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PRESIDENTIAL GUIDANCE IN CONNECTION WITH THE CONDUCT OF EMPLOYMENT TRIBUNAL PROCEEDINGS DURING THE COVID-19 PANDEMIC

This Guidance is 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.

Employment Tribunals must have regard to this Guidance but they are not bound by it.

This Guidance has effect from 18 March 2020.

Background

1. The overriding objective of the Rules, as set out in rule 2, is to enable Employment Tribunals to deal with cases fairly and justly. Tribunals are required to seek to give effect to the overriding objective when interpreting, or exercising any power given by, the Rules. Parties and their representatives are required to assist Tribunals to further the overriding objective, and in particular are to cooperate generally with each other and the Tribunal.

2. During the Covid-19 pandemic Employment Tribunals, seeking to apply the overriding objective in rule 2, will need to take into account the impact of the pandemic when assessing what steps may be taken to give effect to the overriding objective. The purpose of this document is to provide:

- (a) Tribunals with guidance as to how certain of the powers provided by the Rules may be exercised, during the pandemic, to give effect to the overriding objective and
- (b) information to parties about steps Tribunals may take (including making orders and giving directions) during the pandemic, when exercising their powers under the Rules and how parties can cooperate with Tribunals to further the overriding objective.

3. This guidance is issued against the backdrop of a number of constraints that are likely to impact upon what can realistically be done, in terms of Employment Tribunal practice and procedure, in response to the possible effects of Covid-19. For example:

- not all Employment Tribunal Offices have ready access to video conferencing equipment;
- if Employment Judges are working at locations other than Employment Tribunal offices, and need documents to be scanned and case management applications to be emailed to them, this will depend on there being sufficient staff and equipment available in those offices to carry out these tasks;

- not all hard copy documents received in a case are capable of being transformed into a digital format;
- if case files/hearing related documents, which are not available in digital format, are needed by Employment Judges working at locations other than Employment Tribunal offices this will depend in some instances on secure delivery services being available to transport those documents;
- given the range of Employment Tribunal hearings that require to be conducted in public, in terms of the Rules, this will limit what can be done from locations not open to the public (for example, a judge's private residence).

Hearings conducted by electronic communication

4. 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. We consider 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. If a hearing takes place by electronic communication this will reduce the risk to parties and representatives, and related worry and stress, which may be occasioned by travelling to hearing centres and interacting physically with a range of individuals. It may also mean that a hearing can take place expeditiously which might otherwise be delayed due to Covid-19 related difficulties (such as travel disruption or inability to appear in person due to self-isolation).

Paragraphs 5-14 set out our guidance on this topic in more detail.

5. Employment Tribunals already conduct a significant number of case management preliminary hearings, which are private (rule 56), by telephone. However, a large number of such hearings take place in person at tribunal hearing centres: it is not the objective of this Guidance to suggest that in-person hearings currently take place without good reason nor that in-person case management hearings should no longer take place at all. However, it may be that, with the support and cooperation of parties (particularly when both are legally represented), it is possible to reduce the number of in-person case management hearings that need to take place by relatively small changes in practice.

6. For example, it may be that there is scope for the tribunal 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 hearing takes place, with information also being provided at that stage about sources of further information and advice. A direction could 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. Proceeding in this way may assist in making a telephone case management hearing an effective means of making good progress in managing the case, even if it is one that the judge might normally have assessed as one which would benefit from an in-person hearing. If parties cooperate with each other, and the tribunal, in this process it could result in fewer in-person case management preliminary hearings being required.

7. During the pandemic Employment Judges and parties should start from the premise that a case management preliminary hearing should take place by telephone or other electronic means unless this would be contrary to the overriding objective. Similarly, where judges have already fixed in person case management hearings in cases they are responsible for managing, but those hearings have not yet taken place, they should consider whether it is possible to convert these into hearings to be conducted by telephone or other electronic means.

8. Regional Employment Judges (REJ s) and the Vice-President in Scotland (VP) should review hearing lists generally in the offices for which they are responsible with a view to identifying whether there are any in-person preliminary hearings which could be converted to hearings conducted by electronic means.

9. Parties (particularly those who are represented), 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 an in-person case management preliminary hearing can be converted to one which takes place by electronic means.

10. It is not common for a substantive issue preliminary hearing or a final hearing to take place by telephone or other electronic means. There are many reasons why this is so. Again it is not our objective to suggest that such hearings should take place by electronic means where that would be contrary to the overriding objective. It is a matter for the individual Employment Judge or Tribunal hearing the case to make an assessment of whether conducting such a hearing in this way would be in accordance with the overriding objective. However, Tribunals, and parties, bearing in mind their duty to cooperate in furthering the overriding objective, should give consideration as to whether there are any steps that could be taken to facilitate a hearing taking place by electronic means. For example, it may be that an Employment Judge could order that parties cooperate with each other in producing a statement of agreed facts and a list specifying facts in dispute that require to be determined. Narrowing the facts that need to be determined in this way could mean that some simpler cases, requiring little oral evidence, could take place by electronic means.

11. On occasion in-person hearings may take place simply for the purpose of delivering legal arguments/submissions. Judges and parties should start from the premise that normally, during the pandemic, it would be appropriate for written submissions to be used, with each party having the opportunity to comment on the submissions made by the other side. If a party considers that 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.

12. On occasion remedy hearings are fixed in cases where no ET3 has been submitted in a case and a liability only judgment has been issued under rule 21. When this happens it is often because the claimant is unrepresented and the Employment Judge forms the view that it will be easier and quicker to gather the information needed to make a remedy determination in person. However, the Covid-19 pandemic brings other factors into play, as already noted, such as risk and difficulty of travelling to hearing centres. In these circumstances, we would expect judges to start from the premise that they should normally 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.

13. 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.

14. Where parties consider that an in-person hearing of any kind, which is already fixed, could be converted to a telephone hearing or hearing by other electronic means they should notify the tribunal office as soon as that becomes clear so that the request can be placed before a judge.

Other listing matters

15. Employment Judges should bear in mind that, in the event that it is not possible to convene a hearing in public for Covid-19 related reasons, it may be possible for the hearing to be converted to a case management preliminary hearing, which will take place in private and could be done electronically, so that progress may still be able to be made in the case. For example, it may be possible at a case management hearing to further narrow the scope of what is in dispute, promote understanding of the law that will be applied to the facts and explore scope for resolving the dispute by alternative dispute resolution. It is expected that parties will cooperate when a proposal of this type is made since it is likely to be a step which will further the overriding objective.

16. When hearings have been postponed for Covid-19 related reasons REJs and the VP should consider whether it may be possible to substitute other cases into the list, assuming that the notice requirements under the Rules can be met or parties are prepared to waive them.

Constitution of the Employment Tribunal

17. Some types of claim normally require to be heard by an Employment Tribunal constituted as a full (three person) tribunal. However, it is possible for such claims to be heard by an Employment Judge and one member (s.4(1)(b) Employment Tribunals Act 1996 (ETA)) or by an Employment Judge alone (s.4(2) and (3)(e)) with the consent of both parties. Employment Judges, in furtherance of the overriding objective, should bear these provisions in mind and take the opportunity to explore with parties, in appropriate cases, whether such consent may be forthcoming in circumstances where it has not been possible to constitute a full tribunal for Covid-19 related reasons.

Other case management matters

18. It is undoubtedly the case that Employment Judges will be asked 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 and requests for extensions of time may be made for Covid-19 related reasons. Similarly, it may be that witness orders are granted for individuals who are not available to attend a hearing for Covid-19 related reasons. When considering whether or not to make an order, or vary or revoke one already granted, for Covid-19 related reasons, Employment Judges will 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. Similarly, it will be of assistance to Employment Judges if those making postponement applications can set out any steps they have taken in an effort to avoid a postponement being necessary.

19. During the pandemic it is possible that Employment Judges may be based for all or part of the time at locations other than Employment Tribunal Offices. Parties should bear in mind that if requests for case management orders or other correspondence is sent to the tribunal electronically then this will assist in ensuring that case management referrals can be made to the judge expeditiously by electronic means, thereby furthering the overriding objective.

Additional powers in the Rules

20. 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.



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