

EMPLOYMENT TRIBUNAL PROCEDURE IN A PANDEMIC: PART I

Introduction

1. A number of key changes to ET practice and procedure have been published this month. This blog addresses the headline changes introduced by **The Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020** (“the Regulations”)¹ which were laid before Parliament on 17 September 2020. In the main, these changes are measures designed to ameliorate the disruption caused by the Covid-19 pandemic, and to keep the wheels of justice turning. They are to be welcomed by practitioners and ET users alike.
2. The Regulations are available [here](#), and are accompanied by an Explanatory Memorandum [here](#). The majority of the changes will come into force on 8 October 2020, save for those relating to the extended period for ACAS Early Conciliation, which come into force on 1 December 2020.

What's the “new normal”?

3. **Virtual hearings:** the increase in hearings conducted in Cloud Video Platform (“CVP”) has resulted in greater flexibility, but it has also thrown up other considerations:
 - **Inspection of witness statements - r. 44:** for remote hearings witness statements may be inspected outside of the hearing (e.g. after the conclusion, or though less likely, before the hearing commences).
 - **Public hearing - r. 46:** the absolute requirement that parties and the public are able to see a witness in the same way as the ET has been qualified to the extent that this can be achieved “so far as practicable.” Note the requirement to be able to hear what the ET hears is unamended so as to preserve open justice.
4. **Cross-fertilisation of Judges:** Subject to certain suitability criteria, Judges who usually sit in other jurisdictions *may* be able to sit as EJs. The judge must be nominated by the Senior President of Tribunals and the relevant President in each jurisdiction, appropriate consent must be given, and the judge must also consent. The Regulations contain a long list of judges who may, subject to certain criteria, act as an EJ, ranging from a Deputy District Judge (Magistrates’ Courts) to the Lord Chief Justice of England and Wales. Regrettably, Justices of the Supreme Court do not appear eligible to be parachuted into the ET.
5. **Additional responsibilities of Legal Officers:** The functions performed by Legal Officers have expanded, the rationale being to allow EJs to spend more time on dispute resolution (subject to this being authorised in a Practice Direction by the Senior President of Tribunals).

¹ Amending the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014.

6. Legal Officers may now determine a referral under r. 12(1)(c), (e) or (f) – errors on the face of a claim form in respect of ACAS EC numbers and certificates as well as the following types of application:
 - r. 20 – applications for an extension of time for presenting a Response;
 - r. 30 – extension of time to comply with a case management order; an application, to which all parties agree to amend a claim or response; an application for additional information about another party's claim or defence; or, an application for different claims to be considered together;
 - r. 30A – postponement of a hearing; where such an application is made more than 7 days before the date on which the hearing begins and which is consented to by all parties;
 - r. 36(1) – order for specification of lead cases where all parties agree;
 - r. 54 - where the hearing sought would only determine matters under rule 53(1)(a), a preliminary consideration of the claim and case management; where all parties agree to the fixing of case management preliminary hearings;
 - confirmation of a stay (or in Scotland, a sist) of the proceedings in the event of a respondent's compulsory liquidation or administration; and
 - whether to dismiss a claim under r. 52 – dismissal following withdrawal.
7. Parties will be able to apply for any decision made by a Legal Officer to be considered afresh by an EJ within 14 days after notice of such a decision.
8. **Multiple Claimants and Respondents:** probably much to the greater relief of Claimant lawyers following ***Asda Stores Ltd v Brierley and Ors*** [2019] ICR 910, the circumstances in which multiple claimants (and respondents) may use a single claim form (or response form) in respect of materially the same disputes has been revised.
 - The requirement that claims be strictly “based on the same set of facts” is relaxed: two or more claimants may make their claims on the same ET1 if their claims give rise to common or related issues of fact or law or it is otherwise reasonable for their claims to be made on the same claim form;
 - a single response form may be used either where either “the responses give rise to common or related issues of fact or law or it is otherwise reasonable for the responses to be made on a single responses form”.
9. **ACAS Early Conciliation – duration and minor errors:** the two key changes are:
 - the standard period for ACAS EC is increased from one calendar month to six weeks (removing the previous optional additional 14-day extension period). As well as simplifying the process, it will assist ACAS with the backlog of cases (apparently as a result of the efforts of the ETS the backlog has remained static);
 - ETs have greater discretion over errors on the claim form (e.g. mistyped reference numbers). It is hoped that technical satellite disputes will be avoided, and that errors may be dealt with expeditiously.
10. **Miscellaneous:** Without going into unnecessary detail, minor modifications have been made to r. 19 (rejection of an ET3 – not in prescribed form or late (r. 17)); reconsideration of a rejection of ET3 presented late (r. 18). As occurs in some Regions already, ETs may list hearings upon the receipt of the ET1.
11. One important change is that r. 67 is amended so that judgments for withdrawn claims are exempted from the requirement that they be recorded on the Register.

12. Finally, r.21 is amended to make it clear that an Employment Judge may issue a default judgment after the determination of a preliminary issue at a preliminary hearing without a further hearing where there is no response to a claim.

Conclusion

13. The Regulations coupled with the latest Presidential Guidance provide a practical path to ensure that justice is not unavoidably delayed, and to enable the various cogs in the ET system to continue turning. They are to be welcomed in these unprecedented times. All that remains to be seen is whether there is sufficient resource and technology in place to underpin the success of these initiatives, and whether the ETS will face a surge in new claims. Success is likely to be tied to that of the Jobs Support Scheme, and whether businesses can hold out during the second wave.

ALEX SHELLUM

OLD SQUARE CHAMBERS

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