formulate questions they may have for the judge and prepare their responses to any orders issued (in draft) in advance of a telephone case management hearing so this will enable the hearings to run smoothly and taking up less time which in turns means more hearings can continue. Parties (particularly those who are represented) are advised, in light of their duty to cooperate in furthering the Overriding Objective, should actively engage with each other with a view to assisting the tribunal so that hearings can be converted and take place by electronic means. This may mean that representatives should aim to contact each other in advanced and ensure that each side has all the documentation required for the hearing and be as transparent with each other as possible. Ensuring that any such documentation wished to be relied upon is sent as far in advance as is possible.

Substantive issue preliminary hearings or a final hearings are rarely conducted by electronic means, not least because there was no need before but for many other reasons including practicality of such situations. However, there is no ability to conduct in person hearings now and where possible Tribunals must still continue to function where possible. The guidance doesn't seek to bind Tribunals to hear such claims by electronic means but to evaluate whether any of the claims they have can proceed on such basis. Employment Judges are asked to make

the assessment on suitability, but this will inevitably require the input of the parties and all involved should give ‘consideration as to whether there are any steps that could be taken to facilitate a hearing taking place by electronic means’, and where possible communicate this to the Tribunal.

Again, parties are advised to cooperate with each wherever possible a suggestion of this is by for example ‘producing a statement of agreed facts or a list specifying facts in dispute that require to be determined at such hearings in advance. Narrowing the facts that need to be determined to simplify cases, requiring little oral evidence’, which in turn would make electronic hearings more attractive so that they can proceed. Whilst practitioners are required to this in any event given the lack of time and resources this is often something that is done at the door of court, the Tribunal’s guidance is that preparation in advance will allow for a more efficient process and ultimately means that the profession can ‘get back to work’.

On occasion in-person hearings take place simply for the purpose of delivering legal arguments/submissions parties should now start from the premise that, during the pandemic, it is appropriate for written submissions to be used, with each party having the opportunity to comment on the submissions made by the other side. Again, such submissions will need to be served in advanced of the hearing. If representatives, consider this would be contrary to the Overriding Objective ‘then they should make their position clear in writing as soon as it becomes evident that arrangements are going to have to be made for submissions to be delivered’.

In cases for final remedy hearings absent the service of an ET3 under Rule 21 the Guidance states that it is now expected for judges to gather the information they need to determine remedy by means of a telephone hearing and/or by sending written questions to a claimant, designed to elicit the required information should they need to do so before a determination is made.

Judicial mediation hearings, which are normally conducted in-person, may be able to take place by video or telephone conference call. Judges and parties should remain alive to that possibility and consider whether that might be feasible at the time when the judicial mediation hearing is being fixed, if a mediation hearing is already schedule it is again reiterated that parties should

co-operate and work together to enable such hearings to continue where possible by electronic means.

Constitution of the Employment Tribunal

Some types of claims are normally required to be heard by an Employment Tribunal constituting a three person bench. It is possible for claims to be heard by an Employment Judge and one member pursuant to s.4(1)(b) Employment Tribunals Act 1996 (ETA) or by an Employment Judge alone pursuant to s.4(2) and (3)(e)) with the consent of both parties. Employment Judges have been advised that they should consider these provisions in light of the current pandemic and to explore the possibility of hearings continuing by application of such sections and address this where relevant with the parties.

Other case management matters

It is undoubtedly the case that Employment Judges will now be asked more frequently to make Orders to address the consequences of Covid-19, or to take into account one or more Covid-19 factors, when deciding whether or not to make an Order. For example, it is clearly foreseeable that postponement applications or requests for extensions of time may be made for Covid-19 related reasons.

The Guidance on postponement applications under Rule 29 can be found here.

The Guidance on request for extensions of time under Rule 21 can be found here.

When considering whether or not to make an order, or vary or revoke one already granted, for Covid-19 related reasons, Employment Judges are advised to expect parties to provide whatever evidence is available which shows or tends to show that the reason put forward for the application is a valid Covid-19 related one so as to avoid any tactical litigation relying on the current climate unreasonably.

As with most professions now following the announcement of Boris Johnson that those who can, should work from home. Therefore, during the pandemic Employment Judges will be based for all or part of the time at home. Parties should bear this in mind when corresponding with the Tribunal and ensure that communication is sent electronically to ensure that such correspondence can be sent to the judge expeditiously by electronic means, thereby furthering the overriding objective.

Additional Powers in the Rules

"The attention of parties and Employment Judges is drawn to the following Rules:

Rule 41 allows the Tribunal to regulate its own procedure and to conduct a hearing in the manner it considers fair, having regard to the principles contained in the overriding objective.

Rule 47 allows a Tribunal, in the event of non-attendance by a party, to dismiss a claim or proceed with the hearing in the absence of a party. Any party who is not able to attend for Covid-19 related reasons, and who does not wish either of these steps to be taken, should do all they can to inform the Tribunal Office of the reason for non- attendance in advance of the hearing so that this information is available to the Employment Judge who is to hear the case.

Rule 60 refers to the manner in which decisions 'made without a hearing' are to be communicated to parties. This rule does not override the requirements in the Rules for hearings to take place in the circumstances described in the Rules. However, if any party considers that a decision which would normally be taken at a hearing, is one which could be made without a hearing, bearing in mind the other provisions in the Rules and the overriding objective, they should make a written application. That application should explain why the decision can, in their view, be made without a hearing and still be in accordance with law.

Rule 64 allows orders and judgments to be made by consent. Specifically, if parties are able to agree in writing on the terms of an order or judgment a Tribunal may, if it thinks fit, make such an order or judgment. Parties are encouraged to cooperate with each other so that, where possible, applications can be made under this Rule."

What can be taken from the guidance is that as a profession, employment lawyers are urged where possible to use ADR and facilitate negotiations with a view to settling claims if they can. Practitioners should be pragmatic and efficient and allow reasonable time for papers to be served and this should be done electronically. All parties to proceedings should co-operate and not unreasonably delay or take issue with any situation created by Covid-19.

The Employment Tribunal has a very useful FAQs page where a lot of the commonly asked questions have been asked and can be found here.

Employment Appeal Tribunals Guidance

All hearings in the Employment Appeal Tribunal, whether in London or Edinburgh, which were listed to take place up to and including 15 April 2020, are postponed. To be clear, this applies to all types of hearing, and the EAT will not be in a position for the moment to conduct hearings either in person or by remote communication. The President or a Judge of the EAT may, however, issue directions via remote communication in respect of a particular case should it be deemed necessary for reasons of urgency.

The time limits for instituting appeals, and the requirements for the proper and effective institution of an appeal, remain as set out in the EAT's Rules and Practice Direction. Copies of these, and guidance in relation to them, are available here. During this period of restriction, Notices of Appeal and accompanying documents must be sent by email in all cases. Please note the limit on email attachment size when doing so.

During this period, the EAT will not be in a position to respond immediately to telephone enquiries. Parties should anticipate that it may take appreciably longer for the EAT administration to respond to communications than usual.

It is anticipated that a further announcement will be made before 10 April 2020 including as to whether these restrictions will extend beyond this initial period and/or with an update regarding arrangements for hearings taking place thereafter.

When hearings resume, they will initially be conducted exclusively by telephone, Skype or some other form of video link. Parties should anticipate that the EAT staff may request remote contact details, or other assistance, to enable the relisting of hearings by these methods to be facilitated wherever possible.

These measures may be subject to change, depending on Government advice, and the ability of the EAT to hold hearings, including remote hearings by telephone, Skype or some other form of video link.

If you require any specific or additional legal advice on Employment issues please contact Miss Brooke-Ward's clerks on clerkscivil@psqb.co.uk or call 0113 245 9763.