

EMPLOYMENT TRIBUNAL PROCEDURE IN A PANDEMIC: PART II

Introduction

1. On 14 September 2020, the President of the Employment Tribunals (England and Wales), Judge Barry Clarke, issued two new Presidential Guidance documents in the context of the COVID-19 pandemic – the *Presidential Guidance on remote and in-person hearings* and the *Presidential Guidance on remote hearings and open justice*.
2. The Guidance provides practitioners and ET users with a “nuts and bolts” guide to how hearings should be conducted during the COVID-19 pandemic, whether remotely, in-person, or a combination of the two. The Guidance is available [here](#) and [here](#).

The Presidential Guidance on remote and in-person hearings

3. The Guidance maximises flexibility in permitting ETs to conduct remote hearings wholly or in part. As with all case management decisions, this is a matter of discretion, to be exercised in accordance with the overriding objective. The standard form ET1 and ET3 forms will be modified to enable parties to express a preference as to how the hearing is to be conducted. The following considerations are likely to be relevant:
 - the availability of enough space in safe, risk-assessed venues;
 - whether safe travel to the ET is possible, especially for those using public transport;
 - the availability of suitable technological resources for use by the ET, and HMCTS staff to provide support;
 - the comparative delay in listing an in-person hearing vs. a remote one;
 - the personal circumstances (disability or vulnerability) of any participant, including whether a litigation friend or interpreter is required;
 - whether the parties are legally represented (which may favour holding the hearing remotely);
 - the ability of any participant to participate meaningfully in a remote hearing (i.e. whether they have access to, and familiarity with, the necessary technology); and
 - whether the nature of the disputed evidence is such that fairness and justice require it to be evaluated by the Tribunal in a face-to-face environment.
4. The Guidance also prescribes various responsibilities on all the parties ahead of a remote hearing - which should be obvious: such as ensuring that witnesses are aware of how to log into the hearing; that they have a suitable device with a stable internet connection; and that they are in an appropriate setting to give evidence etc. Parties should ensure that they have a form of oath or affirmation that they wish to take, including access to any Holy Book; copies of their witness statement; hearing bundle; and immediate contact details for each participant and their representative should the need arise.
5. **Documents:** Electronic documents are preferred on health and safety grounds. Where at least one of the parties is professionally represented, the witness statements and bundle must be supplied in PDF format. The Guidance sets out the principles which apply to the formatting of PDF documents - they should conform to optical character recognition; be numbered; appear the right way up (!); be bookmarked for ease of navigation with an

appropriate description where significant; and an index or table of contents should be prepared. PDF bundles of approximately 20MB or larger are likely to be too large to send to the ET as a single email attachment. Parties are to contact the Regional Office to make arrangements, and the ET should be advised if additional documents have been added.

6. Where it is not practicable to use e-documents, or where the ET directs the provision of paper documents for in-person hearings, each participant should wear their own gloves, or a separate set of hardcopy documents should be made available to each party or witness. For the same reasons, oath/affirmation cards should not be shared (the EJ is likely to read out the oath and ask the witness to repeat it). Holy Books are not to be touched if provided by HMCTS, but this will not prevent a witness from bringing their own copy.
7. **“Hand-ups”** (in the old language): the ET will only accept paper documents handed up where arrangements can be made for safe handling. If that is not possible, the ET **may** refuse to accept a document. Where paper documents are submitted, parties should ensure that 24 hours can pass to allow for safe handling. Generally, where paper documents are provided to the ET, they should be sent so that they are received one week before the start of the hearing.
8. **Miscellaneous Covid-19 measures:** for those who have not set foot in an ET since lockdown, the rules are straightforward: face coverings should be worn in the public areas of the ET, it is a matter for the EJ whether to permit the removal of face coverings when giving evidence or when a representative is addressing the ET. There will be regular breaks for handwashing, and risk assessments made available for those who wish to inspect. For advocates – water jugs and glasses are removed in most venues, and instead replaced by a bottle of hand sanitiser. Be sure to bring your own water bottle (and that witnesses do likewise).
9. It is incumbent upon professional representatives to liaise with unrepresented parties to ensure that the witness statements and the bundle are provided to them in an accessible format.

Presidential Guidance on remote hearings and open justice

10. This Guidance is principally aimed at ensuring that open justice is preserved while ETs continue to conduct cases throughout the COVID-19 pandemic, whether remotely, partly remotely, or in-person. Again, the rules are straightforward: anyone who wishes to observe a hearing may contact the administrative staff to obtain details of how to attend the remote hearing. Pending the amendment to r. 44 of the 2013 Rules, members of the press or public may inspect a witness statement either by it being placed on the screen for long enough so that it can reasonably be read, or by the ET directing the witness to read their statement aloud. If neither of those actions is practicable then submissions will be heard as to the best way to ensure open justice. Other provisions concern relocating to a larger Covid-secure hearing room so as to allow effective participation, and/or otherwise permitting viewing of the hearing by remote means (an experience shared by many employment law *aficionados* watching the epic contest in **Uber** before the Supreme Court).
11. One miscellaneous curiosity of note is that where members of the public attend a hearing in-person or remotely, they must apply to the ET for permission if they wish to use live, text-based communications (including *Twitter*). Members of the press or other ‘legal commentators’ are not required to apply for permission, however. Quite how one qualifies

as a 'legal commentator' is a mystery, and it is unclear whether a member of the public can become a "one-time" legal commentator.

Conclusion

12. The Guidance provides welcome clarity as to what practitioners and ET users alike can expect from a trip to the ET in the COVID-19 era, either in-person or virtually. It remains to be seen whether the Guidance will provide a degree of standardisation towards the conduct of ET litigation across the Regions, or whether Regional differences or practices will develop. However analysed, ET users will have to become accustomed to new ways of working. It is clear from the Guidance that a lot of thought has gone into the mechanics of how hearings can be conducted in a safe way while ensuring that justice is neither delayed nor closed to the public eye. Consequently, even though the duration of the second wave of COVID-19 remains uncertain, the ET system should nevertheless be better equipped than before to weather the coming winter storm.

ALEX SHELLUM

OLD SQUARE CHAMBERS

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